

TEACHING TOMORROW’S CITIZENS:  
THE LAW’S ROLE IN EDUCATIONAL DISPROPORTIONALITY

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[Schools] are educating the young for citizenship. . . .<sup>1</sup>  
[P]ublic education must prepare pupils for citizenship in  
the Republic. . . .<sup>2</sup>

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INTRODUCTION

A *Huffington Post* reporter wanted to discuss the extent to which conservatives are “coopting” the language of historically liberal civil rights advocates, especially in light of *Shelby County v. Holder*.<sup>3</sup> Several re-

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1. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

2. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986).

3. In *Shelby County*, the Court held that the “coverage formula” found in Section 4 of the Voting Rights Act of 1965 was unconstitutional and “[could] no longer be used as a basis for subjecting jurisdictions to preclearance.” *Shelby Cnty. v. Holder*, 133 S.Ct. 2612, 2615, 2631 (2013). The coverage formula required certain “covered” jurisdictions to prove that any proposed changes to voting laws

sponses immediately came to mind; however, the one response which often led my thoughts on this topic, even before I entered academia, was to question why progressives (or liberals, depending on your age, preference, and political slant) are regularly depicted as *reacting* to that which conservatives proffer. The intent of this article, therefore, is to engage in what is typically identified as a progressive issue through what is typically identified as a conservative framework, perhaps coopting a perspective.

As the reporter argued, conservatives are increasingly coopting the language of progressives; further, many of the historic liberals being coopted were members of the mid-20th Century civil rights movement.<sup>4</sup> The tone of the reporter's questions seemed to suggest that she felt conservatives were "stealing" ideas. While some consider coopting to be, merely, a form of propagandizing, it is equally arguable that *any* propaganda is a strategic coopting of words or ideas. As such, this article looks at a historically progressive issue, the distribution of equal and equitable educational resources, through a historically conservative lens—the original construction and intent of one of the nation's Founding Fathers.<sup>5</sup>

While educating the public fell outside the Founding Fathers' considerations at the conception of the new nation, and therefore never made it into the United States Constitution, the need to create a citizenry unlike that from whence they had come was contemplated.<sup>6</sup> That need—to pre-

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were not discriminatory. *Id.* at 2615–17. Prior to the decision, the Act applied to nine states and several additional counties. *Id.* at 2624.

4. See, e.g., Jeffrey Lord, *Rush Limbaugh: America's Real Civil Rights Leader*, THE AMERICAN SPECTATOR (July 18, 2013, 11:35 AM), <http://spectator.org/blog/2013/07/18/rush-limbaugh-americas-rush>; Kathryn Jean Lopez, *Aborting the Race Card: Getting Beyond What Impedes True Civil-Rights Progress*, NATIONAL REVIEW ONLINE (Jan. 31, 2011, 12:00 AM), <http://www.nationalreview.com/articles/258427/aborting-race-card-kathryn-jean-lopez>; Louis R. Williams, *Connerly Perpetuates King's Dream*, SUN SENTINEL (Oct. 3, 1999), [http://articles.sun-sentinel.com/1999-10-03/features/9910010818\\_1\\_skin-color-dr-king-s-dream-ward-connerly](http://articles.sun-sentinel.com/1999-10-03/features/9910010818_1_skin-color-dr-king-s-dream-ward-connerly). Harvey Mansfield, Kenan Professor of Government at Harvard University, has called Connerly "a great black thinker" and lauded him for standing [sic] up for his views. "The greatest blackthinkers [sic] have always disagreed," he said. Mansfield said that African Americans today face [sic] two competing visions of racial reconciliation [sic]. "Martin Luther King is a most honored black. Malcolm X is the most fashionable," Mansfield said [sic]." Marc J. Ambinder, *California Regent Defends Prop. 209*, THE HARVARD CRIMSON (Apr. 7, 1998), <http://www.thecrimson.com/article/1998/4/7/california-regent-defends-prop-209-pcalifornia/>.

5. I do not intend to sound hegemonic but intend to rely on the traditional conservative language—Founding Fathers. I completely recognize that women contributed as much, if not more, to the establishment of America.

6. In a 1787 article published in the *American Museum* magazine, Dr. Benjamin Rush said, "There is nothing more common than to confound the terms of *American Revolution* with those of the *late American war*. The American war is over, but this is far from being the case with the American Revolution." Albert Castel, *The Founding Fathers and the Vision for a National University*, 4 HIST. OF EDUC. Q. 280, 280 (1964) (quoting Benjamin Rush, *Address to the People of the United States*, AMERICAN MUSEUM). In the same article, Dr. Rush went on to argue for the establishment of a federal university in order to support the federal government and in which "every thing connected with government, such as history—the law of nature and nations—the civil law—the municipal laws of our country—and the principles of commerce—would be taught by competent professors." *Id.* Though this was the first time the idea of a national university was mentioned, it was not the last:

pare citizenry for the continual maintenance of the nation—remains applicable today. Education, in one form or another, has been, and remains now, the primary technique for preparing tomorrow's citizens—today's children—for the various roles required to sustain America.<sup>7</sup>

This article begins by considering citizenry in America, its origins and purpose as well as the training provided by education to become a participatory American citizen. The article then discusses how the concept of disproportionality arises in education through legal mandates and leads to different definitions of "citizen" for different groups. Next, the article considers how the law, within the United States generally and within the Rocky Mountain States more specifically, has viewed the application of proportionality, inside and outside of education. Historically, educational racial discrimination is usually discussed in a black-white dichotomy and in terms of the South's war for segregation.<sup>8</sup> This article adds western expansion analysis using Colorado and Rocky Mountain States as a case study. And lastly, the article concludes by re-conceptualizing a different educational paradigm—one in which historically progressive techniques help fulfill traditionally conservative morals.

Providing some form of bridge or interpretation of competing interests is the goal of this work. Ultimately, the language of progressives (i.e., a union whose strength is maintained via collective or communal contribution—a social democracy)<sup>9</sup> and the language of conservatives (i.e., a union whose strength is maintained via the sum of individual strengths—a Darwinian democracy)<sup>10</sup> are more similar than diametrically opposed. With

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For nearly forty years after its appearance practically every major American leader strongly and repeatedly urged the establishment of such an institution. Indeed, George Washington made this the chief object of his later life and even sought to advance it after death through the means of his last will and testament.

*Id.* See also LAW AND THE SHAPING OF PUBLIC EDUCATION 1785–1954 21, 23 (David Tyack et al. eds., 1987).

7. See AMERICAN EDUCATION AND VOCATIONALISM: A DOCUMENTARY HISTORY, 1870–1970, (Marvin Lazerson & W. Norton Grubb eds., 1974); DEMOCRATIC SCHOOLS: LESSONS IN POWERFUL EDUCATION, (Michael W. Apple & James A. Beane eds., 1995).

8. See, e.g., Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980); Alberto F. Cabrera et al., *Campus Racial Climate and the Adjustment of Students to College: A Comparison Between White Students and African-American Students*, 70 J. OF HIGHER EDUC. 134 (1999); DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* (2004); EDMUND W. GORDON, *EDUCATION AND JUSTICE: A VIEW FROM THE BACK OF THE BUS* (1999); TOO MUCH SCHOOLING, TOO LITTLE EDUCATION: A PARADOX OF BLACK LIFE IN WHITE SOCIETIES (Mwalimu J. Shujaa ed., 1994).

9. See Mark A. Graber, *Social Democracy and Constitutional Theory: An Institutional Perspective*, 69 FORDHAM L. REV. 1969 (2001).

10. "Darwinian conservatism is an evolutionary conservatism in which order emerges from a natural or immanent teleology that we can observe in ordinary human experience. . . . The immanent teleology of evolutionary conservatism is displayed in the striving of human beings to satisfy their evolved natural desires." Larry Arnhart, *Darwinian Conservatism versus Metaphysical Conservatism*, INTERCOLLEGIATE REV., 22, 23 (2010), available at [http://www.mmisi.org/IR/45\\_1-2/arnhart.pdf](http://www.mmisi.org/IR/45_1-2/arnhart.pdf) (contrasting two views of conservatism: one which views human social order as grounded in evolutionary principles, or "Darwinian Conservatism," and the other which views human social order as

patience and consideration, a broad analysis of these interests could look more like crossing a spectrum than crossing a border. If both interests listen to each other better and more civilly, the final product will develop more efficiently and completely. Simply put, without respectful argument, democracy dies.

Three theories ground this work: new institutionalism, critical discourse analysis, and critical race theory.<sup>11</sup> New institutionalism helps explain the emergence of institutions within a context where institutions work interdependently, not independently of each other. For purposes of this article, new institutionalism helped expand my analysis of the relationship between the institutions of law and education.<sup>12</sup> Additionally, critical discourse analysis and critical race theory are invaluable tools as they not only permit, but force, the investigator to dive into the subtleties of acts, statutes, case law, and, therefore, each individual word.<sup>13</sup> When researchers accept words at their face value, they often interpret under a majoritarian or privileged conceptualization.<sup>14</sup> This is premised upon normalization. Thus, the interpretation becomes a self-fulfilling prophecy. Only by critiquing the subtleties, and the often unmentioned affected groups, can we truly assess the costs and benefits of legal positions.<sup>15</sup>

## I. CITIZENRY

Thomas Jefferson was amongst the Founding Fathers who foresaw the necessity of an educated citizenry.<sup>16</sup> He stated, "Above all things I hope

based in religious principles, or "Metaphysical Conservatism").

11. See Mark C. Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 L. & SOC. INQUIRY 903 (1996); LILIE CHOULIARAKI & NORMAN FAIRCLOUGH, *DISCOURSE IN LATE MODERNITY: RETHINKING CRITICAL DISCOURSE ANALYSIS* (4th ed. 2005) (discussing the need and desire to go deeper into the meanings of words); RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY* (2d ed. 2012).

12. See, e.g., LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785–1954, *supra* note 6. David Tyack & Thomas James, *State Government and Public Education: Exploring the "Primeval Forest,"* 26 HIST. OF EDUC. Q. 39 (1986); Michael Heise, *Equal Educational Opportunity, Hollow Victories, and the Demise of School Finance Equity Theory: An Empirical Perspective and Alternative Explanation*, 32 GA. L. REV. 543 (1998).

13. See Teun A. Van Dijk, *Critical Discourse Analysis*, in THE HANDBOOK OF DISCOURSE ANALYSIS 352 (Deborah Schiffrin et al. eds., 2001).

14. See Allan Luke, *Text and Discourse in Education: An Introduction to Critical Discourse Analysis*, 21 REV. RES. IN EDUC. 3 (1996).

15. It baffles me when academics and the judiciary argue for uncritical analysis of acts, statutes, and case law. We spend years in elementary, secondary, and post-secondary education learning the subtleties behind great works of literature. Then, when we turn to legal writings, they suggest we stop. Nothing could be further from what will most benefit the country and mankind.

16. "It is an axiom in my mind that our liberty can never be safe but in the hands of the people themselves, and that too of the people with a certain degree of instruction. This it is the business of the state to effect, and on a general plan." Letter from Thomas Jefferson to George Washington (Jan. 4, 1786) *quoted in* JAMES BRYANT CONANT, *THOMAS JEFFERSON AND THE DEVELOPMENT OF AMERICAN PUBLIC EDUCATION* 98 (1962). See also Thomas J. Walsh, *Education as a Fundamental Right Under the United States Constitution*, 29 WILLAMETTE L. REV. 279 (1993).

the education of the common people will be attended to, convinced that on their good sense we may rely with the most security for the preservation of a due degree of liberty."<sup>17</sup> Simply put, an uneducated citizenry would lead to the failure of the new governmental paradigm within the United States: democracy.<sup>18</sup> Jefferson knew that education could not be limited to the elite for their fledgling political concept to work.<sup>19</sup> As an alternative to a country ruled by a monarchy or a military despot, a country ruled by the people would have to continually educate all of the people because they were the rulers.<sup>20</sup> Otherwise, the system of governance would have seen no meaningful change from what was. Jefferson understood that a failure in this prerequisite would likely lead to the failure of the country.<sup>21</sup>

Because an uneducated citizenry was, and is, so detrimental to the progression and growth of the country, self-fulfillment and self-determination were at the forefront of the Founding Fathers' concerns.<sup>22</sup>

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17. Letter from Thomas Jefferson to James Madison (1787) *quoted in* Jessica Goldberg & Jeffrey Smith, *The effects of education on labor market outcomes*, in *HANDBOOK OF RESEARCH IN EDUCATION FINANCE AND POLICY* 688 (Helen F. Ladd & Edward B. Fiske eds., 2008) (2007), *available at* [http://econweb.umd.edu/~goldberg/docs/Goldberg\\_and\\_Smith\\_AEFA.pdf](http://econweb.umd.edu/~goldberg/docs/Goldberg_and_Smith_AEFA.pdf).

18. "If a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be." Letter from Thomas Jefferson to Colonel Charles Yancey (Jan. 6, 1816) *quoted in* Richard W. Riley, *The Role of the Federal Government in Education—Supporting a National Desire for Support for State and Local Education*, 17 *ST. LOUIS U. PUB. L. REV.* 29, 30 (1997).

19.

In the preamble of his 1779 bill for free schools in Virginia, Thomas Jefferson laid out the basic logic of state-sponsored schools for republican citizenship. Citizens must choose leaders wisely, defeat ambition and corruption in politics, and protect liberty by keeping a vigilant eye on government. All citizens should have a chance not only to vote but to be elected. The government needs wise and honest laws, Jefferson argued, and thus it needs educated and virtuous lawmakers. In a republic, these men must be chosen "without regard to wealth, birth or other accidental condition." Because there are many people who cannot afford a good education, Jefferson argued, all should share the cost, in order to foster the best possible representative government.

CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780-1860* 6 (1983).

20. "Every government degenerates when trusted to the rulers of the people alone. The people themselves therefore are its only safe depositories. And to render even them safe, their minds must be improved to a certain degree." THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA, 1781-1785* (William Peden ed., 1955) *quoted in* Cynthia S. Jordan, "Old Words" in "New Circumstances": *Language and Leadership in Post-Revolutionary America*, 40 *AM. Q.* 491, 504 (1988).

21. "Convinced that the people are the only safe depositories of their own liberty, and that they are not safe unless enlightened to a certain degree, I have looked on our present state of liberty as a short-lived possession unless the mass of the people could be informed to a certain degree." Letter from Thomas Jefferson to Littleton Waller Tazewell (1805), *quoted in* Jeffrey A. Carr, *The State of the Public Education System of the Twenty First Century in the United States in Contrast with the Legislative and Executive Policy Formulations of Thomas Jefferson*, 37 *U.W. LA. L. REV.* 30, 40 (2004).

22. "Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. . . . that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). Justice Brandeis then quotes Jefferson in Footnote 2 of his concurring opinion:

This is the idea that every person will strive to be a rational autonomous being constantly expressing one's own ideas as well as having *real* life options.<sup>23</sup> However, to do that in an efficacious way, a person must be doing so in an educated manner.<sup>24</sup> If educational opportunities are stifled, then too are self-fulfillment and the betterment of the citizenry.<sup>25</sup> Without education as a resource, society ceases to advance, ideas are stymied, progress is diminished and tomorrow's children never reach or serve their full potential.<sup>26</sup>

Mass education, as most Americans think of it, originated in the middle of the 19th Century.<sup>27</sup> The earliest visionaries (e.g., Thomas Jefferson,

Compare Thomas Jefferson: "We have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors and especially when the law stands ready to punish the first criminal act produced by the false reasonings; these are safer corrections than the conscience of the judge." . . . Also in first Inaugural Address: "If there be any among us who would wish to dissolve this union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."

*Id.* at 375 n.3 (citation omitted).

23.

Self-determining persons can make unforced and meaningful choices about their lives without having to sacrifice their secure sense of personal and cultural identity; they can make these choices from among good options; and they can act with the knowledge that who they are is worthy of public respect and recognition.

MICHELE MOSES, *EMBRACING RACE: WHY WE NEED RACE-CONSCIOUS EDUCATION POLICY* 5 (2002). "[F]reedom of speech is an end in itself because the very nature of man is such that he can realize self-fulfillment only if he is free to express himself." MELVILLE B. NIMMER, *DOES COPYRIGHT ABRIDGE THE FIRST AMENDMENT GUARANTEES OF FREE SPEECH AND PRESS?*, 17 *UCLA L. REV.* 1180, 1188 (1970) (discussing Justice Brandeis's concurring opinion in *Whitney*, in which he laid out three major justifications for freedom of speech in a democratic society). "The protection of self-fulfillment is one of the purposes underlying the First Amendment. In many symbolic speech cases, the individual's expressive conduct similarly is more cathartic than communicative." HOWARD M. FRIEDMAN, *WHY DO YOU SPEAK THAT WAY?—SYMBOLIC EXPRESSION RECONSIDERED*, 15 *HASTINGS CONST. L. Q.* 587, 599 (1988) (footnotes omitted) (specifically addressing symbolic expression).

24. In 1787 Thomas Jefferson wrote the following to James Madison:

And say, finally, whether peace is best preserved by giving energy to the government, or information to the people. This last is the most certain, and the most legitimate engine of government. Educate and inform the whole mass of the people. Enable them to see that it is their interest to preserve peace and order, and they will preserve them. . . . They are the only sure reliance for the preservation of our liberty.

Letter from Thomas Jefferson to James Madison (1787), *quoted in* DANIEL KEMMIS, *COMMUNITY AND THE POLITICS OF PLACE* 11 (1945).

25. See Vincent J. Samar, *Autonomy, Gay Rights and Human Self-Fulfillment: An Argument for Modified Liberalism in Public Education*, 10 *WM. & MARY J. WOMEN & L.* 137 (2004).

26. In Jefferson's words, "The boys of the rising generation are to be the men of the next, and the sole guardians of the principles we deliver over to them." Letter from Thomas Jefferson to Samuel Knox (Feb. 12, 1810), *quoted in* Charles J. Crimmins, *Teaching the Constitution: An American Tradition* 90 *DENV. U. L. REV.* 1003, 1021 (2013) (footnote omitted).

27.

The public school as we know it was born in the mid-nineteenth century. Its founders called it the "common" school. . . . They arose through two decades of debate prior to the Civil War in the Northeast and the Midwest of what is now the United States and, later in the nineteenth century, in the South and the West.

SCHOOL: *THE STORY OF AMERICAN PUBLIC EDUCATION* 11, 11 (Sarah Mondale & Sarah B. Patton, eds., 2001).

Harvey Mudd, John Adams) imagined that the national government would create an invaluable societal resource.<sup>28</sup> By educating each and every child, the country would not only create a stronger citizenry and government, it would also advance the new world.<sup>29</sup> In other parts of the world, mass education simply did not exist in any structured, continuous manner.<sup>30</sup> Moreover, most societies used their form of education to segregate students into castes and roles that would preordain their lives.<sup>31</sup>

Jefferson saw past this and contemplated an institution that would minimize the gap between the aristocrats, who had journeyed from Europe to America to increase their already well-established wealth, and the laborers who crossed the Atlantic simply looking for a better way of life, for themselves and their families.<sup>32</sup>

In no other way would their embryonic government be able to stay a "government of the people, by the people."<sup>33</sup> Without some equalizer, like an educated population, domination by the few was a certainty.<sup>34</sup>

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"[E]ducational leaders led by Horace Mann, Henry Barnard, and others rose to the occasion and implemented a vision for the common schools that eventually, after the Civil War, captured the imagination and support of the American people." WILLIAM JEYNES, *AMERICAN EDUCATIONAL HISTORY: SCHOOL, SOCIETY, AND THE COMMON GOOD*, 145 (2007). See also Nathaniel J. McDonald, *Ohio Charter Schools and Educational Privatization: Undermining the Legacy of the State Constitution's Common School Approach*, 53 CLEV. ST. L. REV. 467, 477 (2006).

28. "The whole people must take upon themselves the education of the whole people, and must be willing to bear the expenses of it. There should not be a district of one mile square, without a school in it, not founded by a charitable individual, but maintained at the public expense of the people themselves." JOHN ADAMS, *THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES*, VOLUME 9, 540 (Charles Francis Adams ed., 1854).

29.

What, but education, has advanced us beyond the condition of our indigenous neighbors? And what chains them to their present state of barbarism and wretchedness, but a bigotted veneration for the supposed superlative wisdom of their fathers, and the preposterous idea that they are to look backward for better things, and not forward, longing, as it should seem, to return to the days of eating acorns and roots, rather than indulge in the degeneracies of civilization?

THOMAS JEFFERSON, REPORT FOR UNIVERSITY OF VIRGINIA, (1818). CONANT, *supra* note 16, at 130.

30. See JEYNES, *supra* note 27, at 3 (regarding the Spanish colonies which did not emphasize education).

31. See FRANK PIERREPONT GRAVES, *A STUDENT'S HISTORY OF EDUCATION* (1916 ed., 1916) (especially Chapter I: The Earliest Education).

32. "[I]nstead of an aristocracy of wealth, of more harm and danger, than benefit, to society, to make an opening for the aristocracy of virtue and talent, which nature has wisely provided for the direction of the interests of society, & scattered with equal hand through all it's conditions, was deemed essential to a well ordered republic." THOMAS JEFFERSON, *AUTOBIOGRAPHY OF THOMAS JEFFERSON, 1743-1790*, 58 (1914).

33. Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), available at <http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm> (last visited Dec. 28, 2013). "There are two subjects, indeed, which I shall claim a right to further as long as I breathe: the public education, and the sub-division of counties into wards. I consider the continuance of republican government as absolutely hanging on these two hooks[.]" Thomas Jefferson (1814) *quoted in* ROBERT J. FRANCIOSI, *THE RISE AND FALL OF AMERICAN PUBLIC SCHOOLS: THE POLITICAL ECONOMY OF EDUCATION IN THE TWENTIETH CENTURY* 143 (2004). "Above all things I hope the education of the common people will be attended to, convinced that on their good sense we may rely with the most security for the preservation of a due degree of liberty." Letter from Thomas Jefferson to James Madison (1787),

The people found this innovative idea to be a colossal waste of time.<sup>35</sup> The poor were far more concerned with having their children home, able to work the fields or maintain the residence.<sup>36</sup> The rich saw no reason for their well-earned wealth to be wasted on ignorant peasant children.<sup>37</sup> Legislators attacked Jefferson's idea on every front with one goal in mind: to eradicate every scintilla of the educational proposal.<sup>38</sup> The concept was a failure before it ever took off.<sup>39</sup>

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quoted in Liz Kramer, *Achieving Equitable Education Through the Courts: A Comparative Analysis of Three States*, 31 J. L. & EDUC. 1, 1n.1(2002).

34. "[T]he tax which will be paid for this purpose [of education], is not more than the thousandth part of what will be paid to kings, priests and nobles, who will rise up among us if we leave the people in ignorance." THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 395 (Adrienne Koch & William Peden eds., 1970).

35. "Although most Americans almost take for granted the presence of public schools, from their inception as a part of a national movement, these schools sparked controversy and political division." JEYNES, *supra* note 27, at 145. "America had schools, but, except in large cities, America did not have school systems." KAESTLE, *supra* note 19, at 62. "[T]he suggestion that *all* the children (rich and poor alike) should receive a common education gratis was a proposal far too radical to be accepted in Virginia in 1779 or for many, many years." CONANT, *supra* note 16, at 5.

36. Conant alludes:

The rather elaborate scheme for making the choice of those poor boys who were to attend the residential grammar schools *without charge* makes clear that Jefferson was aware of the difficulties involved in any selective scheme of education, particularly in a country with a free and easy type of society still largely frontier in outlook.

CONANT, *supra* note 16, at 6.

"Parents had considerable power in early rural education. They directly controlled what textbooks their children would use; . . . they controlled what subjects would be taught, who the teacher would be, and how long school would be in session." KAESTLE, *supra* note 19, at 22.

37. "The mood of the American people for many generations was inherently hostile to any notion of educating one group of children at public expense for a longer period of time than all the others. . . . [T]he doctrine of equality of status came in conflict with the notion of equality of opportunity." CONANT, *supra* note 16, at 7. This attitude deeply concerned Horace Mann, who is widely considered the "father of the common school" and it was this concern that, large part, drove him to advocate for common schools. JEYNES, *supra* note 27, at 145.

