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Democratizing Education Rights

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DEMOCRATIZING EDUCATION RIGHTS

Joshua E. Weishart*

ABSTRACT

If the United States is to reverse its creeping, illiberal descent, generations of youth must emerge from this tribal, post-truth, pandemic-shattered era to mend democracy. Hope for that uncertain future lies in re-engineering how schoolchildren learn democracy—not from a civics textbook but by experiencing it in the classroom. The sad irony is that we still lack a knowledge base, grounded in research, for that type of democratic education. Nearly two and a half centuries into the republic’s existence, our commitment to democratic education is honored more in the breach than in observance. And our uninformed, polarized, and disaffected electorate is no happy coincidence.

As calls to “reimagine education” mount in the time of coronavirus, this Article is the first to propose a constitutional remedy—an individualized education plan (IEP)—for all schoolchildren to bring democracy directly to the classroom. This IEPs-for-all remedy animates an affirmative duty long neglected but firmly established in the text, history, and precedents of state constitutions: the duty to educate democratically. This Article is the first to distinguish this duty apart from constitutional obligations of equality and adequacy, contending that the duty to educate democratically guarantees public schooling for and *through* democracy.

Borrowing a process from its namesake in special education law, the IEPs-for-all remedy signals that all education is special by giving students a voice in their own education and teachers more autonomous choices over how to address their students’ needs, capacities, and interests. Such forms of democratic participation can empower teachers to teach and students to learn democracy through experience. Retooled for data collection, the IEP can also amass a knowledge base about educational needs, interventions, and effective instructional practices to inform democratic decision-making—locally at first in the classrooms, schools, districts, and then eventually in the states charged with the constitutional duty to educate democratically.

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INTRODUCTION

Democracy and education are on a perilous course together—having been driven apart. Wedged between them: segregated schools, unfair funding, high-stakes testing, and market-driven reforms. In truth, however, the inextricable link between education and democracy has long been oversold. Education no more guarantees a quality democracy than does democracy guarantee a quality education.

If test scores are a proxy for educational quality, authoritarian countries perform as well or better than democracies.¹ Singapore and Chinese provinces top global rankings in math, science, and reading.² The average Russian and Vietnamese student

¹ See Sirianne Dahlum & Carl Henrik Knutsen, *Do Democracies Provide Better Education? Revisiting the Democracy-Human Capital Link*, 94 *WORLD DEV.* 186, 193 (2017).

² See Louis Volante et al., *New Global Testing Standards Will Force Countries to Revisit Academic Rankings*, CONVERSATION (Apr. 16, 2019, 6:46 PM), <https://theconversation.com/new-global-testing-standards-will-force-countries-to-revisit-academic-rankings-115199> [<https://perma.cc/4E6N-HQVJ>]; Andreas Schleicher, *PISA 2018: Insights and Interpretations*,

outperforms the average American student on those measures.³ Some authoritarian regimes are now outpacing developed democracies in their educational investments.⁴ And yet the overall increase in education has not been met with increased democratization in these regimes.⁵ On the contrary, research suggests autocracies can actually stave off democratization by increasing their educational expenditures.⁶

If schooling is a proxy for educational quality, democracies far surpass autocracies. Democracies provide *more* schooling, to *more* citizens.⁷ But more does not always mean *better* education, for *better* citizens.⁸ Democracy is, in fact, declining around the world, stretched thin by widening inequality, political polarization, populism, disillusionment with and distrust of democratic institutions, and under growing threat from authoritarianism.⁹ Mass schooling in democracies perhaps slowed but has not halted

OECD (2019), <https://www.oecd.org/pisa/PISA%202018%20Insights%20and%20Interpretations%20FINAL%20PDF.pdf> [<https://perma.cc/A836-7TW6>].

³ Sirianne Dahlum & Carl Henrik Knutsen, *Democracies Are No Better at Educating Students than Autocracies. This Is Why.*, WASH. POST (June 13, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/06/13/democracies-are-no-better-at-educating-than-autocracies-this-is-why/> [<https://perma.cc/P78B-5QN8>].

⁴ See Paul D. Shinkman, *U.S. Investment in 'Human Capital' Plunges While China's Rises*, U.S. NEWS (Sept. 24, 2018), <https://www.usnews.com/news/best-countries/articles/2018-09-24/us-investment-in-human-capital-plunges-while-chinas-rises> [<https://perma.cc/ESP5-YV6G>]; Linda Yulisman, *Singapore Tops New Index on Investing in Education, Health*, STRAITS TIMES (Oct. 12, 2018, 5:00 AM SGT), <https://www.straitstimes.com/world/singapore-tops-new-index-on-investing-in-education-health> [<https://perma.cc/TPS6-UNM5>]. See generally Santiago Lopez-Cariboni & Xun Cao, *When Do Authoritarian Rulers Educate: Trade Competition and Human Capital Investment in Non-Democracies*, 14 REV. INT'L ORGANIZATIONS 367 (2019).

⁵ See Anders Corr, *Waiting for China to Democratize? Holding Your Breath May Be Fatal*, FORBES (Apr. 3, 2017), <https://bit.ly/32oVXS9> [<https://perma.cc/VCU6-V9EE>]; Danni Mei, *The Growing Middle Class and the Absence of Democracy in China*, CUNY ACAD. WORKS 37 (2019), https://academicworks.cuny.edu/gc_etds/3179 [<https://perma.cc/ZRC8-RECW>]; Lee Morgenbesser & Thomas B. Pepinsky, *Elections as Causes of Democratization: Southeast Asia in Comparative Perspective*, 52 COMP. POL. STUD. 3, 20 (2019).

⁶ Eric C. C. Chang & Wen-Chin Wu, *Autocracy and Human Capital* (2018) (Preliminary Draft, prepared for presentation at the International Political Economy Society Conference at MIT on Nov. 2–3, 2018, cited with permission from authors), https://www.internationalpoliticaleconomicsociety.org/sites/default/files/paper-uploads/2018-10-28-18_45_13-echang@msu.edu.pdf [<https://perma.cc/75FV-WL67>]; see also Kevin Croke et al., *Deliberate Disengagement: How Education Can Decrease Political Participation in Electoral Authoritarian Regimes*, 110 AM. POL. SCI. REV. 579, 580 (2016).

⁷ See Dahlum & Knutsen, *supra* note 1, at 186 (citing to a “vast literature, drawing on contemporary and historical data from different regions of the world”).

⁸ See Daron Acemoglu et al., *From Education to Democracy?*, 95 AM. ECON. REV. 44, 47–48 (May 2005) (reporting study suggesting that, with country-fixed effect, more education does not necessarily make for stronger democratic institutions or support among the population for democratic reforms).

⁹ See FREEDOM HOUSE, *DEMOCRACY IN RETREAT* (2019), <https://bit.ly/2CoRWSZ> [<https://perma.cc/L4XS-4MA8>]; see also *Democracy Index 2018: Me Too?: Political Participation*,

this illiberal descent. Quantity has not meant quality, at least judged by the apparent diminished capacity of citizens in democracies to sustain and progress democracy.¹⁰

To be sure, education is necessary to secure the conditions for democracy,¹¹ but it is not sufficient to make democracy work, if education is not itself democratic. This notion of a “democratic education,” while susceptible to different meanings and applications,¹² essentially entails a “reciprocal relationship between democracy and education.”¹³ Its origins lie in ancient Greek philosophy extolling the virtues of citizenship education.¹⁴ Variations on that theme were later espoused by Locke and Rousseau.¹⁵ Our most prominent Founders—Jefferson, Franklin, Washington, and Adams—were also firmly convinced, embracing civic education as though the survival of their new republic depended on it.¹⁶ The law, most notably state constitutions, reflected as much.¹⁷

Protest and Democracy, ECONOMIST INTELLIGENCE UNIT (2019); Yascha Mounk & Roberto Stefan Foa, *The End of the Democratic Century: Autocracy’s Global Ascendance*, 97 FOREIGN AFF. 29, 30 (2018). See generally CONSTITUTIONAL DEMOCRACY IN CRISIS? (Mark A. Graber, Sanford Levinson & Mark Tushnet eds., 2018); DEMOCRACIES DIVIDED: THE GLOBAL CHALLENGE OF POLITICAL POLARIZATION (Thomas Carothers & Andrew O’Donohue eds., 2019).

¹⁰ See Charles Edel, *Democracy Is Fighting for Its Life*, FOREIGN POL’Y (Sept. 10, 2019), <https://foreignpolicy.com/2019/09/10/democracy-is-fighting-for-its-life> [<https://perma.cc/NC4U-DEAW>]; Quinton Mayne & Brigitte Geißel, *Don’t Good Democracies Need “Good” Citizens? Citizen Dispositions and the Study of Democratic Quality*, 6 POL. & GOVERNANCE 33, 43–44 (2018).

¹¹ See ADAM PRZEWORSKI ET AL., DEMOCRACY AND DEVELOPMENT: POLITICAL INSTITUTIONS AND WELL-BEING IN THE WORLD, 1950–1990 (2000); Eduardo Aleman & Yeaji Kim, *The Democratizing Effect of Education*, RES. & POL., 1–2 (2015); Nicholas Apergis, *Education and Democracy: New Evidence from 161 Countries*, 71 ECON. MODELLING 59, 66 (2018); Robert Barro, *Determinants of Democracy*, 107 J. POL. ECON. 158, 158, 166–67 (1999); Edward L. Glaser et al., *Why Does Democracy Need Education?*, 12 J. ECON. GROWTH 77, 79, 81 (2007); Seymour Martin Lipset, *Some Social Requisites for Democracy: Economic Development and Political Legitimacy*, 53 AM. POL. SCI. REV. 69, 78–80 (1959).

¹² See Edda Sant, *Democratic Education: A Theoretical Review (2006–2017)*, 89 REV. EDUC. RES. 655, 657 (2019).

¹³ See Kathy Hytten, *Democracy and Education in the United States*, OXFORD RESEARCH ENCYCLOPEDIA, EDUC. (2017), <https://bit.ly/2LgALrE> [<https://perma.cc/U47E-UURA>].

¹⁴ See DEREK HEATER, A HISTORY OF EDUCATION FOR CITIZENSHIP 1–2, 9, 13 (2004).

¹⁵ See generally Jonathan Marks, *Rousseau’s Critique of Locke’s Education for Liberty*, 74 J. POL. 694 (2012).

¹⁶ See LORRAINE SMITH PANGLE & THOMAS L. PANGLE, THE LEARNING OF LIBERTY: THE EDUCATIONAL IDEAS OF THE AMERICAN FOUNDERS 94, 96–98 (1993); Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1081–85 (2019). See generally Sandra Day O’Connor, *The Democratic Purpose of Education: From the Founders to Horace Mann to Today*, in TEACHING AMERICA: THE CASE FOR CIVIC EDUCATION (David Feith ed., 2011).

¹⁷ See Joshua E. Weishart, *Equal Liberty in Proportion*, 59 WM. & MARY L. REV. 215, 232–33 (2017) (citing state constitutional provisions and case law).

Yet the progression has not always been linear because civic education's lineage has not been exclusively democratic. Authoritarian countries have engaged in civic education as well to indoctrinate autocratic values and preferences.¹⁸ Those autocratic beliefs systems indeed prevailed for “the greater part of human history.”¹⁹

At the dawn of the twentieth century, John Dewey sought to reclaim education as a distinctively democratic project.²⁰ Democratic education, he proposed, is about more than the transmission of civic knowledge—it is about an “associated” democratic way of “living.”²¹ That way of life cannot simply be taught from a textbook to passive learners, it has to be experienced and socially constructed with diverse, active learners in a classroom that is its own democratic community.²² The social dimension of schooling through this experiential, participatory learning process is essential, in Dewey's view, to inculcate the capacities and habits of interaction and cooperative problem-solving necessary for democratic communities to thrive.²³

In the life of a democracy then, “education is not a mere means to such a life. Education is such a life.”²⁴ So conceived, democratic education is not “education *for* democracy” but rather “education *through* democracy.”²⁵

Well into the twenty-first century, Dewey's democratic education continues to influence educational thought, but has never been fully implemented in practice.²⁶ Within a decade of Dewey's *Democracy and Education*, “citizenship education was entrenched firmly in American schools, by professional guidance, state legislation and the publication of textbooks.”²⁷ But even at its peak, civic education was never a top priority, often neglected at the expense of reading, math, and science.²⁸ By the

¹⁸ See CHARLES L. GLENN, *CONTRASTING MODELS OF STATE AND SCHOOL: A COMPARATIVE HISTORICAL STUDY OF PARENTAL CHOICE AND STATE CONTROL* (2011); HEATER, *supra* note 14, at 152–53. See generally RUSSELL F. FARNEN & JOS D. MELOEN, *DEMOCRACY, AUTHORITARIANISM AND EDUCATION* (2000).

¹⁹ See John Dewey, *Religion and Morality in a Free Society*, in 15 JOHN DEWEY: THE LATER WORKS 173 (Jo Ann Boydston ed., 1983).

²⁰ See generally JOHN DEWEY, *DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION* (1916).

²¹ *Id.* at 87.

²² See JIM GARRISON ET AL., *DEMOCRACY AND EDUCATION RECONSIDERED: DEWEY AFTER ONE HUNDRED YEARS* 109–10 (2016); ROBERT B. WESTBROOK, *JOHN DEWEY AND AMERICAN DEMOCRACY* 171–72 (1991); Sarah M. Stitzlein, *Habits of Democracy: A Deweyan Approach to Citizenship Education in America Today*, 30 *EDUC. & CULTURE* 61, 62–63 (2014).

²³ See Gert Biesta, *Education and the Democratic Person: Towards a Political Conception of Democratic Education*, 109 *TEACHERS C. REC.* 740 (2007). See generally WALTER FEINBERG, *DEWEY AND EDUCATION* (2018).

²⁴ DEWEY, *supra* note 20, at 359–60.

²⁵ See Biesta, *supra* note 23, at 742; Sant, *supra* note 12, at 681–83 (modified emphasis).

²⁶ See Walter Feinberg, *Dewey, John*, in *ENCYCLOPEDIA OF EDUCATIONAL THEORY & PHILOSOPHY* 228 (D.C. Phillips ed., 2014).

²⁷ HEATER, *supra* note 14, at 120.

²⁸ See *id.* at 121–22.

1970s, with the nation in the grips of the Watergate scandal, “citizenship education was in chaos.”²⁹ Sidelined further by an emphasis on marketable, career-ready skills and the pressure to improve standardized test scores, it has not since recovered.³⁰

Today, with the nation once again gripped by scandals at the highest levels of government, civic knowledge and participation—when most needed—are least reliable:

- Only 23% of eighth graders scored at or above proficiency on the most recent National Assessment of Educational Progress (NAEP) civics exam.³¹
- Perhaps little wonder then that about 75% of Americans cannot name all three branches of government and, more distressing, a full third cannot name *any* of the three branches.³²
- Voter turnout in the 2016 election was near its lowest in twenty years. That puts Americans’ voter participation near the bottom—26th out of 32 developed democracies.³³
- Most alarming, American youth are increasingly ambivalent about, or have lost faith entirely in, democracy.³⁴ Fewer object to military coups or see the importance of free elections,³⁵ a sizeable percentage would prefer technocracy to democracy,³⁶ and there has been spike in the number of youth who say democracy is “bad” or “very bad.”³⁷

²⁹ *Id.* at 122.

³⁰ See U.S. DEP’T OF EDUC., ADVANCING CIVIC LEARNING AND ENGAGEMENT IN DEMOCRACY: A ROAD MAP AND CALL TO ACTION 1 (2012) (“Many elementary and secondary schools are pushing civics and service-learning to the sidelines, mistakenly treating education for citizenship as a distraction from preparing students for college-level mathematics, English, and other core subjects.”).

³¹ *New Results Show Eighth Graders’ Knowledge of U.S. History, Geography, and Civics*, THE NATION’S REPORT CARD (2014), <https://bit.ly/2On9ea0> [<https://perma.cc/82ZK-5QQM>].

³² *Americans’ Knowledge of the Branches of Government Is Declining*, ANNENBERG PUB. POL’Y CTR. UNIV. PA. (Sept. 13, 2016), <https://www.annenbergpublicpolicycenter.org/americans-knowledge-of-the-branches-of-government-is-declining/> [<https://perma.cc/J96P-TJPG>].

³³ Drew Desilver, *U.S. Trails Most Developed Countries in Voter Turnout*, PEW RESEARCH CTR. (May 21, 2018), <https://pewrsr.ch/2XPKt9J> [<https://perma.cc/AU75-RCPE>].

³⁴ See Roberto Stefan Foa & Yascha Mounk, *The Danger of Deconsolidation: The Democratic Disconnect*, 27 J. DEMOCRACY 5, 7–8 (2016).

³⁵ See *id.* at 9–10, 12–13.

³⁶ Richard Wike et al., *Democracy Widely Supported, Little Backing for Rule by Strong Leader or Military*, PEW RESEARCH CTR. (Oct. 16, 2017), <https://pewrsr.ch/2snuUu7> [<https://perma.cc/AB3A-2G5B>].

³⁷ See Yascha Mounk & Roberto Stefan Foa, *Yes, People Really Are Turning Away from Democracy*, WASH. POST (Dec. 8, 2016), <https://wapo.st/33ryGiK> [<https://perma.cc/XVT8-HGUS>]. Compare World Values Surveys, Wave 3 (1995–1998), <https://www.worldvaluesurvey.org/WVSDocumentationWV3.jsp> [<https://perma.cc/J2VM-JGJV>], with World Values Surveys, Wave 6 (2010–2014), <https://bit.ly/2R2dj50> [<https://perma.cc/C9L6-P87V>].

