



Protecting Education as a Civil Right

Remedying Racial Discrimination and
Ensuring a High-Quality Education

Kimberly Jenkins Robinson

Protecting Education as a Civil Right: Remediating Racial Discrimination and Ensuring a High-Quality Education

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Table of Contents

Executive Summary	v
Introduction	1
Why Should We Protect Education as a Civil Right?	4
Federal Law Protecting Education as a Civil Right Is Limited	8
Limited Federal Antidiscrimination Protections for Education	8
U.S. Supreme Court’s Rejection of a Federal Right to Education	10
State Law Does Not Consistently and Effectively Protect Education as a Civil Right	13
State Antidiscrimination Laws Are Varied	13
The Limits of Many State Rights to Education	14
Protecting Education as a Civil Right: Recommendations	16
The Federal Role	17
Barriers to a Federal Right to Education	19
Essential Protections That a Federal Right to Education Can Include	19
The State Role	21
Essential and Equitable Resources	24
Conclusion	26
Endnotes	28
About the Author	45

Executive Summary

Education has long stood at the epicenter of the battle for civil rights. Well over half a century ago when the U.S. Supreme Court declared racially segregated schools unlawful in *Brown v. Board of Education*, it stated that equal educational opportunity is a right when the state has decided to provide education. Yet long-standing educational opportunity and achievement gaps along lines of race, national origin, class, and neighborhood have endured. These disparities matter because they harm such important national interests as a knowledgeable and engaged citizenry, a robust economy, a well-prepared military, and a just society.

Inequitable educational opportunity and achievement gaps persist in the United States in no small part because our nation provides limited protection for education as a civil right at the federal level and uneven protection at the state level. Leaders across the political spectrum have framed education as a critical civil rights issue of our time and confirmed the importance of equal educational opportunity. This consensus provides an important starting point for exploring the deeper questions surrounding what it means to protect education as a civil right in the United States.

Both federal and state governments can adopt and enforce complementary legal and policy guardrails that are necessary to safeguard education as a civil right. These guardrails can embrace the legal and policymaking strengths of each level of government while ensuring that the full complement of laws and policies provides much-needed protection of access to a high-quality and equitable education for all of our nation's schoolchildren.

This report explores two critical questions. First, how do existing federal and state laws and policies protect, or fail to protect, education as a civil right? Second, how can federal and state laws and policies be reformed to protect education as a civil right?

The report adopts a progressive and capacious definition of a civil right to education. This definition acknowledges that many think that protecting education as a civil right would require remedying racial, national origin, and other forms of identity-based discrimination in education. This approach is an important starting point, and the work of remedying identity-based discrimination needs a more sustained and comprehensive investment to achieve this goal. However, the nation must do more than remedy racial, national origin, and other forms of identity-based discrimination to protect education as a civil right. Achieving this goal also requires the nation to make an affirmative commitment to ensuring that all children receive access to a high-quality education so that they can participate in society and flourish. The report invites policymakers to explore how federal and state laws and policies can work synergistically to protect education as a civil right.

Why Should We Protect Education as a Civil Right?

Civil rights provide protections from discrimination on the basis of such characteristics as race, color, sex, disability, national origin, sexual orientation, and religion. Civil rights also include affirmative rights to a body of law that protects the capacity of individuals to participate in society and flourish. This report embraces both definitions of civil rights to provide a comprehensive approach.

Guaranteeing and protecting education as a civil right can serve important goals, including providing a foundation to a thriving democracy, preparing schoolchildren to become productive members of our economy and society, reducing the societal costs of inadequate education, and remedying the fundamental injustice of low-quality and inequitable educational opportunities.

Federal Law Protecting Education as a Civil Right Is Limited

Federal law is limited in its protection of education as a civil right. Title VI of the Civil Rights Act of 1964 (Title VI) prohibits discrimination on the basis of race, color, or national origin in any program or activity that receives federal financial assistance, including states and school districts that receive federal financial support for schools. The U.S. Department of Education adopted a regulation to prohibit recipients of federal funds from implementing policies or practices that have the effect of discrimination, also known as disparate impact discrimination.

Despite its significant historical impact, today Title VI is limited in its ability to ensure nondiscrimination in public schools for three reasons. First, the U.S. Supreme Court interpreted the core nondiscrimination protection to prohibit only intentional discrimination for private plaintiffs asserting a Title VI claim. Intentional discrimination is difficult to prove. Second, private individuals cannot enforce the federal regulation's prohibition of disparate impact discrimination. Third, the Office for Civil Rights (OCR) in the U.S. Department of Education, which is the primary federal office that enforces Title VI, possesses an important but sometimes limited capacity to enforce the prohibition of disparate impact discrimination due to its underfunding.

Federal law also does not guarantee a positive right to education and thus does not protect education's role in advancing the capacity of individuals to participate in society and to flourish. In *San Antonio Independent School District v. Rodriguez* (1973), the U.S. Supreme Court in a 5–4 decision concluded that the Equal Protection Clause of the 14th Amendment neither explicitly nor implicitly guarantees a right to education.

State Law Does Not Consistently and Effectively Protect Education as a Civil Right

A review of state law reveals that states vary widely in their legal protections from racial discrimination in education. This body of state law does not serve as effective protection against racial discrimination in education for two reasons. First, many state protections from racial discrimination in education do not reach disparate impact discrimination. Second, a child's protection from racial discrimination by state law varies from state to state.

Similarly, many existing state protections of a positive right to education are limited in their ability to protect education as a civil right. Although state rights to education can provide important benefits, their shortcomings include the facts that some are unenforceable, some vary widely in their strength and effectiveness, and many neglect the need to equitably distribute resources.

Given the differences among states, including variability in geography, delivery methods, economic capacity, and costs, some variation of state education rights is unsurprising and reasonable. However, these differences do not fully explain why some states equip schools to provide a high-quality education, while others only equip schools to offer second-rate educational opportunities.

Protecting Education as a Civil Right: Recommendations

The federal government has often taken the lead in protecting civil rights in the United States and can enact, strengthen, and enforce the laws and policies needed to safeguard education as a civil right. Indeed, the history surrounding the passage of the 14th Amendment in the late 19th century—with its safeguards for equal protection of the laws and citizenship—confirms that

many federal lawmakers understood education to be a civil right since the nation's early history. Therefore, the limited protection of education as a civil right today weakens the democratic foundations of our nation.

Although state and local governments remain the principal policymakers in education, they govern within the constraints of federal law and policy and with the critical support of federal financial assistance. Protecting education as a civil right could build upon the focus on educational equity and the needs of disadvantaged schoolchildren in the Elementary and Secondary Education Act of 1965 and its reauthorizations, including the Every Student Succeeds Act of 2015.

The federal toolbox of incentives, conditions, and mandates can be employed to lead the nation to the federal and state laws and policies that guarantee education as a civil right. Although specific programs can provide essential support for education, it remains critical to protect education as a civil *right* due to the legal, political, and persuasive value of rights.

The recommendations below offer complementary federal and state reforms that can better protect education as a civil right.

The federal role

To strengthen the protections from racial discrimination in education and enforcement of these protections, the federal government could:

- Raise awareness of discrimination in educational opportunities on the basis of race, national origin, and color.
- Amend Title VI of the Civil Rights Act of 1964 to prohibit disparate impact discrimination and provide a private right of action to enforce it.
- Increase technical assistance and grants to states and districts to support implementation of best practices for preventing and remedying disparate impact discrimination and providing greater access to equitable educational opportunities.
- Increase funding to OCR and the Department of Justice's Educational Opportunities Section to enforce Title VI's disparate impact prohibition and other protections from racial discrimination.
- Issue OCR guidance clarifying the disparate impact legal standard to support stronger administrative and judicial enforcement.

Although robust nondiscrimination laws and their enforcement provide essential protections to schoolchildren, they alone would not safeguard a civil right to education that aims to “protect those aspects of our natural capabilities most conducive to social participation and well-being.”¹ Balancing the primacy of state and local control of education and a limited federal role can guide the federal government in providing at least three essential protections through a federal right to education:

1. The federal government can recognize a federal right to education that requires states to provide the foundational educational opportunities necessary to be an engaged and effective citizen, a productive worker, and a college- and career-ready graduate.
2. A federal right to education can require states to provide educational opportunities in an equitable manner.

3. To ensure that a federal right to education provides these two protections, a federal forum is needed so that students and their families can allege that a state has failed to provide these foundational educational opportunities or has not provided them in an equitable manner.

The state role

States can expand protections for education as a civil right by ensuring that school districts are complying with Title VI, adopting and enforcing robust prohibitions of discrimination in education, and strengthening and enforcing state rights to education. States can provide essential leadership, laws, and enforcement for both nondiscrimination protections and state rights to education that could greatly advance protection of education as a civil right.

Some states have adopted substantial protections that focus on discrimination in education. Other states can build on these examples as they consider which protections to adopt. States can take the following steps to help address discrimination in education:

- Adopt a far-reaching prohibition of education discrimination that covers all types of discrimination and discrimination in all facets of education.
- Develop a definition of discrimination to cover disparate impact and unintentional discrimination.
- Elevate the importance and durability of the state prohibitions of discrimination in education by adopting these prohibitions in state constitutions.
- Offer both technical and financial assistance to districts and schools to aid in their understanding and enforcement of these laws.
- Implement a comprehensive approach to enforcing both Title VI and state civil rights laws that includes expansion of state attorney general offices or state educational agencies with statutory enforcement authority.

Such state laws and policies can provide an important complement to federal antidiscrimination laws.

If a federal right to education protects students' right to an education that prepares them to be engaged citizens, productive workers, and college- and career-ready graduates, state rights to education can go a step further by:

- driving the United States toward educational excellence;
- ensuring that states provide the high-quality educational opportunities needed to achieve state education standards by adopting opportunity-to-learn standards; and
- engaging all three branches of government to adopt and enforce a state right to education.

A civil right to education also can ensure that schoolchildren receive the essential and equitable resources that are needed to achieve education's aims.

Fortunately, the reforms to federal and state law that are needed to protect education as a civil right are within reach. They are needed more than ever as the United States tackles the educational impacts of the COVID-19 pandemic and the continuing systemic discrimination and racial injustice experienced in our schools. Federal and state governments can protect education as a civil right that forges a prosperous path for the future of our nation.

Introduction

Education has long stood at the epicenter of the battle for civil rights. Courthouses, school board meetings, and schools, along with institutions of higher education, have served as the battlegrounds where conflicts have raged about the constitutionality of educational opportunities that were not only separate but also unequal. Well over half a century ago when the U.S. Supreme Court declared racially segregated schools unlawful in *Brown v. Board of Education*, it stated that equal educational opportunity is a right when the state has decided to provide education.² Yet long-standing educational opportunity and achievement gaps along lines of race, national origin, class, and neighborhood have endured.³ These disparities matter because they harm such important national interests as a knowledgeable and engaged citizenry, a robust economy, a well-prepared military, and a just society.⁴

Inequitable educational opportunity and achievement gaps persist in the United States in no small part because our nation provides limited protection for education as a civil right at the federal level and uneven protection at the state level. Civil rights laws and policies in the United States provide one of the primary engines for expanding opportunities for those who would otherwise lack a mechanism to demand equal treatment. Limited civil rights protections for education leave those provided substandard educational opportunities without effective tools to insist on the high-quality education that every child deserves.

Inequitable educational opportunity and achievement gaps persist in the United States in no small part because our nation provides limited protection for education as a civil right at the federal level and uneven protection at the state level.

The good news is that our nation's leaders across the political spectrum have framed education as a critical civil rights issue of our time and confirmed the importance of equal educational opportunity. Recent examples include President George W. Bush's statement that "now our challenge is to make sure that every child has a fair chance to succeed in life. That is why education is the great civil rights issue of our time." President Barack Obama stated that "the best possible education is the single most important factor in determining whether they succeed. But it's also what will determine whether we succeed. It's the key to opportunity. It is the civil rights issue of our time." President Donald Trump also stated that "education is the civil rights issue of our time." President Joe Biden echoed this sentiment on the campaign trail when he noted that "systemic racism is persistent across our institutions today—including in our schools—and must be addressed. President Biden will make sure that no child's education opportunity is determined by their zip code, parents' income, race, or disability."⁵ Other political leaders have made similar statements.⁶

At a time when partisan rancor and gridlock is commonplace, it is important to recognize that both parties agree that a civil rights framework provides the proper lens for thinking about education. This consensus across political aisles provides an important starting point for exploring the deeper questions surrounding what it would mean to protect education as a civil right in the United States.

An effective civil rights framework for education will become even more crucial as the nation wrestles with the unprecedented educational impacts of the COVID-19 pandemic and its disproportionate impact on economically disadvantaged schoolchildren and children of color and their communities, as well as other vulnerable groups. This global health crisis also provides an unprecedented opportunity to redesign schools in ways that are more equitable and empowering for all children at a time when the nation is experiencing a heightened commitment to racial justice and equity.⁷ The United States needs a strong and complementary array of federal and state laws to protect education as a civil right, along with robust enforcement of these laws that supports the equitable redesign of schools and prevents exacerbating preexisting opportunity and achievement gaps.

An exploration of the laws and policies that could protect education as a civil right must begin with acknowledging that the federal government plays a critical role in protecting the civil rights of schoolchildren. For instance, when Southern states engaged in massive resistance to the U.S. Supreme Court's decision in *Brown v. Board of Education*, the federal government ultimately stepped in to take numerous actions to enforce school desegregation.⁸ These actions included sending federal troops to protect the Little Rock Nine as they integrated Central High School in Little Rock, AR, and the U.S. Supreme Court eventually issuing opinions such as *Green v. County School Board*⁹ and *Swann v. Charlotte-Mecklenburg*,¹⁰ which demanded that school districts act immediately to eliminate the vestiges of segregation “root and branch” and that upheld the use of busing to accomplish desegregation.

However, neither federal, state, nor local governments can tackle the Herculean challenges confronting education alone, just as no single law, court decision, or even a constitutional amendment will solve all of our nation's education ills. Our nation's schools are embedded in governance structures that emphasize state and local control of education and a limited federal role, also known as education federalism. Despite the expansion of the federal role in education for more than half a century, our nation's insistence on state and local control of education will place limits on the scope and reach of federal education reforms, and these limits will mean that state law and policy can serve as an essential complement to federal protections of education as a civil right.

Both federal and state governments can adopt and enforce complementary legal and policy guardrails that are necessary to safeguard education as a civil right. These guardrails can embrace the legal and policymaking strengths of each level of government while ensuring that the full complement of laws and policies provides much-needed protection for access to a high-quality and equitable education for all of our nation's schoolchildren.¹¹

This report explores two critical questions. First, how do existing federal and state laws and policies protect, or fail to protect, education as a civil right? Second, how can federal and state laws and policies be reformed to protect education as a civil right?

The report adopts a progressive and capacious definition of a civil right to education and then reviews federal and state law and policy to answer these questions and offers recommendations for reform. This definition acknowledges that many think that protecting education as a civil right would require remedying racial, national origin, and other forms of identity-based discrimination in education. This approach is an important starting point, and the work of remedying racial discrimination needs a more sustained and comprehensive investment to achieve this goal.