[Mann] believed that affluent people had a natural advantage over the indigent in that they were able to send their children to the best schools. As a result, the children of the wealthy possessed an inherent advantage in terms of obtaining the best jobs and enjoying a high standard of living. He believed that the availability of education would make it possible for the poor to compete more adequately with the rich for the best jobs that were available. Mann thought that the wage gap that existed between the prosperous and the poor should not be solved by revolution, but by the education of the lower classes of people.

JEYNES, *supra* note 27, at 147.

38. "There had long been Americans who dreamed of state school systems—Jefferson in Virginia, Rush in Pennsylvania, Gideon Hawley in New York, James Carter in Massachusetts—but by and large they had failed to persuade their legislative colleagues that state-level organization and regulation of common schooling were necessary." KAESTLE, *supra* note 19, at 62–63. According to Conant, "[T]he provision of free elementary education[] was slowly accepted in principle but largely negated in practice." CONANT, *supra* note 16, at 20. For example,

The Virginia legislature in 1796 had passed a bill that purported to provide such education, but it was a fraud, for, as Jefferson wrote in his autobiography:

And in the Elementary bill, they inserted a provision which completely defeated it; for they left it to the court of each county to determine for itself, when this act should be carried into execution, within their county. One provision of the bill was, that the expenses of these schools should be borne by the inhabitants of the county, every one in proportion to his general tax rate. This would throw on wealth the education of the poor; and the jus-



Similarly, today, the political cry is that our schools are failing.<sup>40</sup> Contemporary disputes about educating Americans often mirror the historical arguments.<sup>41</sup> Libertarians, as well as others, lift up privatization of the education system as the solution.<sup>42</sup> Moreover, today's poor, disproportionately black and brown children and families, often see American education as disconnected from their lives, their realities, and their communities.<sup>43</sup> Mirroring Jefferson's times, the wealthy can find little or no reason to waste their resources on children who clearly do not "want" an education; at least, not nearly as much as the progeny of the rich.<sup>44</sup> However, one major difference between contemporary education and middle 19th Century education is that contemporary education is well-established.<sup>45</sup> Politi-

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tices, being of the more wealthy class, were unwilling to incur that burden, and I believe it was not suffered to commence in a single county.

CONANT, *supra* no. 16, at 29–30 (endnote omitted).

39. CONANT, *supra* no. 16, at 5. It would not be until Reconstruction that the concept took hold and "captured the imagination and support of the American people." JEYNES, *supra* note 27, at 145 (citation omitted).

40. See, e.g., Christine Armario, *Duncan: 82 Percent Of US Schools May Be Labeled 'Failing' Under No Child Left Behind Policies*, HUFFINGTON POST (March 9, 2011, 7:29 PM), [http://www.huffingtonpost.com/2011/03/09/failing-schools-82-percent\\_n\\_833653.html](http://www.huffingtonpost.com/2011/03/09/failing-schools-82-percent_n_833653.html).

41. See generally McDonald, *supra* note 27 (addressing the state of Ohio specifically, but with national application).

42. See, e.g., Andrei Shleifer, *State Versus Private Ownership* (Nat'l Bureau Econ. Research, Working Paper No. 6665, 1998); Lindsey M. Burke & Brittany Corona, *Heritage Foundation Officials: A New Way to Fund Education*, NEWS OK (Nov. 29, 2013), <http://newsok.com/article/3909102>; Rachel Tabachnick, *Strategy for Privatizing Public Schools Spelled out by Dick DeVos in 2002 Heritage Foundation Speech*, TALK TO ACTION (Tue., May 3, 2011, 12:05 AM), <http://www.talk2action.org/story/2011/5/3/12515/58655>. But see Kevin D. Brown, *Reexamination of the Benefit of Publicly Funded Private Education for African-American Students in a Post-Desegregation Era*, 36 IND. L. REV. 477 (2003) (examining how the availability of public vouchers for private education would negatively impact African-American students).

43. "Unfortunately, the cultural underpinning of schools in the United States is largely congruent with middle-class, European values, leading many schools to ignore or downplay the strengths of diverse students and their families." Barbara Bazron et al., *Creating Culturally Responsive Schools*, 63 EDUC. LEADERSHIP 83, 83 (2005), available at <http://inclusiveclassrooms.pressible.org/files/2010/04/CreatingCulturallyResponsiveSchools.pdf> (citations omitted).

44. Bruce J. Biddle and David C. Berliner argue, "[r]esistance to equitable funding for schools has also been supported by several belief systems about the causes of poverty." Bruce J. Biddle & David C. Berliner, *A Research Synthesis/Unequal School Funding in the United States*, 59 EDUC. LEADERSHIP 48 (2002). They identify the three belief systems as "individualism," "essentialism" and "culture of poverty." *Id.* According to Biddle and Berliner,

Each of these belief systems can lead to the argument that because students from impoverished homes are unlikely to benefit from a "quality" education, funding public schools equally in rich and poor neighborhoods would only waste tax dollars. To voice such arguments openly is not acceptable in the United States today, but the beliefs that would justify them are still embraced privately by many white, affluent people who use them to rationalize resistance to proposals for equal school funding.

*Id.*

45. For example, the United States Department of Education:

The mission of the Department of Education is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access. It engages in four major types of activities:

1. Establishes policies related to federal education funding, administers distribution of those funds and monitors their use.

cally, it is too late to argue against education as a societal good. Instead, the argument has shifted to identifying schools as business products.<sup>46</sup> Successful products must flourish while “unprofitable” products must be eliminated.<sup>47</sup> But, in modern times, the question remained, how to assign success and failure?

Legislators learned tactics to assign the failure to the smallest unit of analysis, children, instead of the largest, the country or its designated representatives.<sup>48</sup> Across the country, this is evidenced through legislatively-mandated standardized testing.<sup>49</sup> The testing assigns failing grades (amongst other grades) to particular schools based on their student’s performance, not the nation or even the state where the grade would be intimately connected to legislators and political executives.<sup>50</sup> The rhetoric is that “we must do better” but the grades, or their resulting punishments, mostly, are meted out on particular communities.<sup>51</sup> The proverbial “hot

2. Collects data and oversees research on America's schools.

3. Identifies major issues in education and focuses national attention on them.

4. Enforces federal laws prohibiting discrimination in programs that receive federal funds.

ED.GOV: U.S. DEP'T OF EDUC., <http://www2.ed.gov/about/what-we-do.html> (last modified Feb. 2, 2010).

46. See WILLIAM G. OUCHI, MAKING SCHOOL WORK: A REVOLUTIONARY PLAN TO GET YOUR CHILDREN THE EDUCATION THEY NEED (2003) (arguing, among other things, that every school principal is an entrepreneur).

47. Perhaps the most striking example of this view is *No Child Left Behind*:

States, districts and schools that improve achievement will be rewarded. Failure will be sanctioned. Parents will know how well their child is learning, and that schools are held accountable for their effectiveness with annual state reading and math assessments in grades 3-8.

President George W. Bush, *No Child Left Behind* 3 (2001), available at <http://education.ucf.edu/mirc/Research/NCLB%20-%20Bush.pdf> (last visited Feb. 18, 2014).

48. *Id.*

49. *Id.* See also, Michele S. Moses & Michael J. Nanna, *The Testing Culture and the Persistence of High Stakes Testing Reforms*, 23 EDUC. AND CULTURE 55 (2007).

50. Bush, *supra* note 47, at 8.

51. In a 1983 speech, then-President Ronald Reagan said, "'We've created the greatest public school system the world has ever seen, and then have let it deteriorate. . . ." JEFFREY R. HENIG, RETHINKING SCHOOL CHOICE: LIMITS OF THE MARKET METAPHOR 83 (1994). "Receiving an honorary degree from the University of South Carolina in the fall of 1983, [Reagan] emphasized that the problem with education was not lack of money, but insufficient 'homework, testing . . . and good old-fashioned discipline.'" *Id.* "Early in his tenure as governor of Arkansas, [Bill] Clinton exhorted state legislators to raise spending per pupil in the public schools, arguing that the state was obliged to provide a better quality of education to its young citizens." DAVID J. SIEMERS, PRESIDENTS AND POLITICAL THOUGHT 218 n.32 (2009).

In a speech in 2002, President Bush stated that the purpose of [No Child Left Behind] [was] to ensure that "every child in every school must be performing at grade level in the basic subjects that are the key to all learning, reading and math." In the same speech, he argue[d] that "it's an exciting time for American education; it really is. We're facing challenges, but we have the blueprint for success." The No Child Left Behind Act starts the way for a better tomorrow.

WILLIAM HAYES, NO CHILD LEFT BEHIND: PAST, PRESENT, AND FUTURE 15 (2008).

President Obama in his book *The Audacity of Hope: Thoughts on Reclaiming the American Dream* reflects the language of education for the knowledge economy: "in a knowledge-based economy where eight of the nine fast-growing occupations this decade require scien-

potato" just keeps getting passed around, until no one knows where to place the blame (other than not on themselves).<sup>52</sup> Haphazardly, the blame gets placed back on the students, leaving them to carry the burden and deal with the stigma placed on them and their schools.<sup>53</sup> These child victims are disproportionately from historically marginalized communities.<sup>54</sup> The undeniable message received by these students is that *your* schools are bad and *our* schools are good. *We* will save you from depredation.<sup>55</sup>

On the opposite end of the spectrum are schools that are regularly acknowledged as templates, to be reproduced by *those other* schools.<sup>56</sup> Generally, the templates have certain variables in common.<sup>57</sup> The socio-

tific or technological skills, most workers are going to need some form of higher education to fill the jobs of the future."

JOEL SPRING, *THE POLITICS OF AMERICAN EDUCATION* 9 (2011). Spring goes on to observe, "[b]laming schools makes good politics because otherwise politicians might have to blame . . . powerful and wealthy interests that can use their influence to thwart political ambitions. It is politically safe to just blame the schools." SPRING, *supra*, at 18. See also EQUITY & EXCELLENCE COMM'N, U.S. DEP'T OF EDUC., *FOR EACH AND EVERY CHILD* (2013), available at <http://www2.ed.gov/about/bdscmm/list/eec/equity-excellence-commission-report.pdf>.

52. This problem is not new. In 1974 Henry M. Levin, an associate professor at the School of Education and Department of Economics at Stanford University, observed:

The complexities in making an educational system accountable under such conditions are readily apparent. Conflicts even exist among different levels of government with regard to their educational preferences. The federal government may view racial integration of the schools as a high priority, while the local government may view it as a low priority, with negative impact. Depending then upon whether the schools are racially integrated or not, there will be questions of accountability raised by one or the other of these governments.

Henry M. Levin, *A Conceptual Framework for Accountability in Education*, 82 SCH. REV. 363, 370 (1974) (footnote omitted).

53. "The accountability requirements of the No Child Left Behind Act of 2001 place high-poverty schools and racially diverse schools at a disadvantage because they rely on mean proficiency scores and require all subgroups to meet the same goals for accountability." James S. Kim & Gail L. Sunderman, *Measuring Academic Proficiency Under the No Child Left Behind Act: Implications for Educational Equity*, 34 EDUC. RESEARCHER 3, 3 (2005).

54. "As documented in federal statistics and a large number of current lawsuits, schools serving large numbers of low-income students and students of color have larger class sizes, fewer teachers and counselors, fewer and lower-quality academic courses, extracurricular activities, books, materials, supplies and computers, libraries and special services." Linda Darling-Hammond, *Race, inequality and Educational Accountability: The Irony of "No Child Left Behind,"* 10 RACE ETHNICITY & EDUC. 245, 247 (2007).

55. Interview with John Merrow, *Grading Schools: How to Determine the 'Good' from the 'Bad'?*, PBS NEWSHOUR (June 6, 2011, 12:00 AM), [http://www.pbs.org/newshour/bb/education/jan-june11/schools\\_06-06.html](http://www.pbs.org/newshour/bb/education/jan-june11/schools_06-06.html). See also *The Top-Five Reasons to Avoid a High School*, GREAT SCHOOLS, <http://www.greatschools.org/find-a-school/1632-five-reasons-to-avoid-a-high-school.gs> (last visited Dec. 30, 2013); Michael J. Petrilli, *If You Send Your Kid to a Failing School, You are a Bad Person*, EDUCATION NEXT (Sept. 4, 2013), <http://educationnext.org/if-you-send-your-kid-to-a-failing-school-you-are-a-bad-person/>.

56. Briana Boyington, *2014 Best High Schools*, U.S. NEWS & WORLD REPORT (Apr. 21, 2014), <http://www.usnews.com/education/high-schools/slideshows/best-high-schools-2013>.

57. Princeton economists David Card and Alan Krueger identified "objective measures of school quality" as including "pupil-teacher ratios, relative wages of teachers, and the duration of the school term." David Card & Alan Krueger, *Does School Quality Matter? Returns to Education and the Characteristics of Public Schools in the United States* 2 (Nat'l Bureau Econ. Research, Working Paper No. 3358, 1990). "In general terms, however, [socioeconomic status] describes an individual's or a family's ranking on a hierarchy according to access to or control over some combination of valued

economic status of the parents is above the national average, the teachers are the most senior and the most educated, and the school provides opportunities for the students to engage in challenging studies and extracurricular activities.<sup>58</sup> Disproportionately, these children are from historically privileged communities.<sup>59</sup>

The outcomes are expected. Not surprisingly, children from the historically privileged communities disproportionately end up as legislators, in professional careers, and reside in neighborhoods where constituent's concerns are provided with rapid response by elected officials.<sup>60</sup> Disproportionately, children from historically marginalized communities are provided uncritical curriculum, funneled into the school-to-prison pipeline, and disproportionately lose all American citizenry privileges.<sup>61</sup> The cycle is perpetually reproduced.<sup>62</sup>

Various social factors play a role and should also be critiqued for Jefferson's dream of democracy to stay alive.<sup>63</sup> For example, economists opine about unemployment percentages, gross national product, and other factors influencing the nation's financial status.<sup>64</sup> Additionally, the health

commodities such as wealth, power, and social status." Selcuk R. Sirin, *Socioeconomic Status and Academic Achievement: A Meta-Analytic Review of Research*, 75 REV. OF EDUC. RES. 417, 418 (2005).

58. Card & Krueger, *supra* note 57; Sirin, *supra* note 57.

59. "Racial and cultural background continues to be a critical factor in academic achievement in the United States. Recent surveys conducted by the National Center for Education Statistics (NCES) indicated that, on average, minority students lagged behind their White peers in terms of academic achievement." Sirin, *supra* note 57, at 420.

60. Jonathan Kozol writes:

[W]hat is now encompassed by the one word ("school") are two very different kinds of institutions that, in function, finance and intention, serve entirely different roles. Both are needed for our nation's governance. But children in one set of schools are educated to be governors; children in the other set of schools are trained for being governed. The former are given the imaginative range to mobilize ideas for economic growth; the latter are provided with the discipline to do the narrow tasks the first group will prescribe.

JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* 176 (1992).

61. "The school-to-prison pipeline is the collection of education and public safety policies and practices that push our nation's schoolchildren out of the classroom and into the streets, the juvenile justice system, or the criminal justice system." Deborah N. Archer, *Introduction: Challenging the School-to-Prison Pipeline*, 54 N.Y.L. SCH. L. REV. 867, 868 (2010).

62.

Societies cannot be all generals, no soldiers. But, by our schooling patterns, we assure that soldiers' children are more likely to be soldiers and that the offspring of the generals will have at least the option to be generals. If this is not so, if it is just a matter of the difficulty of assuring perfect fairness, why does the unfairness never benefit the children of the poor?

KOZOL, *supra* note 60.

63. See, e.g., Russell W. Rumberger, *Why Students Drop Out of School and What Can be Done* (Paper prepared for the conference, "Dropouts in America: How Severe is the Problem? What Do We Know about Intervention and Prevention?" Harvard University, January 13, 2001) available at <http://civilrightsproject.ucla.edu/research/k-12-education/school-dropouts/why-students-drop-out-of-school-and-what-can-be-done/rumberger-why-students-drop-out-2001.pdf> (last visited Oct. 6, 2013).

64. For example:

A puzzling paradox confronts observers of modern society. We are witnesses to a dramatic expansion of market-based economies whose capacity for wealth generation is awesome in

care industry opines about nutrition, exercise, and factors influencing individual and family well-being.<sup>65</sup> However, undeniably, one such factor is the law. This article will further explain why.

#### A. Democratic Educational Training

One reason that law must support the proportionality of educational systems and outcomes is grounded in the ability of the people to recognize and understand the issues.<sup>66</sup> It is one skill to read a manual, a book, or a political position. It may be quite another to understand it, its nuances, and to foster critical analysis. Education must provide the foundation to engage one's community competently and confidently.<sup>67</sup> Once citizens are able to engage in the community's dialogue, they can intelligently support or critically deconstruct societal behaviors.<sup>68</sup>

At its inception, America battled both domestic and international issues.<sup>69</sup> A citizenry unable to comprehend and rationalize all that the nation

comparison to both the distant and the recent past. At the same time, there is a growing perception of substantial threats to the health and well-being of today's children and youth in the very societies that benefit most from this abundance.

DEVELOPMENTAL HEALTH AND THE WEALTH OF NATIONS: SOCIAL, BIOLOGICAL, AND EDUCATIONAL DYNAMICS 1 (Daniel P. Keating & Clyde Hertzman eds., 1999).

65. See, e.g., Howard S. Adelman & Linda Taylor, *Looking at School Health and School Reform Policy Through the Lens of Addressing Barriers to Learning*, 3 CHILD. SERVICES: SOC. POL'Y, RESEARCH, & PRAC. 117 (2000); D. J. Barr-Anderson, A. W. Adams-Wynn, K. I. DiSantis & S. Kumanyika, *Family-Focused Physical Activity, Diet and Obesity Interventions in African-American Girls: A Systematic Review*, 14 OBESITY REVIEWS 29, 29-30 (2013) (discussing the need for specially designed intervention techniques for reducing disproportionate obesity among African American girls).

66. "Though [the people] may acquiesce, they cannot approve what they do not understand." Thomas Jefferson, Opinion on Apportionment Bill (1792), in WORDS OF THE FOUNDING FATHERS 125 (Steve Coffman ed., 2012).

67. Jarrod S. Hanson and Kenneth Howe argue for a deliberative democratic approach in teaching civics since it "ask[s] people to engage in deliberations with others . . . [and] requires participants to acknowledge the autonomy of others and the accompanying right to hold moral positions on public issues that may differ from their own." Jarrod S. Hanson & Kenneth R. Howe, *The Potential for Deliberative Democratic Civic Education*, 19 DEMOCRACY & EDUC. 1, 2 (2011).

68. *Id.*

69.

It was in a hothouse atmosphere of passion, suspicion, and fear that the republican political institutions forged by the American Constitution were put to the test. Indeed, the twelve years from 1789 to 1801 represent a critical era in American history equivalent to that of the Civil War. The new nation was on trial in the 1790s and no one knew what the verdict would be. The overriding question in the minds of all Americans was: Could a people whose identity was born in revolution and divided into thirteen independent and jealous sovereignties create a stable, enduring national authority? And would this be possible amid the swirl of international conflict that threatened to engulf the young nation and plunge it into that great life-and-death struggle between the French Republic and Imperial Britain, an involvement that would imperil American independence?

JAMES ROGER SHARP, AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS 1 (1993); see generally THE FEDERALIST NOS. 3-5 (John Jay) (discussing the need for a federal government to protect against foreign force and influence); THE FEDERALIST NOS. 6, 7 (Alexander Hamilton) (discussing the need for a federal government to protect against dissension among the states).

faced would likely revert back to a situation of comfort.<sup>70</sup> That would mean a return to a monarchy, because that was the form of rule most recent in time and, therefore, most likely to breed thoughts of security.<sup>71</sup> The people, then and now, vote for referendums or positions that seem least challenging.<sup>72</sup> Education (and within the complexities of the term “education,” I include propaganda) was the strategy for making citizens “learned” while simultaneously acclimating them to the new style of government and the role that they were expected to play.<sup>73</sup>

A second reason that law must support the proportionality of educational systems is that education prepares citizens to become responsible critics.<sup>74</sup> Responsibility is paramount as undirected criticism is often unwieldy and unproductive.<sup>75</sup> Responsibility should be compared to subservi-

70. Writing to Mann Page in 1795, Jefferson declared:

I do most anxiously wish to see the highest degrees of education given to the higher degrees of genius and to all degrees of it, so much as may enable them to read & understand what is going on in the world and to keep their part of it going on right; for nothing can keep it right but their own vigilant & distrustful superintendence.

Letter from Thomas Jefferson to Mann Page (1795) in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON*, 435 (Adrienne Koch & William Pedin eds., 1998).

71. As Thomas Jefferson observed,

Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. . . . [S]uch is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States.

*THE DECLARATION OF INDEPENDENCE* (U.S. 1776).

72.

Doubts about people's capacity for competent citizenship historically have centered on two charges. One is that the rank and file have neither the intellectual nor the moral capacity to make sound decisions and that, even if they did, they wouldn't take the time. The other is that people may have a measure of common sense and social responsibility but the world in which they live is too complex for citizens to understand and too subject to centralized forces for local action to be effective. Those persuaded by these arguments look to elites to be guardians of the public's true interests. They believe their pessimism is realistic and in accord with "facts."

DAVID MATHEWS, *POLITICS FOR PEOPLE: FINDING A RESPONSIBLE PUBLIC VOICE* 6 (2d ed. 1999). Mathews goes on to say that he is not as pessimistic:

We would like to believe that self-government is possible, that people can form viable democratic publics in their communities and in the country, and that we can relate to one another and our problems in ways consistent with the norms of democracy. A democratic public is, in fact, made up of relationships or ways of relating that are based on assumptions not so much about what we *are* as about what we *must be*.

*Id.* at 6–7.

73. See, Julius Nyerere, Education for Self-Reliance, Symposium on Understanding Quality Education available at [http://www.afed.itacec.org/document/julius\\_nyerere.pdf](http://www.afed.itacec.org/document/julius_nyerere.pdf) (last visited Jan. 3, 2014).

74. Joel Westheimer & Joseph Kahne, *What Kind of Citizen? The Politics of Educating for Democracy*, 41 AM. EDUC. RES. J. 237 (2004).

75. See Robert J. Nash, *Fostering Moral Conversations in the College Classroom*, 7 J. ON EXCELLENCE IN C. TEACHING, 83 (1996) (speaking specifically to the classroom context, but with broader application).

ence. This is important because previous generations survived under a mentality of minimal challenge to the government, usually some monarchy.<sup>76</sup> While the downside of subservience is obvious, what it does provide is a lack of responsibility for political outcomes. In order to critically analyze, people must be educated in a way that roles and responsibilities can be constructively challenged.<sup>77</sup>

When people have no foundation upon which they can fully comprehend and participate in their roles and responsibilities, critical analysis becomes merely complaining, with no logical or positive outcome.<sup>78</sup> While complaining may serve the function of bringing issues into the light, complaining rarely produces solutions.<sup>79</sup> Instead, for the genesis of a positive

76. THE DECLARATION OF INDEPENDENCE, *supra* note 71.

77. According to Joel Westheimer and Joseph Kahne, "the growing number of educational programs that seek to further democracy by nurturing 'good' citizens embody a similarly broad variety of goals and practices." Joel Westheimer & Joseph Kahne, *Educating the "Good" Citizen: Political Choices and Pedagogical Goals*, 37 POL. SCI. & POL. 241, 241 (2004). They identify three "visions of 'citizenship' . . . the *personally responsible citizen*; the *participatory citizen*; and the *justice-oriented citizen*." *Id.* at 242. They describe the "Justice-Oriented Citizen" in this way:

A third image of a good citizen is, perhaps, the perspective that is least commonly pursued. We refer to this view as the justice-oriented citizen, one that calls explicit attention to matters of injustice and to the importance of pursuing social justice goals. Justice-oriented citizens critically assess social, political, and economic structures and consider collective strategies for change that challenge injustice and, when possible, address root causes of problems. The vision of the justice-oriented citizen shares with the vision of the participatory citizen an emphasis on collective work related to the life and issues of the community. However, these programs emphasize preparing students to improve society by critically analyzing and addressing social issues and injustices. These programs are less likely to emphasize the need for charity and volunteerism as ends in themselves and more likely to teach about social movements and how to affect systemic change.

*Id.* at 243. See also MERIEL BLOOR & THOMAS BLOOR, *THE PRACTICE OF CRITICAL DISCOURSE ANALYSIS: AN INTRODUCTION* (Routledge 2013).