All of this has prompted renewed interest in civic education from across the political spectrum.³⁸ But, although there is wide agreement about the need to increase civic knowledge and participation, there is less agreement on exactly how.³⁹

An emerging consensus among experts is that a high-quality civic education program must include at least some of the experiential “participatory elements” characteristic of an education *through* democracy approach.⁴⁰ At the same time, there is well-financed effort to steer civic education in an altogether different direction, away from public schools towards schools of choice.⁴¹ Backed by its own research,⁴² a more apt description of this approach might be “education *within* democracy” because the overriding concern is that parents retain “control over education within a democracy.”⁴³ On this view, education and democracy are instrumental values in the service of liberty within a “market society.”⁴⁴

With few exceptions, the states responding to the civic education and engagement crisis have instead taken the path of least resistance—education *for* democracy—by

³⁸ See *A Crisis in Civic Education*, AM. COUNCIL OF TRS. & ALUMNI 1–2 (Jan. 2016), <https://bit.ly/2Dk0kDU> [<https://perma.cc/Z6KD-LZ8M>]; David Davenport, *The Civic Education Crisis*, DEFINING IDEAS: A HOOVER INST. J. (Apr. 5, 2019), <https://hvr.co/2rwBw8R> [<https://perma.cc/B4H5-SMBW>]; Sarah Shapiro & Catherine Brown, *The State of Civics Education*, CTR. FOR AM. PROGRESS (Feb. 21, 2018), <https://www.americanprogress.org/issues/education-k-12/reports/2018/02/21/446857/state-civics-education> [<https://perma.cc/B8BU-BXUC>].

³⁹ See Eliza Newlin Carney, *Everyone Wants Civic Education; The Rub Comes in Deciding What that Means*, FULCRUM (Sept. 19, 2019), <https://bit.ly/2smXsnA> [<https://perma.cc/XD4J-HYSC>]; Ken Kyle & Charles Jenks, *The Theoretical and Historical Case for Democratic Education in the United States*, 33 EDUC. STUD. 150, 151–52 (2002).

⁴⁰ See MICHAEL HANSEN ET AL., THE 2018 BROWN CENTER REPORT ON AMERICAN EDUCATION: HOW WELL ARE AMERICAN STUDENTS LEARNING? 21 (2018), https://2QWiXG7www.brookings.edu/wp-content/uploads/2018/06/2018-Brown-Center-Report-on-American-Education_FINAL1.pdf [<https://perma.cc/739D-ZF3F>] [hereinafter BROWN CENTER REPORT]; Lisa Guilfoile & Brady Delander, *Guidebook: Six Proven Practices for Effective Civic Learning*, EDUC. COMM. OF THE STATES 13 (Jan. 2014), <https://bit.ly/2qWfjBz> [<https://perma.cc/2A7S-QJ63>].

⁴¹ See Bill Bigelow, *The Koch Brothers Sneak into School: How Right-Wing Billionaires Seek to Shape the Social Studies Curriculum*, HUFFPOST (Nov. 18, 2014, 11:00 AM), <https://bit.ly/2OCCx8z> [<https://perma.cc/ZSM4-SZJ5>]; see also Grace Tatter, *Koch Panel Advocates for Vouchers, Elimination of Common Core*, CHALKBEAT (July 22, 2014, 11:13 PM), <https://tn.chalkbeat.org/2014/7/22/21107434/koch-panel-advocates-for-vouchers-elimination-of-common-core> [<https://perma.cc/S4LV-9ZVC>].

⁴² See, e.g., Clive R. Belfield, *Democratic Education Across School Types: Evidence for the U.S. from NHES99*, 12 EDUC. POL’Y ANALYSIS ARCHIVES 1, 4 (2004); David E. Campbell, *The Civic Side of School Choice: An Empirical Analysis of Civic Education in Public and Private Schools*, 2008 BYU L. REV. 487, 488; Brian P. Gill et al., *A Life Lesson in Civics: How Democracy Prep Charter Schools Boost Student Voting*, 19 EDUC. NEXT (Summer 2019), <https://bit.ly/35wMryi> [<https://perma.cc/T4D7-ZFY8>].

⁴³ See Sant, *supra* note 12, at 682 (modified emphasis).

⁴⁴ *Id.* at 682, 685 (“Policies of choice, standardization, and accountability,” that respond to those demands, “dominate education policy globally.”).

simply increasing the number of civics or social studies offerings or requiring civics testing.⁴⁵ But expecting that approach to yield different (better) outcomes in our highly polarized political and social climate is at best naïve and at worst disregards a century-long record of abysmal results.⁴⁶

Although momentous, these challenges are not insurmountable. At the risk of oversimplifying the issue, what ails democracy and education is the “and”—the separation, the space between.

Fusing democracy and education should not begin on a scale envisioned by Dewey, however, because we still do not know precisely how to accomplish democratic education. The experts disagree, and their “research base [is] too thin to offer unambiguous guidance.”⁴⁷ That problem is not unique to democratic education—“the unfortunate reality is that we still do not know very much about the causal effects of various educational and school reform interventions on the adult outcomes.”⁴⁸ The dearth of data and *research* contributes to the elusiveness of the *remedy* in education *rights* cases and gives pause to courts already reluctant to enforce their judicial solutions on the other resistant branches.⁴⁹

It is an all-too-familiar dynamic, ensnaring the “three R’s” of education law: rights, remedies, and research. Most legal scholars who confront this dynamic tend to focus where they are doctrinally well-versed, on education rights and remedies, while seemingly overlooking the potential for research to mediate between them.

Seizing on that potential, this Article proposes a first but giant step towards democratizing education *rights*: to facilitate both participatory learning and productive

⁴⁵ Lauren Camera, *Uninformed and Unengaged: States Are Turning to Civics Education in an Effort to Produce Informed and Active Students*, U.S. NEWS (Nov. 23, 2018), <https://www.usnews.com/news/the-report/articles/2018-11-23/in-increasingly-partisan-times-states-turn-to-civics-education> [<https://perma.cc/U7PD-MQDN>]; Emily Cardinali, *What Your State Is Doing to Beef Up Civics Education*, NPR (July 21, 2018, 5:57 AM), <https://n.pr/2XM2yp5> [<https://perma.cc/5WLD-BTJD>]; Stephen Sawchuk, *How 3 States Are Digging in on Civics Education*, EDWEEK (June 26, 2019), <https://bit.ly/2OEPu8q> [<https://perma.cc/3MGH-38QL>].

⁴⁶ See HEATER, *supra* note 14, at 125.

⁴⁷ BROWN CENTER REPORT, *supra* note 40, at 16. See generally Sant, *supra* note 12.

⁴⁸ Christopher S. Elmendorf & Darien Shanske, *Solving “Problems No One Has Solved”:* Courts, Causal Inference, and the Right to Education, 2018 U. ILL. L. REV. 693, 702 (emphasis omitted); see also Eloise Pasachoff, *Two Cheers for Evidence: Law, Research, and Values in Education Policymaking and Beyond*, 117 COLUM. L. REV. 1933, 1937, 1952, 1961 (2017).

⁴⁹ See *McCleary v. State*, 269 P.3d 227, 258 (Wash. 2012) (“Finding the appropriate remedy in cases involving [the state constitution education clause] has always proved elusive.”); William S. Koski, *Beyond Dollars? The Promises and Pitfalls of the Next Generation of Educational Rights Litigation*, 117 COLUM. L. REV. 1897, 1927–28 (2017) (questioning whether courts would be receptive to new, narrowly drawn remedies given “empirical uncertainty” on hotly contested topics in education policy). See generally Joshua E. Weishart, *Aligning Education Rights and Remedies*, 27 KAN. J.L. & PUB. POL’Y 346, 359 (2018) (“The remedial failures of past and contemporary waves of education rights litigation cannot be attributed solely to the remedies themselves but to their disconnect with the rights they are meant to vindicate.”).

research by tailoring, to those ends, an existing, reliably enforceable *remedy*. That remedy—an individualized education plan (IEP)—has been guaranteed to certain students with disabilities under the Individuals with Disabilities Education Act (IDEA) for more than four decades.⁵⁰ An IEP is a “comprehensive plan” developed through a “collaboration among parents and educators” that (1) addresses the “unique needs” of the child, considering his or her “individual circumstances,” (2) sets forth “measurable annual goals, including academic and functional goals,” and (3) describes the services that will be provided so that the child can make “progress” towards those goals.⁵¹

I submit that all K–12 students should experience the process of developing an IEP annually. The collaborative IEP development process itself will empower students, giving them a *voice* in setting measurable goals for their own education. It will also empower teachers to make more autonomous *choices* to address each student’s actual needs, capacities, and interests identified in the IEP. Voice and choice are hallmarks of democratic participation in the classroom.⁵²

All K–12 students should also have their IEP progress regularly monitored through teacher-created assessments and documentary practices. Data collected from both the IEP development and monitoring process can then be used locally to inform democratic decision-making, characterized by participants’ deliberative consideration and justification of reasons for collective action.⁵³

The IEP can be an instrument for collective deliberation among students, parents, and teachers and also among teachers about their students’ educational needs, effective interventions, and instructional practices responsive to those needs.⁵⁴ Within schools and school districts, IEP-generated data can be aggregated and used to shape policies and allocate resources to address student needs. Researchers can also use the aggregate data to fill gaps in existing research and build a knowledge base from which to inform state policymakers, who are constitutionally charged with delivering a democratic education.⁵⁵

The IEPs-for-all remedy, to be clear, does not confer any new constitutional entitlement nor any specific educational service or resource, beyond the IEP itself. It is primarily a process-oriented remedy designed to inform and evolve decision-making on existing entitlements while also critically empowering teachers and students, along with their parents, in the IEP development and monitoring process.⁵⁶ Should

⁵⁰ See Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1400–1482 (2018)).

⁵¹ *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 994 (2017) (citations omitted).

⁵² See generally Kristan A. Morrison, *Democratic Classrooms: Promises and Challenges of Student Voice and Choice, Part One*, 87 EDUC. HORIZONS 50 (2008).

⁵³ See Amy Gutmann & Sigal Ben-Porath, *Democratic Education*, in ENCYCLOPEDIA OF POLITICAL THOUGHT 865 (Michael T. Gibbons ed., 2015).

⁵⁴ See *Andrew F.*, 137 S. Ct. at 994.

⁵⁵ See *infra* Section II.A.1. and accompanying notes.

⁵⁶ See *Andrew F.*, 137 S. Ct. at 994.

this iterative process help identify educational needs, the remedy will have served much of its purpose, whether or not those needs are actually met. Engaging teachers, students, and parents in a participatory democratic process that can yield productive research is the point—the starting point towards improving democratic education.

Repurposing and retooling the IEP remedy for democratic education can hardly be accomplished through a simple IDEA amendment, however. Expanding the remedy to all public schoolchildren in order to track growth and inform teaching and policy-making through research demands a firm constitutional foothold. That foothold resides securely in the text and judicial interpretations of state constitutions.⁵⁷

Before traversing that law, I step back in Part I to consider the law and policy missteps which have led to the miseducation of democracy, betraying our selfishness, ignorance, and passion. In selfish pursuit of social mobility for the few, we have disempowered most teachers and students through high-stakes testing and a one-size-fits-all factory model of schooling that commodifies education. We have remained deliberately ignorant of the nature and extent of educational disparities and deprivations that thwart democratic equality. And we have enabled “special” education to trade on our passions for children with disabilities to subvert the very fairness we seek for all.

Against these headwinds, a course correction requires more than a policy prescription. It compels a constitutional imperative. The IEPs-for-all remedy is that imperative, I argue in Part II, necessary to fulfill the state constitutional duty to educate democratically. The textually committed duty to educate democratically follows from two words that appear in nearly all fifty state constitution education provisions: “public schools.”⁵⁸ Of the various means of education—e.g., parochial, tutorial, parental, institutional—all states eventually committed instead to public schools as essential to the survival of their republican forms of government.⁵⁹ State constitutions adhere to the text and history of these education clauses.⁶⁰

And yet courts have not given meaningful effect to the “public school” words in state constitutions.⁶¹ Nor have courts seriously considered remedial measures necessary to discharge the correlative duty to educate democratically.⁶² Part II makes a concerted effort in that direction by justifying IEPs for all as critical, first-step remedial measures designed to incorporate and inform, without needing to settle, contested approaches to democratic education. A constitutional remedy requires no

⁵⁷ See Weishart, *supra* note 17, at 232–33 (citing state constitutional provisions).

⁵⁸ Or the synonymous terms “free” or “common schools.” See William E. Sparkman, *The Legal Foundations of Public School Finance*, 35 B.C. L. REV. 569, 573 n.22 (1994) (quoting the “public,” “free,” or “common” “school” language in every state constitution education clause).

⁵⁹ See generally MICHAEL A. REBELL, *FLUNKING DEMOCRACY: SCHOOLS, COURTS, AND CIVIC PARTICIPATION 1* (2018); DEREK W. BLACK, *SCHOOLHOUSE BURNING: PUBLIC EDUCATION AND THE ASSAULT ON AMERICAN DEMOCRACY*, 113–33 (2020).

⁶⁰ See *infra* Section II.A.

⁶¹ See generally REBELL, *supra* note 59.

⁶² See *id.* at 67.

more in a pluralistic society with evolving notions of citizenship and no less in a republic, if that society is to remain democratic.

From our miseducation in the vices of democracy comes a lesson in the virtue of democratic education in which one-for-all individuality triumphs over all-for-one individualism. The education of democracy exalts instead generosity, wisdom, and respect—the practical implications of which I sketch in Part III.

To encourage generosity over the prevailing selfishness of social mobility discourse and practices, we need to empower teachers and students to claim ownership of and collaborate on education plans centered around the diverse needs and interests of each child—IEPs that create space to nurture and assess both academic and social growth in more participatory learning environments. To lay the groundwork for wisdom to suppress ignorance, we need better information systems—sourced at the individual student level through IEPs—about the inputs, throughputs, and outputs of various educational intervention strategies to establish fairer public school classrooms and systems that advance democratic equality.

And to redirect our passions towards mutual and self-respect, we need to recognize that “[t]he separation between general and special education is neither natural nor inevitable.”⁶³ Because all education is special, “there should be one system where educators have the ability to differentiate for all learners.”⁶⁴ Providing every student an IEP can remove some of the “special” education stigma and better position teachers to accommodate the individual needs of all learners.⁶⁵

Anticipating objections, the IEPs-for-all remedy is not intended to disturb any of the procedural and substantive rights afforded to students with disabilities under the IDEA. Eligible students will still be entitled to these *statutory* guarantees, non-disabled students will not. But if states are to ever fulfill their *constitutional* guarantees to all students, regardless of status, then the needs, interests, and capabilities of each student must be considered. A number of states are coming to this realization.⁶⁶

Indeed, if providing an IEP for every student seems hopelessly unrealistic, consider that a majority of states have taken steps in that direction. Over thirty states already require “personalized” or “individualized” “learning plans” for all or most

⁶³ Christine Ashby, *Disability Studies and Inclusive Teacher Preparation: A Socially Just Path for Teacher Education*, 37 RES. & PRAC. PERSONS SEVERE DISABILITIES 89, 98 (2012).

⁶⁴ Jennifer P. Stone et al., *Thoughts on Dewey’s Democracy and (Special) Education*, 50 J. THOUGHT 3, 14 (2016).

⁶⁵ See Stephen A. Rosenbaum, *Full Sp[]Ed Ahead: Expanding the IDEA Idea to Let All Students Ride the Same Bus*, 4 STAN. J. CIV. RTS. & CIV. LIBERTIES 373, 376 (2008).

⁶⁶ See U.S. DEP’T OF LABOR, OFFICE OF DISABILITY EMP’T POLICY, INDIVIDUALIZED LEARNING PLANS ACROSS THE U.S. (2016), <https://www.dol.gov/odep/ilp/map/> [<https://perma.cc/5UED-B5R8>] [hereinafter INDIVIDUALIZED LEARNING PLANS]; *Personalized Learning and the Every Student Succeeds Act: Mapping Emerging Trends for Personalized Learning in State ESSA Plans*, KNOWLEDGEWORKS (Mar. 14, 2018), <https://bit.ly/2u8ngob> [<https://perma.cc/G7U3-33XU>] [hereinafter *Personalized Learning*].

secondary education students.⁶⁷ Pressure to personalize learning likely will increase as the COVID-19 pandemic forces more school districts to adopt virtual learning platforms.⁶⁸ This, of course, does not minimize the challenge of providing to all students, primary as well as secondary, individualized education plans, which are more involved than the personalized learning plans already in use.⁶⁹ Rising to that challenge will require a considerable infusion of additional resources and supports for educators. It would be grossly unfair to otherwise impose another unfunded burden on teachers and strain already-overstretched resources for a growing population of students with disabilities.

Yet the price tag for the IEP-for-all remedy should be judged in relation to the hundreds of billions spent on education, the single largest expenditure state governments make.⁷⁰ In the near future, states will be tempted to spend less on public education to cover budget shortfalls caused by the COVID-19 pandemic.⁷¹ If states succumb to that temptation, they will merely repeat the mistakes of the Great Recession with devastating consequences.⁷² Cuts to education are not unavoidable, particularly with federal government assistance.⁷³ Nor should we accept the inevitability of a Faustian bargain with virtual instruction.

The current crisis presents instead an opportunity to bet the future of the statehouse on the success of the schoolhouse, one that is furnished to re-engineer democratic education with a remedy that benefits all schoolchildren. If states are to chart that path to educational justice through democratic education, then, I conclude, the shrewdest investment they can make initially, in fidelity with their state constitutions, is to provide IEPs for all.

⁶⁷ See INDIVIDUALIZED LEARNING PLANS, *supra* note 66; *Personalized Learning*, *supra* note 66.

⁶⁸ See Annie Grayer, *Several Big US School Districts Are Extending Remote Classes into the Fall*, CNN (July 15, 2020, 4:21 PM), <https://www.cnn.com/2020/07/13/us/school-reopening-plans-major-cities/index.html> [<https://perma.cc/C6K6-3DQ7>].

⁶⁹ See generally INDIVIDUALIZED LEARNING PLANS, *supra* note 66.

⁷⁰ See *State & Local Government Snapshot*, U.S. CENSUS BUREAU (Feb. 15, 2018), <https://www.census.gov/library/visualizations/interactive/state-local-snapshot.html> [<https://perma.cc/Y3QN-SJ6V>].

⁷¹ See Bruce D. Baker et al., *Weathering the Storm: School Funding in the COVID-19 Era*, PHI DELTA KAPPAN (June 1, 2020), <https://kappanonline.org/school-funding-covid-19-baker-weber-atchison/> [<https://perma.cc/LU7F-47MD>].