However, the nation must do more than remedy racial, national origin, and other forms of discrimination to protect education as a civil right. Achieving this goal would also require that the nation make an affirmative commitment to ensuring that all children receive access to a high-quality education. The report invites policymakers to explore how federal and state laws and policies can work synergistically to protect education as a civil right.

The report finds that federal and state laws and policies provide limited and uneven protection for education as a civil right. It then proposes a complementary array of reforms to protect education as a civil right. These reforms would enable federal and state governments to build upon the existing protections for education as a civil right and the political consensus that education is currently a vital civil rights issue.

Why Should We Protect Education as a Civil Right?

An examination of why the United States should protect education as a civil right must begin with an understanding of the function of rights and a definition of a civil right. Rights language exists at the forefront of education reform efforts because it provides families, educators, and policymakers with an impactful vocabulary to convey their concerns with and aspirations for education.¹² These current efforts build upon a historical focus on rights to remedy inequalities in education. For instance, the U.S. Supreme Court's declaration in *Brown v. Board of Education* that the segregation of schoolchildren was unconstitutional provided an important step in the efforts to end Jim Crow. The Civil Rights Act of 1964 and the Elementary and Secondary Education Act of 1965 provided critical enforcement tools to operationalize the right that *Brown* recognized.¹³

What constitutes a civil right has changed throughout our nation's history and remains contested.¹⁴ Today, many equate "civil rights" with rights to be free from discrimination.¹⁵ Thus, many understand civil rights to provide a body of law that protects against discrimination based on prohibited reasons such as race, national origin, religion, sex, sexual orientation, and disability.¹⁶ This modern understanding of civil rights represents a shift in thinking from the Reconstruction era understanding of civil rights, which was disputed and fluid.¹⁷ Given the significant critiques of this approach to civil rights, including its focus on intentional discrimination by identified state actors,¹⁸ this report adopts a broader definition of civil rights that includes the entitlement to a body of law that protects the capacity of individuals to participate in society and flourish.¹⁹

Furthermore, as noted in the introduction, remedying racial and other forms of discrimination in education only provides an essential starting point for protecting education as a civil right. To achieve the broader definition of a civil right adopted for this report, the nation also will need to ensure that all students receive a high-quality education.

This report focuses on racial discrimination because of the long-standing history of such discrimination in the United States and the recent renewed attention to adopting reforms to address it. As a result, the report leaves for others the examination of protecting education as a civil right that protects all possible bases for discrimination, such as religion, national origin, sex, sexual orientation, gender identity, and disability.

The Importance of Rights

Rights can act as a constraint on the decisions and actions of a democratic majority in order to advance justice, including through their judicial enforcement. Comprehensive reform frequently relies upon a rights discourse because rights, particularly at the federal level, can express a national priority.

The ability of rights to constrain democratic majorities is particularly important for education, because receiving an inadequate education undermines an individual's ability to participate and prevail in the democratic process that could guarantee an adequate and equitable education. Therefore, a right to education can serve as an essential precondition to an inclusive and just democracy.²⁰

Defining Civil Rights

Civil rights provide protections from discrimination on the basis of such characteristics as race, sex, disability, national origin, sexual orientation, and religion. Civil rights also can include affirmative rights to a body of law that protects the capacity of individuals to participate in society and flourish.²¹ This report embraces both approaches to a civil right to provide a comprehensive approach.

Many reasons support why our nation should protect education as a civil right. Education has long served as “the most important function of state and local governments,” as the U.S. Supreme Court recognized in *Brown v. Board of Education*. State governments allocate the most funds to public education among social welfare programs, with states and localities providing the lion’s share of the funding, while the federal government historically has contributed approximately 9% of school funding.²² Public education also affects more people than other social welfare programs.²³ Education serves as a precondition for a wide array of human functions and is a necessary foundation for functioning in an ordered society.

Guaranteeing and protecting education as a civil right can serve important goals, including:

- **Providing the foundation to a thriving democracy.** A well-educated citizenry has always served as the foundation of our democracy. Both the founders of our nation and those who engineered common schools possessed a deep commitment to educating students to become effective citizens for a democratic nation. Following the Revolutionary War, constitutional drafters for some New England states guaranteed education in their state constitutions, and other states confirmed this commitment in the 19th century by adopting such guarantees during the common schools movement.²⁴ After the Civil War, when Southern states were readmitted into the Union, Congress both explicitly and implicitly conditioned readmission on the states guaranteeing education.²⁵ Education provided the vehicle for creating the educated citizenry essential to a republican form of government guaranteed by Article IV, section 4, of the Constitution.

The caliber of a child’s education shapes their ability to engage effectively in public discourse. Therefore, children must receive an education that empowers them to engage as equals in collective, deliberative decisions, including decisions that require them to analyze complex issues through critical and reflective analysis and to express their viewpoints in a clear, reasoned manner. As education scholar Anne Newman has explained, “Democratic institutions clearly cannot thrive unless citizens receive an education tailored to the demands of citizenship. These demands involve unavoidably high standards whose realization should not be left to the sway of majoritarian politics, and thus justify the use of rights claims in the education arena.”²⁶

The United States’ tolerance of substantial and enduring educational opportunity and achievement gaps neglects the very foundation of our democracy. Educators and policymakers have deemphasized civics and social studies while they focused on math and reading. Students of color and students from low-income families have been harmed the most by this approach, as research confirms that they lag behind their white peers in

civic skills and knowledge.²⁷ Those denied an adequate and equitable education too often lack the political agency and influence to protect their interests.²⁸ Therefore, protecting education as a civil right provides a necessary foundation for a thriving democracy.

- **Preparing schoolchildren to become productive members of our economy and society and reducing the societal costs of inadequate education.** Education is essential for providing schoolchildren the array of analytical, literacy, and problem-solving skills that they will need to enter college and start a career in an economy that is moving away from low-skilled labor to a knowledge economy.²⁹ The United States needs an educated workforce to remain competitive in the global economy, and educational inequities impede the nation's ability to compete effectively. Indeed, the costs of racial opportunity and achievement gaps are growing because the nation's public schoolchildren became majority children of color in 2014.³⁰

The opportunity costs of not closing achievement and graduation gaps will continue to grow as global market integration continues apace. Rising to this monumental challenge requires a highly skilled labor force. The window of opportunity to harness the demographic dividend is closing, but unlike developing countries with high youth dependency rates, the United States has the economic resources to make the necessary investments. Whether it has sufficient political will is the real question.³¹

Opportunity and achievement gaps also impose a variety of costs on our society. They deprive many children of the ability to reach their highest earning potential, which is not only a loss to the child, their families, and their communities, but also deprives local, state, and federal governments of the taxes that they could collect.³² One study found that the United States loses \$156 billion in tax revenues and income over the life span of the yearly cohort of students who fail to graduate from high school.³³ The United States also would save between approximately \$7.9 billion and \$10.8 billion annually in welfare and housing assistance and food stamps by ensuring that every student received at least a high school degree.³⁴ In addition, the United States saves \$69,980 in criminal justice expenses over the lifetime of a high school graduate and \$175,000 over the lifetime of a college graduate. Similarly, the United States saves approximately \$50,300 in public health spending over the life span of a high school graduate and \$86,560 in such expenses for a college graduate.³⁵ One estimate of the potential cost savings from reducing the high school dropout rate by one third found that the United States would annually save approximately \$250 billion.³⁶

Protecting education as a civil right can help to close opportunity and achievement gaps in ways that enable schoolchildren to succeed in college or career, and their success provides essential building blocks for our economy and society.

- **Remedying the fundamental injustice of low-quality and inequitable educational opportunities.** A fundamental injustice at the heart of our nation is the fact that opportunity gaps persist along lines of race, national origin, class, and zip code because the United States does not guarantee each child a high-quality or equitable education.³⁷ Although policymakers, educators, and reformers in recent decades have invested significant attention and reforms aimed at closing the achievement gap, too often these

reforms fail to focus on the widespread opportunity gaps that drive the achievement gap.³⁸ A civil right to education could provide new tools to close these opportunity gaps and energize the efforts to reduce achievement gaps and thereby begin to remedy this fundamental injustice.

Furthermore, one fundamental injustice that has garnered new attention in recent years is the systemic racism that undergirds and shapes American society. A civil right to education could help to dismantle the long-standing efforts to undereducate and undermine the educational opportunities and achievements of children of color. In many ways, a civil right to education is long overdue. Generations of schoolchildren continue to experience a separate and unequal education despite the Supreme Court's declaration in *Brown* that such practices are unconstitutional and "inherently unequal."

Federal Law Protecting Education as a Civil Right Is Limited

Federal law is limited in its protection of education as a civil right.³⁹ Federal law and policy do not provide a comprehensive array of antidiscrimination protections for education, nor do they provide consistent enforcement of existing protections. Federal law also does not guarantee a positive right to education and thus does not protect education's ability to enable individuals to participate in society and flourish.

Limited Federal Antidiscrimination Protections for Education

The Civil Rights Act of 1964 and the changing nature of discrimination in education

Title VI of the Civil Rights Act of 1964 (Title VI) prohibits discrimination on the basis of race, color, or national origin in any program or activity that receives federal financial assistance, including states and school districts that receive federal financial support for schools. This law also authorizes federal agencies to adopt regulations to effectuate this prohibition.⁴⁰ The U.S. Department of Education adopted a regulation to prohibit recipients of federal funds from implementing policies or practices that have the effect of discrimination, also known as disparate impact discrimination.⁴¹ Some examples of the types of discrimination prohibited by Title VI include racial, color, or national origin discrimination in assigning students to classes, course offerings, and other academic programs and in administering discipline. This prohibition has served as an important tool to challenge discrimination in public schools.⁴² Since all states accept federal funding for education, they are all required to comply with Title VI of the Civil Rights Act and its implementing regulations.

Despite its significant historical impact, today Title VI is limited in its ability to ensure nondiscrimination in public schools for three reasons. First, the U.S. Supreme Court interpreted the core nondiscrimination protection to prohibit only intentional discrimination for private plaintiffs asserting a Title VI claim.⁴³ Intentional discrimination is difficult to prove. Second, private individuals cannot enforce the federal regulation's prohibition of disparate impact discrimination. Third, OCR in the U.S. Department of Education, which is the primary federal office that enforces Title VI, possesses an important but sometimes limited capacity to enforce the prohibition of disparate impact discrimination due to its underfunding.

Intentional discrimination

To prevail on a claim of intentional discrimination, the complainant must prove that the defendant engaged in the allegedly discriminatory behavior, in part, “‘because of,’ not merely ‘in spite of’” how the behavior harms a particular group.⁴⁴ Although overt discrimination was commonplace throughout this nation's history, far fewer openly discriminatory policies exist today, largely due to the influence of the 1964 Civil Rights Act.⁴⁵ Today, most actors in public schools no longer openly admit their discriminatory aims, and thus it can be nearly impossible to prove that educators, education officials, or board members intentionally discriminated against a student or group of students.⁴⁶

Furthermore, the racism of today operates as a system and is not solely confined to individual bad actors, just as Jim Crow's embrace of separate and unequal operated as a system. This modern systemic inequality results from the nation's failure to dismantle the full scope of inequality that

Jim Crow inflicted. The requirement to prove intentional discrimination of individual actors leaves these institutionalized injustices beyond the reach of modern civil rights laws despite the fact that they provide the primary source of racial injustice today.⁴⁷

Modern discrimination also often takes the form of implicit racial bias. Implicit racial bias—or the implicit associations we hold outside of conscious awareness—often leads to negative stereotypes of students of color. Implicit racial bias can adversely influence how educators treat students of color and lower educators’ expectations of students of color.⁴⁸ Title VI’s requirement to prove intentional discrimination limits the law’s ability to remedy the implicit racial bias that hinders the equitable and effective operation of our nation’s schools.

Disparate impact discrimination

Given the great difficulty of proving intentional discrimination and the decrease in overt discrimination, a claim for disparate impact discrimination provides the only potential avenue for those injured by discrimination to find relief from an array of harmful educational practices. To prove disparate impact discrimination, a plaintiff must show that a school district’s facially neutral policy or practice imposes a disproportionate adverse effect on a group under Title VI’s protection. Once the plaintiff establishes this, the school district must show that the policy or practice is required by educational necessity. A plaintiff can still prevail if she or he can offer a comparably effective alternative that imposes less of a disparate impact or can prove that the school district’s justification is a pretext for discrimination.⁴⁹

Defining Disparate Impact Discrimination

Disparate impact discrimination is a policy or practice that is neutral on its face but disproportionately and adversely harms a protected class of individuals. Disparate impact claims provide a potential remedy for a wide range of educational practices, including school funding, disciplinary measures, tracking, and the overrepresentation of minorities in special education.⁵⁰ Only federal agencies may enforce the regulations that prohibit disparate impact discrimination, because the U.S. Supreme Court eliminated the ability for individuals to enforce these regulations in court in *Alexander v. Sandoval*.⁵¹

Nevertheless, despite their utility, disparate impact claims have their limits.⁵² For example, judges exercise broad latitude when determining whether an education policy or practice serves an educational necessity.⁵³ Courts also have historically deferred to the decisions of localities and educators and continue to do so when courts defer to educators’ policy decisions about the importance of a practice to a legitimate educational goal, which can make the educational necessity standard fairly easy to meet.⁵⁴ The burden on educational institutions to prove educational necessity varies among the courts, with some courts applying a rigorous standard and others applying a lenient one.⁵⁵ These shortcomings of disparate impact claims limit their effectiveness in remedying discrimination in education.

In addition, the Department of Education’s willingness to enforce the disparate regulation has vacillated depending on the political views of the administration. This has further limited the ability of this regulation to address discrimination.⁵⁶

Limited federal enforcement of civil rights in education

OCR is the primary federal office that enforces civil rights in education.⁵⁷ OCR is underfunded, lacks adequate staff, and has experienced an unprecedented volume of complaints alleging Title VI violations in recent years.⁵⁸ Despite claims by the Trump administration that it increased the efficiency and effectiveness of civil rights enforcement, evidence indicates that OCR decreased enforcement of civil rights under the Trump administration.⁵⁹ The Department of Justice’s Educational Opportunities Section also enforces Title VI, and the Biden administration has reaffirmed its commitment to vigorous civil rights enforcement.⁶⁰

Other civil rights protections for education are also limited in their ability to remedy modern racial discrimination

Two additional federal measures that address racial discrimination, the Equal Educational Opportunities Act of 1974 (EEOA) and Title IV of the Civil Rights Act of 1964, also are limited to intentional racial discrimination and thus are restricted in their ability to remedy modern-day racial disparate impact discrimination. The EEOA prohibits the denial of equal educational opportunity because of an individual’s race, color, sex, or national origin through such practices as intentional racial segregation between or within schools, transfer of a student that has the “purpose and effect” of increasing segregation, and failure to eliminate the vestiges of an intentionally segregated school system. The Department of Justice Educational Opportunities Section enforces the EEOA, and plaintiffs can bring a lawsuit to enforce this statute.⁶¹ These protections from racial discrimination are limited to intentional discrimination.⁶²

Title IV of the Civil Rights Act of 1964 authorizes the U.S. attorney general to bring lawsuits to remedy a school’s denial of equal protection of the laws or denial of admission based on race, color, religion, sex, or national origin.⁶³ The United States is involved in approximately 140 desegregation cases and initiates “new investigations to challenge modern-day forms of segregation across the country.”⁶⁴ The equal protection analysis for racial discrimination addresses intentional discrimination.⁶⁵

These shortcomings of federal civil rights laws and their enforcement limit the effectiveness of federal protections from racial discrimination to address discrimination in public schools today.