78. Kahne and Westheimer discuss "[u]sing before-and-after surveys and systematic analysis of observations, interviews, and portfolios of student work . . . to track changes in students' commitment to and capacity for democratic participation." Joseph Kahne & Joel Westheimer, *Teaching Democracy: What Schools Need to Do*, 85 PHI DELTA KAPPAN 34, 40, 57 (2003). They continue:

Although care is certainly warranted when discussing controversial issues, our study revealed that keeping social issues out of the classroom is not wise. The sense that something is wrong is *compelling*, especially to adolescents who are already developing their own critiques of the world. Addressing social and political issues in classroom contexts recognizes their importance and at the same time helps make connections between critique, analysis, and action. Students begin to see the value not only in studying these problems but also in doing something to try to address them. As the progressive educator Harold Rugg observed:

To guarantee maximum understanding, the very foundation of education must be the study of the actual problems and controversial issues of our people. . . . The avoidance of controversy is a travesty of both knowledge and democracy. To keep issues out of the school, therefore, is to keep thought out of it; it is to keep life out of it.

*Id.* at 58 (endnote omitted). See also, Gary L. Anderson, *Toward Authentic Participation: Deconstructing the Discourses of Participatory Reforms in Education*, 35 AM. EDUC. RES. J. 571 (1998).

79. Kahne and Westheimer identify "three broad priorities" of successful programs for training democratic citizens: civic commitment, capacity, and connection. Kahne & Westheimer, *supra* note 78, at 57.

In an attempt to bring conceptual coherence to current discourses of participation, this article will focus on what a more authentic approach to participation might look like. While the

outcome, complaining must evolve into critical analysis and engagement.<sup>80</sup> This, in turn, leads to a bevy of credible suggestions. As suggestions are deliberately debated<sup>81</sup> and carefully considered, the “best” and most agreed upon should rise to the top.<sup>82</sup> Those that rise to the top will inevitably be the truth so arduously sought after.<sup>83</sup> The more discussion, the more ideas; the more counter-speech, the more the truth is uncovered and myths dispelled.<sup>84</sup> This was to be a foundational trait of the new government.<sup>85</sup>

A third reason that law should support the proportionality of educational systems is that education prepares the citizenry to participate.<sup>86</sup> Education is the manner in which tomorrow’s citizens find their roles in America.<sup>87</sup> A government “of the people, by the people”<sup>88</sup> necessitates actual participation by the citizens.<sup>89</sup> One or more individuals must act as

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term *authentic* may be problematic to the extent that it suggests a single essentialist core to participation, I prefer this term to others, such as *deep* or *empowering* participation, because I have found that teachers and parents alike resonate to it as an antidote to what they see as the more cynical and contrived forms of participation they often experience.

Anderson, *supra* note 78, at 573 (footnote omitted) (Anderson proceeds to connect his definition of “authentic participation” with participatory approaches to democratic theory).

80. Such critical analysis and engagement has been called for in such fields as law and education. See, e.g., Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983); Gloria Ladson-Billings & William F. Tate IV, *Toward a Critical Race Theory of Education*, 97 TEACHER’S C. REC. 47 (1995) (arguing that a critical race theoretical perspective should be employed in education as in law “by developing three propositions: (1) race continues to be significant in the United States; (2) U.S. society is based on property rights rather than human rights; and (3) the intersection of race and property creates an analytical tool for understanding inequity”).

81. Hanson & Howe, *supra* note 67.

82. “The best test of truth is the power of the thought to get itself accepted in the competition of the market.” Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 4 (2004) (quoting *Abrams v. U.S.*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). See also R.H. Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV., 384 (1974); Hanson & Howe, *supra* note 67.

83. Blasi, *supra* note 82. See also Coase, *supra* note 82; Hanson & Howe, *supra* note 67.

84. Blasi, *supra* note 82.

85. See Blasi, *supra* note 82; Coase, *supra* note 82.

86. “One of the most fundamental obligations of any society is to prepare its adolescents and young adults to lead productive and prosperous lives as adults. This means preparing all young people with a solid enough foundation of literacy, numeracy, and thinking skills for responsible citizenship. . . .” RONALD FERGUSON ET AL., *PATHWAYS TO PROSPERITY: MEETING THE CHALLENGE OF PREPARING YOUNG AMERICANS FOR THE 21ST CENTURY 1* (Harvard Univ. Graduate Sch. Educ. Pathways to Prosperity Project ed., 2011), available at [http://www.gse.harvard.edu/news\\_events/features/2011/Pathways\\_to\\_Prosperty\\_Feb2011.pdf](http://www.gse.harvard.edu/news_events/features/2011/Pathways_to_Prosperty_Feb2011.pdf) (last visited Feb. 18, 2014).

87. *Id.*

88. Abraham Lincoln, *The Gettysburg Address* (1863).

89. Akhil Reed Amar puts it this way:

The central pillar of Republican Government, I claim, is popular sovereignty. In a Republican Government, the people rule. They do not necessarily rule directly, day-to-day. Republican Government probably does not (as some have claimed) prohibit all forms of direct democracy, such as initiative and referendum, but neither does it require ordinary lawmaking via these direct populist mechanisms. What it does require is that the structure of day-to-day government—the Constitution—be derived from “the People” and be legally alterable by a “majority” of them. These corollaries of popular sovereignty—the people’s right to alter or abolish, and popular majority rule in making and changing constitutions—were bedrock principles in the Founding, Antebellum, and Civil War eras.



the head of the body of people.<sup>90</sup> Others must coordinate defense of the body.<sup>91</sup> Others must guide the finances of the body.<sup>92</sup> The analogy between rulers leading a country and the people leading the country could continue *ad infinitum*. Suffice it to say that the people must participate in each of the many roles and, ideally, do so willingly.<sup>93</sup>

One way to inspire willingness to participate is to have the government engage the populous.<sup>94</sup> However, talking *at* someone and talking *with* someone, are two completely different theories.<sup>95</sup> To make this idea work, communication must begin with equal footing.<sup>96</sup> The government can no longer "talk at" the people, but instead must treat them as equals, with an equal voice, rather than regarding them as "the people," something less than the elites in government. This transition from a *per se* subservient position would negate the complacent attitudes of most Americans, and replace it with an active voice, taking back the idea of a government by the people, for the people.

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Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749 (1994).

90. The founders articulated this concept in the Preamble to the Constitution and its Articles: We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

U.S. CONST. pmb. See also U.S. CONST. art. II.

91. See U.S. CONST. pmb. See also U.S. CONST. art. II.

92. See U.S. CONST. pmb. See also U.S. CONST. art. II.

93. One example of unwilling American participation is the military's draft.

94. Thomas Jefferson warned, "Every government degenerates when trusted to the rulers of the people alone. . . . The people themselves therefore are its only safe depositories. And to render even them safe their minds must be improved to a certain degree." Dennis Shirley, *A Brief History of Public Engagement in American Public Education*, in PUBLIC ENGAGEMENT FOR PUBLIC EDUCATION: JOINING FORCES TO REVITALIZE DEMOCRACY AND EQUALIZE SCHOOLS 27, 27 (Marion Orr & John Rogers eds., 2011) (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 147 (W.W. Norton & Co. 1982) (1987)).

95. See generally COURTNEY B. CAZDEN, CLASSROOM DISCOURSE: THE LANGUAGE OF TEACHING AND LEARNING (2d ed., 1988), 53-79 available at <http://www.wou.edu/~girodm/library/cazden.pdf> (last visited Jan. 3, 2014) (exploring discourse speeches in the classroom: speaking rights, the teacher's role, and speech style).

96. According to Habermas's discourse principle,

[T]he settlement of contested normative claims through communicative action . . . thus provides a procedural criterion of normative validity. The discourse principle accordingly requires mutual recognition among all communicative actors, as well as consideration of all interests, as pre-conditions to the reaching of a consensus on action norms that are in the equal interests of all those affected. Consistent with this, the discourse principle does not predetermine which laws are valid but rather affords a counterfactual (idealized) means to test whether the laws would command the consensus of all those possibly affected.

Michel Rosenfeld, *Law as Discourse: Bridging the Gap Between Democracy and Rights*, 108 HARV. L. REV. 1163, 1169 (1995) (citations omitted) (reviewing JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1995)).

Unwilling participation by the many would likely lead back to control by a few.<sup>97</sup> In some ways, this has come to pass. As the campaigns for political positions become financially exorbitant and skeptics question politicians' veracity, an increasing homogeneity emerges in the characteristics of office-holders.<sup>98</sup> Unarguably, some level of homogeneity has always existed. While the physical similarities between the Founding *Fathers* are obvious, their ownership status (of land and people) evidences another level of homogeneity.<sup>99</sup> Today, one can often see similar traits, like the same academic institutions (perhaps, even to the secondary school level), shared by many national politicians, executives, and judiciary.<sup>100</sup> Simi-

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97. Arend Lijphart argues that "[t]he problem of inequality can be solved by institutional mechanisms that maximize turnout." Arend Lijphart, *Unequal Participation: Democracy's Unresolved Dilemma*, 91 AM. POL. SCI. REV. 1, 1 (1997). Lijphart observes,

Political equality and political participation are both basic democratic ideals. In principle, they are perfectly compatible. In practice, however, as political scientists have known for a long time, participation is highly unequal. And unequal participation spells unequal influence—a major dilemma for representative democracy in which the "democratic responsiveness [of elected officials] depends on citizen participation," and a serious problem even if participation is not regarded mainly as a representational instrument but as an intrinsic democratic good. *Moreover, as political scientists have also known for a long time, the inequality of representation and influence are not randomly distributed but systematically biased in favor of more privileged citizens—those with higher incomes, greater wealth, and better education—and against less advantaged citizens.*

This systematic class bias applies with special force to the *more intensive and time-consuming forms of participation*. Steven J. Rosenstone and John Mark Hansen found that, in the United States, the smaller the number of participants in political activity, the greater the inequality in participation. In other countries, too, it is especially the more advantaged citizens who engage in these intensive modes of participation—both conventional activities such as working in election campaigns, contacting government officials, contributing money to parties or candidates, and working informally in the community and unconventional activities like participation in demonstrations, boycotts, rent and tax strikes, occupying buildings, and blocking traffic.

*Id.* (emphasis added) (citations omitted).

Lijphart goes on to suggest "the combination of voter-friendly registration rules, proportional representation, infrequent elections, weekend voting, and holding less salient elections concurrently with the most important national elections" as institutional mechanisms which could maximize turnout in addition to compulsory voting, arguing "[i]ts advantages far outweigh the normative and practical objections to it." *Id.* However, if the latter suggestion were to be implemented, it is conceivable it might lead to the very result it was supposed to avoid.

98. See Aliyah Frumin, *How Much Does It Cost to Win a Seat in Congress? If You Have to Ask . . .*, MSNBC (Mar. 11, 2013, 8:47 AM), <http://tv.msnbc.com/2013/03/11/the-astonishing-amount-of-money-it-costs-to-win-a-seat-in-congress-today/>.

99. See, e.g., PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON*, (2d ed. 2001); Paul Finkelman, *The Founders and Slavery: Little Ventured, Little Gained*, 13 YALE J. L. & HUMAN. 413 (2001); Tania Tetlow, *The Founders and Slavery: A Crisis of Conscience*, 3 LOY. J. PUB. INT. L. 1 (2001).

100. For example, all current Supreme Court justices have attended from one of two institutions: Harvard or Yale. See *Biographies of the Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES (MAY 15, 2014), <http://www.supremecourt.gov/about/biographies.aspx>; LEGAL INFORMATION INSTITUTE, <http://www.law.cornell.edu/supct/justices/alito.bio.html>. Former presidents Gerald Ford, Bill Clinton, George H.W. Bush, and George W. Bush are Yale alumni, as is former Vice President Dick Cheney. Elena Novak, *Want to Succeed in Politics? Here are the 10 Colleges You Should Consider*, ULOOP: FLA. STATE POLITICS NEWS (Sept. 4, 2013), <http://fsu.uloop.com/news/view.php/97554/want-to-succeed-in-politics-here-are-the-10-colleges-you->

larly, contemporary politicians often share the same socio-economic status.<sup>101</sup> Thus, homogeneity has remained an issue and evidences undemocratic results in the American democratic model.

But, conceptually, the Founding Fathers imagined a different dynamic. One in which participation occurred at all levels of society.<sup>102</sup> All segments of America were required to participate for national power to be distributed (ideally, evenly) throughout the population.<sup>103</sup> Today, that would require racial diversity, gender diversity, class diversity, religious diversity, sexual orientation diversity, and a host of other American demographic categories.<sup>104</sup> Without such heterogeneity, the logical conclusion is a movement toward a heightened level of eliteness.<sup>105</sup>

By elite, I am not limiting the definition to economic class, racial or gender divides, or sexual orientation differences; rather, I consider any combination or growth out of these or additional divisions to contribute to eliteness. In other words, eliteness refers to a broader categorization. Merriam-Webster defines elite as "a group of persons who by virtue of position or education exercise much power or influence."<sup>106</sup> My utilization of the word relies on the same understanding; that a particular group is per-

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should-consider. From the opposite coast, notable Stanford graduates include Supreme Court justices Stephen Breyer, Anthony Kennedy, Sandra Day O'Connor, and William Rehnquist; U.S. senators Max Baucus, Cory Booker, Dianne Feinstein, Jeff Merkley and Ron Wyden. *Facts 2014: Alumni*, STANFORD, <http://facts.stanford.edu/alumni/> (last modified May 5, 2014).

101. "Despite electing Yale and Harvard graduates for the last four consecutive presidents, Americans overwhelmingly want the next president to come from a non-Ivy League school, according to a national poll of likely voters." Paul Bedard, *Poll: No More Harvard, Yale Presidents!*, WASHINGTON EXAMINER (Apr. 12, 2013, 3:40 PM), <http://washingtonexaminer.com/poll-no-more-harvard-yale-presidents/article/2527037>. Harvard has produced seven United States Presidents, and Yale five. *Obama Joins List of Seven Presidents With Harvard Degrees*, HARVARD GAZETTE (Nov. 6, 2008), <http://news.harvard.edu/gazette/story/2008/11/obama-joins-list-of-seven-presidents-with-harvard-degrees/>.

102. Conant writes:

Now comes a curious argument in favor of universal suffrage. "The influence over government must be shared among all the people," declares Jefferson, and continues, "If every individual which composes their mass participates of the ultimate authority, the government will be safe; because the corrupting the whole mass will exceed any private resources of wealth; and public ones cannot be provided but by levies on the people. In this case every man would have to pay his own price. The government of Great Britain has been corrupted, because but one man in ten has a right to vote for members of parliament. The sellers of the government, therefore, get nine-tenths of their price clear. It has been thought that corruption is restrained by confining the right of suffrage to a few of the wealthier of the people; but it would be more effectually restrained by an extension of the right to such numbers as would bid defiance to the means of corruption."

CONANT, *supra* note 16, at 8-9.

103. *See id.*

104. "Liberal democracy is a great philosophy of inclusion. It is rule of the people, by the people, and for the people, and today 'the people' is taken to mean everybody, without the unspoken restrictions that formerly excluded peasants, women, or slaves." Charles Taylor, *The Dynamics of Democratic Exclusion*, 9 J. DEMOCRACY 143, 143 (1998).

105. CONANT, *supra* note 16, at 8-9.

106. MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/elite> (last visited Jan. 3, 2014).

mitted to exercise disproportionate power. Therefore, as heterogeneity yields to homogeneity, similarly the heterogeneous groups yield power to the homogeneous groups. Over time, the homogenous groups become elite and reinforce a cyclical pattern difficult to disrupt.

Ultimately, the less elite a country's leadership remains, the more the country is governed by all the people,<sup>107</sup> not simply some. A "strict interpretation" of the language creating America suggests that this is what was contemplated, strategized, and purposefully implemented. But only by equitably and equally educating tomorrow's citizens—children in elementary and secondary education—can the structure exist for participation by the many, not the few.<sup>108</sup> Both the comprehension of political issues as well as the opportunity to procure sufficient political resources is related, if not correlated, to education.<sup>109</sup>

### B. Disproportionality

In order to evaluate disproportionality in governance of education, I now analyze the concept of proportionality. Proportionality is defined as: "corresponding in size, degree, or intensity."<sup>110</sup> Disproportionality, the lack of proportionality, does not "just happen." Statisticians have taught us that absent external variables, probability leads to proportionality.<sup>111</sup> Since the Law of Averages suggests that outcomes will be proportionately distributed,<sup>112</sup> our inquiry must turn to what causes a disproportionate outcome.

Disproportionality in education is historically suggested through standardized test scores.<sup>113</sup> The validity of these scores is often questioned.<sup>114</sup>

107. Suggesting a *proportionate* sharing of governance.

108. As Jefferson argued:

[T]he most effectual means of preventing [the perversion of power into tyranny is] to illuminate, as far as practicable, the minds of the people at large, and more especially to give them knowledge of those facts which history exhibiteth, that, possessed thereby of the experience of other ages and countries, they may be enabled to know ambition under all its shapes, and prompt to exert their natural powers to defeat its purposes.

Conant, *supra* note 16, at 88.

109. See Letter from Thomas Jefferson to Mann Page, *supra* note 70.

110. MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/proportionality> (last visited Nov. 10, 2013).

111. "If various alternatives are equally likely, and then some event is observed, the updated probabilities for the alternatives are proportional to the probabilities that the observed event would have occurred under those alternatives." Eric Gaze, *The Full Monty ... In Proportion*, THE NATIONAL NUMERACY NETWORK, [http://serc.carleton.edu/nnn/columns/full\\_monty.html](http://serc.carleton.edu/nnn/columns/full_monty.html).

112. D.G. REES, *ESSENTIAL STATISTICS* 48 (4th ed. 2001); DAVID FREEDMAN ET AL., *STATISTICS* (4th ed. 2007).

113. Alfie Kohn, *Poor Teaching for Poor Kids*, 79 *LANGUAGE ARTS* 251 (2002) (discussing the inherent unfairness of standardized testing, stemming from socio-economic differences).

114. See, e.g., Thomas N. Haladyna et al., *Raising Standardized Achievement Test Scores and the Origins of Test Score Pollution*, 20 *EDUC. RESEARCHER* 2 (1991); Pamela A. Moss, *Can There Be Validity Without Reliability?*, 23 *EDUC. RESEARCHER* 5 (1994); SAUL GEISER & MARIA VERONICA

However, other metrics also reflect disproportionality amongst students.<sup>115</sup> These metrics include, but are not limited to graduation rates, college enrollment, and income after graduation.<sup>116</sup> Collectively, these disproportional outcomes are often referred to as the achievement gap, or, perhaps more correctly, as the achievement debt.<sup>117</sup>

Whether one agrees with the science behind standardized testing, the data provided (flawed or flawless) indicates disproportionality.<sup>118</sup> In an undisturbed schema, the proportion of students from non-normative races should fall across the distribution range in a manner replicating the normative (and usually, quantitatively, majority) group.<sup>119</sup> Usually, European-American students form the normed community and African-American, Latino, Asian-American, and indigenous communities collect at the extremes.<sup>120</sup> The non-normative, then, exist either at the “they’re just not interested in education” end of the spectrum (the majority) or the “see, you’re not like them/if they only applied themselves like you” demarcation (the minority).<sup>121</sup> When a failure of proportionality occurs across races (and even within races), it requires the larger body (a school, a school district, a state, and a nation) to pause and reanalyze the distribution of resources, methods, and strategies.<sup>122</sup>

Graduation rates are another reliable indicia because all students are placed within the K-12 education system with one common enunciated purpose, graduation.<sup>123</sup> Again, the science behind proportionality suggests that graduation rates should be proportionate to the population.<sup>124</sup> In a

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SANTELICES U. CAL. BERKELEY CTR. FOR STUDY IN HIGHER EDUC., *Validity of High-School Grades in Predicting Student Success Beyond the Freshman Year: High-School Record vs. Standardized Tests as Indicators of Four-Year College Outcomes*, available at <http://escholarship.org/uc/item/7306z0zf> (last visited Jan. 3, 2014).

115. See Gloria Ladson-Billings, *A Letter to Our Next President*, 59 J. TCHR. EDUC. 235 (2008).

116. *Id.*

117. *Id.*

118. Grace Kao & Jennifer S. Thompson, *Racial and Ethnic Stratification in Educational Achievement and Attainment*, 29 ANN. REV. SOC. 417, 420–421 (2003).

119. That is, non-normative races should correspond in population across the distribution range with the majority group. Gaze, *supra* note 111. See also REES, *supra* note 112.

120. Asian-American communities, in particular, end up at both ends of the distribution. Some communities (Korean, Chinese, Japanese) end up at the “high” end of the distribution. Others (Hmong, Vietnamese, Filipino) end up at the opposite end.

121. See Paul Wong et al., *Asian Americans as a Model Minority: Self-Perceptions and Perceptions by Other Racial Groups*, 41 SOC. PERSP. 95, 95 (1998).

122. See Geoffrey L. Cohen et al., *Reducing the Racial Achievement Gap: A Social-Psychological Intervention*, 313 SCIENCE 1307 (2006); Mavis G. Sanders, *Overcoming Obstacles: Academic Achievement as a Response to Racism and Discrimination*, 66 J. NEGRO EDUC. 83 (1997); Joshua Aronson, *The Threat of Stereotype*, 62 EDUC. LEADERSHIP 14 (2004).

123. Graph A in the Appendix to this article demonstrates the disproportionality in high school completion rates.

124. Applying the principle of proportionality, if graduation, voluntary disenrollment, remediation, and expulsion are equally likely alternatives for a student population, absent some “observed event,” i.e., external variable, the rates for each alternative should be proportionate to the population. See Gaze, *supra* note 111.

simplified, dualistic analysis, then, approximately 14% of the graduating class should consist of African Americans as well as 14% of the drop-outs.<sup>125</sup> The current data shows a completely different scenario<sup>126</sup> (See Graph A). The correlations between leaving school and decreased income and increased likelihood of incarceration are well established.<sup>127</sup>

The above statistics prove that graduation occurs at a disproportionate rate. We also know that the graduates will earn significantly more money over their lifetimes.<sup>128</sup> Lost income is not static; it does not affect only that individual or couple.<sup>129</sup> Lost income decreases the ability to inherit. By inherit, I do not suggest the term used loosely in public discourse and often responded to by someone stating, “I didn’t inherit anything from my parents.” By inherit, I mean the ability for one generation to pass on resources to the next. It can be in the form of access to education and educational resources at any level; it can be in the form of familial businesses or contacts, it can even be in something as remote as medical attention that is an afterthought for some and unfathomable for others. All of these are inheritances because they are abilities and activities available to someone, in large part, due to the resources of their parents.

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125. *Id.*

126. *See infra* Graph B.

127. *See* ALLIANCE FOR EXCELLENT EDUC., THE HIGH COST OF HIGH SCHOOL DROPOUTS: WHAT THE NATION PAYS FOR INADEQUATE HIGH SCHOOLS (2011), *available at* <http://www.all4ed.org/wpcontent/uploads/2013/06/HighCost.pdf>; ANTHONY P. CARNEVALE ET AL., GEORGETOWN UNIV. CTR. ON EDUC. AND WORKFORCE, THE COLLEGE PAYOFF: EDUCATION OCCUPATION, LIFETIME EARNINGS, *available at* [http://www.cristoreynetwork.org/uploaded/Document\\_files/The\\_College\\_Payoff\\_Summary.pdf](http://www.cristoreynetwork.org/uploaded/Document_files/The_College_Payoff_Summary.pdf). Unlike other academics, I do not suggest that graduation is relevant only to post-secondary education. Graduation should predominantly demonstrate the ability to participate in future choices (e.g., academically, vocationally, politically). This leaves tomorrow’s citizens with the skills to be competitive across a variety of platforms, but the choice of where to focus. Again, we should also witness a proportionate distribution across the array of choices. As this article argues, a disproportionate distribution should warn us to investigate further.

128. According to the U.S. Census Bureau,

[E]ducation levels had more effect on earnings over a 40-year span in the workforce than any other demographic factor, such as gender, race and Hispanic origin. For example, a worker with a professional degree is expected to make more than a worker with a eighth grade education or lower. . . . The estimated impact on annual earnings between a professional degree and an eighth grade education was about \$72,000 a year, roughly five times the impact of gender, which was \$13,000.

*Education Impacts Work-Life Earnings Five Times More Than Other Demographic Factors, Census Bureau Reports*, U.S. CENSUS BUREAU (Sept. 8, 2011), <http://www.census.gov/newsroom/releases/archives/education/cb11-153.html>.

