

# The Right to Comprehensive Educational Opportunity

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## ABSTRACT

*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 22%, 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 in a cost-efficient manner, 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 basis.*

*This article seeks to establish a statutory and constitutional basis for a right to comprehensive educational opportunity. The federal No Child Left Behind Act ("NCLB"), building on the nation's egalitarian traditions, 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 re-authorization 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 state constitutions imposes an obligation on the state to create an education that overcomes the effects of poverty.*

*The federal constitutional argument is based on 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 Independent School District v. Rodriguez*, 411 U.S. 1 (1973), evidence and precedents from the state "sound basic education" cases demonstrate that an adequate education is a necessary prerequisite for students to exercise their free speech and voting rights; a sound basic education—and one that incorporates*

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necessary comprehensive services—therefore, does constitute a fundamental interest under the federal Constitution. Next, based on the precedent of *Plyler v. Doe*, 457 U.S. 202 (1982), failing to provide children from impoverished backgrounds 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 scrutiny. Finally, even under the less demanding rational basis 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. The final section of the article argues that implementation of the right to comprehensive educational opportunity, which is feasible even in tough economic times, is a constitutional responsibility of the executive and legislative branches, as well as the courts.

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## I. INTRODUCTION

Raising academic standards and at the same time eliminating the achievement gaps between advantaged and disadvantaged students are America's primary national educational goals. This pursuit of equity and excellence reflects a bipartisan consensus of presidents, governors, legislators, corporate leaders, educators, and the public that has been forged over the past two decades. The linking of equity with higher achievement 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.<sup>1</sup> It also reflects a broad awareness that, unless our nation can provide a high quality education to all of its children, America will lose its ability to compete effectively in the global marketplace and will jeopardize the continued vitality of its democratic institutions.

The federal No Child Left Behind Act ("NCLB")<sup>2</sup> and related standards-based reform initiatives<sup>3</sup> undertaken by virtually all of the states over the past two decades have made limited progress in achieving these goals.<sup>4</sup>

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<sup>1</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

<sup>2</sup> 20 U.S.C. § 6301 (2006).

<sup>3</sup> Standards-based reform is built around substantive content standards in English, mathematics, social studies, and other major subject areas. These content standards are usually set at sufficiently high cognitive levels to meet the competitive standards of the global economy, and they are premised on the assumption that virtually all students can meet these high expectations if given sufficient opportunities and resources. Once the content standards have been established, every other aspect of the education system—including teacher training, teacher certification, curriculum frameworks, textbooks and other instructional materials, and student assessments—should be made to conform with these standards. The aim is to create a coherent system of standards, resources, and assessments that will result in significant improvements in achievement for all students. For general descriptions of the standards-based reform approach, see SUSAN H. FUHRMAN, *DESIGNING COHERENT EDUCATION POLICY: IMPROVING THE SYSTEM* (1993), and ROBERT ROTHMAN, *MEASURING UP: STANDARDS, ASSESSMENT AND SCHOOL REFORM* (1995). The impetus for adopting standards-based reform as a reaction to perceived comparative international shortcomings of American schools during the late 1980s is discussed below.

<sup>4</sup> There has been incremental progress on 4th-grade reading and math scores and in reducing achievement gaps on the National Assessment of Educational Progress ("NAEP"), 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, there has been virtually no gain in standardized reading scores. In addition, the performance of 12th-grade students nationwide in reading and mathematics on the 2009 NAEP showed improvement since 2005, but the average score for reading was lower compared with 1992, and significant achievement gaps among major racial/ethnic groups remain in both subjects. NAT'L CTR. FOR EDUC. STATISTICS (2010). 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 2009–2010, an estimated 38% of all schools in the country failed to make AYP and in twelve states and the District of Columbia more than 50% of the schools failed to meet these legally-mandated targets. ALEXANDRA USHER, CTR. ON EDUC. POLICY, *UPDATE WITH 2009–10 DATA AND FIVE-YEAR TRENDS: HOW MANY SCHOOLS HAVE NOT MADE ADEQUATE YEARLY PROGRESS 3–4* (2011), available at <http://www.cep-dc.org/>. According to Arne Duncan, U.S. Secretary of Education, 80% of all schools nationwide may fail to make AYP by the end of the next school year, if no changes are made in the law or regulations. *The Budget and Policy Proposals of the U.S. Department of Education: Hearing*

While vital school improvement efforts must continue, the country's ambitious national educational goals cannot be met unless the nation understands and confronts the core problem underlying the achievement gap: the extensive pattern of childhood poverty that inhibits educational opportunity and educational achievement.

The childhood poverty rate in the United States (22%) is the highest among the wealthy industrialized nations in the world.<sup>5</sup> 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.<sup>6</sup> 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 are the effects on the child's potential to succeed academically.<sup>7</sup>

According to a growing body of research, America will attain its goals of promoting equity and preparing students to function effectively as citizens and productive workers only when a concerted effort is made to eliminate the substantial socioeconomic barriers that keep many low-income children and youth from school success.<sup>8</sup> The need for such a comprehensive ap-

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*Before the H. Comm. on Educ. & the Workforce*, 112th Cong. 9 (2011) (statement of Hon. Arne Duncan, Sec'y of the U.S. Dep't of Educ.), available at <http://www.ed.gov/news/speeches/winning-future-education-responsibility-reform-and-results>.

In terms of comparative international rankings, on the latest tests conducted by the Program in International Student Assessment ("PISA"), average math scores of fifteen-year-olds in the United States were lower than average scores in seventeen other Organization for Economic Co-Operation and Development ("OECD") countries, higher than average scores in five OECD countries, and not measurably different from average scores in eleven others. In science and reading, U.S. scores were also in the middle of the pack: Twelve OECD countries had higher average science scores than the United States, nine had lower average scores, and twelve had average scores that were not measurably different from the U.S. average score; in reading, compared to the thirty-three other OECD countries, six had higher average scores than the United States, thirteen had lower average scores, and fourteen had average scores not measurably different from the U.S. average. STUART KERACHSKY, NAT'L CTR. FOR EDUC. STATISTICS, PROGRAM FOR INTERNATIONAL STUDENT ASSESSMENT (PISA) 2009 RESULTS (2010), available at <http://nces.ed.gov/surveys/pisa/pisa2009highlights.asp>.

<sup>5</sup> The percentage of children living in relative income poverty, defined as "living in a household where the equivalent income is less than 50% of the national median," in the United States in 2000 was 22%, placing it last among the 24 OECD countries listed. UNICEF INNOCENTI RESEARCH CTR., CHILD POVERTY IN PERSPECTIVE: AN OVERVIEW OF CHILD WELL-BEING IN RICH COUNTRIES, INNOCENTI REPORT CARD 7 (2007). 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.* at 6.

<sup>6</sup> These 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).

<sup>7</sup> *Id.* at 47-48.

<sup>8</sup> See, e.g., *id.*; David C. Berliner, *Our Impoverished View of Educational Research*, 108 TCHR. C. REC. 949, 949 (2006) (arguing that "poverty places severe limits on what can be accomplished through school reform efforts" and suggesting that "the most powerful policy for improving our nations' school achievement is a reduction in family and youth poverty"); Jeanne Brooks-Gunn & Greg J. Duncan, *The Effects of Poverty on Children*, 7 FUTURE OF CHILDREN 55 (1997) (summarizing studies of the effects of long-term poverty on children's

proach to educational opportunity has been widely recognized.<sup>9</sup> Moreover, a number of demonstration projects have shown the dramatic gains that can result from coordinated efforts to meet children's broad learning needs.<sup>10</sup> Almost no one would disagree with the basic proposition that poverty substantially limits students' opportunities for school success, but some are skeptical of whether the schools, even in collaboration with other governmental agencies and community organizations, are capable of responding to these needs on a broad systemic basis.<sup>11</sup> In this article, I will argue that comprehensive

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welfare and cognitive abilities); Whitney C. Allgood, *The Need for Adequate Resources for At-Risk Children* 1 (Econ. Policy Inst., Working Paper No. 277) (2006) (comprehensively reviewing studies and literature on impact of poverty on children's readiness to learn and setting forth a "model for determining the components and costs of an adequate education for at-risk students"); James E. Ryan, *Schools, Race and Money*, 109 YALE L.J. 249, 284–96 (1999) (providing overview of research and commentary on the impact of concentrated poverty school performance); Russell W. Rumberger, *Parsing the Data on Student Achievement in High Poverty Schools*, 85 N.C. L. REV. 1293, 1310–11 (2007) (discussing national longitudinal study of 10,000 students that indicates that attending a high-poverty school has a significant effect on achievement of students from poverty backgrounds).

<sup>9</sup> See, e.g., JEAN ANYON, *RADICAL POSSIBILITIES: PUBLIC POLICY, URBAN EDUCATION AND A NEW SOCIAL MOVEMENT* (2005) (arguing that low-achieving schools are embedded in a larger social order, and sustainable positive change can only come by altering that order); FIRST FOCUS, *BIG IDEAS FOR CHILDREN: INVESTING IN OUR NATION'S FUTURE* (2008) (essays by twenty-two scholars and advocates setting forth policy ideas for providing comprehensive services to children); EDMUND W. GORDON, BEATRICE L. BRIDGLALL & AUNDRA SAA MEROE, *SUPPLEMENTARY EDUCATION: THE HIDDEN CURRICULUM OF HIGH ACADEMIC ACHIEVEMENT* (2005) (discussing the importance of out-of-school experiences for success in schools); DAVID L. KIRP, *KIDS FIRST: FIVE BIG IDEAS FOR TRANSFORMING CHILDREN'S LIVES AND AMERICA'S FUTURE* (2011) (outlining a "kids first" agenda to meet children's broad needs); Helen F. Ladd et al., *A Broader Bolder Approach to Education* (2008) (task force report calling for high-quality early childhood, preschool, and kindergarten education, children's health services, afterschool, summer school, and other out-of-school activities); SUSAN B. NEUMAN, *CHANGING THE ODDS FOR CHILDREN AT RISK: SEVEN ESSENTIAL PRINCIPLES OF EDUCATIONAL PROGRAMS THAT BREAK THE CYCLE OF POVERTY* (2009) (describing specific principles for changing the learning odds for children disadvantaged by poverty); Jeffrey R. Henig & S. Paul Reville, *Why Attention Will Return to Non-School Factors*, EDUC. WEEK, May 25, 2011, at 28 ("Our scenario for the future of school reform will require a new conception of education as encompassing a broader idea of child development."); Joe Nocera, *The Limits of School Reform*, N.Y. TIMES, Apr. 25, 2011, at A25 ("Over the long term, fixing our schools is going to involve a lot more than, well, just fixing our schools.").

<sup>10</sup> See, e.g., JOY G. DRYFOOS, *FULL SERVICE SCHOOLS: A REVOLUTION IN HEALTH AND SOCIAL SERVICES FOR CHILDREN, YOUTH, AND FAMILIES* 100–09 (1998) (discussing the achievements of the Children's Aid Society's Community Schools in New York City); PAUL TOUGH, *WHATEVER IT TAKES: GEOFFREY CANADA'S QUEST TO CHANGE HARLEM AND AMERICA* 5–20, 66–67, 93 (2008) (discussing the history and operations of the Harlem Children's Zone); SAMUEL P. WHALEN, *THREE YEARS INTO CHICAGO'S COMMUNITY SCHOOLS INITIATIVE (CSI): PROGRESS, CHALLENGES, AND LESSONS LEARNED* (2007) (evaluating initial experience with implementation of a broad-based community school initiative by the Chicago Public Schools); Martin J. Blank, *How Community Schools Make a Difference*, 61 EDUC. LEADERSHIP 62, 64–65 (2004) (discussing Portland, Oregon's Schools Uniting Neighborhoods ("SUN") Initiative which joins a range of libraries, neighborhood health clinics, community organizations, and area churches and businesses in an extensive collaboration with forty-six schools in eight districts).

<sup>11</sup> See, e.g., FREDERICK M. HESS, *COMMON SENSE SCHOOL REFORM* 3 (2004).

There are a number of nonschool changes that might improve the lives of children and boost their academic success. Better child nutrition, heightened parental in-

services can be provided on a feasible, large-scale basis to overcome the impact of poverty on educational opportunity. To do so, however, disadvantaged students' access to the necessary comprehensive services needs to be seen as a basic *right*, rather than as a benefit that policymakers may bestow or deny at their discretion.

### A. *Parameters of the Right*

In the United States, realization of major social reform generally is accomplished through the establishment and enforcement of legal rights. Americans "speak of what is most important to us in terms of rights and . . . frame nearly every social controversy as a clash of rights."<sup>12</sup> "Rights talk" is the language Americans use to focus political dialogue, galvanize social movements, and press for major reforms.<sup>13</sup> A "right" is an individual claim that is entitled to preference above other societal goals.<sup>14</sup> If a political posi-

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volvement, more stable families, cleaner air, improved health care, safer streets, expanded library service, more extensive after-school programs or more engaged civic leadership would all help. . . . When discussion of school improvement meanders into these issues, however, it is easy to drift from tackling the education problems we can address to bewailing larger questions that schools are ill-equipped to manage.

*Id.* The Education Equality Project ("EEP"), led by an unusual combination of prominent public figures, including former chancellor of the New York City Schools, Joel Klein, former House Republican leader, Newt Gingrich, and civil rights activist, Reverend Al Sharpton, has also suggested that any effort to shift the focus of school reform to efforts aimed at reducing poverty or improving the health and welfare of children was nothing more than an attempt to use poverty as an excuse for not educating all children at high standards. See Joel I. Klein et al., *Why Great Teachers Matter to Low-Income Students*, WASH. POST, Apr. 9, 2010, at A19.

<sup>12</sup> See 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. *Id.* at 14–15. 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, 1867, 1872–74, 1877 (1987) (arguing that rights create a more equal community that "draws those who use [a right] inside the community, and urges the community to pay attention to the individual claimants"); cf. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 290 (Vintage ed., 1945) (1835) ("Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.").

<sup>13</sup> 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, 668–70 (1993) (discussing how courts synthesize and focus political debates on major issues of public policy).

<sup>14</sup> 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, *RIGHTS, JUSTICE AND THE BOUNDS OF LIBERTY: ESSAYS IN SOCIAL PHILOSOPHY* 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

tion is perceived as a “right,” those asserting it have a potent position for laying claim to societal resources and efforts to support their ends. Establishing comprehensive educational opportunity as a *right*, therefore, will focus attention on the critical link between poverty and achievement gaps, and will require the government to provide the full range of resources necessary to meet the urgent educational needs of children from backgrounds of poverty.

The right that I am proposing would require states to adopt a comprehensive approach to educational opportunity that ensures disadvantaged students the services and support most critical for school success. These resources include traditional educational resources like high-quality teaching, a rich and rigorous curriculum, adequate facilities, and sufficient, up-to-date learning materials. In addition, they must include supplemental resources needed to overcome the impediments to educational achievement imposed by the conditions of poverty. Extensive research in this area has emphasized four fundamental areas of requisite preventive and supportive services: (1) early childhood education beginning from birth; (2) routine and preventive physical and mental health care; (3) after-school, summer school, and other expanded learning time programs; and (4) family engagement and support.<sup>15</sup> To be effective in overcoming achievement gaps and promoting

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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.* 1143, 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, *FOUR ESSAYS ON LIBERTY* 122–34 (1969).

A right can be “moral (based on a moral theory or principle)” or “legal (prescribed by particular laws).” MARIE CONNOLLY & 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 that 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. 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. *DE TOCQUEVILLE, supra* note 12, at 290.

<sup>15</sup> The Campaign for Educational Equity at Teachers College, Columbia University 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. SHARON L. KAGAN, *AMERICAN EARLY CHILDHOOD EDUCATION: PREVENTING OR PERPETUATING INEQUITY?* 6–7 (2009), *available at* [http://www.equitycampaign.org/i/a/document/13797\\_EquityMatters\\_Kagan\\_Final.pdf](http://www.equitycampaign.org/i/a/document/13797_EquityMatters_Kagan_Final.pdf). 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. 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/i/a/document/12558\\_EquityMattersVol6\\_WebFINAL.pdf](http://www.equitycampaign.org/i/a/document/12558_EquityMattersVol6_WebFINAL.pdf). After-school programs have been found to result in small, but meaningful, positive effects on academic outcomes, and significant improvements in attitudes

educational attainment at high proficiency levels, these services must be provided consistently, comprehensively, and at high-quality levels.<sup>16</sup> Access to this comprehensive range of services will enable students disadvantaged by backgrounds of poverty to enter school ready to learn at grade level, and to maintain that capability throughout their school years.

This Article will argue that many legal precedents exist for articulating and enforcing such a right to comprehensive educational opportunity. Part II will demonstrate how the Elementary and Secondary Education Act of 1965 (“ESEA”) incorporated the potent egalitarian tradition of the “American dream” ideology into a major federal educational funding initiative, and how that commitment to providing meaningful educational opportunities for economically disadvantaged students culminated in the latest version of the ESEA, the federal No Child Left Behind Act (“NCLB”).<sup>17</sup> NCLB, which promises all students “significant” educational opportunities and mandates that the states provide students sufficient educational opportunities to ensure that they achieve at high levels,<sup>18</sup> can be said to implicitly include a right to comprehensive educational opportunity.

I argue that this implicit right be made explicit in the currently pending process to reauthorize the ESEA/NCLB. The economic costs of doing so are feasible and attainable, even during the current economic downturn, and un-

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and behaviors. MARGO GARDNER, JODIE L. ROTH & JEANNE BROOKS-GUNN, CAN AFTER-SCHOOL PROGRAMS HELP LEVEL THE PLAYING FIELD FOR DISADVANTAGED YOUTH? 18–23 (2009), available at [http://www.equitycampaign.org/i/a/document/11242\\_After-school\\_report\\_10-7-09\\_web.pdf](http://www.equitycampaign.org/i/a/document/11242_After-school_report_10-7-09_web.pdf). 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.” HEATHER B. WEISS ET AL., REFRAMING FAMILY INVOLVEMENT IN EDUCATION: SUPPORTING FAMILIES TO SUPPORT EDUCATIONAL EQUITY 21 (2009), available at [http://www.equitycampaign.org/i/a/document/12018\\_EquityMattersVol5\\_Web.pdf](http://www.equitycampaign.org/i/a/document/12018_EquityMattersVol5_Web.pdf).

Other factors, such as parental employment, housing, and welfare policies, although of great economic and social significance, are less directly related to educational achievement and are not incorporated in this right. 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 generally ANYON, *supra* note 9.

<sup>16</sup> The types of consistent, coordinated services needed to meet the student needs identified in the research summarized in the previous footnote would include: 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; consistent, routine, and preventive physical and mental health care, as through a school-based clinic from birth through age eighteen; high-quality after-school and summer programs from age five through eighteen; and school-based comprehensive service coordinators from age three through high school. See generally Michael A. Rebell & Jessica R. Wolff, *A Proposal For Essential Standards and Resources*, in PROVIDING COMPREHENSIVE EDUCATIONAL OPPORTUNITY TO LOW-INCOME STUDENTS (2011), available at <http://www.equitycampaign.org>. Essentially, these services attempt to replicate the enriched home learning environments, lessons, activities, access to cultural events, quality health care, and stable, supportive home environments that middle class children generally experience as a matter of course.

<sup>17</sup> 20 U.S.C. § 6301 (2006).

<sup>18</sup> *Id.*

less a right to comprehensive educational opportunity is recognized and implemented, the achievement gaps will not be overcome, and the strong national interest in maintaining the country's economic status and democratic viability will not be accomplished.

In Part III, I discuss how the extensive number of state courts that have held that public school children have a constitutional right to "a sound basic education"<sup>19</sup> or a "thorough and efficient education"<sup>20</sup> have established important state constitutional precedents for this right. Some of these cases have broadly defined the constitutional standard to include a range of comprehensive services,<sup>21</sup> and others have specifically held that the state constitution imposes an obligation on the state to create an educational system that overcomes the effects of poverty on "the very young."<sup>22</sup>

A number of important equal protection decisions of the federal courts have also established precedents for the broad-based educational opportunity claims of children from backgrounds of poverty. Accordingly, I argue in Part IV that, despite the U.S. Supreme Court's 1973 holding in *San Antonio Independent School District v. Rodriguez*<sup>23</sup> that education is not a fundamental interest entitled to strict scrutiny under the federal Constitution, developments since that time have established sufficient precedents under each category of the Supreme Court's tripartite equal protection analysis to support a right to comprehensive educational opportunity. Educational deprivations that deny students a meaningful opportunity to develop the skills they need to be capable voters and to exercise First Amendment rights are entitled to strict scrutiny review; the social and economic burdens on students and on society that result from inadequate education call for intermediate scrutiny by the federal courts; and the precedents that have established a category of "second order" rational basis review call into serious question the prevalent pattern of providing some, but not all, students the comprehensive services they need to succeed in school.