U.S. Supreme Court’s Rejection of a Federal Right to Education

Federal law also does not guarantee a positive right to education and thus does not protect education’s ability to enable individuals to participate in society and flourish.

Due Process and Equal Protection

The 14th Amendment to the U.S. Constitution states in part, “No state shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” Due process provides a procedural protection that guarantees students notice and an opportunity to be heard before their liberty or property is deprived. Equal protection of the laws prohibits schools from discriminating against students on the basis of such characteristics as race, national origin, and sex. Both the equal protection clause and the due process clause can protect fundamental rights, such as the right to travel or to marry.⁶⁶

In *San Antonio Independent School District v. Rodriguez*, the U.S. Supreme Court in a 5–4 decision concluded in 1973 that the equal protection clause of the 14th Amendment neither explicitly nor implicitly guarantees a right to education when it rejected a claim that substantial funding disparities between districts in Texas violated this clause.⁶⁷ The Court upheld the Texas funding system as legitimately related to Texas’s interest in local control of schools. It noted that it was deferring to state and local lawmakers about how to distribute funding and to resolve the education disputes at the heart of the case, such as whether money influenced educational outcomes. It noted that the plaintiffs had not alleged that the schoolchildren were denied the opportunity to obtain “the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.” The Court explained that it was not placing its seal of approval on the Texas school funding approach, given the clear need for greater equality and improved quality in educational opportunities as well as the potential overreliance on the property tax to fund schools. Instead, the Court noted that lawmakers and the democratic process should develop solutions. In response, litigators turned to state courts to challenge the inequity and inadequacy of school funding systems.⁶⁸

In *San Antonio Independent School District v. Rodriguez*, the U.S. Supreme Court in a 5–4 decision concluded in 1973 that the equal protection clause of the 14th Amendment neither explicitly nor implicitly guarantees a right to education when it rejected a claim that substantial funding disparities between districts in Texas violated this clause.

Although the Supreme Court rejected the invitation to recognize a federal right to education in *Rodriguez*, the Court has ruled for plaintiffs who have alleged a total deprivation of education. For instance, in *Plyler v. Doe*, the Court held that Texas could not deny undocumented schoolchildren admission to school, as this denial did not further a “substantial state interest.” The Court noted the importance of education to the nation’s “basic institutions” as well as the enduring impact of denying education, which distinguished education from other government benefits.⁶⁹ Similarly, the Court in *Goss v. Lopez* held that schoolchildren had a property interest in their public education and that the due process clause required that those who faced a temporary suspension from school be given notice and an opportunity to be heard.⁷⁰ These decisions reveal that the *Rodriguez* decision does not authorize states that provide a public education the authority to arbitrarily withhold that education.

After decades of litigation in state court, litigants have recently returned to federal court and have sought to establish federal constitutional protection of a right to education.⁷¹ The plaintiffs in *Gary B. v. Whitmer* won an important case in 2020 when they convinced a three-judge panel of the U.S. Court of Appeals for the Sixth Circuit that the children in a variety of Detroit public schools were denied their fundamental right to a basic minimum education that protected their right to literacy, in violation of the due process clause of the 14th Amendment.⁷² The court held that “access to a foundational level of literacy—provided through public education—has an extensive historical legacy and is so central to our political and social system as to be ‘implicit in the concept of ordered liberty.’”⁷³ The court explained that students are entitled to the teaching, “educational materials,”

and facilities that enable them to become literate. After this initial decision, the parties reached a settlement.⁷⁴ An en banc court vacated the decision when it decided to rehear the case, and thus the case lacks binding or precedential effect. However, given that the litigation had settled, no rehearing occurred. Other litigants have pursued relief from substandard educational opportunities and outcomes in federal court, but so far those efforts have been unsuccessful.⁷⁵

Despite the limited success of litigation to establish a federal right to education thus far, the renewed interest in litigation to recognize a federal right to education suggests that some reformers are recognizing the benefits of a federal forum to remedy substandard educational opportunities, particularly when a state forum is unavailable or ineffective.⁷⁶ However, for schoolchildren in public schools today, a federal right to education remains illusory and out of reach, particularly given the current right-of-center makeup of the U.S. Supreme Court.

State Law Does Not Consistently and Effectively Protect Education as a Civil Right

State law does not consistently and effectively protect education as a civil right.⁷⁷ All state constitutions provide protection for education.⁷⁸ Yet state laws vary significantly in the scope of their prohibitions of discrimination in education and their protection of education as a positive right. These inconsistencies and gaps in coverage confirm that state laws alone do not effectively protect education as a civil right.

State Antidiscrimination Laws Are Varied

A review of state law reveals that states vary widely in their legal protections from racial discrimination in education. Most states have enacted a general constitutional protection against racial discrimination.⁷⁹ States also have adopted a wide variety of prohibitions of racial discrimination in education, such as a broad constitutional⁸⁰ or statutory provision⁸¹ that prohibits racial discrimination against students in education. Many of these provisions also protect students from other forms of discrimination, such as national origin, sex, sexual orientation, religious, and disability discrimination.

States also have enacted a variety of prohibitions of racial discrimination in specific aspects of education. For example, some states prohibit racial discrimination in admissions,⁸² testing for special needs,⁸³ or school discipline.⁸⁴ Some states prohibit racial discrimination in charter schools⁸⁵ and in school choice.⁸⁶ Some states have also extended protections from racial discrimination to protections from discrimination based on certain hairstyles, such as locs and braids, in schools.⁸⁷ Other approaches include declaring education free of racial discrimination to be a civil right⁸⁸ or guaranteeing equal educational opportunity.⁸⁹

This body of state law does not serve as effective protection against racial discrimination in education for two reasons:

- **Many state protections from racial discrimination in education do not reach disparate impact discrimination.** Although most states possess a general prohibition against racial discrimination,⁹⁰ some of these provisions may not reach disparate impact discrimination because numerous states interpret their constitutional nondiscrimination provisions as consistent with the federal equal protection clause (which only reaches intentional discrimination)⁹¹ or they have otherwise determined that the provision does not prohibit disparate impact discrimination or have limited the application of the state equal protection clause to intentional discrimination.⁹² Similarly, although some states' education-specific prohibitions of discrimination reach disparate impact or unintentional discrimination, others do not.⁹³ Given that disparate impact discrimination is the predominant form of discrimination in schools today, those states that do not prohibit disparate impact discrimination in education and provide a method for enforcement leave schoolchildren vulnerable to discrimination without any state mechanism to remedy it.⁹⁴ Schoolchildren in these states who bring intentional discrimination claims against harmful policies and practices will face the same difficulties as federal plaintiffs in proving intentional discrimination that are outlined above.

- **A child’s protection by state law from racial discrimination varies from state to state.** State protections from discrimination in education do not consistently reach disparities in the quality of education.⁹⁵ Furthermore, state prohibitions of discrimination in education also vary widely in the scope of coverage, from broad coverage to quite limited coverage. For instance, although many states have adopted a general proscription of racial discrimination in schools,⁹⁶ some state prohibitions of racial discrimination in education only reach such actions as admissions to public schools, segregation, or funding.⁹⁷

In these ways, state civil rights laws only provide a patchwork of protection from racial discrimination, leaving many schoolchildren without a legal avenue to end all forms of discrimination.

The Limits of Many State Rights to Education

Many existing state protections of a positive right to education are limited in their ability to protect education as a civil right. Before turning to the limitations of state rights to education, it is important to acknowledge the substantial gains made by successful school funding litigation and reforms to ensure that all children are guaranteed access to a quality education. Litigation has been successful in such states as New Jersey, Kansas, and Kentucky, and successful litigation about state rights to education has occurred in numerous states.⁹⁸ Social science research confirms that substantial funding reforms can lead to significant funding increases and improved academic outcomes.⁹⁹ When a state recognizes a right to education, students and their families can gain a powerful weapon to fight for high-quality educational opportunities and outcomes in both the courtroom and in democratic politics.

Although state rights to education can provide these benefits, they have shortcomings that contribute to the lack of effective state protection for education as a civil right. These shortcomings include the following:

- **Some state rights to education are unenforceable.** Numerous states lack judicial accountability for their educational opportunities and outcomes because an array of state courts, including in Illinois, Indiana, Michigan, Oklahoma, and Rhode Island, have held that cases asserting rights to education cannot be heard in court.¹⁰⁰ Protecting a right to education typically requires the cooperation of all three branches. Therefore, a closed courthouse, disinterested governors, or resistant legislatures leave many schoolchildren with a weak right to education that may merely guarantee that they can enter the schoolhouse door, even if that schoolhouse is crumbling.¹⁰¹

Students in states with no or unsuccessful litigation regarding their state’s right to education are left to the legislative and executive whims of elected officials who too often operate education systems in ways that provide subpar educational opportunities for many economically disadvantaged students and students of color, including providing them inadequate teachers and inequitable funding and resources.¹⁰² Many students do not receive the educational opportunities that are necessary for education to achieve its intended aims, including preparing students for civic participation and equipping students with the skills and capacities that they need to thrive and succeed, such as effective reading and math skills.¹⁰³

In addition, judicial hostility to school finance litigation as well as legislative resistance can hinder school finance litigation and the reforms that are enacted even when plaintiffs prevail. Such obstacles existed before the COVID-19 pandemic hit.¹⁰⁴ Therefore, judicial enforcement of state rights to education remains elusive in numerous states.

- **State education rights vary widely in their strength and effectiveness.** Given the differences among states, including variability in geography, delivery methods, economic capacity, and costs, some variation of state education rights is unsurprising and reasonable.¹⁰⁵ However, these differences do not fully explain why some states equip schools to provide a high-quality education, while others only equip schools to offer second-rate educational opportunities. Those who rely on state innovations and reforms to ensure educational excellence and equity too often fail to acknowledge that this approach has failed many children for generations, with economically disadvantaged students and students of color too often receiving the worst opportunities.¹⁰⁶

Even when courts are willing to acknowledge that state education rights are being violated, “Courts ... are generally much less willing to ensure that legislatures do what it takes to fix them.”¹⁰⁷ Courts also too often steer clear of the types of comprehensive reforms that would protect education as a civil right, such as reducing the influence of wealth over education by reconfiguring districts to redistribute property wealth or ending the reliance on property taxes.¹⁰⁸ Given the absence of standards for mutual enforcement of both adequacy and equity, state courts also often struggle with creating “an enforceable remedy” for violations of a state right to education.¹⁰⁹

- **Many state rights to education neglect the need to equitably distribute resources.** Many states fail to give disadvantaged students the opportunities and resources that these students need to compete successfully with their peers.¹¹⁰ A recent national study found that most states do not provide the funding that would enable the highest-poverty children to reach national average achievement outcomes on standardized assessments. In “numerous states,” only the districts with the lowest poverty concentrations can attain these outcomes and, in several states, high-poverty districts lack “thousands to tens of thousands of dollars” in funding that they would need to reach these outcomes.¹¹¹ These results confirm that many state rights to education leave far too many children stuck in substandard schools with little hope of acquiring the knowledge and skills they need to function as engaged citizens and productive employees in the United States, while others receive a first-rate education that prepares them to be tomorrow’s leaders.

For these reasons, state laws and policies do not fully and consistently protect education as a civil right.

Protecting Education as a Civil Right: Recommendations

The federal government has often taken the lead in protecting civil rights in the United States and can enact, strengthen, and enforce the laws and policies needed to safeguard education as a civil right. Indeed, the history surrounding the passage of the 14th Amendment in the late 19th century—with its safeguards for equal protection of the laws and citizenship—confirms that many federal lawmakers understood education to be a civil right since the nation’s early history.¹¹² Therefore, the limited protection of education as a civil right today weakens the democratic foundations of our nation.

The history surrounding the passage of the 14th Amendment in the late 19th century—with its safeguards for equal protection of the laws and citizenship—confirms that many federal lawmakers understood education to be a civil right since the nation’s early history.

Although state and local governments remain the principal facilitators of and policymakers in education, they govern within the constraints of federal law and policy and with the critical support of federal financial assistance.¹¹³ Protecting education as a civil right could build upon the focus on educational equity and the needs of disadvantaged schoolchildren in the Elementary and Secondary Education Act of 1965 (ESEA) and its reauthorizations, including the Every Student Succeeds Act of 2015.¹¹⁴ The ESEA’s reauthorizations over time generally have increased the demands that states and localities must meet to receive federal funds. Generous federal aid could be leveraged to guide states in enacting laws and policies that protect education as a civil right, just as it has been leveraged to require states to adopt challenging state standards and to guide states and districts to disaggregate and publish student achievement data.¹¹⁵ The federal toolbox of incentives, conditions, and mandates can be employed to lead the nation to the federal and state laws and policies that guarantee education as a civil right.¹¹⁶

The historical focus on state and local control of education has constrained past federal efforts to advance equal educational opportunity, such as when the U.S. Supreme Court emphasized a return to local control of education to curtail school desegregation efforts and deferred to state and local control of education when it refused to recognize a right to education in *Rodriguez*.¹¹⁷ This approach to education federalism is likely to constrain how the federal government protects education as a civil right. Therefore, protecting education as a civil right can be most effective when it harnesses the strengths of federal, state, and local support for and authority over education.

The recommendations below offer complementary federal and state reforms that can strengthen protection of education as a civil right. Effective implementation of these laws would require courts and legislatures to articulate rights and all three branches to enforce these rights.¹¹⁸ The recommendations offer possibilities while simultaneously acknowledging the federalism constraints that may limit enactment of these reforms.

Although specific programs can provide essential support for education, it remains critical to protect education as a civil *right* due to the legal, political, and persuasive value of rights.¹¹⁹ Therefore, protecting education as a civil *right* remains the aim of the recommendations that follow.

As noted above, the report leaves for future research an examination of how law and policy could safeguard education as a civil right that protects against forms of discrimination beyond racial discrimination.

The Federal Role

The federal role in protecting against discrimination

Given that most, but not all, modern-day discrimination is either not intentional—or at least typically cannot be proven to be intentional, due to the high judicial standards required for proving intent—the recommendations below focus on remedying disparate impact discrimination. The disparate impact approach also can help to dismantle systemic racism in ways that focusing on intentional discrimination cannot.

Intentional discrimination has become generally unacceptable only because the law has deemed it to be so. It will take increased understanding, widespread support, and enforcement of the disparate impact prohibition to reduce disparate impact discrimination.

