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And on the Third Wave: Using Intersectionality to Resurrect Heightened Scrutiny in Public Education Litigation

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This Symposium marks the fiftieth anniversary of San Antonio Independent School District v. Rodriguez*, and seeks to address how society could have been different if the Supreme Court had recognized education as a fundamental right. It also considers how the lack of a fundamental right to education may have led to the under-education of our population and may be linked to other issues like economic inequality and the shifting landscape of fundamental rights.*

This Article focuses on the ties between race and socioeconomic status in public school K–12 education. It analyzes the impact of the Rodriguez *holding that education is not a fundamental right, in federal courts as well as in state courts. All state constitutions have education clauses, and in some of them, education is a fundamental right, but there are different interpretations of what the right entails. Some states find it mandates substantive equality for all students, while others find it to be a floor of adequate education for all, without regard to differences above that floor.*

The increasing reluctance to expanding fundamental rights, especially since the Dobbs v. Jackson Women's Health Organization *decision, means that litigants need to pursue other strategies to achieve educational equity in public school systems. This Article makes the case, drawing upon precedents considering gender and illegitimacy, that impoverished children in low-funded school districts meet the requirements for quasi-suspect class status.*

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If impoverished childhood is treated as a quasi-suspect class in the education context, then those classifications would be subject to intermediate scrutiny. School districts then would have to establish an important government interest in local education financing schemes, and significantly differential funding based on property taxes would have to meet the test of "substantially related means." Following the rationale of William Penn School District v. Pennsylvania Department of Education*, the differential funding schemes would fail under intermediate scrutiny. Stepping away from substantive due process to an equal protection analysis bolsters the arguments for proponents of educational equity.*

INTRODUCTION

Meant to be a "sequel" of sorts to *Brown v. Board of Education*,[1] as Martha Minow notes,[2] the litigants in *San Antonio Independent School District v. Rodriguez* sought a ruling that extended beyond separate being inherently unequal to hold that unequal funding also violates the equality mandate of *Brown*.[3] Newly appointed conservative Justices selected by the Nixon administration,[4] like the new villains that appear in a Marvel action sequel, dispelled any hope of expanding educational rights when *Rodriguez* formally held that education is not a fundamental right under the United States Constitution.[5]

Federal courts have continually reaffirmed the holding of *Rodriguez*,[6] until the Sixth Circuit in *Gary B. v. Whitmer* temporarily established literacy as a fundamental right under the Constitution.[7] That holding lasted for less than two months until the case was reheard en banc, and the parties' settlement vacated the decision.[8] Without status as a fundamental right, courts apply rational basis review and uphold any "legitimate" state interest,[9] notwithstanding the rationale of *Plyler v. Doe*, which held that prohibiting undocumented school-age children from attending public

1. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

2. Martha Minow, San Antonio Independent School District v. Rodriguez *at Fifty: Contingencies, Consequences, and Calls to Action*, 55 LOY. U. CHI. L.J. 361, 362 (2023) ("It was a sequel to *Brown v. Board of Education*, but the Court declined the arguments for educational equality and opportunity."); *see generally* MARTHA MINOW, IN *BROWN*'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK (2011).

3. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

4. S. Sidney Ulmer & John A. Stookey, *Nixon's Legacy to the Supreme Court: A Statistical Analysis of Judicial Behavior*, 3 FLA. ST. U. L. REV. 331, 340 (1975) (noting that during Richard Nixon's presidency, he appointed the following Supreme Court Justices: Justice Harry Blackmun, Justice William Burger, Justice Lewis Powell, and Justice William Rehnquist).

5. *Rodriguez*, 411 U.S. at 37 ("In one further respect we find this a particularly inappropriate case in which to subject state action to strict judicial scrutiny.").

6. *See* Sandlin v. Johnson, 643 F.2d 1027, 1029 (4th Cir. 1981) ("Nor is education a fundamental right which would trigger strict scrutiny of claims of denial of equal protection."); Shaffer v. Bd. of Sch. Dirs. of Albert Gallatin Area Sch. Dist., 687 F.2d 718, 720 (3d Cir. 1982) ("The Supreme Court . . . has said that arguments are 'unpersuasive' to establish 'that education is a fundamental right or liberty.'" (quoting *Rodriguez*, 411 U.S. at 37)); Toledo v. Sanchez, 454 F.3d 24, 33 (1st Cir. 2006) (same).

7. Gary B. v. Whitmer, 957 F.3d 616, 621 (6th Cir. 2020) (holding literacy is a fundamental right deeply rooted in Michigan history and tradition), *reh'g en banc granted, opinion automatically vacated by circuit rule*, 958 F.3d 1216 (6th Cir. 2020).

8. *Gary B.*, 958 F.3d at 1216.

9. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 437 (1985) (analyzing whether a city ordinance was "rationally related to the city's legitimate interests" after concluding that "no fundamental right was implicated").

schools violated the Constitution because the classification was not based on furthering a "substantial" goal of the state.[10]

In the fifty years since *Rodriguez*, the issue of fundamental rights status has largely been a state-by-state consideration, with each state analyzing whether education is a fundamental right under its own state constitution.[11] Some states find that it is a fundamental right, while others do not.[12] Still others have considered the issue a political question and thus non-justiciable.[13]

In states that do not consider education a fundamental right, the litigation has focused mainly on the Equal Protection Clause and inequalities in funding.[14] Studies show that increased funding, if done well, can substantially increase educational attainment levels and other outcomes.[15] However, funding has thus far been considered an economic issue and therefore subject to rational basis review, where it is often found to be rationally serving a legitimate government interest in local control.

In February 2023, a Pennsylvania trial court held education as a fundamental right for all school-age children in the state.[16] The trial court's exhaustive analysis demonstrates its care and attention to defining the parameters of the right, supported by history and tradition.[17] Its limitation based on age is groundbreaking. The case, as discussed below, provides strong arguments that other state court litigants can employ to expand the number of states that find education a fundamental right. These

10. Plyler v. Doe, 457 U.S. 202, 226 (1982).

11. *Rodriguez*, 411 U.S. at 58–59.

12. Chris Chambers Goodman, *Now Children Learn Better: Revising NCLB to Promote Teacher Effectiveness in Student Development*, 14 U. MD. L.J. RACE RELIG. GENDER & CLASS 81, 86–87 (2014) ("[C]ourt decisions are rife with conflicts . . . . This debate over adequacy and equality continues to hamper significant educational opportunity reform in most states."); Amy L. Moore, *When Enough Isn't Enough: Qualitative and Quantitative Assessments of Adequate Education in State Constitutions by State Supreme Courts*, 41 U. TOL. L. REV. 545, 560 (2010) (indicating that all fifty states' constitutional provisions demand that "states make education available to its children," however, "not every state elaborates on what type of education ought to be supplied" (citing MARTHA M. MCCARTHY & PAUL T. DEIGNAN, WHAT LEGALLY CONSTITUTES AN ADEQUATE PUBLIC EDUCATION?: A REVIEW OF CONSTITUTIONAL, LEGISLATIVE, AND JUDICIAL MANDATES 120–26 (1982))).

13. Moore, *supra* note 12, at 573 n.246 ("Three states explicitly did not reach the question: Arkansas, Maine, and Rhode Island.").

14. For a discussion of state courts declining to find a right for adequate or equal education, see *infra* Sections I.B, III.B.

15. *See, e.g.*, Davíd G. Martínez & Julian Vasquez Heilig, *An Opportunity to Learn: Engaging in the Praxis of School Finance Policy and Civil Rights*, 40 L. & INEQ. 311, 316 (2022) ("[E]mpirical evidence also supports the notion that school funding matters not only for the holistic health of the schooling system, but also to provide a high-quality system of formal education that increases students' capacity to learn and achieve within the schooling pipeline.").

16. William Penn Sch. Dist. v. Pa. Dep't of Educ., 170 A.3d 414, 463 (Pa. 2017).

17. *Id.* at 460.

arguments focus on the children's lack of control over their educational opportunities. Choices by their parents, school district officials, and taxpayers, over resources, curriculum and funding priorities, are all outside of the children's control. Yet, these decisions significantly impact their educational opportunities, prospects, and potential.

Part I of this Article begins with the background of the *Rodriguez* case and subsequent litigation over whether state constitutional rights to education require equal educational opportunity or adequate educational resources, updating the author's previous work in this area. Part II then addresses the concept of intersectionality in the context of *Plyler v. Doe*, where the Court held that denying undocumented school children access to public schools violated the Equal Protection Clause. In doing so, Part II also explains the impact of both race and class on continuing educational inequities since *Rodriguez*. Next, Part III analyzes the trial court's decision in *William Penn School District v. Pennsylvania Department of Education*, which held that a fundamental right to education for all school-age children exists under the Pennsylvania State Constitution and describes its implications for other state court litigation. Part IV concludes with a proposal—that litigants in federal court move away from the fundamental rights approach in educational inequality cases, given the current Court majority's reticence to find new fundamental rights, and instead focus on the Equal Protection Clause, arguing that heightened scrutiny should apply to impoverished children.

I. *RODRIGUEZ* AND SUBSEQUENT LITIGATION ON EQUALITY, ADEQUACY, AND COMPULSORY ATTENDANCE

While *Brown v. Board of Education* paved the way for desegregated education because separate was inherently unequal, integration did not equalize educational opportunities. Integration, when it actually occurred, provided more opportunities for equal education, but those opportunities did not materialize for many students. This Part traces the post-*Brown* litigation on the meaning of equal education, adequate education, and some arguments against compulsory attendance laws.

Section I.A describes the Supreme Court rationale in *San Antonio v. Rodriguez*, and its holding that education is not a federal fundamental right. Section I.B next outlines state court decisions over the quality of education required under their constitutions, and the short-lived federal decision in *Gary B. v. Whitmer*, which temporarily found one component of education—access to literacy—to be a federal fundamental right. Section I.C then dives deeper into the *Gary B.* analysis to explain how compulsory attendance laws, in the absence of adequate education, violate due process. Looking ahead, Section I.D analyzes the *Gary B.* discussion

of the link between race and public education, to provide arguments for other jurisdictions to consider.

A. Education is not a Fundamental Right under Federal Law

San Antonio v. Rodriguez was brought to challenge the Texas system of financing public schools.[18] The financing scheme provided that the state would finance approximately 80 percent of the cost of public education, and the school districts would provide the remaining 20 percent by imposing real property taxes.[19] Because of the different home assessment values between affluent and impoverished districts, the amount of funding that impoverished districts could collect from their local property taxes did not cover the remaining 20 percent; thus, there was a funding disparity across districts.[20] The Supreme Court was asked to consider whether this financing scheme disadvantaged a suspect class or impinged upon a fundamental right.[21] The Court explained that education was not explicitly protected under the Federal Constitution, because education is not mentioned and public education did not exist at the time of the Founding. Even though it is of "undisputed importance," education is not a fundamental right under Federal Constitution.[22] The Court also found that no suspect class was being harmed, and because there was no consideration of quasi-suspect class status, rational basis review was the appropriate standard for courts to apply in educational inequality litigation.[23]

Justice Brennan dissented on the grounds that "there can be no doubt that education is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed

18. *Rodriguez*, 411 U.S. at 4–5.