Finally, in Part V, I discuss implementation issues. NCLB, a range of political initiatives at the federal and state levels, and the legal precedents established by the state court adequacy decisions, have established the infrastructure for providing comprehensive services, but more definitive action is needed to organize the existing programs into a coherent national strategy. A strong legal basis exists for seeking acknowledgement of a right to comprehensive educational opportunity in the federal and state courts, but recog-

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<sup>19</sup> See, e.g., *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326 (N.Y. 2003); *Abbeville Cnty. Sch. Dist. v. State*, 515 S.E.2d 535 (S.C. 1999); *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997).

<sup>20</sup> See, e.g., *DeRolph v. State*, 667 N.E.2d 733 (Ohio 1997); *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990).

<sup>21</sup> See, e.g., *Abbott v. Burke*, 710 A.2d 450 (N.J. 1998); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989).

<sup>22</sup> *Abbeville Cnty. Sch. Dist. v. State*, No. 31-0169, slip op. at 157 (S.C. Ct. C.P. Dec. 29, 2005); *Hoke Cnty. Bd. of Educ. v. State*, 599 S.E.2d 365, 392 (N.C. 2004).

<sup>23</sup> 411 U.S. 1 (1973).

tion and implementation of the right should not be the exclusive responsibility of the courts. Invoking the history of the development of the right to a free, appropriate education for students with disabilities through the federal Individuals with Disabilities Education Act<sup>24</sup> and analogous state statutes, I argue that the legislative and executive branches have an obligation, equal to that of the courts, to recognize and implement this right.

## II. THE STATUTORY RIGHT TO COMPREHENSIVE EDUCATIONAL OPPORTUNITY

The main mechanism through which the federal government currently attempts to implement America's historic promise of meaningful educational opportunity to all children is the Elementary and Secondary Education Act of 1965, which, in its latest revision, is now known as the No Child Left Behind Act.<sup>25</sup> I will argue in this section that the ESEA/NCLB implicitly established a right to comprehensive educational opportunity for economically disadvantaged students. That implicit commitment should be made explicit when the Act is reauthorized in the near future.

### A. *Education's Primacy of Place in American Traditions*

Education has always held a primacy of place as the central public institution of the American nation. In pre-colonial days, the move to a new continent dislodged traditional moorings.<sup>26</sup> In America, much more extensively than in Europe, education shifted from a private family responsibility to "a matter of public concernment" and a broad communal undertaking.<sup>27</sup> With the advent of the American Revolution, many of the leaders of the new republic saw a broader and national purpose for education. Schools could be critical to building a new democracy by "the deliberate fashioning of a new republican character, rooted in the American soil . . . and committed to the promise of an American culture."<sup>28</sup> The Founders also recognized early on that education for a democratic culture had to imbue all citizens with the knowledge and skills needed to make intelligent decisions. As John Adams put it:

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<sup>24</sup> 20 U.S.C. § 1401 (2006).

<sup>25</sup> 20 U.S.C. § 6301 (2006).

<sup>26</sup> LAWRENCE A. CREMIN, *AMERICAN EDUCATION: THE COLONIAL EXPERIENCE, 1607–1783*, at 192–93 (1970).

<sup>27</sup> *Id.* at 193–94; see also James S. Coleman, *The Meaning of Equal Educational Opportunity*, in *EQUALITY OF EDUCATIONAL OPPORTUNITY: A HANDBOOK FOR RESEARCH* 5 (L.P. Miller & Edmund E. Gordon eds., 1974) (discussing how because of the lack of traditional class structure in the United States, a public school system that provided a common educational system for all children took root here much earlier than in England).

<sup>28</sup> LAWRENCE A. CREMIN, *AMERICAN EDUCATION: THE NATIONAL EXPERIENCE, 1783–1876*, at 3 (1980).

A memorable change must be made in the system of education and knowledge must become so general as to raise the lower ranks of society nearer to the higher. The education of a nation instead of being confined to a few schools and universities for the instruction of the few, must become the national care and expense for the formation of the many.<sup>29</sup>

The common school movement of the mid-nineteenth century sought to carry out this egalitarian ideal by providing tax-supported public schools “open to all” and “for the rich and the poor alike.”<sup>30</sup> The common school heritage is at the core of the American dream ideology: Schools are seen as the places where “routes of access—to success, to mobility, to fulfillment of individual promise—are supposed to be equalized and actualized for all children.”<sup>31</sup> The American dream posits that 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, once the polity ensures a chance for everyone, it is up to individuals to go as far and as fast as they can in whatever direction they choose.”<sup>32</sup>

From an historical perspective, America’s common school movement was a landmark egalitarian achievement, and the American dream ideology has been a significant vehicle for reconciling the American values of rugged individualism and equal opportunity.<sup>33</sup> Nevertheless, from the outset, these egalitarian aspirations were sullied by constitutional acceptance of slavery, as well as gender and class limitations on access to citizenship and educa-

<sup>29</sup> DAVID McCULLOUGH, JOHN ADAMS 364 (2001).

<sup>30</sup> CREMIN, *supra* note 26, at 138. For a general discussion of the history and significance of the common school movement, see CARL KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY 1780–1860 (1983).

<sup>31</sup> HEATHER BETH JOHNSON, THE AMERICAN DREAM AND THE POWER OF WEALTH: CHOOSING SCHOOLS AND INHERITING INEQUALITY IN THE LAND OF OPPORTUNITY 172 (2006).

<sup>32</sup> JENNIFER L. HOCHSCHILD & NATHAN SCOVRONICK, THE AMERICAN DREAM AND THE PUBLIC SCHOOLS 10 (2003). 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.” President Bill Clinton, Remarks to the Annual Conference of the Democratic Leadership Council (Dec. 3, 1993).

<sup>33</sup> Originally, the American dream ideology sought to reconcile the demands of equality and rugged individualism by promising that all who come to America, where the 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 national origin or religion. During the 1800s, the vast expanse of land available in the Western territories created a 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 [twentieth] century, Americans increasingly looked to education as the primary source of opportunity.” Isabel V. Sawhill & Daniel P. McMurrer, *American Dreams and Discontent: Beyond the Level Playing Field*, in OPPORTUNITY IN AMERICA 1 (1996), available at <http://www.urban.org/url.cfm?ID=306773>.

tion. Not surprisingly, therefore, the efforts of the modern civil rights movement to eliminate racist, classist, and sexist constraints on equal opportunity have predominantly focused on educational institutions.<sup>34</sup> In *Brown v. Board of Education*,<sup>35</sup> the U.S. Supreme Court described the primacy of place of education in contemporary times in the following terms:

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.<sup>36</sup>

In the wake of *Brown* and the civil rights movement, in 1965, the federal government committed itself to extending America's historical commitment to equal educational opportunity to racial minorities and low-income students with the passage of the Elementary and Secondary Education Act of 1965.<sup>37</sup> Given the entrenched resistance of most southern states to implementing *Brown*'s mandate and the limited efforts being made by many other states to provide meaningful educational opportunities to Black, Latino, and other minority students, to low-income students, and, in many cases, to girls and women, a proactive stance on these issues by the federal government was of critical importance.<sup>38</sup>

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<sup>34</sup> See generally *United States v. Virginia*, 518 U.S. 515 (1996) (banning gender discrimination in higher education military academy); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (seeking equal funding for low-income public school students); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding unconstitutional *de jure* segregation in public schools); *McLauren v. Okla. State Regents*, 339 U.S. 637 (1950) (overturning state policy limiting access of blacks to graduate education).

<sup>35</sup> 347 U.S. 483 (1954).

<sup>36</sup> *Id.* at 493.

<sup>37</sup> Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965).

<sup>38</sup> See generally MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004) (discussing strong resistance to implementation of *Brown* in southern states); see also CHRISTOPHER T. CROSS, *POLITICAL EDUCATION: NATIONAL POLICY COMES OF AGE 144* (2004) (noting that equity "continues to be the key principle guiding federal aid").

*B. Enactment and Initial Development of the ESEA*

Reflecting on his own experience as a child whose schooling opportunities allowed him to rise out of poverty,<sup>39</sup> President Lyndon B. Johnson was a strong proponent of the American dream ideology. He recognized 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 say, "You are free to compete with all the others," and still just[ly] believe that you have been completely fair. Thus, it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates.<sup>40</sup>

Acting on these beliefs, Johnson engineered the enactment of the Elementary and Secondary Education Act of 1965,<sup>41</sup> a statute that vastly expanded the role of the federal government in education and focused the federal role on expanding opportunities for economically disadvantaged students. The centerpiece of the ESEA was Title I, which distributed nearly \$1 billion to school districts throughout the country to provide extra services to students from low-income families. It "established a federal priority in education, to improve education for children from poor families. . . . [It was] an expression of the old American idea . . . that public schools could be the 'balance wheel of the social machinery,' righting wrongs that the economy and society imposed on children."<sup>42</sup>

Historically, federal involvement in educational matters had been relatively minor. Despite the founders' strong belief in the importance of education, throughout most of the nation's history schooling was left largely to states and localities, consistent with the basic federalist structure of the U.S. Constitution.<sup>43</sup> Johnson was able to change this legacy and promote a key

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<sup>39</sup> CROSS, *supra* note 38, at 27.

<sup>40</sup> LYNDON B. JOHNSON, *THE VANTAGE POINT: PERSPECTIVES OF THE PRESIDENCY, 1963–1969*, at 166 (1971) (quoting himself, from a commencement speech he gave at Howard University on June 4, 1965).

<sup>41</sup> Pub. L. No. 89-10, 79 Stat. 27 (1965).

<sup>42</sup> DAVID K. COHEN & SUSAN L. MOFFITT, *THE ORDEAL OF EQUALITY: DID FEDERAL REGULATION FIX THE SCHOOLS?* 2 (2009) (quoting in part HORACE MANN, 4 *LIFE AND WORKS OF HORACE MANN*, TWELFTH REPORT 251 (1891)).

<sup>43</sup> The one major exception to this pattern was the federal government's land-grant program. The Northwest Ordinance of 1785, which governed the distribution of land in the new territories, mandated that one section of each township be devoted to the maintenance of public schools. Federal gifting of land—both through the ordinance and in subsequent additional gifts of land to the states—became especially important when industrialization and immigration prompted the beginning of the common school movement in the mid-1800s. See J. Hirschland & Sven Steinmo, *Correcting the Record: Understanding the History of Federal Intervention and Failure in Securing U.S. Educational Reform*, 17 *EDUC. POL'Y* 343, 348–49 (2003). For a brief time after the Civil War, the federal government sought to undertake a number of significant educational initiatives focused on expanding access to education for the newly freed slaves. At that time, the federal government established a Department of Education, and a number of bills calling for a stronger federal role in funding and overseeing education were introduced into Congress. The most notable of these was the bitterly contested

role for the federal government in promoting equal educational opportunity by taking advantage of the public goodwill that followed the assassination of President John F. Kennedy, a large Democratic congressional majority, and his own deft political skills.<sup>44</sup> Significantly, he was able to overcome the historical opposition to federal aid to education precisely because Title I did not provide general aid to education, but, consistent with the tenets of the American dream, only categorical aid targeted to assist needy students.<sup>45</sup>

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“Hoar Bill” of 1870, which would have established a federal system of educational oversight that could “compel by national authority the establishment of a thorough and efficient system of public instruction throughout the whole country [that] is not to supersede, but to stimulate, compel, and supplement action by the State.” GORDON CANFIELD LEE, *THE STRUGGLE FOR FEDERAL AID, FIRST PHASE: A HISTORY OF THE ATTEMPTS TO OBTAIN FEDERAL AID FOR THE COMMON SCHOOLS, 1870–1890*, at 42 (1949) (citing CONG. GLOBE, 41st Cong., 2d Sess. 478 (1870)); see also Goodwin Liu, *Education, Equality and National Citizenship*, 116 YALE L.J. 369 (2006) (discussing attempts to establish a substantive federal right to education during the Reconstruction era). After the southern states were readmitted to the Union, the Department of Education was downgraded to a bureau housed in the Department of the Interior, with a greatly reduced budget, and the Hoar Bill was defeated. By the late nineteenth century, strong opposition had developed to any involvement of the federal government in educational affairs. This stance continued throughout the first half of the twentieth century, with the limited exception of the National Defense Education Act of 1958 (“NDEA”), passed in response to the challenge presented by the Soviet Union’s launching of its Sputnik Space Satellite. CROSS, *supra* note 38, at 11–14. NDEA provided states with about \$1 billion in categorical aid to encourage students to study science and math through college tuition loans and to improve foreign language instruction and science labs in schools and colleges. *Id.*

<sup>44</sup> Historically, bills to provide federal aid for education had repeatedly failed in Congress because of northern Congressmen’s insistence that any federal aid be coupled with demands for racial justice or assistance to schools for African American children, concerns in some quarters that some of any such aid would flow to parochial schools, and apprehension that federal aid would undermine local control of schools. These concerns had been summarized in terms of the “‘three R’s’—race, religion, and regulation (opposition to government support for integration and Catholic schools, and bureaucratic centralization). . . .” PATRICK J. MCGUINN, *NO CHILD LEFT BEHIND AND THE TRANSFORMATION OF FEDERAL EDUCATION POLICY, 1965–2005*, at 29 (2006). President Johnson was able to steer the ESEA through Congress only by carefully countering opposition to each of the “three R’s.” The opposition of the powerful southern committee chairs to the anti-discrimination amendment was finessed by the passage the year before of Title VI of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000d–2000d-6 (2006). Title VI, which authorized the total cut-off of federal aid to states that operated funded programs in a discriminatory manner, in effect established a permanent anti-discrimination amendment to all federal funding legislation and removed this issue as a consideration in the passage of future bills. To deal with the strong conflicting pressures from Catholic groups that sought aid for parochial schools, and from the National Education Association and other liberal groups that were opposed to it, the ESEA was structured to provide services to eligible children through supplemental services that would be provided directly to the child and not to the private school. CROSS, *supra* note 38, at 27; MCGUINN, *supra* note 44, at 30. Opposition based on local control concerns was overcome by funding formulas that maximized the number of eligible districts (about 94% of districts received some Title I funds) and placed only very limited constraints on how the money could actually be spent. MCGUINN, *supra* note 44, at 31–32, 34.

<sup>45</sup> “[A] central reason for the bill’s passage was that its proponents advanced it as a ‘special purpose’ bill for the neediest students. It was not to be general aid, opposed for decades out of a fear of federal control and the inability to settle religious and racial conflicts. Congress was successful because ‘the new special purpose was the education of children of needy families and children living in areas of substantial unemployment.’” ELIZABETH DEBRAY, *POLITICS, IDEOLOGY, AND EDUCATION: FEDERAL POLICY DURING THE CLINTON AND BUSH ADMINISTRATIONS* 6 (2006) (internal quotation marks omitted).

With the passage of the ESEA, federal spending on education rose to 10% of total education funding by 1968 and has remained at about that level ever since.<sup>46</sup> To gain passage of the Act, however, Johnson had to agree to a number of political compromises that inhibited the development of strong evaluation and accountability requirements and that blunted its potential as a vehicle for meeting the educational needs of low-income children:

There would be federal school aid and some federal influence on schools' priorities, but the aid was distributed in a way that greatly constrained federal influence. The governance arrangements that favored local control and fragmentation persisted. Title I's chief instrument was a formula grant that was keyed mainly to the incidence of poverty: once the total federal appropriation was decided, each state's allocation reflected its proportion of the national population of those who were poor, and the allocation within states followed in the same fashion. Though the formula decided how much money states and localities would get, it decided nothing about how that money would be spent—save that it was to be spent on the education of children from poor families. . . . States and localities would control how the money would be spent and that was the one political price of passage for the 1965 ESEA.<sup>47</sup>

Over the next three decades, as evaluation reports began to document waste and abuse in local Title I programs and disappointing educational results despite the expenditure of billions of federal dollars,<sup>48</sup> Congress increasingly began to focus on tighter controls and accountability mechanisms. Major new initiatives were included in the revisions to the law in the 1990s that emphasized performance-based accountability systems which required

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<sup>46</sup> MCGUINN, *supra* note 44, at 33. As total educational spending has expanded substantially in the years since 1968, the federal share has also expanded substantially, although at a slightly slower rate; total national spending on K-12 educational operations is now approximately \$477 billion. U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS TABLE 178 (2009), *available at* [http://nces.ed.gov/programs/digest/d09/tables/dt09\\_178.asp](http://nces.ed.gov/programs/digest/d09/tables/dt09_178.asp). Total federal spending is now \$37 billion, of which Title I accounts for approximately \$14.5 billion and spending for students with disabilities totals about \$12.5 billion. U.S. DEP'T OF EDUC., EDUCATION DEPARTMENT BUDGET HISTORY TABLE: FY 1980–FY 2012 PRESIDENT'S BUDGET, *available at* <http://www2.ed.gov/about/overview/budget/history/edhistory.pdf>.

<sup>47</sup> COHEN & MOFFITT, *supra* note 42, at 3; *see also* CROSS, *supra* note 38, at 29–30 (discussing how, in the hearings and congressional committee reports concerning Title I, no consideration was given to how the money would be spent).

<sup>48</sup> An influential early report issued by the NAACP Legal Defense fund claimed that Title I money was being grossly misspent and catalogued the serious problems encountered by the federal government in attempting to monitor the states' use of Title I funding. RUBY MARTIN & PHYLLIS MCCLURE, *TITLE I OF ESEA: IS IT HELPING POOR CHILDREN?* (1969). For a discussion of difficulties the U.S. Department of Education has had in enforcing the statute and the regulations since 1965, *see generally* COHEN & MOFFITT, *supra* note 42.

states to test students to assess their academic progress, issue school report cards, and provide assistance to low-performing schools.<sup>49</sup>

The emphasis on performance-based accountability intensified after reports in the 1980s, such as *A Nation at Risk*, raised alarms about the quality of the education American students were receiving and about their ability to compete effectively in the global economy.<sup>50</sup> Responding to these concerns, both Presidents George H.W. Bush and Bill Clinton pressed Congress to incorporate goals, standards, and outcome assessments into Title I.<sup>51</sup> In doing so, they sought to increase substantially the federal role in educational policy and to induce the states to move in coherent and consistent ways to improve equity and excellence in the nation's schools.

The original national goals and standards that both presidents had contemplated were quite robust. In 1989, President Bush convened a presidential summit involving all fifty state governors and many leading corporate CEOs to consider the crisis in American education. The participants agreed that the country needed national goals to stimulate higher educational achievement. In his State of the Union address in 1990, President Bush announced the goals, which included achieving a 90% high school graduation rate, being first in the world in math and science, and providing every graduate the knowledge and skills necessary to compete in the global marketplace.<sup>52</sup> 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 "all children in America will start school ready to learn."<sup>53</sup>

The bipartisan drafting committee which 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 opportunity inputs, such as "high-quality and developmentally appropriate preschool programs that help prepare children for school."<sup>54</sup> In addition, the committee agreed that:

[C]hildren will receive the nutrition, physical activity experiences and health care needed to arrive at school with healthy minds and

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<sup>49</sup> Improving America's Schools Act of 1994 ("IASA"), Pub. L. No. 103-382, §§ 111(a)(3); 1116(a)(3); 1116(c), 108 Stat. 3518 (1994).

<sup>50</sup> NAT'L COMM'N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* 5 (1983) (warning of a "rising tide of mediocrity" in America's schools); see also NAT'L ASSESSMENT OF EDUC. PROGRAMS, *AMERICA'S CHALLENGE: ACCELERATING ACADEMIC ACHIEVEMENT* (1990) (decrying poor performance of American students on comparative international assessments, especially in science and math).

<sup>51</sup> See DEBRAY, *supra* note 45, at 27-37; MCGUINN, *supra* note 44, at 75-104; see also John "Jack" Jennings, *Chapter I: A View from Congress*, 13 EDUC. EVALUATION & POL'Y ANALYSIS 335, 336 (1991) ("A major shift in [Title I] is occurring; it emphasizes that educational improvements are the intended result, not just fiscal and programmatic compliance.").

<sup>52</sup> MCGUINN, *supra* note 44, at 61-62.

<sup>53</sup> *Id.* at 61.

<sup>54</sup> Goals 2000: Educate America Act of 1994, Pub. L. No. 103-227, 108 Stat. 125 (codified as amended at 20 U.S.C. §§ 5801, 5812(1)(B)(i) (2006)).

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.<sup>55</sup>

The original drafters of Goals 2000 assumed that the statute that would emerge from their deliberations would also ensure that the resources necessary to provide all students the opportunity inputs for which they were advocating would be an integral part of the statutory scheme. A federal task force established to propose mechanisms for implementing Goals 2000 explained why “opportunity to learn” standards must be considered a necessary part of the standards-based reform approach:

[I]f 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 assessment 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.<sup>56</sup>

The Clinton Administration’s original Goals 2000 legislative proposal responded to this recommendation by including provisions for national “opportunity to learn” standards that would be developed by a National Education and Standards Council. Strong opposition to federal oversight of state spending, however, led to a substantial watering down of this concept in the final Goals 2000 legislation enacted in 1994; that statute called for only “voluntary” national school delivery standards that states could choose to adopt or state “opportunity to learn” standards that states could voluntarily develop.<sup>57</sup> Even these minimal, voluntary “opportunity to learn” standards were revoked after the Republicans took control of Congress later that year.<sup>58</sup> Given these realities, the administration did not push to include any of the specific school readiness concepts that the drafting committees had proposed.

