

Education Law and Policy in the Time of COVID-19: Using a Legal Framework to Expose Educational Inequity

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Empirical data show that the COVID-19 pandemic deepened and exacerbated social inequalities, to the detriment of low-income communities of color. Using the law as a conceptual framework and legal research methodology, this study examines education law against the exacerbated social inequalities low-income students of color faced during the pandemic. Considering the bounds of the law against the exacerbated social inequalities surfaces the limitations of the law in a time of large-scale crisis and thereby exposes issues of educational inequity. In this context, policymakers bear the responsibility to adopt policies that promote educational equity. The study brings educational law and policy issues in the COVID-19 context to the fore of the educational equity discourse within the educational research community and has implications for policy and practice as well. The study is of import as educational researchers continue to examine the impact of COVID-19 across numerous social contexts and disciplines.

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The COVID-19 pandemic changed the context in which K–12 and higher education institutions (HEIs) operated and raised questions regarding the law and policies governing education (National School Boards Association, 2020; Smalley, 2020; U.S. Department of Education [DoE], 2020a, 2020b). Educational institutions were required to safeguard students' rights during the crisis and prepare for its aftermath (Carver, 2020; Reich et al., 2020; U.S. DoE, n.d.-a, n.d.-b). In this context, the rights of low-income students of color are of particular interest (e.g., Burch, 2020; NAACP, 2020); they have historically faced educational inequities (e.g., Kosciw et al., 2018), exacerbated during the pandemic. Thus, it is important to examine the law against the exacerbated inequalities to identify the limitations of the law in a time of large-scale crisis. In this article, I employ a legal framework to examine the limitations of the legal bounds against the exacerbated social inequalities during the pandemic to expose issues of educational inequity.

The pandemic exacerbated inequalities (Armitage & Nellums, 2020; Fisher & Bubola, 2020; Lancker & Parolin, 2020; van Dorn et al., 2020), disproportionately, negatively affecting low-income communities of color (e.g., Benfer & Wiley, 2020) who have historically faced rampant inequality (Eisenhauer, 2001; Park & Quercia, 2020; Wilson & Shelton, 2012). To minimize the spread of COVID-19, governments adopted social distancing policies (Chiu et al., 2020). Businesses operated under restricted conditions and some

subsequently closed (Bartik et al., 2020). Most affected were low-income people of color holding low-wage jobs (K. Parker et al., 2020; see also Halpern-Meehin et al., 2015; Hoffman, 2017). People lost their jobs and, with them, employer-provided health insurance (see Koch, 2009; Legerski, 2012). Low-income people of color who kept their jobs faced different challenges: reduction in workhours or change in working conditions (K. Parker et al., 2020). People of color were also more likely to live in racially segregated low-income communities and households with essential workers (DeLuca et al., 2013; Kantamneni, 2020) who risked their health each time they left home (Gray et al., 2020; van Dorn et al., 2020). They were also more likely to contract COVID-19 (Benfer & Wiley, 2020; Haynes et al., 2020) and had a higher likelihood of having underlying conditions that increased the risk of COVID-19-related complications and death (Dyer, 2020; Hooper et al., 2020; Pirtle, 2020; see also Dickman et al., 2017).

Educational institutions closed or adopted hybrid, remote options (Education Week, 2020; Malee Bassett & Arnhold, 2020). Many students living in low-income communities experienced unstable internet connection and lacked electronic devices, both critical to fully participate (Katz et al., 2017; McMurtrie, 2020; National Center for Education Statistics, 2020; Wooley et al., 2020). The digital divide falls along socioeconomic and ethnoracial lines, and early data suggest the pandemic deepened this divide (Blagg et al.,



2020; Wooley et al., 2020). Some students shared electronic devices when living in households with limited devices. Others parked outside businesses to access the internet (Editorial Board, 2020). Others struggled to find a space to study in households with little space (Stewart, 2020).

Schools in low-income communities prioritized providing students food (Dunn et al., 2020), electronic devices, and internet (Herold, 2020b); these schools are often under-resourced (Sosina, 2020). Wealthier, often predominantly White schools enjoyed more resources to shoulder the pandemic (see Kelly, 2020). Some privileged parents withdrew their children from schools operating remotely and started their own nano-schools, small groups of children learning together (Kuhfeld et al., 2020). Others enrolled their children in private schools with low teacher–student ratios, allowing in-person classes (Sullivan, 2020). The disparate responses threatened to widen the inequality and educational inequities facing low-income students of color (Kuhfeld et al., 2020).

These few challenges listed here highlight what early research found: low-income people of color bore the brunt of the negative consequences of the pandemic (Benfer & Wiley, 2020; Dunn et al., 2020; Haynes et al., 2020; K. Parker et al., 2020). During the pandemic, educational institutions served students in a context in which COVID-19 exacerbated inequalities, and they will serve students as long-term inequalities unfold (Burgess & Sievertsen, 2020; Dorn et al., 2020; Lancker & Parolin, 2020; see also Bozkurt et al., 2020; Gupta & Garg, 2020). A discussion of the laws that bound students' rights, the limitations of the bounds, and the implications for equity, is thus merited.

The following overarching questions guide the analysis: *Given the social inequality low-income students of color in private and public K–20 educational settings face, what must (not) and may (not) schools and HEIs do to safeguard students' rights? What are the limitations of these legal bounds? What are the implications of these legal bounds for educational equity as schools and HEIs consider what they should do?* I use a legal framework and research methodology (Eckes & McCall, 2014; McCarthy, 2010; Mead, 2009; Mead & Lewis, 2016) and focus on students' rights, drawing on pertinent constitutional law, agency guidance, and case law (see Bowden, 2010; S. B. Thomas et al., 2009). I anchor the discussion on students' rights, because any right draws across multiple sources of law to bound the right across different contexts (i.e., private vs. public institutions). I focus on (1) K–12 students from low-income communities and (2) ethnoracial minoritized students in K–20—they experienced acute challenges during the pandemic. Within each category, I describe students' rights, note the relevant context (i.e., private vs. public schools and HEIs), and analyze how the exacerbated inequalities draw attention to the limitations of the legal bounds, exposing issues of educational (in)equity and

shifting the responsibility to schools and HEIs to further equity.