Further, graduation also benefits the public as a whole:

We find that each new high school graduate would yield a public benefit of \$209,000 in higher government revenues and lower government spending for an overall investment of \$82,000, divided between the costs of powerful educational interventions and additional years of school attendance leading to graduation. The net economic benefit to the public purse is therefore \$127,000 per student and the benefits are 2.5 times greater than the costs.

Henry Levin et al., *The Costs and Benefits of an Excellent Education for All of America's Children* (2006), 1 [http://www3.nd.edu/~jwarlick/documents/Levin\\_Belfield\\_Muennig\\_Rouse.pdf](http://www3.nd.edu/~jwarlick/documents/Levin_Belfield_Muennig_Rouse.pdf)

129. *Id.*

Alternatively, graduation can be interrupted by expulsion.<sup>130</sup> Graph B illustrates the disproportionality in expulsion. Expulsion is, statistically, the precursor to a lost citizen.<sup>131</sup> Expulsion depletes democracy. Expulsion divorces a student from formal education.<sup>132</sup> As discussed in the following paragraph, expulsion is one of the entrances into the school-to-prison-pipeline.<sup>133</sup> Once the prisoner label is applied, an individual is stripped of many citizens' rights.<sup>134</sup> Expulsion not only deprives the individual student

130.

Suspension and expulsion are similar punishments, both resulting in the removal of a student from school for some period of time. The length of removal varies with the discipline imposed. Suspension is the short-term removal of a student from school or "the denial of participation in regular courses and activities." A long-term suspension is any suspension that lasts longer than ten days but less than the "time between the start of the suspension and the end of the [school] term." Expulsion, on the other hand, is the complete removal of a student from school for an extended period of time, usually for the remainder of the school term.

Roni R. Reed, *Education and the State Constitutions: Alternatives for Suspended and Expelled Students*, 81 CORNELL L. REV. 582, 584 (1996) (footnotes omitted).

Expulsion from schools has increased due to the liberal interpretation and application of zero tolerance policies. Zero tolerance policies in schools came about in response to well-publicized instances of school violence and the public's perceptions (or misperceptions) of the level of violence in public schools. Kevin P. Brady, *Zero Tolerance or (In)tolerance Policies? Weaponless School Violence, Due Process, and the Law of Student Suspensions and Expulsions: An Examination of Fuller v. Decatur Public School Board of Education School District, 2002 BYU EDUC. & L.J.* 159, 160 (2002). Various state legislatures keenly felt pressure from their constituents to address the problem. *Id.* at 160–61. Then,

[I]n 1994, the collective concerns of these state legislatures led to Congress's passage of the Federal Gun-Free Schools Act, which required all states to pass legislation mandating a one-year expulsion for any student found carrying firearms on school property. Officially, the U.S. Department of Education defined these zero tolerance policies as policies that "mandate predetermined consequences or punishments for specific offenses." Zero tolerance policies were initially conceived as a way to minimize school violence and contribute generally to a better learning environment in schools.

*Id.* at 161 (citations omitted).

Before and after the Act was passed, many school administrators "appl[ie]d their zero tolerance policies to violations other than firearms possession, including the possession and/or use of drugs, and more recently, to behaviors that fall loosely under the category of school disruption, such as fist fighting and verbal abuse." *Id.*

131. "As a consequence of [the Gun Free Schools Act], zero tolerance school laws, policies and informal practices have swept the nation. In the process, these laws have swept uncounted numbers of our most vulnerable and needy children into the streets where they remain uneducated, unserved, and unsupervised." Ruth Zweifler & Julia De Beers, *The Children Left Behind: How Zero Tolerance Impacts Our Most Vulnerable Youth*, 8 MICH. J. RACE & L. 191, 193 (2002).

132. Reed, *supra* note 130 (suggesting alternative education programs as one solution to this problem).

133. Johanna Wald & Daniel F. Losen, *Defining & Redirecting a School-to-Prison-Pipeline*, in *DECONSTRUCTING THE SCHOOL-TO-PRISON PIPELINE: NEW DIRECTIONS FOR YOUTH DEVELOPMENTS* 9 (Johanna Wald & Daniel J. Losen, eds., 2003).

134.

Even when not barred by law from holding specific jobs, ex-offenders in Chicago find it extraordinarily difficult to find employers who will hire them, regardless of the nature of their conviction. They are also routinely denied public housing and welfare benefits, and they find it increasingly difficult to obtain education, especially now that funding for public education has been hard hit, due to exploding prison budgets.

MICHELLE ALEXANDER, *THE NEW JIM CROW* 190 (rev. ed. 2012).

of the ability to digest the information from a formal education and benefit from the socio-economic rewards, it also deprives the country of a potential resource that could have provided far greater labor, information, taxable income, and more.<sup>135</sup>

Lastly within this discussion, disproportionality in education manifests itself in the school-to-prison pipeline.<sup>136</sup> Again, using a simplified distribution for the sake of discussion, proportionality suggests that approximately 14% of the African American students should find themselves in International Baccalaureate, gifted and talented, and other similar programs.<sup>137</sup> Moreover, 14% should find themselves in remedial-type classes.<sup>138</sup> Instead, the failure to achieve proportionality across student labels (including race, special education status, and others) leads to a similar level of proportionality in another (perhaps, the next) institution—prison, hence, the school-to-prison pipeline.<sup>139</sup> By creating disproportionality in the school system, we contribute to a similar disproportionality in the prison system.

Moreover, we see evidence of disproportionality within individual schools and school districts.<sup>140</sup> Within these locations, the racial ratio of students in advanced placement, remedial placement, and the school-to-prison pipeline further evidence educational disproportionality.<sup>141</sup> Given the wealth of evidence, researchers are called to search for contributory variables.

Law is one such external variable that affects levels of proportionality. The next section analyzes how educational laws generally and regional laws more specifically, have contributed to disproportionality.<sup>142</sup> While other factors are similarly relevant (e.g., economics),<sup>143</sup> the law has always had a primary role in how America educated its children and which

135. Gaze, *supra* note 111. See also Zweifler & De Beers, *supra* note 131; Anne Gregory et al., *The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin?* 39 EDUC. RESEARCHER 59, 60 (2010).

136. "Across the country, an alarming number of students, and a disproportionate number of students of color, are being removed from mainstream educational environments for nonviolent violations of school policy, which many would consider to be typical childhood behavior." Archer, *supra* note 61, at 868. See also Gregory et al., *supra* note 135.

137. See Gaze, *supra* note 111.

138. *Id.*

139. *Id.* See generally Archer, *supra* note 61.

140. Wanda J. Blanchett et al., *Urban School Failure and Disproportionality in a Post-Brown Era: Benign Neglect of the Constitutional Rights of Students of Color*, 26 REMEDIAL AND SPECIAL EDUC. 70, 74–75 (2005).

141. Jacqueline Ercole, Labeling in the Classroom: Teacher Expectations and their Effects on Students' Academic Potential 9–8 (May 10, 2009) (Unpublished Honors Scholar thesis, University of Connecticut) (discussing the effects of "positive" labels on the entirety of the school).

142. While this type of analysis should be done for each individual state, such a study is far too broad for this article. Instead, one American region has been chosen as a representative model. The hope is that others, situated in other regions, will continue this research.

143. See generally ROE L. JOHNS & EDGAR L. MORPHET, *THE ECONOMICS AND FINANCING OF EDUCATION: A SYSTEMS APPROACH* (3d ed. 1975).



children received what resources, even when legislatures “believed” they were acting in the best interests of all children.<sup>144</sup>

## II. THE LAW'S ROLE IN DISPROPORTIONALITY

The argument made throughout this article, that laws have been enacted creating racial disproportionality of youth placed into special education, disciplined in schools, and funneled into the juvenile justice system, is mirrored within the Mountain West region.<sup>145</sup> This section focuses on the law's role in school discipline as well as its formation of a funnel into the juvenile justice system—two units receiving the outcome of educational disproportionality. Furthermore, this section addresses the question, what is the law's role in the formation and maintenance of these trends?

First, I consider the original articles and sections of Colorado's Constitution and subsequent statutes. My analysis is largely grounded in Colorado's data because, in 2013, the state “celebrated” *Forty Years Since Keyes v. School District No. 1*.<sup>146</sup> This case highlighted historical disproportionality in education and the symposium highlighted the continuing nature of the issue. Reflecting on *Keyes*, as an academic and Colorado resident, was another impetus for this work.

### A. Colorado & Rocky Mountain States

Colorado's Constitutional educational history should be placed in the context of American history. In the early 1800s, the United States was vigorously expanding its borders.<sup>147</sup> Territories had been seized from west of the Mississippi to the Pacific Ocean and many east coast citizens journeyed westward in search of land and wealth.<sup>148</sup> To entice the adventurous, many states advertised their willingness and readiness to educate the

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144. “[S]tate governments exercise ultimate power over the amount of state money allocated among school districts from state revenues and thereby exercise both actual fiscal and at least theoretical policy control over the system of education in the states.” Allen W. Hubsch, *Education and Self-Government: The Right to Education Under State Constitutional Law*, 18 J.L. & EDUC. 93, 98 (1989).

145. There are eight states in the Mountain West region: Montana, Idaho, Nevada, Wyoming, Utah, Colorado, Arizona and New Mexico. *Census Regions and Divisions of the United States*, U.S. CENSUS BUREAU, available at [http://www.census.gov/geo/maps-data/maps/pdfs/reference/us\\_regdiv.pdf](http://www.census.gov/geo/maps-data/maps/pdfs/reference/us_regdiv.pdf) (last visited Jan. 3, 2014). See Table A for information on population and Subsection A for information on pertinent statutes in each state.

146. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973) (holding that a finding of an intentionally segregative school board created *prima facie* case of unlawful segregation). See also Symposium, *Forty Years Since Keyes v. School District No. 1*, 90 DENV. U.L. REV. 1023 (2013).

147. See GREG ROZA, WESTWARD EXPANSION (2011).

148. *Id.*

children of their new citizens.<sup>149</sup> One way to assure this promise was to incorporate that education directly into the state's constitution.<sup>150</sup>

On August 1, 1876, Colorado established its public school system and its method of operation.<sup>151</sup> From inception, the authority placed with the board of education ("the board") was to come from election by the "registered electors of the state."<sup>152</sup> Moreover, each board member was required to be a "qualified elector" of their district.<sup>153</sup>

With regard to the school's ability to control or penalize student behavior, the Colorado public school system existed without substantial structural modification for nearly 100 years.<sup>154</sup> At the same time, children from historically marginalized communities in Colorado were attending separate schools.<sup>155</sup> In 1954, an historic moment in American education

149. Historians often begin the story of common schooling in the Midwest by noting the educational provisions of the Northwest Ordinances of 1785 and 1787. Designed to shape the settlement of the area, the ordinances decreed that one of the thirty-six sections of land in each township was to be set aside for purposes of common schooling. Technically, this legislation remained in force into the statehood period of the old Northwest, but it had very little effect on the actual support of schools.

KAESTLE, *supra* note 19, at 183.

150. "Indeed, the constitutions of all fifty states have in fact recognized an affirmative obligation of government to educate its citizens." Hubsch, *supra* note 144, at 96-97. Pertinent clauses from each state's constitution are excerpted in the Appendix of Hubsch's article.

151. COLO. CONST. art. 9, in GENERAL LAWS OF THE STATE OF COLORADO 54-57 (William M. Clark comp., 1877).

152. COLO. CONST. art. 9, § 1.

153. *Id.* See also:

Male Coloradans extended to women the right to vote on November 7, 1893. Colorado thus became the second state in the Union, after Wyoming in 1890, to allow gender neutral suffrage. Until 1911, when California reevaluated its suffrage laws, Colorado boasted the largest city (Denver) in the nation allowing women to vote. Similar to the 1860s and 1870s, ethnicity and race continued to play a role in the suffrage debate. According to one historian, "[b]y enfranchising women, natives gained more ballots than did the foreign-born. Ironically, while many women suffragists lamented the fact that male ex-slaves had the franchise while white women did not, African Americans in the state were expressly excluded from voting in the ratification of the state's constitution.

Tom I. Romero, II, *Wringing Rights Out of the Mountains: Colorado's Centennial Constitution and the Ambivalent Promise of Human Rights and Social Equality*, 69 ALB. L. REV. 569, 573 (2006) (footnotes omitted).

Further,

The Enabling Act for the Colorado Constitution stipulated that only residents eligible to vote in territorial elections could vote in the election that ratified the constitution. Under the controlling 1868 Colorado territorial law, voters were males over the age of twenty-one "not being a negro or mulatto." The disenfranchisement of blacks in the 1860s and 1870s seems rather odd since less than 500 blacks resided in the Colorado Territory alongside nearly 40,000 whites. The Enabling Act, however, also mandated that the proposed constitution could "make no distinction in civil or political rights on account of race or color."

*Id.* at 573 n.34 (citations omitted). Thus, the original 1876 Constitution limited suffrage to all males over age 21.

154. COLO. CONST. art. 9, §§ 1-5.

155.

The practice of maintaining separate schools throughout the Southwest was never sanctioned by any State statute, although in California, a statute allowing separate schools for "Mongolians" and "Indians" was interpreted to include Mexican-Americans in the latter group. Generally, the segregation of Mexican-Americans was enforced by the customs and regulations of school districts throughout the Southwest. Nevertheless, the segregation was *de jure* since sufficient State action was involved.

history occurred with the United States Supreme Court's decision in the *Brown v. Board of Education*.<sup>156</sup> With a new mandate for integrated schools, most American schools had to adjust to an unfamiliar population.<sup>157</sup> Previous scholars have noted the unprecedented delay in the Court's *Brown* decision compared to implementation.<sup>158</sup> During that time, many schools did everything they could to avoid compliance with the integration mandate.<sup>159</sup> In one extreme example, Virginia went as far as to close all public schools to avoid compliance.<sup>160</sup> The belief was that European Americans would be able to afford private schools while African Americans would suffer.<sup>161</sup> In 1963, during this period of state "negotiation," Colorado implemented Colorado Revised Statutes §§ 22-33-105 and 22-33-106.<sup>162</sup> For the first time in its history, Colorado codified a public

Guadalupe Salinas, *Mexican-Americans and the Desegregation of Schools in the Southwest*, 8 HOUS. L. REV. 929, 940 (1971).

156. 347 U.S. 483 (1954). "The *Brown* decision had promised that the common school might finally include all children—but whites resisted." DAVID B. TYACK, *THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION* 283 (1974). See also Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

157. TYACK, *supra* note 156. See also Bell, *supra* note 156.

158. The *Brown* decision was "ignored by the President, condemned by much of Congress, and resisted wherever it was sought to be enforced." Bell, *supra* note 156, at 519.

159. "In early 1969, the Denver School Board had adopted three resolutions designed to desegregate the schools in the predominantly black Park Hill area of their city. After a local election which produced a school board majority opposed to the three integration resolutions, the plan was scrapped." Frank T. Read, *Judicial Evolution of the Law of School Integration Since Brown v. Board of Education*, 39 LAW AND CONTEMP. PROB. 7, 39 (1975). African-American plaintiffs followed suit soon thereafter, which eventually gave rise to the Supreme Court's decision in *Keyes v. School District No. 1*. *Id.* See also Richard Delgado & Jean Stefancic, *Home-Grown Racism: Colorado's Historic Embrace—And Denial—Of Equal Opportunity in Higher Education*, 70 U. COLO. L. REV. 703, 752–53 (1999) (specifically regarding Colorado's response after the *Keyes* decision).

160. Bell, *supra* note 156, at 528–29.

161. See, e.g., *Poindexter v. La. Fin. Assistance Comm'n*, 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968) (voiding "tuition grants" for children to attend private segregated schools).

162. Colorado Revised Statutes § 22-33-105 ("suspension, expulsion, and denial of admission") contains the following provisions:

1. Power to engage in discipline on students resided with the board of education;
2. Alternative to suspension can be invoked—at the behest of the parents;
3. Statute prohibits court involvement.

COLO. REV. STAT. § 22-33-105 (West 2013).

Colorado Revised Statutes § 22-33-106 ("Grounds for suspension, expulsion, and denial of admission") provides:

- (1) The following may be grounds for suspension or expulsion of a child from a public school during a school year:
  - (a) Continued willful disobedience or open and persistent defiance of proper authority;
  - (b) Willful destruction or defacing of school property;
  - (c) Behavior on or off school property that is detrimental to the welfare or safety of other pupils or of school personnel, including behavior that creates a threat of physical harm to the child or to other children . . .
  - (c.5)(I) Declaration as a habitually disruptive student . . .
  - (d) Committing one of the following offenses on school grounds, in a school vehicle, or at a school activity or sanctioned event:

school's permission to expel and suspend students. Critical theorists are required to view this from a lens that questions the timing and utility of §§ 22-33-105 and 22-33-106.

The *de jure* ability to expel and suspend students legitimized control over bodies.<sup>163</sup> The demographics evidence which bodies.<sup>164</sup> The extent and direction of the control is further seen through the school-to-prison pipeline.<sup>165</sup> The demographics of the students funneled into the pipeline mirror the demographics of those American law has historically sought to control.<sup>166</sup>

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I. Possession of a dangerous weapon without the authorization of the school or the school district;

II. The use, possession, or sale of a drug or controlled substance as defined in section 18-18-102(5), C.R.S.; or

III. The commission of an act that, if committed by an adult, would be robbery pursuant to part 3 of article 4 of title 18, C.R.S., or assault pursuant to part 2 of article 3 of title 18, C.R.S., other than the commission of an act that would be third degree assault under section 18-3-204, C.R.S., if committed by an adult.

e. Repeated interference with a school's ability to provide educational opportunities to other students.

f. Carrying, using, actively displaying, or threatening with the use of a firearm facsimile that could reasonably be mistaken for an actual firearm in a school building or in or on school property. Each school district shall develop a policy that shall authorize a student to carry, bring, use, or possess a firearm facsimile on school property for either a school-related or a nonschool-related activity. Such policy shall also consider student violations under this section on a case-by-case basis using the individual facts and circumstances to determine whether suspension, expulsion, or any other disciplinary action, if any, is necessary.

g. Pursuant to section 22-12-105(3), making a false accusation of criminal activity against an employee of an educational entity to law enforcement authorities or school district officials or personnel.

COLO. REV. STAT. § 22-33-106 (West 2013).

163. Michelle Alexander argues that mass incarceration of those from historically marginalized groups has replaced Jim Crow laws as a means of social control. ALEXANDER, *supra* note 134. An important precept underlying Alexander's thesis is Michel Foucault's "carceral system":

Foucault used this term to refer to the prevalence of forms of social control, surveillance, and punishment—especially the prison system—in modern life. He argued that the principles, techniques, apparatuses, and networks of the carceral system that was initially developed to control criminals have become embedded into the rest of society. Thus, mass incarceration is a reflection of a society where penal systems of social control are normalized and legitimized within everyday beliefs, practices, and institutional policies.

Jacqueline Johnson, *Mass Incarceration: A Contemporary Mechanism of Racialization in the United States* 47 GONZ. L. REV. 301, 302 n.8 (2011–2012).

164. See *Suspension/Expulsion Statistics for 2012–2013*, COLO. DEP'T. OF EDUC., <http://www.cde.state.co.us/cdereval/suspend-expelcurrent.htm> (last updated Oct. 9, 2013).

165. "[A] contemporary symbiotic relationship between educational and carceral methods . . . makes schools function like penal institutions aiming to control and punish, rather than educate, students." Chauncey D. Smith, *Deconstructing the Pipeline: Evaluating School-To-Prison Pipeline Equal Protection Cases Through a Structural Racism Framework*, 36 FORDHAM URB. L.J. 1009,1027 (2009).

166. One example is immigration law. See Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J.1111 (1998). Another example is unemployment law. Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235 (1971). See also Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. KAN. L. REV. 713 (1986).

*i. Colorado Revised Statutes § 22-33-105.* Section 22-33-105 is entitled "Suspension, expulsion, and denial of admission." It begins with a presumption of participation in public schooling by all children between the ages of six and twenty-one. The section then sets out certain exceptions. While original authority to suspend or expel a student rests with the board of education, it may also be delegated to a school principal or any individual designated in writing by said principal.<sup>167</sup> A concern for disproportionate outcomes should begin here. Is the racial composition of the board members, school principal(s), or designee(s) within a school or its district, proportionate to the communities served? Are those instilled with the power to suspend and expel culturally competent about their students' norms and the family's culture? Are the "abilities" of the students served appropriately commensurate with the expectations of board members and principals? Because an evidentiary hearing occurs only "if one is requested by the parent, guardian, or legal custodian of the child,"<sup>168</sup> to what extent do cultural practices<sup>169</sup> lead to disproportionate outcomes?<sup>170</sup>

Interestingly, Colorado's statutes mandate an alternative to suspension.<sup>171</sup> This is invoked when a parent, guardian or legal custodian attends class with the pupil.<sup>172</sup> While this clearly provides for the optimal outcome—a student's presence in school for the maximal potential time, what suppositions are made about a parent's ability to be present in the school for a "period of time specified by the suspending authority" during work hours?<sup>173</sup>

Moreover, the statute says that there shall be a denial of any court intervention.<sup>174</sup> This should raise suspicion, in part, due to the litigious "success" of historically marginalized communities in addressing educational discriminatory concerns.<sup>175</sup> However, Colorado codified such exclusion for some petitions once *filed* (not necessarily adjudicated) in juvenile

167. COLO. REV. STAT. § 22-33-105(2)(a) (2013).

168. COLO. REV. STAT. § 22-33-105(2)(c) (2013).

169. By cultural practices I mean the normative actions of non-normative groups. For instance, many non-European American communities believe in strict adherence to authority. Therefore, while a European American parent may defend a child's actions through every judicial avenue available, a non-European American parent may find the authorities (the principal and the teachers) unquestionable. Cultural capital "teaches" one how to game the system for the most profit.

170. COLO. REV. STAT. § 22-33-105(2)(c) (2011).

171. See COLO. REV. STAT. § 22-33-105(4) (2011).

172. *Id.*

173. *Id.*

174. "No court which has jurisdiction over the charges against a student who is subject to the provisions of this subsection (5) shall issue an order requiring the student to be educated in the education program in the school in contradiction of the provisions of this subsection (5)." COLO. REV. STAT. § 22-33-105 (5)(c) (2011).

175. Examples of such success include, but are not limited to, *Brown v. Board of Education*, 349 U.S. 294 (1954), *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), and *Lau v. Nichols*, 414 U.S. 563 (1974).

or district court.<sup>176</sup> For these instances: “No court which has jurisdiction over the charges against a student who is subject to the provisions of this subsection (5) shall issue an order requiring the student to be educated in the education program in the school in contradiction of the provisions of this subsection (5).”<sup>177</sup> In other words, as the school shuffles the designated students out, a court shall have no authority to shuffle them back in, regardless of any legal impropriety. Beyond the practical limits on review, this section also raises questions about Constitutional separation of powers issues.<sup>178</sup>

*ii. Colorado Revised Statutes § 22-33-106.* While the discussion of § 22-33-105 critically analyzed who may suspend and expel as well as the procedures, we now turn to § 22-33-106 to view when such actions are permitted. The first is when a student exhibits “[c]ontinued willful disobedience or open and persistent defiance of proper authority.”<sup>179</sup> While avoidance of chaos is obviously necessary to any educational pursuit, this subsection raises issues similar to those raised above. Are those instilled with the power to suspend and expel culturally competent about their students’ norms and the family’s culture? Where is the line between disagreement or an engaged challenging of norms and ideas (based on culture, ability, or otherwise) versus disobedience and defiance? When is a challenge exactly what the forefathers envisioned of the citizenry and, therefore, rewarded, and when is it seen as militancy and, therefore, punished? Is a student or class considered gifted because they challenge the status quo or traditional methods of learning; or, are they disruptive and problematic? Is a student insightful when they articulate that they don’t learn best “that way,” or are they defying “proper authority”? As critical theorists, we argue that much of the disproportionate outcomes stem from a place of privilege; a place that is demographically segregated by race.<sup>180</sup>

Herein, the intersections with (dis)ability are explicitly laid.<sup>181</sup> When considering a student’s behavior that creates a threat of physical harm to that child or other children, the statute goes on to state:

[I]f the child who creates the threat is a child with a disability pursuant to section 22-20-103(5), the child may not be expelled if the actions creating the threat are a manifestation of the child’s dis-

176. COLO. REV. STAT. § 22-33-105(5)(a) (2011) (“Whenever a petition filed in juvenile court alleges . . .”) (emphasis added).