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<sup>55</sup> *Id.*

<sup>56</sup> Linda Darling-Hammond, *Creating Standards of Practice and Delivery for Learner-Centered Schools*, 4 STAN. L. & POL’Y REV. 37, 38 (1993) (quoting NAT’L COUNCIL ON EDUC. STANDARDS & TESTING, RAISING STANDARDS FOR AMERICAN EDUCATION 13 (1992)).

<sup>57</sup> Goals 2000: Educate America Act of 1994 § 3.

<sup>58</sup> See Improving America’s Schools Act of 1994 (IASA), Pub. L. No. 103-382, 108 Stat. 3518 (1996) (reauthorizing ESEA but not requiring “opportunity to learn” standards). No efforts were made to include any “opportunity to learn” standards in the No Child Left Behind Act when it was enacted in 2001. See generally DEBRAY, *supra* note 45, at 27–37; MCGUINN, *supra* note 44, at 75–127.

Although Congress has not adopted the strong approach to national goals and standards that the first Bush and Clinton Administrations had contemplated, in its reauthorization processes since 1990, Congress did steadily enhance many other evaluation and accountability provisions of the Act, and the net effect has been a substantial increase in the federal government's oversight role.<sup>59</sup> The culmination of these efforts was the No Child Left Behind Act of 2001, supported by President George W. Bush and strong bipartisan majorities in Congress. NCLB accepted and expanded the performance-based accountability provisions that had been introduced in the 1994 Improving America's Schools Act, but added more stringent requirements and sanctions to compel the states to take these responsibilities seriously.<sup>60</sup> The law also substantially increased federal funding and expanded the civil rights aims and mandates of the IASA, including a specific requirement that achievement gaps be substantially eliminated by 2014 by requiring that all students be proficient according to challenging state standards. In essence, therefore, NCLB might be said to implicitly support students' rights to meaningful educational opportunity—but without ensuring that the resources and mechanisms necessary to achieve these challenging mandates were in place.

### *C. The Implicit Right to Comprehensive Educational Opportunity in NCLB*

NCLB has two major stated purposes that are set out in its opening paragraph. The first is that “all children have a fair, equal and significant opportunity to obtain a high quality education,” and the second is that all children “reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.”<sup>61</sup>

Incorporation of the term “significant” as a modifier of the term “opportunity” here is important. “Educational opportunity” had not been paired with the adjective “significant” in any previous versions of the ESEA. The preceding reauthorization of the ESEA, the Improving America's Schools Act of 1994, had utilized the phrase “fair and equal” educational opportunity<sup>62</sup> in its purposes clause. The word “significant” is,

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<sup>59</sup> See generally DEBRAY, *supra* note 45, at 27–37; MCGUINN, *supra* note 44, at 75–104.

<sup>60</sup> The performance accountability requirements of the IASA have been widely flouted: Facing a federal government that lacked any meaningful way to enforce the provisions, however, most states failed to comply. In 1999, Secretary of Education Richard Riley noted that just 36 states issued school report cards; only 19 states provided assistance to low-performing schools, and just 16 had the authority to close down failing schools . . . . As late as 2002, two years after the target date for full compliance, just 16 states had fully complied with the 1994 law. FREDERICK M. HESS & MICHAEL J. PETRILLI, NO CHILD LEFT BEHIND PRIMER 15 (2006).

<sup>61</sup> 20 U.S.C. § 6301 (2006).

<sup>62</sup> Improving America's Schools Act of 1994, Pub. L. No. 103-382, § 1001(a)(1), 108 Stat. 3519 (1994) amended by 20 U.S.C. § 6301 (Supp. II 2002). This phrase was repeated in the original House and Senate versions of NCLB, see H.R. REP. NO. 107-334, at 691–92 n.10 (2001), but was amended by adding “significant” in the final version of the Act, possibly to

of course, a synonym for “meaningful.”<sup>63</sup> “Meaningful” is a term that courts have repeatedly linked to educational opportunity to generally connote the need to provide a range of programs and services that respond directly to students’ educational needs and that will reasonably allow them to develop their educational potential. Thus, when the Supreme Court insisted in *Lau v. Nichols* that educational services provided to English language learners be “meaningful,”<sup>64</sup> Congress, the lower federal courts, and the United States Department of Education (“USDOE”) responded by articulating in very precise terms the types of services that would meet that requirement.<sup>65</sup> Similarly, state courts have referred to “meaningful education” to insist that state constitutional guarantees for a sound, basic education be given concrete, substantive content.<sup>66</sup>

Although reference to “significant” or “meaningful” in an introductory purposes clause does not constitute a statutory mandate, it does provide guidance for interpreting the Act. Congress’s additional explicit expectation in the purposes clause that *all* students achieve proficiency in relation to challenging state academic standards—and the fact that this expectation was set forth as an explicit mandate to be achieved by a date certain later in the

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substitute for a detailed delineation of concrete educational opportunities that had appeared in the original purposes clause of the Senate’s bill, but that was omitted in the final enacted version. See 20 U.S.C.A. § 6301 (2000 & Supp. II 2002) and accompanying text.

<sup>63</sup> The primary dictionary definition of “significant” is “[h]aving or expressing a meaning; meaningful.” THE AMERICAN HERITAGE COLLEGE DICTIONARY 1268 (3d ed. 1997).

<sup>64</sup> 414 U.S. 563, 568–69 (1974).

<sup>65</sup> Specifically, in response to *Lau*, Congress increased tenfold funding available under the Bilingual Education Act, Pub. L. No. 93-380, §§ 702 (a)(3), 703 (a)(4)(A), 88 Stat. 484 (1974), and expanded its definitions to emphasize bilingual, bicultural programs. See also Rachel Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 CAL. L. REV. 1249 (1988) (providing a history of federal intervention on bilingual educational issues). Also, in response to *Lau*, the federal Department of Health, Education, and Welfare enacted a set of regulations which came to be known as “the *Lau* Remedies” which required a school district to provide a remedial plan whenever it had twenty or more students of the same language group whose primary or home language was a language other than English. See KEITH A. BAKER & ADRIANA A. DEKANTER, BILINGUAL EDUCATION, A REAPPRAISAL OF FEDERAL POLICY XII–XIII, at 213–21 (1983).

<sup>66</sup> See, e.g., *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 331–36 (N.Y. 2003) (holding that the state constitution requires that each child be provided the opportunity for a “meaningful” high school education that included certain “essential” resources such as qualified teachers, small class sizes, and books and other instrumentalities of learning, and that they be must be taught the specific skills that will prepare them to function productively as civic participants capable of voting and serving on juries); see also *Abbott v. Burke*, 710 A.2d 450, 481 (N.J. 1998) (“The use of content and performance standards embodied the accepted definition of a thorough and efficient education, *i.e.*, to prepare all students with a *meaningful opportunity* to participate in their community.”) (emphasis added); *West Orange-Cove Consol. Indep. Sch. Dist. v. Neeley*, 176 S.W.3d 746, 787 (Tex. 2005) (“‘Districts satisfy this constitutional obligation when they provide all of their students with a *meaningful opportunity* to acquire the essential knowledge and skills reflected in . . . curriculum requirements . . . .’”) (emphasis added) (citing TEX. EDUC. CODE § 28.001); *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 253–54 (Conn. 2010) (holding that the state must provide an “objectively ‘meaningful opportunity’” to receive the benefits of the constitutional right (quoting *Neeley*, 176 S.W.3d at 787)).

Act<sup>67</sup>—makes clear that Congress intended that the states provide the specific resources and programs that would be necessary for all children to achieve at high proficiency levels.<sup>68</sup> Congress apparently understood that in order for states to achieve the Act's challenging equity and excellence goals, especially with regard to economically disadvantaged students, a substantially greater range of services would need to be provided. Presumably, the substantial increase in federal funding provided in NCLB was intended to assist the states in doing so.<sup>69</sup> Congress also required the states, in return for this extra funding, to accept a series of stringent accountability provisions to make sure that the purposes of the Act would be achieved.<sup>70</sup>

Implicitly, then, NCLB imposes an obligation on the states to provide disadvantaged students whatever services are necessary to allow them to meet the Act's stringent proficiency goals. Although Congress omitted any explicit private right of action on behalf of individual students,<sup>71</sup> clearly, "the students and their parents are the beneficiaries of regulations."<sup>72</sup> Although the Act applies an "aggregate focus"<sup>73</sup> to the states' obligations to provide the services children need to meet the Act's requirements and lodges enforcement responsibilities in the U.S. Department of Education, rather than in individual parents and students, its focus on "improving the condition of children collectively"<sup>74</sup> nevertheless constitutes an implied right to comprehensive educational opportunity on behalf of these students that is to be enforced by the Department of Education.<sup>75</sup> As with any right, *all* students are *entitled* to a meaningful educational opportunity under NCLB, and such opportunities are not a discretionary benefit that states can deny or limit to only a few beneficiaries.

Ten years have passed since the initial implementation of this statute—that is, more than two-thirds of the time allotted for achieving the Act's man-

<sup>67</sup> 20 U.S.C. § 6311(b)(2)(F) (2006).

<sup>68</sup> Also relevant in this regard is Congress's addition of "high quality education" to the first purposes clause: "[A]ll children have a fair, equal and significant opportunity to obtain a high quality education." 20 U.S.C. § 6301 (2006).

<sup>69</sup> Between 2001 and 2007, federal funding under Title I of the 1965 Elementary and Secondary Education Act increased by over \$4 billion, or approximately 45%; however, these appropriations fell far short of the \$16 billion authorization increase that Congress had included in the No Child Left Behind Act of 2001, of which ESEA is a major component. See MICHAEL A. REBELL & JESSICA R. WOLFF, MOVING EVERY CHILD AHEAD: FROM NCLB HYPE TO MEANINGFUL EDUCATIONAL OPPORTUNITY 99 (2007).

<sup>70</sup> For a description of the Act and its accountability provisions and sanctions, see *infra* notes 76–80 and accompanying text.

<sup>71</sup> *Newark Parents Ass'n v. Newark Pub. Sch.*, 547 F.3d 199, 205–06 (3d Cir. 2008) (holding that NCLB does not confer a private right of action upon students and their parents that is enforceable under 42 U.S.C. § 1983; the sole remedy provided in NCLB is for the Secretary of Education to withhold funds from states).

<sup>72</sup> *Id.* at 210.

<sup>73</sup> *Ass'n of Cmty. Orgs. for Reform Now v. N.Y.C. Dep't of Educ.*, 269 F. Supp. 2d 338, 345 (S.D.N.Y. 2003).

<sup>74</sup> *Id.* at 347.

<sup>75</sup> For a discussion of the Department's efforts to undertake these enforcement responsibilities in two major cases, see discussion *infra* sections II.D and II.E.

date that 100% of all students be proficient in meeting challenging state standards by 2014<sup>76</sup>—and it is clear that only minimal progress has been made toward reaching its ambitious goals. The major reason for this substantial shortfall is that, in implementing NCLB, states have focused only on the outcome requirements. They have neglected the Act's goal of providing students a meaningful educational opportunity. In doing so, many states have temporized, delayed, and manipulated standards and assessments to avoid the sanctions imposed by the Act, rather than ensuring that students have the resources and other inputs necessary for them to succeed.<sup>77</sup>

NCLB strongly emphasizes accountability and testing-based outcomes. The statute requires that each state develop “challenging” academic content standards and performance or assessment standards.<sup>78</sup> Both schools and districts must demonstrate that they are making adequate yearly progress (“AYP”) toward proficiency for all students by 2014, as reflected in regular reading, math, and science exams.<sup>79</sup> These test scores are reported overall and for a number of disaggregated subgroups.<sup>80</sup> If the school overall, or any one of four subgroups (racial/ethnic groups, economically disadvantaged students, students with disabilities, or students with limited English proficiency), does not meet its improvement target, the school does not make AYP.<sup>81</sup> The Act prescribes sanctions for schools and districts that fail to meet these demanding AYP requirements. Specifically, the Act: (1) allows students to transfer out of the school or obtain supplemental tutoring from outside vendors; (2) requires schools that have not met AYP over a number of years to implement corrective action plans; and (3) if these do not work, requires more radical action, such as restructuring the entire school or turning it into a charter school.<sup>82</sup>

In contrast to these extensive accountability provisions, the only specific resource requirement in NCLB is that all students be taught by “highly qualified teachers.”<sup>83</sup> 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

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<sup>76</sup> 20 U.S.C. § 6311(b)(2)(F) (2006).

<sup>77</sup> See REBELL & WOLFF, *supra* note 69, at 109–43.

<sup>78</sup> 20 U.S.C. § 6311(1)(A) (2006).

<sup>79</sup> 20 U.S.C. § 6311(3)(A) (2006).

<sup>80</sup> 20 U.S.C. § 6311(3)(C)(xiii) (2006).

<sup>81</sup> 20 U.S.C. § 6311(3)(G)–(H) (2006). Accommodations and alternative assessments are permitted for certain students with disabilities in the same manner as those provided by the Individuals with Disabilities Education Act, 20 U.S.C. § 1412(a)(16)(A) (2006). 20 U.S.C. § 6311(3)(I)(ii) (2006). 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. *Id.* § 6311(3)(I)(i).

<sup>82</sup> 20 U.S.C. § 6316 (2006). For a detailed discussion of the structure of NCLB and of the background and history of its passage, see REBELL & WOLFF, *supra* note 69, at 54–62. See also HESS & PETRILLI, *supra* note 60, at 15.

<sup>83</sup> 20 U.S.C. § 6319 (2006).

standard to ensure that teachers are capable of teaching students from diverse backgrounds to meet challenging state standards.<sup>84</sup> Because of political opposition to federal imposition of “opportunity to learn” standards,<sup>85</sup> NCLB contains no explicit requirements for the states to provide adequate resources to meet the Act’s stringent outcome requirements. Implicitly, of course, states do need to provide sufficient, comprehensive resources if all students are to have a meaningful opportunity to succeed. Implicitly recognizing this reality, the USDOE and the federal courts have held that states are required to spend whatever sums are necessary to comply with the law’s provisions.

#### *D. The NCLB’s Implicit Funding Requirements*

Although the federal government substantially increased funding for Title I when the NCLB was first enacted, in the years since, it has actually appropriated only about 25% of the full amount of increased financial support for the states that was authorized by the statute—a shortfall now of about \$12 billion per year.<sup>86</sup> Nor is there any 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.<sup>87</sup> 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 (“NEA”), sued the U.S.

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<sup>84</sup> See REBELL & WOLFF, *supra* note 69, at 83–89.

<sup>85</sup> See *supra* text accompanying notes 54–56.

<sup>86</sup> 20 U.S.C. § 6311(2)(F) (2006).

<sup>87</sup> For example, in Texas, where more than half of the funding for public education comes from local property taxes, the disparity in taxable wealth between the richest and the poorest school districts is 200 to 1. Dew ISD in Freestone County had \$2,037,488 in property value for each weighted student while Boles ISD in Hunt County had \$10,071. *West Orange-Cove Consol. Indep. Sch. Dist. v. Neeley*, 176 S.W.3d 746, 756 (Tex. 2005). In New York, in 2005, the rural Whitney Point School District, where almost half of the students come from backgrounds of poverty, spent \$9,931 per student, compared to \$23,344 spent per student in affluent Manhasset, where only 4.4% of the students come from backgrounds of poverty. N.Y. STATE EDUC. DEP’T, NEW YORK: THE STATE OF LEARNING: STATISTICAL PROFILES OF PUBLIC SCHOOL DISTRICTS 26 tbl.1 (2005); see BRUCE D. BAKER, DAVID G. SCIARRA & DANIELLE FARRIE, EDUC. LAW CTR., IS SCHOOL FUNDING FAIR? A NATIONAL REPORT CARD (2010) (discussing recent progress and regression in funding equity in all fifty states); DIANA EPSTEIN, CTR. FOR AM. PROGRESS, MEASURING INEQUITY IN SCHOOL FUNDING (2011) (providing current overview of the extent of funding disparities in all fifty states). 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 on public education relative to the state’s wealth and that distribute funding equitably. 20 U.S.C. § 6337 (2006). In fiscal year 2010, however, only 1% of the formula funds were distributed through this adjustment. Specifically, only 20% of state funds were eligible for this adjustment, providing for a maximum 5% increase, meaning that only 1% of the total funds were involved in this equity adjustment. See New America Foundation, Federal Education Budget Project, *No Child Left Behind Act—Title I School Funding Equity Factor*, (July 12, 2011), <http://febfp.newamerica.net/background-analysis/no-child-left-behind-act-title-i-school-funding-equity-factor>.

Secretary of Education. In *School District of Pontiac v. Secretary*, the plaintiffs claimed that the U.S. Department of Education was violating the “unfunded mandate” provision of NCLB<sup>88</sup> by requiring states and school districts to spend their own funds in order to achieve compliance.<sup>89</sup> The plaintiffs also alleged that the inadequate levels of federal funding caused the low student achievement scores on standardized tests.<sup>90</sup>

The trial court held that the unfunded mandate provision applied not to the basic statutory mandates, but only to any additional regulatory requirements that federal officials administering the Act might add.<sup>91</sup> The states were required to meet the many demanding statutory obligations imposed by the Act, the court held, because when they agreed to accept federal funds, the statutory language had put them on notice of the extent of the responsibilities they were accepting.<sup>92</sup> An *en banc* panel of the Sixth Circuit deadlocked on this issue, leaving the lower court’s ruling intact.<sup>93</sup>

Although the *Pontiac* decision is binding only in the Sixth Circuit, the case upheld the administrative position of the U.S. Department of Education, which requires the states to provide whatever resources are necessary to meet the mandates of NCLB. The U.S. Supreme Court declined to review the *Pontiac* decision, and the plaintiffs have indicated that they are not planning to pursue further litigation in other jurisdictions.<sup>94</sup> It now appears settled that, under the current language of NCLB, the states are legally responsible for providing whatever additional funds may be required beyond their ESEA grants to achieve compliance with NCLB’s requirements.

If compliance is taken seriously, the costs involved in meeting NCLB’s current stringent requirements could be staggering.<sup>95</sup> 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 it would cost \$1.5 billion for the additional school-based programs that would be required in order for 75% of students in kindergarten through third grade

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<sup>88</sup> 20 U.S.C. § 7907(a) (2006) (stating that “[n]othing in this Act shall be construed to . . . mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act”) (emphasis added).

<sup>89</sup> 584 F.3d 253, 256 (6th Cir. 2009). In *Connecticut v. Duncan*, the Second Circuit affirmed dismissal for lack of ripeness in a similar case in which a state claimed that NCLB’s assessment requirements violated the NCLB’s prohibition on unfunded mandates. 612 F.3d 107, 112 (2d Cir. 2010).

<sup>90</sup> *Pontiac*, 584 F.3d at 261.

<sup>91</sup> *Id.* at 259–60.

<sup>92</sup> *Id.* at 273–74.

<sup>93</sup> *Id.* at 256.

<sup>94</sup> 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 by pursuing more litigation to challenge the prevailing interpretation of the existing language. Alyson Klein, *NEA Eyes Congress as High Court Refuses NCLB Case*, EDUC. WEEK, June 16, 2010, available at <http://www.edweek.org/ew/articles/2010/06/09/35nea.h29.html>.

<sup>95</sup> For a discussion of the projected costs of providing a comprehensive educational opportunity on a realistic time schedule, as opposed to NCLB’s unattainable 2014 full proficiency goal, see discussion *infra* section II.F.

to meet the state's interim proficiency requirements.<sup>96</sup> A Texas study indicated that the state would have to increase its annual education spending by \$1.5 billion in order for all districts in the state to reach the state's proficiency targets.<sup>97</sup> Moreover, both the Ohio and Texas estimates were based on interim-year AYP proficiency goals and did not calculate the additional amount that would be required to meet the mandate for 100% proficiency by 2014. Obviously, any serious efforts to meet this goal would entail prohibitive levels of expenditure, especially with regard to bringing the last—and most difficult—10–15% of underachieving students up to proficiency levels.

The plaintiffs in *Pontiac* were correct to argue that it would be unreasonable to require them to bear whatever additional costs would be necessary to achieve compliance with NCLB requirements. 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, a ruling in their favor would have been disastrous for children, as Judge Sutton explained in his concurring opinion:

The school districts' interpretation would break the accountability backbone of the Act. Excusing school districts from compliance with the Act whenever federal funding fell short would make it hard if not impossible to hold them accountable for meeting the Act's goals. If school districts decided they were not given enough money to test all children, they could test just some children. If school districts decided they were not given enough money to fix all underperforming schools, they could fix just some schools. Because the school districts have alleged that virtually every major requirement of the Act is underfunded . . . their interpretation would excuse them from all of these requirements, transforming a no-exceptions accountability system into a non-existent one.<sup>98</sup>

The *Pontiac* litigation thus brought to light the impossible imbroglio created by NCLB. On the one hand, undertaking serious efforts to try to meet the mandated goal of 100% proficiency by 2014 would be financially ruinous for the states; on the other hand, limiting states' obligations to the relatively small amount of federal funding that accompanied the Act "invites States and school districts to evade their obligations to poor and minority

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<sup>96</sup> WILLIAM DRISCOLL & HOWARD FLEETER, PROJECTED COSTS OF IMPLEMENTING THE FEDERAL "NO CHILD LEFT BEHIND ACT" IN OHIO: A DETAILED FINANCIAL ANALYSIS PREPARED FOR THE OHIO DEPARTMENT OF EDUCATION PURSUANT TO HOUSE BILL 3 (2003).