⁷² See Matt Barnum, *12 Ways the Last Recession Changed America's Schools—and What that Means for the Years Ahead*, CHALKBEAT (Apr. 22, 2020, 10:18 AM), <https://www.chalkbeat.org/2020/4/22/21230992/great-recession-schools-research-lessons-coronavirus> [<https://perma.cc/S5UM-TQML>]. See generally Derek W. Black, *Averting Educational Crisis: Funding Cuts, Teacher Shortages, and the Dwindling Commitment to Public Education*, 94 WASH. U.L. REV. 423 (2017).

⁷³ See Baker et al., *supra* note 71; see also Frank Adamson et al., *Austerity, Subsistence, or Investment: Will Congress and the President Choose to Bail Out Our Children's Future?*, NAT'L EDUC. POL'Y CTR. 4–5 (June 4, 2020), <http://nepc.colorado.edu/publication/austerity> [<https://perma.cc/QFL6-542L>].

I. THE MISEDUCATION OF DEMOCRACY

“It may be an easy thing to make a Republic,” wrote common school architect Horace Mann in 1848, “but it is a very laborious thing to make Republicans.”⁷⁴ In time, schools would largely assume the laborious endeavor to make democratic citizens, just as Mann advocated. But even he forewarned (in the less quoted, second half of the same sentence) that such an undertaking was doomed to fail if predicated on vice: “and woe to the republic that rests upon no better foundations than ignorance, selfishness, and passion.”⁷⁵ “Such a republic may grow in numbers and in wealth,” its “armies may be invincible,” and “it may possess every capacity and opportunity of being great.”⁷⁶ And yet will that republic “resemble an obscene giant” who, consumed by passions, selfishness, and ignorance, will meet “an ignominious end.”⁷⁷

The miseducation of democracy may well hasten the end of both (public) education and (liberal) democracy, unless we counter those vices imbued in mainstream education law and policy.

First, democratic education is foiled by the selfishness pervading social mobility discourse and practices that conceive education solely as a “private good,” a “commodity” to be exchanged in a “zero-sum competition” for selective opportunities and positions that confer higher social status.⁷⁸ There are two main policy drivers for this selfishness: high-stakes testing and the one-size-fits-all model of schooling.

High-stakes testing, and the curriculum and pedagogy aligned with it, deprives teachers of professional autonomy over their instructional practices and the opportunity to engage with their students and conduct meaningful performance assessments that evaluate social-emotional learning as well as democratic character traits.⁷⁹ Teachers need autonomy, time, and authentic assessments to support positive relationships with students that cultivate individual capacities to meet the demands of democratic citizenship.⁸⁰ Likewise, excessive standardization under the one-size-fits-all model of schooling disempowers students by depriving them of the opportunity to be active participants in their own learning, to explore their interests, and to develop independent critical thought and agency.

⁷⁴ HORACE MANN, *Twelfth Annual Report*, in *THE REPUBLIC AND THE SCHOOL: HORACE MANN ON THE EDUCATION OF FREE MEN* 78 (Lawrence A. Cremin ed., 1957).

⁷⁵ *Id.*

⁷⁶ *Id.* at 78–79.

⁷⁷ *Id.*

⁷⁸ See David F. Labaree, *Public Goods, Private Goods: The American Struggle over Educational Goals*, 34 *AM. EDUC. RES. J.* 39, 42, 56 (1997).

⁷⁹ See generally JACK SCHNEIDER, *BEYOND TEST SCORES: A BETTER WAY TO MEASURE SCHOOL QUALITY* 1 (2017).

⁸⁰ See generally *id.*; Dinah Sparks & Nat Malkus, *Public School Teachers Autonomy in the Classroom Across School Years 2003–04, 2007–08, and 2011–12*, NAT'L CTR. EDUC. STAT. (Dec. 2015), <https://nces.ed.gov/pubs2015/2015089.pdf> [<https://perma.cc/EPT9-CK9H>].

Second, democratic education is stymied by our ignorance-fitted blinders to inequality. We cannot expect children to be schooled in the tenets and habits of democracy—principally, equality and liberty—in school systems that treat them as unequals and deny them opportunities to achieve real freedom. Democratic education demands “democratic equality,” which, in turn, demands greater needs-based equity for disadvantaged students and high-quality educational adequacy for all students.⁸¹ Unquestionably, this requires fairer school funding systems, but too often, asymmetric information between educators and policymakers about the extent and nature of educational disparities and deprivations thwarts progress.

Third, students with disabilities deserve IEPs and remedial services, but we should not let our passion for fairness in schooling blind us to the “special education paradox”: “The same program that can separate disadvantaged students from their peers, distinguish them with a stigmatizing label, and subject them to a curriculum of low expectations can also provide additional resources, supports, and services without which they cannot benefit from education.”⁸²

Compounding problems of bias in identifying children with disabilities, determining their eligibility for special education services, and meeting those services all while maintaining inclusive classroom settings is the unavoidable stigma associated with this entire legal architecture. It is an affront to the original impulses behind federal special education law—democratic education and equality.⁸³

A. Selfishness: Disempowering Most for the Social Mobility of the Few

As a goal for public education, social mobility is as seductive as it is illusory. Mann hoped the common school would be an engine of social mobility and economic opportunity,⁸⁴ serving as “the great equalizer of the conditions of men—the balance wheel of the social machinery.”⁸⁵ Social mobility through education has become ingrained in our understanding of the American Dream.⁸⁶ That Dream has faded for many who have awakened to the harsh reality that social mobility has become practically

⁸¹ See Joshua E. Weishart, *Transcending Equality Versus Adequacy*, 66 STAN. L. REV. 477, 513–14, 543–44 (2014).

⁸² NAT’L RESEARCH COUNCIL, MINORITY STUDENTS IN SPECIAL AND GIFTED EDUCATION 20 (Suzanne Donovan & Christopher T. Cross eds., 2002).

⁸³ See COLIN ONG-DEAN, DISTINGUISHING DISABILITY: PARENTS, PRIVILEGE, AND SPECIAL EDUCATION 13–14 (2009) (observing that legislative history verifies the “egalitarian and democratic impulses . . . target[ing] multiple forms of exclusion and inequality” behind statutory purpose to promote “democratic solutions to the problems of special education”).

⁸⁴ LAWRENCE A. CREMIN, AMERICAN EDUCATION: THE NATIONAL EXPERIENCE, 1783–1876 138 (1980).

⁸⁵ MANN, *supra* note 74, at 59.

⁸⁶ See JENNIFER L. HOCHSCHILD & NATHAN SCOVRONICK, THE AMERICAN DREAM AND THE PUBLIC SCHOOLS 1–2 (2003).

infeasible.⁸⁷ Given that reality, the notion that schools are engines of social mobility serves to legitimize inherited privilege: upper-income students with all of their advantages accumulate the “prizes of the school meritocracy” and are then said to *deserve* what they get.⁸⁸ “They arrived [to school] with inherited privilege but they leave with earned privilege.”⁸⁹

The discourse and practices that fuel the social mobility goal (myth) of education, nevertheless, remain ascendant, as they have been for the better part of the past century.⁹⁰ Unrestrained, the social mobility goal magnifies a consumer lens over public education, sharpening the focus on competition while blurring the peripheral vision of democratic education.⁹¹ Viewed through the consumer lens, learning becomes unimportant—what matters is credentialing: schools provide the educational credentials for “student[s] to gain an advantage in the competition for social position.”⁹² This competition encourages stratification between schools and within schools so that only some students will obtain superior credentials which they can then exchange for better jobs and higher social status.⁹³

Prodded along by the illusion of meritocracy, public education becomes “an arena for zero-sum competition filled with self-interested actors seeking opportunities for gaining educational distinctions at the expense of each other.”⁹⁴

Whereas democratic education thinks “schools should make republicans[,]” a system preferencing the unfettered goal of social mobility thinks schools “should make winners.”⁹⁵ And the winners are, by and large, the children of “upper middle class parents” who “see the most to gain from . . . a stratified educational system, . . . who play the game of academic one-upmanship most aggressively” and who “hold onto the educational advantages they already have.”⁹⁶

⁸⁷ See Raj Chetty et al., *The Fading American Dream: Trends in Absolute Income Mobility Since 1940*, NBER WORKING PAPER SERIES 18 (2016), <https://bit.ly/2RxrZYx> [<https://perma.cc/8NUM-RVTL>]; Michael Hout, *Americans' Occupational Status Reflects the Status of Both of Their Parents*, 115 PNAS 9527, 9531 (2018); Richard V. Reeves & Christopher Pulliam, *No Room at the Top: The Stark Divide in Black and White Economic Mobility*, BROOKINGS INST. (Feb. 14, 2019), <https://brook.gs/2NFy2sS> [<https://perma.cc/NAW2-4FVU>].

⁸⁸ David F. Labaree, *How Schools Came to Democratize Merit, Formalize Achievement, and Naturalize Privilege: The Case of the United States*, 10 INT'L J. HIST. EDUC. 29, 37 (2020). The losers of school meritocracy are also said to deserve what they get as well.

⁸⁹ *Id.*

⁹⁰ See Labaree, *supra* note 78, at 58–59.

⁹¹ See *id.* at 50–58, 65–70.

⁹² *Id.* at 50–51. Thus, we “have succeeded in producing students who are well schooled and poorly educated.” *Id.* at 68.

⁹³ See *id.* at 51–55.

⁹⁴ *Id.* at 56. “Portraying the social structure as [one] . . . of opportunity that can be negotiated by those with the most valuable credentials, the social mobility goal puts a democratic face on the inequalities of capitalism.” *Id.* at 72.

⁹⁵ *Id.* at 66.

⁹⁶ *Id.* at 54.

Such selfishness, such “*possessive individualism*” exalts “the needs of the market” over the needs “of the polity.”⁹⁷ Social mobility individualism, favoring individuals above all, presents a sharp contrast to democratic education’s promotion of individuality, recognizing the capabilities and contributions of individuals within a democratic society.⁹⁸

The three main approaches to democratic education emphasize respecting schoolchildren as individuals.⁹⁹ Each, at a minimum, conceives a democratic education as one that values individuality and cultivates individual capacities for self-rule.¹⁰⁰ Education *for* and *within* democracy perceives such values and capacities necessary to fortify individual liberty and prepare children to meet the demands of citizenship.¹⁰¹ Education *through* democracy celebrates the incommensurable value of individuality as essential to an integrated, interconnected “social conception” of a democratic citizen.¹⁰² Valuing individuality and cultivating capacities for individual liberty are thus central to democratic education, a point of consensus.¹⁰³

Schools must be sites for nurturing these democratic values and capacities—yet another point of consensus.¹⁰⁴ The point that is often obscured, however, is that the success of this type of schooling very much depends on how well it interacts with the needs, capacities, and interests of individual students. “The recurring theme emerging from the policy evaluation and research literature is the over-riding influence of individual characteristics and differences in any learning endeavor.”¹⁰⁵ The individualized

⁹⁷ *Id.* at 66. Social psychology research suggests that achieving higher social class status makes one more selfish. See Adam D. Galinsky et al., *Social Class, Power, and Selfishness: When and Why Upper and Lower Class Individuals Behave Unethically*, 108 J. PERSONALITY & SOC. PSYCH. 436, 447 (2015).

⁹⁸ See Jim Garrison, *Individuality, Equality, and Creative Democracy—the Task Before Us*, 118 AM. J. EDUC. 369, 374 (2012).

⁹⁹ See Sant, *supra* note 12, at 680.

¹⁰⁰ See *id.* at 682; see also Biesta, *supra* note 23, at 742; Amy Gutmann, *Civic Education and Social Diversity*, 105 ETHICS 557, 573 (1995) (“The convergent conclusions reflect the fact that most (if not all) of the same skills and virtues that are necessary and sufficient for educating children for citizenship in a liberal democracy are those that are also necessary and sufficient for educating children to deliberate about their way of life, more generally (and less politically) speaking.”).

¹⁰¹ See Biesta, *supra* note 23, at 745.

¹⁰² See *id.* at 746.

¹⁰³ To be sure, education *within* democracy places a premium on individualism in a market-driven competition that is antithetical to education *through* democracy which promotes social cohesion, interaction, and cooperative problem solving instead. But we need not digress about this or other differences in justifying the IEPs-for-all remedy, the success of which does not depend on resolving such differences, all the way down.

¹⁰⁴ See Scott Fletcher & Peter Nelson, *Democratic Theory of Education*, in ENCYCLOPEDIA OF EDUCATIONAL THEORY & PHILOSOPHY, *supra* note 26, at 215, 215.

¹⁰⁵ L. Allen Phelps et al., *Education Alignment and Accountability in an Era of Convergence: Policy Insights from States with Individual Learning Plans and Policies*, 19 EDUC. POL’Y ANALYSIS ARCHIVES, 1, 7 (2011).

learning endeavor most conducive to democratic education is impeded by a high-stakes standardized testing and accountability regime superimposed on an already-regimented, one-size-fits-all model of schooling, which limits the voices and choices of students and teachers.

1. High-Stakes Testing

Limiting teacher autonomy was indeed the initial impetus for standardized testing, which allowed elite policymakers to exert “greater control over teaching.”¹⁰⁶ Teachers had previously frustrated the curriculum, goals, and training promulgated by policymakers, deeming them, in their professional judgment, ill-suited for the classroom.¹⁰⁷ Through standardized testing, however, policymakers gained leverage over teachers, who could no longer discount the “state-designed curriculum” and standards that their students would be tested on.¹⁰⁸

That leverage increased exponentially under the No Child Left Behind Act (NCLB), which required standardized testing in math and reading (and later science at particular grade levels) from third through eighth grades and once in high school, demanded all states achieve 100 percent proficiency, and imposed sanctions on schools that failed to meet their yearly targets.¹⁰⁹ NCLB was designed to exert “top-down control of the schools.”¹¹⁰ Upon reauthorization and renaming in 2015, the Every Student Succeeds Act (ESSA) “eased up on the punitive features of NCLB” but not its testing requirements.¹¹¹ Add to this state testing prerogatives and loads of practicing testing and by high school graduation “the average American student has sat through roughly ten standardized tests a year at least seven years.”¹¹²

All that high-stakes testing serves its original purpose to limit teacher autonomy, the research shows.¹¹³ Teaching to the test, forced to use curriculum and methods

¹⁰⁶ See SCHNEIDER, *supra* note 79, at 36.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 41; U.S. DEP’T OF EDUC., NO CHILD LEFT BEHIND: A DESKTOP REFERENCE 16–19 (2002), <https://www2.ed.gov/admins/lead/account/nclbreference/reference.pdf> [https://perma.cc/6GFB-KA85].

¹¹⁰ Terry M. Moe, *Politics, Control, and the Future of School Accountability*, in NO CHILD LEFT BEHIND?: THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY 80, 81 (Paul E. Peterson & Martin R. West eds., 2013).

¹¹¹ SCHNEIDER, *supra* note 79, at 44; see also Derek W. Black, *Abandoning the Federal Role in Education: The Every Student Succeeds Act*, 105 CALIF. L. REV. 1309, 1333 (2017) (“The ESSA retains the NCLB’s basic testing regime, including almost the same exact testing development, schedule, demographic disaggregation, subject matter, and alignment.”).

¹¹² SCHNEIDER, *supra* note 79, at 44.

¹¹³ See LINDA DARLING-HAMMOND, THE FLAT WORLD AND EDUCATION: HOW AMERICA’S COMMITMENT TO EQUITY WILL DETERMINE OUR FUTURE 71–72 (2010); Meredith L.

that drill “recall and recitation,” strips teachers of their professional autonomy to employ instructional strategies that better serve their students’ higher-order learning.¹¹⁴ This stripping of teacher autonomy is most pronounced in areas where test scores are not assured by student demographics.¹¹⁵ “The loss of autonomy over their work combined with performance pressure of assessment and accountability policies led teachers to report increased stress and anxiety, longer work hours, and lower morale.”¹¹⁶ The resulting de-professionalization and demoralization has contributed to teacher turnover during nationwide teacher shortages, particularly in high-need schools.¹¹⁷ The harm to students caused by teacher attrition is indisputable “given the significant body of research that demonstrates that teaching experience . . . is positively associated with student achievement gains,” particularly with low-income and minority students.¹¹⁸

What has *not* been shown to increase student achievement significantly is post-NCLB standardized testing and accountability,¹¹⁹ with scores remaining mostly stagnant the past two decades.¹²⁰ But even when there have been marginal improvements in test scores, it suggests little more than that the students have learned to make use of rote memorization and other lower-order thinking skills.¹²¹ “Researchers consistently find that instruction focused on memorizing unconnected facts and

Wronowski & Angela Urick, *Examining the Relationship of Teacher Perception of Accountability and Assessment Policies on Teacher Turnover During NCLB*, 27 EDUC. POL’Y ANALYSIS ARCHIVES 1, 3 (2019). See generally TONYA R. MOON ET AL., NAT’L RES. CTR. GIFTED & TALENTED, STATE STANDARDIZED TESTING PROGRAMS: THEIR EFFECTS ON TEACHERS AND STUDENTS (2007), <https://bit.ly/2T99X1e> [<https://perma.cc/LY4W-ZGQY>]; Sparks & Malkus, *supra* note 80.

¹¹⁴ See WAYNE AU, UNEQUAL BY DESIGN: HIGH-STAKES TESTING AND THE STANDARDIZATION OF INEQUALITY 82–99 (2009) (illustrating five different types of classroom control imposed by high-stakes testing); DARLING-HAMMOND, *supra* note 113, at 71–72; M. GAIL JONES ET AL., THE UNINTENDED CONSEQUENCES OF HIGH-STAKES TESTING 40–43 (2003); see also PHILLIP HARRIS ET AL., THE MYTHS OF STANDARDIZED TESTS: WHY THEY DON’T TELL YOU WHAT YOU THINK THEY DO 35–37 (2011).

¹¹⁵ See SCHNEIDER, *supra* note 79, at 9.