An increased knowledge of the students' rights amid the pandemic serves as a tool to understand and promote short- and long-term educational equity for marginalized students (Burgess & Sievertsen, 2020). I argue that while the pandemic does not change the students' rights, COVID-19 exacerbated the inequalities marginalized populations faced and, considering the legal bounds of the students' rights in light of the exacerbated inequalities, exposes the limitations of the law. These limitations increase the risk that marginalized students may not fully enjoy an equitable education. Considering the limitations of the bounds of the law in the context of the pandemic, thus, emphasizes the urgency for courts to strengthen students' rights and educational institutions to adopt policies that promote educational equity. Given the implications for educational equity, the pressing education law and policy issues are of valuable import for educational researchers, policymakers, and practitioners (see Cauchemez et al., 2009).

Framework

This article relies on the law as a framework (see Rebell, 2011). The laws guaranteeing students' educational rights can be described as falling within four sources of federal and state laws (Russo, 2012). The first source of law (constitutional law) guarantees students certain rights (Avant & Davis, 1984). The federal and state constitutions also bestow the power on the three branches of government to create other sources of law (U.S. Constitution [Const.] art. I, § 1; art. II, § 1; art. III, § 1). The legislative branches create statutes. These statutes include laws that protect students against discrimination on the basis of, for example, race, color, and national origin (Title VI of the Civil Rights Act of 1964). The executive branches, via government agencies (e.g., the U.S. DoE), have the constitutional power to execute the law through regulations and policy guidance, which include “interpretive rules” and “general statements of policy” (Government Organization and Employees, 1966). Lastly, the judiciary interprets the law, employing common law reasoning, applying precedent in case law (*Caminetti v. United States*, 1917; *Marbury v. Madison*, 1803; Re, 2014).

Any student right across K–12 school/postsecondary and private/public contexts is delineated by a conglomeration of multiple sources of law (Cohen, 1968; Warnick, 2013). For example, the Equal Protection Clause guarantees students' right to be treated equally under the law (U.S. Const. amend. XIV, § 1). Courts have interpreted the Clause to mean students cannot be segregated based on race (*Brown v. Bd. of Educ.*, 1954), and the U.S. DoE (2020c) has issued policy guidance to help educators comply with the law. Together, these sources of law give students the right to be free from racial discrimination.

Because the law answers the “Must we?” and “May we?” questions, using a legal framework focused on students’ educational rights helps discern the legal boundaries of discretion that govern the work of educational institutions as they consider the “Should we?” policy question in a time of public health crisis and amplified social inequalities (see Mead, 2009). For example, using a legal framework helps to answer: May we give greater weight to poverty-related stressors, often disproportionately affecting students of color, in the college admissions process? These are legal questions, which inform policy decisions (Superfine, 2009). The “Must we?” and “May we?” questions considered against the inequalities COVID-19 exacerbated surfaces questions of educational equity as institutions consider what policies and practices they “should” adopt. Through the framework, I identify the legal bounds of discretion for educational institutions, identify the limitations of the bounds in light of the exacerbated inequalities, and discuss the implications for educational equity.

Method

This article uses legal research methodology (Eckes & McCall, 2014; McCarthy, 2010; Mead, 2009; Mead & Lewis, 2016). I examined constitutional law, statutes, and accompanying guidance and regulations to discern the boundaries of students’ rights. Mead (2009) explained, “Legal research may seek to capture the current statutory boundaries and jurisprudential thinking on a topic in order to describe its implications, both for current practice and for future policy development” (p. 287). To retrieve pertinent constitutional law, statutes, and regulations, I used the LexisNexis legal database. I also used the U.S. DoE to retrieve department guidance and other informational resources. Using legal reasoning, I identified the students’ rights. This article does not cover all decisions, legislation, or regulations bearing on students’ rights. Moreover, the study does not analyze how COVID-19 may have affected nonstudents. Instead, the study presents a comprehensive, in-depth analysis of areas with salient law and policy issues that arise because of COVID-19 and have a direct bearing on educational equity issues for low-income students of color in K-20. Other historically marginalized groups, for example, students experiencing homelessness and students in rural communities, are also beyond the scope of the article.

Students’ Educational Rights

Students From Underresourced Communities

Students’ right to receive an education is limited to the public K–12 context and is largely a state matter (Hubsch, 1989; *San Antonio Indep. Sch. Dist. v. Rodriguez*, 1973). While state-sponsored education was historically a local matter, by the 1970s, all states had adopted education clauses

in their constitutions, compulsory education laws, school curricula, and state funding frameworks. The funding schemes were similar: local taxes supplemented state and federal funding. Because states did not cap the amount local districts could contribute, wealthier communities made greater contributions to schools and disparate inequality was common (*San Antonio Indep. Sch. Dist. v. Rodriguez*, 1973).

Seeking to redress the disparities, in *Rodriguez*, Mexican American children in Texas tested the constitutional theories governing education. Upon entering the Union in 1845, Texas adopted a constitutional clause establishing free state-sponsored education. Texas adopted a dual system for financing education as early as 1883 (E. Parker, 2016). School districts could raise local taxes, and Texas supplemented the funds. The dual financing scheme remained in place, but by the 1970s, inequality was becoming patently evident as migration patterns shifted. Similar to other states, Texas shifted from primarily rural, where most wealth was evenly spread across the state, to industrialized, where differences in the value of assessable property grew disparate. Migration patterns fell along ethnoracial lines; people of color were predominantly segregated in urban areas, whereas many White people fled to the suburbs.