<sup>97</sup> Jennifer Imazeki & Andrew Reschovsky, *Does No Child Left Behind Place a Fiscal Burden on States? Evidence from Texas*, 1 EDUC. FIN. & POL'Y 217, 238 (2006). The \$1.5 billion figure refers to the additional costs needed to achieve a 55% passing rate for 2005–2006, while the additional costs needed to achieve a 70% and a 90% passing rate for future years are \$4.4 billion and \$10.6 billion, respectively.

<sup>98</sup> Sch. Dist. of the City of Pontiac v. Sec'y of U.S. Dep't of Educ., 584 F.3d 253, 286–87 (6th Cir. 2009) (Sutton, J., concurring).

children.”<sup>99</sup> It is not surprising, therefore, that the judges had such a difficult time deciding this case. Ultimately, what the case highlights is the necessity to confront and correct the perverse expectations and unworkable funding obligations NCLB has created. The core problem is the unattainable 100% proficiency mandate that drives the inflexible AYP requirements that the states cannot actually meet. As the 2014 target year for 100% proficiency draws near, it is clear that no one truly believes that this goal can or will be met.<sup>100</sup> Although 100% proficiency is a worthy rhetorical and motivational goal, it was clearly unreasonable to impose this target as a legal *mandate* that *must* be attained within a few short years.<sup>101</sup>

### 1. Reforms Needed in the Next Reauthorization of ESEA/NCLB

Although NCLB has implicitly endorsed comprehensive educational opportunity as a prime national educational goal, the means it has provided for eliminating achievement gaps and achieving this goal are clearly inadequate. The way out of this dilemma 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 challenging, but attainable, comprehensive educational opportunity mechanisms. The ESEA is, at this point, long overdue for reauthorization. Congress has now begun the reauthorization process, though that process is not likely to be completed until after the next Presidential election.

The U.S. Department of Education has issued an extensive “Blueprint for Reform” for NCLB.<sup>102</sup> This document proposes, among other things, an aspirational goal of attaining 100% graduation rates by 2020, rather than an unattainable but legally mandatory 100% proficiency target in 2014.<sup>103</sup> Sec-

<sup>99</sup> *Id.* at 287 (citations omitted).

<sup>100</sup> Senator Edward M. Kennedy, one of the Congressional architects of the law, acknowledged that “[t]he idea of 100 percent is, in any legislation, not achievable.” Amit R. Paley, ‘No Child’ Target Is Called Out of Reach: Goal of 100% Proficiency Debated as Congress Weighs Renewal, WASH. POST, Mar. 14, 2007, at A1.

<sup>101</sup> For a discussion of the manner in which the unattainable 100% proficiency goal has undermined the entire structure and credibility of NCLB, see REBELL & WOLFF, *supra* note 69. See generally Richard Rothstein, Rebecca Jacobsen & Tamara Wilder, *Proficiency for All—An Oxymoron*, in NCLB AT THE CROSSROADS: REEXAMINING THE FEDERAL EFFORT TO CLOSE THE ACHIEVEMENT GAP 134 (Michael A. Rebell & Jessica R. Wolff eds., 2009) (arguing that 100% proficiency and challenging standards are inherently contradictory goals).

<sup>102</sup> U.S. DEP’T OF EDUC., A BLUEPRINT FOR REFORM: THE REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT (2010).

<sup>103</sup> *Id.* at 9. The Department also recommends 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”), which have been designed to meet these higher standards. For example, adoption of these standards, or college and career ready standards like them, is one of the eligibility criteria the Department requires for waivers from NCLB’s AYP and 100% profi-

retary of Education Arne Duncan also announced at the beginning of the 2011–2012 school year that because Congress has failed thus far to act on reauthorization, he would “unilaterally” grant waivers from the 100% proficiency requirement for states that have adopted acceptable accountability programs and are “making other strides toward” school improvement.<sup>104</sup> Neither the Department’s Blueprint nor the Secretary’s waiver policy, however, makes any recommendations to ensure that states devote sufficient resources to maximize student proficiency and minimize achievement gaps by 2020.

If the 2014 full proficiency mandate is removed—as it should be—the overemphasis on outcomes, as measured by test scores, will be tempered, and the federal government will be in a position to exercise greater oversight regarding the resources the states are providing students to allow them to achieve its goals. Elimination of the full proficiency mandate will require greater emphasis on federal monitoring to ensure that the states devote sufficient resources to provide all students meaningful educational opportunities that can result in a substantial reduction in the achievement gaps. In essence, these changes should move the orientation of the Act back to the understanding of the importance of inputs that permeated the Goals 2000 movement. In other words, meaningful educational opportunity can be provided to all students if clear and attainable accountability goals are delineated, and students from backgrounds of poverty are provided the resources they need in order to be “ready to learn” at grade level when they begin

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ciency targets. U.S. DEP’T OF EDUC., ESEA FLEXIBILITY 3 (2011), *available at* <http://www.ed.gov/esea/flexibility>. At the time of this writing, the Common Core standards have been adopted by 43 states and the District of Columbia. *See* Ass’n for Supervision & Curriculum Dev., Common Core Standards Adoption by State, <http://www.ascd.org/public-policy/common-core-standards.aspx>.

<sup>104</sup> *See* U.S. DEP’T OF EDUC., *supra* note 103; *see also* Sam Dillon, *Overriding a Key Education Law: Waivers Offered to Sidestep a 100 Percent Proficiency Rule*, N.Y. TIMES, Aug. 8, 2011, at A12. “For a waiver to be approved,” states will need to “show that they are adopting” college-ready standards, are implementing teacher evaluation systems “based on student test scores and other measures,” are “overhauling the lowest-performing schools” and are “adopting locally designed school accountability systems to replace” some current NCLB requirements. Dillon, *supra* note 104, at A12; *see also* Letter from Arne Duncan, U.S. Sec’y of Educ., to Hon. John Kline, Chairman, Comm. on Educ. & the Workforce, U.S. House of Representatives (July 6, 2011) (stating that if Congress does not reauthorize ESEA soon, USDOE might exercise its authority “to waive most statutory and regulatory requirements if needed”). Before the Secretary acted, a number of states had announced that because NCLB’s 100% proficiency requirements are unreasonable, they simply would no longer attempt to comply. *See, e.g.*, Josh Verges, *S.D. Schools Back Out of No Child Left Behind*, ARGUS LEADER, June 30, 2011 (stating that South Dakota intends to use 2010 NCLB AYP targets and not the more demanding 2011 targets); Jessie L. Bonner and Christine Armario, *More States Defying Federal Gov’t on Education Law*, FOXNEWS.COM (July 21, 2011), <http://www.foxnews.com/us/2011/07/21/more-states-defying-federal-govt-on-education-law>; Larry Abramson, *States Threaten to Defy ‘No Child Left Behind,’* NAT’L PUB. RADIO (June 29, 2011) (reporting that Idaho Schools Superintendent stated, “[w]e’re not going to identify more schools as ‘needs improvement’”).

school and to continue to meet demanding academic expectations as they proceed through the elementary and secondary schooling years.<sup>105</sup>

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 Goals 2000 and the prior incarnations of the ESEA. Federalism concerns and the funding obligations of the states as clarified in the *Pontiac* case can be met by both 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 analyses<sup>106</sup> 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 how they will be distributed in an equitable manner.<sup>107</sup>

If substantial progress is to be made toward eliminating achievement gaps, the essential programs and services the states need to provide to low-income students must include not only adequate school-based resources, but also the full range of comprehensive services they need in the areas of early

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<sup>105</sup> See discussion *supra* notes 51–53.

<sup>106</sup> Over the past few decades, legislatures, state education departments, litigators, and independent foundations have undertaken cost studies in over 35 states. For 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 C. REC. 1303 (2007). Eric Hanushek takes the position that since none of the existing cost study methodologies can definitively define the minimum expenditure that is necessary to achieve a specified outcome standard, they all should be abandoned. Eric A. Hanushek, *Science Violated: Spending Projections and the ‘Costing Out’ of an Adequate Education*, in *COURTING FAILURE: HOW SCHOOL FINANCE LAWSUITS EXPLOIT JUDGES’ GOOD INTENTIONS AND HARM OUR CHILDREN* 257 (Eric A. Hanushek ed., 2006); Eric A. Hanushek, *Pseudo-Science and a Sound Basic Education*, in *EDUC. NEXT* 5 (2005). The “scientific” precision that Hanushek seeks is, however, an illusion because no type of economic analysis can establish a definitive causal connection between a precise funding amount and a specific educational outcome since the educational process inherently involves an array of judgmental and environmental factors. Hanushek himself does not offer any alternative “scientific” methodology that would be superior to the existing approaches. See also William Duncombe, *Responding to the Charge of Alchemy: Strategies for Evaluating the Reliability and Validity of Costing-Out Research*, 32 J. EDUC. FIN. 137, 141 (2006) (“To argue as Hanushek does that there is no role for technical analysis in the costing out process is akin to arguing that there is no role for technical analysis in forecasting state revenues, because forecasts by different methods and organizations can vary significantly.”).

<sup>107</sup> 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: Educate America Act of 1994, Pub. L. No. 103-227, § 3(a)(7), 108 Stat. 129 (codified as amended at 20 U.S.C. § 5802(3)(a)(7) (1994)) (emphasis added). At the time, the major concerns about federal intervention centered on the “practices and conditions.” *Id.* The proposal in the text does not call for the federal government to develop a menu of preferred educational practices and impose 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.

education, extended learning time, health services, and family supports. US-DOE appears to agree 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.<sup>108</sup>

Although the Department recognizes that preparing students for success requires comprehensive approaches, its actual recommendation falls short of the mark because it asks Congress only to provide competitive grants to support this aim. The administration has been successful in advancing some of its educational policies through competitive grant programs like Race to the Top,<sup>109</sup> Investing in Innovation,<sup>110</sup> and Promise Neighborhoods.<sup>111</sup> Ulti-

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<sup>108</sup> U.S. DEP’T OF EDUC., *supra* note 102, at 31 (emphasis added).

<sup>109</sup> Race to the Top (“RTTT”) is a \$4.35 billion grant competition designed by the federal government to encourage and support education reform at the state and local levels. See U.S. DEP’T OF EDUC., RACE TO THE TOP PROGRAM EXECUTIVE SUMMARY 2 (2009), <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf>. Created by the American Recovery and Reinvestment Act of 2009 (“ARRA”), Pub. L. No. 111-5, 123 Stat. 115, RTTT provides grants to states whose applications reflect a commitment to, *inter alia*, six criteria: (1) articulation and implementation of an education reform agenda; (2) adoption of common standards and student assessment mechanisms; (3) use of data to support instruction; (4) fostering of effective teachers and principals; (5) improvement of underperforming schools; and (6) creation of favorable conditions for the operation of charter schools. See U.S. DEP’T OF EDUC., *supra*, at 3. Many states altered state laws and policies in order to make their applications more competitive. See, e.g., Tara Malone, *State Officials Pursue Private Support for Public School Reform Initiatives*, CHI. TRIB., Feb. 13, 2011. The competition was conducted in two phases. Only Delaware and Tennessee received grants in the first phase. Press Release, U.S. Dep’t of Educ., Delaware and Tennessee Win First Race to the Top Grants (Mar. 29, 2010), <http://www.ed.gov/news/press-releases/delaware-and-tennessee-win-first-race-top-grants>. The second phase saw an additional ten winners: the District of Columbia, Florida, Georgia, Hawaii, Maryland, Massachusetts, New York, North Carolina, Ohio, and Rhode Island. Press Release, U.S. Dep’t of Educ., Nine States and the District of Columbia Win Second Round Race to the Top Grants (Aug. 24, 2010), <http://www.ed.gov/news/press-releases/nine-states-and-district-columbia-win-second-round-race-top-grants>. The Obama administration requested \$1.35 billion for RTTT for FY 2011. See Press Release, U.S. Dep’t of Educ., Fiscal Year 2011 Budget Summary (Feb. 1, 2010), <http://www2.ed.gov/about/overview/budget/budget11/summary/edlite-section1.html>. Congress ultimately appropriated \$700 million (\$500 million was designated for a new early learning competition within RTTT, and \$200 million for a third round of the original competition). Press Release, U.S. Dep’t of Educ., U.S. Department of Education Announces \$200 Million to Continue State-Led Reforms Under Race to the Top

mately, however, the competitive grant approach is not a satisfactory strategy, since only a limited number of states or school districts qualify, and policymakers tend to think that they have satisfied the need in this area once they have signed off on these limited appropriations.

For the national policy of substantially narrowing achievement gaps to succeed, all students from impoverished backgrounds in all states must be provided meaningful access to comprehensive services. Congress, therefore, needs to reassert its historical role as the guarantor of educational equity by requiring the states to offer students the full range of comprehensive services necessary to provide them a meaningful educational opportunity. The federal government should increase its appropriations to more closely meet the authorization targets it had set forth in the original NCLB legislation, but ultimately, consistent with the *Pontiac* decision, the funding levels necessary for full compliance would be the responsibility of the states.<sup>112</sup> The states should demonstrate in their compliance plans exactly how they will meet their students' comprehensive needs. Each state would, consistent with the

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(May 25, 2011), <http://www.ed.gov/news/press-releases/us-department-education-announces-200-million-continue-state-led-reforms-under-r>.

<sup>110</sup> Investing in Innovation, colloquially known as "i3," is a federally funded competition that provides grants to school districts, as well as to nonprofit organizations that work with schools. See U.S. Dep't of Educ., Purpose Section of Investing in Innovation Fund, <http://www2.ed.gov/programs/innovation/index.html>. Like RTTT, i3 was established by the ARRA. *Id.* The competition's purpose is to incentivize the development of local programs and practices that improve student achievement, reduce achievement gaps, decrease dropout rates, or increase high school graduation or college enrollment rates. See *id.* The competition awards three types of grants: "Scale-up," "Validation," and "Development." *Id.* In 2010, 49 applicants received grants totaling almost \$650 million. U.S. Department of Education Investing in Innovation Fund Awards, <http://www2.ed.gov/programs/innovation/awards.html>. The Obama administration requested \$500 million for the i3 program for FY 2011. U.S. Dep't of Educ., Flagship Initiative, Collaboration: Open Innovation Web Portal, <http://www2.ed.gov/about/overview/budget/budget11/summary/edlite-section1.html>. Congress appropriated \$150 million. U.S. Dep't of Educ., Launching the FY2011 Investing in Innovation (i3) Competition, <http://www.ed.gov/oii-news/launching-fy2011-investing-innovation-i3-competition>.

<sup>111</sup> Created in 2010 under the authority of the Fund for the Improvement of Education, 20 U.S.C.A. § 7243 (West 2011), Promise Neighborhoods is a federal program that provides competitive grants to (1) nonprofit organizations, (2) institutions of higher education, and (3) Indian tribes working to improve educational and developmental outcomes among children in distressed communities. See U.S. Dep't of Educ., Purpose Section of Promise Neighborhoods, <http://www2.ed.gov/programs/promiseneighborhoods/index.html>. The program awards one-year grants to support the creation of comprehensive community programs, which are expected to focus on improving schools and preparing students for college and careers. See Press Release, U.S. Dep't of Educ., U.S. Department of Education Opens Competition for Promise Neighborhoods (Apr. 30, 2010), <http://www2.ed.gov/news/pressreleases/2010/04/04302010b.html>. The Obama administration requested \$210 million for Promise Neighborhoods for FY 2011. See *id.* Congress appropriated \$30 million. See Press Release, U.S. Dep't of Educ., U.S. Education Secretary Announces \$30 Million for New Round of Promise Neighborhoods Grants to be Awarded This Year (Apr. 27, 2011), <http://www.ed.gov/news/press-releases/us-education-secretary-announces-30-million-new-round-promise-neighborhoods-gran>. Twenty-one grants were awarded by the program in 2010. U.S. Department of Education Promise Neighborhoods Awards, <http://www2.ed.gov/programs/promiseneighborhoods/awards.html> (last visited June 21, 2011).

<sup>112</sup> *Sch. Dist. of the City of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253 (6th Cir. 2009). See discussion *supra* section II.D.

basic parameters of the right to comprehensive educational opportunity,<sup>113</sup> develop the basket of goods, services, and practices that is most consistent with its particular academic and performance standards, needs, and perspectives.

## 2. *The Economic Feasibility of Fully Implementing the Right*

Providing an appropriate range of comprehensive services to students disadvantaged by poverty is not only necessary and proper, it is also economically feasible. The Campaign for Educational Equity at Teachers College, Columbia University commissioned a detailed study to determine in specific dollar terms how much it would cost to provide sufficient, high-quality early childhood, extended day and year, family support and health services 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).<sup>114</sup> The study, undertaken by education economist Richard Rothstein and his colleagues, estimated the cost of providing the full range of such services from birth (or, more precisely, from six months before birth since prenatal maternal health services are included) through age eighteen.<sup>115</sup> It determined that 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 above the current average per capita cost for the K-12 education of New York State students.<sup>116</sup> New York is, of course, a relatively high-cost state; on an average national basis, the cost of providing an equivalent set of services, given the same assumptions, would be approximately \$9,000.<sup>117</sup>

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<sup>113</sup> See discussion of the right to comprehensive educational opportunity *supra* notes 15–17 and accompanying text.

<sup>114</sup> 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 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 Rebell & Wolff, *supra* note 16.

<sup>115</sup> Richard Rothstein, Tamara Wilder & Whitney Allgood, *How Much Does It Cost?*, in PROVIDING COMPREHENSIVE EDUCATIONAL OPPORTUNITY TO LOW-INCOME STUDENTS (2011), available at <http://www.equitycampaign.org>.

<sup>116</sup> This conclusion assumed 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 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 eighteen-and-a-half years. Reducing the high incidence of special education identification for low-income students to the rate for middle-class students could save an average of \$380 per year. 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 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. See *id.* at 4, 34.

<sup>117</sup> Rebell & Wolff, *supra* note 16, at 19.

An additional study commissioned by the Campaign identified the amounts that federal, state, and municipal governments, as well as private philanthropy, presently spend to provide partial early childhood, health, extended learning, and family support services in New York City.<sup>118</sup> Its finding, translated into average per capita terms, was that \$6,070 per year is already being spent to provide services that are often of questionable quality to a limited number of children in the eligible population.<sup>119</sup> 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 could conclude that a high-quality, integrated system of comprehensive educational opportunity would require approximately \$4,750 more per disadvantaged child than we are now spending for these services (the national equivalent figure would be \$4,230).<sup>120</sup>

To add an amount in excess of \$4,000 per low-income disadvantaged child to current educational expenditures is not an inconsequential amount of money, especially in tough economic times.<sup>121</sup> The long-term economic and social benefits to society would, however, far surpass the amount of the necessary investment. In fact, another study commissioned by the Campaign for Educational Equity determined that the social returns on undertaking the investments recommended by Rothstein and his colleagues would, in the long run, generate economic benefits worth twice the cost of the initial expenditures, or the equivalent of a 9% annual return.<sup>122</sup> In short, the critical

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<sup>118</sup> Clive Belfield & Emma Garcia, *How Much Does New York City Now Spend on Children's Services?*, in PROVIDING COMPREHENSIVE EDUCATIONAL OPPORTUNITY TO LOW-INCOME STUDENTS (2011), available at <http://www.equitycampaign.org>.

<sup>119</sup> *Id.* at 14.

<sup>120</sup> Rebell & Wolff, *supra* note 16, at 19–20.

<sup>121</sup> 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 one year at a time, only the cost of prenatal care for expectant mothers would be required during the first year. Moreover, tough times provide opportunities to reconsider current practices and improve the efficiency of current services. Some or all of the additional costs of funding additional comprehensive services could, perhaps, be obtained from efficiencies and mandate relief obtained from base school operations.

<sup>122</sup> Clive Belfield, Fiona Hollands & Henry Levin, *What Are the Social and Economic Returns?*, in PROVIDING COMPREHENSIVE EDUCATIONAL OPPORTUNITY TO LOW INCOME STUDENTS (2011), available at <http://www.equitycampaign.org>. From a national perspective, detailed analyses of the economic consequences of inadequate education indicate that the lifetime loss to the country in income tax revenues and social security contributions from one age cohort of high school dropouts, many of whom are low-income students who have been denied meaningful educational opportunities, is between \$58 billion and \$135 billion. THE PRICE WE PAY: ECONOMIC AND SOCIAL CONSEQUENCES OF INADEQUATE EDUCATION 117–18 (Clive R. Belfield & Henry M. Levin eds., 2007). 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 to 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. The potential savings in public assistance costs that might be produced if all single mother dropouts completed high

conclusion to be drawn from these analyses is that broad-based implementation of the right to comprehensive educational opportunities is economically feasible.