177. COLO. REV. STAT. § 22-33-105(5)(c) (2011).

178. *See id.*

179. COLO. REV. STAT. § 22-33-106(1)(a) (2011).

180. *See Luke, supra* note 14.

181. *See Subini Annamma et al., Dis/ability critical race studies (DisCrit): theorizing at the intersections of race and dis/ability*, 16 RACE, ETHNICITY, & EDUC. 1 (2013) (proposing “a new theoretical framework that incorporates a dual analysis of race and ability: Dis/ability Critical Race Studies, or DisCrit”).

ability. However, the child shall be removed from the classroom to an appropriate alternative setting. . . .<sup>182</sup>

The statute's safeguards include a mandate that, within ten days, the school shall reexamine the child's individual education plan (IEP).<sup>183</sup> The analysis invoked here questions whether all communities have the capital to continually negotiate, evaluate, and modify their children's IEPs. A critical theorist must ask: Who is best able to make the IEPs work for them and what groups struggle most with the IEP process?

A nexus to criminal law can also be seen within this statute. Analogous to habitual offender statutes in criminal law,<sup>184</sup> Colorado's educational statutes offer a "habitually disruptive student" status.<sup>185</sup> To be so defined, a student has been suspended under this statute "three or more times during the course of a school year" for "causing a material and substantial disruption."<sup>186</sup> Under such a label, "expulsion shall be mandatory."<sup>187</sup>

The statute goes on to identify other, obvious, infractions. For example, bringing a firearm to school, or possessing a firearm at school, result in mandatory expulsion for one year.<sup>188</sup> It also provides for a student possibly escaping expulsion via some administratively sufficient admission of guilt.<sup>189</sup>

Then, § 22-33-106 returns to the application of its mandates to students with disabilities. Pursuant to § 22-33-106(1)(d)(2):

Subject to the district's responsibilities under article 20 of this title, the following shall be grounds for expulsion from or denial of admission to a public school, or diversion to an appropriate alternate program:

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182. COLO. REV. STAT. § 22-33-106(1)(c) (2011).

183. *Id.*

184. For example, Colorado's habitual offender statute provides in pertinent part:

(1)(a) A person shall be adjudged an habitual criminal and shall be punished by a term in the department of corrections of life imprisonment if the person:

(I) Is convicted of:

(A) Any class 1 or 2 felony or level 1 drug felony; or

(B) Any class 3 felony that is a crime of violence, as defined in section 18-1.3-406(2); and

(II) Has been twice convicted previously for any of the offenses described in subparagraph (I) of this paragraph (a).

COLO. REV. STAT. § 18-1.3-801 (2013).

185. § 22-33-106(1)(c.5).

186. COLO. REV. STAT. § 22-33-106(1)(c.5)(II) (2011).

187. *Id.*

188. *See* COLO. REV. STAT. § 22-33-106(1.5) (2011).

189. COLO. REV. STAT. § 22-33-106(1.5) (2011).

- (a) Physical or mental disability such that the child cannot reasonably benefit from the programs available;
- (b) Physical or mental disability or disease causing the attendance of the child suffering therefrom to be inimical to the welfare of other pupils.<sup>190</sup>

Given the statistical evidence provided herein,<sup>191</sup> the racial implications for expulsion, denial of admission, or diversion to an alternate education program appear quite clear.

### B. Federal Legislation

The law's effect can be seen from the state level down to the very structure of individual schools.<sup>192</sup> Thanks to federal and state rules and regulations, public schools continually scramble to meet a variety of expectations.<sup>193</sup> The federal mandate known as No Child Left Behind Act of 2001 (NCLB)<sup>194</sup> has led many states to adopt a standardized test as their primary form of compliance.<sup>195</sup> With a host of penalties lurking in the

190. COLO. REV. STAT. § 22-33-106(2) (2011).

191. See, e.g., *infra* Graphs A, B, & C.

192. COLO. REV. STAT. § 18-1.3-801 (2013); Consider the effects of *No Child Left Behind*: The plan includes a major focus on student assessment, with serious and wide-ranging consequences for schools, districts and states where students do not perform at federally-defined acceptable levels. The plan's assessment and accountability provisions will have a significant impact on the ability of states to deliver the level of education required under their respective state constitutions, and the ability of states to define for themselves what constitutes an appropriate education for their students.

David Nash, *Improving No Child Left Behind: Achieving Excellence and Equity in Partnership with the States*, 55 RUTGERS L. REV. 239, 239–240 (2002) (footnotes omitted).

193. See Kim & Sunderman, *supra* note 53 (discussing accountability requirements under No Child Left Behind and the negative impact on high-poverty and racially diverse schools as a result); Nash, *supra* note 192, at n.7.

194. No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301–7941 (2012).

195. No Child Left Behind “requires states to establish 'challenging' academic standards for all schools and to test all students regularly to ensure that they are meeting those standards.” James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 932–33 (2004). Ryan continues:

Test scores are the fuel that makes the NCLBA run. Scores are tabulated for schools in the aggregate and must be disaggregated for a number of subgroups, including migrant students, disabled students, English-language learners, and students from all major racial, ethnic, and income groups. All of these scores are then used to determine whether schools are making “adequate yearly progress.” Adequate yearly progress (AYP), in turn, is the linchpin of the NCLBA.

Adequate yearly progress is tied to whether a sufficient percentage of students are performing proficiently on state tests. The NCLBA requires states to bring *all* students to the proficient level within twelve years of the Act's passage (i.e., by 2014), and states must ensure that their definitions of adequate yearly progress will enable the ultimate twelve-year goal to be met. To accomplish this, states must set a proficiency goal each year, and that percentage must rise periodically so that by 2014, it hits 100%.

*Id.* at 940 (footnotes omitted). *But see* Nash, *supra* note 192, at 241:



shadows, teachers often structure their class learning environments in a way that enables them to “teach to the test.”<sup>196</sup> Similarly, more affluent parents continue to clamor for classes that allow for elite monikers: “gifted,” “International Baccalaureate,” and “advanced placement,” to name a few.<sup>197</sup> At the opposite end of the spectrum are parents who may not have the cultural capital to argue their children into certain classes or out of certain categories. Like a scarlet letter, labels placed on these students include “disruptive,” “remedial,” and “mentally challenged” (not in a good way).<sup>198</sup> The contrast in these ends of the spectrum is vast, and likely terminal, to a child's future. The law is foundational in the structure.

NCLB has turned elementary and secondary school teachers into scared automatons.<sup>199</sup> Failure to meet standards is a specter looming in the shadows, constantly pushing teachers to meet quotas.<sup>200</sup> While parents specifically, and adults more generally (e.g., college professors, employers, etc.), continually cry out for children who can think,<sup>201</sup> teachers' fu-

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Unfortunately, the Act also ignores and/or exacerbates many of the serious problems inherent in standardized testing. It relies on the capacity of states to develop rigorous, valid, and reliable assessment instruments where there is clear evidence that few, if any, states have developed or shown the capacity to develop such tests.

196. “Worst of all, [No Child Left Behind] may worsen the achievement gaps that it seeks to eliminate by encouraging educators to narrow the curriculum, teach to flawed, low-level tests, and sentence large numbers of minority and disadvantaged students to an inferior, remedial education.” Nash, *supra* note 191, at 241 (footnote omitted). See also Marilyn Cochran-Smith & Susan L. Lytle, *Troubling Images of Teaching in No Child Left Behind*, 76 HARVARD EDUC. REV. 668, 678–679 (2006).

197. MARA SAPON-SHEVIN, *PLAYING FAVORITES: GIFTED EDUCATION AND THE DISRUPTION OF COMMUNITY* (1994).

198.

A disproportionate number of non-dominant racial, ethnic, and linguistic continue to be referred, labeled, and placed in special education, particularly in the categories of Learning Disability, Intellectual Disability (formerly called Mental Retardation), and Emotional Disturbance or Behavior Disorders. These categories often referred to as high incidence categories, are the most problematic in terms of diagnosis because they rely on the subjective judgment of school personnel rather than biological facts. Although it is perhaps easier to conceptualize dis/abilities that are ‘clinically determined’ (i.e. based on professional judgment) as subjective, all dis/ability categories, whether physical, cognitive, or sensory, are also subjective. In other words, societal interpretations of and responses to specific differences from the normed body are what signify a dis/ability. Indeed, notions of dis/ability continually shift over time according to the social context. Thus, dis/ability categories are *not* ‘given’ or ‘real’ *on their own*. Rather, [dis/abilities such as] ‘autism, mental retardation, and competence are what any of us make of them.’

Annamma, *supra* note 180, at 2–3 (citations omitted).

“Special education,’ frequently viewed solely as an outgrowth of regular education, actually developed from several disciplines. Historical accounts describe special education as a product of superstition, abandonment, and elimination of such persons identified as mentally or physically disabled. . . .” ARLENE SACKS, *SPECIAL EDUCATION: A REFERENCE HANDBOOK* xi (2001).

199. See generally Cochran-Smith & Lytle, *supra* note 195.

200. *Id.*; Brian Resnick, *The Mess of No Child Left Behind*, THE ATLANTIC (Dec. 16, 2011, 9:30 AM), <http://www.theatlantic.com/national/archive/2011/12/the-mess-of-no-child-left-behind/250076/>.

201. “Increasingly, though, many of us worry that there’s too much testing in schools now—and too many classes that merely “teach to the tests”—where the focus is more on practice tests and test-

tures are intimately connected to their students' level of memorization.<sup>202</sup> Thinking requires exploration outside of the norm.<sup>203</sup> It requires challenging, disrupting, expanding, and more.<sup>204</sup> Thinking requires vulnerability; the willingness to be wrong.<sup>205</sup> These qualities are antagonistic to the NCLB tests.

This struggle leaves teachers in a lose-lose conundrum when political rhetoric continues to cry out for win-wins. Teachers can actually do what they love and teach children to think for themselves and to expand the

taking strategies than on learning rich and challenging content." TONY WAGNER, *THE GLOBAL ACHIEVEMENT GAP: WHY EVEN OUR BEST SCHOOLS DON'T TEACH THE SURVIVAL SKILLS OUR CHILDREN NEED— AND WHAT WE CAN DO ABOUT IT* xiii (2008). Wagner continues:

[M]ore and more countries are graduating increasing numbers of young people who not only have basic computational and analytic skills but also are hungry for the middle-class lifestyle we have promoted through media and advertising around the world. In short, our young people are now in direct competition with youth from developing countries for many of what traditionally have been considered our "good middle-class white-collar" jobs. While some of our students are learning skills that enable them to interpret and manipulate information and data, the sheer numbers of students who are learning these skills in other countries and the fact that they will work for much less put our students at an extreme competitive disadvantage.

*Id.* at xv.

202.

It should not be news to anyone that teachers across the country, either by choice or in response to administrative pressures, are teaching to the tests. Why shouldn't they? When test scores are all that matter, when they determine if children advance from grade to grade or even graduate, test preparation is the order of the day. . . .

At the high school level teachers race to cover mountains of content, hoping their charges will memorize the right terms for true/false or multiple choice exams. There can be no time for exploring the roots of the war in Iraq when students will face tests asking them to choose between the definitions of "despotism" and "absolute dictatorship." While it might be possible to teach some of these terms and other items in the context of world issues the sheer number required by testing standards prohibits taking the time to do so.

George Wood, *A View from the Field: NCLB's Effects on Classrooms and Schools*, in *MANY CHILDREN LEFT BEHIND: HOW THE NO CHILD LEFT BEHIND ACT IS DAMAGING OUR CHILDREN AND OUR SCHOOLS*, 33, 38-40 (Deborah Meier & George Woods eds., 2004) [hereinafter *MANY CHILDREN LEFT BEHIND*].

[Most educators] are equally impatient with any talk about the need to focus more on teaching students workplace skills. Many believe that churning out better workers for the corporate world is nothing more than "vocational education" and likely means turning kids into little automatons who know only how to follow orders. . . . Teaching kids the history of the Electoral College doesn't prepare them to be more thoughtful voters—or even to want to vote at all. . . .

Equally important, what would be involved in creating the "challenging and rigorous curriculum for all students" that many are now demanding? What is even meant by "rigor" today, and how do we get more of it in our students' classes? High school students could be required to take more college-prep and Advanced Placement courses, but would they graduate "jury-ready" as a result? Would they know how to distinguish fact from opinion, weigh evidence, listen with both head and heart, wrestle with the sometimes conflicting principles of justice and mercy, and work to seek the truth with their fellow jurors?

Wagner, *supra* note 201, at xvi-xvii.

204. *Id.*

205. Simply ask the author of any law review article or peer-reviewed journal. The process of thinking is born out in the text. From Plato to Aristotle, Sartre to Kierkegaard, brilliance has always been, and should always be, challenged.

world as they know it. Or, they can keep their jobs and teach children to memorize.<sup>206</sup> Thus, job security lies in the ability of one's clients to recite in an efficiently monotonous form all that a board of education, likely disconnected from the cultural needs and differences of historically marginalized students, has ordained as knowledge.<sup>207</sup>

This form of testing has also resulted in a public school exodus. One must presume this is a politically desired result.<sup>208</sup> The rhetoric of saving all public school children has created an addiction for all things non-public.<sup>209</sup> Whether the parents have significant disposable income allowing for an exit to a private school, have significant time to wait in line for a lottery number that *may* allow their child to exit to a charter school, or are able to access a battery of other educational entrepreneurial laboratories, the end result is a belief that *anything* is better for their child than their public school system.<sup>210</sup> Thus, without those resources, these students be-

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Teachers across the map complain that the joy is being drained from teaching as their work is reduced to passing out worksheets and drilling children as if they were in dog obedience school. Elementary "test prep" classroom methods involve teachers snapping their fingers at children to get responses, following scripted lessons where they simply recite prompts for students or have children read nonsense books, devoid of plot or meaning.

MANY CHILDREN LEFT BEHIND, *supra* note 201, at 39.

207. *Id.*

208. Standardized testing also has affected teacher retention in public schools:

Consequently, some argue an exodus of teachers has followed the implementation of high-stakes tests exacerbating problems related to teacher retention. Teachers are leaving the profession after high-stakes testing policies are implemented, and new teachers and teachers who teach in grades in which high-stakes tests are administered are avoiding or are transferring out of the grades in which high-stakes tests matter.

Researchers in one study found that roughly 75 percent of the teachers had left one school over the summer. They left because the state designated the school as a low-performing school, and they wanted to avoid the forthcoming consequences.

In Texas, another researcher found teachers were leaving teaching because of the restraints and pressures the TAAS [Texas Assessment of Academic Skills] placed on them and their students. In addition, 43 percent of teacher respondents indicated they were "seriously considering" leaving teaching because of low pay, poor benefits, and the stress associated with the TAAS. One Texas teacher reported leaving a public school because of having to teach just to the test and because of the consequences attached to the TAAS.

In New York, a 25-year veteran left teaching because of how the tests cheated her students and overpowered what she taught in her classroom. In fact, many of New York's 4th grade teachers, particularly in urban schools, are seeking teaching assignments in other grades.

In sum, teachers are beginning to exit grades in which high-stakes tests are administered, are leaving public schools for private schools in which they are exempt from such policies, and are leaving teaching altogether after high-stakes tests are implemented.

AUDREY L. AMREIN & DAVID C. BERLINER, ARIZ. STATE UNIV. EDUC. POLICY RESEARCH UNIT, AN ANALYSIS OF SOME UNINTENDED AND NEGATIVE CONSEQUENCES OF HIGH-STAKES TESTING 45-46 (2002) (citations omitted).

209. *See generally*, Brown, *supra* note 42.

210. *See* Chris Lubienski, *Whither the Common Good?: A Critique of Home Schooling*, 75 PEABODY J. EDUC. 207 (2000) (arguing that homeschooling is part of this exodus away from public schools, and because it deprives the public schools of social capital, it is not only a reaction to the decline of public schools, but a cause as well).

come victims of the socio-economic cycle of disproportionality and resource *misallocation*.

Because each of these excesses involves a limited resource, disproportionality is a necessary result. Income, time, and access do not separate one child's potential, creativity, or brilliance from another's; they separate one parent's privilege from another's. This is not "No Child Left Behind," this is "Most Children Left Behind" (or for the positivist: "Few Children Pushed Ahead").

### C. Federal and State Interpretations

Additionally, case law affects how school districts act.<sup>211</sup> As courts, nationally and locally, rule on how law and policy is permissibly interpreted, they must be or become aware of the role that they are playing in disproportionality in education. To do otherwise is to stick their heads in the sand and hide behind the cowardice of "all we do is interpret the law."<sup>212</sup> U.S. citizens have seen the history behind such a stance and the judges and justices are just as responsible as the executive and legislative agents that permit atrocities to occur under their watch.<sup>213</sup>

Nationally, we have seen the United States Supreme Court's decisions ebb and flow with the political climate of the day. From *Plessy*<sup>214</sup> to *Brown*,<sup>215</sup> *Bakke*,<sup>216</sup> *Grutter*,<sup>217</sup> *PICS*,<sup>218</sup> and more, the Court has affected

211. See generally *infra* notes 214–217.

212. See generally Stephen M. Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, 30 LAW & SOC. INQUIRY 89 (2005); see also Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of the U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989).

213. *Plessy v. Ferguson*, 163 U.S. 537, 540 (1896) (holding as constitutional a Louisiana state statute providing for "equal but separate accommodations for the white and colored races" aboard railway cars).

In *Korematsu*, the Court said:

[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

*Korematsu v. U.S.*, 323 U.S. 214, 216 (1944).

In 1983, President Reagan awarded Mr. Korematsu the National Medal of Freedom. President Reagan called the *Korematsu* decision a grave injustice. Frank Dunham, *When Yasir Esam Hamdi Meets Zacarias Moussaoui*, 4 RICH. J. GLOBAL L. & BUS. 21, 23 (2004).

214. *Plessy*, 163 U.S. 537.

215. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (overruling *Plessy* and holding that segregation of people by race violates the Equal Protection Clause of the Fourteenth Amendment).

216. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (holding that admissions decisions based on race or ethnicity made by state colleges and universities must be reviewed under the Fourteenth Amendment and must withstand strict scrutiny).

217. *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that an admissions program could use race as a "plus factor" when making admissions decisions, but that a program that automatically awarded points to certain minorities was unconstitutional). See Bryan K. Fair, *Taking Educational Caste Seriously: Why Grutter Will Help Very Little*, 78 TUL. L. REV. 1843 (2004).

the direction of disproportionality in some way and at some level. Often, the opinions of the Supreme Court leave the public wondering about the “real” world in which the nine Justices live.<sup>219</sup> Suggesting that the result on student proportionality was neither a consideration nor an issue is irrational. Briefs were filed making the issue of proportionality relevant and scholars wrote about the role policy played in these decisions.<sup>220</sup> However, the goal here is to focus on Colorado as a type of micrometer of a systemic issue.

Within Colorado in the 1970s, a post-*Brown* phenomenon began when school systems began busing students.<sup>221</sup> Busing involved school systems

218. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 706 (2007); Nancy Conneely, Note, *After PICS: Making the Case for Socioeconomic Integration*, 14 TEX. J. C.L. & C.R. 95, 96 (2008) (“[t]hat race cannot be used as a determining factor in K-12 public school admission plans.”)

219. “Some now argue that judges are too active, while others argue that they are too self-restrained. These criticisms come from all corners of society. In recent years, for example, accusations that the U.S. Supreme Court is too activist have swelled.” Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 21–22 (2002) (The author, president of the Supreme Court of Israel, argued that “[s]uch allegations should be evaluated within the framework of a supreme court’s role in a democracy.”).

220. A few examples:

Law schools consider race and ethnicity in admissions for a web of interconnected reasons. They do not consider race to achieve racial balance; few if any law schools have minority enrollments that approach minority proportions in the population. Instead, the issue is the harm to legal education, to the schools as institutions, and to society, if disadvantaged minority groups are substantially excluded from legal education.

Brief for American Law Deans Association as Amicus Curiae Supporting Respondents at 1, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 399070.

The 21% level of participation by students of color amongst recent law graduates—even with the limited affirmative action programs that remain in place—still does not amount to “proportional” representation because people of color comprise 31% of the U.S. population at this time. And though within the judiciary, African Americans are finally now measurably represented, their numbers still remain very small (0.5% to 0.6% of Federal Judges).

Brief Amici Curiae of Veterans of the Southern Civil Rights Movement and Family Members of Murdered Civil Rights Activists in Support of Respondents at 9, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) (2003 WL 539178).

[T]oday, the typical white public school student attends a school that is 80 percent white, a statistic that is far out of proportion with the overall representation of white children in public schools. And most blacks and Latinos attend schools in which approximately two-thirds of the students are also black or Latino and more than half of the population is of the student’s own race. Asians, on the other hand, live in the nation’s most integrated communities and attend the most integrated schools—and have a college graduation rate almost double the national average.

Brief Amici Curiae of Media & Telecommunication Companies in Support of Respondents at 16, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2006) (Nos. 05-908, 05-915) (2006 WL 2927065) (citations omitted). See also *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971); Brief for Respondents at 20, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2006) (No. 05-908) (2006 WL 2922956) (urging the Court to follow *Swann*, which held that “each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole.”; Barbara J. Flagg, *In Defense of Race Proportionality*, 69 OHIO ST. L.J. 1285 (2008) (examining the *PICS* decision and, by extension, *Grutter*).

221. See Tom I. Romero, II, *Our Selma Is Here: The Political and Legal Struggle for Educational Equality in Denver, Colorado, and Multiracial Conundrums in American Jurisprudence*, 3 SEATTLE J. SOC. JUST. 73 (2004).

taking affirmative measures to create schools that were integrated in fact as well as in law.<sup>222</sup> In 1974, by citizens' initiative, the Colorado Constitution was amended so that no student could be assigned or transported to any public education institution for the purpose of achieving racial balance.<sup>223</sup> Again, critical theorists must consider what interests were served and what privileges maintained by this Constitutional modification.

The citizens' initiative, intentionally or unintentionally, supported maintaining a disproportionate amount of funding within certain school districts and racial populations. Since Colorado's Constitution structured pupil funding in a manner directly connected to the wealth of surrounding neighborhoods, poorer districts were unable to provide as many resources to as many students.<sup>224</sup> Equality might suggest that if the populations that needed the greatest support could not have the funds brought to their location they could, instead, go to where the funds were located. Equity would suggest otherwise. The citizens' initiative made equity illegal. It served to maintain educational privileges because, at that moment, funding could not be (re)distributed to poorer communities and students from these communities could not be (re)distributed to where greater funding existed.

Various lawsuits arose at different points in time challenging the disproportionate allocation of resources. While many cases are worthy of their own article, first consider *Keyes v. Sch. Dist. No. 1*,<sup>225</sup> a nationally renowned Colorado busing case. In *Keyes*, the United States Supreme Court found that petitioners proved intentional racial segregation regarding one particular school and substantiated a claim that all other schools in the district were similarly situated:

Rather, we have held that where plaintiffs prove that a current condition of segregated schooling exists within a school district

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222. *Id.*

223. In pertinent part:

No sectarian tenets or doctrines shall ever be taught in the public school, nor shall any distinction or classification of pupils be made on account of race or color, nor shall any pupil be assigned or transported to any public educational institution for the purpose of achieving racial balance.

Section 8 [of Article IX of the Colorado Constitution] bans teaching of sectarian tenets or doctrines in the public schools and use of religious criteria in hiring teachers or admitting students to public schools. It also prohibits classification of students based on race. A 1974 citizens' initiative added the final phrase to the section, which prohibits assigning or busing students to achieve racial balance in any public education institution.

DALE A. OESTERLE & RICHARD B. COLLINS, *THE COLORADO STATE CONSTITUTION: A REFERENCE GUIDE* 212 (2002). The initiative passed with 485,536 votes (68.7 %) to 220, 842 votes (31.3%). *Ballot History*, COLO. GEN. ASSEMBLY, available at <http://www.leg.state.co.us/lcs/ballohistory.nsf/> (expand hyperlink next to "2013"; then expand hyperlink next to "1974"; then expand hyperlink next to "Initiative"; then follow "An amendment to section 8 article IX of the Constitution of the State of Colorado, to prohibit the assignment or transportation of pupil" hyperlink).