The Plaintiffs resided in Edgewood, a district where approximately 90% of students were Mexican American and over 6% Black. In contrast, the most affluent school district in San Antonio, Alamo Heights, was predominantly White, with only 18% Mexican Americans and less than 1% Black people. In 1967–1968, Edgewood spent \$356 per pupil (state: \$222, federal: \$108, local: \$26), while Alamo Heights spent \$594 per pupil (state: \$225, federal: \$36, local: \$333). Despite increases in state funding, disparities persisted. Plaintiffs argued that Texas’ funding system discriminated against them on the basis of wealth and infringed on their fundamental right to an education. If the Supreme Court of the United States (SCOTUS) agreed, Texas would need to show a compelling interest for maintaining the financing system and to establish how the funding scheme was narrowly tailored to meet their interest.

But SCOTUS rejected the arguments, finding “wealth” too amorphous to be a suspect class, because “wealth” did not encompass any class “fairly definable as indigent, or as composed of persons whose income are beneath any designated poverty level” (*San Antonio Indep. Sch. Dist. v. Rodriguez*, 1973, p. 22-23). According to SCOTUS, Plaintiffs also did not experience a complete deprivation of education and “at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages” (*San Antonio Indep. Sch. Dist. v. Rodriguez*, 1973, p. 24). Additionally, SCOTUS rejected the claim that education is a federal fundamental right. Plaintiffs argued that education is a fundamental right, because it is essential to the exercise of First Amendment rights and to the intelligent use of the right to vote, but SCOTUS

explained, “[We have] never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice” (*San Antonio Indep. Sch. Dist. v. Rodriguez*, 1973, p. 58). Having found no suspect class and no fundamental right, SCOTUS declared Texas’ funding scheme rational.

Notably, SCOTUS distinguished between the role of law and policy:

[t]his case [involves] persistent and difficult questions of educational policy, another area in which this Court [lacks] specialized knowledge . . . [W]ithin the limits of rationality, ‘the legislature’s efforts to tackle the problems’ should be entitled to respect. (p. 42; internal citations omitted).

Since *Rodriguez*, state legislatures have exercised substantial discretion and have maintained similar funding schemes. While states have generally improved public schooling, educational disparities along socioeconomic status have deepened.

The U.S. Sixth Circuit *Gary B. v. Whitmer* (“*Gary B.*”) case in April 2020 exposed the persistent inequalities facing low-income students of color in the 21st century, decades after *Rodriguez*. Plaintiffs in the case lived in low-income communities and attended districts among the lowest performing in Michigan. The districts did not require teachers be licensed or knowledgeable in the content area they taught. Teachers lacked meaningful curricula and taught elementary level reading to high school students who struggled to sound out elementary grade level books. Teacher shortages were common; teachers were chronically absent. Lacking qualified teachers, districts relied on paraprofessionals, substitute teachers, and students to teach.

The facilities’ conditions were equally lacking—dilapidated and unable to meet state and local safety codes. Buildings lacked proper ventilation and heat systems. Classes were scorching hot during the summer and below zero in the winter. Buildings were infested with mice, cockroaches, bedbugs, and other vermin. The water in the buildings was hot and contaminated, and the restrooms were filthy, lacked toilet paper, working sinks, and stall doors. Windows were boarded up and there was a shortage of desks. When there were desks, they were crammed wall-to-wall with no aisles to accommodate the number of students.

Schools lacked books or owned outdated, torn, and irreparable books. Teachers shared the same books, using the most relevant sections to teach their subjects. Schools did not own enough books to assign homework. Basic school supplies also lacked.

Plaintiffs argued that they received an education in name only. In April 2020, a 2-1 panel in the Sixth Circuit agreed and found a fundamental right to a *basic minimum* public education, that is, access to literacy (*Gary B. v. Whitmer*, 2020a). In finding the fundamental right to a minimum education, the Court applied the *Glucksberg* and *Obergefell*

frameworks. The Court detailed the country’s history of provision of free state-sponsored education and found people have come to expect and recognize education as a right. In a powerful statement, the Court also acknowledged the inequalities low-income communities of color face:

[T]he history of education in the United States also demonstrates a substantial relationship between access to education and access to economic political power, one in which race-based restrictions on education have been used to subjugate African Americans and other people of color. (p. 648)

A fundamental right to a *minimum* education would mean that similarly situated districts in the Sixth Circuit would have to provide a compelling interest in maintaining funding schemes that allowed districts to employ uncredentialed teachers, operate in decrepit buildings, and lack appropriate books and materials, while allowing other districts to enjoy access to a higher quality of education.

Though a watershed case, *Gary B.* was short-lived (Testani, 2020). After the ruling, the Michigan legislature, some defendants, and interest groups petitioned the Appellate Court to rehear the case *en banc*, before the entire Court (Brief of Home School Legal Defense, 2020; *Gary B. v. Whitmer*, 2020d; M. Walsh, 2020b). Rather than granting any of the parties’ petitions, the Court called for a hearing before the entire court on its own, *sua sponte*. According to Appellate Court Rule 35(b), a *sua sponte* rehearing automatically vacated the 2-1 ruling without an opinion (*Gary B. v. Whitmer*, 2020c), leaving it with no precedential value.

Following Plaintiffs’ request, the Court dismissed the case as moot (*Gary B. v. Whitmer*, 2020c; M. Walsh, 2020a). The case was a win for Plaintiffs inasmuch as they received a substantial monetary award via the settlement (The Office of Governor Gretchen Whitmer, 2020). In dismissing the case, the Court did not provide extensive rationale. Relying on a technicality and not providing rationales allowed the Court to avoid siding with any perspective, a highly suspect action (Epstein, 2020).