¹¹⁶ Wronowski & Urick, *supra* note 113, at 3 (citing research); see also Kara Moloney, *Teaching to the Test: A Discourse Analysis of Teachers’ Perceptions of Education in the Era of No Child Left Behind*, 13 INT’L J. LEARNING 19, 24 (2006) (reporting that teachers feel demoralized “frustrated, ineffectual, and silenced”).

¹¹⁷ See Wronowski & Urick, *supra* note 113, at 3, 6, 20–21.

¹¹⁸ *Id.* at 21.

¹¹⁹ See NAT’L RESEARCH COUNCIL, INCENTIVES AND TEST-BASED ACCOUNTABILITY IN EDUCATION, 85–86 (Michael Hout & Stuart W. Elliott eds., 2011), <https://bit.ly/36RRx9c> [<https://perma.cc/74X5-F6JN>].

¹²⁰ See Dana Goldstein, *‘It Just Isn’t Working’: PISA Test Scores Cast Doubt on U.S. Education Efforts*, N.Y. TIMES (Dec. 5, 2019), <https://nyti.ms/35HZJaN>; Jaekyung Lee & Yin Wu, *Is the Common Core Racing America to the Top? Tracking Changes in State Standards, School Practices, and Student Achievement*, 25 EDUC. POL’Y ANALYSIS ARCHIVES 1, 13 (2017).

¹²¹ DARLING-HAMMOND, *supra* note 113, at 72.

drilling skills out of context produces inert rather than active knowledge that . . . is soon forgotten and cannot be retrieved or applied when it would be useful later.”¹²²

The collateral damage from standardized testing extends to the curriculum, which has been narrowed to allow more instructional time for math and reading.¹²³ Courses in civics, social studies, government, and history have been among the most frequent casualties.¹²⁴ The reduction or elimination of such courses has widened the “civic empowerment gap” between affluent, mostly white students and students of color and/or students living in poverty, exacerbating their disillusionment with, indifference to, and distrust of government institutions.¹²⁵ The narrowing of the curriculum also contributes to dissatisfaction and demoralization among teachers who feel besieged,¹²⁶ and for good reason.

ESSA might have lowered the stakes for schools,¹²⁷ but it did not alter the high stakes for teachers who are still being evaluated in a majority of states for “tenure, compensation, and retention” based on test scores.¹²⁸ To make matters worse, the “value added modeling” used for such evaluations is plagued by a host of well-documented validity and reliability problems.¹²⁹ These “high-stakes evaluation reforms reduced the supply of newly licensed teachers” and, among new teachers, “substantially decreased perceptions about job security, job satisfaction, cooperative effort, and control over their teaching.”¹³⁰

¹²² *Id.* at 70.

¹²³ See *id.* at 71; Wayne Au, *High-Stakes Testing and Curricular Control: A Qualitative Metasynthesis*, 36 EDUC. RESEARCHER 258, 259 (2007).

¹²⁴ See REBELL, *supra* note 59, at 32, 63; Wayne Au, *Social Studies, Social Justice: W(h)ither the Social Studies in High-Stakes Testing?*, 36 TCHR. EDUC. Q. 43, 43–55 (2009); CARNEGIE-KNIGHT TASK FORCE ON THE FUTURE OF JOURNALISM, MANDATORY TESTING AND THE NEWS IN THE SCHOOLS: IMPLICATIONS FOR CIVIC EDUCATION 3 (2007), <https://bit.ly/37WSzRw> [<https://perma.cc/6PY5-39NF>].

¹²⁵ See REBELL, *supra* note 59, at 21–23, 63; AU, *supra* note 114, at 97–98. See generally Sergio Nieves, *The Civic Achievement Gap: A Study on the Civic Knowledge, Skills, and Attitudes of Hispanic Students in Miami-Dade County Public Schools*, 31 EDUC. & SOC’Y 1 (2013).

¹²⁶ See Jason M. Smith & Philip E. Kovacs, *The Impact of Standards-Based Reform on Teachers: The Case of “No Child Left Behind,”* 17 TEACHERS & TEACHING 201, 203 (2011).

¹²⁷ Black, *supra* note 111, at 1333 (“The ESSA reduces test scores to one factor among many that a state must consider in the context of pursuing the state’s self-defined goals for student progress. As a result, test results remain a mandatory factor, but one a state can minimize.”).

¹²⁸ See Derek W. Black, *The Constitutional Challenge to Teacher Tenure*, 104 CALIF. L. REV. 75, 92–93 (2016).

¹²⁹ See DANIEL KORETZ, *THE TESTING CHARADE: PRETENDING TO MAKE SCHOOLS BETTER* 149–59 (2017); Black, *supra* note 128, at 94–102; Scott R. Bauries, *Perversity as Rationality in Teacher Evaluation*, 72 ARK. L. REV. 325, 331–32 (2019) (“Scholarship has established that the reliability of value-added model scores from year to year ranges between .2 to .3—or what would be considered very low reliability—not much better than chance.”).

¹³⁰ See Matthew Kraft et al., *Teacher Accountability Reforms and the Supply and Quality of New Teachers* 4, 6 (Annenberg Inst. at Brown Univ., EdWorkingPaper No. 19-169, Dec. 2019), <https://bit.ly/2TqNqNC> [<https://perma.cc/8AU4-MQKN>].

Keeping the focus on the detrimental effects to teachers is critical for two reasons. First the most obvious: Decades of empirical research confirms that teachers are the most influential educational resource, within a school's control, that affects student achievement.¹³¹ Second but less appreciated: "No matter how thoughtful and thorough our curricula, policies, or procedures," no matter how well-designed and aligned the standardized test and accountability mechanism, "democratic education ultimately takes place between teachers and students."¹³²

Education is fundamentally relational.¹³³ Thus, the most pernicious effect high-stakes testing could have would be on the teacher-student relationship, which is "among the most important factors influencing student learning."¹³⁴ High-stakes testing strains the teacher-student relationship with undue pressure while also robbing teachers of the time they need to invest in those relationships, to engage with and get to know their students to promote deeper learning.¹³⁵ Absent strong, caring, and supportive relationships with their students, teachers are challenged to progress character education,¹³⁶

¹³¹ See, e.g., WILLIAM L. SANDERS & JUNE C. RIVERS, CUMULATIVE AND RESIDUAL EFFECTS OF TEACHERS ON FUTURE STUDENT ACADEMIC ACHIEVEMENT 3, 6–7 (1996); Linda Darling-Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, 8 EDUC. POL'Y ANALYSIS ARCHIVES 1, 2 (2000); Robert Gordon et al., *Identifying Effective Teachers Using Performance on the Job*, BROOKINGS INST. 8 (Apr. 2006), https://www.brookings.edu/wp-content/uploads/2016/06/200604hamilton_1.pdf [<https://perma.cc/Y48R-FQ3L>]; Eric A. Hanushek, *Valuing Teachers: How Much Is a Good Teacher Worth?*, 11 EDUC. NEXT 41, 43 (2011); Steven G. Rivkin et al., *Teachers, Schools, and Academic Achievement*, 73 ECONOMETRICA 417 (2005).

¹³² Rachel Bradshaw, *Democratic Teaching: An Incomplete Job Description*, 22 DEMOCRACY & EDUC. 1, 1 (2014).

¹³³ See generally GERT J.J. BIESTA, GOOD EDUCATION IN AN AGE OF MEASUREMENT: ETHICS, POLITICS, DEMOCRACY (2010); NO EDUCATION WITHOUT RELATION (Charles Bingham & Alexander M. Sidorkin eds., 2004).

¹³⁴ Solvi Mausethagen, *A Research Review of the Impact of Accountability Policies on Teachers' Workplace Relations*, 9 EDUC. RES. REV. 16, 17 (2013); see also Jeffrey Liew & Erin M. McTigue, *Educating the Whole Child: The Role of Social and Emotional Development in Achievement and School Success*, in HANDBOOK OF CURRICULUM DEVELOPMENT 467–78 (L.E. Kattington ed., 2010); Christi Bergin & David Bergin, *Attachment in the Classroom*, 21 EDUC. PSYCHOL. REV. 141 (2009).

¹³⁵ See Julia Collins et al., *Democratic Spaces: How Teachers Establish and Sustain Democracy and Education in Their Classrooms*, 27 DEMOCRACY & EDUC. 1, 8 (2019) (observing all teacher participants in study agreed that "high-stakes standardized testing" hindered democratic education by limiting "student-centered content and instruction" as well as "the time spent engaging in democratic practices such as discussion, project-based learning, and social-emotional growth"); Aaron J. Jeffrey et al., "If We're Ever in Trouble They're Always There": *A Qualitative Study of Teacher-Student Caring*, 114 ELEMENTARY SCH. J. 100, 112, 114 (2013); Nelda Wellman, *Teacher Voices: The Impact of High-Stakes Testing on Teacher Caring*, 20 TCHR. EDUC. & PRAC. 204 (2007).

¹³⁶ See Marvin W. Berkowitz et al., *Toward a Science of Character Education: Frameworks for Identifying and Implementing Effective Practices*, 13 J. CHARACTER EDUC. 33, 38

which is both associated with “higher levels of educational outcomes”¹³⁷ and critical to democratic education.¹³⁸

Even more pronounced for democratic education, high-stakes testing “crowds out individualized and responsive education.”¹³⁹ Teachers have identified high-stakes testing as the greatest obstacle to more personalized learning environments.¹⁴⁰ The science of learning tells us that personalized or “individualized learning” fosters better teacher-student relationships and supports social-emotional learning.¹⁴¹ “Continual, age-appropriate, and *individualized* contextual support provides the epigenetic forces that turn genes on and off, copy and arrange them, so that growth, development, thinking, and learning can occur.”¹⁴²

2. One-Size-Fits-All Schooling

Learning and growth are otherwise inhibited by the standardized testing and a one-size-fits-all model of schooling that disempowers students as well.¹⁴³ “Modern schools were developed to limit diversity, to create as much homogeneity as possible in the ideas under study, the methods of instruction, and the students convened to study together.”¹⁴⁴ Under that structure, learning is “explicitly impersonal” as students are processed “along a conveyer belt from one teacher to the next, grade to grade.”¹⁴⁵ In the

(2017); Darcia Narvaez & Daniel K. Lapsley, *Teaching Moral Character: Two Alternatives for Teacher Education*, 43 TCHR. EDUCATOR 156, 156 (2008).

¹³⁷ William H. Jeynes, *A Meta-Analysis on the Relationship Between Character Education and Student Achievement and Behavioral Outcomes*, 51 EDUC. & URBAN SOC’Y 33, 33 (2019).

¹³⁸ See Wolfgang Althof & Marvin W. Berkowitz, *Moral Education and Character Education: Their Relationship and Roles in Citizenship Education*, 35 J. MORAL EDUC. 495 (2006); Collins et al., *supra* note 135, at 5.

¹³⁹ Richard M. Ryan & Netta Weinstein, *Undermining Quality Teaching and Learning: A Self-Determination Theory Perspective on High-Stakes Testing*, 7 THEORY & RES. EDUC. 224, 229 (2009).

¹⁴⁰ See John F. Pane et al., *Informing Progress: Insights on Personalized Learning Implementation and Effects*, RAND 25 (2017), <https://bit.ly/3875qko> [<https://perma.cc/KC5E-E4WF>].

¹⁴¹ See Linda Darling-Hammond et al., *Implications for Educational Practice of the Science of Learning and Development*, 24 J. APPLIED DEV. SCI. 97, 101–04, 129–30 (2019), <https://bit.ly/2FQS7rW> [<https://perma.cc/EF9P-BC2D>].

¹⁴² Mary Helen Immordino-Yang et al., *Nurturing Nature: How Brain Development Is Inherently Social and Emotional, and What This Means for Education*, 54 J. EDUC. PSYCHOL. 185, 187 (2019) (emphasis added).

¹⁴³ See Wally Barnes & John R. Slate, *College-Readiness Is Not One-Size-Fits-All*, 16 CURRENT ISSUES EDUC. 1, 3 (2013).

¹⁴⁴ Linda Darling-Hammond, *The Right to Learn and the Advancement of Teaching: Research, Policy, and Practice for Democratic Education*, 25 EDUC. RESEARCHER 5, 12 (1996).

¹⁴⁵ *Id.* at 13.

interim, a mostly “passive” learning experience exacerbates student disengagement.¹⁴⁶ All of this encourages conformity and docility rather than critical thinking and independent agency.¹⁴⁷

Excessive standardization of the curriculum further “precludes students from pursuing genuine interests at an individualized speed,” even though “student curiosity and an appropriate level of challenge are key drivers in the learning process.”¹⁴⁸ Instead, standardization will “lead some students to be underchallenged, some overchallenged, and few optimally challenged.”¹⁴⁹ Research has shown that the use of controlling instructional practices is associated with lower levels of engagement, learning, and psychological well-being compared to classrooms where students have some autonomy and opportunities for input in their learning environment.¹⁵⁰

No matter, high-stakes standardization succeeds in reducing students to test scores, “commodities to be produced, inspected, and compared” to fit the production line, one-size-fits-all model of public education.¹⁵¹

The implications for democratic education should now be clear. One-size-fits-all makes schools “poor places in which to learn democracy” by modeling “authoritarian and coercive forms of social control.”¹⁵² There is little room for student voices and choices.¹⁵³ “Democratic education,” by contrast, “seeks to enable students to be empowered as autonomous, critical thinkers” and thus “brings student voice into the learning environment.”¹⁵⁴

¹⁴⁶ See *id.*; AU, *supra* note 114, at 20, 25–33 (explaining how “the logics of industrial capitalist production [] came to be instituted as the dominant model for schooling”).

¹⁴⁷ See Jamie C. Atkinson, *Countering the Neos: Dewey and a Democratic Ethos in Teacher Education*, 25 DEMOCRACY & EDUC., 1, 5 (2017).

¹⁴⁸ Jack Schneider, *American Schools Are Modeled After Factories and Treat Students like Widgets. Right? Wrong.*, WASH. POST (Oct. 10, 2015), <https://wapo.st/38acWuH> [<https://perma.cc/J8HA-B8CT>].

¹⁴⁹ Ryan & Weinstein, *supra* note 139, at 229.

¹⁵⁰ See Sung Hyeon Cheon & Johnmarshall Reeve, *A Classroom-Based Intervention to Help Teachers Decrease Students’ Amotivation*, 40 CONTEMP. EDUC. PSYCHOL. 99, 99–101 (2015); Richard M. Ryan & Christopher P. Niemiec, *Self-Determination Theory in Schools of Education: Can an Empirically Supported Framework Also Be Critical and Liberating?*, 7 THEORY & RES. EDUC. 263, 270 (2009).

¹⁵¹ AU, *supra* note 114, at 41. High-stakes standardization “is being deployed differently in working-class and poor public schools as opposed to in professional-class public schools . . . [which] continue to receive public investment while the schools of working class and poor students . . . are being transformed into a new kind of commodified lower tier through privatization.” Kenneth J. Saltman, *Democratic Education Requires Rejecting the New Corporate Two-Tiered School System*, 118 AM. J. EDUC. 389, 390 (2012).

¹⁵² Darling-Hammond, *supra* note 144, at 6; see also Gutmann & Ben-Porath, *supra* note 53, at 865.

¹⁵³ Rachel Bishop, *Shared Decision-Making in Public Schools: A Case for Student Involvement*, MASTERS IN TEACHING PROGRAM 2006–2008, 30, <https://bit.ly/2NFIQY8> [<https://perma.cc/8BTR-9RKQ>].

¹⁵⁴ Collins et al., *supra* note 135, at 3, 9.

That environment must be one that offers “every student a sense of worth and membership [thereby] promoting increased self-direction, self-control, and cooperation.”¹⁵⁵ Education should also be responsive enough to support competence in democratic decision-making. Not by giving every student a vote in the school budget, curriculum, or pedagogy, but democratic in the sense that their education is participatory, promoting a community of inquiry which fosters self-reflection, self-governance, and *selfless* awareness of the needs and interests of others.

At bottom, high-stakes testing under the heavy weight of the one-size-fits-all model of schooling reflects instead the *selfishness* of the social mobility goal for education.¹⁵⁶ That goal is likely here to stay,¹⁵⁷ as is standardized testing.¹⁵⁸ But we can, ironically enough, temper the selfishness with more individualized, learner-centered measures.¹⁵⁹ *Individualized* here should not be misunderstood as *customized* in the made-to-order sense. Customizing education would only further its commodification, whereas individualizing education would democratize it.

B. Ignorance: Democratic Inequality Blinders

“What the best and wisest parent wants for his own child, that must the community want for all of its children.”¹⁶⁰ This, perhaps Dewey’s most “famous and oft-quoted” line, reflects the moral equality of persons that is foundational to his theory of democratic education.¹⁶¹ It does not reflect the ideal of educational equality embraced by most state courts construing their state constitution education and equality provisions. State courts have not insisted that all children deserve the finest education imaginable, on par with what the best and wisest parents would want for their child. Fulfilling that mandate would seemingly require states to attempt to satisfy an insatiable demand “to devote as many resources to education as needed to maximize children’s life chances”—sacrificing other public goods and values in the process.¹⁶² Most state courts have instead moderated two demands—educational adequacy and equality—toward “democratic equality.”¹⁶³

¹⁵⁵ See Ann V. Angell, *Democratic Climates in Elementary Classrooms: A Review of Theory and Research*, 19 THEORY & RES. SOC. EDUC. 241, 247 (1991).

¹⁵⁶ John Dewey predicted as much nearly a century ago. See John Dewey, *Individuality, Equality and Superiority*, in 7 JOHN DEWEY: THE MIDDLE WORKS 289 (Jo Ann Boydston ed., 1983); Garrison, *supra* note 98, at 374 (quoting Dewey, who stated that “[i]t was reserved for our own day to combine the name of individualism, laudation of selfish energy in industrial accomplishment with instances upon uniformity and conformity in mind”).

¹⁵⁷ See Labaree, *supra* note 78, at 73.

¹⁵⁸ See SCHNEIDER, *supra* note 79, at 49–53, 58.

¹⁵⁹ See Darling-Hammond, *supra* note 144, at 7.