19. *Id.* at 9.

20. *Id.* at 9–10. To be certain, the Court stated that

> The districts' share, known as the Local Fund Assignment, is apportioned among the school districts under a formula designed to reflect each district's relative taxpaying ability. The Assignment is first divided among Texas' 254 counties pursuant to a complicated economic index that takes into account the relative value of each county's contribution to the State's total income from manufacturing, mining, and agricultural activities. It also considers each county's relative share of all payrolls paid within the State and, to a lesser extent, considers each county's share of all property in the State. Each county's assignment is then divided among its school districts on the basis of each district's share of assessable property within the county. The district, in turn, finances its share of the Assignment out of revenues from local property taxation.

Id. (footnotes omitted).

21. *Id.* at 17.

22. *Id.* at 35.

23. *Id.* at 18.

by the First Amendment."[24] Therefore, it should be subject to strict scrutiny, under which the Texas financing scheme would fail.[25] Justice Marshall, along with Justice Douglas, also dissented largely on the grounds that the political process was not the appropriate forum for reconciling these concerns, given that "countless children unjustifiably receive inferior educations that 'may affect their hearts and minds in a way unlikely ever to be undone.'"[26]

B. The State Courts Debate Over Adequate or Equal Education

Rodriguez foreclosed consideration of education as a fundamental right under the Constitution but allowed states to consider its status under their state constitutions.[27] While all states have some type of constitutional provision regarding public education, fewer than ten states have found education to be a fundamental right or interest.[28] Even in those states that declare education to be a fundamental right or interest, that interest or right does not encompass adequate funding necessary to exercise that right.[29]

On school finance litigation, some states require an "adequate" level of education for all students.[30] One example is the State of Washington, where the court held that there is a judicially enforceable duty in the state constitutional requirement of a minimum level of education.[31] Other

24. *Id.* at 63 (Brennan, J., dissenting).

25. *Id.* (Brennan, J., dissenting).

26. *Id.* at 71–72 (Marshall, J., dissenting) (quoting Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954)).

27. *Id.* at 39 ("But we think it plain that, . . . [the Texas school financing system] should be scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution.").

28. Goodman, *supra* note 12, at 87 n.11 ("[T]he following states have identified a 'qualitative right' to an education: Connecticut, South Dakota, Colorado, Montana, Kansas, Texas, Arkansas, New York, Wisconsin, South Carolina, Arizona, New Hampshire, North Carolina, Ohio, Vermont, Wyoming, Massachusetts, Idaho, Kentucky, West Virginia, and Washington." (quoting Brief for Education Law Center and Campaign for Educational Equity Teachers College, Columbia University, as Amici Curiae Supporting Plaintiffs-Appellants at 7 n.2, Robles-Wong vs. State of California, No. RG-10524770, (Cal. Ct. App., 2013) (available at https://perma.cc/Q3CR-LEYC)); *see also* Moore, *supra* note 12 at 561 n.142 (analyzing state constitutional text, to note the states' that require education to be "uniform, "efficient," and "general").

29. Goodman, *supra* note 12, at 87–88; *see also* MARTHA M. MCCARTHY & PAUL T. DEIGNAN, WHAT LEGALLY CONSTITUTES AN ADEQUATE PUBLIC EDUCATION?: A REVIEW OF CONSTITUTIONAL, LEGISLATIVE, AND JUDICIAL MANDATES 11–12 (1982) (noting that some courts that have found education to be a fundamental right "have not espoused" the specified minimum level of education required).

30. States that require an "adequate" or "sufficient" level of education include Florida, Georgia, New Mexico, and Wyoming. MCCARTHY & DEIGNAN, *supra* note 29, at 120–26.

31. Seattle Sch. Dist. No. 1 of King Cnty. v. State, 585 P.2d 71, 95 (Wash. 1978).

states have an "equality" mandate[32]—which means that regardless of the level of education provided, that same level of educational opportunity must be provided equally to all, as recognized federally in *Brown v. Board* and *Serrano v. Priest* in California.[33] Even in these jurisdictions, equality is rarely enforced by the courts.[34]

In *Gary B. v. Whitmer* (vacated within weeks), the Sixth Circuit established literacy as a fundamental right that was deeply rooted in the history and tradition of the Wisconsin Constitution.[35] The court examined the *Plyler v. Doe* decision and determined that "while still couched in rational basis review, the *Plyler* court held that where a discrete group of children is denied a basic public education, such a policy can survive only if it 'furthers some substantial state interest.'"[36]

C. Compulsory Attendance Policies Can Amount to Arbitrary Detention

The *Gary B.* court next examined the plaintiffs' compulsory attendance claim that the right to freedom of movement and freedom from state custody is restricted when the state forces them to attend "schools in name only."[37] The court noted that it "seems beyond debate that confining students to a 'school' that provides no education at all would be an arbitrary

32. MCCARTHY & DEIGNAN, *supra* note 29, at 120–26.

33. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 493 (1954) ("[W]here the state has undertaken to provide it, [education] is a right which must be made available to all on equal terms."). Serrano v. Priest, 557 P.2d 929, 957 (Cal. 1976) ("[M]aking the quality of educational opportunity available to a student dependent upon the wealth of the district in which he lives, is manifestly inconsistent with fundamental constitutional provisions guaranteeing the equal protection of the laws . . . .").

34. *See* Chris Chambers Goodman, *Class in the Classroom: Poverty, Policies, and Practices Impeding Education*, 27 AM. U. J. GENDER & SOC. POL'Y & L. 95, 112–13 & nn.92–95 (2019) (discussing the use of Professor Weinhart's theory of proportionality, which states each student should receive "the same consideration of his needs and interests," to address both equality and adequacy simultaneously). Professor Weinhart believes proportionality can also balance the vastly different concepts of equality and liberty to mitigate the harm caused by educational disparities. *Id.* at 112. *See also* Aaron Y. Tang, *Broken Systems, Broken Duties: A New Theory for School Finance Litigation*, 94 MARQ. L. REV. 1195, 1221 (2011) ("For in the general absence of clear constitutional text obligating the states to provide first-rate educational opportunities to all children, many courts have ruled that the state's educational duty is limited to meeting a 'sound basic education' or 'minimally adequate education' standard, rejecting plaintiffs' requests to defer to the more robust adequacy concept embodied in state academic content standards." (first quoting Abbeville County Sch. Dist. v. State, 515 S.E.2d 535, 540–41 (S.C. 1999); and then quoting Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 664–67 (N.Y. 1995))).

35. Gary B. v. Whitmer, 957 F.3d 616, 649 (6th Cir. 2020), *reh'g en banc granted, opinion automatically vacated by circuit rule*, 958 F.3d 1216 (6th Cir. 2020).

36. *Id.* at 635 (quoting Plyler v. Doe, 457 U.S. 202, 223–24, 230 (1982)).

37. *Id.* at 621.

detention, prohibited by the common law's understanding of due process tracing back to the Magna Carta."[38]

Recognizing that the state does have broader authority to regulate conduct applying to children—often on the grounds that they are especially vulnerable—the court noted that where the conduct regulation has very little relationship to the protection goal, principles of liberty outweigh regulation.[39] The concept of liberty is based on "the idea that the government exists to serve the individual, not that the individual exists to be subservient to government or to a majority that controls government."[40] Children's status of being minors "does not alter our conclusions," the court announced, using an example of the ancient city-state of Sparta. Sparta assembled boys from the age of seven to be trained and educated to serve the purposes of the state. The court noted that "it hardly will be affirmed that any Legislature could impose such restrictions upon the people of a State without doing violence to both the letter and spirit of the Constitution."[41]

While other circuits have acknowledged concerns about compulsory attendance laws, they often rule in favor of school district policies and against parents' religiously-motivated arguments.[42] For instance, the Eighth Circuit determined that a testing requirement for homeschooled children did not violate the Constitution because the parents had no fundamental right based on religious grounds to supervise their children's education in a way that prohibited testing.[43] Because the state standards and district practices were necessary to fulfill state constitutional mandates on education, restricting parental liberty to forego these mandates did not violate any constitutional principles.[44]

38. *Id.* at 638.

39. *See, e.g.*, Aladdin's Castle, Inc. v. City of Mesquite, 630 F.2d 1029, 1043 (5th Cir. 1980), *rev'd*, 455 U.S. 283 (1982) (determining that there is no issue of special vulnerability in preventing children from using a coin-operated amusement device like a videogame, in the absence of parental supervision).

40. *Id.* at 1045.

41. *Id.* at 1046 (quoting Meyer v. Nebraska, 262 U.S. 390, 402 (1923)).

42. *See, e.g.*, Duro v. Dist. Att'y, Second Jud. Dist. of N.C., 712 F.2d 96, 99 (4th Cir. 1983) (unsuccessfully challenging North Carolina's compulsory school attendance laws on religious grounds); Murphy v. Arkansas, 852 F.2d 1039, 1044 (8th Cir. 1988) (upholding the constitutionality of an Arkansas law requiring parents of homeschooled children to administer annual standardized tests and a comprehensive performance test at age fourteen).

43. *Murphy*, 852 F.2d at 1043.

44. *Id.* ("The recognition of such a right would fly directly in the face of those cases in which the Supreme Court has recognized the broad power of the state to compel school attendance and regulate curriculum and teacher certification.").

Some circuits apply a balancing test when the parent's interest in preventing compulsory school attendance is expressed on the grounds of religious liberty. For instance, the Fourth Circuit held that the state's compelling interest in compulsory education outweighed a parent's religious rights. In this case, the parent could not demonstrate that homeschooling would "prepare his children to be self-sufficient participants in our modern society or enable them to participate intelligently in our political system, which, as the Supreme Court stated, is a compelling interest of the state."[45] The court recognized the parent's fundamental rights to free exercise, and the right to participate in decisions regarding the upbringing of one's children.[46] In this case, it seems that if the parent had provided additional evidence of assessments or some other mechanism to evaluate the effectiveness of the homeschooling program, the court may have granted relief from mandatory testing.

As Professor Kristine Bowman explains,[47] the current "parents' rights movement" is focused on curriculum and anti-critical race theory and anti-trans policies, practices, and legislation. The movement emphasizes "liberty over community" and fails to approach education as a "public good."[48] Diminishing notions of community and public good leads to siloing, and an "in-group/out-group" mentality, which diminishes intergroup contact and increases polarization.[49] The rejection of "expertise" by many exacerbates these divisions,[50] as it can lead parents to believe that they themselves are better determinants of education policy, curricula, and practices than the education experts running the school districts and teaching in the schools.[51] Once again, the children's educational opportunities are curtailed by actors and actions beyond their control.

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45. *Duro*, 712 F.2d at 99.

46. *Id.* at 98 ("Nevertheless, in balancing Duro's religious belief against North Carolina's interest in compulsory education, keeping in mind both the children's future well-being and their state constitutional right to an education . . . the balance in this case tips in favor of the state.").

47. Kristine L. Bowman, Assoc. Dean & Professor of L., Mich. State Univ., Speech at the Loyola University Chicago Law Journal Symposium: San Antonio Independent School District v. Rodriguez: Fifty Years Later (Mar. 31, 2023) (on file with the Loyola University Chicago Law Journal).