224. See, e.g., *Lujan v. Colo. State Bd. Of Educ.*, 649 P.2d 1005, 1013 (Colo. 1982) (en banc).

225. 413 U.S. 189 (1973). See Read, *supra* note 160.

where a dual system was compelled or authorized by statute at the time of our decisions in [*Brown I*], the state automatically assumes an affirmative duty 'to effectuate a transition to a racially nondiscriminatory school system.'<sup>226</sup>

Furthermore, the Court held that because petitioners had presented a *prima facie* case of intentional discrimination, the burden would shift to the school board, to show that there was not intentional discrimination.<sup>227</sup> On remand, the school board would have to rebut the claim, and if they could not, it would be deemed to have an affirmative duty to immediately desegregate the schools.<sup>228</sup> Even though the Board attempted to counter the argument of the petitioners by saying that it was not intentional and, rather, was the product of neighborhood composition with regard to the other schools, the Court stated: "Plainly, a finding of intentional segregation as to a portion of a school system is not devoid of probative value in assessing the school authorities' intent with respect to other parts of the same school system."<sup>229</sup>

Second, consider *Lujan v. Colorado State Board of Education*.<sup>230</sup> The plaintiffs in *Lujan* were children living in sixteen of Colorado's one hundred eighty-one school districts who challenged the constitutionality of the Public School Finance Act of 1973,<sup>231</sup> which set out the public school financing system for the state.<sup>232</sup> The trial court found the system violated equal protection under the federal and state constitutions, as well as a state constitutional provision requiring the state provide a "thorough and uniform" system of public schools.<sup>233</sup> Under the system, a school district obtained approximately forty-seven percent of its operating income from property taxes collected from its district.<sup>234</sup> Thus, schools in districts with higher property values received significantly more operating income than schools located in districts with lower property values.<sup>235</sup>

Overruling the trial court, the Colorado Supreme Court first held that education is not a fundamental right under either the United States Constitution or the Colorado Constitution, and therefore not subject to strict judicial scrutiny.<sup>236</sup> The court overruled the trial court's finding that strict

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226. *Keyes*, 413 U.S. at 200 (citations omitted).

227. *Id.* at 208.

228. *Id.* at 213.

229. *Id.* at 207.

230. 649 P.2d 1005 (Colo. 1982) (en banc).

231. COLO. REV. STAT. §§ 22-50-101-22-50-120 (repealed 1988).

232. *Lujan*, 649 P.2d at 1010-1011.

233. *Id.* at 1017 (quoting COLO. CONST. art. 9, § 2).

234. The balance was funded through direct federal and state contributions, as well as through other means. *Id.*

235. *Id.* at 1013.

236. In reaching its decision, the Colorado Supreme Court followed the United States Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), in

judicial scrutiny was additionally required because a wealth-based suspect classification had been established.<sup>237</sup> It also found the financing system was "rationally related to a legitimate state purpose."<sup>238</sup> Finally, the court found that the system did not violate the state constitution's mandate for a system of "thorough and uniform" public schools:

We find that Article IX, Section 2 of the Colorado Constitution is satisfied if thorough and uniform educational opportunities are available through state action in each school district. While each school district must be given the control necessary to implement this mandate at the local level, this constitutional provision does not prevent a local school district from providing additional educational opportunities beyond this standard. In short, the requirement of a "thorough and uniform system of free public schools" does not require that educational expenditures per pupil in every school district be identical.<sup>239</sup>

Lastly, consider *Lobato v. State*.<sup>240</sup> In *Lobato*, fourteen school districts in the San Luis Valley in Colorado, and a group of parents of students from across the state, comprised the plaintiffs.<sup>241</sup> The plaintiffs contended "that Colorado's school financing system [was] underfunded and distribute[d] funds on an irrational and arbitrary basis in violation of the education clause's mandate of a 'thorough and uniform' system of public education."<sup>242</sup> The Colorado Court of Appeals found that the plaintiffs' claims were nonjusticiable because questions of educational financing were the sole domain of the legislature and because "there were no judicially manageable standards to assess the constitutionality of the public school finance system."<sup>243</sup>

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analyzing the question of whether education is a fundamental right and thus subject to strict scrutiny under the federal constitution, but declined to apply the "Rodriguez test" when analyzing that same question under the Colorado state constitution "because of the basic and inherently different natures of the two constitutions. . . ." *Lujan*, 649 P.2d at 1017. The court admitted that if it "were to adopt the 'Rodriguez test,' educational opportunity would then arguably be a fundamental interest in Colorado entitled to strict scrutiny." *Id.*

237. The court again looked to *Rodriguez* when analyzing the question with reference to the federal constitution. *Lujan*, 649 P.2d at 1019. The question was one of first impression with reference to the Colorado constitution, and the court reached its decision after finding the appellees (plaintiffs) failed to "satisfy the requisite elements constituting an identifiable 'class'; that they do not meet the traditional features of suspectness; and that wealth alone will not create a suspect classification in Colorado." *Lujan*, 649 P.2d at 1022.

238. *Id.* at 1024.

239. *Id.* at 1025.

240. 218 P.3d 358 (Colo. 2009) (en banc).

241. *Id.*

242. *Id.* at 364.

243. *Id.* at 367.



The Colorado Supreme Court distinguished *Lobato* from *Lujan* because the challenge to the school financing system in *Lujan* was based on educational equality, whereas the challenge in *Lobato* was grounded in adequacy.<sup>244</sup> The Colorado Supreme Court reversed the Colorado Court of Appeals and found the plaintiffs' claims were justiciable, but that was all.<sup>245</sup> It reversed and remanded the case to the court of appeals, directing the case be returned to the trial court:

To be successful, [the plaintiffs] must demonstrate that the school finance scheme is not rationally related to the constitutional mandate of a "thorough and uniform" system of public education. The trial court must give significant deference to the legislature's fiscal and policy judgments. The trial court may appropriately rely on the legislature's own pronouncements to develop the meaning of a "thorough and uniform" system of education. If the court finds that the current system of public finance is irrational, then the court must provide the legislature with an appropriate period of time to change the funding system so as to bring the system in compliance with the Colorado Constitution.<sup>246</sup>

The outcomes (potential or actual) discussed above are not isolated to Colorado. While copying the ideas, if not the exact same words, the Colorado statutes and interpretations that support disproportionality are also found in the other Rocky Mountain States: Montana,<sup>247</sup> Idaho,<sup>248</sup> Wyoming,<sup>249</sup> Utah,<sup>250</sup> Nevada,<sup>251</sup> Arizona,<sup>252</sup> and New Mexico.<sup>253</sup>

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244. *Id.*

245. *Id.* at 374.

246. *Id.* at 374–375.

247. The constitution of the state of Montana was adopted by the state constitutional convention on August 17, 1889,

and it was ratified on October 1, 1889. DECIUS SPEAR WADE, THE CODES AND STATUTES OF MONTANA: IN FORCE JULY 1ST, 1895 xix (Butte, Mont., 1895). Article XI, "Education," stipulates under Section 1 that it is the duty of "the Legislative Assembly of Montana to establish and maintain a general, uniform and thorough system of public, free common schools." *Id.* at cxiii. The succeeding sections in Article XI describe how the public schools should be funded and how they should operate. *Id.* at cxiii–cxiv. The current and original language of the Montana Suspension and Expulsion section are available in Appendix A. See MONT. CODE ANN. § 20-5-202 (2013); I FORTY-SECOND LEGIS. ASSEMBLY 129 (1971) in Appendix A.

248. The Idaho state constitution was adopted by the state constitutional convention in 1889. PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO 1889, VOL. I tit. p. (I.W. Hart, ed., 1912). Section 1 of Article IX provides: "[I]t shall be the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools." PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO 1889, VOL. II 2070 (I.W. Hart ed., 1912). The succeeding sections describe how the public schools should be funded and how they should operate. *Id.* at 2070–72. The current and earlier language of the Idaho Denial of School Attendance section are available in Appendix A. See IDAHO CODE ANN. § 33-205 (2013); 1963 Idaho Sess. Laws 34 in Appendix A.

249. The constitutional convention for the state of Wyoming was held in Cheyenne between September 2, 1889 and September 30, 1889. JOURNAL AND DEBATES OF THE CONSTITUTIONAL

While it is beyond the breadth of this article to more fully dissect each state as done with Colorado, the point is that similar statutes exist and can produce similar results.<sup>254</sup> With that in mind, we must search for ways to disrupt the current pattern. One method is to strategize and structure with a goal of proportionality. That method is developed next.

### III. PROPORTIONALITY

Proportionality in any administrative or judicial entity that judges students should become the standard reviewed by the Supreme Court. Proportionality provides an objective measure for the Court, which has, historically, argued against subjective measures in other areas of analysis.<sup>255</sup>

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CONVENTION OF THE STATE OF WYOMING tit. p. (Cheyenne, Wyo., Daily Sun Book & Job Printing 1893). Article VII, "Education," mandates in Section 1 that the "legislature shall provide for the establishment and maintenance of a complete and uniform system of public instruction, embracing free elementary schools of every needed kind and grade." *Id.* at 30. The other sections in Article VII regulate the operation and funding of the public schools. *Id.* at 30–35. There are three Wyoming statutes relevant to this discussion: WYO. STAT. ANN. §§ 21-4-305, -306, -308. The current and historical text of these statutes is available in Appendix A. *See* WYO. STAT. ANN. §§ 21-4-305, -306, -308 (2013); 1969 Wyo. Sess. Laws 164–65 *in* Appendix A.

250. The Utah state constitution was adopted on May 8, 1895. OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION ASSEMBLED AT SALT LAKE CITY ON THE FOURTH DAY OF MARCH, 1895, TO ADOPT A CONSTITUTION FOR THE STATE OF UTAH, VOL II 1852 (Salt Lake City, Utah, Star Printing Co. 1898). Article X of the Utah state constitution provides for education: "SECTION 1. The Legislature shall provide for the establishment and maintenance of a uniform system of public schools[. . . ." *Id.* at 1871. The sections that follow in Article X are concerned with the operation and funding of the public schools. *Id.* at 1871–72. There are three Utah statutes relevant to this discussion: UTAH CODE ANN. §§ 53A-11-902, -904, -905. The current and historical text of these statutes is available in Appendix A. *See* UTAH CODE ANN. §§ 53A-11-902, -904, -905 (2013); 1994 Utah Laws 1122; 1994 Utah Laws 516 *in* Appendix A.

251. The Nevada state constitution was adopted by the state constitutional convention in 1864. OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEVADA (San Francisco, Frank Eastman, Printer, 1866). Article XI is the constitutional provision regarding education, and requires in Section 2 that the ". . . Legislature shall provide for a uniform system of common schools . . ." *Id.* at 845. Again, the sections that follow lay out how the common schools should operate and be funded. *Id.* at 845–846. There are three Nevada statutes relevant to this discussion: NEV. REV. STAT. §§ 392.463, .4644, .467. The current and historical text of these statutes is available in Appendix A. *See* NEV. REV. STAT. §§ 392.463, .4644, .467 (2013); 1985 Nev. Stat. 350; 1999 Nev. Stat. 3185; 1956 Nev. Stat. 161 *in* Appendix A.

252. *See* ARIZ. REV. STAT. §§ 15-841, -844 (2013); 1912 Ariz. Sess. Laws 399; 1991 Ariz. Sess. Laws 807–08 *in* Appendix A.

253. The New Mexico state constitution was adopted on January 21, 1911. STEPHEN BROOKS DAVIS, JR. ET AL., NEW MEXICO STATUTES, ANNOTATED: CONTAINING THE CODIFICATION PASSED AT THE SECOND SESSION OF THE LEGISLATURE OF THE STATE OF NEW MEXICO, IN EFFECT JUNE 11, 1915, WITH THE 1915 SESSION LAWS AS AN APPENDIX 56 (Denver, Colo., W.H. Courtright, 1915). Article XII Section 1 of the original New Mexico state constitution stipulates, "[a] uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the state shall be established and maintained." *Id.* at 86. The provisions that follow outline the funding and operation requirements. *Id.* at 86–89. *See* N.M. STAT. ANN. § 22-5-4.3 (2013); 1986 N.M. Laws 752 *in* Appendix A.

254. A national survey of these statutes and their implications is far beyond the breadth of this work but definitely a consideration for a larger treatise or additional researchers.

255. For example, in criminal law. Andrew D. Leipold, *Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law*, 73 CHI.-KENT L. REV. 559 (1998) (critiquing

There are examples of the Court's history surrounding proportionality in other adjudicative bodies.

In *Ballard v. United States*,<sup>256</sup> a mail fraud case, the Court addressed a system where “women were not included in the panel of grand and petit jurors.”<sup>257</sup> Citing a civil case<sup>258</sup> as precedent, the Court stated that citizens drawn to decide guilt and punishment should be “drawn from a cross-section of the community.”<sup>259</sup> The Court concluded that a “purposeful and systematic exclusion of women” had occurred, invalidating the previous trials.<sup>260</sup> Within this article, the data demonstrating disproportionality is evidence of purposefulness, even if individuals, organizations, or agencies state otherwise. The Court has previously disregarded an individual's stated intention, turning instead to the objective measures.<sup>261</sup> There is no reason to deviate from its historic rationale now.

In *Peters v. Kiff*,<sup>262</sup> the Court considered a white petitioner's challenge to the exclusion of Negroes from jury service.<sup>263</sup> Citing *Ballard* and other cases, the Court stated: “When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.”<sup>264</sup> The Court concluded by reversing and remanding with a reminder to lower courts that “even if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or the appearance of bias.”<sup>265</sup> That lack of “human nature” and “human experience” is equally deplorable and absent from tribunals making life-altering decisions for tomorrow's citizens. And, as the Court noted, even the “appearance of bias” should raise concern.

*Taylor v. Louisiana*,<sup>266</sup> an aggravated kidnapping case, not only cited *Ballard* and *Peters*, but relied on the Federal Jury Selection and Service Act of 1968.<sup>267</sup> According to the Court, that Act's purpose was to mandate

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objective tests and arguing that a lack of inquiry into subjective intent promotes racial bias).

256. 329 U.S. 187 (1946).

257. *Id.* at 189.

258. *Thiel v. S. Pac. Co.*, 328 U.S. 217 (1946).

259. *Ballard*, 329 U.S. at 192–93 (quoting *Thiel*, 328 U.S. at 220).

260. *Ballard*, 329 U.S. at 193.

261. For example, the Court in *Horton v. California* noted that “even-handed law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.” *Horton v. Cal.*, 496 U.S. 128, 138 (1990).

262. *Peters v. Kiff*, 407 U.S. 493 (1972).

263. *See generally id.*

264. *Id.* at 503.

265. *Id.* at 502.

266. 419 U.S. 522 (1975).

267. 28 U.S.C. §§ 1861–1878 (2012).

juries representing a fair cross section of their community.<sup>268</sup> The Court looked to legislative intent in stating:

In passing this legislation, the Committee Reports of both the House and the Senate recognized that the jury plays a political function in the administration of the law and that the requirement of a jury's being chosen from a fair cross section of the community is fundamental to the American system of justice.<sup>269</sup>

Because both the Court and Congress have both highlighted the importance of having a fair cross section of the community in a body making punitive decision, it is only logical to attach that same significance to a similarly structured body in educational settings.

Finally, and most recently, in *Castaneda v. Partida*,<sup>270</sup> a habeas corpus case, like *Peters*, the Court suggested the levels of disproportionality that would raise concern.<sup>271</sup> In the jurisdiction where Partida was convicted, Mexican-Americans comprised 79.1% of the population.<sup>272</sup> Yet, "over an 11-year period, only 39% of the persons summoned for grand jury service were Mexican-American."<sup>273</sup> The 40% difference was sufficient "to establish a prima facie case of discrimination against the Mexican-Americans in the Hidalgo County grand jury selection."<sup>274</sup> Therefore, the Court has also provided direction regarding the levels of disproportionality that are most alarming.

The disproportionality argument is similar to, but distinctly different from, the arguments surrounding *Plessy v. Ferguson*.<sup>275</sup> The suggestion in *Plessy* was that segregated schools were legal as long as all types of schools received equal funding, an equal portion of the resources.<sup>276</sup> However, *Plessy* failed due to the reality of expenditures.<sup>277</sup> Moreover, the

268. *Taylor*, 419 U.S. at 529.

269. *Id.* at 529-30 (footnotes omitted).

270. 430 U.S. 482 (1977).

271. *Id.* at 493.

272. *Id.* at 486.

273. *Id.* at 495.

274. *Id.* at 496; *see also* *Turner v. Fouche*, 396 U.S. 346 (1970) (holding a difference of 23% sufficient to establish a prima facie case).

275. 163 U.S. 537 (1896).

276. *Id.* at 544-45.

277.

[The Jim Crow laws] required blacks and whites to use separate public transportation and accommodations and to attend segregated public schools. In 1896 the Supreme Court upheld these laws in *Plessy v. Ferguson*, stating that separate facilities for blacks and whites were constitutional as long as they were equal. . . .

Segregated black schools were inferior to white schools in terms of teacher quality, teacher pay, funding, and resources. Black schools were inferior to white schools from the end of Reconstruction until the *Brown* decision because less funding was given to minority schools. As a result, black children who attended these schools were given fewer educational opportunities. In turn, fewer blacks had the opportunity to go on to higher educa-

litigators supporting the *Brown v. Board of Education*<sup>278</sup> decision took American education down another path. They challenged the inherent discrimination taking place which they believed would continue to take place) under a scheme of "separate but equal."<sup>279</sup>

Since *Brown*, a number of scholars challenged whether the educational civil rights strategy was advised.<sup>280</sup> They argued that current statistics bear out the failure of the *Brown* strategy and argue that students from historically marginalized communities would have fared far better had *Brown's* counsel fought for increased funding for *their* schools.<sup>281</sup> They argued for an equal portion of resources.<sup>282</sup>

Proportionality, or an equal and equitable portion, is one step toward the objectivity that the Court clearly desires. The Court regularly seeks bright line tests.<sup>283</sup> Proportionality provides a bright line test. The Court wants rules that, when applied, leave little room for misinterpretation. Proportionality achieves that. Proportionality gives administrators, legislators, and judges a bright line standard from which they can *begin* analysis. In opposition to most individuals or supporting organizations, the resources are with the institution—the school, the school district, the state, or the nation. As such, once a plaintiff establishes a *prima facie* case dem-

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tion, and those that did were forced to attend segregated colleges that were inferior to their white counterparts. There were other injustices as well. Black students were required by law to attend a black school, in some cases forcing these students to be bused to schools miles away and to walk through dangerous parts of a city or town. The backdrop of the *Brown* decision was a public school system that was separate but unequal.

Conneely, *supra* note 217, at 98–99 (footnotes omitted).

278. 347 U.S. 483 (1954).

279. "*Brown v. Board* was never just about sitting next to white children—it was about sharing the same resources they had access to." Conneely, *supra* note 217, at 96 (quoting Cheryl Brown Henderson, the daughter of the lead plaintiff in *Brown*).

280. "Black people need reform of our civil rights strategies as badly as those in the law needed a new way to consider American jurisprudence prior to the advent of the Legal Realists." Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 363–364 (1992).

[T]he antidefiance strategy was brought full circle from a mechanism for preventing evasion by school officials of *Brown's* antisegregation mandate to one aimed at creating a discrimination-free environment. This approach to the implementation of *Brown*, however, has become increasingly ineffective; indeed, it has in some cases been educationally destructive. A preferable method is to focus on obtaining real educational effectiveness which may entail the improvement of presently desegregated schools as well as the creation or preservation of model black schools.

Bell, *supra* note 157, at 532. See also Gloria Ladson-Billings, *Landing on the Wrong Note: The Price We Paid for Brown*, 33 EDUC. RESEARCHER 3 (2004); Gloria Ladson-Billings, *Can We at Least Have Plessy? The Struggle for Quality Education*, 85 N.C. L. REV. 1279 (2007).

281. As Ladson-Billings posits:

Critical race theorists might argue that the way to deal with persistent school segregation would be to allow White middle-income schools to remain segregated if they choose but to attach exorbitant monetary fines to such behavior. These monies would be directed into low-income communities' schools to improve the quality of their education.

Ladson-Billings, *Landing on the Wrong Note: The Price We Pay for Brown*, *supra* note 257, at 10.

282. *Id.*

283. See, e.g., *Montejo v. La.*, 556 U.S. 778, 794 (2009).

onstrating disproportionality between residential populations and educational populations, the burden must shift to the defendant. The defendant institution has the most resources and the most data. The individuals and supporting organizations act as a “checks and balance” against the otherwise unfettered manipulation of the governmental institution. If the Court continues to eliminate avenues to critically interrogate the power structures, it diminishes one of the very democratic functions contemplated by the Founding Fathers, the power of the country’s leaders (of the people, by the people) to lead.

This article has shown that America historically supported disproportionality across racial categories. As this section detailed, the solution lies in the attainment of proportionality. We have guidance from case law and previous research to help describe the techniques for attaining proportionate representation. By introducing this framework on a microcosm of America—the schools—citizens are able to consider the outcome in “real time” and decide the efficacy of instituting on a broader level.

#### CONCLUSION

Original intent is a term historically connected to conservative voices. Educational inequality is a struggle historically connected to liberal or progressive voices. This article utilized the theories and goals behind the Founding Father’s original intent to prove the need to immediately equalize and equitize American education. In a vacuum, political preferences can isolate and divide. However, when common ground is the starting point, innovative strategies and alliances can form and provide outcomes beneficial to more stakeholders.

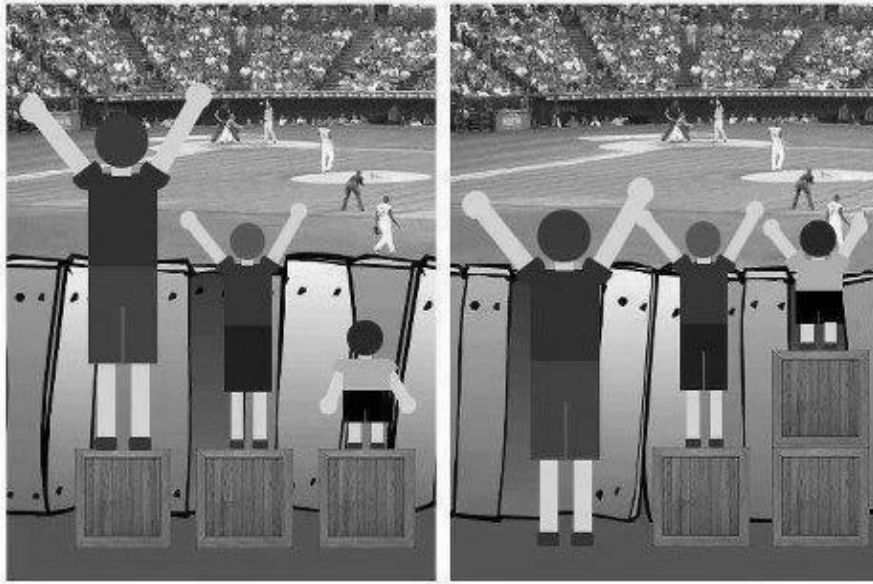
In the end, the distribution of education is one part of America’s original sins. Moreover, as current political speeches and judicial opinions suggest, it is a sin that fails to seek forgiveness. At “conception,” education’s core strands of DNA were held together by a belief that America could only survive as a new democracy if all citizens were provided adequate tools to equally participate in governance. While Jefferson and the other Founders clearly embraced innovation, their embrace was partial. They never contemplated that America’s citizenry would encompass African Americans, Mexican Americans, Latinos, Asian Americans, and multiple indigenous peoples. They believed that they were educating all of America’s future citizens; but, they intentionally left out a portion of the population.

Today, the allocation of educational resources is as intentional as ever. Collectively and individually, Americans understand what is required for all of its future citizens to receive an equal and equitable education. They have known it and contested it throughout time: during slavery, during Jim Crow, during the aftermath of *Brown*, and today. They contest it while

simultaneously uttering rhetoric about the need to compete in a global economy. Since the country's actions appear to belie the rhetoric, the perception of global must mean homogenous. As long as the majority of educational opportunities continue to be directed at historically privileged communities, success is only logical if the global community resembles them.<sup>284</sup> If America continues on its path of inequity and inequality in education, she will maintain her current crash course with disaster. At impact, that injustice will likely leave American citizens embracing history's most tragic exhibition of democracy at work.