¹⁶⁰ JOHN DEWEY, *THE SCHOOL AND SOCIETY* 3 (2d ed. 1915).

¹⁶¹ See Scott Ellis Ferrin, *Rights, Religion, Regard, Contact: The Common School Ideal, a Nurturing, Safe and Effective Educational Environment for All Students*, 2011 BYU EDUC. & L.J. 205, 208.

¹⁶² AMY GUTMANN, *DEMOCRATIC EDUCATION* 129 (1999).

¹⁶³ See Weishart, *supra* note 81, at 513. I have previously used the term “equal liberty”

1. Democratic Equality: Adequacy & Needs-Based Equity

Democratic equality does not insist on absolute equality of educational inputs or outcomes.¹⁶⁴ Nor does it even call for equality of educational opportunities, if by that we mean ensuring literally equal chances for educational success—another insatiable demand that would sacrifice too much and yet still be impossible to achieve.¹⁶⁵ Rather, the central egalitarian thrust of democratic equality is relational: It does not require that we treat all children equally but that we treat them as equals. We can show such equal concern and respect to children by providing an education that endows them with “the ‘capabilities’ necessary to escape deprivation and maintain standing as equal citizens in a democratic society.”¹⁶⁶

Following decades of school funding litigation challenging educational deprivations and disparities under state constitutions, claimants have increasingly sought a democratic equality insisting on “an adequately equal and equally adequate education.”¹⁶⁷

Adequately equal in the sense of not demanding strictly equal inputs, outcomes, or opportunities but rather approximately equal chances for educational success achieved through distributions that treat differently situated children according to their needs.¹⁶⁸ Such needs-based equity, often termed “vertical equity” in the literature, may direct more (not equal) “compensatory resources and services to the neediest students to mitigate their disadvantages” and “develop their capabilities, their internal *freedom* to be equal citizens.”¹⁶⁹

Equally adequate in the sense of not being indifferent to large-scale inequalities of inputs, outcomes, or opportunities but rather accepting the egalitarian ethos that all children should have access to an adequate education, where that qualitative

believing it more accurately denotes the moderated demands of educational adequacy and equality. See Weishart, *supra* note 17, at 241; see also Joshua E. Weishart, *Protecting a Federal Right to Educational Equality and Adequacy*, in A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY 314–15 (Kimberly Jenkins Robinson ed., 2019) (“[Equal liberty] invokes an ancient tradition, reflected in the most influential and foundational democratic documents, and it enjoys plenty of constitutional cachet. More importantly, it captures what we mean to equalize—what we can actually equalize—through public education, and that is access to a baseline set of capabilities, positive liberties, that, when exercised, promotes full and equal citizenship.”). But because it is used more frequently in the literature cited in this Article, I use “democratic equality” here instead to avoid confusion.

¹⁶⁴ GUTMANN, *supra* note 162, at 170.

¹⁶⁵ See Weishart, *supra* note 81, at 532–33.

¹⁶⁶ *Id.* at 513 (citing Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 289, 316 (1999)); see also Elizabeth Anderson, *Fair Opportunity in Education: A Democratic Equality Perspective*, 117 ETHICS 595, 597, 620 (2007); GUTMANN, *supra* note 162, at 170.

¹⁶⁷ See Weishart, *supra* note 17, at 241.

¹⁶⁸ See *id.* at 224–30.

¹⁶⁹ *Id.* at 229, 231.

threshold is set high enough so that children not only escape deprivation but also develop capabilities to function as equal citizens, a dynamic and evolving standard.¹⁷⁰

Concerning such democratic equality, legal scholarship has been primarily focused on the 30,000-foot view—how public school systems are financed and thus how educational opportunities are generally distributed, the effect of those distributions on achievement, and whether, all these things considered, public education systems fulfill state constitutional guarantees.¹⁷¹ From that view, we continue to see a disturbing pattern of chronic underfunding and inequities such that all, or nearly all, public education systems remain constitutionally infirm.¹⁷² That might suggest legal scholarship should stay the course, focused on systemic issues. But, in fact, we need a better understanding of what fidelity to equality and adequacy looks like on the ground, at the individual student level, to inform our analysis of wholesale improvement of public education systems.

We cannot drill down to the individual student level of analysis, however, due to our own deliberate ignorance: either no such data exists or it exists in some form but is inaccessible to researchers.¹⁷³ To be sure, many states have huge administrative datasets that could be linked to education records.¹⁷⁴ States are now required to improve their educational data systems as a condition for receiving federal funding and several have done so.¹⁷⁵ Nevertheless, “more than half forbid the linkage of educational records with other records,” others “stymie researchers, raising sometimes meritless objections” under privacy laws, and still others “flatly prohibit the use of critical outcomes datasets, such as records of voter registration and turnout, for research purposes.”¹⁷⁶

Christopher Elmendorf and Darien Shanske explain that the state record linkage needs to be made at the individual-student level to reasonably verify the causal effects of intervention strategies and programs:

¹⁷⁰ *Id.* at 238–41.

¹⁷¹ *See generally, e.g.,* Derek W. Black, *Educational Gerrymandering: Money, Motives, and Constitutional Rights*, 94 N.Y.U. L. REV. 1385 (2019).

¹⁷² *See id.* at 1386–88 (“Public school funding is in worse condition than it has been in decades. In real dollar terms, school funding in most states is lower today than it was before the 2008 recession . . . [and] states consistently fund education well below the levels that disadvantaged students need to achieve acceptable academic outcomes In the past, advocates have challenged school funding inadequacies and inequities as deprivations of students’ state constitutional right to education But courtroom victories have not stopped inadequacies and inequities from reoccurring. Ironically, the more plaintiffs win the more things seem to stay the same.”).

¹⁷³ *See* Rebecca Wolf, *A Within-School Equity Analysis of Teacher Resource Expenditures*, 44 J. EDUC. FIN. 45, 49 (2018) (“The limited research on the equity of instructional expenditures within schools stems, in part, from the lack of available data Accordingly, the research community has advocated for more research tracing fiscal resources to the individual student level.”). *See generally* Elmendorf & Shanske, *supra* note 48.

¹⁷⁴ *See* Elmendorf & Shanske, *supra* note 48, at 715–17.

¹⁷⁵ *See id.* at 718.

¹⁷⁶ *Id.* at 718–19.

Researchers need to be able to link records of individuals' educational experiences . . . with records of the same individuals' subsequent outcomes in other social, economic, and political domains. For these linkages to be made, state education administrators must maintain detailed, accurate records of students' school and classroom assignments, as well as the assignment of teachers and curricula to classrooms. And, critically, the school records must contain identifiers that allow students to be matched to their future and past selves in other administrative datasets. Finally, there must be a procedure in place for researchers to obtain matched records from the state, with individual identifying information removed to safeguard privacy interests.¹⁷⁷

Yet even if states were to link education records with other administrative datasets and grant access to researchers, there would still be insufficient student-level data upon which to develop fairer public school funding systems advancing democratic equality. This problem presents its own solution: remove our ignorance-fitted blinders that obscure (i) educational needs, (ii) the allocations necessary to meet those needs, and (iii) the adequacy of those allocations to satisfy constitutional benchmarks.

2. Unidentified Educational Needs

First, we have just scratched the surface in cataloging the educational needs of students. Open questions about the diverse, unmet needs of students impede the success of needs-based equity funding.¹⁷⁸ Educational needs have typically been identified through socio-economic statistical models that document academic achievement patterns (e.g., test scores, graduation rates) in relation to various student categories and characteristics.¹⁷⁹ These statistical relations make use of proxies for educational need, such as zip code, free or reduced lunch, disability, and English-language learner.¹⁸⁰

Proxies such as free or reduced lunch “provide an imprecise measure of school-level economic disadvantage.”¹⁸¹ They can also contribute to a “deficit model thinking”

¹⁷⁷ *Id.* at 716.

¹⁷⁸ See Gloria M. Rodriguez, *Vertical Equity in School Finance and the Potential for Increasing School Responsiveness to Student and Staff Needs*, 79 PEABODY J. EDUC. 7, 17 (2009) (“One concern stemming from current applications of vertical equity is that a thorough critique of the conceptualizations of educational need is warranted.”); Xiaobin Li, *Ontario and Hawaii: Who Makes Stronger Vertical Equity Efforts?*, 44 INT’L STUD. EDUC. ADMIN. 71, 73 (2016) (“Vertical equity is harder to achieve because it is very difficult for people to agree on what different needs students have and how much assistance disadvantaged students require to achieve the desired learning outcomes.”).

¹⁷⁹ Rodriguez, *supra* note 178, at 17.

¹⁸⁰ See *id.*

¹⁸¹ Thurston Domina et al., *Is Free and Reduced-Price Lunch a Valid Measure of Educational Disadvantage?*, 47 EDUC. RESEARCHER 539, 540 (2018). “If these criteria imprecisely

that explains poor academic achievement as being tied to racial or class-related “characteristics of students” rather than explanations that require “the surfacing of *institutional* biases, assumptions, and practices that facilitate differential student success.”¹⁸² The under-conceptualization of educational need thereby “place[s] the burden of failure on the shoulders of students.”¹⁸³

What’s more, socio-economic proxies do not always align with educational needs.¹⁸⁴ Although they often overlap, there are instances in which students have high educational needs and relatively low socio-economic needs (e.g., middle-class gifted students) and vice versa.¹⁸⁵ Also, the more focus we give to socio-economic needs to the neglect of educational needs, “the more we risk marginalizing other significant educational goals such as enhancing personal autonomy.”¹⁸⁶

A complete typology of educational needs is critical not only to reveal our biases and renew our focus but can also inform the needs-based equity principles often implemented through categorical and weighted student funding (WSF) formulas.¹⁸⁷ Those formulas assign weights to all students (e.g., 1.0) but apportion extra weights to certain student categories with more expensive educational needs (e.g., low income +0.4, English-language learners +0.5).¹⁸⁸

Weighting student funding in this way is supposed to yield more funding to schools with higher populations of the more expensive student categories.¹⁸⁹ “The

distinguish poor and non-poor schools, they may impede efforts to provide educational opportunities for students from highly economically disadvantaged homes.” *Id.* at 550.

¹⁸² Rodriguez, *supra* note 178, at 18–19.

¹⁸³ *Id.* (“This limitation in conceptual understanding in turn limits the power of analyses that seek to identify the additional, special, or varying needs of students and to identify the particular funding streams and teaching strategies that are required to address them.”).

¹⁸⁴ See, e.g., Tal Gilead & Iris Ben David-Hadar, *Employing Needs-Based Funding Formulae—Some Unavoidable Tradeoffs*, 31 INT’L J. EDUC. MGMT. 1092, 1095 (2017).

¹⁸⁵ See *id.*

¹⁸⁶ *Id.*

¹⁸⁷ See Betty Malen et al., *The Challenges of Advancing Fiscal Equity in a Resource-Strained Context*, 31 EDUC. POL’Y 615, 617 (2017).

¹⁸⁸ See *id.* at 616 (“A recent review of literature on WSF indicates that . . . these initiatives vary widely in terms of their design and implementation.”). See generally Deborah A. Verstegen & Robert C. Knoepfel, *From Statehouse to Schoolhouse: Education Finance Apportionment Systems in the United States*, 38 J. EDUC. FIN. 145 (2012) (surveying information on states’ use of weights to distribute funding according to different demographics of students); Deborah A. Verstegen, *Public Education Finance in the United States and Funding Policies for Populations with Special Education Needs*, 19 EDUC. POL’Y ANALYSIS ARCHIVES 1 (2011) (reporting survey data showing states providing additional support through weights to students with special needs).

¹⁸⁹ See Karen Hawley Miles & Marguerite Roza, *Understanding Student-Weighted Allocation as a Means to Greater School Resource Equity*, 81 PEABODY J. EDUC. 39, 53, 57 (2006) (explaining that use of weights based on certain demographics for distribution of funding and finding that “student-weighted allocation resulted in more schools receiving allocations near the district’s weighted average expenditure and increased equity”). *But see*

validity of WSF weights is [thus] contingent on the ability to identify the categories of students who are more expensive to educate and to determine the cost of the various educational services these students require.”¹⁹⁰ But therein lies the rub: “a lack of agreement not only on the categories of students who warrant [extra weight] but also on the size of the weights that should be assigned to them.”¹⁹¹

Because weights are often chosen through a political process,¹⁹² states have been able to exploit this lack of expert agreement, using the “low estimates” for weighted funding “seemingly for no reason other than to achieve cost savings.”¹⁹³ Worse, states accrue additional savings by failing to provide weights for the effects of concentrated poverty, “which is doubly problematic in states where supplements for individual low-income students are already too low.”¹⁹⁴ School districts feel the pressure to save costs as well and thus determine weights based on what they can afford “financially and politically, rather than by empirically grounded assessments of differential costs of educating various categories of students.”¹⁹⁵

3. Imprecise Weighted Student Funding Allocations

Second, even when WSF brings more money to schools serving more high-need students, uncertainty remains about whether that money is actually spent on those students.¹⁹⁶ Assessments of needs-based equity allocations have had to rely on school

Robert K. Toutkoushian & Robert S. Michael, *An Alternative Approach to Measuring Horizontal and Vertical Equity in School Funding*, 32 J. EDUC. FIN. 395, 398 (2007) (noting “serious limitation” of vertical equity “metrics is that they do not generally account for the effects of multiple dimensions of student and district need”).

¹⁹⁰ Malen et al., *supra* note 187, at 618.

¹⁹¹ *Id.* at 619. See Colleen Fahy, *Education Funding in Massachusetts: The Effects of Aid Modifications on Vertical and Horizontal Equity*, 36 J. EDUC. FIN. 217, 231 (2011); Toutkoushian & Michael, *supra* note 189, at 397.

¹⁹² See Helen F. Ladd, *Reflections on Equity, Adequacy, and Weighted Student Funding*, 3 EDUC. FIN. & POL’Y 402, 408–12 (2008).

¹⁹³ See Black, *supra* note 171, at 1403.

¹⁹⁴ *Id.* at 1405. An “additional poverty weighting would direct funds to school districts to provide them the capacities to devise programs or structures that have been proven to recruit, retain, and train teachers and administrators to work in schools with students living in poverty.” Matthew R. Della Sala et al., *Modeling the Effects of Educational Resources on Student Achievement: Implications for Resource Allocation Policies*, 49 EDUC. & URBAN SOC’Y 180, 198 (2017).

¹⁹⁵ Malen et al., *supra* note 187, at 633; see Robert C. Knoepfel et al., *Finance Equity, Student Achievement, and Justice: A Five State Analysis of Equality of Opportunity*, 52 J. EDUC. ADMIN. 812, 828 (2014) (lamenting “a lack of alignment between the state finance distribution system and measures of student achievement [in the states studied, none of which] had both an equitable finance distribution model and equitable student performance”).

¹⁹⁶ See Lena Batt, *Dollars Follow the Students, but Do Teachers Follow the Dollars? Examining the Impact of Weighted Student Funding on Teacher Sorting in New York City*, ASS’N EDUC. FIN. & POL’Y 45, <https://bit.ly/37zT4kR> [<https://perma.cc/X6DC-6YRT>].

district averages, hardly the gold standard.¹⁹⁷ Indeed, in some instances, such reliance altogether “ignored” individual student-level funding differences and may have “led to the unintended transfer of funds from high needs students to lower needs students.”¹⁹⁸

The lack of transparency has also made it difficult to assess the impact of WSF particularly where school districts use different student categories or weights, where allocations are made directly to the school rather than through a central allocation, or where there are more traditional, “non-weighted allocations” for special programs.¹⁹⁹ Notably, “WSF often only allocates one-half to two-thirds of the district’s budget, limiting the equalizing power of WSF, as centralized funding may still be distributed in inequitable ways.”²⁰⁰ And for all the ways in which states have approached equity between school districts, states have generally been unwilling to ensure school districts have relatively equal purchasing power.²⁰¹ Failing to factor in purchasing power further limits the potential impact of WSF.²⁰²

Now some good news: ESSA requires states to publish annual report cards that contain school-level, per-pupil spending data.²⁰³ Some are cautiously optimistic that this information, in the hands of advocates, holds potential to improve school funding fairness.²⁰⁴ District administrators and principals remain skeptical, however,²⁰⁵ and for good reason: “ESSA does not require states or districts to take any action when funding disparities are revealed.”²⁰⁶ That is discouraging given that we have long known about *interdistrict* disparities between school districts and *intradistrict*

¹⁹⁷ See Rodriguez, *supra* note 178, at 13, 15–16.

¹⁹⁸ James Lynn Woodworth, *An Analysis of Intradistrict Funding Equity in Rural and Urban School Districts*, THESES & DISSERTATIONS 75 (2013), <https://bit.ly/37AiI98> [<https://perma.cc/25CR-V8LL>].

¹⁹⁹ See Batt, *supra* note 196, at 16; see also Lauren A. Webb, Note, *Educational Opportunity for All: Reducing Intradistrict Funding Disparities*, 92 N.Y.U. L. REV. 2169, 2182 (2017) (“[S]pecial programs that are not targeted toward high-need students, such as arts programs or advanced courses, and not made available at other schools may both increase disparities in per-pupil expenditures and decrease comprehensive equity.”).

²⁰⁰ Webb, *supra* note 199, at 2209.

²⁰¹ Nicola A. Alexander et al., *Locating Equity: Implications of a Location Equity Index for Minnesota School Finance*, 44 J. EDUC. FIN. 140, 159 (2018).

²⁰² Malen et al., *supra* note 187, at 636.

²⁰³ Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802, §§ 1111(h)(1)(C)(x), (2)(C) (2015).

²⁰⁴ See Kimberly Jenkins Robinson, *Restructuring the Elementary and Secondary Education Act’s Approach to Equity*, 103 MINN. L. REV. 915, 948 (2018); Financial Transparency, EDU-NOMICS LAB, <https://edunomicslab.org/our-research/financial-transparency/> [<https://perma.cc/6FAS-9GB7>] (last visited Oct. 22, 2020).