Gary B. was as much about the education of the children in Michigan as it was about testing, in the 21st century, the boundaries *Rodriguez* established. Since *Rodriguez*, advocates and academics have debated whether education should be a federal fundamental right (e.g., Black, 2020; Lynch, 1998; T. J. Walsh, 1993; Wilkins, 2005). *Gary B.* tested how low the constitutional floor can be before courts intervene (Tampio, 2021). By relying on technicalities to vacate the case and not providing any rationale when dismissing the case, the Appellate Court gave no indication regarding its thinking about the constitutional floor. As opportunity gaps continue to widen across socioeconomic lines, other cases will likely continue to test and seek to establish a federal constitutional floor beyond *Rodriguez*’s ruling that there is no federal fundamental right to an education. While the debate regarding the right at the federal level unfolds,

students have a right to a public education under each state's constitution, which vary by state (see B. Friedman & Solow, 2013; Minorini & Sugarman, 1999; E. Parker, 2016; Slade, 2017).

Rodriguez and *Gary B.* provide little recourse for students facing worsening conditions during the pandemic. The federal legal bounds do not establish a minimum fundamental right to education that would require states to allocate more resources to low-income districts that had fewer resources to shoulder the pandemic (e.g., Nicola et al., 2020). Lack of resources has historically negatively influenced student performance (Mangino & Silver, 2011). In turn, lower performance translates into being underprepared for work or postsecondary education and a lower earning potential (Dorn et al., 2020; Hein et al., 2013; see also Bangser, 2008; Walpole, 2008). Students who came to rely on their schools for resources necessary to learn (e.g., meals, internet, electronic devices) had restricted access to these resources during the pandemic. Wealthier, predominantly White districts were better positioned to adapt to the pandemic and continued to draw from well-resourced local tax pools, given state school funding largely continue to resemble schemes in place at the time of *Rodriguez* (see Education Law Center, 2019; Rivera & Lopez, 2019). Low-income districts predominantly adopted remote modalities but struggled to teach students who did not have stable internet or devices and students who stopped attending (see Reza, 2020; Trinidad, 2021; Vogels, 2020).

No court has ruled on what it means for schools to meet their constitutional duty to provide an education during a pandemic. The legal bounds require districts provide an education (see *Plyler v. Doe*, 1982; E. Parker, 2016). However, *Rodriguez* suggests that states can provide educational opportunities that are vastly different and vary across socio-economic status and still pass constitutional muster. Moreover, *Gary B. v. Whitmer* (2020a, 2020b) provides insights into the role of the courts in addressing the deepened, exacerbated inequalities. While the Sixth Circuit Court agreed that the conditions Plaintiffs faced were abysmal, the Court vacated the ruling, which would have required the state to address the conditions Plaintiffs faced.

Amid the pandemic, *Rodriguez* offers some guidance:

The very complexity of . . . managing a statewide public school system suggests that 'there will be more than one constitutionally permissible method of solving them,' and that, within the limits of rationality, 'the legislature's efforts to tackle the problems' should be entitled to respect. (p. 42)

Ultimately, the legal bounds place the responsibility of the quality of education on state and local policymakers. State policymakers retain the discretion to decide how they should address the deepened inequalities the pandemic exacerbated. They have the authority to fashion policies and reallocate resources to meet the demands of low-income

communities. At the local level, district and school leaders who are equity oriented also have discretion in adopting plans within their spheres and creating budgets. While the law does not require that states guarantee equal or equitable outcomes, district and school leaders can lead with an equity framework. They can adopt policies and practices that go beyond what is legally expected but that ultimately mitigate the challenges low-income students face (Zhao, 2020). District and school policies should center the needs of low-income students, prioritizing providing these students access to their education.

The disparate, widening opportunity gaps and inequalities expose the limitations of the federal constitutional boundaries during a pandemic (see Herold, 2020a). The federal boundaries are insufficient to address the needs of low-income students because the boundaries require little. *Rodriguez* states there is no fundamental right to an education, and no subsequent cases have been successful in identifying a more concrete federal constitutional floor. In *Schoolhouse Burning*, Derek Black (2020) cogently advocated that the courts should recognize a fundamental right to an education. The United States, Black (2020) argued, has democratic norms which are predicated on the importance of public education, and thus, a robust public education is vital to the survival of the democracy. While for decades litigation has surfaced to establish a fundamental right to an education, these lawsuits have not been successful (see *Cook v. Raimondo*, 2018; *Martinez v. Malloy*, 2018). Recognizing the fundamental right would secure better funding and would require policies and practices that promote better opportunities and outcomes, especially during the pandemic and as the long-term effects of the pandemic unfold.

Ethnoracially Minoritized Students in K–20

K–12. In 1954, SCOTUS ruled that *Plessy v. Ferguson's* (1896) doctrine, "separate but equal," was inherently unequal under the 14th Amendment to the U.S. Constitution (*Brown v. Bd. of Educ.*, 1954). *Brown* shone light on the systemic inequalities facing Black students in the 1950s and connected the inequalities to a history of exclusionary policies and practices (Young et al., 2015). At the time of the adoption of the Amendment, "Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent . . . In fact, any education of Negroes was forbidden by law . . ." (*Brown v. Bd. of Educ.*, 1954, p. 489). The ruling promised educational equality through desegregation (Young et al., 2015).