To strengthen the legal protections from racial discrimination in education and enforcement of these protections, the federal government can:

- **Raise awareness of discrimination in educational opportunities on the basis of race, national origin, and color.** Any strengthening of civil rights protections and enforcement could build upon a federal and national effort to raise awareness of educational opportunity gaps and their harmful impact upon the United States and its residents. Raising awareness of these gaps is essential to garner support for reforms that protect education as a civil right, because educational opportunity gaps lie outside of the experience of many Americans and research confirms that reforms that support disadvantaged individuals often fail unless they also benefit more privileged individuals.¹²⁰
- **Amend Title VI of the Civil Rights Act of 1964 to prohibit disparate impact discrimination and provide a private right of action to enforce it.** Title VI can be amended to prohibit disparate impact discrimination and to include a private right of action to enforce this prohibition.¹²¹ The U.S. Supreme Court’s decision in *Alexander v. Sandoval* holding that private plaintiffs may not enforce disparate impact regulatory prohibitions through a private right of action broke with long-standing tradition that embraced private enforcement of disparate impact claims under Title VI.¹²² Federal agencies have consistently prohibited disparate impact discrimination through rules and guidance to enforce Title VI.¹²³ Disparate impact litigation provides a critical tool to challenge an array of education policies, such as school funding and testing regimes.¹²⁴ Amending Title VI to prohibit disparate impact discrimination and to provide a private right of action to enforce the prohibition would reinvigorate this important civil rights protection.
- **Increase technical assistance and grants to states and districts to support implementation of best practices for preventing and remedying disparate impact discrimination and providing greater access to equitable educational opportunities.** OCR provides technical assistance to communities, school districts, and schools on issues covered by Title VI.¹²⁵ Litigation regarding disparate impact discrimination will likely

increase once a private right of action exists to enforce the disparate impact prohibition. This litigation may target such inequities as the fact that across the United States, districts with the highest concentrations of students of color receive approximately 13%, or \$1,800 per student, less than districts with the lowest concentrations of such students.¹²⁶ The potential for new litigation on this and other issues may incentivize states, districts, and schools to focus greater attention and resources on preventing and remedying disparate impact discrimination. OCR could expand its technical assistance regarding Title VI so that states, districts, and schools are fully equipped to implement reforms for preventing and remedying this and other types of disparate impact discrimination. Such technical assistance currently builds upon OCR's guidance on the Title VI requirements regarding resource comparability and the potential civil rights violations that can result when the distribution of resources inflicts intentional or disparate impact discrimination in violation of Title VI and its regulations.¹²⁷ If the federal government authorizes a private right of action to enforce the prohibition of disparate impact discrimination, the federal government also could offer grants to incentivize states and districts to adopt effective policies and practices that reduce and eliminate disparate impact discrimination and to support the comprehensive implementation of such policies and practices.¹²⁸

- **Increase funding to OCR and the Department of Justice's Educational Opportunities Section to enforce Title VI's disparate impact prohibition and other protections from racial discrimination.** OCR needs sufficient resources to increase the effectiveness of its enforcement strategy to reduce disparate impact discrimination through its resolution of complaints as well as through proactive compliance reviews.¹²⁹ Over the past 25 years (fiscal year 1997 to fiscal year 2021), Congress has appropriated less funding for OCR than the president's budget requested 19 out of 25 times, although Congress exceeded the president's budget request for the past 4 consecutive years.¹³⁰ In addition, OCR's caseload has significantly increased over this time frame, so it is doing more with less.¹³¹ Congress can provide additional support to remedy disparate impact discrimination by providing additional funding for OCR enforcement of this prohibition, as well as to the Department of Justice's Educational Opportunities Section, which actively works with OCR to enforce Title VI.¹³² Additional funding also could be allocated to the Educational Opportunities Section to enforce Titles VI and IV and the EEOA.
- **Issue OCR guidance clarifying the disparate impact legal standard to support stronger administrative and judicial enforcement.** Once a plaintiff proves that a policy or practice has a racially disparate impact, the defendant must show that the practice is justified by an educational necessity.¹³³ However, courts apply the educational necessity standard with various degrees of rigor.¹³⁴ OCR can adopt guidance that clarifies that a rigorous threshold should be applied for educational necessity by requiring educators to prove that the challenged practice is essential for achieving educational goals. The guidance also could include best practice examples that illustrate when an education practice is and is not necessary. These examples, coupled with more administrative and private enforcement of the disparate impact standard, could encourage states and school districts to adopt these best practices. History suggests that guidance from OCR regarding how to interpret the disparate standard also may influence how courts apply this standard, given that guidance from the Department of Health, Education, and Welfare influenced how courts interpreted their obligations to ensure desegregation.¹³⁵

The federal role in protecting a right to education

Although robust nondiscrimination laws and their enforcement provide essential protections to schoolchildren, they alone would not safeguard a civil right to education that aims to “protect those aspects of our natural capabilities most conducive to social participation and well-being.”¹³⁶ Instead, a federal right to education along with state rights to education can provide a critical complement to nondiscrimination laws. A federal right to education can also build upon the federal efforts to improve achievement and strengthen educational equity in ESEA and its reauthorizations.¹³⁷ A full exploration of the arguments for and against a federal right to education, how such a right might be recognized, and what it could guarantee are beyond the scope of this report, but the analyses of leading scholars on these issues are explored in *A Federal Right to Education: Fundamental Questions for Our Democracy*.¹³⁸

Barriers to a Federal Right to Education

The recognition of a federal right to education—whether through legislation, a judicially implied right, or a constitutional amendment—must confront the reality that the nation’s approach to the federal role in education will always be tempered by those who strongly believe that the federal government should limit its role in education and the challenges of implementing federal objectives through state actors.¹³⁹ Other barriers to federal recognition of a right to education include the following varied perspectives:

- Some will favor a limited scope for a federal right to education to preserve state authority over education and state and local flexibility to serve as laboratories of democracy.
- Some will insist that any increase in the federal role in education should focus on creating and strengthening specific programs rather than a federal right to education.¹⁴⁰
- Some will disagree about the best mechanism for recognizing a right to education and whether it should be through the U.S. Supreme Court, legislation, or a constitutional amendment.
- Some will disagree about the appropriate content of a federal right to education.¹⁴¹

Although these constraints must be acknowledged in considering how a federal right to education might be recognized or adopted, they should not end the pursuit of a federal right to education. Such a right can help protect our national interests in an educated and engaged citizenry, a productive and strong economy, a just and integrated society, and human flourishing.

Essential Protections That a Federal Right to Education Can Include

A federal right to education must balance the primacy of state and local control of education and a limited federal role against the need for federal intervention to elevate education to a civil right. This balancing can guide the federal government in providing at least three essential protections through a federal right to education. These protections can be enacted through conditions on federal financial assistance or a federal mandate.¹⁴²

1. **The federal government can recognize a federal right to education that requires states to provide the foundational educational opportunities necessary to be an engaged and effective citizen, a productive worker, and a college- and career-ready graduate.** A federal right to education provides a workable and flexible pathway for ensuring education serves these critical roles.¹⁴⁵

As a democratic nation, the United States relies on an educated citizenry as the very foundation of our government.¹⁴⁴ The Supreme Court has repeatedly acknowledged this essential role for schools.¹⁴⁵ For instance, the Court has noted that since our nation's earliest history we have understood that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."¹⁴⁶ Despite the well-established understanding of education as essential to our democratic government, the states are not ensuring that students receive the education they need to participate effectively in democracy.¹⁴⁷

To create engaged and effective citizens, the United States must build consensus around the essential knowledge and skills needed for civic participation. For example, students must possess both civic knowledge, such as knowledge of the structure of the political system in the United States and their role in this system, and civic skills, such as the ability to comprehend and analyze a complex array of knowledge and information.¹⁴⁸

A federal right to education also could require at least a floor of educational opportunity that enables students to gain meaningful employment upon graduation. This requires students to gain the analytical, literacy, numeracy, and problem-solving skills that modern employment requires and that too many states are not providing.¹⁴⁹ Education provides the essential tools for preparing students for the workforce.¹⁵⁰ States are tolerating—and too often creating—educational inequities and inadequacies that hinder the nation's ability to sustain a strong economy and to compete effectively in the global marketplace, including by creating unnecessary criminal justice and health care costs that arise from inadequate and inequitable educational opportunities.¹⁵¹ Recognizing and protecting a federal right to education that enables students to gain meaningful employment would help to reduce these unnecessary costs.

An even more impactful approach to a federal right to education would provide schoolchildren the educational opportunities that they need to enter college or pursue a career. Currently, states set their own content and performance standards, and most states have adopted college- and career-ready standards.¹⁵² However, it is commonly known that there is wide variation in the quality of these standards.¹⁵³ A study by the American Institutes for Research used international benchmarking to compare what students are expected to know in different states. It found that the gap in standards between states with high and low standards represents as much as three or four grade levels. Indeed, "this 'expectations gap' is so large that it is more than twice the size of the national black-white *achievement gap*,"¹⁵⁴ which has been the focus of education law and policy reform for generations.¹⁵⁵ A robust federal right to education could help to close this expectations gap by ensuring that states provide access to the educational opportunities that students need to enter college or pursue a career.

2. **A federal right to education can require states to provide educational opportunities in an equitable manner.** The states do not consistently include equity among their priorities. The federal government possesses a superior and more consistent track record of advancing equity in educational opportunities. Given the significant financial assistance it provides for education, the federal government is overdue for setting some minimum requirements for an equitable system for funding education, including ensuring that students from disadvantaged communities receive additional education funding to enable them to compete effectively with their more affluent peers and insisting that school funding systems are linked to the desired educational opportunities and outcomes rather than to political convenience and residual budgeting.¹⁵⁶ A federal focus on equity could build upon federal efforts to support closing opportunity gaps that are evidenced in the reauthorizations of the Elementary and Secondary Education Act.
3. **To ensure that a federal right to education provides these two protections, a federal forum is needed so that students and their families can allege that a state has failed to provide these foundational educational opportunities.** Federal accountability helps to ensure that states do not neglect federal priorities. Without it, states can be quick to accept federal benefits, such as funding, while neglecting federal aims.¹⁵⁷ Unfortunately, state legislatures often neglect the educational needs of economically disadvantaged students and students of color and cater to wealthier and whiter interests. Judicial review sometimes provides the most effective means for enforcing individual rights. A judicial remedy can help enforce the federal right to education.¹⁵⁸ Ideally, courts would serve as a last, but important, resort for students and families. Additional efforts that precede litigation could emphasize a collaborative approach between the federal government and the states.¹⁵⁹

These three federal components of a federal right to education would help to ensure that all students receive a high-quality, equitable education while still providing room for state and local experimentation, accountability, and flexibility. These recommendations aim at a strong foundation for the nation's education system while leaving the pursuit of educational excellence to the states, as explained below. Moreover, if federal courts refuse to open the federal courthouse to lawsuits challenging inadequate and inequitable educational opportunities¹⁶⁰ and Congress does not recognize a federal right to education, states will need to fulfill the aims outlined above as well as the goals noted below.

The State Role

States can expand protections for education as a civil right by ensuring school districts are complying with Title VI, adopting and enforcing robust prohibitions of discrimination in education, and strengthening and enforcing state rights to education. States can provide essential leadership, laws, and enforcement for both nondiscrimination protections and state rights to education that could greatly advance protection of education as a civil right.

States can provide essential leadership, laws, and enforcement for both nondiscrimination protections and state rights to education that could greatly advance protection of education as a civil right.

The state role in protecting against discrimination

Some states have adopted substantial protections that focus on discrimination in education. Other states can build on these examples as they consider which protections to adopt. Adopting and enforcing prohibitions focused on schools can serve an important expressive purpose that signals to the public, educators, school leaders, families, and communities that the state prioritizes preventing and remedying discrimination in education. States also may choose to rely on general nondiscrimination prohibitions that can be applied to schools. In addition to comprehensive legal protections, an effective approach to preventing and remedying discrimination also requires widespread public awareness and consistent enforcement in schools, along with efforts to ensure that districts are complying with Title VI.

States can take the following steps to help address discrimination in education:

- **Adopt a far-reaching prohibition of education discrimination that covers all types of discrimination and discrimination in all facets of education.** Such a comprehensive approach would close the gaps in the patchwork of current coverage that are noted above. States can model their language after states that prohibit discrimination in education on a broad array of bases, such as California, Connecticut, and New York.¹⁶¹ States can also adopt language that would prohibit discrimination in all facets of education. For instance, a New Hampshire law states that “no person shall be excluded from participation in, denied the benefits of, or be subjected to discrimination in public schools because of their age, sex, gender identity, sexual orientation, race, color, marital status, familial status, disability, religion or national origin.”¹⁶² This all-inclusive language accomplishes the twin goals of addressing the diverse bases of education discrimination as well as the many facets in which discrimination can occur.
- **Develop a definition of discrimination to cover disparate impact and unintentional discrimination.** For instance, Oregon provides a broad definition of discrimination that includes both intentional and disparate impact discrimination in stating that “‘discrimination’ means any act that unreasonably differentiates treatment, intended or unintended, or any act that is fair in form but discriminatory in operation, either of which is based on race, color, religion, sex, sexual orientation, national origin, marital status, age or disability.”¹⁶³ States can build on this and similar approaches to adopt prohibitions of both intentional and disparate impact discrimination.
- **Elevate the importance and durability of the state prohibitions of discrimination in education by adopting these prohibitions in state constitutions.** Although state constitutions can be amended, amendments typically require more steps for adoption than a statute.¹⁶⁴ These steps may include a legislative- or citizen-initiated proposal for amendment that must be approved by the voters or a constitutional convention or commission with voter approval.¹⁶⁵ Including a broad proscription of discrimination in a state constitution sends a signal to educational institutions and the public that ending discrimination in education stands as a core value of the state and a priority of its citizens.
- **Offer both technical and financial assistance to districts and schools to aid in their understanding and enforcement of these laws.** Technical assistance to districts and schools helps to ensure that administrators, teachers, and staff understand their obligations. Technical assistance can highlight best practices and successful models for

remediating discriminatory practices. States also can incentivize comprehensive district-level prioritization of civil rights protections by offering financial assistance to support districts that train and dedicate staff to identify when and how intentional and disparate impact discrimination exists and how to remedy it. This combination of technical and financial assistance could empower and incentivize many districts to change discriminatory policies and practices.

- **Implement a comprehensive approach to enforcing both Title VI and state civil rights that includes expansion of state attorney general offices or state educational agencies with statutory enforcement authority.** Enforcing new and existing civil rights protections for education in a consistent and sustained manner can persuade districts and schools to prioritize protecting students from discrimination. These efforts can include equipping state attorney general offices or state educational agencies with statutory enforcement authority with the resources that they need to make sure that districts are complying with Title VI and state protections from discrimination. Even if no new state protections are adopted, these offices can help ensure that districts and schools are complying with Title VI and its disparate impact regulation.

This proposed array of state laws and policies can provide an important complement to federal antidiscrimination laws.

The state role in protecting a right to education

The state role in protecting a right to education depends in significant part on whether the United States recognizes a federal right to education. If the U.S. Supreme Court and Congress continue to refuse to recognize a federal right to education, then state rights to education should ensure students receive an education that prepares them to actively engage in democracy, enter the workforce, and be ready for college or career.