²⁰⁵ See Daarel Burnette II, *Your Guide to ESSA’s New School-by-School Spending Mandate*, EDUC. WEEK (Oct. 8, 2019), <https://www.edweek.org/ew/articles/2019/10/09/your-guide-to-essas-new-school-by-school-spending.html> [<https://perma.cc/L938-ZANP>] (discussing a study that showed the majority of principals and administrators felt that the ESSA’s requirements would not lead to more equitable funding as it might simply confuse the public more).

²⁰⁶ See Robinson, *supra* note 204, at 948.

disparities between schools in the same district; even certain “stealth inequities” have been exposed.²⁰⁷ And yet those disparities remain.

Whether ESSA succeeds in clarifying school-level spending, there will still be hidden resource inequities. Research suggests within-school teacher sorting and resource disparities inhibit needs-based equity and opportunities to learn.²⁰⁸ For example, within a school “minority, low-income, special education, and English language learner[s] . . . were more likely to be taught by novice teachers than other students within the same school.”²⁰⁹ Moreover, actual expenditures on low-income students fell far short of those outlined in the state WSF plan.²¹⁰ In other words, “state funding for low-income students did not ultimately reach low-income students.”²¹¹ Or if it did, the impact of the additional funding was offset by assigning novice teachers to students with greater needs.²¹²

4. Unmeasured Adequacy Benchmarks

Even if socio-economic proxies for educational needs were sufficient and ESSA delivers greater transparency to ensure WSF makes it to the students who need it most, we will still be left with the “greatest challenge” for progressing needs-based equity: “determining whether [the] implicit funding weights are adequate.”²¹³ Empirical methodologies complete with regression analysis have been developed to estimate the actual costs of providing an adequate education,²¹⁴ and over one hundred such adequacy cost studies have been commissioned in forty-one states and the District of Columbia.²¹⁵ Nevertheless, “experts in the field concede that it is extraordinarily difficult to calculate precise costs and to develop a consensus on the weights that should be applied to each student group.”²¹⁶ Different decisions based on different set of assumptions using different factors can lead to varying cost estimates.²¹⁷

²⁰⁷ See BRUCE D. BAKER, EDUCATIONAL INEQUALITY AND SCHOOL FINANCE: WHY MONEY MATTERS FOR AMERICA’S STUDENTS 124–29 (2018) (discussing evidence and studies that have shown multiple ways in which funding is inequitably distributed between districts and between schools within districts).

²⁰⁸ Robinson, *supra* note 204, at 951; Wolf, *supra* note 173, at 48, 60.

²⁰⁹ Wolf, *supra* note 173, at 48.

²¹⁰ See *id.* at 60–61, 64.

²¹¹ *Id.* at 64.

²¹² See Joon-Ho Lee & Bruce Fuller, *Does Progressive Finance Alter School Organizations and Raise Achievement? The Case of Los Angeles*, EDUC. POL’Y 1, 30 (2020) (highlighting how schools receiving better budgets often assigned the most novice teachers to the English learners in their study).

²¹³ See Wolf, *supra* note 173, at 52.

²¹⁴ See BAKER, *supra* note 207, at 189, 96–97, 201 (documenting some of the many ways that states have developed to estimate the costs of providing an adequate education).

²¹⁵ See JOSHUA E. WEISHART, LONG OVERDUE: AN ADEQUACY COST STUDY IN WEST VIRGINIA 5 (2019), <https://bit.ly/31bvI2G> [<https://perma.cc/J5Y8-G92P>].

²¹⁶ Malen et al., *supra* note 187, at 619.

²¹⁷ See Thomas A. Downes & Leanna Stiefel, *Measuring Equity and Adequacy in School*

Imperfect though they may be, adequacy cost studies are still useful guides, and far better than the alternative—that is, “informed policy (conceptually and empirically) is likely better than uninformed policy.”²¹⁸ For, without any adequacy baseline specifying spending targets, it is also difficult to assess the impact of needs-based equity reforms.²¹⁹ The mere perception of adequacy may be enough to move the needle: research suggests that school district leaders’ perceptions of adequate funding enabled them to justify and facilitate needs-based distributions.²²⁰

Fortunately, we can remove the ignorance-fitted blinders that have obscured our full view of educational needs, WSF allocations, and the adequacy of those allocations. We simply need more information, at the individual student level.

C. Passion: The Special Education Paradox

Special education law trades on the passions of parents seeking fairness for their children with disabilities to subvert the democratic education and equality aims of the law itself. That law was meant to address the separation and exclusion of children with disabilities from general educational opportunities.²²¹ Years of legal and political advocacy by their parents helped secure passage of the federal law, the IDEA in its current form.²²² The hope then was that the law would yield “an integration of general and special education complementary disciplines.”²²³

Yet scholars would come to realize the “paradox of special education” as “both a service and a disservice” to children with disabilities,²²⁴ one that situates them in

Finance, in HANDBOOK OF RESEARCH IN EDUCATION FINANCE AND POLICY 244, 247–51 (Helen F. Ladd & Margaret E. Goertz eds., 2015) (discussing the main different approaches that are used to calculate school finance adequacy, the factors that those approaches consider, and the differing results that can be achieved); *see also* BAKER, *supra* note 207, at 196, 203 (showing how different factors can be considered in different cost analysis methods).

²¹⁸ *See* BAKER, *supra* note 207, at 203.

²¹⁹ *See id.* at 206–08; Toutkoushian & Michael, *supra* note 189, at 397–98 (explaining how it is difficult to determine if equity has been reached with no baseline numbers).

²²⁰ Taylor N. Allbright et al., *Conceptualizing Equity in the Implementation of California Education Finance Reform*, 125 AM. J. EDUC. 173, 193 (2019).

²²¹ *See* Barbara L. Pazey & James R. Yates, *Conceptual and Historical Foundations of Special Education Administration*, in HANDBOOK OF LEADERSHIP AND ADMINISTRATION FOR SPECIAL EDUCATION 26–29 (Jean B. Crockett et al. eds., 2019) (discussing the development of special education law through examining the history of exclusionary school practices); Ruth Colker, *The Disability Integration Presumption: Thirty Years Later*, 154 U. PA. L. REV. 789, 802–03 (2006) (explaining how the law developed in order to assist the millions of children who were completely kept out of public school settings).

²²² *See* ROBERTA WEINER & MAGGIE HUME, . . . AND EDUCATION FOR ALL: PUBLIC POLICY AND HANDICAPPED CHILDREN 15–16 (2d ed. 1987) (reviewing the years of difficult and continuous advocacy that led to the passage of the IDEA laws).

²²³ *See* Pazey & Yates, *supra* note 221, at 29.

²²⁴ *See* David J. Connor & Beth A. Ferri, *The Conflict Within: Resistance to Inclusion and Other Paradoxes in Special Education*, 22 DISABILITY & SOC’Y 63, 74 (2007).

forms of schooling that are both inclusive and exclusive.²²⁵ The same “special” education that includes students with disabilities by providing them with needed services, supports, accommodations, and procedural and substantive legal rights also excludes them with lower expectations, restricted access to the general education curricula, and stigma.²²⁶ So, even as special education services many children reasonably well, it is a great disservice to others.

“For some, the ends have justified the means.”²²⁷ A somewhat responsive education for children with disabilities is preferable “to no education at all.”²²⁸ And indeed before federal special education law, an estimated four million children with disabilities did not receive necessary supports or services to be properly educated and another one million received “no schooling whatsoever.”²²⁹ On that score, the IDEA, which now serves over six million children, has “largely achieved its goal of ensuring greater access to schooling and increased provision of services.”²³⁰

Others, nevertheless, see special education as “the dark side of public education—the institutional practice that emerged in twentieth-century industrialized democracies to conceal its failure to educate all citizens for full political, economic, and cultural participation in democracy.”²³¹ It is not the original intent of special education law but:

[T]he very apparatus of what legitimates special education as a field [that] has been called into question, including: the growth of disability categories and their reification; the separate education and certification of teachers; academic journals devoted to specializations; the burgeoning industry of professionals to serve the disabled (therapists, counsellors, evaluators, school psychologists, etc.); separate schools; segregated programs within existing schools; different funding sources, etc. Supporters of

²²⁵ See Lani Florian, *Special or Inclusive Education: Future Trends*, 35 BRITISH J. SPECIAL EDUC. 202, 202–03 (2008) (noting that many commentators view special education as both including and excluding children with special needs from the learning environment available to other children their age).

²²⁶ NAT’L RESEARCH COUNCIL, *supra* note 82, at 20; see Amanda L. Sullivan, *Understanding and Addressing Inequities in Special Education*, in SCHOOL PSYCHOLOGY AND SOCIAL JUSTICE: CONCEPTUAL FOUNDATIONS AND TOOLS FOR PRACTICE, 74 (David Shriberg et al. eds., 2013) (discussing a study which highlighted some of the severe issues that children of minority, low-income, or immigrant families face within the special education system).

²²⁷ Florian, *supra* note 225, at 203.

²²⁸ *Id.*

²²⁹ Connor & Ferri, *supra* note 224, at 63.

²³⁰ *Id.* at 66; IDEA, NAT’L SCH. BOARDS ASS’N, <https://www.nsba.org/Advocacy/IDEA> [<https://perma.cc/ZX5N-V3D3>] (last visited Oct. 22, 2020).

²³¹ Thomas M. Skrtic, *Preface*, in DISABILITY AND DEMOCRACY: RECONSTRUCTING (SPECIAL) EDUCATION FOR POSTMODERNITY xv (Thomas M. Skrtic ed., 1995).

inclusion have held a mirror to special education and asked ‘What is so special?’ . . . Sadly, more often than not ‘special’ (i.e. disability) becomes synonymous with exclusion, segregation and marginalization.²³²

1. Special Education Inequities

Perhaps the “special” label would not be as problematic if the special education apparatus were not so fraught with disparities in identification, eligibility, placement, and outcomes. Decades of research have documented both the under- and overidentification of racial and ethnic minorities and poor students for special education and related services.²³³ Such disproportionality varies illogically across states with “minority enrollment” being a “consistent predictor[.]” of “minority disproportionality.”²³⁴ Although revised regulations place more pressure on states to correct such disproportionality, “states under-report, fail to report, or face a lack of severe penalties or sanctions when found to have significant disproportionality within the state.”²³⁵ And courts generally have been unreceptive to claims regarding the misidentification of students.²³⁶

Clearing the disproportionality hurdle merely lands one in the “mess” that is “IDEA eligibility,” as one scholar put it: “few areas are so thoroughly unsettled, with so few guideposts, as eligibility for special education services under the statute.”²³⁷ To be eligible, a child must have at least one of the statute’s enumerated disabilities

²³² Connor & Ferri, *supra* note 224, at 64.

²³³ See Claire Raj, *The Misidentification of Children with Disabilities: A Harm with No Foul*, 48 ARIZ. ST. L.J. 373, 383, 385 (2016) (examining how racial bias may creep into determinations of disability, and is causing minority children to be heavily over identified); Natasha M. Strassfeld, *The Future of IDEA: Monitoring Disproportionate Representation of Minority Students in Special Education and Intentional Discrimination Claims*, 67 CASE WESTERN RES. L. REV. 1121, 1123 (2017) (stating that student placement became a new way to segregate minority students, and that minority students have historically been consistently both over- and underidentified as having a disability).

²³⁴ Sullivan, *supra* note 226, at 76.

The existing research suggests that disproportionality is a multiply mediated educational phenomenon that results from the interactions of larger social and structural forces (e.g., race, class, access to high quality teachers), education policies (e.g., zero tolerance or English-only legislation), biases in referral and evaluations processes, and local school cultures (e.g., racialization of school discipline or culture of referral).

Aydin Bal et al., *A Situated Analysis of Special Education Disproportionality for Systemic Transformation in an Urban School District*, 35 REMEDIAL & SPECIAL EDUC. 3, 4 (2013) (citation omitted).

²³⁵ Strassfeld, *supra* note 233, at 1127.

²³⁶ See Raj, *supra* note 233, at 375–76.

²³⁷ Mark C. Weber, *The IDEA Eligibility Mess*, 57 BUFF. L. REV. 83, 84 (2009).

that “adversely affects” his or her “educational performance.”²³⁸ Neither the statute nor its regulations define those terms, “adversely affect” and “educational performance,” leaving it to states to define and thus permitting different eligibility standards.²³⁹ Yet forty-one states have failed to further define those terms which has also led to inconsistent interpretations and applications of eligibility requirements.²⁴⁰

Just because a child has one of the enumerated disabilities that affects his or her educational performance, however, does not mean that child is eligible under the IDEA.²⁴¹ The child must also actually need *both* “special education”²⁴² and “related services.”²⁴³ Here again the IDEA contains little guidance for judging whether the child actually needs special education and related services and there are conflicting court decisions on those issues.²⁴⁴ Other seemingly intractable eligibility problems include determining when children with emotional or learning disabilities are eligible; the methods have proven difficult to implement.²⁴⁵

Beyond identification and eligibility lies the difficult terrain of assessing what special education and related service are necessary to guarantee children with disabilities receive a “free appropriate public education” (FAPE), as required by the IDEA.²⁴⁶ The FAPE standard itself has been the subject of enormous controversy and a torrent of litigation.²⁴⁷ Although the Supreme Court recently and unanimously set the standard in *Endrew F.*,²⁴⁸ some are already cautioning that there will be

²³⁸ 20 U.S.C. § 1401(3)(A) (2012); 34 C.F.R. § 300.8(c)(1)–(13) (2012).

²³⁹ Robert A. Garda, Jr., *Untangling Eligibility Requirements Under the Individuals with Disabilities Education Act*, 69 MO. L. REV. 441, 465–66, 465 n.128 (2004).

²⁴⁰ Jamie Lynne Thomas, *Decoding Eligibility Under the IDEA: Interpretations of “Adversely Affect Educational Performance,”* 38 CAMPBELL L. REV. 73, 80–84 (2016).

²⁴¹ See Garda, *supra* note 239, at 457–58 (explaining how having an enumerated disability is the first barrier, however, in order to qualify, that enumerated disability must also “adversely affect educational performance”).

²⁴² 34 C.F.R. § 300.39(b)(3) (2012) (“*Specially designed instruction* means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction.”).

²⁴³ 20 U.S.C. § 1401(26) (2012) (“The term ‘related services’ means transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.”).

²⁴⁴ Weber, *supra* note 237, at 84.

²⁴⁵ *Id.*

²⁴⁶ 20 U.S.C. § 1412(a)(1)(A) (2012).

²⁴⁷ See, e.g., Alyssa Iuliano, Note, *Endrew F. v. Douglas County School District: The Supreme Court’s Elusive Attempt to Close the Gap Between Some Educational Benefit and Meaningful Educational Benefit*, 35 Touro L. REV. 261, 261–62, 265–66, 269 (2019) (detailing how the courts, school districts, and the public have struggled with understanding what is appropriate for public education for over forty years).

²⁴⁸ See *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988, 1001 (2017) (stating that the IDEA “requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances”).

unintended consequences.²⁴⁹ Moreover, different interpretations of the new standard for appropriate progress in light of the child's circumstances is "yielding vastly different outcomes and creating additional confusion."²⁵⁰ Even if there were more agreement regarding the FAPE standard, there would still likely be disagreement over what constitutes special education and related services.²⁵¹

Then there is the problem of placement. The IDEA requires that the FAPE be provided in the "least restrictive environment" (LRE) to facilitate mainstreaming or inclusion in the general education classroom setting.²⁵² "Research demonstrates when students with disabilities are included in regular education environments, they experience improved academic, behavioral, and social outcomes."²⁵³ Yet racial minority students with disabilities are still "more likely to be served in restrictive, segregated placements and are subject to harsher, more frequent disciplinary consequences."²⁵⁴ Moreover, as with all the other IDEA concepts, there is disagreement about the extent to which the LRE requirement can and should be applied—some favoring a presumption that integration should be the rule enforced absent rebuttable evidence,²⁵⁵ while others favor an individualized assessment rather than a rigid

²⁴⁹ See Michael S. Morgan, *Paved with Good Intentions: How Endrew F. Could Affect Struggling School Districts*, 49 SETON HALL L. REV. 777, 779 (2019) ("[S]truggling school districts may suffer under *Endrew F.*'s heightened educational standard."); Claire Raj & Emily Suski, *Endrew F.'s Unintended Consequences*, 46 J.L. & EDUC. 499, 500 (2017) ("*Endrew F.*'s new FAPE standard further entrenches the extant disparities between the special education programs of low-income children with disabilities and those who come from higher income families."); Julie Waterstone, *Endrew F.: Symbolism v. Reality*, 46 J.L. & EDUC. 527, 532 (2017) ("One can also foresee that some school districts may respond to requests for certain programs or services by pointing to the language that the Court did not declare a substantive right to equal education and, thus, the service or program is not needed.").

²⁵⁰ Josh Cowin, Note, *Is That Appropriate?: Clarifying the IDEA's Free Appropriate Public Education Standard Post-Endrew F.*, 113 NW. U. L. REV. 587, 591 (2018); see Iuliano, *supra* note 247, at 264 (indicating that the topic is confusing, and the Supreme Court should have taken *Endrew F.* as an opportunity to issue a bright-line rule).

²⁵¹ See Robert Garda, Jr., *The New IDEA; Shifting Educational Paradigms to Achieve Racial Equality in Special Education*, 56 ALA. L. REV. 1071, 1109–10, 1121 (2005) (discussing the different ways decision makers interpret special education, and how the variations will create different plans of actions and opinions).

²⁵² 20 U.S.C. § 1412(a)(5)(A) (2016) ("To the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.").

²⁵³ Claire Raj, *Coerced Choice: School Vouchers and Students with Disabilities*, 68 EMORY L.J. 1037, 1064 (2019).

²⁵⁴ Sullivan, *supra* note 226, at 77 (citations omitted).