While *Brown* promised desegregation, some communities resisted integration efforts, such as school busing (Delmont, 2016; see also, Knoester & Au, 2017). Integration efforts plateaued in the 1970s and seemed to reverse themselves thereafter (Muñiz & Frankenberg, 2019). Additionally, local politics and district boundaries complicated *Brown's*

promise of integration (Frankenberg et al., 2019; Frankenberg & Le, 2008; Rivkin, 1994). In *The Color of Law*, Rothstein (2017) detailed resistance to integration and the government's role in influencing *de facto* (i.e., by chance) segregation post *Brown*. Rothstein argued that government policies played a significant role in redlining and prohibiting people of color from accessing housing in well-resourced communities. People of color were pushed and segregated into predominantly urban, low-income areas, while many White people fled to the suburbs. People of color also faced additional burdens, including the placement of toxic waste plants within close proximity of their communities and schools (Mohai & Saha, 2007). These conditions presented a hazard that threatened to negatively impact long-term health (see Mendez et al., 2014).

By the 1990s, districts across the nation were highly segregated (Orfield & Frankenberg, 2014; see also Bischoff & Owens, 2019). Districts took initiative to integrate students, adopting race-based student assignment policies (*Parents Involved in Cmty. Sch. v. Seattle*, 2007). In 2007, these efforts came under SCOTUS's scrutiny in *Parents Involved*. The districts in the case were in Seattle, Washington and Louisville, Kentucky. The district in Seattle, which had never operated legally segregated schools, allowed incoming ninth graders to choose their school by ranking schools. If too many students ranked the same school as their top choice, the district employed tie breakers to admit students. The district gave preference to students with siblings in the school. The second tiebreaker involved the racial composition of the school and the incoming students' race. If the school was not within 10 percentage points of the district's White/non-White racial makeup, the school selected incoming students whose race would help balance the school's racial makeup.

The district in Louisville adopted a similar policy. In 1973, a federal court found the district was legally segregated and issued a desegregation decree in 1975. In 2000, the court found that the district had achieved "unitary status," eliminating "[t]o the greatest extent practicable" the vestiges of prior segregation (*Parents Involved in Cmty. Sch. v. Seattle*, 2007, p. 716). In 2001, the district adopted a race-based assignment policy to avoid segregation that required all nonmagnet schools to maintain a Black enrollment between 15% and 50%. Thirty-four percent of the district's students were Black and most of the remaining students were White. The district clustered elementary schools to facilitate integration. To assign students, the district considered space available, the racial makeup of the school, and students' race. If the school had reached "extremes of the [district's] racial guidelines," the school would not assign a student whose race would contribute to racial imbalance (*Parents Involved in Cmty. Sch. v. Seattle*, 2007, p. 786).

Applying strict scrutiny, SCOTUS found both districts' policies unconstitutional. SCOTUS found that the districts

did not argue either of two court-recognized compelling interests: remedying past discrimination or diversity in post-secondary education (see *Grutter v. Bollinger*, 2003). SCOTUS declined to determine whether the interests the districts asserted were compelling but found racial diversity and avoiding racial isolation were compelling interests. SCOTUS ruled that the race-conscious approaches the districts adopted were not narrowly tailored (*Parents Involved in Cmty. Sch. v. Seattle*, 2007). Applying the *Grutter v. Bollinger* (2003) factors to determine whether the districts narrowly tailored their race-based approaches to their goals, SCOTUS found that the districts had not considered workable race-neutral alternatives; the racial classifications seemed to have minimal impact, suggesting they may not be necessary; the districts adopted a limited definition of diversity that did not reflect the diversity in the district; and the districts did not engage in individualized evaluation of students.

Following the case, districts hesitated to adopt race-conscious approaches, interpreting the ruling as prohibiting the use of race and ethnicity in assignment policies (Himes, 2013; see also McNeal, 2009). In 2008, the U.S. Department of Justice and the U.S. DoE (2008) provided guidance to districts nationwide. The guidance explained that districts could seek to achieve racial diversity and avoid racial isolation through race-neutral and race-conscious approaches. Districts should prioritize workable race-neutral approaches that may increase ethnoracial diversity through general correlates of race (e.g., socioeconomic status). When race-neutral approaches are unworkable, districts can adopt race-conscious approaches that do not make race the defining factor in assigning students and do not rely on students' individual race.

By 2020, cities and school districts were as segregated as in the time of *Brown* (Orfield & Jarvie, 2020), most through *de facto* segregation (see *Booker v. Bd. of Educ. of City of Plainfield*, 1965), which courts interpreted to occur fortuitously (Startz, 2020; see also De Voto & Wronowski, 2018; Gingerelli, 2020). As a result, *de facto* segregation is not legally redressable (Frankenberg & Taylor, 2018). District leaders and educators bear the responsibility of adopting policies and practices that promote integration (Diem & Pinto, 2017; Turner, 2020) even when their district boundaries are racially segregated.

It is this district responsibility that is heightened in the context of COVID-19 and its aftermath. The COVID-19 context threatens to disrupt schools' ability to find diverse populations to further racial diversity and avoid racial isolation, in part, because the pandemic disrupted the lives of ethnoracially minoritized populations and their communities (see Abedi et al., 2020; Blanchard et al., 2020; Centers for Disease Control and Prevention, 2020). Troubling trends in the Black and Brown communities have caused disruptions for students and their families (Quirk, 2020). "Black,

Hispanic, and Indigenous people have been disproportionately affected. . . . For example, the age-adjusted mortality rate among Black people with COVID-19 is 3.4 times as high as that of White people” and in July 2020, Black men were dying at nine times the rate of other groups (Tiako et al., 2021, p. 50). These statistics may be less surprising when considering that men of color have the lowest life expectancies from any group in the United States (see Bond & Herman, 2016). Similarly, women of color have struggled to legitimize their pain and convince health care workers of their COVID-19 related symptoms (see Leigh et al., 2014). Access to COVID-19 testing has also favored wealthier predominantly White communities (Rubin-Miller et al., 2020), a function influenced by racial residential segregation (McMinn et al., 2020). While these trends are general in nature, they cannot be divorced from the fact that students live in these communities, because they reside in racially segregated neighborhoods.