48. Lainie Rutkow & Joshua T. Lozman, *Suffer the Children: A Call for United States Ratification of the United Nations Convention on the Rights of the Child*, 19 HARV. HUM. RTS. J. 161, 179 (2006).

49. Susan D. Carle, *Acting Differently: How Science on the Social Brain Can Inform Antidiscrimination Law*, 73 U. MIA. L. REV. 655, 676–82 (2019).

50. *See, e.g.*, TOM NICHOLS, THE DEATH OF EXPERTISE: THE CAMPAIGN AGAINST ESTABLISHED KNOWLEDGE AND WHY IT MATTERS, at x (2017) (noting American's increasing pride in their lack of knowledge, especially concerning public policy).

51. *Id.* at 5 ("Americans now believe that having equal rights in a political system also means that each person's opinion about anything must be accepted as equal to anyone else's.").

D. The Inextricable Ties between Race and Public Education

Returning to the *Gary B.* case, the court next examined how the history of public education "is inextricably tied to race."[52] Analyzing *Rodriguez*, the court addressed the dual approach to school finance and the notion that local funding via county property taxes was a more significant contributor than state funds.[53]

The court then determined that access to literacy is a fundamental right and held that "the state provision of the basic minimum education is a longstanding presence in our history and tradition and is essential to our concept of ordered constitutional liberty."[54] Using the Court's substantive due process cases, it reasoned that access to literacy should be recognized as a fundamental right.[55]

Arguments against recognizing education as a fundamental right included deference to the political process and that the due process clause provides only negative, not positive, rights. The panel rejected these arguments, explaining that the Court has recognized positive fundamental rights and "[a]ccess to literacy is such a right."[56] The dissent disputed the notion of process equaling substance, echoing Justice Thomas's views on this point.[57] This ruling was subsequently vacated as the parties reached a settlement, and thus it has no precedential value.[58] Its arguments may be persuasive to other jurisdictions and will be analyzed in that context below.

II. INTERSECTIONALITY AND *PLYLER V. DOE*

The notion of intersectionality, first conceived by Professor Kimberlé Crenshaw, examines the interactions between various categories of identity and difference and how they influence our lives in the law.[59] Her groundbreaking work identified the challenge faced by Black women

52. Gary B. v. Whitmer, 957 F.3d 616, 645 (6th Cir. 2020), *reh'g en banc granted, opinion automatically vacated by circuit rule*, 958 F.3d 1216 (6th Cir. 2020).

53. *Id.* at 645–46 (explaining the dual approach as a system to which both local school districts and the state contribute).

54. *Id.* at 649.

55. *Id.* at 642.

56. *Id.* at 662.

57. *Id.* at 666 (Murphy, J., dissenting).

58. Gary B. v. Whitmer, 958 F.3d 1216 (6th Cir. 2020).

59. *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139 (1989) ("[She chose] this title as a point of departure in [her] efforts to develop a Black feminist criticism because it sets forth a problematic consequence of the tendency to treat race and gender as mutually exclusive categories of experience and analysis.").

when they filed discrimination complaints; they were often forced to designate their experiences as either gender-based or race-based, even though many asserted that the discrimination was tied to their full identity as Black women.[60] The assumed homogeneity in various categories of identity is destructive for those with overlapping identities. Being compelled to select one identity as the primary focus also makes it more difficult to establish a prima facie discrimination case successfully.

For instance, when a plaintiff claims discrimination based on race, she must show that she is being treated differently than people of another race. However, if she is claiming discrimination based on being a Black woman, she needs to establish two points to meet the prima facie case. First, she must demonstrate that she is being treated differently than other women of all races. If she is being treated similarly poorly as Latinas, she cannot establish differential treatment based on gender. Second, she must demonstrate that she is being treated differently than all Black people. But if all the Black men are treated as poorly as her, then she cannot establish differential treatment. For these reasons, potential plaintiffs with intersectional discrimination claims face double difficulties to establish discrimination under current doctrine.

For children in impoverished circumstances in under-resourced schools, each of which are circumstances beyond the children's ability to control, intersectional identities can provide a more compelling case for heightened scrutiny than the Supreme Court has considered. The overlap between socioeconomic status,[61] race,[62] and, in some cases, national origin,[63] demonstrates that there are many layers of identity involved in determining who constitutes the "class" for purposes of determining whether a classification violates the Constitution. Without considering intersectional identities properly, these students have to prove three

60. *Id.* at 140 ("[I]n race discrimination cases, discrimination tends to be viewed in terms of sex- or class-privileged Blacks; in sex discrimination cases, the focus is on race- and class-privileged women.").

61. *See supra* Section I.A (discussing the Court's application of rational basis to educational inequality litigation including *Rodriguez*, which refused to apply strict scrutiny to a case challenging an education funding scheme relying on local property taxes).

62. *See infra* Part IV (noting race as the first of two classes subject to strict scrutiny under the Court's equal protection doctrine). In *Frontiero v. Richardson*, the Court ruled that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny." 411 U.S. 677, 688 (1973). However, three years later the Court, in *Craig v. Boren*, overruled *Frontiero*, and held: "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." 429 U.S. 190, 197 (1976).

63. *See infra* Part IV (noting national origin as the second of two classes subject to strict scrutiny under the Court's equal protection doctrine).

things to make a prima facie case—that they are being treated worse than other students: (1) of similar socioeconomic status; (2) who are white; and (3) from the United States. Because some white students of low socioeconomic status will experience the same sub-standard educational opportunities, the prima facie case will fail under current doctrine.

As recounted in Section I.B, the Court in *Plyler v. Doe* addressed the issue of whether the State of Texas could deny free public education to undocumented school-aged children based on their status of being undocumented when all other children were eligible for free public education. While recognizing that undocumented status "is not relevant to any proper legislative goal," nor is it an "immutable characteristic since it is the product of conscious, indeed unlawful, action," the Court specifically held that the classification "imposes its discriminatory burden on the basis of the legal characteristic over which children can have little control."[64] This lack of control supports the conclusion that the classification may be unfair. An unfair classification may not even be rational. The Court accepted that because education was not deemed a fundamental right after the *Rodriguez* decision, a compelling justification for this classification was unnecessary.[65]

The Court, however, went on to explain that the classification "can hardly be considered rational unless it furthers some substantial goal of the State."[66] This latter phrasing suggests that the Court was applying a higher standard of review than rational basis, as "substantial" goals are often analogized to "important" goals, and thus implicate intermediate scrutiny.[67] The *Plyler* Court concluded with this language: "If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here."[68]

The *Plyler* Court's phrasing is reminiscent of *Carolene Products* Footnote Four, which states that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching

64. Plyler v. Doe, 457 U.S. 202, 220 (1982).

65. *Id.* at 223 ("[A] State need not justify by compelling necessity every variation in the manner in which education is provided to its population.").

66. *Id.* at 224.

67. *Id.* ("In light of these countervailing costs, the discrimination [at issue] can hardly be considered rational unless it furthers some substantial goal of the State.").

68. *Id.* at 230.

judicial inquiry."[69] Just as it is unfair to penalize children for the actions of their parents in entering the country without permission or proper documentation, it is also unfair to penalize the children for the actions, inactions, or oppression of their parents who have limited employment opportunities and thus little choice but to live within the boundaries of school districts that provide only substandard educational opportunities.

In *Plyler*, we saw the intersection issue of children of undocumented parents and children who themselves were undocumented.[70] This immigration status intersected for many of the children with poverty and also with which language they, or their parents, were able to speak. Each of these identities is beyond the control of the children. Any deficits in English language acquisition and comprehension are often overlooked, when they are obvious markers for national origin discrimination, which generally is subject to strict scrutiny.[71]

In *Rodriguez*, the primary issue was explicitly poverty, though there were underlying implications related to national origin and language. Despite these nuances, the Supreme Court chose the lowest common denominator of poverty, thereby applying only rational basis review.[72] However, an intersectional approach likely would have found heightened scrutiny to be appropriate, given the overlap of national origin and language for a large percentage of the affected students.

States should be the guardians of public education guaranteed by their state constitutions, particularly when the parents are not necessarily in a position to effectively advocate or pay extra for their student's education. When a parent cannot vote, lacks the education or information to vote effectively, or is constrained by socioeconomic factors (having little choice but to live in an area that has low rent and is therefore affordable) to live in areas with under-resourced schools, the challenges for students increase significantly. In these circumstances, it is incumbent upon the state to step in and provide the additional protection these students require

69. United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938).

70. *Plyler*, 457 U.S. at 205 ("The question presented by these cases is whether, consistent with the Equal Protection Clause of the Fourteenth Amendment, Texas may deny to undocumented school-age children the free public education that it provides to children who are citizens of the United States or legally admitted aliens.").

71. *Infra* Part IV. *See also* Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 310 (2013) (holding that treatment on the account of race or ethnic origin is inherently suspect); Graham v. Richardson, 403 U.S. 365, 372 (1971) (holding alienage classifications must, generally, meet strict scrutiny).

72. *Plyler*, 457 U.S. at 223 (noting that the deference applied to education is not strict scrutiny); *see also* San Antonio Indep. Sch. Dist. v. Rodriquez, 411 U.S. 1, 23 (1973) (determining that the statute classified on the basis of poverty and applying rational basis review).

to satisfy the state constitutional mandate of adequate or equal education, depending on the jurisdiction.

For these reasons, an intersectional approach is the best mechanism for augmenting the level of scrutiny for children living in poverty and attending under-resourced public schools.

III. *WILLIAM PENN II*: THE SEQUEL'S IMPLICATIONS FOR STATE COURT LITIGATION

The Pennsylvania Supreme Court first heard *William Penn* in 2017. The court held that challenges to the system of funding public education were justiciable.[73] The court noted that the "[p]etitioners are entitled to the opportunity" to "substantiate and elucidate the classification at issue and to establish the nature of the right to education, if any, to determine what standard of review the lower court must employ to evaluate their challenge."[74] This ruling, remanding the case to the trial court, provided a beacon of hope that now illuminates an entire landscape in the Commonwealth of Pennsylvania.

This Part provides a deep dive into the most significant education law case of the year, *William Penn II*. Section III.A describes the court's analysis of other state constitutions as persuasive authority on whether education is a fundamental right. Then, Section III.B shifts to the counter-argument, acknowledging the states that decline to find education to be a fundamental right, and explaining why those authorities are not persuasive. Section III.C next analyzes the court's discussion of the appropriate level of scrutiny for the fundamental right, what constitutes meaningful local control, and its conclusion that the state did not meet the compelling government interest prong. Section III.D explains the implications of education as a fundamental right under state constitutions.

A. Education as a Fundamental Right under State Constitutions

The state trial court issued its ruling on February 7, 2023,[75] holding that "[e]ducation is a fundamental right guaranteed by the Pennsylvania Constitution to all school-age children residing in the Commonwealth," and finding that the Pennsylvania Constitution imposes an obligation to provide education "that does not discriminate against students based on the level of income and value of taxable property in their school

73. William Penn Sch. Dist. v. Pa. Dep't of Educ., 170 A.3d 414, 463 (Pa. 2017).

74. *Id.* at 464.