Some may still object that explicit inclusion of comprehensive services is a bad bargain for the states. For a relatively small amount of federal funding, they will have to accept substantial funding obligations. But this perspective loses sight of what is at stake for the states, and for the nation at large. There is broad consensus among business leaders, government officials, and educators that overcoming educational achievement gaps is critical to the nation's future.<sup>123</sup> Whereas thirty-five years ago a high school dropout earned about 64% of the amount earned by a diploma recipient, in 2004 she would earn only 37% of the graduate's amount.<sup>124</sup> Inadequate education also increases crime rates and health 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.<sup>125</sup>

So far, of course, all of the states have accepted the federal funds available under NCLB/ESEA, even though stringent federal funding and accountability requirements have been attached, and the states are likely to continue to do so even if an obligation to provide a comprehensive range of services is spelled out in the statute. Moreover, virtually every one of the fifty states has adopted standards-based reform and a commitment to overcome achievement gaps as its prime educational policy.<sup>126</sup> This means that they have obligations under state law to provide the resources to meet this goal, and any amount of federal aid that they would receive would facilitate meeting the states' own policy goals.

In any event, from a legal point of view, states agreeing to take the federal funding available under the Act are obligated to carry out its terms,

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school would range from \$7.9 billion to \$10.8 billion per year. *Id.* at 173. Note also that the United States now spends on average 2.35 times more per year (\$22,722 versus \$9,683) on each prisoner than on each public school student. CHILDREN'S DEF. FUND, *THE STATE OF AMERICA'S CHILDREN* 2011, at H-12 (2011), <http://www.childrensdefense.org/child-research-data-publications/data/state-of-americas-2011.pdf>.

<sup>123</sup> See generally MCGUINN, *supra* note 44, at 174–76; REBELL & WOLFF, *supra* note 69, at 50.

<sup>124</sup> Cecilia Elena Rouse, *Consequences for the Labor Market*, in *THE PRICE WE PAY*, *supra* note 122, at 99; see also ANTHONY P. CARNEVALE & STEPHEN J. ROSE, *THE UNDEREDUCATED AMERICAN* (2011) (stating that the nation's failure to maintain sufficient college-going workers since 1980 has resulted in unacceptable levels of income inequality).

<sup>125</sup> See generally *THE PRICE WE PAY*, *supra* note 122; see also Lance Lochner, *Non-Production Benefits of Education: Crime, Health, and Good Citizenship* (Nat'l Bureau of Econ. Research, Working Paper No. 16722, 2011) (describing how improvements in education can lower crime, improve health, and increase voting and democratic participation); Thomas R. Bailey, *Implications of Educational Inequality in a Global Workforce*, in *THE PRICE WE PAY*, *supra* note 122, at 74 (discussing the relationship between education and productivity).

<sup>126</sup> BENJAMIN MICHAEL SUPERFINE, *THE COURTS AND STANDARDS-BASED REFORM* 21 (2008) ("Currently, standards-based reforms are ubiquitous across the United States. Under state and federal law, every state is required to have put in place standards-based reform policies.").

even if that means increasing their local contributions by substantial amounts:

Nothing within Spending Clause jurisprudence . . . suggests that States are bound by the conditional 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.<sup>127</sup>

This is standard fare with federal grant programs. For example, in accepting relatively small amounts of federal funding to support education for students with disabilities, states have, for the past two decades, obligated themselves to provide an extensive array of costly services for such students, as well as a battery of extensive parental due process rights.<sup>128</sup> 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 requirements that states have accepted under the current version of NCLB are already quite far-reaching.<sup>129</sup>

This new proposal also should not raise federalism concerns in light of the sanctions already provided for in the Act. Currently, school districts that fail to meet their AYP goals must offer students the option to transfer to other schools in the district and spend Title I funds for tutoring by outside vendors. In addition, schools that have not made AYP for multiple years in a

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<sup>127</sup> *Charles v. Verhagen*, 348 F.3d 601, 609 (7th Cir. 2003) (finding that the state was 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 and were not allocated to religious observances); *see also* *Benning v. Georgia*, 391 F.3d 1299 (11th Cir. 2004).

<sup>128</sup> Individuals with Disabilities Education Act, 20 U.S.C. §§ 1401–09, 1411–19, 1431–44, 1450–82 (2006). 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,” Congress’ 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*, <http://febp.newamerica.net/background-analysis/individuals-disabilities-education-act-funding-distribution>.

<sup>129</sup> 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 scores for each school and school district, break-down “adequate yearly progress” in relation to these test scores, and issue annual state and local report cards containing specified data. 20 U.S.C. § 6311 (2006). These plans must be submitted initially and then periodically revised to reflect changes in the state’s strategies and programs. 20 U.S.C. § 6311(f). In addition, local educational agencies are required to file with the state detailed plans that describe, among other things, how they will conduct academic assessments, provide additional educational assistance to students needing help in meeting 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. 20 U.S.C. § 6312 (2006).

row must implement one of a specified list of remedial mechanisms, including replacing most of the staff, converting the school into a charter school, hiring a professional management company to run the school, or allowing a take-over by the state.<sup>130</sup>

Substituting reasonable requirements for providing an appropriate range of comprehensive services would be less burdensome on states and local school districts than many of the existing mandates, especially those related to the demanding AYP timelines and assessment criteria that are most likely to be substantially revised. Indeed, the existing requirements for local school district plans already mandate that consideration be given to using some of the Title I funds to support preschool programs, coordinating and integrating them with other school services,<sup>131</sup> and using Title I funds to support after-school, summer, and school-year extension programs.<sup>132</sup> The suggested changes would, in essence, require all schools receiving Title I funds to ensure that they are making these and other comprehensive services available in a coordinated manner in order to provide all students a meaningful educational opportunity. USDOE should vigorously enforce students' rights to comprehensive educational opportunity under the ESEA, and Congress should explicitly grant students and their parents the authority to enforce this right.<sup>133</sup>

### III. THE RIGHT TO COMPREHENSIVE EDUCATIONAL OPPORTUNITY UNDER STATE CONSTITUTIONAL EDUCATIONAL ADEQUACY PROVISIONS

#### 1. *General Overview of the Adequacy Litigations*

Over the past thirty-five years, litigations challenging the constitutionality of state education finance systems have been filed in forty-five of the fifty states.<sup>134</sup> The state courts became the sole forum for reviewing inequities in public education financing after the U.S. Supreme Court ruled in *San*

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<sup>130</sup> 20 U.S.C. § 6316 (2006). Failure to meet deadlines for submitting required information may also subject states to substantial withholding of federal funding. 20 U.S.C. § 6311(g) (2006).

<sup>131</sup> 20 U.S.C. §§ 16312(b)(1)(E), (K) (2006).

<sup>132</sup> 20 U.S.C. § 16312(b)(1)(Q) (2006).

<sup>133</sup> 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 and in accordance with their needs. This should be a process review, but one that will ensure that action is being taken in good faith to meet children's needs. 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. The general federal oversight mechanisms and private right of action being proposed here are substantially less stringent impositions than the extensive federal accountability requirements and parental due process and litigation opportunities provided under the IDEA. See 20 U.S.C. §§ 1412, 1414 (2006).

<sup>134</sup> For a regularly updated compendium and analysis of these litigations, see NAT'L EDUC. ACCESS NETWORK, <http://www.schoolfunding.info> (last visited Dec. 5, 2011).

*Antonio Independent School District v. Rodriguez*<sup>135</sup> 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 twenty-two out of thirty-three (67%) of the final constitutional decisions.<sup>136</sup>

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—guaranteeing all students some basic level of education, although they use different terms to do so.<sup>137</sup> The contemporary courts have, in essence, revived and given major significance to the long-dormant provisions that were originally incorporated into state constitutions as part of the common school movement of the mid-nineteenth century.<sup>138</sup> Some, especially in New England, date back to eighteenth-century ideals of creating a new republican citizenry that would “cherish the interests of literature and science.”<sup>139</sup>

<sup>135</sup> 411 U.S. 1 (1973).

<sup>136</sup> 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* 15–29, 134–35 n.12 (2009) (analyzing state courts’ active role in “adequacy cases” and listing all of the cases).

<sup>137</sup> See, e.g., FLA. CONST. art. IX, § 1 (“high quality system of free public schools”); GA. CONST. art. VIII, § 1 (“adequate public education”); IDAHO CONST. art. IX, § 1 (a “general, uniform and thorough system” of education); N.J. CONST. art. VIII, § 4 (“thorough and efficient system of free public schools”); N.Y. CONST. art. XI, § 1 (“[T]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all of the children of this state may be educated.”). The New York Court of Appeals has interpreted the concept of “educated” in this provision to mean a “sound basic education.” *Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359, 368–69 (N.Y. 1982); see also *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661, 665 (N.Y. 1995) (holding that New York state constitution’s education clause requires “a sound basic education”). Attempts to categorize the constitutional language in the state constitutions in terms of their relative strength have proved unavailing. For example, William E. Thro set forth four basic categories related to the relative “strength” of the educational clauses: (1) seventeen states that simply mandate free public education; (2) twenty-two states that “impose some minimum standard of quality”; (3) six states that require a “stronger and more specific educational mandate” than (1) or (2); and (4) four states that regard education as an “important, if not the most important, duty of the state.” William E. Thro, *The Role of Language of the State Education Clauses in School Finance Litigation*, 79 EDUC. L. REP. 19, 23–24 (1993). His predictions regarding the likely outcome of court cases based on his categorizations have, however, often been belied by the actual decisions. For example, based on Thro’s categorization, plaintiffs should have won the cases in Maine, Rhode Island, and Illinois, which they lost. See *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178 (Ill. 1996); *Sch. Admin. Dist. No. 1 v. Comm’r*, 659 A.2d 854 (Me. 1994); *City of Pawtucket v. Sundlun*, 662 A.2d 40 (R.I. 1995). Moreover, plaintiffs should have lost the decisions in New York, North Carolina, and Vermont, which they won. See *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 326 (N.Y. 2003); *Leandro v. State*, 488 S.E.2d 249, 256 (N.C. 1997); *Brigham v. State*, 692 A.2d 384 (Vt. 1997).

<sup>138</sup> See discussion of education’s primacy in American culture *supra* section II.A.

<sup>139</sup> MASS. CONST. part 2, ch. 5, § 2; see also N.H. CONST. art. 83; *Brigham*, 692 A.2d at 392–93. John Dinan argues that the drafters of these state constitutional clauses saw them as being largely hortatory and did not intend to create a judicially enforceable right that could be used to overturn legislative judgments regarding an equitable, adequate, or uniform education. John Dinan, *The Meaning of State Constitutional Education Clauses: Evidence from the Constitutional Convention Debates*, 70 ALB. L. REV. 927, 939 (2007); see also John C. Eastman,

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 reviewed students’ needs for education in contemporary society have by and large required state school systems to provide substantially more than a minimum level of knowledge and skills. The cases often draw on the state’s own strong commitment to standards-based reforms, essentially calling upon the states to ensure that all students, including those from impoverished backgrounds, are given a reasonable opportunity to meet those standards.<sup>140</sup>

The courts have tended to insist that states provide students an education that will equip them to obtain a decent job in our increasingly complex society and to carry out effectively their responsibilities as citizens in a modern democratic polity.<sup>141</sup> One seminal judicial definition specifies that an adequate education must include (in addition to traditional reading and mathematical skills): knowledge of the physical sciences; “sufficient

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*Reinterpreting the Education Clauses in State Constitutions*, in SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY 55 (Martin C. West & Paul E. Peterson eds., 2007). A contrary view that holds that the state constitutions contained “rich, powerful language” which was not merely “moving rhetoric” but was “intended to create the educations and the citizens they spoke about in that rhetoric,” is set forth in INST. FOR EDUC. EQUITY & OPPORTUNITY, EDUCATION IN THE 50 STATES: A DESKBOOK OF THE HISTORY OF STATE CONSTITUTIONS AND LAWS ABOUT EDUCATION 3–4 (2008). The vast majority of state court judges have rejected the originalist viewpoint and held that the constitutional purpose “should be measured with reference to the demands of modern society.” *Campaign for Fiscal Equity, Inc.*, 801 N.E.2d at 326.

<sup>140</sup> For example, the Supreme Court of North Carolina directed the trial court to consider the “[e]ducational goals and standards adopted by the legislature” to determine “whether any of the state’s children are being denied their right to a sound basic education.” *Leandro*, 488 S.E.2d at 259. Similarly, in Idaho, where a dispute arose over whether the constitutional “thoroughness” clause included a state obligation to ensure adequate capital facilities for schools, the court took notice of the fact that relevant state statutes obligated the state to ensure proper facilities and stated:

Balancing our constitutional duty to define the meaning of the thoroughness requirement of art. 9 § 1 with the political difficulties of that task has been made simpler for this Court because the executive branch of the government has already promulgated educational standards pursuant to the legislature’s directive in I.C. § 33-118.

*Idaho Sch. for Equal Educ. Opportunity v. State*, 976 P.2d 913, 919 (Idaho 1998) (citation omitted).

<sup>141</sup> See, e.g., *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 253 (Conn. 2010) (holding that the state constitution requires the state to provide “an education suitable to give [students] the opportunity to be responsible citizens able to participate fully in democratic institutions, such as jury service and voting . . . [and to be] prepared to progress to institutions of higher education, or to attain productive employment and otherwise contribute to the state’s economy”); *Robinson v. Cahill*, 303 A.2d 273, 295 (N.J. 1973) (defining the state constitutional requirement as “that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market”); *Campaign for Fiscal Equity*, 801 N.E.2d at 332 (defining “sound basic education” in terms of providing students with a “meaningful high school education” that will prepare them to “function productively as civic participants”); *Campbell Cnty. Sch. Dist. v. State*, 907 P.2d 1238, 1259 (Wyo. 2001) (defining the core state constitutional requirement in terms of providing students with “a uniform opportunity to become equipped for their future roles as citizens, participants in the political system, and competitors both economically and intellectually”).

knowledge of economic, social and political systems to enable the student to make informed choices”; “sufficient understanding 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.”<sup>142</sup> This definition has influenced many of the subsequent cases.<sup>143</sup>

One of the clearest rejections of a minimalist interpretation of a state constitution adequacy clause was a 2003 decision of the New York Court of Appeals, the state’s highest court. Invalidating the intermediate appeals court’s ruling that the constitutional standard should be equated with sixth- to eighth-grade level reading and math skills, the court held that New York’s schoolchildren were constitutionally entitled to the “opportunity for a *meaningful* high school education, one which prepares them to function productively as civic participants.”<sup>144</sup> In doing so, the court stressed that although in the nineteenth 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.”<sup>145</sup>

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<sup>142</sup> *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 186 (Ky. 1989).

<sup>143</sup> The *Rose* standards have been explicitly adopted by courts in Massachusetts and New Hampshire, and they have substantially influenced the constitutional definitions adopted by the courts in Alabama, North Carolina, and South Carolina. See *Opinion of the Justices*, 624 So.2d 107 (Ala. 1993); *McDuffy v. Sec’y*, 615 N.E.2d 516, 554 (Mass. 1993); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1359 (N.H. 1997); *Leandro*, 488 S.E.2d at 255; *Abbeville Cnty. Sch. Dist. v. State*, 515 S.E.2d 535, 535 (S.C. 1999); see also *Unified Sch. Dist. No. 229 v. State*, 885 P.2d 1170, 1186 (Kan. 1994) (noting striking resemblance between the *Rose* standards and standards enacted by the Kansas legislature).

<sup>144</sup> *Campaign for Fiscal Equity*, 801 N.E.2d at 332 (emphasis added).

<sup>145</sup> *Id.* at 332. Although it is too soon to judge the long-term impact of many of the recent adequacy decisions, especially in states where current fiscal constraints have led the legislature to delay implementation of major remedial reforms, many of the earlier decisions have resulted in significant educational reforms, increased and more equitable funding on education, and improved student achievement. See, e.g., GORDON MACINNES, IN PLAIN SIGHT: SIMPLE, DIFFICULT LESSONS FROM NEW JERSEY’S EXPENSIVE EFFORT TO CLOSE THE ACHIEVEMENT GAP 35–37 (2009) (noting that Union City, New Jersey, a 92% Latino district that is the poorest in the state, effectively closed the achievement gap between its students and non-urban students, and may be the first urban district in the United States to sustain academic achievement into the middle grades); PETER SHRAG, FINAL TEST: THE BATTLE FOR ADEQUACY IN AMERICA’S SCHOOLS (2003) (finding that litigation in Kentucky, Massachusetts, and other states has led to noticeable improvements in student achievement); William N. Evans, Sheila E. Murray & Robert M. Schwab, *The Impact of Court-Mandated Finance Reform*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 72, 77 (Helen F. Ladd et al. eds., 1999) (study of 10,000 school districts from 1972–1992 found that court-ordered reform leveled up disparities and increased overall spending on education); Margaret Goertz, Susanna Loeb & Jim Wyckoff, *Recruiting, Evaluating and Retaining Teachers: The Children First Strategy to Improve New York City’s Teachers*, in EDUCATION REFORM IN NEW YORK CITY: AMBITIOUS CHANGE IN THE NATION’S MOST COMPLEX SCHOOL SYSTEM 157, 166 (Jennifer A. O’Day, Catherine S. Bitter & Louis M. Gomez eds., 2011) (noting that in New York City, as a result of the CFE litigation, “the qualifications of teachers in the schools with the greatest proportion of poor students improved dramatically between 2000 and 2005”); Molly A. Hunter, *All Eyes Forward: Public Engagement and Educational Reform in Kentucky*, 28 J.L. & EDUC. 485 (1999) (discussing major educational reforms implemented to implement court

## 2. *The Growing Focus on Comprehensive Services*

In considering the actual knowledge and skills that students need to function productively in the twenty-first century, some state courts have begun to recognize that students who come to school disadvantaged by the burdens of severe poverty need a broader set of services and resources in order to have a *meaningful* educational opportunity. Thus, the New Jersey Supreme Court ordered that students in the state's poorest urban districts be provided additional resources, beyond the level currently enjoyed by students in affluent suburbs because:

[T]he 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.<sup>146</sup>

In a follow-up decision, the New Jersey Supreme Court required the state to provide low-income and minority students a range of specific comprehensive services, including after-school and summer supplemental programs, school-based health and social services, and preschool services for children ages three and four.<sup>147</sup>

In Kentucky, the legislature's response to the state supreme court's decision in *Rose v. Council for Better Education*<sup>148</sup> was to revamp totally the

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decision); James J. Kemple, Children First and Student Outcomes: 2003–2010, in *EDUCATION REFORM IN NEW YORK CITY*, *supra* at 255 (“Recent reports from the DOE indicate that, on average, [New York City’s] schools have made significant progress both on test score measures and on high school completion rates.”). In other instances, however, courts have failed to enforce their decisions, and few measurable gains have resulted from litigation, or initial gains that were achieved have been reversed. *See, e.g.*, Larry J. Obhof, *DeRolph v. State and Ohio’s Long Road to an Adequate Education*, 2005 B.Y.U. EDUC. & L.J. 83 (2005) (discussing failure of Ohio Supreme Court to enforce its decision). For extensive analyses and differing perspectives on the success of judicial interventions in these cases, see ERIC A. HANUSHEK & ALFRED A. LINDSETH, *SCHOOLHOUSES, COURTHOUSES, AND STATEHOUSES: SOLVING THE FUNDING-ACHIEVEMENT PUZZLE IN AMERICA’S SCHOOLS* (2009) (criticizing judicial intervention in adequacy cases); REBELL, *supra* note 136; *see also* Bruce D. Baker & Kevin G. Weiner, *School Finance and the Courts: Does Reform Matter, and How Can We Tell?*, 113 TEACHERS C. REC. 2374 (2011) (analyzing methodologies used to assess success of judicial interventions in adequacy litigation).

<sup>146</sup> *Abbott v. Burke*, 575 A.2d 359, 400 (N.J. 1990).

<sup>147</sup> *Abbott v. Burke*, 710 A.2d 450, 450 (N.J. 1998).

<sup>148</sup> *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 186 (Ky. 1989). The court held, *inter alia*, that “[s]ince we have, by this decision, declared the system of common schools in Kentucky to be unconstitutional, Section 183 places an absolute duty on the General

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.<sup>149</sup> 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.<sup>150</sup> In addition, the Kentucky Education Reform Act provided a statewide early childhood education program for four-year-olds from low-income families and for three- and four-year-olds with disabilities,<sup>151</sup> and provided requirements for extended day and summer instruction for struggling students.<sup>152</sup>

More recently, Judge John P. Erlick, in finding that Washington's current education finance system does not meet 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

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Assembly to re-create, re-establish a new system of common schools in the Commonwealth." *Id.* at 215.