**IMAGE A**<sup>285</sup>

**Equality is not always Equity or Justice**



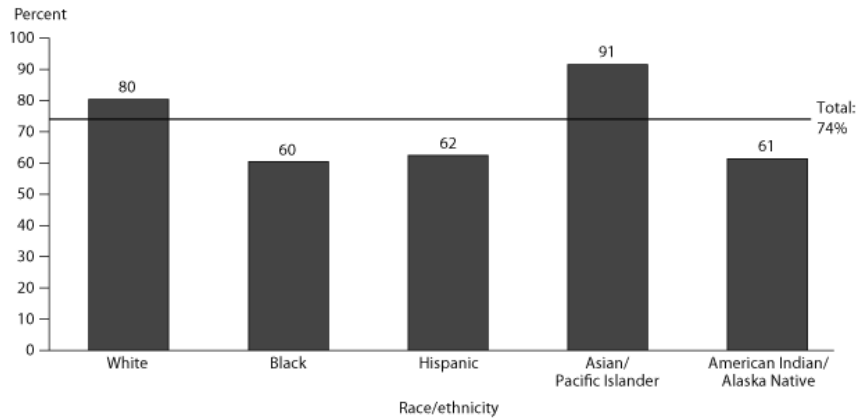
**This is EQUITY & JUSTICE**

284. Or, the strategy is for complete and utter global domination. While this would be unsurprising, the consequences would be extremely unpredictable and likely catastrophic.

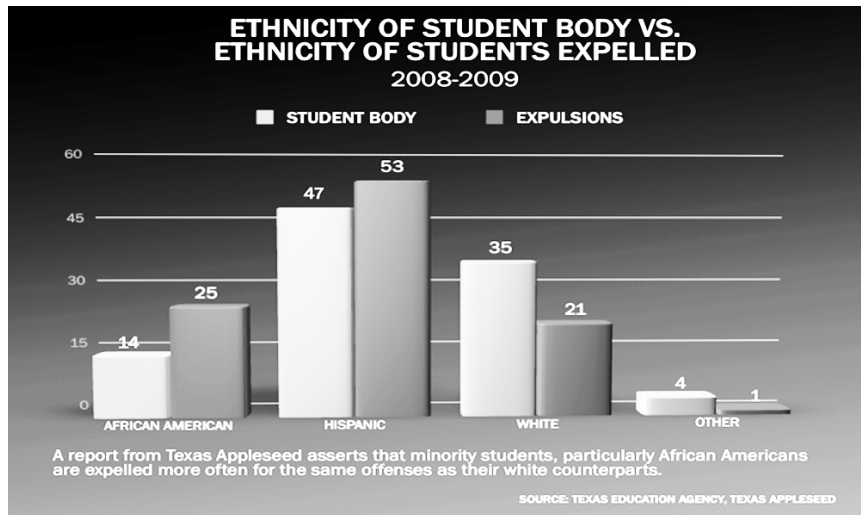
285. *Equality Is Not Always Justice*, IMGUR, <http://imgur.com/gallery/HYx95Xk> (last visited Dec. 28, 2013).

**GRAPH A**<sup>286</sup>

Averaged freshman graduation rate for public high school students, by race/ethnicity: School year 2006-07



**GRAPH B**<sup>287</sup>

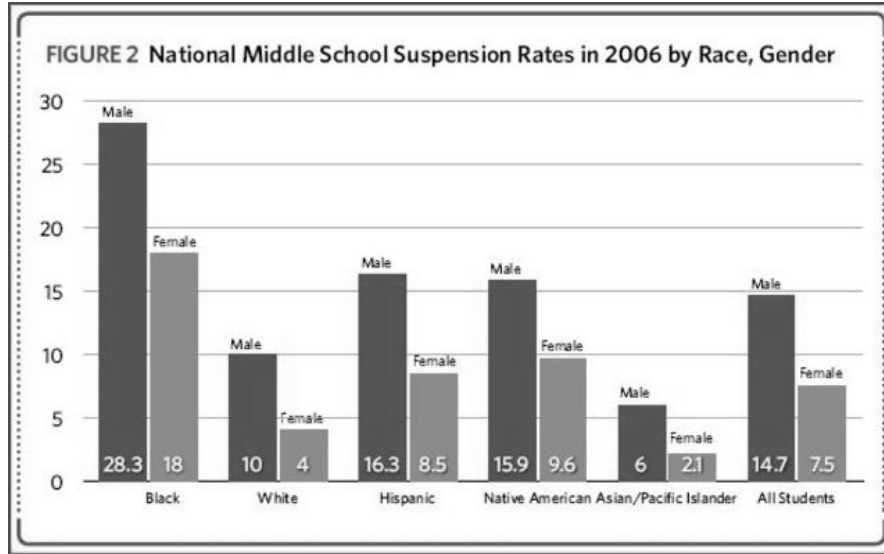


286. Averaged freshman graduation rate for public high school students, by race/ethnicity: School year 2006-07, U.S. DEPT. OF EDUC., NATIONAL CENTER FOR EDUC. STATISTICS, (July 2010) available at [http://nces.ed.gov/pubs2010/2010015/figures/figure\\_18\\_2.asp](http://nces.ed.gov/pubs2010/2010015/figures/figure_18_2.asp) (last visited May. 26, 2014).

287. Deborah Fowler et al., *Texas' School to Prison Pipeline* 44, TEXAS APPLESEED (April 2010), available at [http://www.texasappleseed.net/index.php?option=com\\_docman&task=doc\\_download&gid=308&Itemid=](http://www.texasappleseed.net/index.php?option=com_docman&task=doc_download&gid=308&Itemid=) (last visited May 26, 2014) (this graph modified to add commentary and to change the places of White and Hispanic students for side-to-side comparison of Hispanic and African American students).



**GRAPH C**<sup>288</sup>



**GRAPH D**<sup>289</sup>



288. DANIEL J. LOSEN & RUSSELL J. SKIBA, *SUSPENDED EDUCATION: URBAN MIDDLE SCHOOLS IN CRISIS 5* (2010), available at [http://www.splcenter.org/sites/default/files/downloads/publication/Suspended\\_Education.pdf](http://www.splcenter.org/sites/default/files/downloads/publication/Suspended_Education.pdf).

289. *5Ss of the School to Prison Pipeline*, SAVE THE KIDS (Dec. 23, 2013), <http://savethekidsgroup.org>.

TABLE A

MOUNTAIN WEST STATES<sup>290</sup>

STATE	POPULATION <sup>291</sup>	DEMOGRAPHIC BREAKDOWN <sup>292</sup>						
		White alone	Hispanic or Latino	Black or African American alone	American Indian and Alaskan Native alone	Asian alone	Native Hawaiian and Other Pacific Islander alone	Some other race alone
United States	308, 745, 538	72.4%	16.3%	13.6%	1.7%	5.6%	0.4%	7.0%
MONTANA	989, 415	87.9%	2.9%	0.4%	6.0%	0.6%	0.1%	0.1%
IDAHO	1, 567, 582	84.3%	10.9%	0.5%	1.0%	1.2%	0.1%	0.1%
WYOMING	563, 626	86.3%	8.4%	0.8%	2.0%	0.7%	0.0%	0.1%
UTAH	2,763, 885	80.7%	12.7%	1.0%	1.0%	2.0%	0.9%	0.1%
NEVADA	2, 700, 551	54.8%	26.1%	7.7%	0.9%	7.0%	0.6%	0.2%
COLORADO	5, 029, 196	70.3%	20.4%	3.7%	0.6%	2.7%	0.1%	0.2%
ARIZONA	6, 392, 017	58.2%	29.4%	3.8%	4.1%	2.7%	0.2%	0.1%
NEW MEXICO	2, 059, 179	40.9%	45.9%	1.7%	8.6%	1.3%	0.0%	0.2%

290. See *Census Regions and Divisions of the United States*, *supra* note 146.

291. *Interactive Population Map*, U.S. CENSUS 2010, <http://www.census.gov/2010census/popmap/index.php> (last visited Aug. 25, 2013).

292. *Community Facts Search*, U.S. CENSUS BUREAU, <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml> (last visited Sept. 17, 2013).

**Appendix A – Statutory Provisions***Montana*

When it was enacted in 1971, the statute entitled “Suspension and Expulsion” read as follows:

Section 124. Section 75-6311. Suspension and expulsion. As provided in sections 75-6109 and 75-6113, any pupil may be suspended by a teacher, superintendent or principal. The trustees of the district shall adopt a policy defining the authority and procedure to be used by a teacher, superintendent or principal in suspending a pupil and to define the circumstances and procedures by which the trustees may expel a pupil. Expulsion shall be a disciplinary action available only to the trustees.

I Forty-Second Legis. Assembly 129 (1971).

Today, that statute reads as follows:

20-5-202 Suspension and expulsion.

(1) As provided in 20-4-302, 20-4-402, and 20-4-403, a pupil may be suspended by a teacher, superintendent, or principal. The trustees of the district shall adopt a policy defining the authority and procedure to be used by a teacher, superintendent, or principal in the suspension of a pupil and in defining the circumstances and procedures by which the trustees may expel a pupil. Expulsion is any removal of a pupil for more than 20 school days without the provision of educational services and is a disciplinary action available only to the trustees. A pupil may be suspended from school for an initial period not to exceed 10 school days. Upon a finding by a school administrator that the immediate return to school by a pupil would be detrimental to the health, welfare, or safety of others or would be disruptive of the educational process, a pupil may be suspended for one additional period not to exceed 10 school days if the pupil is granted an informal hearing with the school administrator prior to the additional suspension and if the decision to impose the additional suspension does not violate the Individuals With Disabilities Education Act, 20 U.S.C. 1400, et seq.

(2)

(a) The trustees of a district shall adopt a policy for the expulsion of a student who is determined to have brought a firearm, as defined in 18 U.S.C. 921, to school and for referring the matter to the appropriate local law enforcement agency. A student who is determined to have brought a firearm to school under this subsection must be expelled from school for a period of not less than 1 year, except that the trustees may authorize the school administra-

tion to modify the requirement for expulsion of a student on a case-by-case basis. The trustees shall annually review the district's weapons policy and any policy adopted under this subsection (2)(a) and update the policies as determined necessary by the trustees based on changing circumstances pertaining to school safety.

(b) A decision to change the placement of a student with a disability who has been expelled pursuant to this section must be made in accordance with the Individuals With Disabilities Education Act.

(3) In accordance with 20-4-302, 20-4-402, 20-4-403, and subsection (1) of this section, a teacher, a superintendent, or a principal shall suspend immediately for good cause a student who is determined to have brought a firearm to school.

(4) Nothing in this section prevents a school district from:

(a) offering instructional activities related to firearms or allowing a firearm to be brought to school for instructional activities sanctioned by the district; or

(b) providing educational services in an alternative setting to a student who has been expelled from the student's regular school setting.

MONT. CODE. ANN. § 20-5-202 (2013).

#### *Idaho*

This statute was a recodification of earlier statutes, which recodification occurred in 1963. The language of the 1963 recodification read as follows:

#### SECTION 28. DENIAL OF SCHOOL ATTENDANCE.

—The board of trustees may deny attendance at any of its schools, by suspension or expulsion, to any pupil who is an habitual truant, or who is incorrigible, or whose conduct, in the judgment of the board, is such as to be continuously disruptive of school discipline, or of the instructional effectiveness of the school. Any pupil having been suspended or expelled may be readmitted to the school by the board of trustees upon such reasonable conditions as may be prescribed by the board; but such readmission shall not prevent the board from again suspending or expelling such pupil for cause.

No pupil shall be expelled without the board of trustees having first given notice to the parent or guardian of the pupil, which notice shall state the time and place where such parent or guardian may appear and show cause why the pupil should not be expelled. Any pupil who is within the age of

compulsory attendance, who is expelled as herein provided, shall come under the purview of the youth rehabilitation law, and an authorized representative of the board shall file a petition with the probate court of the county of the pupil's residence, in such form as the court may require under the provisions of section 16-1807.

1963 Idaho Sess. Laws 34.

The current language of the statute is as follows:

#### Denial of school attendance

The board of trustees may deny enrollment, or may deny attendance at any of its schools by expulsion, to any pupil who is an habitual truant, or who is incorrigible, or whose conduct, in the judgment of the board, is such as to be continuously disruptive of school discipline, or of the instructional effectiveness of the school, or whose presence in a public school is detrimental to the health and safety of other pupils, or who has been expelled from another school district in this state or any other state. Any pupil having been denied enrollment or expelled may be enrolled or readmitted to the school by the board of trustees upon such reasonable conditions as may be prescribed by the board; but such enrollment or readmission shall not prevent the board from again expelling such pupil for cause.

Provided however, the board shall expel from school for a period of not less than one (1) year, twelve (12) calendar months, or may deny enrollment to, a student who has been found to have carried a weapon or firearm on school property in this state or any other state, except that the board may modify the expulsion or denial of enrollment order on a case-by-case basis. Discipline of students with disabilities shall be in accordance with the requirements of federal law part B of the individuals with disabilities education act and section 504 of the rehabilitation act<sup>1</sup>. An authorized representative of the board shall report such student and incident to the appropriate law enforcement agency.

No pupil shall be expelled nor denied enrollment without the board of trustees having first given written notice to the parent or guardian of the pupil, which notice shall state the grounds for the proposed expulsion or denial of enrollment and the time and place where such parent or guardian may appear to contest the action of the board to deny school attendance, and which notice shall also state the rights of the pupil to be represented by counsel, to produce witnesses and submit evidence on his own behalf, and to cross-examine any adult witnesses who may appear against him. Within a reasonable period of time following such notification, the board of trustees shall grant the pupil and his parents or guardian a full and fair hearing on the proposed expulsion or denial of enrollment. However, the

board shall allow a reasonable period of time between such notification and the holding of such hearing to allow the pupil and his parents or guardian to prepare their response to the charge. Any pupil who is within the age of compulsory attendance, who is expelled or denied enrollment as herein provided, shall come under the purview of the juvenile corrections act, and an authorized representative of the board shall, within five (5) days, give written notice of the pupil's expulsion to the prosecuting attorney of the county of the pupil's residence.

The superintendent of any district or the principal of any school may temporarily suspend any pupil for disciplinary reasons, including student harassment, intimidation or bullying, or for other conduct disruptive of good order or of the instructional effectiveness of the school. A temporary suspension by the principal shall not exceed five (5) school days in length; and the school superintendent may extend the temporary suspension an additional ten (10) school days. Provided, that on a finding by the board of trustees that immediate return to school attendance by the temporarily suspended student would be detrimental to other pupils' health, welfare or safety, the board of trustees may extend the temporary suspension for an additional five (5) school days. Prior to suspending any student, the superintendent or principal shall grant an informal hearing on the reasons for the suspension and the opportunity to challenge those reasons. Any pupil who has been suspended may be readmitted to the school by the superintendent or principal who suspended him upon such reasonable conditions as said superintendent or principal may prescribe. The board of trustees shall be notified of any temporary suspensions, the reasons therefor, and the response, if any, thereto.

The board of trustees of each school district shall establish the procedure to be followed by the superintendent and principals under its jurisdiction for the purpose of effecting a temporary suspension, which procedure must conform to the minimal requirements of due process.

IDAHO CODE ANN. § 33-205 (2013).

### *Wyoming*

When it was originally enacted in 1969, the Wyoming Statute entitled "Suspension or Expulsion; Authority; Procedure" read as follows:

#### Suspension or Expulsion of a Child from Public School

Section 61. (a) The board of trustees of any school district may suspend or expel any child from the public schools for any reason enumerated by the statutes of this state. The board of trustees may delegate authority to administrative and supervisory personnel to suspend any child for a period not to exceed ten (10) school days;

provided, that in every such case of suspension or expulsion, oral notice shall be given immediately, if possible, and in addition written notice shall be given within twenty-four (24) hours, to the parents, guardian, or custodian of the child affected, stating the reason for the suspension or expulsion.

(b) No board of trustees may expel any child from school or suspend any child for more than ten (10) days without an opportunity for a hearing, if requested, in accordance with the procedures of the Wyoming Administrative Procedures Act.

(c) Suspension or expulsion shall not be imposed as an additional punishment for offenses punishable under the laws of the state, except where the offense was committed at a school function or is of such nature that continuation of the child in school would clearly be detrimental to the welfare, safety, or morals of other pupils. No suspension or expulsion shall be for longer than one (1) school year.

(d) Any decision of the board shall be considered a final decision which may be appealed to the district court of the county in which the school district is located, pursuant to provisions of the Wyoming Administrative Procedure Act. The court may, on application or on its own motion, stay the decision of the board pending appeal, as the best interests of the child appear.

1969 Wyo. Sess. Laws 164–65.

Today, the statute reads as follows:

(a) The board of trustees of any school district may delegate authority to disciplinarians chosen from the administrative and supervisory staff to suspend any student from school for a period not to exceed ten (10) school days. In addition, the board of trustees shall, subject to the case-by-case modification permitted by this subsection, require the district superintendent to expel from school for a period of one (1) year any student determined to possess, use, transfer, carry or sell a deadly weapon as defined under W.S. 6-1-104(a)(iv) within any school bus as defined by W.S. 31-7-102(a)(xl) or within the boundaries of real property used by the district primarily for the education of students in grades kindergarten through twelve (12). The superintendent with the approval of the board of trustees may modify the period of expulsion on a case-by-case basis based upon the circumstances of the violation. Upon a violation of this subsection and following notice and hearing requirements of this section, the superintendent shall notify the district attorney of the violation together with the specific act in violation of this subsection and the name of the student violating this subsection. Nothing in this subsection prohibits a district from

providing educational services to the expelled student in an alternative setting.

(b) The disciplinarian shall give the student to be suspended oral or written notice of the charges against him and an explanation of the evidence the authorities have. The disciplinarian shall give the student to be suspended an opportunity to be heard and to present his version of the charges against him. No student shall be removed from school without such notice and opportunity to be heard, except as provided by subsection (c) of this section.

(c) The disciplinarian shall give the student to be suspended the opportunity to be heard as soon as practicable after the misconduct, unless the student's presence endangers persons or property, or threatens disruption of the academic process, in which case his immediate removal from school may be justified, but the opportunity to be heard shall follow as soon as practicable, and not later than seventy-two (72) hours after his removal, not counting Saturdays and Sundays. Written notice of suspension shall be sent to the student's parents, guardians or custodians within twenty-four (24) hours of the decision to conduct them.

(d) The board of trustees of any school district or the superintendent if designated, may suspend a student for a period exceeding ten (10) school days or may expel a student for a period not to exceed one (1) year, provided the student is afforded an opportunity for a hearing in accordance with the procedures of the Wyoming Administrative Procedure Act [ §§ 16-3-101 through 16-3-115].

(e) Suspension or expulsion shall not be imposed as an additional punishment for offenses punishable under the laws of the state, except for expulsion by a district superintendent under subsection (a) of this section, or where the offense was committed at a school function, against the property of the school, or is of such nature that continuation of the child in school would clearly be detrimental to the education, welfare, safety or morals of other pupils. No suspension or expulsion shall be for longer than one (1) year.

(f) Any decision of the board, or of a designated superintendent, shall be considered a final decision which may be appealed to the district court of the county in which the school district is located, pursuant to provisions of the Wyoming Administrative Procedure Act. The court may, on application or on its own motion, stay the decision of the board or superintendent pending appeal, considering both the best interests of the child and the need to maintain an orderly environment conducive to learning for other children.

WYO. STAT. ANN. § 21-4-305 (2013).

When it was originally enacted in 1969, the Wyoming Statute entitled "Suspension or Expulsion; Grounds" read as follows:



#### Grounds for Suspension or Expulsion

Section 62. The following shall be grounds for suspension or expulsion of a child from a public school during the school year.

- (a) Continued wilful [sic] disobedience or open and persistent defiance of the authority of school personnel.
- (b) Wilful [sic] destruction or defacing of school property.
- (c) Any behavior which in the judgment of the local board of trustees is clearly detrimental to the welfare, safety, or morals of other pupils.
- (d) Torturing, tormenting, or abusing a pupil or in any way mistreating a pupil or a teacher with physical violence.

1969 Wyo. Sess. Laws 165.

Today, the statute reads as follows:

(a) The following shall be grounds for suspension or expulsion of a child from a public school during the school year:

- (i) Continued willful disobedience or open defiance of the authority of school personnel;
- (ii) Willful destruction or defacing of school property during the school year or any recess or vacation;
- (iii) Any behavior which in the judgment of the local board of trustees is clearly detrimental to the education, welfare, safety or morals of other pupils, including the use of foul, profane or abusive language or habitually disruptive behavior as defined by subsection (b) of this section;
- (iv) Torturing, tormenting, or abusing a pupil or in any way mistreating a pupil or a teacher with physical violence;
- (v) Possession, use, transfer, carrying or selling a deadly weapon as defined under W.S. 6-1-104(a)(iv) within any school bus as defined by W.S. 31-7-102(a)(xl) or within the boundaries of real property used by the district primarily for the education of students in grades kindergarten through twelve (12).

(b) As used in paragraph (a)(iii) of this section, "habitually disruptive behavior" means overt behavior willfully initiated by a student causing disruption in the classroom, on school grounds, on school vehicles or at school activities or events, which requires the attention of a teacher or other school personnel.

WYO. STAT. ANN. § 21-4-305 (2013).

When it was originally enacted in 1969, the Wyoming Statute entitled “Punishment and Disciplinary Measures; Denial of Diploma or Credit” read as follows:

**Reasonable Forms of Punishment and Disciplinary Measures**

Section 64. (a) Each board of trustees in each school district within the state may adopt rules for reasonable forms of punishment and disciplinary measures. Subject to such rules, teachers, principals, and superintendents in such district may impose reasonable forms of punishment and disciplinary measures for insubordination, disobedience, and other misconduct.

(b) No diploma or credit for a course which has been completed successfully shall be denied a pupil who has earned it; provided, such diploma or credit shall not be deemed earned until payment has been made for all indebtedness due to the school district.

1969 Wyo. Sess. Laws 165.

Today, the statute reads as follows:

(a) Each board of trustees in each school district within the state may adopt rules for reasonable forms of punishment and disciplinary measures. Subject to such rules, teachers, principals, and superintendents in such district may impose reasonable forms of punishment and disciplinary measures for insubordination, disobedience, and other misconduct.

(b) Teachers, principals and superintendents in each district shall be immune from civil and criminal liability in the exercise of reasonable corporal discipline of a student as authorized by board policy.

(c) No diploma or credit for a course which has been completed successfully shall be denied a pupil who has earned it; provided, such diploma or credit shall not be deemed earned until payment has been made for all indebtedness due to the school district.

WYO. STAT. ANN. § 21-4-308 (2013).

*Utah*

When it was enacted in 1994, the Utah statute entitled “Delegation of Authority to Suspend a Student—Procedure for Suspension—Readmission” read as follows:

53A-11-905 Delegation of authority to suspend a student—Procedure for suspension—Readmission.

(1) A local board of education may delegate to any school principal or assistant principal within the school district the power to suspend a student in the principal's school for up to ten school days.

(2) The board may suspend a student for up to one school year or delegate that power to its executive officer.

(3) If a student is suspended under Subsection (1) or (2), the suspending authority shall immediately notify the parent or guardian of the student of the following:

- (a) that the student has been suspended;
  - (b) the grounds for the suspension;
  - (c) the period of time for which the student is suspended; and
  - (d) the time and place for the parent or guardian to meet with the suspending authority to review the suspension.
- (4) (a) A suspended student shall immediately leave the school building and the school grounds following a determination by the parent or guardian of the student and the school of the best way to transfer custody of the student to the parent or guardian.
- (b) Except as otherwise provided in Subsection (c), a suspended student may not be readmitted to a public school until:
- (i) the meeting referred to in Subsection (a) has taken place; or
  - (ii) in the discretion of the suspending authority, the parent or guardian of the suspended student has substantially agreed to review the suspension with the suspending authority.
- (c) A suspension may not extend beyond ten days unless the student and the student's parent or guardian have been given a reasonable opportunity to appear before the suspending authority and respond to the allegations and proposed disciplinary action.

1994 Utah Laws 1122.

Today, the statute reads as follows:

- (1) (a) A local board of education may delegate to any school principal or assistant principal within the school district the power to suspend a student in the principal's school for up to 10 school days.
- (b) A governing board of a charter school may delegate to the chief administrative officer of the charter school the power to suspend a student in the charter school for up to 10 school days.
- (2) The board may suspend a student for up to one school year or delegate that power to the district superintendent, the superintendent's designee, or chief administrative officer of a charter school.