The disruption to the communities can create access issues for students of color in K–12—access to their schools and campus resources, such as meals, internet, devices, and peer interactions (Rolland, 2020). Given the high risk of contracting COVID-19, many schools located in communities of color closed at disproportionate rates compared with wealthier, predominantly White communities (Smith & Reeves, 2020). This has led to complications. For example, low-income students attending densely populated schools and without access to electronic devices may attend remotely with unreliable internet, have to locate a reliable internet hotspot location, or, in extreme circumstances, not attend at all (Trinidad, 2021; Reza, 2020; Vogels, 2020). Students in secondary school had less access to college admittance tests (e.g., SAT; College Board, n.d.). These are only some of the ways in which the pandemic disrupted the students’ lives.

The disruptions and issues of access can present challenges for schools seeking to achieve racial diversity and avoid racial isolation, because the legal bounds are substantially limited (e.g., the courts are willing to recognize few state goals as compelling enough to adopt race-conscious assignment policies). Recruiting students from ethnoracial minorities for educational programs require additional capacity and targeted efforts. Rather than recruiting through in-person formats, schools would have to consider how to reach students who have difficulties with access via, for example, community flyers. As schools decide what policies they should adopt, they must work within the legal bounds. Specifically, they must adopt narrowly tailored approaches—approaches with a close connection to their goals. Before adopting race-conscious approaches, the schools would have to consider workable race-neutral alternatives. If these are unworkable, then schools can adopt race-conscious approaches. However, race should be one of many factors in a comprehensive process.

The COVID-19 context also complicates schools’ efforts to integrate within schools (see Ahearn, 2017). The context significantly restricts student–student contact and complicates the implementation of integration policies and practices (see M. Anderson & Perrin, 2018; Dolan, 2015, 2017; Garland & Wotton, 2002). For instance, consider programs such as the Boston’s Metropolitan Council for Educational Opportunity (METCO) program (Angrist & Lang, 2004; Batson & Hayden, 1987). Designed to promote integration across ethnoracial and socioeconomic lines across school districts, METCO buses participating students to different school districts (Eaton, 2001). METCO increases diversity in schools (Stokes, 2019). Amid the pandemic, interactions among students were limited to virtual meetings, for those students who have access to electronic devices and a stable internet connection. To be clear, in-person meetings do not automatically lead to integration. Students remain deeply segregated within schools (Joyner & Kao, 2000; Moody, 2001; Tatum, 1997). However, literature demonstrates the benefits of interactions among students from diverse backgrounds (Gurin et al., 2004; Hawley, 2007; Juvonen et al., 2018). COVID-19 limits the venues that allow for these meaningful interactions, and suggests schools should reconsider how to adopt policies and practices virtually to further meaningful integration (see Freeman et al., 2020) and policies and practices that encourage integration as students return to schools.

Postsecondary Education. Ethnoracial equity is also of concern in postsecondary education. The law in postsecondary education regarding race and ethnicity has focused on admissions policies (Donaldson, 2014; Wright & Garces, 2018). The admissions process is an entry point for students seeking a postsecondary degree and thereby to improve their social mobility (Bowen, 1999; Carnevale & Rose, 2004). A postsecondary degree has implications for students’ post-graduation quality of life (Edgerton et al., 2012).

In 2021, less than 10 states had bans on affirmative action policies; thus, race-conscious admission policies should be of interest in approximately 40 states wherein HEIs can bolster ethnoracial diversity (see Potter, 2014). Ethnoracial diversity in higher education is itself a worthy goal, contributing to a pluralistic society, on which the U.S. democracy depends (Chang et al., 2006; Engberg & Hurtado, 2011; Zhang, 2019). Scholarship and courts have identified the benefits of an ethnoracially diverse student body for the university experience and postgraduation (Bowman, 2013; Denson et al., 2017). While there is a correlation between ethnoracial identity and socioeconomic status, studies have shown the value of explicitly considering race and ethnicity in admissions (Torres, 2020). For example, in states that have banned race-conscious admissions, ethnoracial diversity decreased after the bans (Garces, 2012; Peele & Willis, 2020). These findings suggest that other proxies are not as

effective as the explicit use of race and ethnicity to bolster ethnoraical diversity. Given its importance for students and graduates, this is an area in which identifying the legal boundaries in light of the pandemic can surface the limitations of the law.

SCOTUS has affirmed diversity as a compelling interest HEIs can pursue by considering an applicant's race and ethnicity as factors in holistically evaluating applicants (*Fisher v. Univ. of Texas at Austin*, 2013; *Gratz v. Bollinger*, 2003; *Grutter v. Bollinger*, 2003). The latest SCOTUS case regarding race-conscious admissions arose in Texas. Fisher, a White woman, challenged The University of Texas (UT)–Austin's admissions policy, arguing UT's policy discriminated against her because of her race by denying her admission in 2008 (*Fisher Univ. of Texas. at Austin*, 2013).

UT employed a Top Ten Percent plan through which UT admitted the top 7% to 8% graduates at any Texas high school and accounted for 75% of the incoming class. UT filled the remaining seats through a combination of the "Academic Index" (based on SAT score plus academic performance) and "Personal Achievement Index" (based on essay scores, supplemental materials, potential contributions to UT's community, and special circumstances). Special circumstances included "socioeconomic status," "family responsibilities," "single-parent home[s]," "SAT score in relation to the average SAT score at the applicant's school," "language spoken at [home, and] the applicant's race" (L. Friedman, 2019, p. 723).