<sup>149</sup> KY. REV. STAT. ANN. § 156.496 (West 2008); *see also* TENN. CODE ANN. § 49-2-115 (1992) (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 such centers in 82 school districts, *see* FAMILY RESOURCE CENTERS, <http://www.tn.gov/education/earlylearning/frcs.shtml> (last visited Dec. 5, 2011). The recently-enacted Rhode Island Afterschool and Summer Learning Program Act commits the state to prepare "all children to succeed in school and life by providing access to publicly-funded high quality after-school and summer learning programs." R.I. GEN. LAWS § 16-88-2 (2009) (emphasis added).

<sup>150</sup> KY. REV. STAT. ANN. § 156.4977 (West 1992).

<sup>151</sup> KY. REV. STAT. ANN. § 157.3175 (West 1990).

<sup>152</sup> KY. REV. STAT. ANN. § 158.070 (West 1952).

outside the school, the schools are capable of compensating, given proper and adequate resources.<sup>153</sup>

Other courts have focused on the importance of early childhood education for children from backgrounds of poverty. 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.<sup>154</sup>

In the first case, Judge Howard Manning ruled in October 2000 that many disadvantaged children in North Carolina were unprepared for school due to the absence of pre-kindergarten opportunities, and he ordered the state to provide pre-kindergarten programs for all “at-risk” four-year-olds.<sup>155</sup> When the case reached the North Carolina Supreme Court in 2004, the appellate court agreed that the state was ultimately responsible for meeting “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,”<sup>156</sup> and that the State is constitutionally obligated to provide services to such children “prior to enrollment in the public schools.”<sup>157</sup> 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.<sup>158</sup>

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 educa-

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<sup>153</sup> *McCleary v. State*, No. 07-2-02323-2 SEA, slip op. at 58–59 (Wash. Super. Ct. Feb. 4, 2010); *see also* *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 290 (Conn. 2010) (Schaller, J., concurring). As Justice Schaller has noted:

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.

*Id.*

<sup>154</sup> *Hoke Cnty. Bd. of Educ. v. State*, No. 95 CVS 1158, slip op. at 112–13 (N.C. Super. Ct. Oct. 12, 2000); *Abbeville Cnty. Sch. Dist. v. State*, No. 93-CP-31-0169, slip op. at 157 (S.C. Ct. C.P. Dec. 29, 2005).

<sup>155</sup> *Hoke*, No. 95 CVS 1158 at 112–13.

<sup>156</sup> *Hoke*, 599 S.E.2d at 392.

<sup>157</sup> *Id.* at 393.

<sup>158</sup> *Id.* at 393–94.

tional system that overcomes . . . the effects of poverty.”<sup>159</sup> 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.”<sup>160</sup> Based on expert testimony from both plaintiff and defense 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.”<sup>161</sup> 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.<sup>162</sup> This case is currently on appeal before the South Carolina Supreme Court.<sup>163</sup>

Two other state courts have included access to preschool services for students from poverty backgrounds as part of their remedies without specifically holding that access to early childhood education is an integral part of the constitutional right to the opportunity for an adequate education. The first to do so was the Supreme Court of New Jersey. In the major remedial decision it issued in *Abbott v. Burke*, after finding the state was still not providing students a thorough and efficient education,<sup>164</sup> the court “identified early childhood education as an essential educational program for children in the [low-wealth urban districts]” and found that “[i]ntensive preschool and all-day kindergarten enrichment program[s are necessary] to reverse the educational disadvantage these children start out with.”<sup>165</sup> Accordingly, it directed the commissioner of education to require extensive, high quality preschool services for all three- and four-year-olds in poor, urban districts.<sup>166</sup> In doing so, the court stated that provision of preschool education has a “strong constitutional underpinning,” but because there were specific statutory requirements in the New Jersey education law calling for such

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<sup>159</sup> *Abbeville Cnty.*, No. 93-CP-31-0169 at 157.

<sup>160</sup> *Id.* at 155.

<sup>161</sup> *Id.* at 158.

<sup>162</sup> *Id.* at 161. Judge Cooper also observed that “[s]uch 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.*

<sup>163</sup> *Abbeville Cnty. Sch. Dist. v. State*, No. 93-CP-31-0169 (S.C. filed Sept. 6, 2007). This appeal is still pending as of November 2011, more than three years after argument and submission of briefs. See Education Justice, *South Carolina: Status & Recent Developments*, <http://www.educationjustice.org/states/southcarolina.html> (last visited Nov. 10, 2011) (noting that the parties argued *Abbeville County School District v. State* in 2008 and continue to wait for a decision from the South Carolina Supreme Court).

<sup>164</sup> For a discussion of the growing focus on comprehensive services, see *infra* section III.B.

<sup>165</sup> *Abbott v. Burke*, 693 A.2d 417, 436 (N.J. 1997) (citing CARNEGIE CORP. OF N.Y., YEARS OF PROMISE: A COMPREHENSIVE LEARNING STRATEGY FOR AMERICA’S CHILDREN vii (1996)). The court directed the state’s education commissioner to require the thirty-one 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 450, 463–64 (N.J. 1998).

<sup>166</sup> *Id.* at 464.

services, the court held that it did not need to “reach the constitutional issue.”<sup>167</sup>

In Alaska, the trial court in *Moore v. State* also ordered the state education department to ensure the availability of preschool services for low-income students in poorly-performing school districts at the remedial stage of the litigation. The court 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.<sup>168</sup> Nevertheless, the court later 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.”<sup>169</sup> 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.<sup>170</sup>

In its decision, the court then found that the state’s efforts to improve education in the underperforming districts 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.”<sup>171</sup>

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 state constitution<sup>172</sup> and to be in a position to compete with their peers when they enter school.<sup>173</sup> These rulings were, however, subsequently overruled by their respective state supreme courts.<sup>174</sup> 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

<sup>167</sup> *Id.*

<sup>168</sup> See Decision and Order, *Moore v. State*, No. 3AN-04-9756, slip op. at 177 (Alaska Super. Ct. June 21, 2007), available at <http://www.schoolfunding.info>.

<sup>169</sup> See Findings of Fact, Conclusions of Law and Order, *Moore v. State*, No. 3AN-04-9756, slip op. at 55 (Alaska Super. Ct. Feb. 4, 2009), available at <http://www.schoolfunding.info>.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 33.

<sup>172</sup> *Hancock v. Driscoll*, No. 02-2978, 2004 WL 877984, at \*158 n.221 (Mass. Super. Ct. Apr. 26, 2004).

<sup>173</sup> *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 501 (Ark. 2002).

<sup>174</sup> *Id.* at 472; *Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134, 1136–37 (Mass. 2005).

to ultimately determine whether and how these services should be provided.<sup>175</sup> 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.”<sup>176</sup>

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.”<sup>177</sup> These rights have prevailed over budget cut pressures: Recently, the trial judge in North Carolina invalidated substantial legislative budget cuts to the preschool program and ordered the state to provide access to “any eligible at-risk four-year-old that applies.”<sup>178</sup>

The state court adequacy cases complement and strengthen the implicit right to comprehensive educational opportunity set forth in the federal NCLB/ESEA. Taken together, these developments in both state constitutional law and congressional policy have major implications for federal equal protection law. In the next section, I argue that the U.S. Supreme Court, which last considered the equity and adequacy of state educational funding systems almost four decades ago, should revisit the federal precedents in this area and explicitly acknowledge that students from poverty backgrounds have a right to comprehensive educational opportunity under the Fourteenth Amendment to the federal Constitution.

#### IV. THE RIGHT TO COMPREHENSIVE EDUCATIONAL OPPORTUNITY UNDER THE FEDERAL EQUAL PROTECTION CLAUSE

The U.S. Supreme Court considered the application of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution to issues of the funding of elementary and secondary education in *San Antonio*

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<sup>175</sup> 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).

<sup>176</sup> Bradley D. Jesson & David Newbern, *Special Masters' Report to the Supreme Court of Arkansas* (Apr. 2, 2004), <http://courts.state.ar.us/lake%20view/report.pdf>.

<sup>177</sup> Ryan, *supra* note 175, 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.

<sup>178</sup> Hoke Cnty. Bd. of Educ. v. State, No. 95 CVS 1158, slip op. at 24 (N.C. Super. Ct. July 18, 2011).

*Independent School District v. Rodriguez*.<sup>179</sup> 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 the state's property poor districts.<sup>180</sup> 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 action (or inaction) under the Equal Protection Clause:<sup>181</sup> "strict scrutiny," "intermediate scrutiny," and "rational basis."<sup>182</sup>

The severity of the level of scrutiny the Court applies 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 determining whether strict scrutiny should apply.<sup>183</sup> Plaintiffs' efforts to establish either that poverty should be considered a "suspect class"<sup>184</sup> or that education should be considered a "fundamental interest" entitled to strict scrutiny review<sup>185</sup> ultimately were rejected by a 5-4 majority. The Court then applied the rational basis test and held that local control of education was a justifiable state interest and dismissed plaintiffs' claim.<sup>186</sup>

As discussed in the previous section, since the Court issued this ruling in 1973, numerous state courts have examined in depth the inequities in education funding under state equal protection and adequate education clauses. These developments are highly relevant to major issues that the Supreme Court left open for future consideration in *Rodriguez*. There have also been important equal protection decisions by the federal courts and by the Supreme Court itself that have a bearing on the issue of comprehensive educational opportunity. For these reasons, it is appropriate at this time to re-examine federal law in this area. Doing so will demonstrate that low-income students should have a strong claim, under all three tiers of the Supreme Court's equal protection analysis, to meaningful educational opportunities that include a range of comprehensive services.<sup>187</sup>

<sup>179</sup> 411 U.S. 1 (1973).

<sup>180</sup> *Id.* at 11-17.

<sup>181</sup> *Id.* at 16-17.

<sup>182</sup> See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996) (striking down exclusion of women from military college under intermediate scrutiny test); *FCC v. Beach Comm'n's*, 508 U.S. 307, 313 (1993) (upholding cable television regulations under rational basis test); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (striking down miscegenation statute and holding that "the Equal Protection Clause demands that racial classifications . . . be subjected to the most rigid scrutiny").

<sup>183</sup> Indeed, the Court itself noted that "Texas virtually concedes that its historically rooted dual system of financing education could not withstand the strict judicial scrutiny that this Court has found appropriate in reviewing legislative judgments that interfere with fundamental constitutional rights or that involve suspect classifications." *Rodriguez*, 411 U.S. at 16.

<sup>184</sup> *Id.* at 18-28.

<sup>185</sup> *Id.* at 29-37.

<sup>186</sup> *Id.* at 44-55.

<sup>187</sup> 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 funda-

### A. *Strict Scrutiny*

Although the *Rodriguez* Court found that funding inequities at issue in that case did not rise to fundamental interest status, it *did not* find that strict scrutiny was inappropriate for all education claims. The Court specifically left open the possibility that students who were deprived of an education sufficient to prepare them to be capable voters and to exercise their First Amendment rights might have a valid federal constitutional claim entitled to strict scrutiny review. The Court raised this issue while noting that the plaintiffs in *Rodriguez* had presented no evidence 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.”<sup>188</sup> Furthermore, a few years later, in *Papasan v. Allain*,<sup>189</sup> the Supreme Court specifically stated that it still had not “definitively settled the questions 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.”<sup>190</sup>

The adequacy issue had not been raised in *Rodriguez* because the plaintiffs there solely focused on the dollar disparities in funding between school districts.<sup>191</sup> As discussed in the previous section, over the four decades 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 could bring to the Court’s attention the strong evidence of educational inadequacy that plaintiffs developed in many of the state adequacy cases, thereby presenting persuasive evidentiary justification for the

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mental interest under the state constitution—may be even more supportive of a right of economically disadvantaged children to receive comprehensive educational services.

<sup>188</sup> *Rodriguez*, 411 U.S. at 24 (citations omitted).

<sup>189</sup> 478 U.S. 265 (1986).

<sup>190</sup> *Id.* at 285. At issue in this case was the unequal distribution among the state’s school districts of money in a state fund that had been derived in the distant past from the sale of state lands. 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 of 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 instant case.

<sup>191</sup> “Appellees brought this class action on behalf of schoolchildren said to be members of poor families who reside in school districts having a low property tax base, making the claim that the Texas system’s reliance on local property taxation favors the more affluent and violates equal protection requirements because of substantial interdistrict disparities in per-pupil expenditures resulting primarily from differences in the value of assessable property among the districts.” *Rodriguez*, 411 U.S. at 1.

adequacy claim that was lacking in *Rodriguez*. Virtually all state courts that have considered this kind of evidence<sup>192</sup> have found that their respective educational systems are depriving poor and minority students of adequate educational opportunities. The virtual unanimity of state court findings in this regard is itself a strong indication of a pervasive national problem of educational inadequacy of which the U.S. Supreme Court should take note.

In *Rodriguez*, the justices engaged in a substantial colloquy 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. In particular, Marshall emphasized the importance of education for exercising First Amendment rights, "both as a source and as a receiver of information and ideas" and the importance of education for exercising the constitutional right to vote.<sup>193</sup>

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

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 . . . .<sup>194</sup>

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<sup>192</sup> As indicated above, in the general overview of the adequacy litigations *supra* section III.A, two-thirds of state courts that have considered adequacy claims have found for plaintiffs. Almost all of the courts that have found for defendants have, however, done so on justiciability or separation of powers grounds, dismissing the complaints before they went to trial, or without purporting to review the trial evidence that had been presented. See REBELL, *supra* note 136, at 22–29.

<sup>193</sup> *Rodriguez*, 411 U.S. at 112–14 (Marshall, J., dissenting) (citations omitted). Justice Brennan, in his separate 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.'

*Id.* at 62–63 (Brennan, J., dissenting) (citing *Rodriguez*, 411 U.S. at 102–03 (Marshall, J., dissenting)) (alteration in original).

<sup>194</sup> *Id.* at 37 (Powell, J.).

He then indicated that he had no disagreement with this perspective, stating that “[w]e need not dispute any of these propositions”<sup>195</sup> because the plaintiffs who had focused on the funding inequity issues 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.<sup>196</sup>

In short, a minimally adequate education for federal constitutional purposes appears to be one that provides students with the essential skills that they will need for “full participation in the political process.”<sup>197</sup> Specifically, this means the “reading skills and thought processes” needed for political discourse and debate and to exercise intelligent use of the franchise.<sup>198</sup> Given the strong emphasis on the importance of voting rights articulated by the *Rodriguez* Court (and in a host of major Supreme Court pronouncements before and since that decision),<sup>199</sup> evidence that states are not currently pro-

<sup>195</sup> *Id.* at 36 (emphasis added).

<sup>196</sup> *Id.* at 36–37. In upholding the rationality of the local funding component of the Texas Education Finance system, Justice Powell also noted that “[w]hile 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).

<sup>197</sup> *Id.* at 37.

<sup>198</sup> *Id.* at 36.

<sup>199</sup> See, e.g., *Shaw v. Reno*, 509 U.S. 630, 639 (1993) (avowing the principle that the right to vote is essential to democracy); *Burdick v. Takushi*, 504 U.S. 428, 441 (1992) (“[T]he right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system.”); *Bd. of Estimate of N.Y. v. Morris*, 489 U.S. 688, 698 (1989) (“The personal right to vote is a value in itself . . . .”); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) (“[W]ealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned.”); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”); *Reynolds v. Sims*, 377 U.S. 533, 567 (1964) (“To the extent that a citizen’s right to vote is debased, he is that much less a citizen.”); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (“[The right to vote] is regarded as a fundamental political right, because preservative of all rights.”).

viding many low-income students with the educational opportunities they need to intelligently exercise the franchise would be compelling.

Should the U.S. Supreme Court reconsider the adequate education issue left open by *Rodriguez*, it would need to review closely the particular skills that students need to function capably as citizens in a democratic society. The importance of developing such skills was at the heart of the constitutional requirements for an adequate education that many of the state courts articulated in the state adequacy cases.<sup>200</sup> A particularly probing examination of this issue was undertaken by the trial court in *Campaign for Fiscal Equity, Inc. ("CFE") v. State*,<sup>201</sup> 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 charter referendum proposal that was on the ballot in New York City while the trial was in progress."<sup>202</sup> The specific question posed was whether graduates of New York high schools would have the skills needed to comprehend that document.<sup>203</sup> The attorneys for the parties were also asked to have their witnesses undertake similar analyses 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.<sup>204</sup>

Plaintiffs' witnesses 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.<sup>205</sup> They then related these skills to the particular standards for English literature arts, social studies, mathematics, and sciences that were set forth in the Regents learning standards recently adopted by New York State.<sup>206</sup> They also described the types of skills a juror would need to comprehend and apply concepts like the prepon-

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<sup>200</sup> See, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989) (noting that 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 understanding of governmental processes to enable the student to understand the issues that affect his or her community . . ."); *Campaign for Fiscal Equity v. State*, 801 N.E.2d 326, 332 (N.Y. 2003) (explaining that the 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").

<sup>201</sup> 719 N.Y.S.2d 475 (N.Y. Sup. Ct. 2001), *aff'd* 801 N.E.2d 326 (N.Y. 2003). The author was co-counsel for plaintiffs in this litigation.

<sup>202</sup> Author's participation in Judge's colloquy with counsel, November 3, 2000. The following five paragraphs are largely taken from Michael A. Rebell, *Educational Adequacy, Democracy, and the Courts*, in *ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL: CONFERENCE SUMMARY* (Timothy Ready et al. eds., 2002).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> Transcript of Record at 6484-89, 13452-60, *Campaign for Fiscal Equity v. State*, 719 N.Y.S.2d 475 (N.Y. Sup. Ct. 2001).

<sup>206</sup> *Id.* at 6484, 6489.

derance of the evidence,<sup>207</sup> and showed how the specific types of skills needed to undertake this complex reasoning process were also cultivated by the Regents learning standards.<sup>208</sup>

The defendants 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.<sup>209</sup> Their implicit argument was that voters do not require high-level cognitive skills to understand the political issues as discussed on radio and television news programs. Since most voters do not actually read complex ballot propositions, they need not possess the level of skill necessary to comprehend such documents.<sup>210</sup> They also claimed that dialogue among members of the jury could substitute for a lack of understanding of particular points by some of the individual jurors.<sup>211</sup>

Overall, the implied premise of the defendants' position was that citizens do not actually need to function at a high skill level, 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:

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

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<sup>207</sup> *Id.* at 6516.

<sup>208</sup> *Id.* at 6517. Plaintiffs' witnesses "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." *Id.* at 6522–24, 6528–34.

<sup>209</sup> *Id.* at 16874, 16878–79, 16886, 16888–89; Defendants' Exhibits Nos. 19290, 19293, Campaign for Fiscal Equity v. State, 719 N.Y.S.2d 475 (N.Y. Sup. Ct. 2001).

<sup>210</sup> Defendants also 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, and concluded that only a seventh- or eighth-grade level of reading skills was needed to comprehend these materials. Tr. of R., *supra* note 205, at 17182–83. The plaintiffs countered that this 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 they 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 17185, 17201, 17215.

<sup>211</sup> *Id.* at 17220.

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.<sup>212</sup>

The debate regarding the level of skills citizens need to exercise their civic responsibilities and constitutional rights that has been initiated by the state courts is important. Although society may have accepted unreflectively 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, its implications cannot be avoided. Our society cannot knowingly perpetuate 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.

At the present time, most students from poverty backgrounds 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.<sup>213</sup> Accordingly, should the U.S.

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<sup>212</sup> Campaign for Fiscal Equity, Inc. v. State, 719 N.Y.S.2d 475, 485 (N.Y. Sup. Ct. 2001). Justice DeGrasse apparently meant that a capable voter or juror needs sufficient skills to follow arguments made by experts on complex subjects, not that voters and jurors necessarily need to master the intricacies of campaign finance reform or DNA themselves. The Court of Appeals generally affirmed these conclusions, although not necessarily the particulars of the lower court's reasoning, stating that:

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.

Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 331 (N.Y. 2003) (citations omitted).

<sup>213</sup> For example, in New York State in 2008, only 63% of low-income students graduated from high school. N.Y. STATE EDUC. DEPT., N.Y. STATE REPORT CARD: ACCOUNTABILITY

Supreme Court agree to consider these issues, a strong case can be made that the actual skills that these students have acquired by the time they leave school are far short of the basic citizenship skills they need to exercise intelligent use of the franchise.<sup>214</sup> 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 federal and the state courts have repeatedly held that the cost factors cannot justify the denial of constitutional rights.<sup>215</sup>

### B. *Intermediate Scrutiny*

Despite the Supreme Court's application of rational basis review in *Rodriguez*, in a later decision involving a claim of educational deprivation, the Supreme Court applied the more demanding "intermediate" level of scrutiny that previously had been used only in gender and illegitimacy cases; the plaintiffs then prevailed. The issue in *Plyler v. Doe*<sup>216</sup> 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

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AND OVERVIEW REPORT 2008–09, at 13 (2009), <https://reportcards.nysed.gov/statewide/2009/statewideAOR.pdf>. Proficiency rates for eighth-grade students in New York on the state's Regents Exams for 2010 low-income students were 39.1% in reading and 49% in math. N.Y. STATE EDUC. DEPT., A NEW STANDARD FOR PROFICIENCY: COLLEGE READINESS 31 (2010), [http://www.oms.nysed.gov/press/PressConferencePresentationUPDATEDAM07\\_28.pdf](http://www.oms.nysed.gov/press/PressConferencePresentationUPDATEDAM07_28.pdf). In Massachusetts in 2008, only 8% of low-income students were proficient in eighth-grade math as assessed by the National Assessment of Educational Progress ("NAEP"). MASS. DEP'T OF ELEMENTARY & SECONDARY EDUC., FY09 ANNUAL REPORT 41 (2009), <http://www.doe.mass.edu/boe/annual/09.pdf>.