²⁵⁵ See Mark C. Weber, *A Nuanced Approach to the Disability Integration Presumption*, 156 U. PA. L. REV. PENNUMBRA 174, 174–75 (2007) (arguing that the integration presumption should control if there is no other evidence).

presumption.²⁵⁶ Either way, implementation of LRE has been complicated, susceptible to interpretations “either based primarily on the needs of a student or on the availability of district resources.”²⁵⁷ In all of this, FAPE is given lexical priority over LRE, such that school administrators use “arguments for the former to defeat the latter.”²⁵⁸

Lastly, despite the IDEA’s procedural and substantive protections and services, students with disabilities still disproportionately suffer poor outcomes:

- “According to the U.S. Department of Education, less than half of states across the country meet federal performance targets for special education.”²⁵⁹
- “In 2015, just 16% of fourth grade students with disabilities nationwide achieved proficiency on the mathematics portion of the National Assessment of Educational Progress, compared with 43% of their peers without disabilities, and the disparity increased as students grew older.”²⁶⁰
- “Poor academic results and low graduation rates lead to negative life outcomes, including high arrest and unemployment rates.”²⁶¹
- “The National Council on Disability estimates that ‘up to 85 percent of youth in juvenile detention facilities have disabilities that make them eligible for special education services,’ though very few actually receive services while incarcerated.”²⁶²
- “The criminalization of students with disabilities through long-term suspensions and other exclusionary disciplinary policies leads to missed classroom time, high drop-out rates, and, far too frequently, arrest and incarceration.”²⁶³

To be fair, the fault does not entirely lie with the IDEA’s legal architecture. Congress deserves a good share of the blame. When it enacted the statute, it agreed to cover forty percent of the costs of educating students with disabilities—a promise it has never fulfilled; indeed, it has “routinely covered less than twenty percent of

²⁵⁶ See Colker, *supra* note 221, at 860–62 (indicating that an individualized approach utilizing a checklist would be the best way to determine integration).

²⁵⁷ See Cari Carson, Note, *Rethinking Special Education’s “Least Restrictive Environment” Requirement*, 113 MICH. L. REV. 1397, 1404 (2015).

²⁵⁸ See Thomas M. Skrtic & Kimberly M. Knackstedt, *Disability, Difference, and Justice: Strong Democratic Leadership for Undemocratic Times*, in HANDBOOK OF LEADERSHIP AND ADMINISTRATION FOR SPECIAL EDUCATION 158 (Jean B. Crockett et al. eds., 2019).

²⁵⁹ Allison Zimmer, *Solving the IDEA Puzzle: Building a Better Special Education Development Process through* Endrew F., 93 N.Y.U. L. REV. 1014, 1021 (2018) (citations omitted).

²⁶⁰ *Id.* at 1021–22.

²⁶¹ *Id.* at 1022.

²⁶² *Id.*

²⁶³ *Id.*

the costs.”²⁶⁴ Consequently, the “deficiency has been assumed by states, and more directly, by local school districts, many of which struggle to offset the deficit.”²⁶⁵ By significantly underfunding the costs of special education, Congress has set IDEA up to fail, or at least not succeed.

2. The Inescapable Stigma

Even if special education were fully funded, however, the stigma associated with it seems inescapable, especially so long as the medical model, emphasizing disability as an impairment to be cured, predominates over social constructions of disability.²⁶⁶ The stigma can be quite detrimental to the “educational, social, and occupational trajectories of students” with disabilities.²⁶⁷ “Once labeled as such, a ‘child with a disability’ often has lower expectations for herself after grasping what that label means. Further, teachers often lower expectations for children with disabilities making under-achievement a self-fulfilling prophecy.”²⁶⁸ Such stigmatic harms fall more harshly on minority students, particularly African-American children.²⁶⁹

Considering these stigmatic harms together with the disparities in identification, eligibility, placement, and outcomes especially in “under-funded and over-tasked districts where most minorities attend school,” one is forced to wonder whether “the label of ‘special education’ may carry harms that outweigh its benefits.”²⁷⁰

It was not supposed to be this way. Special education law was “the product of egalitarian and democratic impulses” directed at “multiple forms of exclusion and inequality at once.”²⁷¹ Its article of faith: the advocacy of passionate parents to bring about reform for their children with disabilities as well as “systemic reform” advancing “broader social goals of equality and inclusion.”²⁷² Instead, legal and institutional interpretations have muted the broader social agenda and joint action, reducing parental participation to isolated and private due process hearings where parents “mount ‘individualized, technical disputes’ over their child’s disability diagnosis and accommodations.”²⁷³

Even there, the process is far from democratic or egalitarian. Institutional design flaws, information asymmetries, negative externalities, and transaction costs confer

²⁶⁴ Morgan, *supra* note 249, at 803.

²⁶⁵ *Id.*

²⁶⁶ Wendy F. Hensel, *Sharing the Short Bus: Eligibility and Identity Under the IDEA*, 58 HASTINGS L.J. 1147, 1181 (2007).

²⁶⁷ Steven L. Nelson, *Special Education, Overrepresentation, and End-Running Education Federalism: Theorizing Towards a Federally Protected Right to Education for Black Students*, 20 LOY. J. PUB. INT. L. 205, 240 (2019).

²⁶⁸ Raj, *supra* note 233, at 388.

²⁶⁹ *See id.* at 388–89.

²⁷⁰ *See id.* at 374.

²⁷¹ *See* ONG-DEAN, *supra* note 83, at 13.

²⁷² Skrtic & Knackstedt, *supra* note 258, at 149.

²⁷³ *Id.* at 161 (quoting ONG-DEAN, *supra* note 83, at 10) (citation omitted).

a well-documented advantage to privileged parents who are thereby positioned to secure better outcomes for their children.²⁷⁴ The isolation and class stratification fosters a competitive environment that only serves to perpetuate hierarchies of privilege and disproportionality.²⁷⁵ To be fair, so does education with its chronic inequitable and inadequate funding and pervasive patterns of racial and socio-economic segregation.²⁷⁶ But if special education merely replicates—or worse, exacerbates—those disparities, it hardly deserves the label “special.”

In sum, “the existing special education system is fundamentally inequitable” and trades on the passion of parents of children with disabilities to exacerbate its inequities, subverting the fairness and democratic process that special education law was meant to progress.²⁷⁷

II. THE CONSTITUTIONALITY OF DEMOCRATIC EDUCATION

The core purpose of public education is to democratize schoolchildren. So says the Supreme Court.²⁷⁸ So say the education clauses in fifteen state constitutions

²⁷⁴ See Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1435–50 (2011); see also Daniela Caruso, *Bargaining and Distribution in Special Education*, 14 CORNELL J.L. & PUB. POL’Y 171, 171–73, 178–89 (2005).

²⁷⁵ See Skrtic & Knackstedt, *supra* note 258, at 162 (citing, *inter alia*, ONG-DEAN, *supra* note 83); Elisa Hyman et al., *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 AM. U. J. GENDER SOC. POL’Y & L. 107, 112–13 (2011) (“Under the IDEA, due process hearings and mediation are underutilized and are used mostly by wealthy families with financial means for a private school funding remedy.”).

²⁷⁶ See Hyman et al., *supra* note 275, at 110–11.

²⁷⁷ ONG-DEAN, *supra* note 83, at 161.

²⁷⁸ See, e.g., *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (“[P]ublic education must prepare pupils for citizenship in the Republic It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.”); *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (“We have recognized the public schools as a most vital civic institution for the preservation of a democratic system of government.” (citation omitted)); *Ambach v. Norwick*, 441 U.S. 68, 76 (1979) (“Public education, like the police function, ‘fulfills a most fundamental obligation of government to its constituency.’ The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions.” (citation omitted)); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973) (“[A]n abiding respect for the vital role of education in a free society, may be found in numerous opinions of Justices of this Court writing both before and after *Brown* was decided.”); *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (“[S]ome 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.”); *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483, 493 (1954) (recognizing “the importance of education to our democratic society [as] the very foundation of good citizenship”).

explicitly.²⁷⁹ So say the highest courts in forty-eight states.²⁸⁰ So say state statutes.²⁸¹

²⁷⁹ Public education is “essential to the preservation of rights and liberties of the people,” *see* CAL. CONST. art. IX, § 1; ME. CONST. art. VIII, pt. 1, § 1; MASS. CONST. pt. 2, ch. V, § 2; MO. CONST. art. IX, § 1(a); R.I. CONST. art. XII, § 1; TEX. CONST. art. VII, § 1; and to a “free,” “good,” or “republic form,” of government “by the people,” *see* ARK. CONST. art. XIV, § 1; IDAHO CONST. art. IX, § 1; IND. CONST. art. VIII, § 1; MICH. CONST. art. VIII, § 1; MINN. CONST. art. XIII, § 1; N.H. CONST. pt. 2, art. LXXXIII; N.C. CONST. art. IX, § 1; N.D. CONST. art. VIII, § 1; S.D. CONST. art. VIII, § 1

²⁸⁰ *See* Ogle v. Ogle, 156 So.2d 345, 349 (Ala. 1963); Watts v. Seward Sch. Bd., 421 P.2d 586, 621–22 (Alaska 1966); Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 812 (Ariz. 1994); Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 492 (Ark. 2002); Serrano v. Priest, 487 P.2d 1241, 1256 (Cal. 1971); Lujan v. Colo. State Bd. of Educ., 649 P.2d 1005, 1017 (Colo. 1982); Sheff v. O’Neill, 678 A.2d 1267, 1289 (Conn. 1996); Bush v. Holmes, 919 So.2d 392, 405 (Fla. 2006); McDaniel v. Thomas, 285 S.E.2d 156, 165 (Ga. 1981); Spears v. Honda, 449 P.2d 130, 134 (Haw. 1968); Hanson v. De Coursey, 166 P.2d 261, 263 (Idaho 1946); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1194 (Ill. 1996); Bonner v. Daniels, 907 N.E.2d 516, 522 (Ind. 2009); Johnson v. Charles City Cmty. Sch. Bd. of Educ., 368 N.W.2d 74, 85 (Iowa 1985); Gannon v. State, 319 P.3d 1196, 1226–27 (Kan. 2014); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 205–06 (Ky. 1989); Seegers v. Parker, 241 So.2d 213, 230 (La. 1970); Blount v. Dep’t of Educ. & Cultural Servs., 551 A.2d 1377, 1381 (Me. 1988); Hornbeck v. Somerset Cty. Bd. of Educ., 458 A.2d 758, 786 (Md. 1983); McDuffy v. Sec’y of the Exec. Office of Educ., 615 N.E.2d 516, 554–55 (Mass. 1993); Sheridan Rd. Baptist Church v. Dep’t of Educ., 396 N.W.2d 373, 380 (Mich. 1986); Skeen v. State, 505 N.W.2d 299, 310 (Minn. 1993); Miss. Emp’t Sec. Comm’n v. McGlothlin, 556 So. 2d 324, 331 (Miss. 1990); Concerned Parents v. Caruthersville Sch. Dist. 18, 548 S.W.2d 554, 558 (Mo. 1977); McNair v. Sch. Dist., 288 P.188, 190–91 (Mont. 1930); Citizens of Decatur for Equal Educ. v. Lyons-Decatur Sch. Dist., 739 N.W.2d 742, 760 (Neb. 2007); *In re* LAW, 348 P.3d 1005, 1009 (Nev. 2015); Claremont Sch. Dist. v. Governor, 635 A.2d 1375, 1378, 1381 (N.H. 1993); Robinson v. Cahill, 303 A.2d 273, 295 (N.J. 1973); Berger v. Univ. of N.M., 217 P. 245, 246 (N.M. 1923); Campaign for Fiscal Equity v. State, 655 N.E.2d 661, 666 (N.Y. 1995); Leandro v. State, 488 S.E.2d 249, 255 (N.C. 1997); Bismarck Pub. Sch. Dist. v. State, 511 N.W.2d 247, 259 (N.D. 1994); DeRolph v. State, 677 N.E.2d 733, 736 (Ohio 1997); State v. Ross, 183 P. 918, 920 (Okla. 1919); Eugene Sch. Dist. No. 4 v. Fisk, 79 P.2d 262, 267 (Or. 1938); William Penn Sch. Dist. v. Pa. Dep’t of Educ., 170 A.3d 414, 424 (Pa. 2017); City of Pawtucket v. Sundlun, 662 A.2d 40, 57 (R.I. 1995); Abbeville Cty. Sch. Dist. v. State, 767 S.E.2d 157, 159 (S.C. 2014); Davis v. State, 804 N.W.2d 618, 627 (S.D. 2011); Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 150–51 (Tenn. 1993); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 395 (Tex. 1989); Brigham v. State, 692 A.2d 384, 393 (Vt. 1997); Scott v. Commonwealth, 443 S.E.2d 138, 142 (Va. 1994); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 94 (Wash. 1978); Pauley v. Kelly, 255 S.E.2d 859, 877 (W. Va. 1979); Vincent v. Voight, 614 N.W.2d 388, 415 (Wis. 2000); Campbell Cty. Sch. Dist. v. State, 907 P.2d 1238, 1259 (Wyo. 1995).

In Delaware and Utah, where the highest courts apparently have yet to comment on the purpose or function of public education, statutes affirm that it is to democratize school-children. *See* DEL. CODE ANN. tit. 14, § 1056 (West 2002); UTAH CODE ANN. § 53E-2-301 (West 2019).

²⁸¹ *See, e.g.*, OR. REV. STAT. § 329.015 (2011) (focusing on education as “a major civilizing influence on the development of a humane, responsible and informed citizenry”); TEX. EDUC. CODE ANN. § 4.001 (West 2006) (explaining that the mission of the public education system

So say historians.²⁸² So say legal scholars favoring different interpretative methods, from originalism²⁸³ to living constitutionalism,²⁸⁴ even living originalism.²⁸⁵ It is a settled point that has achieved virtual unanimity which one rarely finds in law. Perhaps that explains why it is so often taken for granted.

The democratizing purpose of public education certainly has been implicated in a variety of constitutional matters—e.g., student expression, religious liberty and establishment, immigration, segregation, and school funding.²⁸⁶ But only in the school funding context have courts even attempted to articulate how public education should constitutionally fulfill its core purpose.²⁸⁷ Nearly all of those articulations have been made in decisions interpreting state constitution education clauses.²⁸⁸ These clauses employ adjectives such as “suitable,” “efficient,” and “thorough,” denoting that the state must provide a certain quality of public education.²⁸⁹

is “grounded on the conviction that a general diffusion of knowledge is essential for the welfare of this state and for the preservation of the liberties and rights of citizens” with a goal to “prepare students to be thoughtful, active citizens who have an appreciation for the basic values of our state and national heritage and who can understand and productively function in a free enterprise society”); WIS. STAT. § 118.01 (2009–2010) (requiring schools to teach students “[a]n understanding of the basic workings of all levels of government, including the duties and responsibilities of citizenship”).

²⁸² See, e.g., C. BEARD & M. BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1960); LAWRENCE ARTHUR CREMIN, *THE AMERICAN COMMON SCHOOL: A HISTORIC CONCEPTION* 28 (1951); CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY 1780–1860*, at 3–10 (1983); S. ALEXANDER RIPPA, *EDUCATION IN A FREE SOCIETY: AN AMERICAN HISTORY* 89–134 (1980).

²⁸³ See, e.g., Black, *supra* note 16, at 1102 (“[T]he purpose of a fundamental right to education is to prepare individuals for self-government in our republican form of government.”); Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education*, 2014 MICH. ST. L. REV. 429, 552 (“The obvious explanation for state constitutional clauses creating a duty to set up public schools is a recognition that in a democracy the education of children is vital to the proper functioning of a state as well as being important for the child.”).

²⁸⁴ See, e.g., Susan H. Bitensky, *Theoretical Foundations For A Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 599–600 (1992) (“[I]f democracy cannot survive without education—then necessarily . . . the structural role of the Free Speech Clause ineluctably presupposes and entails an implied affirmative right to education.”); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 399 (2006) (“[T]he constitutionally motivated project of affording all children an adequate education for equal citizenship remains a work in progress.”).

²⁸⁵ See, e.g., Jack M. Balkin, (*Judgment of the Court*), in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S LANDMARK CIVIL RIGHTS DECISION 85* (Jack M. Balkin ed., 2002) (“[E]ducation is essential to the basic functions of citizenship in a democratic society.”).

²⁸⁶ See REBELL, *supra* note 59, at 3–8. See generally James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335 (2000).

²⁸⁷ See REBELL, *supra* note 59, at 57–61.

²⁸⁸ See *id.*

²⁸⁹ See *infra* note 299 (quoting the language used in state constitutions).

Adequacy lawsuits arose demanding enough school funding so that all children would have access to that qualitative threshold.²⁹⁰ In deciding these cases, several state courts have enumerated certain capacities that a constitutionally adequate education should cultivate in all children so that they can function as equal citizens.²⁹¹ Among the enumerated capacities in the influential *Rose* decision include those relating to citizenship:

- (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;
- (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation.²⁹²

Besides adopting these capacities or articulating others, courts have not issued remedial orders that certain actions or resources be directed to ensure such capacities are being developed or, even more generally, that the core democratizing purpose of public education is being fulfilled.²⁹³ Rather, “courts have operated with an implied assumption that, given adequate resources, the schools would be able to provide the programs, services, and activities that students need to develop the requisite civic participation skills.”²⁹⁴ That has been a mistaken assumption.²⁹⁵ Hence, one strategy being proposed now by Michael Rebell and others is to challenge civic education as constitutionally inadequate and seek general or specific remedial orders to enforce the already-articulated judicial standards regarding civic preparation in schools.²⁹⁶

’Tis a strategy worth pursuing, though one that perhaps leaps over a more basic proposition: the state has a duty to educate, not just adequately, but democratically. An adequate education is necessary but not sufficient for a democratic education.

²⁹⁰ See Weishart, *supra* note 17, at 236.

²⁹¹ See *id.* at 238.

²⁹² *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 106, 212 (Ky. 1989).

²⁹³ See REBELL, *supra* note 59, at 61–62, 67; *id.* at 129 (identifying thirteen states that have adopted such constitutional standards “that, if enforced seriously, would require schools to revamp and upgrade their civic preparation efforts”).

²⁹⁴ *Id.* at 62.

²⁹⁵ *Id.* at 129 (noting recent study “found that there was no correlation between states in which plaintiffs prevailed in education adequacy cases and seven indicators of civic preparation that the [research] center tracks”).