However, even if the United States recognizes a federal right to education, states will remain in the driver's seat in shaping how they pursue innovation, accountability, and excellence in education. This is because states possess primary authority over education, and a federal right to education may only accomplish foundational national goals.

If a federal right to education protects students' rights to an education that prepares them to be engaged citizens, productive workers, and college- and career-ready graduates, state rights to education can focus on achieving an array of additional state goals, such as:

- **Driving the United States toward educational excellence.** Educational excellence for all children could serve as the ultimate guarantor of education as a civil right. Educational excellence can include robust content and performance standards that encourage thriving. Pursuing educational excellence empowers schoolchildren to flourish in ways that foundational opportunities do not. The federal government's capacity to support educational excellence is limited by its circumscribed role in education. In contrast, states possess ample authority to function as the laboratories that lead the United States to engage in the experimentation and innovation that can lead to excellence.

- **Ensuring that states provide the high-quality educational opportunities needed to achieve state education standards by adopting opportunity-to-learn standards.** Opportunity-to-learn (OTL) standards establish the in- and out-of-school resources students need to master the content in state standards and to meet state performance standards. They can be used to guide district and school allocations of resources and reduce the opportunity gaps that drive achievement gaps. The consensus needed to adopt and implement OTL standards is more attainable and sustainable at the state level and thus could be an important and unique state contribution to protecting education as a civil right. State courts also can incorporate OTL standards as they enforce state rights to an adequate and equitable education.¹⁶⁶

State OTL standards can be designed to insist on high-quality educational opportunities for everything from the quality and distribution of teachers to facilities, course offerings, and learning resources, including textbooks and technology. State OTL standards also can guide states as they determine the funding that is essential for student attainment of the knowledge and civic goals for a state right to education. Comprehensive implementation of these standards could guide states in remedying some of the primary shortcomings of school funding, including “lower funding to districts serving students with greater needs ... insufficient linkage of funding systems to desired educational outcomes ... low funding levels, and ... inadequate oversight of state funding systems.”¹⁶⁷ States can use OTL standards as a tool that helps them distribute funding equitably, including providing additional funding for students with unique learning needs, for technology, and for facilities, as well as for innovation and experimentation.¹⁶⁸

- **Engaging all three branches of government to adopt and enforce a state right to education.**¹⁶⁹ State legislatures are responsible for adopting laws that effectuate state rights to education, and governors and state departments of education support the implementation of these laws. Courts often provide essential accountability for ensuring that state legislative and executive branches are fulfilling their responsibilities to protect education rights. Therefore, schoolchildren and their families often need access to courts to remedy inequities and inadequacies in educational opportunities.

Together, state rights to education can guide the United States to move beyond laws to protect schoolchildren from harm and aim for educational excellence and high-quality and equitable opportunities to learn. Such rights function best with the support of all three branches of government.

Essential and Equitable Resources

A civil right to education can ensure that schoolchildren receive the essential and equitable resources that are needed to achieve education’s aims. These resources include at least:

- “In every classroom, a competent, certified, well-trained teacher who is teaching the standard course of study by implementing effective educational methods that provide differentiated, individualized instruction, assessment, and remediation to the students in that classroom.

- “In every school, a well-trained, competent principal with the leadership skills and the ability to hire and retain competent, certified, and well-trained teachers who can implement an effective and cost-effective instructional program that meets the needs of at-risk children so that they can have the opportunity to obtain a sound basic education by achieving grade level or above academic performance.
- “In every school, the resources necessary to support the effective instructional program within that school so that the educational needs of all children, including at-risk children, can be met.”¹⁷⁰

Today these resources are too often distributed in ways that disfavor economically disadvantaged children and children of color. A civil right to education can be implemented in ways that reduce these opportunity gaps so that all children receive the essential and equitable resources that they need to be educated free from discrimination and to develop their capacity for well-being and social engagement.¹⁷¹ Ensuring that all schoolchildren receive essential and equitable resources can be pursued through OTL standards at the state level or through other policies and practices that make certain that these resources are being provided.

Conclusion

The United States is long overdue for turning the rhetoric of education as a civil right into a reality. To achieve this goal, the nation not only must remedy the racial, national origin, and other forms of identity-based discrimination that continue to hinder both the opportunities and achievement of many schoolchildren. The nation also must adopt and enforce laws and policies that provide every child access to a high-quality education that enables them to participate effectively in society and democracy and to flourish.

The United States provides limited federal protection and uneven state protection for education as a civil right, whether one embraces the nondiscrimination approach to define a civil right or the broader understanding of a civil right as protecting the ability to participate in society, attain well-being, and flourish.¹⁷² Federal civil rights laws for education fall short of full protection for education as a civil right because, among other things, they set a difficult standard to prove intentional discrimination, do not provide a judicial remedy for disparate impact discrimination, and underfund OCR's enforcement of discrimination protections. The U.S. Supreme Court also rejected the invitation to recognize a federal right to education in *San Antonio Independent School District v. Rodriguez*. State laws also fall short of protecting education as a civil right because state civil rights laws provide a patchwork of protections that leave many children with inadequate protection from discrimination. State rights to education similarly vary in strength and enforceability in ways that leave some children with no redress for substandard and inequitable educational opportunities.

Federal and state law can be reformed to protect education as a civil right that protects schoolchildren from discrimination and that “protect[s] those aspects of our natural capabilities most conducive to social participation and well-being.”¹⁷³ The federal government possesses a superior capacity and authority to protect education as a civil right and can adopt uniform protections that all children may enjoy. The federal government can strengthen its efforts to prevent and remedy disparate impact discrimination by raising awareness of disparate impact discrimination in educational opportunities, enabling private individuals to bring litigation to remedy it, increasing technical and financial assistance to support efforts to prevent it, expanding the capacity of OCR and the Department of Justice's Educational Opportunities Section to enforce disparate impact prohibitions, and issuing guidance that clarifies the disparate impact standard. The federal government also can adopt a right to education that requires states to provide students with the knowledge and skills they need to be engaged citizens, productive workers, and college- and career-ready graduates. A federal right to education also can guarantee equitable educational opportunities and provide a private right of action to enforce that guarantee.

State governments can play a critical complementary role to federal efforts to protect education as a civil right. State governments can adopt broad prohibitions of discrimination in education, expand districts' expertise regarding these prohibitions and their capacity to implement them, and enforce federal and state civil rights protections for education. If a federal right to education is adopted, state governments can build on this right by pushing the United States toward educational excellence, developing comprehensive opportunity-to-learn standards, and providing a judicial remedy for a state's failure to protect a civil right to education. If a federal right to education is

not adopted, state rights to education also should guarantee schoolchildren a right to education that enables them to be engaged citizens and productive workers and prepares them for college and career.

Fortunately, the federal and state law reforms that are needed to protect education as a civil right are within the nation's reach. These reforms are needed more than ever as the United States tackles the educational impacts of the COVID-19 pandemic and the continuing systemic discrimination and racial injustice facing our schools. Federal and state governments can protect education as a civil right that forges a prosperous path for the future of our nation.¹⁷⁴

Endnotes

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58. George, J. (2016). Populating the pipeline: School policing and the persistence of the school-to-prison pipeline. *Nova Law Review*, 40(3), 493–526.
59. See U.S. Department of Education. (2019, July 10). New data show Secretary DeVos’ reforms to the Office for Civil Rights are driving better results for students [Press release]. <https://web.archive.org/web/20190829231850/https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>; Green, E. L. (2018, April 20). DeVos Education Dept. begins dismissing civil rights cases in name of efficiency. *New York Times*. <https://www.nytimes.com/2018/04/20/us/politics/devos-education-department-civil-rights.html> [<https://perma.cc/2TQU-ZF3R>].
60. See U.S. Department of Justice. (n.d.). Educational Opportunities Section. <https://www.justice.gov/crt/educational-opportunities-section>. [<https://perma.cc/V2QD-4ZR3>]; Exec. Order No. 13,985, 86 Fed. Reg. 7009 (2021, January 25). <https://www.federalregister.gov/documents/2021/01/25/2021-01753/advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government>, directing each agency to “assess whether, and to what extent, its programs and policies perpetuate systemic barriers to opportunities and benefits for people of color and other underserved groups”(§ 1).
61. 20 U.S.C. § 1703(a), (b), (e); 20 U.S.C. § 1706.
62. See *Castaneda v. Pickard*, 648 F.2d 989, 1001 (5th Cir. 1981), noting that “certain of the subsections of § 1703 which define the practices which constitute a denial of equal educational opportunity, explicitly include only intentional or deliberate acts.” EEOA also prohibits a state from denying “equal educational opportunity ... by ... the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.” 20 U.S.C. § 1703(f). Courts apply a three-part test from *Castaneda v. Pickard* to assess compliance that examines if the district has adopted an approach to addressing language barriers that is based upon a sound educational theory or is a legitimate experimental strategy; implements the program with the resources, personnel, and

practices that are “reasonably calculated to implement effectively the educational theory”; and evaluates the program to make sure that the language barriers are actually being overcome. See *Castaneda*, 648 F.2d at 1009–1010. Protecting English learners from discrimination based on their national origin also serves as an important component of recognizing education as a civil right. As policymakers consider reforms to protect education as a civil right, they can assess the effectiveness of EEOA to protect English learners from national origin discrimination. See, e.g., O’Sullivan, M. P. (2015). Laboratories for inequality: State experimentation and education access for English-language learners. *Duke Law Journal*, 64(4), 671–715, “The EEOA, as crafted, poorly protects ELLs from state harm” (p. 683); Berenyi, J. R. (2008). “Appropriate action,” inappropriately defined: Amending the Equal Educational Opportunities Act of 1974. *Washington & Lee Law Review*, 65(2), 639–674, “Yet the statute’s open-ended ‘appropriate action’ requirement does not define what is required to state a claim, what type of allegations plaintiffs may make, or to what acts by an educational agency ‘appropriate action’ applies” (p. 657). Such an analysis is beyond the scope of this report’s focus on racial discrimination.

63. 42 U.S.C. § 2000c-6.
64. Civil Rights Division. (2021). *FY 2022 performance budget: Congressional justification*. U.S. Department of Justice. <https://www.justice.gov/jmd/page/file/1398356/download>.
65. See *Washington v. Davis*, 426 U.S. 229, 239-40 (1976).
66. 14th Amendment, § 1; *Brown v. Board of Education*, holding that the 14th Amendment forbids racially separate schools; *Goss v. Lopez*, 419 U.S. 565, 581 (1975), holding that students must receive notice and an opportunity to be heard before being suspended from school; *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-40 (1974), “This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment”; *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969), holding that a state violated the fundamental right to interstate travel protected by the Equal Protection Clause of the 14th Amendment by aiming to deter individuals from moving to the state.
67. 411 U.S. 1 (1973).
68. Robinson, K. J. (2019). “Introduction: The Essential Questions Regarding a Federal Right to Education” in Robinson, K. J. (Ed.). *A Federal Right to Education: Fundamental Questions for Our Democracy* (pp. 1–32). New York University Press.
69. 457 U.S. 202, 221, 230 (1982).
70. 419 U.S. 565, 574, 579 (1975).
71. Robinson, K. J. (2019). “Introduction: The Essential Questions Regarding a Federal Right to Education” in Robinson, K. J. (Ed.). *A Federal Right to Education: Fundamental Questions for Our Democracy* (pp. 1–32). New York University Press.
72. 957 F.3d 616, 648-49, 662 (6th Cir. 2020), vacated 958 F.3d 1216 (6th Cir. 2020) (en banc). The Detroit Public Schools educate a high concentration of African American students because the U.S. Supreme Court’s decision in *Milliken v. Bradley* prevented the lower courts from implementing an interdistrict remedy that would have resulted in more integrated schools. 418 U.S. 717, 745-46 (1974).
73. *Gary B.*, 957 F.3d at 642, quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).
74. See, e.g., Terms for Settlement Agreement and Release Between All Plaintiffs and the Governor of the State of Michigan in *Gary B., et al. v. Whitmer*. (2020, May 13). <http://www.publiccounsel.org/tools/assets/files/1382.pdf> [<https://perma.cc/W2BT-2KAE>].
75. *A.C. v. Raimondo*, 494 F. Supp. 3d 170, 174, 196-97 (D.R.I. 2020), appeal docketed sub nom. *A.C. v. McKee*, No. 20-2082 (1st Cir. Nov. 25, 2020), rejecting plaintiffs’ allegations that the state of Rhode Island had not provided students with an education that would enable them to serve productively as civic participants who are equipped to vote, serve on a jury, and understand our government institutions in violation of the 14th Amendment, among other constitutional protections; *Martinez v. Malloy*, 350 F. Supp. 3d 74, 81, 82-84, 90-91 (D. Conn. 2018), rejecting claims by schoolchildren and parents in Hartford and Bridgeport, Connecticut, against the governor and various state officials that alleged that the defendants violated their rights under the due process and equal protection clauses by keeping plaintiffs in failing schools that denied them “their fundamental right to a minimally adequate education.” Both courts noted that they were bound by *Rodriguez* to dismiss the claims.

76. Robinson, K. J. (2019). “Conclusion: An American Dream Deferred: A Federal Right to Education” in Robinson, K. J. (Ed.). *A Federal Right to Education: Fundamental Questions for Our Democracy* (pp. 327–338). New York University Press; Robinson, K. J. (2019). “Introduction: The Essential Questions Regarding a Federal Right to Education” in Robinson, K. J. (Ed.). *A Federal Right to Education: Fundamental Questions for Our Democracy* (pp. 1–32). New York University Press.
77. For a complete analysis of how state law is limited in its protection of education as a civil right, see Robinson, K. J. (2020). Designing the legal architecture to protect education as a civil right. *Indiana Law Journal*, 96(1), 51–104.
78. Bauries, S. R. (2012). The education duty. *Wake Forest Law Review*, 47(4), 705–768; Black, D. W. (2016). Averting educational crisis: Funding cuts, teacher shortages, and the dwindling commitment to public education. *Washington University Law Review*, 94(2), 423–483. The Education Commission of the States provides a chart of all state education clauses. Education Commission of the States. (2016). *50-state review*. <https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf>.
79. See Friesen, J. (2006). *State Constitutional Law: Litigating Individual Rights, Claims and Defenses* (4th ed., Vol. 1). (Section § 3.01[2]). Lexis Nexis Publishing. See, e.g., Conn. Const. art. I, § 20, “No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his civil or political rights because of religion, race, color, ancestry or national origin”; Haw. Const. art. I, § 5, “No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person’s civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry”; Mass. Const. art. CVI, “Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin”; Va. Const. art. I, § 11, “That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts; and that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination.”
80. See, e.g., Cal. Const. art. I, § 31(a), “The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting”; Mich. Const. art. VIII, § 2, “The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin”; Or. Rev. Stat. Ann. §§ 659.850(1) & (2) (West Supp. 2021), “As used in this section, ‘discrimination’ means any act that unreasonably differentiates treatment, intended or unintended, or any act that is fair in form but discriminatory in operation, either of which is based on race, color, religion, sex, sexual orientation, national origin, marital status, age or disability.... A person may not be subjected to discrimination in any public elementary, secondary or community college education program or service, school or interschool activity or in any higher education program or service, school or interschool activity where the program, service, school or activity is financed in whole or in part by moneys appropriated by the Legislative Assembly”; Tenn. Code Ann. § 4-21-904 (2021), “It is a discriminatory practice for any state agency receiving federal funds making it subject to Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq.), or for any person receiving such federal funds from a state agency, to exclude a person from participation in, deny benefits to a person, or to subject a person to discrimination under any program or activity receiving such funds, on the basis of race, color, or national origin”; Wash. Const. art. IX, § 1, “It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.”
81. See, e.g., N.H. Rev. Stat. Ann. § 193:38 (Supp. 2020), “No person shall be excluded from participation in, denied the benefits of, or be subjected to discrimination in public schools because of their age, sex, gender identity, sexual orientation, race, color, marital status, familial status, disability, religion, or national origin”; N.J. Stat. Ann. § 18A:36-20 (West 2021), “No pupil in a public school in this State shall be discriminated against in admission to, or in obtaining any advantages, privileges or courses of study of the school by reason of race, color, creed, sex or national origin”; Iowa Code § 216.9(1) (2021), “It is an unfair or discriminatory practice for any educational institution to discriminate on the basis of race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability in any program or activity.”