75. William Penn Sch. Dist. v. Pa. Dep't of Educ. (*William Penn II*), 294 A.3d 537, 964 (Pa. Commw. Ct. 2023).

districts."[76] The court order also specifically found that students in these low-income and low-property value districts "are deprived of the same opportunities and resources as students who reside in school districts with high property values and incomes," and that this disparity "is not justified by any compelling government interest nor is it rationally related to any legitimate government objective."[77] The order concluded with this language: "[a]s a result of these disparities, Petitioners and students attending low-wealth districts are being deprived of equal protection of law."[78]

In an over 400-page decision, the court painstakingly evaluated the evidence and arguments of the parties and amici. The court examined similarly-worded education clauses from other state constitutions, such as those of Minnesota, Kentucky, Wyoming, and West Virginia.[79] The court also discussed other states that have found education to be a fundamental right based on other language in their state constitutions, including California, New Hampshire, New Mexico, and North Carolina.[80] The court rejected the legislative respondents' argument that while education is important, that does not mean it rises to the level of a fundamental right.[81] The court also rejected the argument that rational basis review should be the appropriate standard even if the court were to determine that education is a fundamental or important right.[82]

The Law Professor Amici Brief argued that strict scrutiny should apply and that wealth disparities must be demonstrated as a necessary and narrowly tailored means to serve a compelling interest.[83] The court found that whether education is a fundamental right "is a matter of first impression in Pennsylvania . . . ."[84] Analyzing the language of the clause in the Pennsylvania Constitution, the court determined that it "indisputably imposes a duty on the General Assembly to maintain and support a 'thorough and efficient system of public education.'"[85] That duty, the court

76. *Id.* at 964.
77. *Id.* at 964–65.
78. *Id.*
79. *Id.* at 938.
80. *Id.* at 938–39.
81. *William Penn II*, 294 A.3d at 909 ("[T]he Court finds it unnecessary to define the constitutional standard beyond that it requires that every student receive a meaningful opportunity to succeed academically, socially, and civically, by receiving a comprehensive, effective, and contemporary education.").
82. *Id.* at 957.
83. *Id.* at 942 (citing Brief for Law Professors as Amici Curiae in Support of Petitioner at 26, William Penn Sch. Dist. v. Pa. Dep't of Educ., 294 A.3d 537, 946 (Pa. Commw. Ct. 2023) (No. 587 M.D. 2014)).
84. *Id.* at 945.
85. *Id.* at 946 (quoting PA. CONST. art. III, § 14).

found, "at least implicitly, creates a correlative right in the beneficiaries of the system of public education—the students."[86] That duty and corresponding right, in addition to the fact that the Education Secretary in the Commonwealth of Pennsylvania "is the only cabinet-level official required by the Constitution,"[87] and the fact that the Constitution requires education funding,[88] means that "education is an elevated right."[89]

The history of education, which has "been heralded as necessary to the continuing viability of the Commonwealth," and was recognized by the founders of the state even prior to its constitution, leads the court to conclude that "the right to public education is a fundamental right explicitly and/or implicitly derived from the Pennsylvania Constitution."[90] The decision referenced other state decisions recognizing education as a fundamental right.[91] The court examined cases from Minnesota, Wyoming, Maryland, Ohio, Kentucky, North Carolina, California, New York, and Idaho, and concluded that "the bulk of other jurisdictions have considered whether education is explicitly or implicitly guaranteed by their constitutions . . . [and] have found education is a fundamental right, much like this court."[92] For example, Pennsylvania and Minnesota have rejected the argument that education cannot be fundamental unless it is enumerated in the Constitution's Bill or Declaration of Rights.[93]

The *William Penn II* court noted that Minnesota's and West Virginia's Supreme Courts have held that their state constitutions' mandate to maintain "a thorough and efficient" public school system *implies* that education is a fundamental right.[94] Minnesota's and North Carolina's Education Clauses explicitly place a duty upon the legislature to ensure the system is "general and uniform."[95] North Carolina's Constitution also

86. *Id.*

87. *Id.* at 947 (citing PA. CONST. art. IV, §§ 1, 8(a)).

88. *Id.* (citing PA. CONST. art. III, § 11).

89. *Id.*

90. *Id.*

91. *Id.* at 947–49 (citing Pauley v. Kelly, S.E.2d 859, 874 (W. Va. 1979); Skeen v. State, 505 N.W.2d 299, 313 (Minn. 1993); Washakie Cnty. Sch. Dist. No. One v. Herschler, 606 P.2d 310, 333 (Wyo. 1980)).

92. *Id.* at 954–55.

93. *Id.* at 948–49 (holding that specific enumeration in the state constitution is not a necessary requirement for fundamentality). Even courts in states where education is expressly included in its Constitution's Bill of Rights do not always hold that this is a prerequisite for a finding of fundamentality. For instance, in addition to its Bill of Rights, Wyoming finds support for its contention that education is a fundamental right in "more specific education provisions" such as those "including education funding in the general appropriation bill" or "those establishing the Secretary as the only unelected member of the Governor's cabinet mandated by the Constitution." *Id.* at 949.

94. *Id.* at 947–48.

95. *William Penn II*, 294 A.3d at 948–52.

requires the General Assembly to "provide by taxation and otherwise" a mechanism for ensuring that education is provided.[96] Similar to the Pennsylvania Constitution's acknowledgment that proper education is necessary to "serve the needs of the Commonwealth," the Minnesota Supreme Court held that adequate education ensures "the stability of a republican form of government."[97] The State of Kentucky also "relied heavily on the history of its education clause" to support its finding of education as a fundamental right.[98]

B. Other States Decline to Find Education to be a Fundamental Right

However, "[n]ot all states with analogous education clauses have found education to be a fundamental right."[99] In declining to hold education as a fundamental right, the states of Maryland,[100] Ohio,[101] New York,[102] and Colorado,[103] each rejected the "constitutional text" test established in *Rodriguez*, which looks at whether education is explicitly or implicitly included in the state's constitution.[104] These courts drew a distinction between the appropriate test to be used in the federal and state contexts. Ohio reasoned that while the constitutional text test may have "some applicability" to the Federal Constitution, it does not indicate "whether a right is fundamental under the Ohio Constitution."[105] All four

96. *Id.* at 952 (quoting N.C. CONST. art. IX, § 2).

97. *Id.* at 948 (quoting Skeen v. State, 505 N.W.2d 299, 313 (Minn. 1993)).

98. *Id.* at 951 (citing Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 205 (Ky. 1989)).

99. *Id.* at 949.

100. Hornbeck v. Somerset Cnty. Bd. of Educ., 458 A.2d 758, 776 (Md. 1983) (holding that the state's education clause required a system that provided "basic or adequate education to the State's children"). The Maryland court further rejected tests bearing on the importance of education, as well as its historical and traditional value to state citizens, "without ever expressly articulating the standard it used to reach its conclusion." *William Penn II*, 294 A.3d at 950.

101. Bd. of Educ. of City Sch. Dist. of City of Cincinnati v. Walter, 390 N.E.2d 813, 818 (Ohio 1979) ("[W]e reject the '*Rodriguez* test' for determining which rights are fundamental.").

102. Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359, 365–66 (N.Y. 1982) (indicating that metropolitan overburden is an unequalizing force requiring a different test to be applied than that applied by the Supreme Court in *Rodriguez*). Although New York recognized the importance of education, it held the highest scrutiny is "reserved for cases involving intentional discrimination against suspect classes." *William Penn II*, 294 A.3d at 954 (citing *Nyquist*, 439 N.E.2d at 366).

103. Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1017 (Colo. 1982) ("While the [*Rodriguez*] test may be applicable in determining fundamental rights under the United States Constitution, it has no applicability in determining fundamental rights under the Colorado Constitution." (footnote omitted)).

104. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973) (analyzing first, whether the state education system infringes "upon a fundamental right explicitly or implicitly protected by the Constitution").

105. *William Penn II*, 294 A.3d at 951 (quoting *Walter*, 390 N.E.2d at 818).

courts explained that their state constitutions do "not serve as a limit on power" and therefore are not analogous to the Federal Constitution.[106]

Meanwhile, Idaho defines fundamental rights as those which are "expressed as a positive right."[107] The Pennsylvania court did not find this line of cases persuasive because it rejected the standard that Idaho relies on to determine fundamentality, ultimately concluding that implications "can be discerned from the history of the Education Clause," which makes it clear that "the framers here intended a fundamental right."[108] The *William Penn II* court agreed with petitioners that "California's equal protection analysis is persuasive."[109] *Serrano v. Priest* "emphasized the profound importance federal and state courts have placed on education."[110] It also analogized the right to education to other constitutional rights, such as the right to vote.

C. Meeting the Appropriate Level of Scrutiny for Education Inequalities

The court next addressed the appropriate level of review and considered the legislative respondents' argument that even if education is a fundamental right, rational basis review should apply, based on case law from other jurisdictions.[111] After analyzing the other jurisdictions' approaches and distinguishing them, the court determined that any interference with the fundamental right to education should be governed by a strict scrutiny analysis.[112]

In evaluating the compelling government interest, the trial court rejected promoting local control as justifying the disparities between low- and high-wealth school districts.[113] While local control is important, the court focused on the issue of meaningful local control, questioning whether there can be any local control "when low-wealth districts are constantly faced with making tough decisions regarding which programs or resources to cut or which students, all in need of additional resources,

106. *Id.* at 954.

107. *Id.* (quoting Idaho Schs. For Equal Educ. Opportunity v. Evans, 850 P.2d 724, 732 (Idaho 1993)).

108. *Id.* at 952.

109. *Id.*

110. *Id.* at 953 (citing Serrano v. Priest, 487 P.2d 1241, 1244 (Cal. 1971)).

111. *See id.* at 955 (describing the legislature's claim that rational basis review applies to education regardless of whether it is a fundamental right, as the Minnesota and Wisconsin Supreme Courts held).

112. *See id.* at 957 (holding because the challenge in the present case was about the adequacy of the public education system and education is a fundamental right in Pennsylvania, strict scrutiny must apply).

113. *Id.* at 961–62.

receive access to the precious few resources these districts can afford to provide."[114] This refocusing of the local control issue contrasts with many federal circuit court interpretations.[115]

The *William Penn II* court suggested promoting meaningful local control by giving the low-wealth school districts an actual choice by providing them with equitable resources.[116] Other jurisdictions had similarly found that there was not sufficient evidence to establish that the discriminatory funding scheme was necessary for local control.[117] Without a compelling interest, the court concluded that the petitioners' claim must succeed.[118]

The court dismissed the counterargument in a footnote, reasoning that even if rational basis were the appropriate level of scrutiny, the petitioners' claim would still succeed because the court "could not conclude the classification drawn is reasonably related to" accomplishing any legitimate interest in local control.[119] This determination is contrary to circuit decisions interpreting the Federal Constitution.[120]

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114. *Id.* at 961.