SCOTUS found that UT had articulated a compelling interest and its policy was narrowly tailored to meet their interest (*Fisher Univ. of Texas at Austin*, 2013). Regarding the former, UT had articulated concrete and precise goals in its "Proposal to Consider Race and Ethnicity in Admissions." UT sought to destroy stereotypes, promote cross-racial understanding, prepare students for an increasingly diverse workforce and society, cultivate leaders with legitimacy in the eyes of citizens, and to provide an environment that promotes a robust exchange of ideas. UT engaged in continual reassessment of its policy and found it had not yet achieved its goals. The policy was also narrowly tailored. UT's policy had an impact in advancing UT's goals; the percentage of Black and Brown students had increased marginally by 2007. UT considered other race-neutral alternatives to advance their goals, but these were unworkable.

In short, the law allows HEIs to consider race and ethnicity in admissions, but only as a plus factor. While *Brown's* focus was on racial integration, in the 21st century, the focus has shifted to achieving diversity, broadly defined. HEIs do not need to consider race or ethnicity. When they do, they can include race and ethnicity with a goal to achieve a critical mass of students such that all students can benefit from a diverse student body (Miksch, 2003). From a racial equity lens, the legal bounds are insufficient: HEIs need not consider race or ethnicity, if they do not want. The boundaries

are also problematic because a critical mass is difficult to assess. Furthermore, seeking a critical mass risks becoming a ceiling for HEIs; HEIs need not consider how to improve or work toward racial equity beyond a vague critical number of ethnoraically diverse students (Arms, 2007; E. C. Thomas, 2007).

Because the pandemic exacerbated inequalities, arguably, HEIs have a pressing need to consider how the pandemic deepened socioeconomic inequality across ethnoraical lines and to integrate these considerations in admissions (Jaschik, 2020b, 2020c; see also Robinson & Maitra, 2020). HEIs that do not consider race or ethnicity risk underevaluating students who are negatively affected by the pandemic (Keller et al., 2020). Contextualizing the students' challenges through the consideration of race and ethnicity can reframe the cases before admissions committees. Ultimately, changes in admissions can lead HEIs to gain a more ethnoraically diverse student body, which benefits all students.

Their approaches must also be narrowly tailored, considering race only as a plus factor. The approaches may take different forms that account for the pronounced disruption to incoming students' lives. The pandemic may adversely affect students' academic records (T. C. Anderson, 2020; García & Weiss, 2020). Students' race can be a unique factor that calls attention to the systemic challenges communities of color faced during the pandemic (e.g., the lack of access to testing, healthcare, vaccinations). Race and ethnicity can contextualize the potential negative repercussions students faced in their educational trajectory and inequalities returning students of color faced generally (T. C. Anderson, 2020; Camera, 2021). Without this context, students' profiles may be incomplete.

Recruitment efforts are also impacted. The legal boundaries do not require recruitment efforts use race-conscious approaches (*Weser v. Glen*, 2002; *Raso v. Lago*, 1998). However, the law permits (may) schools to engage in practices that would boost the ethnoraical makeup of the applicant pool. Creative efforts are necessary to reach low-income, ethnoraically minoritized students less likely to attend school in person or who have limited access to technological devices and internet. For example, HEIs can increase online and socially distanced recruitment events in communities where ethnoraically minoritized students do not have access to reliable internet or electronic devices (Heisel & Pinion, 2020). Admissions practices that account for the disruption can contextualize students' academic performance during and after the pandemic, akin to UT's consideration of special circumstances. The disruptions to the students' lives can have an impact on academic performance during the pandemic and can disrupt the educational foundation students need. Thus, the disruptions can have ramifications postpandemic.

COVID-19 also presents an opportunity for HEIs to reimagine admissions in a rapidly changing world (e.g., Halford, 2019). For example, some HEIs dropped or

suspended their admissions tests requirements, a choice that can promote equitable opportunities for prospective students (Smalley, 2020). The University of California (UC) system provides an example of action that aimed to disrupt the status quo and account for the inequality that marginalized students face (Jaschik, 2020d; see also Keller & Hoover, 2009). The UC system temporarily suspended the use of the Scholastic Aptitude Test (SAT) and Graduate Record Examinations (GRE) scores as an admissions requirement, in relevant part, to account for the anticipated pandemic disparities (Jaschik, 2020a; Kuhfeld et al., 2020). Nonetheless, the literature suggests such a change in policy is not enough to increase racial diversity (Bennett, 2021). Moreover, after removing standardized testing in the admissions process, HEIs, especially those most selective, have seen an increase in applications and their selectivity has increased (Jaschik, 2021; O'Malley & Bohanon, 2021). Thus, to further racial equity across all institutions, other changes, such as different practices in recruitment and admissions may also be necessary.

By summer 2021, the litigation in this area remained active. The First Circuit upheld Harvard's affirmative action policy, finding the college did not violate Title VI (1964) because it had a compelling interest in furthering diversity and its policy was holistic (*SFFA v. Harvard*, 2020). Title VI race discrimination cases follow a similar legal analysis as 14th Amendment's Equal Protection Clause analysis. The lawsuit reached SCOTUS, a court divided into six ideologically conservative justices and three ideologically liberal justices (Liptak, 2020). SCOTUS was scheduled to decide on June 10, 2021 whether to hear the case.

The same group challenging Harvard's policy sued the University of North Carolina over its affirmative action policy, arguing the policy violates the Equal Protection Clause (*SFFA v. UNC*, 2018). A federal court heard the case in November 2020, noting the case presented important constitutional law questions (University of North Carolina at Chapel Hill, n.d.). Thus, while schools may adopt race-conscious policies, the boundaries could change amidst the unfolding deepened inequalities during and after the pandemic. Scholars argue race-conscious admissions may not survive a SCOTUS ruling, which would further restrict the legal boundaries (Kiracofe, 2020).