82. See, e.g., Ga. Code Ann. § 20-2-131 (2016), “It is further declared that no student shall be refused admission into or be excluded from any public school in the state on account of race, creed, color, or national origin”; N.C. Gen. Stat. § 115C-367 (2019), “No person shall be refused admission to or be excluded from any public school in this State on account of race, creed, color or national origin”; 16 R.I. Gen. Laws § 16-38-1 (2013), “No person shall be excluded from any public school on account of race or color, or for being over fifteen (15) years of age”; S.C. Code Ann. § 59-63-40(1) (2020), “No person shall be refused admission into or be excluded from any public school in the State on account of race, creed, color or national origin”; Wyo. Stat. Ann. § 21-4-303 (2021), “No child shall be denied the right to attend the public schools of this state on account of sex, race, or religion.”
83. See, e.g., Cal. Educ. Code § 56320(a) (Deering 2013), “Testing and assessment materials and procedures used for the purposes of assessment and placement of individuals with exceptional needs are selected and administered so as not to be racially, culturally, or sexually discriminatory”; Minn. Stat. § 125A.08(b) (6) (2020), “In accordance with recognized professional standards, testing and evaluation materials, and procedures used for the purposes of classification and placement of children with a disability are selected and administered so as not to be racially or culturally discriminatory”; Minn. Stat. § 124D.81 (2020), “In accordance with recognized professional standards, all testing and evaluation materials and procedures utilized for the identification, testing, assessment, and classification of American Indian children must be selected and administered so as not to be racially or culturally discriminatory and must be valid for the purpose of identifying, testing, assessing, and classifying American Indian children”; Tex. Educ. Code Ann. § 29.310(a) (2018), “Procedures and materials for assessment and placement of students who are deaf or hard of hearing shall be selected and administered so as not to be racially, culturally, or sexually discriminatory.”
84. See, e.g., Act of May 19, 2012, ch. 188, § 21(e), 2012 Colo. Sess. Laws 715, 731, “School discipline policies and practices must apply equally to all students regardless of their economic status, race, gender, ethnicity, religion, national origin, sexual orientation, or disability”; Fla. Stat. § 1006.13(1) (2019), “Zero-tolerance policies must apply equally to all students regardless of their economic status, race, or disability.”
85. See, e.g., Me. Stat. tit. 20-A, § 2404 (2021), “A public charter school may not discriminate on the basis of race, ethnicity, national origin, religion, gender, sexual orientation, income level, disabling condition, proficiency in the English language or academic or athletic ability, except that nothing in this subsection may be construed to limit the formation of a public charter school that is dedicated to focusing education services on at-risk pupils, students with disabilities and students who pose such severe disciplinary problems that they warrant a specific education program”; Miss. Code Ann. § 37-28-43(1) (2019), “A charter school may not discriminate against any person on the basis of race, creed, color, sex, disability, national origin or any other category that would be unlawful if done by a noncharter public school”; N.Y. Educ. Law § 2854(2)(a) (Consol. Supp. 2021), “A charter school shall not discriminate against any student, employee or any other person on the basis of ethnicity, national origin, gender, or disability or any other ground that would be unlawful if done by a school. Admission of students shall not be limited on the basis of intellectual ability, measures of achievement or aptitude, athletic ability, disability, race, creed, gender, national origin, religion, or ancestry”; Wis. Stat. § 118.40(4)(b)(2) (2017–2018), “A charter school governing board may not do any of the following: ... discriminate in admission or deny participation in any program or activity on the basis of a person’s sex, race, religion, national origin, ancestry, pregnancy, marital or parental status, sexual orientation or physical, mental, emotional or learning disability.”
86. See, e.g., Ark. Code Ann. § 6-18-227(d)(2)(B) (Supp. 2021), “The race or ethnicity of a student shall not be used to deny a student the ability to attend a school in the student’s school district of choice under this section”; Ark. Code Ann. § 6-18-1903(d)(3) (2018), “A school district receiving transfers under this subchapter shall not discriminate on the basis of gender, national origin, race, ethnicity, religion, or disability”; Or. Rev. Stat. Ann. § 339.127(1) (West 2014), “A district school board that admits nonresident students by giving consent ... may not consider race, religion, sex, sexual orientation, ethnicity, national origin, disability, health, whether a student has an individualized education program, the terms of an individualized education program, income level, residence, proficiency in the English language, athletic ability or academic records when: ... determining whether to give consent; or ... establishing the terms of consent”; Or. Rev. Stat. Ann. § 339.128(1) (West 2014), “A district school board that admits nonresident students and charges nonresident students tuition may not consider race, religion, sex, sexual orientation, ethnicity, national origin, disability, health, whether a student has an individualized education program, the terms of an individualized education program, income level, residence, proficiency in the English language, athletic ability or academic records when: ... determining whether to accept a nonresident student; or ... establishing the amount of tuition.”

87. See, e.g., Act of Jun. 2, 2021, ch. 296, §24, 2021 Nev. Stat. 1701, 1718 (to be codified at Nev. Rev. Stat. § 392), “A pupil enrolled in a public school may not be disciplined ... based on the race of the pupil. As used in this section: (a) ‘Protective hairstyle’ includes, without limitation, hairstyles such as natural hairstyles, afros, bantu knots, curls, braids, locks and twists. (b) ‘Race’ includes traits associated with race, including, without limitation, hair texture and protective hairstyles”; Or. Rev. Stat. § 659.850(2) (West Supp. 2021), “A person may not be subjected to discrimination in any public elementary, secondary or community college education program or service, school or interschool activity or in any higher education program or service, school or interschool activity where the program, service, school or activity is financed in whole or in part by moneys appropriated by the Legislative Assembly”; Act of Jun. 11, 2021, sec. 3032, Or. Laws ch. 239 (to be codified at Or. Rev. Stat. § 659.850(1)(a), (b)), “‘Discrimination’ means any act that unreasonably differentiates treatment, intended or unintended, or any act that is fair in form but discriminatory in operation, either of which is based on race, color, religion, sex, sexual orientation, national origin, marital status, age or disability.... ‘Race’ includes physical characteristics that are historically associated with race, including but not limited to natural hair, hair texture, hair type and protective hairstyles.”
88. See, e.g., Act of June 24, 2021, ch. 366, 2021 Me. Legis. Serv. ch. 366 (West), “The opportunity for an individual at an educational institution to participate in all educational, counseling and vocational guidance programs, all apprenticeship and on-the-job training programs and all extracurricular activities without discrimination because of sex, sexual orientation or gender identity, a physical or mental disability, ancestry, national origin, race, color or religion is recognized and declared to be a civil right”; Mich. Comp. Laws Serv. § 37.2102(1) (LexisNexis 2010), “The opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of religion, race, color, national origin, age, sex, height, weight, familial status, or marital status as prohibited by this act, is recognized and declared to be a civil right”; N.Y. Exec. Law § 291 (Consol. Supp. 2021), “The opportunity to obtain education, the use of places of public accommodation and the ownership, use and occupancy of housing accommodations and commercial space without discrimination because of age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, marital status, or disability ... is hereby recognized as and declared to be a civil right.”
89. See, e.g., 24 Pa. Stat. and Cons. Stat. § 5002(a) (West 2019), “It is hereby declared to be the policy of this Commonwealth that all persons shall have equal opportunities for education regardless of their race, religion, color, ancestry, national origin, sex, handicap or disability”; 24 Pa. Stat. and Cons. Stat. § 5002(b) (West 2019), “Equality of educational opportunities requires that students, otherwise qualified, be admitted to certain educational institutions without regard to race, religion, color, ancestry, national origin, sex, handicap or disability.”
90. See Friesen, J. (2006). *State Constitutional Law: Litigating Individual Rights, Claims and Defenses* (4th ed., Vol. 1). (Section § 3.01[2]). Lexis Nexis Publishing.
91. See *Washington v. Davis*, 426 U.S. 229, 239-40 (1976), holding that the Equal Protection Clause only prohibits intentional discrimination; see, e.g., *Hetrick v. Ohio Department of Agriculture*, 98 N.E.3d 1199, 1214-15 (Ohio Ct. App. 2017), “The Equal Protection Clause in the Ohio Constitution is ‘functionally equivalent’ to the right established by the Fourteenth Amendment.... ‘In order to establish a violation of the right to equal protection, a party must show that the agency purposely or intentionally discriminated in its application of the statute’” (citations omitted); *Odunlade v. City of Minneapolis*, 823 N.W.2d 638, 647-48 (Minn. 2012), rejecting federal and Minnesota equal protection claims for failure to show disparate treatment or intentional discrimination against a suspect class; *People v. Conat*, 605 N.W.2d 49, 59-60 (Mich. Ct. App. 1999), “The state constitutional guarantee [of equal protection of the law] provides no greater protection than does its federal counterpart.... The party challenging the statute must demonstrate that it evidences intentional discrimination against a particular group of persons.”
92. See, e.g., *Rollins v. State*, 991 P.2d 202, 210 (Alaska 1999), rejecting a state equal protection claim for selective enforcement for failure to show intentional discrimination; *State v. Baxley*, 656 So. 2d 973, 977-78 (La. 1995), rejecting a state equal protection claim because the claim did not establish intent to discriminate on the basis of sexual orientation; *Aucella v. Town of Winslow*, 583 A.2d 215, 216 (Me. 1990), requiring proof of intentional discrimination to establish an equal protection claim under state law; *State v. Whitfield*, 837 S.W.2d 503, 510 (Mo. 1992), holding that the disparate impact of the decision not

to provide child care on minorities and women was insufficient to state a claim under the federal equal protection clause and the state constitutional guarantee “that all persons are created equal and are entitled to equal rights and opportunity under the law”; *Golab v. City of New Britain*, 529 A.2d 1297, 1301 (Conn. 1987) and *Abbeville County School District v. State*, 515 S.E.2d 535, 538 (S.C. 1999), requiring proof of intentional discrimination to establish an equal protection claim under state law.

93. For examples of states that prohibit disparate impact or unintentional discrimination in education, see La. Const. art. VIII, § 13(D)(1), “Consistent with Article VIII of this constitution, relevant to equal educational opportunities, no state dollars shall be used to discriminate or to have the effect of discriminating in providing equal educational opportunity for all students”; Or. Rev. Stat. Ann. §§ 659.850(1) & 659.850(2) (West Supp. 2021), “As used in this section, ‘discrimination’ means any act that unreasonably differentiates treatment, intended or unintended, or any act that is fair in form but discriminatory in operation, either of which is based on race, color, religion, sex, sexual orientation, national origin, marital status, age or disability.... A person may not be subjected to discrimination in any public elementary, secondary or community college education program or service, school or interschool activity or in any higher education program or service, school or interschool activity where the program, service, school or activity is financed in whole or in part by moneys appropriated by the Legislative Assembly.” Courts also have interpreted other state constitutional protections against discrimination in education to prohibit actions that have the effect of discriminating. See, e.g., *Tinsley v. Palo Alto Unified School District*, 154 Cal. Rptr. 591, 606 (Ct. App. 1979); *Jenkins v. Township of Morris School District*, 279 A.2d 619, 628-30 (N.J. 1971). For examples of state discrimination protections that do not reach disparate impact discrimination, see Ark. Code Ann. § 6-10-114(a)(1) (2018), “It shall be unlawful for any member of the board of directors, administrator, or employee of a public school to knowingly authorize the participation of students in an event or activity held at a location where some students would be excluded or not given equal treatment because of the student’s race, national origin, or ethnic background” (emphasis added); *Keyes v. School District No. 1*, 413 U.S. 189, 208-10 (1973) (noting that under the Colorado antidiscrimination provision for education, a plaintiff must prove that intentional discrimination was “among the factors” motivating the governmental acts of segregation for at least a portion of the school district to receive an initial presumption of intentional discrimination).
94. Schoolchildren facing disparate impact discrimination based on race can file a complaint under Title VI with OCR in the U.S. Department of Education. U.S. Department of Education. (2021, August). *How to file a discrimination complaint with the Office for Civil Rights*. <https://www2.ed.gov/about/offices/list/ocr/docs/howto.html?src=rt>. Such cases are subject to the challenges noted above in “Limited Federal Enforcement of Civil Rights in Education.”
95. Jensen, R. M. (1997). Advancing education through education clauses of state constitutions. *Brigham Young University Education and Law Journal*, 1997(1), 1–48.
96. See, e.g., Haw. Const. art. X, § 1, “There shall be no discrimination in public educational institutions because of race, religion, sex or ancestry”; Cal. Const. art. I, § 31(a), “The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting”; Fla. Stat. § 1000.05(2)(a) (2019), “Discrimination on the basis of race, ethnicity, national origin, gender, disability, religion, or marital status against a student or an employee in the state system of public K-20 education is prohibited. No person in this state shall, on the basis of race, ethnicity, national origin, gender, disability, religion, or marital status, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any public K-20 education program or activity, or in any employment conditions or practices, conducted by a public educational institution that receives or benefits from federal or state financial assistance”; Iowa Code § 216.9(1) (2021), “It is an unfair or discriminatory practice for any educational institution to discriminate on the basis of race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability in any program or activity.”
97. For provisions that prohibit racial discrimination in school admissions and/or segregation, see, e.g., 105 Ill. Comp. Stat. Ann. 5/10-22.5 (West 2021), “No pupil shall be excluded from or segregated in any such school on account of his color, race, sex, or nationality”; Miss. Code Ann. § 37-15-35 (2019), “No person shall be assigned to or by, or restricted from or to, any group, area, school, institution or other political subdivision of the State of Mississippi on the account of race, color, or national origin. There shall be no governmentally enforced segregation by race, color or national origin and there shall be no governmentally enforced integration by reason of race, color or national origin”; Okla. Stat. tit. 70, § 1210.201 (2011), “Segregation of children in the public schools of the State of Oklahoma on account of