115. *See, e.g.*, Robinson v. Shelby Cnty. Bd. of Educ., 566 F.3rd 642, 651 (6th Cir. 2009) (noting that restoring school control to local authorities is necessary when the court is presented with adequate evidence of unitary status); Belk v. Charolotte-Mecklenburg Bd. of Educ., 269 F.3d 305, 312 (4th Cir. 2001) (finding that it is time "to restore to state and local authorities the control of their school system"); Sch. Bd. of Parish of Livingston v. State Bd. of Elementary & Secondary Educ., 830 F.2d 563, 572 (5th Cir. 1987) (applying the rational basis test, the court found the financing scheme to be rationally related to two legitimate state goals, "that of assuring each child in the state an opportunity for a basic education on an equal basis and of permitting and maintaining some measure of local autonomy over public education"). While conceding "that the failure of Louisiana's school financing system to ameliorate all differences in local district wealth serves as a disincentive in some poorer parishes to tax more heavily in order to make up for these differences," the court held "as long as the state's means of achieving its objective is not so irrational as to be invidiously discriminatory" the financing scheme will not fail just because other methods may result in lesser disparities. *Parish of Livingston*, 830 F.2d at 572. Therefore, the financing scheme was constitutional. *Id. See also* Gulino v. N.Y. State Educ. Dep't, 460 F.3d 361, 364–65 (2d Cir. 2006) ("Because the State government is, at bottom, responsible for a school's failure to provide a 'sound basic education,' oversight of the education system at the State level is to be expected. However, this need for oversight must be balanced against the long-standing principle in New York State that public schools be controlled largely by local school boards."); Belanger v. Madera Unified Sch. Dist., 963 F.2d 248, 252–54 (9th Cir. 1992) (explaining that California assumes total control over funding, and "substantial centralized control" over other decisions made by public school authorities).

116. *William Penn II*, 294 A.3d at 961 ("[L]ocal control could be promoted by providing low-wealth districts with real choice, instead of choices dictated by their lack of needed funds.").

117. *Id.* (citing Tennessee Sch. Sys. v. McWherter, 851 S.W.2d 139, 154 (Tenn. 1993)).

118. *Id.* at 962.

119. *Id.* at 962 n.125.

120. *See, e.g.*, A.C. v. Raimondo, 494 F. Supp. 3d. 170 (D.R.I. 2020), *aff'd sub nom.* A.C. *ex rel.* Waithe v. McKee, 23 F.4th 37, 47 (1st Cir. 2022) ("[A]s to the equal protection claim . . . the Students . . . failed to tie the difference between their schools and more affluent ones (that do

In addressing the appropriate remedies, the court returned the issue to the political branches, stating that "it seems only reasonable to allow Respondents, comprised of the Executive and Legislative branches of government and administrative agencies with expertise in the field of education, the first opportunity, in conjunction with Petitioners, to devise a plan to address the constitutional deficiencies identified herein."[121] The ruling explained that the opinion does not infringe upon the goal of continuing to provide local control, and any reform need not be solely financial.[122]

What is required by this ruling is that "every student receives a meaningful opportunity to succeed academically, socially, and civically, which requires that all students have access to a comprehensive, effective, and contemporary system of public education."[123] The decision concludes with these inspiring words: "All witnesses agree that every child can learn. It is now the obligation of the Legislature, Executive Branch, and educators, to make the constitutional promise a reality in this Commonwealth."[124]

D. The Implications of Education as a Fundamental Right under State Law

So, what are the implications of this Pennsylvania trial court decision? Its extensive analysis of other state court cases on the issue of education as a fundamental right provides a useful roadmap for scholars in this area. In addition, the court opinion is persuasive authority for other jurisdictions considering whether local control can constitute a compelling government interest. Finally, its focus on the lack of a reasonable relationship to even an assertively legitimate government interest in local control will further the argument in jurisdictions where education is not considered a fundamental right and, therefore, based on the economic discrimination involved, would be subject to rational basis review.

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provide elective civics courses and experiences) to policies implemented or enforced by Rhode Island to create this alleged disparity. . . ."); *see also* Sandlin v. Johnson, 643 F.2d 1027, 1029 (4th Cir. 1981) ("What appellants denominate as denial of equal educational opportunity sounds rather in tort as a breach of some duty owed by teachers or school boards to their pupils to give them an education. If there is any such cause of action, it does not rise to the level of a constitutional claim . . . .").

121. *William Penn II*, 294 A.3d at 963.

122. *See id.* at 963–64 (explaining the decision does not prevent the legislature from providing local school boards control over their district and relief from the political branches does not need to be entirely financial).

123. *Id.* at 964 (alterations omitted).

124. *Id.*

One implication gives this author pause, however, in returning the issue to the executive, legislative, and administrative branches.[125] A new system of public education funding needs to be created. While the political will to do so in the executive and legislative branches could be strong, the realities of reelection campaigns and up-ending established and relied-upon property tax and funding issues may lead to as much discord as busing and other actions to comply with desegregation mandates of *Brown v. Board*. For instance, in this author's town of Malibu, California, voters in the high-wealth portion of a school district that also contained low-wealth areas in Santa Monica voted to separate into a distinct school district, in large part to avoid sharing financial resources with the lower-wealth portions of the district.[126]

On the other hand, even if the state legislatures were willing to act, we must consider the voting dynamics. It is uncertain whether there would be enough voters in the low-wealth school districts to outnumber the turnout in high-wealth districts, especially when considering factors like turnout and campaign financing.[127] Such a majority is essential for effectuating education financing reform in a way that provides the "comprehensive, effective, and contemporary system of public education" mandated by the court.[128]

Even if state funding was enhanced in low-wealth districts, some scholars believe that increased financing would not be enough to eradicate educational inequalities. As Symposium participant Professor Solangel Maldonado notes, despite additional funding, schools still lag in quality, which correlates with the percentage of middle- and high-income students in the school district. She finds that less optimism is in order as long as the segregation between wealthy and impoverished students based on their socioeconomic status persists.[129]

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125. *See supra* Section III.C (discussing the appropriate level of scrutiny for education inequalities and the issue of the political branches formulating the appropriate remedy for constitutional deficiencies).

126. Judy Abel, *Malibu City Council Approves Term Sheet for School District Split*, MALIBU TIMES (Nov. 1, 2022), https://malibutimes.com/malibu-city-council-approves-term-sheet-for-school-district-split [https://perma.cc/66R3-ZB72].

127. Martha R. Mahoney, *"Democracy Begins at Home"—Notes From the Grassroots on Inequality, Voters, and Lawyers*, 63 U. MIA. L. REV. 1, 4 (2008) (noting that low-income neighborhoods have lower voter turnout than wealthier neighborhoods, in part due to having lower-quality polling locations).

128. *William Penn II*, 294 A.3d at 886.

129. Solangel Maldonado, Professor of L., Stetson Univ. Coll. L., Speech at the Loyola University Chicago Law Journal Symposium: San Antonio Independent School District v. Rodriguez: Fifty Years Later (Mar. 31, 2023) (on file with the Loyola University Chicago Law Journal).

On the other side of this financial debate are Professor Davíd Martínez and Professor Julian Vasquez Heilig, who have demonstrated that an increase in public school financing resulted in almost one additional year of educational attainment for the students.[130] In order to further the benefits of promoting additional funding, they suggest providing tax deductions and other incentives to wealthy communities.[131] Similarly, Professor Kimberly Jenkins Robinson has researched the importance of additional funding as a driver of enhanced educational attainment.[132] All scholars agree that the funding must be "done well."[133] Education done well means recognizing that money alone is not enough. Rather, targeting funds to areas of greatest need is a start. But in order to be most effective, that targeting must be coupled with authorization to expend the funds flexibly and in response to circumstances in real time, all considered in the context of the school's existing resources, strengths, and goals.

Moreover, even if such legislation were passed, high-wealth districts may bring lawsuits claiming they are being denied equal protection. In the Tenth Circuit, members of a wealthy school district alleged the funding system was set up in such a way that the wealthier districts received

130. *See* Martínez & Vasquez Heilig, *supra* note 15, at 316 ("[I]ncreased funding and targeted resources in . . . urban schools were associated with improvement. . . . [F]unding increases have a positive impact on children from low-income families and play a role in decreasing . . . [inequity]."). While some say money alone is not enough, scholar research has found that money does in fact boost achievement in a very significant way. *Id.* at 324 ("[P]er-pupil revenue and expenditures impact student learning . . . ."). Specifically, targeted effort to address huge funding disparities between wealthy and poorer district produces tangible growth. *See* Hosung Sohn, Heeran Park & Haeil Jung, *The Effect of Extra School Funding on Students' Academic Achievements under a Centralized School Financing System*, 18 EDUC. FIN. & POL'Y 1, 3 (2023) ("[A] 20 percent increase in per pupil funding for underperforming schools [in South Korea] reduced the share of below-average students in mathematics, English, social studies, and science by 19.7 percent, 17.0 percent, 16.1 percent, and 18.1 percent compared with the control-side means.").

131. *Id.*

132. *See generally* Kimberly Jenkins Robinson, Rodriguez *at Fifty: Lessons Learned on the Road to a Right to a High-Quality Education for All Students*, 55 LOY. U. CHI. L.J. 343, 346–54 (2023) [hereinafter *Lessons Learned*]; Education Rights Institute, *About the Education Rights Institute*, UNIV. OF VA. SCH. OF LAW, https://www.law.virginia.edu/education/about-education-rights-institute [https://perma.cc/4YNJ-JWPC] (last visited Dec. 4, 2023); KIMBERLY JENKINS ROBINSON, PROTECTING EDUCATION AS A CIVIL RIGHT: REMEDYING RACIAL DISCRIMINATION AND ENSURING A HIGH-QUALITY EDUCATION, LEARNING POL'Y INST. (2021), https://learningpolicyinstitute.org/media/548/download [https://perma.cc/YFF3-D32Z]; DANIEL FARRIE & DAVID SCIARRA, MAKING THE GRADE: HOW FAIR IS SCHOOL FUNDING IN YOUR STATE?, EDUC. L. CTR. (2022), https://files.eric.ed.gov/fulltext/ED619401.pdf [https://perma.cc/QGP7-K9D3].

133. *See* Robinson, *Lessons Learned*, *supra* note 132, at 346 ("[S]chool funding litigation has supported noteworthy gains and reforms for school funding. One of those gains is establishing a broad scholarly consensus that money spent well matters."). *See generally* FARRIE & SCIARRA, *supra* note 132; Symposium, San Antonio Independent School District v. Rodriguez*: Fifty Years Later*, 55 LOY. U. CHI. L.J. 343 (2023).

less aid and, therefore, violated the Equal Protection Clause.[134] The circuit court declined to apply strict scrutiny, based on *Rodriguez* establishing that wealth is not a suspect class.[135] Applying the rational basis test, the court was "loathe to disturb a matter better left to the states," especially where only "relative differences in spending levels are involved."[136] Similar to the Fifth Circuit in *School Board of the Parish of Livingston v. State Bd. of Elementary & Secondary Education*,[137] the Tenth Circuit found the financing scheme was constitutional, explaining that even though there might have been better financing schemes, the rational basis test does not require it to be "the best available."[138]

IV. ALTERNATIVES TO SUBSTANTIVE DUE PROCESS: QUASI-SUSPECT CLASS STATUS

Other scholars have suggested alternatives to applying substantive due process in this area. For instance, Professor Evan Caminker argues that it is the states' duty to provide education and suggests that the approach would be more successful than framing education as an individual right.[139] Professor Derek Black argues that education is not a substantive due process issue but, rather, a constitutional compromise as part of what was required for the rebelling states to return to the Union and thus is an integral part of state citizenship.[140]

This notion of public education as a requirement for state citizenship is supported by the evidence that no state has been admitted to the Union without an education clause in its constitution. Professor Black explains that Congress has the power to enforce a "republican form of government" and that public education is necessary to foster that republican form of government.[141] In addition, he argues that educational

134. Petrella v. Brownback, 787 F.3d 1242, 1249 (10th Cir. 2015).

135. *Id.* at 1263 ("This argument is also foreclosed by *Rodriguez*, which held that a school district's relative wealth is not grounds for heightened scrutiny.").