<sup>214</sup> See generally *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973).

<sup>215</sup> See, e.g., *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 392 (1992) ("Financial constraints may not be used to justify the creation or perpetuation of constitutional violations . . ."); *Bounds v. Smith*, 430 U.S. 817, 825 (1977) ("[T]he cost of protecting a constitutional right cannot justify its total denial."); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969) ("The saving of welfare costs cannot justify an otherwise invidious classification."); *Watson v. City of Memphis*, 373 U.S. 526, 537 (1963) ("Vindication of conceded constitutional rights [to municipal park desegregation] cannot be made dependent upon any theory that it is less expensive to deny than to afford them."). 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 Educ., Inc.*, 790 S.W.2d 186, 208 (Ky. 1989); see also *Klostermann v. Cuomo*, 463 N.E.2d 588, 594 (N.Y. 1984) (explaining that failure to provide suitable treatment to mental health patients could not be "justified by lack of staff or facilities" (citing *Kesselbrenner v. Anonymous*, 33 N.Y.2d 161, 168 (N.Y. 1973))).

<sup>216</sup> 457 U.S. 202 (1982).

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.<sup>217</sup>

The Court then rejected each of the policy rationales put forward by the state of Texas, such as the cost to the state, the impact on other students if scarce resources need to be shared with these students, and the fact that many of these students may not remain permanently in the state. It then 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.”<sup>218</sup> The costs the Court noted 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.”<sup>219</sup>

The similarity of the situation of the children of undocumented immigrants in *Plyler* and the class of children who are educationally disadvantaged by poverty is striking.<sup>220</sup> These children, like the undocumented immigrants’ children, are not “accountable for their disabling status.”<sup>221</sup> Unless they are provided the essential resources they need, many of them will also be marked by “the stigma of illiteracy for the rest of their lives.”<sup>222</sup> In addition, by denying many of these children access to the 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.”<sup>223</sup> Present policies clearly are creating a “subclass of illiterates”<sup>224</sup> that will

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<sup>217</sup> *Id.* at 223–24. 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).

<sup>218</sup> *Plyler*, 457 U.S. at 230.

<sup>219</sup> *Id.*

<sup>220</sup> 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. NANCY K. CAUTHEN & KINSEY ALDEN DINAN, NAT’L CTR. FOR CHILDREN IN POVERTY, IMMIGRANT CHILDREN: AMERICA’S FUTURE (2006), [http://www.nccp.org/publications/pub\\_657.html](http://www.nccp.org/publications/pub_657.html).

<sup>221</sup> *Plyler*, 457 U.S. at 223.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 230.

“lack the ability to live within the structures of civic institutions,”<sup>225</sup> 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.”<sup>226</sup>

The evidence that could be mounted to support the claims of a class of students from poverty backgrounds would be even stronger than the case presented in *Plyler* since, as demonstrated above,<sup>227</sup> 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 educationally 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 a state’s failure to provide the full range of essential resources to educationally disadvantaged children here, as in *Plyler*, is, of course, the presumed high cost of doing so. As discussed above,<sup>228</sup> the actual cost of providing these resources may not be as high as is often presumed. In any event, although economic factors may be considered, for example, in choosing the methods used to provide meaningful access to services,<sup>229</sup> 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.<sup>230</sup>

The Supreme Court has not yet applied the *Plyler* standard to any other cases because, as it has noted, *Plyler* involved a “unique confluence of theo-

<sup>225</sup> *Id.* at 223.

<sup>226</sup> *Id.* at 230. Unlike the *Plyler* class, all of whom were being totally denied access to public education, some children from poverty backgrounds are being provided some of the comprehensive services they need. For a discussion of rational basis review, see *infra* section IV.C. The precise class for whom the *Plyler* precedent should apply, therefore, should be those students from poverty backgrounds 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.

<sup>227</sup> See discussion of research correlating specific comprehensive services with improved school achievement *supra* section I.

<sup>228</sup> See discussion of economic feasibility of fully implementing the right to comprehensive educational opportunity *supra* section II.F.

<sup>229</sup> *Bounds v. Smith*, 430 U.S. 817, 825 (1977). 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.

*Id.* at 266.

<sup>230</sup> See cases cited *supra* note 214.

ries and rationales.”<sup>231</sup> A number of lower federal courts, however, have found the same confluence in cases denying educational opportunities to disadvantaged children, justifying intermediate scrutiny. For example, in *National Law Center on Homelessness v. New York*,<sup>232</sup> a federal district court in 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 appear to be penalizing these homeless children because of the misfortunes or misdeeds of their parents.”<sup>233</sup> Likewise, children from families living in concentrated poverty should not be denied a meaningful educational opportunity because of their socio-economic circumstances.

The United States Court of Appeals for the Eighth Circuit applied the *Plyler* intermediate scrutiny standard to the situation of a student who was living with his aunt and uncle because of the circumstances created by his parents’ divorce.<sup>234</sup> The court enjoined application of a state statute that limited enrollment to children whose parents resided in the school district because children who are not living with their parents due to circumstances of divorce 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.<sup>235</sup> 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.<sup>236</sup> Other federal courts have also applied the *Plyler* intermediate level of scrutiny to cases dealing with school-aged, pre-trial detainees who alleged that they were receiving inadequate educational services,<sup>237</sup> and to the denial of services to a child with disabilities because of residency issues.<sup>238</sup>

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<sup>231</sup> *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 459 (1988) (quoting *Plyler*, 457 U.S. at 243 (Burger, C.J., dissenting)). The issue in *Kadrmas* 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 *Kadrmas*, the Court declined to apply *Plyler*’s intermediate scrutiny standard and utilized a minimal rational relationship analysis. *Id.* at 459. In doing so, the Court noted that the user fee “will not promot[e] the creation and perpetuation of a subclass of illiterates,” 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. *Id.* at 459 (quoting *Plyler*, 457 U.S. at 230).

<sup>232</sup> 224 F.R.D. 314 (E.D.N.Y. 2004).

<sup>233</sup> *Id.* at 322.

<sup>234</sup> *Horton v. Marshall Pub. Schs.*, 769 F.2d 1323 (8th Cir. 1985).

<sup>235</sup> *Id.* at 1329–30 (quoting *Plyler*, 457 U.S. at 223).

<sup>236</sup> *Id.* at 1330–31.

<sup>237</sup> *Donnell C. v. Ill. State Bd. of Educ.*, 829 F. Supp. 1016 (N.D. Ill. 1993).

<sup>238</sup> *Sonya C. v. Ariz. Sch. for the Deaf & Blind*, 743 F. Supp. 700, 712 (D. Ariz. 1990).

### C. Rational Basis Review

Even under the less demanding standard of rational basis review, claims that students from impoverished backgrounds deserve meaningful educational opportunities should prevail. Since the New Deal era, the Supreme Court's approach to reviewing social and economic legislation has reflected extreme deference to legislative policy choices.<sup>239</sup> The basic understanding of the rational basis standard has been that "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."<sup>240</sup> However, in recent decades, the Court has struck down a number of cases even when using this lesser standard, so much so that several of the justices have themselves acknowledged that the Court has, in essence, created a "second order"<sup>241</sup> rational basis review.

This informal "second order" rational basis review has 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.<sup>242</sup> The second category consists of cases that provide bene-

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<sup>239</sup> The origin of the traditional extreme deference to legislative policymaking was a counter-reaction 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), 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.

Williams v. Lee Optical Co., 348 U.S. 483, 489 (1955) (quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1876)). 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 generally C. HERMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937-1947*, ch. 1 (1948) and KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* (2007).

<sup>240</sup> *McGowan v. Maryland*, 366 U.S. 420, 426 (1961); see, e.g., *More v. Doud*, 354 U.S. 457, 465 (1957) ("The [E]qual [P]rotection [C]lause 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." (quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911))); *Lindsley*, 220 U.S. at 78-79 ("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.").

<sup>241</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 458 (1985) (Marshall, J., concurring in part and dissenting in part).

<sup>242</sup> See, e.g., *id.*; see also, e.g., *Romer v. Evans*, 517 U.S. 620 (1996); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).

fits to certain members of a group but deny these benefits without evenhanded justification to others who are similarly situated.<sup>243</sup>

*City of Cleburne v. Cleburne Living Center*<sup>244</sup> is a classic example of the first category of these cases, those that center on disfavored groups. There, the Supreme Court held that a negative attitude toward the mentally retarded was not a constitutionally acceptable justification for setting special zoning requirements for group homes serving the mentally retarded when such zoning requirements were not imposed on boarding or lodging houses serving other populations.<sup>245</sup> Once that justification was set aside as unconstitutional, the Court examined and quickly rejected the other purported justifications for the policy and held that there was no rational basis for the zoning requirement, since the mentally retarded would not pose any real threat to the city's legitimate interests.<sup>246</sup> In doing so, the Court further held that "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."<sup>247</sup>

Similarly, in *Romer v. Evans*,<sup>248</sup> the Supreme 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. 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."<sup>249</sup> 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.<sup>250</sup>

Although it might be argued that the denial of needed services to students from poverty backgrounds is motivated by animus, it is the latter category of "second order" rational relationship cases, those involving the denial of benefits to some, but not all, individuals in a particular group, that

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<sup>243</sup> See, e.g., *Hooper v. Bernhillo Cnty. Assessor*, 472 U.S. 612 (1985); *Zobel v. Williams*, 457 U.S. 55 (1982); *Baxstrom v. Herold*, 383 U.S. 107 (1966); see also *Att'y Gen. v. Soto-Lopez*, 476 U.S. 898 (1986) (discussing denial of civil service benefits to veterans who were not state residents at the time they entered the armed services as a violation of constitutional right to travel).

<sup>244</sup> 473 U.S. at 458.

<sup>245</sup> *Id.* at 448.

<sup>246</sup> *Id.* at 448-50.

<sup>247</sup> *Id.* at 446.

<sup>248</sup> 517 U.S. 620 (1996).

<sup>249</sup> *Id.* at 632.

<sup>250</sup> See also *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973) (holding that the amendment to Food Stamp Act declaring ineligible any household containing an individual who was not related to another member of the household violated Equal Protection Clause because it singled out "hippies").

is most relevant to the right to comprehensive educational opportunity. A prime example of such a case is the Supreme Court's 1982 decision in *Zobel v. Williams*.<sup>251</sup> 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.<sup>252</sup> 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 \$1050, 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.<sup>253</sup>

The Court has applied this doctrine in a number of other contexts where states sought to provide greater benefits to some members of a class than to others. Thus, in *Hooper v. Bernhillo County Assessor*,<sup>254</sup> 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."<sup>255</sup>

In short, these cases hold that the creation of two tiers of citizens, whereby one tier receives governmental benefits and the other does not, violates equal protection. This pattern also clearly applies to the issue of comprehensive educational services for disadvantaged students. Most states currently offer some amount of early childhood, extended learning, access to health, and family support programs and services to some, but not all, of

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<sup>251</sup> 457 U.S. 55 (1982).

<sup>252</sup> *Id.* at 57.

<sup>253</sup> *Id.* at 64 (footnotes omitted).

<sup>254</sup> 472 U.S. 612 (1985).

<sup>255</sup> *Id.* at 623; *see, e.g.*, *Att'y Gen. v. Soto-Lopez*, 476 U.S. 898 (1986) (holding that policy of denying veterans' bonus points for state employment to individuals who resided in other states when initially entered military service violated Equal Protection Clause); *Baxstrom v. Herold*, 383 U.S. 107 (1966) (holding that 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 violated the Equal Protection Clause).

their educationally disadvantaged students. In most cases, these services are distributed through “pilot programs” or by limiting eligibility to residents of certain geographical areas, or by providing limited services to those who qualify on a “first come, first served” basis.

For example, although there has been a substantial increase in the provision of preschool services to educationally disadvantaged students, as of 2005, only 40% of three- and four-year-olds from families with household incomes of \$20,000–30,000 were receiving these services nationally.<sup>256</sup> In New York State, only about 40% of the one million children who need after-school services are receiving them;<sup>257</sup> nationally, only 13% of children and adolescents in the lowest income quintile participate in after-school programs.<sup>258</sup> While Medicaid and the Children’s Health Insurance Program (“CHIP”) provide health coverage to more than 36 million children each year, still more than eight million children remain uninsured; most of these uninsured children are eligible for coverage in Medicaid or CHIP but are not enrolled largely due to state-imposed barriers that differ across states.<sup>259</sup> A recent mapping study of services currently available to disadvantaged students in New York City graphically shows a consistent pattern of partial availability of services in virtually every service area.<sup>260</sup>

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.”<sup>261</sup> Legislatures are granted a considerable

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<sup>256</sup> KATE SHEPPARD, *AMERICAN PROSPECT, PRE-K POLITICS IN THE STATES* (2007), *available at* [http://prospect.org/cs/articles?article=prek\\_politics\\_in\\_the\\_states](http://prospect.org/cs/articles?article=prek_politics_in_the_states). 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 \$100,000 were receiving services. *Id.*; see also NAT’L CTR. FOR EDUC. STATISTICS, 2008–024, *EARLY CHILDHOOD LONGITUDINAL STUDY, BIRTH COHORT (ECLS-B), LONGITUDINAL 9-MONTH-PRE-SCHOOL tbl.2-1* (noting that only 47.1% of four-year-olds in the lowest 20% of the population in terms of socio-economic status receive center-based preschool services (including Head Start)).

<sup>257</sup> See N.Y. STATE AFTERSCHOOL NETWORK, *AFTERSCHOOL FUNDING IN N.Y. STATE: THE CASE FOR A MORE COORDINATED SYSTEM 2–3* (2008), [http://www.nysan.org/files/2125\\_file\\_Afterschool\\_Funding\\_in\\_NYS\\_Brief3.pdf](http://www.nysan.org/files/2125_file_Afterschool_Funding_in_NYS_Brief3.pdf) (citing *FIGHT CRIME: INVEST IN KIDS N.Y., NEW YORK’S AFTER-SCHOOL CHOICE: THE PRIME TIME FOR JUVENILE CRIME OR YOUTH ENRICHMENT AND ACHIEVEMENT* (2002)).

<sup>258</sup> MARGO GARDNER, JODIE L. ROTH, & JEANNE BROOKS-GUNN, *CAN AFTER-SCHOOL PROGRAMS HELP LEVEL THE PLAYING FIELD FOR DISADVANTAGED YOUTH?* 11 (2009). A recent report by the National Center for Education Statistics based on a national sample of approximately 1,800 public elementary schools in all fifty 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. NAT’L CTR. FOR EDUC. STATISTICS, *AFTER-SCHOOL PROGRAMS IN PUBLIC ELEMENTARY SCHOOLS: FIRST LOOK* (2009).

<sup>259</sup> CHILDREN’S DEF. FUND, *supra* note 122, at E-3.

<sup>260</sup> See Belfield & Garcia, *supra* note 118.

<sup>261</sup> *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501 (1931).

degree of discretion in establishing classifications for the distribution of benefits or the imposition of regulations.<sup>262</sup> Slight distinctions in the amount or quality of services being provided, like minor variations in the sizes of pre-school classes or dissimilarities in the particular services that are available in particular after-school programs, should not rise to a constitutional level. But providing extensive preschool or after-school services to a fraction of the children who need them and totally denying such services to all others with equal needs involves much more than minor variations in service availability. Nor does it merely reflect slight differences in levels of services that inevitably arise in the administration of large social welfare programs. As the Supreme Court stated in *Baxstrom v. Herold*: “[E]qual 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.”<sup>263</sup>

Clearly, there is no rational basis for states and local governmental agencies to distinguish between 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.<sup>264</sup> Therefore, following the other “second order” rational basis precedents, in situations involving access to needed comprehensive services, “[w]hen a state distributes benefits unequally, the distinctions it makes [should be] subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment.”<sup>265</sup> Arguably a contrary precedent might be provided by *In re Levy*, a decision of the New York Court of Appeals, in which the court upheld a legislative program that paid maintenance expenses for blind and deaf students living in residential facilities, but not for students with other disabilities.<sup>266</sup> The court’s justification for this decision was that as a matter of history, tradition, and legal precedent in the federal and state courts, “our society has accorded special recognition to the blind and to the deaf in the field of education as elsewhere.”<sup>267</sup> Whether or not such a distinction among subcategories of disabled students would be upheld today,<sup>268</sup> *Levy* still does not counter the argument being

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<sup>262</sup> See, e.g., *Tigner v. Texas*, 310 U.S. 141 (1940) (upholding regulations exempting agriculture from antitrust laws applying to other industries); *Semler v. Or. State Bd. of Dental Examiners*, 294 U.S. 608 (1935) (upholding regulation limiting advertising by dentists but not by other professionals).

<sup>263</sup> 383 U.S. 107, 111 (1966).

<sup>264</sup> 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.

<sup>265</sup> See *Zobel v. Williams*, 457 U.S. 55, 60 (1973).

<sup>266</sup> 345 N.E.2d 556 (N.Y. 1976).

<sup>267</sup> *Id.* at 559; cf. *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955) (“Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think.”); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) (“[T]he existence of the evil itself is a matter for the legislative judgment.”).

<sup>268</sup> Ironically, shortly after the court in *In re Levy*, *supra* note 266, ruled that private residential school maintenance payments could be provided to parents of children who are blind or

made here because neither history, tradition, nor legal precedents has established any clear subcategories among students disadvantaged by circumstances of poverty.

The obvious reason that Congress and state legislatures deny important services to some economically disadvantaged children while providing them to others is that they are not willing to expend the amount of funding that would be necessary to extend benefits to all of the disadvantaged students who need them. In *Zobel*, however, the Supreme Court found that saving money (i.e., "assuring the prudent management of the fund") does not constitute an acceptable basis for discriminating among members of a class under even rational basis review.<sup>269</sup> 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, but the state claims that funding 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 rational basis cases here really means asserting that the Equal Protection Clause requires not only that all eligible students must receive comprehensive services but also that they all must receive an *adequate* level of comprehensive services.

In *Dandridge v. Williams*, the Supreme Court considered 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.<sup>270</sup> At issue in *Dandridge* was a Maryland regulation that placed a maximum ceiling of \$250 per month on family welfare allotments, regardless of the number of children in the family.<sup>271</sup> 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.<sup>272</sup> One could not seriously argue that economies of scale justified capping the amount of benefits without regard to the number of family members who would have to share the limited

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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 *In re Scott K.*, 400 N.Y.S.2d 289 (N.Y. Fam. Ct. 1977). 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 educational services would lead state legislatures to totally eliminate existing preschool programs, deny Medicaid services to all poor children, and/or 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.

<sup>269</sup> 457 U.S. at 60-63.

<sup>270</sup> 397 U.S. 471 (1970).

<sup>271</sup> *Id.* at 474-75.

<sup>272</sup> *Id.*

pot. However, while the trial court had held that this policy violated equal protection,<sup>273</sup> the Supreme Court reversed and upheld Maryland's maximum grant family welfare policy.<sup>274</sup> The opinion stated that "the 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."<sup>275</sup> Thus, its decision allowed the state of Maryland to provide lower per capita welfare benefits to some recipients than others in order to limit its total public welfare expenditures.<sup>276</sup>

Does *Dandridge* mean that even if the Supreme Court applied the *Zobel* precedent to students being denied access to comprehensive services, it would find that a state may extend access in such a manner that overall program standards would be reduced to inadequate levels? Not necessarily. The key distinction here is that education is a vital, primary public service both under federal and state constitutional law.<sup>277</sup>

The central role of education for all aspects of contemporary life was dramatically highlighted by the Supreme Court's declaration in *Brown v. Board of Education* that "[t]oday, education is perhaps the most important function of state and local governments."<sup>278</sup> In *Rodriguez*, the Court quoted this passage from *Brown*, reemphasizing the preeminent position of education among the services that governments provide:

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

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<sup>273</sup> *Williams v. Dandridge*, 297 F. Supp. 450, 458–59 (D. Md. 1968) (holding that Maryland's policy violated equal protection because needy children in large families were being treated differently than needy children in small families, but specifically declining to take a position on whether this decision meant that the state necessarily had to increase its total spending for public assistance).

<sup>274</sup> *Dandridge*, 397 U.S. at 486.

<sup>275</sup> *Id.* at 487.