- race, creed, color or national origin is prohibited”; 16 R.I. Gen. Laws § 16-38-1 (2013), “No person shall be excluded from any public school on account of race or color, or for being over fifteen (15) years of age, nor except by force of some general regulation applicable to all persons under the same circumstances”; S.C. Code Ann. § 59-63-40(1) (2020), “No person shall be refused admission into or be excluded from any public school in the State on account of race, creed, color or national origin”; Tenn. Code Ann. § 49-6-3109(a) (2020), “No person shall be refused admission into or be excluded from any public school in this state on account of race, creed, color, sex or national origin.” For provisions that prohibit racial discrimination in school funding, see, e.g., Del. Const. art. X, § 2, “The General Assembly shall make provision ... for the benefit of the free public schools.... In such apportionment [of funding], no distinction shall be made on account of race or color”; Ky. Const. § 187, “In distributing the school fund no distinction shall be made on account of race or color.”
98. See *Gannon v. State* (Gannon VII), 443 P.3d 294, 296 (Kan. 2019); *Abbott v. Burke*, 575 A.2d 359, 411-12 (N.J. 1990); *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186, 212 (Ky. 1989). See also Sciarra, D. G., & Farrie, D. (2015). “From *Rodriguez* to *Abbott*: New Jersey’s Standards-Linked School Funding Reform” in Ogletree, C. J., Jr., & Robinson, K. J. (Eds.). *The Enduring Legacy of Rodriguez: Creating New Pathways to Equal Educational Opportunity* (pp. 119–142). Harvard Education Press; Ogletree, C. J., Jr., & Robinson, K. J. (2015). “Appendix: School Finance Litigation Cases” in Ogletree, C. J., Jr., & Robinson, K. J. (Eds.). *The Enduring Legacy of Rodriguez: Creating New Pathways to Equal Educational Opportunity* (pp. 275–280). Harvard Education Press; Baker, B. D. (2021). *School Finance and Education Equity: Lessons From Kansas*. Harvard Education Press; Newman, A. (2013). *Realizing Educational Rights: Advancing School Reform Through Courts and Communities*. University of Chicago Press. For an analysis of school finance systems, see: Hinojosa, D. (2018). *Essential building blocks for state school finance systems and promising state practices*. Learning Policy Institute. <https://learningpolicyinstitute.org/product/state-school-finance-systems-report>.
 99. Baker, B. D. (2017). *How money matters for schools*. Learning Policy Institute. <https://learningpolicyinstitute.org/product/how-money-matters-report>; Lafortune, J., Rothstein, J., & Schanzenbach, D. W. (2018). School finance reform and the distribution of student achievement. *American Economic Journal: Applied Economics*, 10(2), 1–26. <https://doi.org/10.1257/app.20160567>; Jackson, C. K., Johnson, R. C., & Persico, C. (2016). The effects of school spending on educational and economic outcomes: Evidence from school finance reforms. *Quarterly Journal of Economics*, 131(1), 157–218. <https://doi.org/10.1093/qje/qjv036>.
 100. *Bonner v. Daniels*, 907 N.E.2d 516, 518 (Ind. 2009), holding that the state’s education clause “does not mandate any judicially enforceable standard of quality”; *Oklahoma Education Association v. State*, 158 P.3d 1058, 1066 (Okla. 2007), holding that allegation of inadequate education funding is not proper for the court’s adjudication; *Committee for Educational Rights v. Edgar*, 672 N.E.2d 1178, 1193, 1195 (Ill. 1996), concluding that “the question of whether the educational institutions and services in Illinois are ‘high quality’ is outside the sphere of the judicial function” and holding that “[education] is not a fundamental individual right for equal protection purposes”; *City of Pawtucket v. Sundlun*, 662 A.2d 40, 55, 62 (R.I. 1995), holding that the Rhode Island Constitution’s education clause does not confer a fundamental right to education and that “the level of state educational funding is largely a matter for the Legislature”; *East Jackson Public Schools v. State*, 348 N.W.2d 303, 306–07 (Mich. Ct. App. 1984), finding that districts in Michigan cannot challenge the school funding system because they are “creations of the state”; Bowman, K. L. (2019). “The Inadequate Right to Education: A Case Study of Obstacles to State Protection” in Robinson, K. J. (Ed.). *A Federal Right to Education: Fundamental Questions for Our Democracy* (pp. 65–83). New York University Press. See also Ogletree, C. J., Jr., & Robinson, K. J. (2015). “Appendix: School Finance Litigation Cases” in Ogletree, C. J., Jr., & Robinson, K. J. (Eds.). *The Enduring Legacy of Rodriguez: Creating New Pathways to Equal Educational Opportunity* (pp. 275–280). Harvard Education Press, listing states where plaintiffs have never prevailed in litigation regarding a state right to education.
 101. Bowman, K. L. (2019). “The Inadequate Right to Education: A Case Study of Obstacles to State Protection” in Robinson, K. J. (Ed.). *A Federal Right to Education: Fundamental Questions for Our Democracy* (pp. 65–83). New York University Press.
 102. See The Equity and Excellence Commission. (2013). *For each and every child: A strategy for education equity and excellence*. U.S. Department of Education. <https://www2.ed.gov/about/bdscomm/list/eec/equity-excellence-commission-report.pdf>.

103. See Rebell, M. A. (2018). *Flunking Democracy: Schools, Courts, and Civic Participation*. University of Chicago Press; The Nation's Report Card. (2019). *NAEP report card: Reading: National student group scores and score gaps*. www.nationsreportcard.gov/reading/nation/groups/?grade=4 [<https://perma.cc/Z7FX-WELT>]; The Nation's Report Card. (2019). *NAEP report card: Mathematics: National student group scores and score gaps*. www.nationsreportcard.gov/mathematics/nation/groups/?grade=4 [<https://perma.cc/E247-S7KB>].
104. Black, D. W. (2017). Averting educational crisis: Funding cuts, teacher shortages, and the dwindling commitment to public education. *Washington University Law Review*, 94(2), 423–483; Bowman, K. L. (2019). “The Inadequate Right to Education: A Case Study of Obstacles to State Protection” in Robinson, K. J. (Ed.). *A Federal Right to Education: Fundamental Questions for Our Democracy* (pp. 65–83). New York University Press; Koski, W. S. (2017). Beyond dollars? The promises and pitfalls of the next generation of educational rights litigation. *Columbia Law Review*, 117(7), 1897–1932.
105. Bowman, K. L. (2019). “The Inadequate Right to Education: A Case Study of Obstacles to State Protection” in Robinson, K. J. (Ed.). *A Federal Right to Education: Fundamental Questions for Our Democracy* (pp. 65–83). New York University Press; Bowman, K. L. (2017). The failure of education federalism. *University of Michigan Journal of Law Reform*, 51(1), 1–54.
106. Robinson, K. J. (2019). “Introduction: The Essential Questions Regarding a Federal Right to Education” in Robinson, K. J. (Ed.). *A Federal Right to Education: Fundamental Questions for Our Democracy* (pp. 1–32). New York University Press.
107. Ryan, J. E. (2010). *Five Miles Away, A World Apart: One City, Two Schools, and the Story of Educational Opportunity in Modern America*. Oxford University Press. (p. 155).
108. Ryan, J. E. (2010). *Five Miles Away, A World Apart: One City, Two Schools, and the Story of Educational Opportunity in Modern America*. Oxford University Press.
109. Weishart, J. E. (2019). “Protecting a Federal Right to Educational Equality and Adequacy” in Robinson, K. J. (Ed.). *A Federal Right to Education: Fundamental Questions for Our Democracy* (pp. 303–326). New York University Press, explaining how both adequacy and equity could be protected through a federal right to education (p. 304).
110. See Brown, C. G. (2017). “From ESEA to ESSA: Progress or Regress?” in Hess, F. M., & Eden, M. (Eds.). *The Every Student Succeeds Act: What It Means for Schools, Systems, and States* (pp. 153–169). Harvard Education Press; Robinson, K. J. (2019). “Conclusion: An American Dream Deferred: A Federal Right to Education” in Robinson, K. J. (Ed.). *A Federal Right to Education: Fundamental Questions for Our Democracy* (pp. 327–338). New York University Press.
111. Baker, B. D., Weber, M., Srikanth, A., Kim, R., & Atzbi, M. (2018). *The real shame of the nation: The causes and consequences of interstate inequity in public school investments*. Education Law Center, Rutgers University. (pp. 2, 39).
112. See Black, D. W. (2018). The constitutional compromise to guarantee education. *Stanford Law Review*, 70(3), 735–838, documenting that when Congress was readmitting Southern states into the Union, it both explicitly and implicitly conditioned this readmission on the states guaranteeing education; Liu, G. (2006). Education, equality, and national citizenship. *Yale Law Journal*, 116(2), 330–411. <https://doi.org/10.2307/20455723>, recounting how congressmen during the 1870s and 1880s relied upon education as a civil right as the foundation for proposing federal legislation directing federal aid to public schools; McConnell, M. W. (1995). Originalism and the desegregation decisions. *Virginia Law Review*, 81(4), 947–1140. <https://doi.org/10.2307/1073539>, “By the turn of the century—and certainly by the time of the *Brown* decision in 1954—there could be little doubt that schools satisfied the criteria even the opponents of the 1875 Act understood for the existence of civil rights. The right to education had become stable, uniform, and legally enforceable” (p. 1104). But see: Eastman, J. C. (1998). When did education become a civil right? An assessment of state constitutional provisions for education 1776–1990. *American Journal of Legal History*, 42(1), 1–34. <https://doi.org/10.2307/846002>, contending that although many states protected education as a civil right when they drafted or revised state constitutions in our nation's early history, education was not a civil right by the end of the 19th century because a state could decline to provide it.
113. Robinson, K. J. (2015). Disrupting education federalism. *Washington University Law Review*, 92(4), 959–1018; Robinson, K. J. (2018). Restructuring the Elementary and Secondary Education Act's approach to equity. *Minnesota Law Review*, 103(2), 915–998.

114. Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015); Robinson, K. J. (2018). Restructuring the Elementary and Secondary Education Act’s approach to equity. *Minnesota Law Review*, 103(2), 915–998.
115. ESEA conditioned federal funding on states adopting challenging state standards. See: Improving America’s Schools Act of 1994, 20 U.S.C. § 6311(b)(1)(D)(3) (1995) (repealed 2001), requiring states to adopt challenging content and performance standards in math and reading; No Child Left Behind (NCLB), 20 U.S.C. § 6311(b)(1)(A)-(C) (2012) (repealed 2015), requiring states to adopt challenging academic standards in math, reading, and science; and Every Student Succeeds Act (ESSA), 20 U.S.C. § 6311(b)(1)(A), (C) & (D) (2016), requiring states to adopt challenging academic standards in math, reading, and science. For requirements on disaggregating and publishing of student test scores, see NCLB, § 6311(b)(3)(C)(xiii), requiring test scores to be disaggregated by gender, major racial and ethnic group, English proficiency status, disability, migrant status, and economic disadvantage; NCLB § 6311 (h)(1) & (2), requiring states and districts to publish report cards of disaggregated student test scores; ESSA § 6311(b)(2)(B)(xi)(I)-(VI), requiring test scores to be disaggregated by major racial and ethnic group, economic disadvantage, gender, disability, English proficiency, and migrant status; and ESSA § 6311(h)(1) & (2), requiring states to publish report cards of disaggregated student test scores.
116. See Robinson, K. J. (2016). No quick fix for equity and excellence: The virtues of incremental shifts in education federalism. *Stanford Law & Policy Review*, 27(2), 210–250.
117. Robinson, K. J. (2013). The high cost of education federalism. *Wake Forest Law Review*, 48(2), 287–332.
118. Abrams, K. (2015). “Performative Citizenship in the Civil Rights and Immigrant Rights Movements” in Katz, E. D., & Bagenstos, S. R. (Eds.). *A Nation of Widening Opportunities: The Civil Rights Act at 50* (pp. 1–28). Michigan Publishing.
119. See Newman, A. (2013). *Realizing Educational Rights: Advancing School Reform Through Courts and Communities*. University of Chicago Press, “Rights give us a moral vocabulary with which to express our aspirations for education for democratic citizenship, and by extension, for a more just society. They also empower individuals to lay claim to the education they deserve here and now.” (p. 116).
120. Robinson, K. J. (2015). Disrupting education federalism. *Washington University Law Review*, 92(4), 959–1018; Cohen, D. K., & Moffitt, S. L. (2009). *The Ordeal of Equality: Did Federal Regulation Fix the Schools?* Harvard University Press.
121. See Kirkpatrick, M. T., & Kwoka, M. B. (2009). Title VI disparate impact claims would not harm national security—A response to Paul Taylor. *Harvard Journal on Legislation*, 46(2), 503–536, “Congress should amend Title VI to explicitly allow a private right of action for claims of discrimination based on disparate impact.... Such legislation is necessary to eliminate discrimination in federally-funded programs in circumstances where the disparate treatment theory is inadequate to establish liability” (p. 511); Chemerinsky, E. (2003). Closing the courthouse doors to civil rights litigants. *University of Pennsylvania Journal of Constitutional Law*, 5(3), 537–557, “There are avenues for reopening the courthouse doors to civil rights litigants.... For example, Congress, by statute, could amend Title VI to overcome *Alexander v. Sandoval* and allow suits to enforce the regulations which prohibit recipients of federal funds from engaging in practices with a racially discriminatory impact” (p. 555).
122. 532 U.S. 275, 285–286 (2001); Black, D. (2002). Picking up the pieces after *Alexander v. Sandoval*: Resurrecting a private cause of action for disparate impact. *North Carolina Law Review*, 81(1), 356–391.
123. Cole, J. P. (2019). *Civil rights at school: Agency enforcement of Title VI of the Civil Rights Act of 1964* (R45665). Congressional Research Services. <https://files.eric.ed.gov/fulltext/ED597849.pdf> [<https://perma.cc/2DLD-WZBG>], listing all federal disparate impact regulations by Cabinet-level departments and some smaller federal agencies.
124. See, e.g., *Powell v. Ridge*, 189 F.3d 387 (3d Cir. 1999), rejecting a motion to dismiss a disparate impact claim against the Pennsylvania school funding scheme; *Larry P. v. Riles*, 793 F.2d 969, 981-83 (9th Cir. 1984), upholding a Title VI disparate impact claim against tests used to place students in classes for individuals with significant intellectual disabilities.