136. *Id.* at 1261 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973)).

137. Sch. Bd. of Par. of Livingston v. State Bd. of Elementary & Secondary Educ., 830 F.2d 563, 572 (5th Cir. 1987) (finding Louisiana's school funding system survived rational basis because it provided educational necessities and encouraged local control of schools).

138. *Petrella*, 787 F.3d at 1267.

139. Evan H. Caminker, *States' Duty Under The Federal Elections Clause And A Federal Right To Education*, 55 LOY. U. CHI. L.J. 403, 407–08 (2023) ("I believe this state electoral duty—which clearly *does* contemplate voting—is a firmer foundation to which a right to education might anchor than those proffered in *Rodriguez* or since.").

140. Derek W. Black, Professor of L., Univ. of S.C. Sch. of L., Speech at the Loyola University Chicago Law Journal Symposium: San Antonio Independent School District v. Rodriguez: Fifty Years Later (Mar. 31, 2023) (on file with the Loyola University Chicago Law Journal).

141. *Id.*

inequalities can be deemed a "badge or incident of slavery" and, therefore, are within Congress's power to address under the Thirteenth Amendment.[142]

This author takes the position that the Equal Protection Clause may provide a stronger avenue for enforcing educational equality. Under the equal protection doctrine as it has evolved in the Supreme Court, the only suspect classes are race and national origin.[143] Noncitizen aliens, regardless of race, are a suspect class generally, in the sense that classifications discriminating against them must meet strict scrutiny—unless those classifications are related to self-government and the democratic process.[144] Some examples of this latter category include classifications affecting the right to vote, holding public office, working as a police officer, or serving on juries.[145] All of the latter classifications against noncitizens are judged on the rational basis review standard.[146]

This Part analyzes how elevating impoverished children to quasi-suspect class status is a more effective legal mechanism than substantive due process to address educational opportunity disparities. Section IV.A begins by explaining the legal precedents supporting quasi-suspect class status for children of low wealth who reside in districts with under-resourced K–12 public schools. Section IV.B then evaluates five factors that scholars have used to determine whether heightened scrutiny should apply to a particular class. After concluding that the factors weigh in favor of heightened scrutiny, Section IV.C next applies the intermediate scrutiny level of review.

142. *Id.*

143. *See* Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 310 (2013) ("[A]ny official action that treats a person differently on account of his race or ethnic origin is inherently suspect." (quoting Fullilove v. Klutznick, 448 U.S. 448, 523 (1980) (Stewart, J., dissenting))).

144. While alienage classifications generally must meet strict scrutiny, when the classification is related to the democratic process or self-government, only rational basis review applies. Graham v. Richardson, 403 U.S. 365, 372 (1971); *see also* Foley v. Connelie, 435 U.S. 291, 296 (1978) ("The State need only justify its classification by a showing of some rational relationship between the interest sought to be protected and the limiting classification.").

145. *See* Sugarman v. Dougall, 413 U.S. 634, 646–48 (1973) (pertaining specifically to public employment and voting); *see also* Perkins v. Smith, 379 F. Supp. 134, 136 (D. Md. 1974), *aff'd mem.*, 426 U.S. 913 (1976) (affirming that the government has a legitimate interest in preserving the unique responsibility of serving on a jury to citizens).

146. *Foley*, 435 U.S. at 296.

A. Defining the Classification

In the education realm, some scholars suggest that impoverished children should also be considered a suspect class.[147] For instance, some scholars recognize that poverty, and childhood are similarly situated to deserve heightened scrutiny.[148] One student note combines the analysis: Kerry Burnet analyzes poor children as a suspect class and explains that on mutability and powerlessness, children rank high on the suspect classification scheme.[149] Childhood poverty arguably is an immutable characteristic over which the children have no control, similar to the marital status of parents and the wealth of a school district.[150] Children are relatively powerless and have been subjected to unequal treatment in the education arena based on inadequate funding.[151]

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147. *See, e.g.*, Peter S. Smith, *Addressing the Plight of Inner-City Schools: The Federal Right to Education After* Kadrmas v. Dickinson Public Schools, 18 WHITTIER L. REV. 825, 826 (1997) (arguing that poor urban students should be considered a suspect class); *id.* at 855 ("Protecting this group conforms with the purpose of the Equal Protection Clause, . . . as 'the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.'" (quoting Plyler v. Doe 457 U.S. 202, 222 (1982))).

148. *See, e.g.*, Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 145 (2011) (analyzing how poverty fits suspect class factors); Hiroharu Saito, *Equal Protection for Children: Toward the Childist Legal Studies*, 50 N.M. L. REV. 235, 284–85 (2020) (suggesting heightened scrutiny for children because they meet all the criteria).

149. Kerry P. Burnet, Note, *Never a Lost Cause: Evaluating School Finance Litigation in the Face of Continuing Education Inequality in Post*-Rodriguez *America*, 2012 U. ILL. L. REV. 1225, 1225 (2012). Burnet's note begins with the premise that where a person lives should not determine their educational opportunities. It argues for establishing "poor children as a suspect class in regards to education" and promotes more court involvement in fair allocations of education funds. *Id.* at 1228. The author also cites the *Carolene Products* Footnote Four regarding scrutiny for "discrete and insular minorities[,]" to make the analogy to the quasi-suspect classification of women and nonmarital children. *Id.* at 1230 (quoting United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938)). Then Burnet discusses the *Rodriguez* decision and efforts at educational financing reform. Burnet, *supra*, at 1231–36.

150. *See* Burnet, *supra* note 149, at 1241–42 (explaining children have no control over the wealth of the family they are born into, and like marital status of parents, childhood poverty has no relation to a child's ability contribute to society).

151. *See generally* Burnet, *supra* note 149, at 1242; *see also* Amy J. Schmitz, Note, *Providing an Escape for Inner-City Children: Creating a Federal Remedy for Educational Ills of Poor Urban Schools*, 78 MINN. L. REV. 1639 (1994). This note seeks to present a framework of a federal judicial remedy to "enable the urban poor to attain the quality education they need to lift themselves from the cycle of poverty." *Id.* at 1640. After discussing *Rodriguez*, the note states that the court "do[es] not address the question of whether discrimination 'against any definable category of poor people' could claim suspect class protection for purposes of challenging school funding disparities." *Id.* at 1650 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 25 (1973)). Recognizing that in *Plyler*, the children of undocumented parents were not deemed to be a suspect class, but the court "nonetheless applied heightened scrutiny to the denial of education because the discrimination created 'special disabilities upon groups disfavored by virtue of circumstances beyond their control.'" *Id.* at 1663 (quoting *Plyler*, 457 U.S. at 217 n.14). The note goes on to say, "[s]imilarly, poor urban students should enjoy special constitutional protection from the denial of

Burnet then addresses the axis of the political process argument, discussing *Harper v. Virginia Board of Elections*,[152] to argue that an absolute deprivation of educational opportunity—as was argued in *Plyler*—is not necessary for finding a violation. She draws the analogy to the poll tax—which did not prevent people from voting as long as they could afford it, but did prevent them if they could not afford it.[153] Highlighting the "unique vulnerability of children" and the "best interest of the child standard," another student note explains that children are the paradigmatic underclass.[154] Children truly have no control over their housing, education, native language or socioeconomic status.

Burnet's article concludes with the mechanism for the Court to overturn *Rodriguez*. The current Court may appreciate the opportunity to overturn additional precedent and focused heavily on socioeconomic status diversity during the oral arguments in the recent affirmative action cases against Harvard and University of North Carolina, Chapel Hill.[155] Burnet suggests defining the classification "even more narrowly, as children of a certain level of poverty who also reside in certain districts of a defined level of low education funding."[156] The justification for this approach is that "wealth has replaced race as the new suspect class. Wealth is the new dividing line of privilege, power, and economic opportunity."[157]

There is support for the idea that lack of wealth is suspect from both sides of the educational equity debate. Calls for class-based affirmative action, for instance, often championed by both sides of the political aisle, suggest that lack of wealth is a preferred method of allocating admissions

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a meaningful education because disparate school funding unfairly discriminates against them and burdens them with a great disadvantage." *Id.*

152. Harper v. Va. Bd. Elections, 383 U.S. 663 (1966).

153. Burnet, *supra* note 149, at 1244 (citing *Harper*, 383 U.S. at 666–68); *see also Plyler*, 457 U.S. at 222 (describing how the "status based denial of basic education" is inconsistent with the Equal Protection Clause because of the lasting social, economic, and intellectual of education).

154. Schmitz, *supra* note 151, at 1664 ("[T]he *Plyler* Court focused on the *creation of a discrete underclass* as the primary reason the denial of education to illegal aliens was unconstitutional."). Schmitz's note argues that "[d]effective urban education perpetuates the same political and economic marginalization in the inter-city that the court feared complete denial of education would cause among the illegal aliens in *Plyler*." *Id.* (footnote omitted). Schmitz concludes with the admonition that heightened scrutiny should be applied when "unequal and inadequate school funding schemes [ ] discriminate against poor urban schoolchildren." *Id.* at 1671.

155. *See* Transcript of Oral Argument, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023) (No. 20-1199) [hereinafter Harvard Transcript]; Transcript of Oral Argument, Students for Fair Admissions, Inc. v. Univ. N. Carolina, 142 S. Ct. 2809 (2023) (No. 21-707) [hereinafter Univ. N. Carolina Transcript].

156. Burnet, *supra* note 149, at 1251.

157. *Id.* at 1252.

spots to elite colleges and universities, when compared to race or ethnicity,[158] or more recently when compared to preferences for offspring of alumnae.[159] If lack of wealth is cause for preferential treatment, then it follows that the unwealthy should be entitled to special protection from class-based discrimination, and only heightened scrutiny can provide that additional protection.

B. Determining the Level of Scrutiny

Scholars have identified a number of factors to consider in evaluating whether a classification should be analyzed under heightened scrutiny.[160] This Section, as identified in "Reevaluating Suspect Classifications," considers five factors: "(1) prejudice against a discrete and insular minority; (2) history of discrimination against the group; (3) the inability of the group to seek political redress (i.e., political powerlessness); (4) the immutability of the group's defining trait; and (5) the relevancy of that trait."[161] An analysis of each of these factors provides persuasive evidence that impoverished children meet the standard for heightened scrutiny.