<sup>276</sup> Note, however, that the Court did cite a justification for the state's policy other than merely saving money. The ceiling amount on welfare payments that Maryland had imposed was keyed to the minimum wage that a steadily employed head of household receives, and the Court saw the state as seeking to maintain "an equitable balance between families on welfare and those supported by an employed breadwinner." *Id.* at 486. Thus, the Court concluded that "a solid foundation for the regulation can be found in the State's legitimate interest in encouraging employment and in avoiding discrimination between welfare families and the families of the working poor." *Id.*

<sup>277</sup> See *supra* section II.A.

<sup>278</sup> 347 U.S. 483, 493 (1954).

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.<sup>279</sup>

The *Rodriguez* Court also expressed a concern that designating education as a fundamental interest might create a "slippery slope" that would require extending similar favored treatment to other important social policy areas.<sup>280</sup> 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,"<sup>281</sup> 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."<sup>282</sup>

Despite taking this stance in *Rodriguez*, the Court in *Plyer* was willing to make distinctions among the various governmental services through its analysis of the deprivation of educational opportunity among undocumented immigrant children. 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."<sup>283</sup> For these reasons, the Court in *Plyer* did apply intermediate scrutiny to issues of educational opportunity.

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<sup>279</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29–30 (1973) (citing *Brown*, 347 U.S. 483) (quoting *Brown*, 347 U.S. at 493). As discussed *supra* section IV.A, 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.

<sup>280</sup> *Rodriguez*, 411 U.S. at 32–35.

<sup>281</sup> *Id.* at 33 (citing *Williams v. Dandridge*, 397 U.S. 471, 485 (1970)) (internal quotation marks omitted).

<sup>282</sup> *Id.* The Court also emphasized that its precedents denying fundamental interest status to housing were instructive in this regard, quoting Justice White's analysis in *Lindsey v. Normet*:

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.

*Rodriguez*, 411 U.S. at 32–33 (quoting *Lindsey v. Normet*, 405 U.S. 56, 74 (1972)) (emphasis added).

<sup>283</sup> *Plyer v. Doe*, 457 U.S. 202, 221 (1982). Justice Blackmun, in his concurring opinion in *Plyer*, was even more specific on this point. He wrote, "[o]nly a pedant would insist that there are no meaningful distinctions among the multitude of social and political interests regu-

Similarly, then, in applying “second order” rational relationship scrutiny, the Court can assign a special status to cases involving issues of educational opportunity, without denigrating the importance of welfare, housing, or other social needs. From a constitutional perspective—and from a perspective consistent with American culture—education clearly does have a favored status, as the Supreme Court consistently and repeatedly emphasized in *Brown*, *Rodriguez*, *Plyler*, and a host of other cases.<sup>284</sup>

The preeminent position of education is further substantiated by education adequacy decisions in state courts. Providing a sound basic education has been held to be an affirmative obligation of the state government in most states.<sup>285</sup> In many states, it is the only social service for which the state has an affirmative constitutional obligation.<sup>286</sup> Although the special status of education in state constitutions is not relevant to the U.S. Supreme Court’s holding in *Rodriguez*, it does affect the calculation of the legitimacy of state actions that negatively impact access to education in the context of rational basis analysis.

If second order rational basis analysis is applied to a claim for comprehensive educational opportunity, and 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. Educational benefits are not “windfalls” like the benefits at issue in *Zobel*; they are vital services that children must receive so that they “may reasonably be

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lated by the States, and *Rodriguez* does not stand for quite so absolute a proposition.” *Id.* at 232–34 (Blackmun, J., concurring).

<sup>284</sup> See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (“Providing public schools ranks at the very apex of the function of a State.”); *Abington Sch. 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.”); *McCullum v. Bd. of Educ.*, 333 U.S. 203, 216 (1948) (Frankfurter, J., concurring) (stating that public schools are designed to serve as “perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people”); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (“The American people have always regarded education and the acquisition of knowledge as matters of supreme importance which should be diligently promoted.”).

<sup>285</sup> See REBELL, *supra* note 136, at 24–25; see generally Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999) (discussing significance of the difference between positive rights in state constitutions and negative rights in the federal Constitution).

<sup>286</sup> The Vermont Supreme Court described the significance of the constitutional preeminence 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. Vermont*, 692 A.2d 384, 391–92 (Vt. 1997) (emphasis added).

expected to succeed in life.”<sup>287</sup> In other words, once it is determined that all children are entitled to a piece of the pie, the pie will necessarily need to be expanded—not simply cut into smaller slices—in order to provide all children a *meaningful* educational opportunity.<sup>288</sup>

## V. IMPLEMENTING THE RIGHT TO COMPREHENSIVE EDUCATIONAL OPPORTUNITY

Many states have already recognized the importance of taking bold new steps to coordinate the services provided by the various state agencies that relate to children’s needs, and efforts have been made to collaboratively implement plans to improve children’s welfare and educational attainment.<sup>289</sup> In at least sixteen 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.<sup>290</sup> The federal government currently has in place at least

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<sup>287</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

<sup>288</sup> 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 gives cumulative force to the bottomline reality that students who are being deprived of meaningful educational opportunities are being seriously aggrieved and are being denied equal protection of the laws. This pattern may also have some relevance to the issue of the basic validity of the Court’s tripartite analytic approach. In the past, many of the Supreme Court justices themselves have questioned the Court’s categorical approach to equal protection analysis and have argued that the degree of the Court’s scrutiny should vary with the significance of the issues presented. *See, e.g.*, *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 451 (1985) (Stevens, J., concurring); *Craig v. Boren*, 429 U.S. 190, 220–21 (1976) (Rehnquist, J., dissenting); *Richardson v. Belcher*, 404 U.S. 78, 90 (1971) (Marshall, J., dissenting); *see also* MARK V. TUSHNET, *MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT 1961–1991*, at 97–103 (1997) (providing a detailed discussion of Justice Marshall’s position on this issue). Regardless of the level of scrutiny it applies, the Supreme Court has always closely considered the inequity of resource allocation patterns that deny a meaningful educational opportunity to millions of poor and minority students, illustrating the artificiality of the traditional tripartite approach to equal protection analysis.

<sup>289</sup> 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. ARIZ. GOVERNOR’S OFFICE FOR CHILDREN, YOUTH & FAMILIES, *FIVE KEYS TO YOUTH SUCCESS: UNLOCKING THE DOOR TO ARIZONA’S FUTURE* (2007), <http://forumforyouthinvestment.org/node/240>. Similarly, Iowa’s Youth Development Strategic Plan 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, are successful in school, and are prepared for a productive adulthood. IOWA’S COLLABORATIVE FOR YOUTH DEV., *IOWA’S YOUTH DEV. STRATEGIC PLAN: 2007–2010*, [http://www.icyd.iowa.gov/index\\_files/ICYDStrategicPlanfinal.pdf](http://www.icyd.iowa.gov/index_files/ICYDStrategicPlanfinal.pdf); *see also* N.Y. STATE OFFICE OF MENTAL HEALTH, *THE CHILDREN’S PLAN: IMPROVING THE SOCIAL AND EMOTIONAL WELL BEING OF NEW YORK’S CHILDREN AND THEIR FAMILIES* (2008), [http://www.ccf.state.ny.us/initiatives/ChildPlan/cpResources/childrens\\_plan.pdf](http://www.ccf.state.ny.us/initiatives/ChildPlan/cpResources/childrens_plan.pdf).

<sup>290</sup> NAT’L GOVERNORS ASS’N, CTR. 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* (Forum for Youth Investment 2007).

363 programs, across seven agencies, that deal with the comprehensive needs of children.<sup>291</sup>

These efforts have created positive visions and structures for providing comprehensive services to children. 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. To coordinate efficiently and economically the myriad efforts that are now taking place and to expand them to meet the nation's urgent educational needs, it is necessary to recognize definitively a right to comprehensive educational opportunity for children from backgrounds of poverty. Official acknowledgement of this right would require the federal government and the states to acknowledge that access to vital services is not a benefit that can be doled out to some children as the political climate permits, but that such access must be provided to all who need it on a consistent and systematic basis, and that governmental institutions must be reorganized to respond to this right.

As I argued in the previous sections, strong bases exist for legal initiatives to seek recognition of this right in both the state and federal courts. Certainly, litigation to gain recognition of the right to comprehensive educational opportunity should be pursued vigorously. But recognition and implementation of the right to comprehensive educational opportunity need not and should not be seen as the exclusive responsibility of the courts. Legal efforts to enforce this right should be accompanied by political advocacy for the inclusion of comprehensive educational opportunity in the pending ESEA reauthorization and by an ongoing political initiative to convince executive and legislative officials, at both the state and federal levels, that they are responsible for acknowledging and acting on students' constitutional right to comprehensive educational opportunities.

A growing number of constitutional scholars have recognized 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

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<sup>291</sup> BELLA ROSENBERG, CHRISTOPHER T. CROSS, SHARON G. DEICH & AMY R. COX, PROMOTING A COMPREHENSIVE APPROACH TO EDUCATIONAL OPPORTUNITY: A PILOT INVENTORY OF EDUCATION-RELATED FEDERAL PROGRAMS FOR CHILDREN AND YOUTH 5 (2009), [http://www.edstrategies.net/files/C&J\\_Fed\\_Prog\\_Inventory\\_Report\\_10-02-25.pdf](http://www.edstrategies.net/files/C&J_Fed_Prog_Inventory_Report_10-02-25.pdf). The authors of this report note that:

[D]espite the ongoing debate about whether or not schools alone can level the education 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.

*Id.* at 5.

courts.<sup>292</sup> These scholars have argued that the Constitution imposes affirmative obligations upon both the legislative and executive branches of government and that “the 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.”<sup>293</sup> 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.<sup>294</sup> 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.<sup>295</sup>

Implementation of a right to comprehensive educational opportunity can best be effectuated through a cooperative, functional separation of powers whereby all three branches of the government are involved at both the

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<sup>292</sup> See 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); Liu, *supra* note 43 (arguing for Congressional recognition of a constitutional right to national citizenship).

<sup>293</sup> CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 9 (1993).

<sup>294</sup> See, e.g., LOUIS FISHER, *CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS* 84 (1988) (discussing methods used by the Supreme Court to sidestep sensitive issues and allow the political branches to revise court doctrines); 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 E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999); 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”).

<sup>295</sup> LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1513 (2d ed. 1988); see also LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* 86–87 (2004) (arguing that institutional limitations compel courts to “under enforce” 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 underenforcement thesis, and the phenomenon of judicial deference all depend upon and fortify the license of nonjudicial actors to apply the Constitution more stringently than would the Court.”).

federal and the state levels.<sup>296</sup> The rapid breakthrough in the acknowledgment and enforcement of the rights of students with disabilities to appropriate educational services provides an instructive example of how a major new right can be effectuated largely by cooperative, functional interchanges, without any pronouncement or mandate from the U.S. Supreme Court.

In the early 1970s, two lower federal courts considered whether students with disabilities had an affirmative right to attend public schools and to receive educational services appropriate to their individual needs, but those cases were quickly settled and never reached the federal courts of appeals or the U.S. Supreme Court.<sup>297</sup> 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, of course, applied only in the venues in which they were litigated, *i.e.* Pennsylvania and the District of Columbia. It was far from clear at the time whether 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 Supreme Court has never mandated or even considered a constitutional right to suitable educational opportunities for students with disabilities.

What happened instead was 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 ("EHCA"),<sup>298</sup> now known as the "Individuals With Disabilities Act" ("IDEA"),<sup>299</sup> and the Rehabilitation Act of 1974,<sup>300</sup> even though no court had ordered them to do so. In drafting these statutes, Congress was directly influenced by the *Mills* and *PARC* decisions. Both of the district court cases 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.<sup>301</sup> The Senate Report which accompanied the 1974 statute acknowledged that the Act "incorporated the major princi-

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<sup>296</sup> See REBELL, *supra* note 136 (discussing 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).

<sup>297</sup> *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Pa. 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).

<sup>298</sup> Pub. L. No. 94-142, 89 Stat. 773 (1975).

<sup>299</sup> Pub. L. No. 101-476, 104 Stat. 1142 (1990) (codified as amended in scattered sections of 20 U.S.C. §§ 1400-1482 (2006)).

<sup>300</sup> 29 U.S.C. § 794 (2006). In 1990, Congress also enacted the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2006), which extends the broad-based anti-discrimination precepts of the Civil Rights Act of 1964 to all persons with disabilities.

<sup>301</sup> See *Mills*, 348 F. Supp. at 878-83; *PARC*, 334 F. Supp. at 1258-67; *PARC*, 343 F. Supp. at 303-06.

ples of the right to education cases,”<sup>302</sup> and, as the U.S. Supreme Court stated in a case interpreting the IDEA: “[T]he fact that both PARC and Mills are discussed at length in the legislative history suggests that the principles which they established are the principles which, to a significant extent, guided the drafters of the Act.”<sup>303</sup>

Enactment of the IDEA under these circumstances has two major implications for present purposes. First, the fact that Congress and many 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.<sup>304</sup> Second, the fact that Congress and the state legislatures have recognized that these students have a right not merely to *access* public education, but to receive “a free appropriate public education that emphasizes special education and related services designed to meet their unique needs”<sup>305</sup> has major implications for considering the highly analogous individual needs of economically disadvantaged children. Like children with disabilities, children from backgrounds of poverty need more than mere access to public school buildings; they need special supports and services to overcome the impediments that inhibit their learning potential. Unless they receive the comprehensive resources they require, many of these students, like the students with disabilities before they received benefits under the IDEA, will “sit[ ] idly in regular classrooms awaiting the time when they [will be] old enough to drop out.”<sup>306</sup>

Clearly, 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*,”<sup>307</sup> 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,

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<sup>302</sup> S. REP. NO. 94-168, at 8 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1432 (citing Senate Report & House Report H.R. Rep. No. 94-332, at 2-3 (1975)).

<sup>303</sup> *Bd. of Educ. v. Rowley*, 458 U.S. 176, 194 (1982). Indeed, immediately after discussing these cases the Senate Report describes the 1974 statute as having “incorporated the major principles of the right to education cases.” S. REP. NO. 94-168.

<sup>304</sup> 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, e.g.*, Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1703(f) (2006) (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 this statute and on the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2006), and its implementing 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. *See, e.g.*, *Lau v. Nicols*, 414 U.S. 563, 566 (1974).

<sup>305</sup> 20 U.S.C. § 1400(d)(1)(A) (2006).

<sup>306</sup> H.R. REP. NO. 94-332, at 2 (1975).

<sup>307</sup> 20 U.S.C. § 1400(d)(1)(A) (2006) (emphasis added).

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 . . . .”<sup>308</sup> These are clearly analogous to, and in many cases exceed, the range of comprehensive services needed by students with economic disadvantages.

Cooperating through a highly effective functional division of labor, all three branches of government, at both the federal and state levels, have dramatically enhanced educational opportunities for millions of students disadvantaged by disabilities, despite the substantial costs involved in doing so.<sup>309</sup> For all of the legal, moral, and political reasons set forth in this article, similar access to meaningful, individualized support services should now be extended to students disadvantaged by conditions of poverty.

## VI. CONCLUSION

The federal government and each of the states have determined that to remain competitive in the global economy and to prepare all of our students to be capable citizens in the twenty-first century, it is vital to our national interest that current gaps in educational achievement be substantially narrowed or eliminated. The nation’s egalitarian heritage, specific statutory mandates of the ESEA/NCLB, and important precedents in dozens of state court education adequacy cases and in a broad range of federal equal protection decisions indicate that students from backgrounds of poverty are entitled 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

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<sup>308</sup> *Id.* § 1401(26)(A). 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, *id.* §§ 1413(4), 1414(d)(1)(A), 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. *See id.* §§ 1414–1415.

<sup>309</sup> The IDEA now provides extensive procedural and substantive rights to almost six million students, constituting, in 2009–2010, more than 13% of all elementary and secondary students in the United States. *See* U.S. DEP’T OF EDUC., DATA ACCOUNTABILITY CENTER, *available at* <https://www.ideadata.org/StateLevelFiles.asp>; *see also* JANIE SCULL & AMBER M. WINKLER, *SHIFTING TRENDS IN SPECIAL EDUCATION 1* (Thomas B. Fordham Inst., 2011).

On a per capita basis, the cost of providing requisite services for students diagnosed with educational disabilities is more than twice the cost of educating other students. THOMAS PARRISH ET AL., *STATE SPECIAL EDUCATION FINANCE SYSTEMS, 1999–2000*, at 22–23 (Washington, D.C., Am. Insts. for Research, 2004). The extra costs to the federal and state governments and local school districts of providing these benefits in 2009–2010 was approximately \$68 billion per year, or approximately \$10,500 per eligible child per year. *See* U.S. DEP’T OF EDUC., DATA ACCOUNTABILITY CENTER, *available at* <https://www.ideadata.org/StateLevelFiles.asp> (extrapolating annual per capita spending figure from 17% federal share of total special education expenditures). 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.

“out-of-school” categories like early childhood education, extended-day, after-school, and summer programs, and health and family support services.

Accordingly, I have argued in this Article that a right to comprehensive educational opportunity for economically disadvantaged students needs to be recognized and implemented by the courts, and by the executive and legislative branches. Some might contend that recognition of such a right would set a precedent that would require government to provide adequate housing, nutrition, employment, and other benefits to the poor—in effect, initiating a new war on poverty at a time when the nation’s politics and economy are moving precisely in the opposite direction. But acknowledgment of this right will not lead to such a slippery slope. Throughout its history, the United States has relied on education as the predominant means for maintaining and improving the lives of the poor and disadvantaged, while eschewing the all-inclusive social welfare systems that other industrialized countries have built.<sup>310</sup> Given the primacy of place that education has always occupied in America, it becomes more imperative, not less, that we ensure meaningful educational opportunity for *all* children during tough economic times.<sup>311</sup>

The costs of implementing a right to comprehensive educational opportunity are manageable, and despite sobering near-term economic forecasts, we cannot afford a delay in taking appropriate 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. Demographic projections indicate that children from minority groups, with the highest proportion of the low-income population, will become a majority of the nation’s student population by 2023.<sup>312</sup> In the absence of extensive educational upgrading for these students, the overall educational

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<sup>310</sup> “[O]ver the last century, as governments of other industrialized countries built and enlarged comprehensive social welfare systems to offset inequality among their citizens, U.S. policymakers have invested in public schools and relatively few other supportive social services.” Amy Stuart Wells, *Our Children’s Burden: A History of Federal Education Policies That Ask (Now Require) Our Public Schools to Solve Societal Inequality*, in NCLB AT THE CROSSROADS, *supra* note 101, at 2; *see also* J. Anyon & K. Greene, *No Child Left Behind as an Anti-Poverty Measure*, 34 TCHR. EDUC. Q. 157 (2007).

<sup>311</sup> The President has recognized that even in these difficult times education must retain its primacy of place, and both he and the Congress have shown a willingness to continue to fund high-priority educational programs, even as other domestic programs have been cut heavily. Despite widespread reductions in spending for domestic programs, the FY 2011 federal budget includes increases for high priority educational programs like Head Start, Race to the Top, Promise Neighborhoods, and Investing in Education. Title I and IDEA special education were flat-funded. *See* Alyson Klein, *Federal Budget’s Approval Sets Stage for Future Battles*, EDUC. WEEK, Apr. 20, 2011. The President’s FY2012 budget proposal includes significant increases for Title I, IDEA special education grants, Race to the Top, Promise Neighborhoods, and Investing in Innovation grants. *See* FIRST FOCUS, CHILDREN’S BUDGET 2011, at 37 (2011), available at [http://www.firstfocus.net/sites/default/files/FirstFocus\\_2011.pdf](http://www.firstfocus.net/sites/default/files/FirstFocus_2011.pdf).

<sup>312</sup> CHILDREN’S DEF. FUND, *supra* note 122, at v.

attainment of the labor force will *decline* in the years ahead rather than remain constant or grow like those of our many economic competitors.<sup>313</sup>

In any event, the current economic downturn and pattern of extensive constraints on state budgets will be behind us in a few years. Consequently, extensive planning should begin now—sound administrative practice would probably call for new programs to be phased in over time in any event—to ensure prompt and proper implementation of coordinated programs to meet children's comprehensive educational needs when additional resources again become more readily available.<sup>314</sup>

Important constitutional rights under both state and federal law are at stake here, and the millions of children who should be covered by these rights are entitled to be provided access to meaningful educational opportunities before their educational growth has been stunted or extinguished. In the end, although I believe that the nation will gain potent economic, social, and security benefits by taking this stance, the moral imperative to respond to these students' needs is the most compelling reason to recognize and act promptly to implement a right to comprehensive educational opportunity.

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<sup>313</sup> See generally Thomas Bailey, *Implications of Educational Inequality in a Global Economy*, in *THE PRICE WE PAY*, *supra* note 122. While the United States had the highest rates of high school graduation and college attendance and completion in the past, there are at least fifteen nations that surpass our attainments in these areas at present with others about to pass us, according to the OECD. ORG. FOR ECON. CO-OPERATION & DEV., *EDUCATION AT A GLANCE 2009: OECD INDICATORS 65* (2009), available at <http://www.oecd.org/dataoecd/41/25/43636332.pdf>.

<sup>314</sup> 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 childcare 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).