125. Office for Civil Rights. (2016). *Securing equal educational opportunity: Report to the President and Secretary of Education: Fiscal year 2016*. U.S. Department of Education. <https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf> (noting that OCR provided almost 100 technical assistance events regarding Title VI issues in fiscal year 2016); Office for Civil Rights. (2016). *Delivering justice: Report to the President and Secretary of Education: Fiscal year 2015*. U.S. Department of Education. <https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2015.pdf> (noting that OCR provided almost 100 technical assistance events regarding Title VI issues in fiscal year 2015); Office for Civil Rights. (2015). *Protecting civil rights, advancing equity: Report to the President and Secretary of Education: Fiscal year 2013–2014*. U.S. Department of Education. <https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2013-14.pdf> (noting that OCR provided 216 technical assistance events regarding Title VI issues in fiscal year 2013–14). The U.S. Department of Education’s Equity Assistance Centers are a resource for the OCR that provide technical assistance to school districts on issues relating to discrimination on the basis of race, national origin, sex, and religion; Office of Elementary and Secondary Education. (2020, November 13). *Training and advisory services: Equity assistance centers*. U.S. Department of Education. <https://oese.ed.gov/offices/office-of-formula-grants/program-and-grantee-support-services/training-and-advisory-services-equity-assistance-centers/>.
126. Morgan, I., & Amerikaner, A. (2018). *Funding gaps: An analysis of school funding equity across the U.S. and within each state*. The Education Trust. <https://s3-us-east-2.amazonaws.com/edtrustmain/wp-content/uploads/2014/09/20180601/Funding-Gaps-2018-Report-UPDATED.pdf>.
127. See Dear Colleague Letter from Catherine E. Lhamon, Assistant Secretary for Civil Rights, U.S. Department of Education. (2014, October 1). *Resource comparability and equitable access to school resources*. <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf>.
128. Robinson, K. J. (2015). Disrupting education federalism. *Washington University Law Review*, 92(4), 959–1018.
129. George, J. (2016). Populating the pipeline: School policing and the persistence of the school-to-prison pipeline. *Nova Law Review*, 40(3), 493–526.
130. U.S. Department of Education. (2021, March 29). *Budget history tables: FY 1980–FY 2021* [Excel spreadsheet]. <https://www2.ed.gov/about/overview/budget/history/index.html>.
131. The Office for Civil Rights reported 5,296 complaints received and 4,981 cases resolved in 1997; 16,720 complaints received and 8,625 cases resolved in 2016; and 9,711 complaints received and 10,185 cases resolved in 2020. Office for Civil Rights. (1998). *Annual report to Congress: Fiscal year 1997 (Part II)*. U.S. Department of Education. <https://www2.ed.gov/about/offices/list/ocr/AnnRpt97/edlite-index.html>; Office for Civil Rights. (2016). *Securing equal educational opportunity: Report to the President and Secretary of Education: Fiscal year 2016*. U.S. Department of Education. <https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf>; Office for Civil Rights. (2021). *Annual report to the Secretary, the President, and the Congress: Fiscal year 2020*. U.S. Department of Education. <https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2020.pdf>.
132. See U.S. Department of Justice. (n.d.). Educational Opportunities Section. <https://www.justice.gov/crt/educational-opportunities-section> [<https://perma.cc/V2QD-4ZR3>].
133. *Elston v. Talladega County Board of Education*, 997 F.2d 1394, 1407 (11th Cir. 1993); *Larry P. v. Riles*, 793 F.2d 969, 983 (9th Cir. 1984).
134. For an example of a more rigorous interpretation of educational necessity, see *Elston*, 997 F.2d at 1412, interpreting educational necessity to mean that the practice “is demonstrably necessary to meeting an important educational goal.” For an example of a more lenient interpretation, see *GI Forum v. Texas Education Agency*, 87 F. Supp. 2d 667, 679 (W.D. Tex. 2000), explaining that “educational necessity exists where the challenged practice serves the *legitimate* educational goals of the institution.”

135. When the Department of Health, Education, and Welfare issued guidance about school desegregation, some federal courts adopted the substance of the guidance as the essential requirements for desegregation. Harriger, K. J. (2016). The Civil Rights Act of 1964 and school desegregation: A double-edged sword? *Wake Forest Journal of Law & Policy*, 6(1), 157–212; Orfield, G. (2000). “The 1964 Civil Rights Act and American Education” in Grofman, B. (Ed.). *Legacies of the 1964 Civil Rights Act* (pp. 89–128). University Press of Virginia. The Court of Appeals for the Fifth Circuit, which had jurisdiction over the most recalcitrant Southern states when it came to desegregation, adopted the Department of Health, Education, and Welfare’s 1966 regulations that required effective desegregation of both students and faculty that created integrated schools as the appropriate judicial standard (pp. 104–105).
136. West, R. L. (2019). *Civil Rights: Rethinking Their Natural Foundation*. Cambridge University Press. (p. 217).
137. Robinson, K. J. (2018). Restructuring the Elementary and Secondary Education Act’s approach to equity. *Minnesota Law Review*, 103(2), 915–998.
138. Robinson, K. J. (Ed.). (2019). *A Federal Right to Education: Fundamental Questions for Our Democracy*. New York University Press.
139. Manna, P. (2011). *Collision Course: Federal Education Policy Meets State and Local Realities*. CQ Press, discussing the challenges of implementing the federal objectives of the No Child Left Behind Act through state actors; Robinson, K. J. (2015). Disrupting education federalism. *Washington University Law Review*, 92(4), 959–1018, noting the traditional U.S. focus on state and local control of education and a limited federal role as well as the benefits of this approach.
140. See Pasachoff, E. (2019). “Doctrine, Politics, and the Limits of a Federal Right to Education” in Robinson, K. J. (Ed.). *A Federal Right to Education: Fundamental Questions for Our Democracy* (pp. 84–108). New York University Press.
141. See generally Robinson, K. J. (Ed.). (2019). *A Federal Right to Education: Fundamental Questions for Our Democracy*. New York University Press.
142. See Robinson, K. J. (2016). No quick fix for equity and excellence: The virtues of incremental shifts in education federalism. *Stanford Law & Policy Review*, 27(2), 210–250.
143. See Robinson, K. J. (2019). “Conclusion: An American Dream Deferred: A Federal Right to Education” in Robinson, K. J. (Ed.). *A Federal Right to Education: Fundamental Questions for Our Democracy* (pp. 327–338). New York University Press.
144. See Nance, J. P. (2019). “The Justifications for a Stronger Federal Response to Address Educational Inequalities” in Robinson, K. J. (Ed.). *A Federal Right to Education: Fundamental Questions for Our Democracy* (pp. 35–64). New York University Press.
145. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 221 (1982); *Ambach v. Norwick*, 441 U.S. 68, 77 (1979); *School District of Abington Township v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring).
146. *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).
147. Rebell, M. A. (2018). *Flunking Democracy: Schools, Courts, and Civic Participation*. University of Chicago Press.
148. Rebell, M. A. (2018). *Flunking Democracy: Schools, Courts, and Civic Participation*. University of Chicago Press.
149. See Nance, J. P. (2019). “The Justifications for a Stronger Federal Response to Address Educational Inequalities” in Robinson, K. J. (Ed.). *A Federal Right to Education: Fundamental Questions for Our Democracy* (pp. 35–64). New York University Press.
150. *Plyler v. Doe* at 221.
151. See Nance, J. P. (2019). “The Justifications for a Stronger Federal Response to Address Educational Inequalities” in Robinson, K. J. (Ed.). *A Federal Right to Education: Fundamental Questions for Our Democracy* (pp. 35–64). New York University Press. See also Robinson, G., & Smith, E. E. (2019). “Introduction” in Robinson, G., & Smith, E. E. (Eds.). *Education for Liberation: The Politics of Promise and Reform Inside and Beyond America’s Prisons* (pp. 1–8). Rowman & Littlefield, noting the lack of a high-quality education for the incarcerated and the importance of educating incarcerated individuals to prepare them for reentry into society.

152. U.S. Department of Education. (n.d.). College- and career-ready standards. <https://www.ed.gov/k-12reforms/standards> [<https://perma.cc/VZG3-9ANK>].
153. Phillips, G. W. (2014). *International benchmarking: State and national education performance standards*. American Institutes for Research. https://www.air.org/sites/default/files/downloads/report/AIR_Int_Benchmarking_State_Ed_Perf_Standards_0.pdf.
154. Phillips, G. W. (2014). *International benchmarking: State and national education performance standards*. American Institutes for Research. https://www.air.org/sites/default/files/downloads/report/AIR_Int_Benchmarking_State_Ed_Perf_Standards_0.pdf. (p. iv, emphasis in original).
155. See generally: Paige, R., & Witty, E. (2010). *The black-white achievement gap: Why closing it is the greatest civil rights issue of our time*. American Management Association, explaining why closing the black-white achievement gap is a civil rights imperative; Rothstein, R. (2004). *Class and schools: Using social, economic, and educational reform to close the black-white achievement gap*. Economic Policy Institute, explaining why closing the black-white achievement gap will require reforming public policy to address the economic and social influences on educational outcomes.
156. See: Brown, C. G. (2017). “From ESEA to ESSA: Progress or Regress?” in Hess, F. M., & Eden, M. (Eds). *The Every Student Succeeds Act: What It Means for Schools, Systems, and States* (pp. 153–170). Harvard Education Press; Barone, C., & DeBray, E. (2011). “Education Policy in Congress: Perspectives From Inside and Out” in Hess, F. M., & Kelly, A. P. (Eds.). *Carrots, Sticks, and the Bully Pulpit: Lessons From a Half-Century of Federal Efforts to Improve America’s Schools* (pp. 61–82). Harvard Education Press; Robinson, K. J. (2016). No quick fix for equity and excellence: The virtues of incremental shifts in education federalism. *Stanford Law & Policy Review*, 27(2), 210–250.
157. See McGuinn, P. (2012). Stimulating reform: Race to the top, competitive grants and the Obama education agenda. *Education Policy*, 26(1), 136–159. <https://doi.org/10.1177%2F0895904811425911>.
158. Newman, A. (2013). *Realizing Educational Rights: Advancing School Reform Through Courts and Communities*. University of Chicago Press.
159. Robinson, K. J. (2007). The case for a collaborative enforcement model for a federal right to education. *UC Davis Law Review*, 40(5), 1653–1747. The proposed collaborative approach requires a federal panel or commission to provide research-based recommendations to states based on state and public reports of state protection of a federal right to education. The approach also recommends that technical and financial assistance should accompany federal accountability to expand state capacity to implement comprehensive reforms.
160. See, for example, the outcomes in *Gary B. v. Witmer*, *A.C. v. Raimondo*, *A.C. v. McKee*, and *Martinez v. Malloy*.
161. Cal. Educ. Code § 220 (Deering Supp. 2021), “No person shall be subjected to discrimination on the basis of disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code, including immigration status, in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance, or enrolls pupils who receive state student financial aid”; Conn. Gen. Stat. § 46a-75 (2019), “All educational, counseling, and vocational guidance programs and all apprenticeship and on-the-job training programs of state agencies, or in which state agencies participate, shall be open to all qualified persons, without regard to race, color, religious creed, sex, gender identity or expression, marital status, age, national origin, ancestry, intellectual disability, mental disability, learning disability, physical disability, including, but not limited to, blindness, or status as a veteran”; N.Y. Exec. Law § 291 (Consol. 2021), “The opportunity to obtain education, the use of places of public accommodation and the ownership, use and occupancy of housing accommodations and commercial space without discrimination because of age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, marital status, or disability, ... is hereby recognized as and declared to be a civil right.”
162. N.H. Rev. Stat. Ann. § 354-A:27 (Supp. 2019).
163. Or. Rev. Stat. Ann. § 659.850(1) (West Supp. 2021).

164. See Levy, M. K. (2020). Packing and unpacking state courts. *William & Mary Law Review*, 61(4), 1121–1158, citing Council of State Governments (2018). *Book of the States 2018*, tbl. 1.3, “The states have different requirements for amending their constitutions but, by and large, it is an easier lift, politically-speaking, to enact legislation than it is to change one’s constitution” (p. 1151).
165. Marshfield, J. L. (2019). Forgotten limits on the power to amend state constitutions. *Northwestern University Law Review*, 114(1), 65–148.
166. Federal OTL standards were attempted but eventually repealed. Robinson, K. J. (2015). Disrupting education federalism. *Washington University Law Review*, 92(4), 959–1018.
167. Robinson, K. J. (2016). No quick fix for equity and excellence: The virtues of incremental shifts in education federalism. *Stanford Law & Policy Review*, 27(2), 201–250. (p. 206).
168. Hinojosa, D. (2018). *Essential building blocks for state school finance systems and promising state practices*. Learning Policy Institute. <https://learningpolicyinstitute.org/product/state-school-finance-systems-report>.
169. See Bowman, K. L. (2019). “The Inadequate Right to Education: A Case Study of Obstacles to State Protection” in Robinson, K. J. (Ed.). *A Federal Right to Education: Fundamental Questions for Our Democracy* (pp. 65–83). New York University Press.
170. Darling-Hammond, L. (2019). “Assuring Essential Educational Resources Through a Federal Right to Education” in Robinson, K. J. (Ed.). *A Federal Right to Education: Fundamental Questions for Our Democracy* (pp. 235–260). New York University Press. (p. 241).
171. West, R. L. (2019). *Civil Rights: Rethinking Their Natural Foundation*. Cambridge University Press.
172. West, R. L. (2019). *Civil Rights: Rethinking Their Natural Foundation*. Cambridge University Press.
173. West, R. L. (2019). *Civil Rights: Rethinking Their Natural Foundation*. Cambridge University Press. (p. 217).
174. Obama, M. (2015, Feb. 20). Remarks by the First Lady at the Black History Month “Celebrating Women of the Civil Rights Movement” Panel. <https://obamawhitehouse.archives.gov/the-press-office/2015/02/20/remarks-first-lady-black-history-month-celebrating-women-civil-rights-mo> [<https://perma.cc/97BP-AJ73>], “I believe that education is the single-most important civil rights issue that we face today. Because in the end, if we really want to solve issues like mass incarceration, poverty, racial profiling, voting rights, and the kinds of challenges that shocked so many of us over the past year, then we simply cannot afford to lose out on the potential of even one young person. We cannot allow even one more young person to fall through the cracks.”

About the Author

Kimberly Jenkins Robinson is the Elizabeth D. and Richard A. Merrill Professor of Law at the University of Virginia School of Law; Professor of Education, University of Virginia School of Education and Human Development; and Professor of Law, Education, and Public Policy at the Frank Batten School of Leadership and Public Policy at the University of Virginia. She also is a Senior Fellow at the Miller Center and a Faculty Affiliate at the Equity Center at the University of Virginia. She is a national expert who speaks broadly about educational equity, equal educational opportunity, civil rights, and the federal role in education. She published the edited volumes *A Federal Right to Education: Fundamental Questions for Our Democracy* (New York University Press, 2019) and, with Professor Charles Ogletree Jr. of Harvard Law School, published *The Enduring Legacy of Rodriguez: Creating New Pathways to Equal Educational Opportunity* (Harvard Education Press, 2015). Her scholarship has been published widely in leading journals, including the *Harvard Law Review*, and proposes innovative legal and policy solutions for ensuring that all children receive equal access to an excellent education. She served in the General Counsel's Office of the U.S. Department of Education and as an education litigation associate with Hogan & Hartson (now Hogan Lovells). She graduated cum laude from Harvard Law School and with a B.A. in foreign affairs from the University of Virginia.



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