- (3) The board may expel a student for a fixed or indefinite period, provided that the expulsion shall be reviewed by the district superintendent or the superintendent's designee and the conclusions reported to the board, at least once each year.
- (4) If a student is suspended, a designated school official shall notify the parent or guardian of the student of the following without delay:
- (a) that the student has been suspended;
  - (b) the grounds for the suspension;
  - (c) the period of time for which the student is suspended; and
  - (d) the time and place for the parent or guardian to meet with a designated school official to review the suspension.
- (5) (a) A suspended student shall immediately leave the school building and the school grounds following a determination by the school of the best way to transfer custody of the student to the parent or guardian or other person authorized by the parent or applicable law to accept custody of the student.
- (b) Except as otherwise provided in Subsection (5)(c), a suspended student may not be readmitted to a public school until:
    - (i) the student and the parent or guardian have met with a designated school official to review the suspension and agreed upon a plan to avoid recurrence of the problem; or
    - (ii) in the discretion of the principal or chief administrative officer of a charter school, the parent or guardian of the suspended student and the student have agreed to participate in such a meeting.
  - (c) A suspension may not extend beyond 10 school days unless the student and the student's parent or guardian have been given a reasonable opportunity to meet with a designated school official and respond to the allegations and proposed disciplinary action.

UTAH CODE ANN. § 53A-11-905 (2013).

When it was enacted in 1994, the Utah statute entitled "Grounds for Suspension or Expulsion from a Public School" read as follows:

53A-11-904. Grounds for suspension or expulsion from a public school.

- (1) (a) A student may be suspended or expelled from a public school during the school year for any of the following reasons:
- (i) continued willful disobedience or open and persistent defiance of proper authority;
  - (ii) willful destruction or defacing of school property;

- (iii) behavior or threatened behavior which poses an immediate and significant threat to the welfare, safety, or morals of other students or school personnel or to the operation of the school;
  - (iv) any serious violation affecting another student or a staff member, or occurring in a school building, in or on school property, or in conjunction with any school activity, including the possession of a weapon, explosive, or flammable material under Section 53A-3-502, or the sale, control, or distribution of a drug or controlled substance as defined in Section 58-37-2, an imitation controlled substance defined in Section 58-37b-2, or drug paraphernalia as defined in Section 58-37a-3; or
  - (v) the commission of an act involving the use of force or the threatened use of force which if committed by an adult would be a felony or class A misdemeanor.
- (b) Suspension or expulsion is mandatory for any violation under Subsection (1)(a)(iv) or (1)(a)(v).
- (2) (a) An habitually disruptive student may be expelled, after the development of a remedial discipline plan for the student, in accordance with a school district's conduct and discipline policies.
- (b) For purposes of this section, "habitually disruptive student" means a student:
- (i) who has caused a disruption in a classroom, on school grounds, on a school vehicle, or at school activities or events more than five times during the school year; and
  - (ii) whose behavior was initiated, willful, and overt and required the attention of school personnel to deal with the disruption.
- (3) A student may be denied admission to a public school on the basis of having been expelled during the same school year.
- (4) A suspension or expulsion under this section is not subject to the age limitations under Subsection 53A-11-102(1).

1994 Utah Laws 1122.

Today, the statute reads as follows:

- (1) A student may be suspended or expelled from a public school for any of the following reasons:
- (a) frequent or flagrant willful disobedience, defiance of proper authority, or disruptive behavior, including the use of foul, profane, vulgar, or abusive language;
  - (b) willful destruction or defacing of school property;

- (c) behavior or threatened behavior which poses an immediate and significant threat to the welfare, safety, or morals of other students or school personnel or to the operation of the school;
  - (d) possession, control, or use of an alcoholic beverage as defined in Section 32B-1-102;
  - (e) behavior proscribed under Subsection (2) which threatens harm or does harm to the school or school property, to a person associated with the school, or property associated with that person, regardless of where it occurs; or
  - (f) possession or use of pornographic material on school property.
- (2) (a) A student shall be suspended or expelled from a public school for any of the following reasons:
- (i) any serious violation affecting another student or a staff member, or any serious violation occurring in a school building, in or on school property, or in conjunction with any school activity, including:
    - (A) the possession, control, or actual or threatened use of a real weapon, explosive, or noxious or flammable material;
    - (B) the actual or threatened use of a look alike weapon with intent to intimidate another person or to disrupt normal school activities; or
    - (C) the sale, control, or distribution of a drug or controlled substance as defined in Section 58-37-2, an imitation controlled substance defined in Section 58-37b-2, or drug paraphernalia as defined in Section 58-37a-3; or
  - (ii) the commission of an act involving the use of force or the threatened use of force which if committed by an adult would be a felony or class A misdemeanor.
- (b) A student who commits a violation of Subsection (2)(a) involving a real or look alike weapon, explosive, or flammable material shall be expelled from school for a period of not less than one year subject to the following:
- (i) within 45 days after the expulsion the student shall appear before the student's local school board superintendent, the superintendent's designee, chief administrative officer of a charter school, or the chief administrative officer's designee, accompanied by a parent or legal guardian; and
  - (ii) the superintendent, chief administrator, or designee shall determine:
    - (A) what conditions must be met by the student and the student's parent for the student to return to school;
    - (B) if the student should be placed on probation in a regular or alternative school setting consistent with Section 53A-11-

907, and what conditions must be met by the student in order to ensure the safety of students and faculty at the school the student is placed in; and

(C) if it would be in the best interest of both the school district or charter school, and the student, to modify the expulsion term to less than a year, conditioned on approval by the local school board or governing board of a charter school and giving highest priority to providing a safe school environment for all students.

(3) A student may be denied admission to a public school on the basis of having been expelled from that or any other school during the preceding 12 months.

(4) A suspension or expulsion under this section is not subject to the age limitations under Subsection 53A-11-102(1).

(5) Each local school board and governing board of a charter school shall prepare an annual report for the State Board of Education on:

(a) each violation committed under this section; and

(b) each action taken by the school district against a student who committed the violation.

UTAH CODE ANN. § 53A-11-904 (2013).

When it was enacted in 1994, the Utah statute entitled "Conduct and Discipline Policies and Procedures" read as follows:

53A-11-902. Adoption of rules.

(1) Members of the council or the directors shall solicit input from various interest groups at the school and in the community in developing the rules and procedures.

(2) Adoption of any discipline procedure or rule under this part requires a majority vote of the full council or a majority of the directors.

1994 Utah Laws 516.

Today, the statute reads as follows:

The conduct and discipline policies required under Section 53A-11-901 shall include:

(1) provisions governing student conduct, safety, and welfare;

(2) standards and procedures for dealing with students who cause disruption in the classroom, on school grounds, on school vehicles, or in connection with school-related activities or events;

- (3) procedures for the development of remedial discipline plans for students who cause a disruption at any of the places referred to in Subsection (2);
- (4) procedures for the use of reasonable and necessary physical restraint or force in dealing with disruptive students, consistent with Section 53A-11-802;
- (5) standards and procedures for dealing with student conduct in locations other than those referred to in Subsection (2), if the conduct threatens harm or does harm to:
  - (a) the school;
  - (b) school property;
  - (c) a person associated with the school; or
  - (d) property associated with a person described in Subsection (5)(c);
- (6) procedures for the imposition of disciplinary sanctions, including suspension and expulsion;
- (7) specific provisions, consistent with Section 53A-15-603, for preventing and responding to gang-related activities in the school, on school grounds, on school vehicles, or in connection with school-related activities or events; and
- (8) standards and procedures for dealing with habitual disruptive student behavior in accordance with the provisions of this part.

UTAH CODE ANN. § 53A-11-902 (2013).

*Nevada*

In 1985, the Nevada statute entitled “Written Rules of Behavior and Punishments” was amended by adding the following:

Section 1. Chapter 392 of NRS is hereby amended by adding thereto a new section to read as follows:

1. Each school district shall prescribe written rules of behavior required of and prohibited for pupils attending school within their district and shall prescribe appropriate punishments for violations of the rules. If suspension or expulsion is used as a punishment for a violation of the rules, the school district shall follow the procedures in NRS 392.467.

1985 Nev. Stat. 350.

Today, the statute reads as follows:

1. Each school district shall adopt a plan to ensure that the public schools within the school district are safe and free of controlled sub-



stances. The plan must comply with the Safe and Drug-Free Schools and Communities Act, 20 U.S.C. §§ 7101 et seq.

2. Each school district shall prescribe written rules of behavior required of and prohibited for pupils attending school within their district and shall prescribe appropriate punishments for violations of the rules. If suspension or expulsion is used as a punishment for a violation of the rules, the school district shall follow the procedures in NRS 392.467.

3. A copy of the plan adopted pursuant to subsection 1 and the rules of behavior, prescribed punishments and procedures to be followed in imposing punishments prescribed pursuant to subsection 2 must be distributed to each pupil at the beginning of the school year and to each new pupil who enters school during the year. Copies must also be made available for inspection at each school located in that district in an area on the grounds of the school which is open to the public.

NEV. REV. STAT. § 392.463 (2013).

In 1999, the Nevada statute entitled "Plan for Progressive Discipline" was amended by adding the following:

Section 1. Chapter 392 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 to 8, inclusive, of this act.

Sec. 2. As used in sections 2 to 8, inclusive, of this act, unless the context otherwise requires, "principal" means the principal of a school or his designee.

Sec. 3. The principal of each public school shall establish a plan to provide for the progressive discipline of pupils and on-site review of disciplinary decisions. The plan must:

1. Be developed with the input and participation of teachers and parents of pupils who are enrolled in the school.
2. Be consistent with the written rules of behavior prescribed in accordance with NRS 392.463.
3. Include, without limitation, provisions designed to address the specific disciplinary needs and concerns *of the school*.
4. Provide for the temporary removal of a pupil from a classroom in accordance with section 4 of this act.

1999 Nev. Stat. 3185 (emphasis added).

Today, the statute reads as follows:

1. The principal of each public school shall establish a plan to provide for the progressive discipline of pupils and on-site review of disciplinary decisions. The plan must:
  - (a) Be developed with the input and participation of teachers and other educational personnel and support personnel who are employed at the school, and the parents and guardians of pupils who are enrolled in the school.
  - (b) Be consistent with the written rules of behavior prescribed in accordance with NRS 392.463.
  - (c) Include, without limitation, provisions designed to address the specific disciplinary needs and concerns of the school.
  - (d) Provide for the temporary removal of a pupil from a classroom in accordance with NRS 392.4645.
2. On or before October 1 of each year, the principal of each public school shall:
  - (a) Review the plan in consultation with the teachers and other educational personnel and support personnel who are employed at the school;
  - (b) Based upon the review, make revisions to the plan, as recommended by the teachers and other educational personnel and support personnel, if necessary; and
  - (c) Post a copy of the plan or the revised plan, as applicable, in a prominent place at the school for public inspection and otherwise make the plan available for public inspection at the administrative office of the school.
3. On or before October 1 of each year, the principal of each public school shall submit a copy of the plan established pursuant to subsection 1 or a revised plan, if applicable, to the superintendent of schools of the school district. On or before November 1 of each year, the superintendent of schools of each school district shall submit a report to the board of trustees of the school district that includes:
  - (a) A compilation of the plans submitted pursuant to this subsection by each school within the school district.
  - (b) The name of each principal, if any, who has not complied with the requirements of this section.
4. On or before November 30 of each year, the board of trustees of each school district shall submit a written report to the Superintendent of Public Instruction based upon the compilation submitted pursuant to

subsection 3 that reports the progress of each school within the district in complying with the requirements of this section.

5. On or before December 31 of each year, the Superintendent of Public Instruction shall submit a written report to the Director of the Legislative Counsel Bureau concerning the progress of the schools and school districts throughout this state in complying with this section. If the report is submitted during:

(a) An even-numbered year, the Director of the Legislative Counsel Bureau shall transmit it to the next regular session of the Legislature.

(b) An odd-numbered year, the Director of the Legislative Counsel Bureau shall transmit it to the Legislative Committee on Education.

NEV. REV. STAT. § 392.4644 (2013).

When it was enacted in 1956, the statute entitled "Suspension or expulsion of pupil: Procedure; limitation" read as follows:

SEC. 361. Exclusion of Under-Age Children. Boards of trustees of school districts in this state shall have the power to exclude from school all children under 6 years of age when the interests of the school require it.

SEC. 362. Suspension or Expulsion of Pupils.

1. Subject to the provisions of subsection 2, the board of trustees of a school district shall have the power to suspend or expel from any public school within the school district, with the advice of the teachers and deputy superintendent of public instruction of the proper educational supervision district, any pupil who will not submit to reasonable and ordinary rules of order and discipline therein.

2. No school teacher, principal or board of trustees shall expel or suspend any pupil under the age of 14 years for any cause without first securing the consent of the deputy superintendent of public instruction of the proper educational supervision district.

1956 Nev. Stat. 161.

Today, the statute reads as follows:

1. Except as otherwise provided in subsections 4 and 5, the board of trustees of a school district may authorize the suspension or expulsion of any pupil from any public school within the school district.

2. Except as otherwise provided in subsection 5, no pupil may be suspended or expelled until the pupil has been given notice of the charges against him or her, an explanation of the evidence and an opportunity

for a hearing, except that a pupil who poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process or who is selling or distributing any controlled substance or is found to be in possession of a dangerous weapon as provided in NRS 392.466 may be removed from the school immediately upon being given an explanation of the reasons for his or her removal and pending proceedings, to be conducted as soon as practicable after removal, for the pupil's suspension or expulsion.

3. The provisions of chapter 241 of NRS do not apply to any hearing conducted pursuant to this section. Such hearings must be closed to the public.

4. The board of trustees of a school district shall not authorize the expulsion, suspension or removal of any pupil from the public school system solely because the pupil is declared a truant or habitual truant in accordance with NRS 392.130 or 392.140.

5. A pupil who is participating in a program of special education pursuant to NRS 388.520, other than a pupil who is gifted and talented or who receives early intervening services, may, in accordance with the procedural policy adopted by the board of trustees of the school district for such matters, be:

(a) Suspended from school pursuant to this section for not more than 10 days.

(b) Suspended from school for more than 10 days or permanently expelled from school pursuant to this section only after the board of trustees of the school district has reviewed the circumstances and determined that the action is in compliance with the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et seq.

NEV. REV. STAT. § 392.467 (2013).

### *Arizona*

When it was enacted in 1912, the statute entitled "Responsibilities of pupils; expulsion; alternative education programs" read as follows:

Sec. 86. All pupils must comply with the regulations, pursue the required course of study, and submit to the authority of the teachers of the school.

Sec. 87. Continued open defiance of the authority of the teacher, and habitual profanity and vulgarity, constitute good causes for expulsion from school.

Sec. 88. Any pupil who cuts, defaces or otherwise injures any school property, is liable to suspension or expulsion, and upon the complaint

of the teacher or Trustees, the parents or guardians of such pupil; shall be liable for all damages.

1912 Ariz. Sess. Laws 399.

Today, the statute reads as follows:

A. Pupils shall comply with the rules, pursue the required course of study and submit to the authority of the teachers, the administrators and the governing board. A teacher may send a pupil to the principal's office in order to maintain effective discipline in the classroom. If a pupil is sent to the principal's office pursuant to this subsection, the principal shall employ appropriate discipline management techniques that are consistent with rules adopted by the school district governing board. A teacher may remove a pupil from the classroom if either of the following conditions exists:

1. The teacher has documented that the pupil has repeatedly interfered with the teacher's ability to communicate effectively with the other pupils in the classroom or with the ability of the other pupils to learn.

2. The teacher has determined that the pupil's behavior is so unruly, disruptive or abusive that it seriously interferes with the teacher's ability to communicate effectively with the other pupils in the classroom or with the ability of the other pupils to learn.

B. A pupil may be expelled for continued open defiance of authority, continued disruptive or disorderly behavior, violent behavior that includes use or display of a dangerous instrument or a deadly weapon as defined in § 13-105, use or possession of a gun, or excessive absenteeism. A pupil may be expelled for excessive absenteeism only if the pupil has reached the age or completed the grade after which school attendance is not required as prescribed in § 15-802. A school district may expel pupils for actions other than those listed in this subsection as the school district deems appropriate.

C. A school district may refuse to admit any pupil who has been expelled from another educational institution or who is in the process of being expelled from another educational institution.

D. A school district may annually or upon the request of any pupil or the parent or guardian review the reasons for expulsion and consider readmission.

E. As an alternative to suspension or expulsion, the school district may reassign any pupil to an alternative education program if the pupil does not meet the requirements for participation in the alternative to suspension program prescribed in subsection H of this section and if good cause exists for expulsion or for a long-term suspension.

F. A school district may also reassign a pupil to an alternative educational program if the pupil refuses to comply with rules, refuses to pursue the required course of study or refuses to submit to the authority of teachers, administrators or the governing board.

G. A school district or charter school shall expel from school for a period of not less than one year a pupil who is determined to have brought a firearm to a school within the jurisdiction of the school district or the charter school, except that the school district or charter school may modify this expulsion requirement for a pupil on a case by case basis. This subsection shall be construed consistently with the requirements of the individuals with disabilities education act (20 United States Code §§ 1400 through 1420). For the purposes of this subsection:

1. "Expel" may include removing a pupil from a regular school setting and providing educational services in an alternative setting.
2. "Firearm" means a firearm as defined in 18 United States Code § 921.

H. A school district or charter school shall expel from school for at least one year a pupil who is determined to have threatened an educational institution as defined in § 13-2911, except that the school district or charter school may modify this expulsion requirement for a pupil on a case by case basis if the pupil participates in mediation, community service, restitution or other programs in which the pupil takes responsibility for the results of the threat. This subsection shall be construed consistently with the requirements of the individuals with disabilities education act (20 United States Code §§ 1400 through 1420). A school district may reassign a pupil who is subject to expulsion pursuant to this subsection to an alternative education program pursuant to subsection E of this section if the pupil participates in mediation, community service, restitution or other programs in which the pupil takes responsibility for the threat. A school district or charter school may require the pupil's parent or guardian to participate in mediation, community service, restitution or other programs in which the parent or guardian takes responsibility with the pupil for the threat. For the purposes of this subsection, "threatened an educational institution" means to interfere with or disrupt an educational institution by doing any of the following:

1. For the purpose of causing, or in reckless disregard of causing, interference with or disruption of an educational institution, threatening to cause physical injury to any employee of an educational institution or any person attending an educational institution.
2. For the purpose of causing, or in reckless disregard of causing, interference with or disruption of an educational institution, threatening to cause damage to any educational institution, the property

of any educational institution, the property of any employee of an educational institution or the property of any person attending an educational institution.

3. Going on or remaining on the property of any educational institution for the purpose of interfering with or disrupting the lawful use of the property or in any manner as to deny or interfere with the lawful use of the property by others.

4. Refusing to obey a lawful order to leave the property of an educational institution.

I. By January 1, 2001, each school district shall establish an alternative to suspension program in consultation with local law enforcement officials or school resource officers. The school district governing board shall adopt policies to determine the requirements for participation in the alternative to suspension program. Pupils who would otherwise be subject to suspension pursuant to this article and who meet the school district's requirements for participation in the alternative to suspension program shall be transferred to a location on school premises that is isolated from other pupils or transferred to a location that is not on school premises. The alternative to suspension program shall be discipline intensive and require academic work, and may require community service, groundskeeping and litter control, parent supervision, and evaluation or other appropriate activities. The community service, groundskeeping and litter control, and other appropriate activities may be performed on school grounds or at any other designated area.

J. Each school shall establish a placement review committee to determine the placement of a pupil if a teacher refuses to readmit the pupil to the teacher's class and to make recommendations to the governing board regarding the readmission of expelled pupils. The process for determining the placement of a pupil in a new class or replacement in the existing class shall not exceed three business days from the date the pupil was first removed from the existing class. The principal shall not return a pupil to the classroom from which the pupil was removed without the teacher's consent unless the committee determines that the return of the pupil to that classroom is the best or only practicable alternative. The committee shall be composed of two teachers who are employed at the school and who are selected by the faculty members of the school and one administrator who is employed by the school and who is selected by the principal. The faculty members of the school shall select a third teacher to serve as an alternate member of the committee. If the teacher who refuses to readmit the pupil is a member of the committee, that teacher shall be excused from participating in the determination of the pupil's readmission and the alternate teacher member shall replace that teacher on the committee until the conclusion of all matters relating to that pupil's readmission.

ARIZ. REV. STAT. § 15-841 (2013).

When it was enacted in 1991, the statute entitled “Suspension and expulsion proceedings for children with disabilities” read as follows:

Notwithstanding sections 15-841, 1-842 and 15-848 the suspension or expulsion of handicapped children, as defined in section 15-761 shall be in accordance with rules prescribed by the state board of education which shall be in conformance with the individuals with disabilities education act. 20 United States Code sections 1410 through 1485.

1991 Ariz. Sess. Laws 807-08.

Today, the statute reads as follows:

Notwithstanding §§ 15-841 and 15-842, the suspension or expulsion of children with disabilities, as defined in § 15-761, shall be in accordance with the individuals with disabilities education act (20 United States Code §§ 1410 through 1485) and federal regulations issued pursuant to the individuals with disabilities education act.

ARIZ. REV. STAT. § 15-844 (2013).

#### *New Mexico*

When it was enacted in 1986, the statute entitled “School discipline policies” read as follows:

##### 22-5-4.3. SCHOOL DISCIPLINE POLICIES.--

A. Local school boards shall establish student discipline policies and shall file them with the department of education. The local school board shall involve parents, school personnel and students in the development of these policies, and public hearings shall be held during the formulation of these policies in the high school attendance areas within each district or on a district-wide basis for those districts which have no high school.

B. Each school district discipline policy shall establish rules of conduct governing areas of student and school activity, detail specific prohibited acts and activities and enumerate possible disciplinary sanctions, which sanctions may include corporal punishment, in-school suspension, school service, suspension or expulsion.

C. An individual school within a district may establish a school discipline policy, provided that parents, school personnel and students are involved in its development and a public hearing is held in the school prior to its adoption. If an Individual school adopts a discipline policy



in addition to the local school board's district discipline policy, it shall submit its policy to the local school board for approval.

D. No school employee who in good faith reports any known or suspected violation of the school discipline policy or in good faith attempts to enforce the policy shall be held liable for any civil damages as a result of such report or of "the employee's" efforts to enforce any part of the policy.

1986 N.M. Laws 752.

Today, the statute reads as follows:

A. Local school boards shall establish student discipline policies and shall file them with the department. The local school board shall involve parents, school personnel and students in the development of these policies, and public hearings shall be held during the formulation of these policies in the high school attendance areas within each school district or on a district-wide basis for those school districts that have no high school.

B. Each school district discipline policy shall establish rules of conduct governing areas of student and school activity, detail specific prohibited acts and activities and enumerate possible disciplinary sanctions, which sanctions may include in-school suspension, school service, suspension or expulsion. Corporal punishment shall be prohibited by each local school board and each governing body of a charter school.

C. An individual school within a school district may establish a school discipline policy, provided that parents, school personnel and students are involved in its development and a public hearing is held in the school prior to its adoption. If an individual school adopts a discipline policy in addition to the local school board's school district discipline policy, it shall submit its policy to the local school board for approval.

D. No school employee who in good faith reports any known or suspected violation of the school discipline policy or in good faith attempts to enforce the policy shall be held liable for any civil damages as a result of such report or of the employee's efforts to enforce any part of the policy.

E. All public school and school district discipline policies shall allow students to carry and self-administer asthma medication and emergency anaphylaxis medication that has been legally prescribed to the student by a licensed health care provider under the following conditions:

- (1) the health care provider has instructed the student in the correct and responsible use of the medication;
- (2) the student has demonstrated to the health care provider and the school nurse or other school official the skill level necessary to use

the medication and any device that is necessary to administer the medication as prescribed;

(3) the health care provider formulates a written treatment plan for managing asthma or anaphylaxis episodes of the student and for medication use by the student during school hours or school-sponsored activities, including transit to or from school or school-sponsored activities; and

(4) the student's parent has completed and submitted to the school any written documentation required by the school or the school district, including the treatment plan required in Paragraph (3) of this subsection and other documents related to liability.

F. The parent of a student who is allowed to carry and self-administer asthma medication and emergency anaphylaxis medication may provide the school with backup medication that shall be kept in a location to which the student has immediate access in the event of an asthma or anaphylaxis emergency.

G. Authorized school personnel who in good faith provide a person with backup medication as provided in this section shall not be held liable for civil damages as a result of providing the medication.

N.M. Stat. Ann. § 22-5-4.3 (2013).