In sum, districts and HEIs need not use race and ethnicity in their admissions policies, but, importantly, they may. Courts have articulated a preference for race-neutral alternatives and permit holistic race-conscious alternatives where institutions do not find workable race-neutral alternatives. Notably, this is a shift from the *Brown* approach where SCOTUS explicitly identified racial issues. Scholars have conceptualized "race-neutral" approaches as "race evasive" (Garces, 2020). Race-conscious policies can further racial diversity and are a pressing need amidst a global crisis in which incoming students face exacerbated inequalities.

Discussion

This study builds on the scholarship on COVID-19, which has found a disproportionate, negative impact on marginalized populations (Gupta et al., 2020; Haffajee & Mello, 2020; Hale et al., 2020; Kim et al., 2020; Singh & Singh, 2020; van Dorn et al., 2020). The virus exacerbated preexisting inequalities (Condon et al., 2020; Robinson et al., 2020). Though research has yet to document the long-term impact of COVID-19, researchers have long documented how inequality inhibits marginalized students' success (Greenwald et al., 1996; Hanushek & Woessmann, 2017). This study extends this work, examining issues of education law and policy amidst the pandemic with a focus on educational equity (see Bishop & Noguera, 2019; Olden, 2017). Educational inequity often involves the same student groups who experienced a disproportionate, negative impact because of COVID-19 (Benfer & Wiley, 2020; Haynes et al., 2020). Multiply marginalized students might experience the ramifications in compounding ways (Dyer, 2020; Hooper et al., 2020; Kantamneni, 2020; Pirtle, 2020).

The findings surface a policy dilemma. The pandemic exacerbated inequalities, and focusing on these in relation to the legal bounds exposes the limitations of the law, the inequities the law permits. With its limitations, the law is insufficient to further educational equity. The law does not offer stronger protections for students in a time of a pandemic in a manner that would require educational institutions make changes toward equity. Of course, the law does not guarantee the best educational outcomes (*San Antonio Indep. Sch. Dist. v. Rodriguez*, 1973) but can change the policymakers' legal bounds of discretion by, for example, recognizing greater protections for students (e.g., a federal fundamental right to education; Black, 2020).

Given the limitations of the legal bounds, institutional policymakers interested in promoting educational equity are continually confronted with "Should we?" policy questions during the pandemic and its aftermath (Smalley, 2020). These questions present a type of crossroads, a point in time in which policymakers can adopt policies that can promote equity (Armitage & Nellums, 2020; Dorn et al., 2020; Lancker & Parolin, 2020). This crossroads presents an opportunity for policymakers to lead with an equity-orientation. Scholars argue that one way to further equity is through democratic processes (Urbinati & Warren, 2008) that consider the multiple viewpoints that are marginalized in mainstream discussions (Ricci, 1970; Urbinati, 2006). Thus, approaches that explicitly identify the assumptions that policymakers carry and student needs are critical to adopt policies that do not further marginalize students.

The impact that COVID-19 has had on low-income communities of color threatens to have reverberating negative effects. While the law does not require more during the pandemic, knowing the law first and foremost is critical

(Vissandjée et al., 2017). Even when the law does not require action, educational equity is a matter of policy, institutionalized action that can further equity. In other words, if the law responds with “You must not.” to “Must we?” schools interested in adopting policies that promote equity can ask “May we?” to adopt policies that are furthering equity and are still within the boundaries of the law. Then, there should be a conversation around “Should we?”—a normative policy question. Is it a good policy to adopt? Who does it serve and who should it serve? These are empirical and normative questions that can help further equity by centering the needs of those most in need.

To be clear, I do not argue that education policy will resolve all the challenges students face. Students face issues outside the school system that can only be addressed through social policy. At the same time, these issues affect students’ lives in ways that interfere with their ability to perform academically to their potential. Educational institutions have a role to play in supporting their students. Equitable education, a core goal for educational institutions, is about accounting for individual student needs. The needs of students will be informed by the challenges that students face outside of school. To this end, educational institutions have a role to play in deciding which policies to adopt. Thus, while the law may not require certain action, given its limitations, education policies and practices can make a difference.

Implications

The study informs the work of researchers in at least two ways. First, the study identifies concrete areas that raise educational equity issues for marginalized students during the pandemic and after (see Armitage & Nellums, 2020; Lancker & Parolin, 2020), which can inform the research questions researchers ask. Second, the study informs the general literature on COVID-19, which includes work on the impact of the pandemic on law and education (Blankenberger & Williams, 2020; Daniel, 2020; Jennings & Perez, 2020). The study brings these two fields together to examine issues affecting marginalized students. The focus on education law and policy allows a discussion on the legal bounds and the often difficult normative “Should we?” question that continually arises during the pandemic and its aftermath.

The study has implications for policymakers and practitioners too. As policymakers debate which policies to adopt in response to COVID-19 and in preparation for its aftermath, they should center the voices of marginalized populations (Greder et al., 2004; Stonewall et al., 2017), even when the law does not require such centering. For example, practitioners can redirect funding to students unable to meet college costs (Kerr, 2020). Policymakers can also reallocate resources in K–12 (M. Anderson & Perrin, 2018; Dolan, 2015, 2017; Garland & Wotton, 2002). The policies and

practices that they can adopt will vary locally, but generally, responding to students’ needs and reallocating resources—even when not legally required—can center marginalized students.

Conclusion

The pandemic exacerbated inequalities (Condon et al., 2020; Pirtle, 2020; C. Walsh, 2020), and marginalized students were most affected (Burgess & Sievertsen, 2020). Using the law as a lens, I identified the legal boundaries delineating students’ rights. Considering these legal bounds in light of the exacerbated inequalities exposes the limitations of the law. The analysis also surfaced the dilemma that policymakers face when observing the boundaries: what policies *should* they adopt given the inequalities, even when the law does not require much more? This question invites careful deliberation. In answering the question, policymakers have the ability to center marginalized students and, thereby, promote educational equity.

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Open Practices

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