First, there is a strong argument that children are "discrete and insular" and in need of even more protection because there are no antidiscrimination laws to protect them based on their age. As such, like the petitioners

158. For example, Justice Thomas explains, "But it seems . . . [Harvard] would not have a constitutional problem if you did it socioeconomically" Harvard Transcript, *supra* note 155, at 43. *See also* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2215 (2023) (Gorsuch, J., concurring) ("SFFA also submitted evidence that Harvard could nearly replicate the current racial composition of its student body without resorting to race-based practices if it: (1) provided socioeconomically disadvantaged applicants just *half* of the tip it gives recruited athletes; and (2) eliminated tips for the children of donors, alumni, and faculty."); *but see Id.* at 2241 (Sotomayor, J., dissenting) ("All of SFFA's proposals are methodologically flawed because they rest on 'terribly unrealistic' assumptions about the applicant pools." (quoting Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580, 643–45, 647 (2021))).

159. The Department of Education opened an inquiry into the legacy admissions policy at Harvard shortly after the Court issued its opinions in the case. *See, e.g.*, Michael D. Shear & Anemona Hartocollis, *Education Dept. Opens Civil Rights Inquiry Into Harvard's Legacy Admissions*, N.Y. TIMES (July 25, 2023), https://www.nytimes.com/2023/07/25/us/politics/harvard-admissions-civil-rights-inquiry.html [https://perma.cc/QAS6-XLMA].

160. *See, e.g.*, Strauss, *supra* note 148, at 138 n.16 ("[T]his argument proceeds under the assumption that the Court reasons from these factors to a conclusion. The factors are part of the 'discovery' process—trying to determine the level of scrutiny—rather than just part of the justification.").

161. *Id.* at 146; *but cf.* Saito, *supra* note 148, at 245. Professor Saito focuses on three factors: "(i) a visible and immutable (or irreversible) trait; (ii) limited access to politics; and (iii) existence of prejudice or stereotype." *Id.* With this framework, there is a problem combining the elderly and children together into one group that suffers from age discrimination. Elderly adults may be more vulnerable to cognitive biases. *Id.* at 255.

in *Romer v. Evans*, where voting on measures to provide LGBTQIA+ persons with so-called preferential treatment were outlawed,[162] children are completely shut out of the political process. Because they cannot vote, they are even more "discrete and insular" than the LGBTQIA+ population in Colorado.[163] And because they are subject to their parents' decisions, children are often punished for matters outside their control.[164]

Second, in the history of discrimination, children often suffer discrimination based on their socioeconomic status, which often results from the actions or inactions of their parents.[165] The Court has recognized that the Bill of Rights applies to children just as it applies to adults, in addressing nonmarital children cases.[166] For instance, *Levy v. Louisiana*,[167] explained that "[n]onmarital children were socially ostracized, and denied inheritance, parental support, social security, and other benefits simply because the state morally disagreed with their parents' behavior."[168] "The Supreme Court struck down the Louisiana law," finding "that it was 'invidious' discrimination to deny [the children] recovery."[169] Similarly, impoverished children have been stigmatized and ostracized for matters beyond their control.

Third, whether children are in a position of power is also a factor for consideration.[170] Professor Hiriharo Saito notes that there are many

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162. *See* Romer v. Evans, 517 U.S. 620, 623–24 (1996) (holding that a Colorado Amendment, which sought to invalidate local laws that barred discrimination against LGBTQIA+ individuals, did not survive strict scrutiny).

163. David A. Strauss, *Is* Carolene Products *Obsolete?*, 2010 U. ILL. L. REV. 1251, 1257 (2010) (defining "discrete and insular" as groups that are identifiably separate from the rest of society that other groups will not form coalitions with because of prejudice).

164. *See* Schmitz, *supra* note 151, at 1663 (stating that children are essentially punished for their birth).

165. Catherine Smith, Obergefell*'s Missed Opportunity*, 79 L. & CONTEMP. PROBS. 223, 224, 227, 231 (2016) (discussing the notion of "child-centered cases" beginning with *Brown* and the notion that children were considered almost property prior to *Brown*); *see also* Martin Levine, *Comments on the Constitutional Law of Age Discrimination*, 57 CHI.-KENT L. REV. 1081, 1084–87 (1981) (addressing Howard Eglit's thesis—that things that are not "freely chosen and cannot freely be abandoned" should be considered in the quasi-suspect classification or characterization analysis).

166. Smith, *supra* note 165, at 228.

167. Levy v. Louisiana, 391 U.S. 68 (1968).

168. Smith, *supra* note 165, at 228.

169. *Id.* at 229 (quoting *Levy*, 391 U.S. at 72); *see also* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 165, 175–76 (1972) (regarding workers compensation inheritance rights for legitimate versus nonmarital children and explaining that "no child is responsible for [their] birth" and yet there is "social opprobrium suffered by these hapless children"); Jimenez v. Weinberger, 417 U.S. 628, 632 (1974) ("[C]lassification is justified by no legitimate state interest, compelling or otherwise." (quoting *Weber*, 406 U.S. at 175–76).

170. *See* Saito, *supra* note 148, at 248 (explaining powerless groups are "prone to be overgeneralized" and suffer from additional discrimination).

statutes that benefit children, which negate their claims of limited access to the political process.[171] But children do not have access; it is only through the benevolence of adults that children receive statutory benefits. What statutes protect children from unequal educational funding? There are three main harms that children suffer due to unequal funding: "economic harm"; stigma or "psychological harm"; and perceived punishment for matters beyond their control.[172]

In terms of discrete and insular minorities that may not be protected by the majoritarian focus of the political process, many have argued that children's interests are represented by their parents.[173] If their parents are more than eighteen years old (and not convicted felons in some jurisdictions or serving time in prison in others), the parents can vote and participate in the political process that determines school board elections and other policies impacting education.[174]

In reality, however, children do not have the ability to seek political redress and thus suffer powerlessness.[175] Even for those children with caring parents or adult figures, there is little evidence to support the notion that parents vote in favor of policies promoting equal or adequate

171. *See Id.* at 281 (questioning whether heighten scrutiny should apply to statutes that benefit children).

172. Smith, *supra* note 165, at 232–34; *see also* Catherine E. Smith & Susannah W. Pollvogt, *Children as Proto-Citizens: Equal Protection, Citizenship, and Lessons from the Child-Centered Cases*, 48 U.C. DAVIS L. REV. 655, 664 (2014) (discussing how same-sex marriage bans harm children and identifies certain child-centered cases). Smith and Pollvogt's article describes children as "citizens in progress," and argues "that states may not deprive children of benefits in order to regulate adult behavior." *Id.* at 664, 659. To bolster their assertion, Smith and Pollvogt pull from both *Weber* and *Plyler* to show that the Fourteenth Amendment was designed to abolish the issue of "class or caste" treatment. *Id.* at 664, 672–73 (quoting Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982)).

173. *See* Strauss, *supra* note 163, at 139–40 (discussing "discrete and insular," how to measure it using a variety of factors, and explains that it is not disadvantaging because white people and males also "receive heightened scrutiny" based on their race and gender); *id.* at 144 (quoting from Justice Powell's lecture on the theory that if the political process does not protect the group because they cannot participate in that process, then the Court "has [a] special mission[] . . . to clear away impediments to participation, and to ensure that all groups can engage equally in the political process; and" review that classification with heightened scrutiny (quoting Lewis F. Powell, Jr., Carolene Products *Revisited*, 82 COLUM. L. REV. 1087, 1089 (1982))).

174. Strauss, *supra* note 163, at 139.

175. *Id.* ("[If] powerlessness [is] measured by the inability to vote . . . minors under eighteen would be politically powerless . . . ."). For further discussion of how adults may not consider the interests of children adequately, see Althea Gregory, Comment, *Denying Protection to Those Most in Need: The FDA's Unconstitutional Treatment of Children*, 8 ALB. L.J. SCI. & TECH. 121, 124 (1997) (arguing that the failure to test drugs in children for some diseases is a violation of equal protection, so in this context, children are a quasi-suspect class). The comment also outlines how "children have been subjected to a history of discrimination" and inadequate representation in the political process. Gregory, *supra*, at 140–41.

educational opportunities for children. The most glaring example of this, of course, is the passage of Proposition 13 in California, where voters—including non-parents, parents, grandparents, and great-grandparents—determined that it was better to have their property tax bills remain more constant than it was to have their taxes rise with property values to try to keep up with the ever-increasing financial demands of funding public education and related programs.[176] And, here we are.

Another problem with the argument that parents protect the interests of their children in the voting booth is the unequal distribution of political power, resources, access, and voter registration percentages that one finds between high-poverty school district parents and low-poverty school district parents.[177] In a previous article, this author echoed the recommendation of others for a Children's Cabinet member in the executive branch of state governments and perhaps even the federal government.[178] That cabinet-level official would be the enforcer to ensure that children's educational rights are protected even when their voting-eligible parents, along with the majority of voters, do not vote or legislate in ways that promoted the children's educational interests.

On the fourth factor, some may argue that childhood is a mutable characteristic in that as long as one survives to age eighteen or twenty-one, one eventually outgrows childhood.[179] However, mutability is not an absolute requirement for applying heightened scrutiny, given that noncitizen alien classifications can also be subject to strict scrutiny.[180] Noncitizenship, like childhood, can be changed with time (and successful naturalization tests and applications). While we may consider being born to unwed parents an immutable characteristic, the fact that such children can be "legitimated" in some jurisdictions suggests that immutability is not an absolute prerequisite for protected class status.[181]

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176. Mildred Wigfall Robinson, *Difficulties in Achieving Coherent State and Local Fiscal Policy at the Intersection of Direct Democracy and Republicanism: The Property Tax as a Case in Point*, 35 U. MICH. J.L. REFORM 511, 515 (2002) (discussing public reaction to a California tax policy that used taxpayer dollars to fund public transportation in order to achieve racial balance in public schools, resulting in a taxpayer revolt that led to the passing of Proposition 13, a state constitutional amendment that curbed property tax increases).

177. Pedro de Oliveira, *Same Day Voter Registration: Post-*Crawford *Reform to Address the Growing Burdens on Lower-Income Voters*, 16 GEO. J. ON POVERTY L. & POL'Y 345, 346 (2009) ("[L]ower-income Americans are less likely to vote than higher-income Americans . . . .").

178. Goodman, *supra* note 34, at 136.

179. Alexander A. Boni-Saenz, *Age, Time, and Discrimination*, 53 GA. L. REV. 845, 849 (2019) (noting age is "clearly mutable" because it changes over time).

180. Graham v. Richardson, 403 U.S. 365, 375 (1971).

181. Anderson v. Holder, 673 F.3d 1089, 1098 (9th Cir. 2012) ("'Legitimation,' the court wrote, 'denotes a procedure—an act or occurrence that makes a child born out-of-wedlock legitimate

Fifth, the relevancy of the trait is context specific.[182] The relevance of childhood is clear, as children can be treated differently when it comes to privileges such as voting, driving, and consuming alcohol. Classifications based on relevant traits still might be based on biases.[183] However, in the case of education, poverty should not be a relevant factor in whether and to what extent children have access. Based on the foregoing analysis, courts should analyze impoverished childhood under heightened scrutiny.

C. Applying the Appropriate Level of Scrutiny

Based on the five factors above, impoverished children should be recognized as a quasi-suspect class. Then, classifications among children requiring their attendance at different schools and school districts would have to be based on an important or substantial government interest. Economic factors are *legitimate* government interests and have been enough thus far to justify the disparities that result from property tax funding and local funding of public schools. However, similar economic interests did not even pass the arguably intermediate scrutiny in *Plyler*,[184] and therefore would not pass as *substantial* government interests, even under the current Court's jurisprudence.

States may argue that there is a compelling government interest in maintaining local control of the school districts, and the Pennsylvania trial court decision in *William Penn II* soundly rejects this argument.[185] Moreover, while many school districts assert the important interest in local funding autonomy in support of their disparate funding schemes, Burnet explains that the "funding system is not substantially related to the

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under the law' . . . ." (quoting Anderson v. Holder, 2010 WL 1734979, at *7 (E.D. Cal. Apr. 27, 2010))); Schreiber v. Cuccinelli, 981 F.3d 766, 774 (10th Cir. 2020) (explaining that children born to unwed parents can be legitimated with the processes of state law passed with the legislative intent to effectuate legitimation); Gil v. Sessions, 851 F.3d 184, 187 (2d Cir. 2017) (noting that a person born abroad to unmarried parents may qualify as a "legitimated child").

182. Strauss, *supra* note 163, at 146. The ambiguity about measuring of factors and how they relate as well as the problem of symmetry are some additional challenges noted. *Id.* at 168.

183. Strauss, *supra* note 163, at 147 n.60 ("Some classifications are more likely than others to reflect deep-seated prejudice . . . ." (quoting Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982))). In *Cleburne*, Justice Marshall noted that "men only" signs are different on the bathroom door than on a court room door. *Id.* at 166 (quoting City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 468–69 (1985) (Marshall, J., concurring in part and dissenting in part)).

184. *Plyler*, 457 U.S. at 230 ("If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here.").

185. William Penn Sch. Dist. v. Pa. Dep't of Educ., 294 A.3d 537, 962 (Pa. Commw. Ct. 2023).

goal of local control."[186] The facilities themselves violate equal protection based on *Brown v. Board of Education*, she concludes, because they are separate educational facilities and are not available "on equal terms."[187]

States may also argue that maintaining school assignments close to the students' homes is a compelling or substantial government interest. If indeed such an interest is substantial or compelling, current school assignment policies that are based on geography may be reasonably related to further that goal. Still, it remains unclear whether proximity could be considered a substantial interest, given the prevalence of magnet and charter schools throughout many school districts.

Furthermore, it is unlikely that current assignment policies are closely connected to providing local control over the schools—unless the assignment policy also determines eligibility for school board positions.[188] Those assignment policies may be *rationally* related to the goal, but they may not be "*substantially* related," as would be required under heightened scrutiny.[189]

Impoverished children should be analogous to the category for nonmarital children. Governed by the intermediate scrutiny standard,[190] it requires an important government interest for which the means used to achieve it are substantially related. While being born to unmarried parents is most often immutable, there are mechanisms in some states to "legitimate" nonmarital children after their birth. Similarly, gender is subject to intermediate scrutiny in federal courts,[191] and while it is mostly immutable or immutable for most people, those with the desire can use medicine, surgeries, and other treatments to change their gender.[192]

Protecting these children from punishment for matters beyond their control might be a key point of analogy with whites who claim to be harmed by affirmative action policies that promote minority admissions and job placement over their own class interests. If children are indeed in need of greater protection, then perhaps the application of intermediate scrutiny opens another door of opportunity. As one author has suggested, why apply strict scrutiny doctrine to intermediate scrutiny analysis?

186. Burnet, *supra* note 149, at 1248.
187. *Id.* at 1249.
188. *Id.* at 1248.
189. *Id.* (emphasis added) (quoting Craig v. Boren, 429 U.S. 190, 197 (1976)).
190. Smith, *supra* note 165, at 230.
191. *Id.* at 235.
192. Vittoria L. Buzzelli, *Transforming Transgender Rights in Schools: Protection From Discrimination Under Title IX and the Equal Protection Clause*, 121 PENN. ST. L. REV. 187, 189 (2016).

Specifically, can the intent requirement be relaxed in intermediate scrutiny cases, so that the disparate impact, plus circumstantial evidence of intent can be enough to prove a constitutional violation?[193]

A successful argument will need to distinguish between childhood as a protected class and age classifications more generally because, as the Supreme Court has determined, age classifications are subject to mere rational basis review.[194] An important issue for consideration in the United States is that age discrimination is only actionable *above* a certain age (over forty under the Age Discrimination in Employment Act),[195] for instance, and the Court has considered age discrimination claims at the age of fifty in *Massachusetts Board of Retirement v. Murgia*,[196] and over age sixty for purposes of the foreign service retirement system in *Vance v. Bradley*.[197] Some have urged heightened scrutiny for age classifications because, like race and gender classifications, they are often based on stereotypes and outdated notions.[198]

No Supreme Court opinion has held that discrimination on the basis that someone is too young is inappropriate, although the Constitutional Amendment implicitly recognized this concern in reducing the eligible

193. *See* Rachel F. Moran, Note, *Quasi-Suspect Classes and Proof of Discriminatory Intent: A New Model*, 90 YALE L.J. 912, 913 (1981) (arguing that it is not right to automatically apply suspect class concepts to quasi-suspect classes, especially when addressing the intent requirement). Instead, if the class is quasi-suspect, then disparate impact plus circumstantial evidence of intent should be enough. *Id.* at 927. Determining what constitutes circumstantial evidence of intent is evidence that it is "severe and that it persisted," Moran concludes. *Id.*

194. Kimel v. Florida Bd. of Regents, 528 U.S. 62, 83 (2000) (applying rational basis test to employee's age discrimination claim because under the Equal Protection Clause age is not recognized as a suspect class).

195. 29 U.S.C. § 631.

196. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).

197. Vance v. Bradley, 440 U.S. 93 (1979).

198. *See, e.g.*, Sara C. Mills, *Perpetuating Ageism Via Adoption Standards and Practices*, 26 WIS. J.L. GENDER & SOC'Y 69, 100–01 (2011) (raising the concept of age as a quasi-suspect class, mainly in the context of elderly or older adoptive parents); *see also* Nina A. Kohn, *Rethinking the Constitutionality of Age Discrimination: A Challenge to A Decades-Old Consensus*, 44 U.C. DAVIS L. REV. 213, 262 (2010) (arguing that old age should be subject to intermediate scrutiny because like gender, stereotypes and generalizations about it have been used to harm people). Professor Kohn cites *Murgia*, 427 U.S. 307 (1976), as an argument for intermediate scrutiny and presents details about so-called "third-strand" scrutiny, citing Justice Marshall and balancing tests. Kohn, *supra*, at 231–56. Kohn notes that age classifications are presumptively rational, citing Justice O'Connor in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), and then states that diversity in the elderly population should be a consideration. Kohn, *supra*, at 225–27. She characterizes the "young-old," the "middle-old," and the "old-old," and then explains Justice Marshall's "sliding scale" approach in his *San Antonio Independent School District v. Rodriguez* dissent. Kohn, *supra*, at 235, 256–57 (citing 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting)). She argues for less deference in certain categories and greater deference in other categories given the stereotypical basis for differential treatment. Kohn, *supra*, at 255.

voting age to eighteen from twenty-one.[199] In other countries, discrimination on the basis of youth can also be considered a violation of rights.[200]

CONCLUSION

The current Supreme Court majority is increasingly unreceptive to fundamental rights that are neither firmly rooted in history and tradition at the time of the Constitution nor the Fourteenth Amendment unless explicitly provided for within the text. Some argue that education is essential to voting and voting is explicitly listed in the Constitution and the Thirteenth Amendment. Others, that educational inequalities along racial lines are a "badge or incident of slavery" as prohibited expressly by the Fifteenth Amendment. But public education did not exist at the time of the founding, nor in any significant way at the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments.[201]

While an argument can be made that there was a clear intent of the drafters of the Civil War Amendments to include education as fundamental because education clauses were required in the revised constitutions of the rebelling states in order to be readmitted, as Professor Derek Black notes, the subsequent education that was provided was traditionally segregated and traditionally unequal.[202] For those reasons, there is little hope of persuading the current Court majority that the "history and tradition" since the Civil War Amendments support a finding that education is a fundamental right.

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199. *See* Saito, *supra* note 148, at 235 (explaining that the law should not be distinguishing between minority and majority children, and suggests that it is okay to consider children as oppressed minorities, but as minorities who are not entitled to full liberation). For instance, children are not similarly situated to the elderly because the elderly can vote and play a role in representative democracy. *Id.* at 267–68. Professor Saito also addresses the issue of "prospect theory," which is more compelling for children than for adults and comments on the age of U.S. presidents. *Id.* at 628–72.

200. For a more in-depth discussion of this issue, see Chris Chambers Goodman, *Clearing the Bench: Using Mandatory Retirement to Promote Gender Parity in the U.S. and the EU Judiciaries*, 95 TUL. L. REV. 1, 12 (2020) (discussing mandatory retirement provisions in the European Union being used, in part, to create more opportunities for younger workers in the job market); Susan Bisom-Rapp & Malcolm Sargeant, *Diverging Doctrine, Converging Outcomes: Evaluating Age Discrimination Law in the United Kingdom and the United States*, 44 LOY. U. CHI. L.J. 717, 719–20 (2013) (discussing United Kingdom discrimination laws recognizing young, middle-aged, and elderly individuals may be adversely affected by age-based stereotypes).

201. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440–41 (1968) ("Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective litigation.").

202. Derek W. Black, Speech at the Loyola University Chicago Law Journal Symposium: San Antonio Independent School District v. Rodriguez: Fifty Years Later (Mar. 31, 2023) (on file with the Loyola University Chicago Law Journal).

Given the current reality, this Article suggests a path of less resistance—giving the equal protection arguments a greater likelihood of success by elevating impoverished children to quasi-suspect status. This shift is likely more palatable to the current Court majority, as evidenced in the oral arguments in *Student for Fair Admissions v. President and Fellows of Harvard College* and *University of North Carolina* affirmative action case, during which the attorneys and Justices repeatedly referred to the need, importance, and even justification of socioeconomic status diversity and socioeconomic status preferences.[203] The resulting majority opinion did not focus on socioeconomic status, but Justice Gorsuch's concurring opinion highlighted it as a constitutional way to grant preferences,[204] and Justice Sotomayor's dissenting opinion acknowledged that colleges could continue to use socioeconomic status.[205]

Let us resurrect the heightened scrutiny that a conservative majority applied in *Plyler*, using the intersectional identities of age and class, and ask courts to apply intermediate scrutiny in this third wave of educational equality cases.

203. *See, e.g.*, Harvard Transcript, *supra* note 155, at 4, 22, 25, 30, 35–38, 42–44, 80–81 (discussing socioeconomic status in the application process); Univ. N. Carolina Transcript, *supra* note 155, at 7–8, 12–13, 24, 43–44, 46–47, 61, 68, 106, 137, 147 (same).

204. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2214–15 (2023) (Gorsuch, J., concurring) ("[Harvard's] preferences for the children of donors, alumni, and faculty are no help to applicants who cannot boast of their parents' good fortune . . . .").

205. *Id.* at 2252 (Sotomayor, J., dissenting) ("Colleges and universities can continue to consider socioeconomic diversity and to recruit and enroll students who are first-generation college applicants or who speak multiple languages, for example.").