²⁹⁶ See *id.* at 127–49 (discussing general and specific remedial orders that adequacy plaintiff attorneys could seek and courts could issue). Rebell has even made a federal case out of it, seeking recognition of a right to education under the U.S. Constitution that would entitle children to a public school education that prepares them to function productively as civic participants. Information about this lawsuit, *Cook v. Raimondo*, is available at <http://cookvraimondo.info> [<https://perma.cc/W8PV-PEWR>].

Adequacy is a principle of distributive justice aimed at guaranteeing to children full and equal citizenship.²⁹⁷ But democratic equality is just one of two aims of democratic education—the other aim is to cultivate in children the moral obligations of citizenship.²⁹⁸ So, whereas adequacy is primarily concerned with *what* education should be provided, democratic education is also concerned with *how* it should be provided.

The duty to educate democratically emanates from the *how*—the delivery method and venue—selected in all state constitutions for public education: public schools. Only public schools can fulfill a state’s duty to educate democratically. Yet their ability to do so has been undercut by goals and policies that make education less democratic. The IEPs-for-all remedy can be the first link that puts public schools back on the track towards democratic education. Many connections will be needed along that route, but the IEPs-for-all remedy can uniquely connect a participatory process with an extended information system to improve that process and inform our approaches to democratic education.

A. The Duty to Educate Democratically

The words *public schools*, or *common schools*, or *free schools* in state constitutions have meaning. All state constitutions include the word “school(s)” in their education provisions and nearly all qualify schools with “public,” “common,” or “free” in reference to the state’s public education duty.²⁹⁹ Interpreting these words

²⁹⁷ See Weishart, *supra* note 81, at 515.

²⁹⁸ See GUTMANN, *supra* note 162, at 50–52; *id.* at 60–61 (arguing that democratic education should aim at Rawls’s “morality of association,” which stresses “the cooperative moral sentiments—empathy, trust, benevolence, and fairness”); Amy Gutmann, *Democratic Schools and Moral Education*, 1 NOTRE DAME J.L. ETHICS & PUB. POL’Y, 461–62.

²⁹⁹ See ALA. CONST. art. XIV, § 256 as amended by am. 111 (“provide for or authorize the establishment and operation of schools”); ALASKA CONST. art. VII, § 1 (“a system of public schools”); ARIZ. CONST. art. XI, § 1 (“a general and uniform public school system”); ARK. CONST. art. XIV, § 1 (“a general, suitable and efficient system of free public schools”); CAL. CONST. art. IX, § 5 (“a system of common schools”); COLO. CONST. art. IX, § 2 (“a thorough and uniform system of free public schools”); CONN. CONST. art. VIII, § 1 (“free public elementary and secondary schools”); DEL. CONST. art. X, § 1 (“a general and efficient system of free public schools”); FLA. CONST. art. IX, § 1 (“a uniform . . . system of free public schools”); GA. CONST. art. VIII, § 1 (“an adequate public education”), § 5, ¶ I (“to establish and maintain public schools”); HAW. CONST. art. X, § 1 (“a statewide system of public schools”); IDAHO CONST. art. IX, § 1 (“a general, uniform and thorough system of public, free common schools”); ILL. CONST. art. X, § 1 (“an efficient system of high quality public educational institutions and services”); IND. CONST. art. VIII, § 1 (“a general and uniform system of Common Schools”); IOWA CONST. art. IX, § 3 (“encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement. The proceeds of all lands . . . granted by the United States . . . [shall be used for] such other means as the General Assembly may provide, shall be inviolably appropriated to the support of Common schools throughout the State.”); KAN. CONST. art. VI, § 1 (“establishing and maintaining public schools”); KY. CONST. § 183 (“an efficient system of common schools”); LA. CONST.

as courts do, considering the text, history, precedents, and the political and social effect of their meaning,³⁰⁰ reveals an unmistakable duty to educate democratically.

1. The Text

The constitutional text itself strongly denotes such a duty. This is self-evident in the text of the fifteen state constitutions which make it rather explicit.³⁰¹ In all

art. VIII, § 1 (“a public educational system”), § 3 (“public elementary and secondary schools”); ME. CONST. art. VIII, pt. 1, § 1 (“[T]he Legislature are authorized, and it shall be their duty to require, the several towns to make suitable provision at their own expense, for the support and maintenance of public schools”); MD. CONST. art. VIII, § 1 (“a thorough and efficient System of Free Public Schools”); MASS. CONST. ch. V, § II (“to cherish the interests of literature and the sciences, and all seminaries of them; especially . . . public schools and grammar schools in the towns”); MICH. CONST. art. VIII, § 2 (“a system of free public elementary and secondary schools”); MINN. CONST. art. XIII, § 1 (“a general and uniform system of public schools”); MISS. CONST. art. VIII, § 201 (“establishment, maintenance and support of free public schools”); MO. CONST. art. IX, § 1(a) (“establish and maintain free public schools for the gratuitous instruction”); MONT. CONST. art. X, § 1(3) (“a basic system of free quality public elementary and secondary schools”); NEB. CONST. art. VII (“free instruction in the common schools”); NEV. CONST. art. XI, § 2 (“a uniform system of common schools”); N.H. CONST. art. LXXXIII (“cherish the interest of literature and the sciences, and all seminaries and public schools”); N.J. CONST. art. VIII, § 4 (“a thorough and efficient system of free public schools”); N.M. CONST. art. XII, § 1 (“a uniform system of free public schools”); N.Y. CONST. art. XI, § 1 (“a system of free common schools”); N.C. CONST. art. IX, § 2 (“a general and uniform system of free public schools”); N.D. CONST. art. VIII, § 2 (“a uniform system of free public schools”); OHIO CONST. art. VI, § 2 (“a thorough and efficient system of common schools”); OKLA. CONST. art. XIII, § 1 (“a system of free public schools”); OR. CONST. art. VIII, § 3 (“a uniform, and general system of Common schools”); PA. CONST. art. III, § 14 (“a thorough and efficient system of public education”); R.I. CONST. art. XII, § 1 (“promote public schools”); S.C. CONST. art. XI, § 3 (“a system of free public schools”); S.D. CONST. art. VIII, § 1 (“a general and uniform system of public schools”); TENN. CONST. art. XI, § 12 (“a system of free public schools”); TEX. CONST. art. VII, § 1 (“an efficient system of public free schools”); UTAH CONST. art. X, § 1 (“establishment and maintenance of the state’s education system”); VT. CONST. ch. II, § 68 (“a competent number of schools ought to be maintained in each town”); VA. CONST. art. VIII, § 1 (“a system of free public elementary and secondary schools”); WASH. CONST. art. IX, § 2 (“a general and uniform system of public schools”); W. VA. CONST. art. XII, § 1 (“a thorough and efficient system of free schools”); WIS. CONST. art. X, § 3 (“the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free”); WYO. CONST. art. VII, § 1 (“a complete and uniform system of public instruction, embracing free elementary schools of every needed kind and grade”).

“[O]nly four states (Alabama, Georgia, Iowa, and Vermont) have nonspecific, rather than specific constitutional provisions with regard to public education.” Julie F. Mead, *The Right to an Education or the Right to Shop for Schooling: Examining Voucher Programs in Relation to State Constitutional Guarantees*, 42 FORDHAM URB. L.J. 703, 736 (2015).

³⁰⁰ See Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 95–96 (2013).

³⁰¹ See *supra* note 299.

other state constitutions, the duty to educate is described as a public, as opposed to a private, duty.³⁰² Standard dictionary definitions dating back to the nineteenth century, when many education provisions in state constitutions were ratified, define “public” democratically as “extending to a whole people”³⁰³ “or belonging to, the people [as] opposed to private [and thus] open to the knowledge of all.”³⁰⁴ Likewise, “common” has been defined as “belonging to the public [and] serving for the use of all,” possessing “a joint right with others in common ground,”³⁰⁵ as in “the *common* privileges of citizens.”³⁰⁶ Dictionaries also define “free” democratically:

Instituted by a *free* people, or by consent or choice of those who are to be subjects, and securing private rights and privileges by fixed laws and principles; not arbitrary or despotic; as a *free* constitution or government. There can be no *free* government without a democratical branch in the constitution.³⁰⁷

Many of these democratic themes permeate definitions of “school”: “the *collective* body of pupils in any place of instruction,”³⁰⁸ as in “a common school,”³⁰⁹ that is “established under state law, regulated by the local state authorities in the various political subdivisions, funded and maintained by *public* taxation, and open and *free* to all children.”³¹⁰

Drawing these themes together, popular legal treatises describe “common or public schools” democratically as “free and open to all on equal terms.”³¹¹

³⁰² Cf. 67B AM. JUR. 2D *Schools* § 1 (2020) (“[T]he word ‘school’ frequently has been defined in state constitutions and statutes as referring only to the public common schools.”).

³⁰³ *Public*, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE DICTIONARY (1828); *Public*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“The people of a country or community as a whole”).

³⁰⁴ *Public*, WEBSTER’S COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1886).

³⁰⁵ *Common*, WEBSTER’S COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1886).

³⁰⁶ *Common*, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE DICTIONARY (1828).

³⁰⁷ *Free*, American Dictionary of the English Language Dictionary (1828); *Free*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“Having legal and political rights; enjoying political and civil liberty”); see also *Free*, WEBSTER’S COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1886) (“Not under an arbitrary or despotic government; subject only to fixed laws, regularly administered, and defended by them from encroachment upon natural or acquired rights; enjoying political liberty.”).

³⁰⁸ *School*, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE DICTIONARY (1828) (emphasis added).

³⁰⁹ *School*, WEBSTER’S COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1886).

³¹⁰ *School*, BLACK’S LAW DICTIONARY (11th ed. 2019) (emphasis added).

³¹¹ 67B AM. JUR. 2D *Schools* § 2 (2020); 113 A.L.R. 697 (“The terms ‘public schools’ and ‘common school’ have in various cases been regarded, broadly speaking, as meaning schools which are free and open to all on equal terms.”); see 78 C.J.S. *Schools and School Districts* § 2 (“A public school is one within a uniform state system of free schools, open and public,

2. The History

History speaks volumes about how the state constitutional text came to reflect a duty to educate democratically. The “Father of American Scholarship and Education,” Noah Webster, whose popular dictionaries defined the text, joined his contemporaries, Thomas Jefferson, Benjamin Rush, and John Adams, in the belief that “government had a duty to make education widely available to safeguard the democratic order.”³¹² That sentiment was held by more than just revolutionary luminaries, “the idea that the future of new republic depended on the education of its citizens exploded in popular magazines and newspapers.”³¹³ Education for the masses was a stern rebuke to the aristocratic traditions that reserved education for the upper classes, believing democratization would eventually trickle down through “dimly-echoed imitation” to the lower classes.³¹⁴

The “revolutionary ethos” was instead egalitarian, seeking “a form of government in which the full rights and duties of citizenship would be made available to the children . . . of almost every rank or station.”³¹⁵ “Almost” is operative here, since few of the founders advocated for extending education to Black Americans—enslaved or free.³¹⁶ Even almost-universal education was nevertheless radical in favoring “citizen equality” (for most) and “collective exercise of responsibility for the education of each citizen” while also denying (for most) “wealth or social position as the prerequisites to citizenship and education for citizenship.”³¹⁷

It was also radical in its departure from the education that the founders and the colonists had themselves experienced. For the privileged few to receive it, education during the colonial era was a mostly private, informal affair, accomplished by private tutors or “locally controlled institutions including a variety of church-affiliated and private schools.”³¹⁸ So, the dilemma for the founding generation was to develop a democratic education program even though “no fully satisfactory model of such a program was to be found in either the colonial past or its cultural matrix, the heritage of educational practice and theory derived from Europe.”³¹⁹

without charge or tuition, established and maintained at public expense, primarily from moneys raised by general and local taxation.”).

³¹² See Friedman & Solow, *supra* note 300, at 113.

³¹³ Benjamin Justice, *The Originalist Case Against Vouchers: The First Amendment, Religion, and American Public Education*, 26 STAN. L. & POL’Y REV. 437, 448–49 (2015).

³¹⁴ See PANGLE & PANGLE, *supra* note 16, at 93–94.

³¹⁵ *Id.* at 94.

³¹⁶ See *id.* at 95.

³¹⁷ See Molly Townes O’Brien, *Private School Tuition Vouchers and the Realities of Racial Politics*, 64 TENN. L. REV. 359, 371–72 (1997).

³¹⁸ Molly O’Brien & Amanda Woodrum, *The Constitutional Common School*, 51 CLEV. ST. L. REV. 581, 590 (2004); see R. BUTTS & L. CREMIN, A HISTORY OF EDUCATION IN AMERICAN CULTURE 121, 123 (1953); Justice, *supra* note 313, at 447.

³¹⁹ PANGLE & PANGLE, *supra* note 16, at 11.

The Founders' solution to this dilemma: "[A]n insistence on public, government-sponsored and supported schools as an essential foundation of a truly self-governing republic."³²⁰ And so they "designed elaborate plans for national systems of public schools."³²¹ Perhaps best known is Jefferson's vision for public schooling detailed in his "Bill for the More General Diffusion of Knowledge" submitted to the Virginia legislature.³²² Its frequently quoted preamble is a "provocative statement" advocating for "the institution of free public schools for two purposes: to educate the people generally and to identify and cultivate society's 'natural aristocracy' of democratic leaders, experts, and professionals, regardless of social class."³²³

The Founders, alas, failed in their efforts to establish public school systems.³²⁴ But theirs was not a complete failure, for even before the U.S. Constitution had been ratified, Congress passed the Land Ordinance of 1785 and Northwest Ordinance of 1787, establishing procedures for the territories to apply for statehood.³²⁵ Both measures "promoted education as a key principle of governance in newly admitted states."³²⁶ Along those lines, the Northwest Ordinance declared that "schools and the means of education shall forever be encouraged."³²⁷ Both Ordinances further "specified that every new town would set aside one-ninth of its land and one-third of its natural resources for the financial support of public education [as well as] reserve one of its lots for the operation of a public school."³²⁸

These Ordinances "reinforce what we already know about the importance of mass, public education to the founding fathers" in establishing "a framework for school law oriented around a particular model of schooling," namely, public schooling.³²⁹ Yet even though these Ordinances "laid the groundwork for a policy of universal, free, public education,"³³⁰ public schools, as we know them today, were virtually nonexistent following the ratification of the U.S. Constitution. "Schooling in the new states continued much as it had during the colonial period: intermittent,

³²⁰ *Id.* at 91; see Justice, *supra* note 313, at 439 (observing that "the public schools were viewed [by founders] as special sites of civic reproduction").

³²¹ Justice, *supra* note 313, at 449.

³²² See Martin D. Carcieri, *Democracy and Education in the Thought of Jefferson and Madison*, 26 J.L. & EDUC. 1, 7–8 (1997).

³²³ *Id.* at 9.

³²⁴ PANGLE & PANGLE, *supra* note 16, at 105 ("Nowhere was that failure more tragic than in Virginia, for nowhere had a more worthy plan been devised.").

³²⁵ See *An Ordinance for Ascertaining the Mode of Disposing of Lands in the Western Territory (May 20, 1785)*, 28 JOURNALS OF THE CONTINENTAL CONG. 1774–1789 375, 375–76; Northwest Ordinance of 1787 art. III, *reprinted in* 1 U.S.C. LVIII–LIX (2018).

³²⁶ Friedman & Solow, *supra* note 300, at 114.

³²⁷ Northwest Ordinance of 1787 art. III, *supra* note 325, at LVIII–LIX.

³²⁸ Derek W. Black, *Breaking the Norm of School Reform*, 72 ARK. L. REV. 307, 316 (2019).

³²⁹ Justice, *supra* note 313, at 468.

³³⁰ See Friedman & Solow, *supra* note 300, at 115.

unevenly distributed, and supported by parental initiative and tuition money rather than by state organization.”³³¹ Indeed, for a quarter of a century thereafter, “as late as 1830” there was still “no federal or state-run school system anywhere in the United States.”³³²

The founding generation had nevertheless “planted the seeds of the future public school system” that would sprout during the common school movement.³³³

Although the common school movement was partly driven by bigoted and divisive “nativist sentiments,” at its purest foundation was an “egalitarian and progressive idealism—the notion that all students in America deserve a quality education, because education is foundational to the myriad other rights protected by the republic.”³³⁴ For common school architect Horace Mann, “public schooling was necessary to preserve republican institutions and to create a political community.”³³⁵ To maintain a republican form of government, he insisted, schooling must be at least “sufficient to qualify each citizen for the civil and social duties he will be called to discharge.”³³⁶

Mann and his “friends of education” spread this gospel “like circuit riders” going town to town speaking to local leaders and educators, all the while making their case in periodicals and conducting teacher training institutes.³³⁷ Joining the effort were labor groups “mindful of the gaps between principle and reality in the democratic ethic of the nation” and perceiving “equal education of all children the only means by which the sense of community among the American people might be perpetuated, and ridge class stratification avoided.”³³⁸ Some have credited labor’s involvement as “the deciding factor in the institution of the American free school system.”³³⁹

But first the common school movement had to overcome decades of stiff opposition.³⁴⁰ “Next to abolition, the battle to establish common schools constituted the most contentious political issue of the nineteenth century.”³⁴¹ One historian explained:

³³¹ O’Brien & Woodrum, *supra* note 318, at 592.

³³² See Friedman & Solow, *supra* note 300, at 117.

³³³ O’Brien & Woodrum, *supra* note 318, at 592.

³³⁴ See Friedman & Solow, *supra* note 300, at 123.

³³⁵ Rosemary C. Salomone, *The Common School Before and After Brown: Democracy, Equality, and the Productivity Agenda*, 120 YALE L.J. 1454, 1466–67 (2011) (reviewing MARTHA MINOW, IN *BROWN’S WAKE: LEGACIES OF AMERICA’S EDUCATIONAL LANDMARK* (2010)).

³³⁶ MANN, *supra* note 74, at 63.

³³⁷ See Friedman & Solow, *supra* note 300, at 123; O’Brien & Woodrum, *supra* note 318, at 597.

³³⁸ CREMIN, *supra* note 282, at 33.

³³⁹ *Id.* at 33–34.

³⁴⁰ See LAWRENCE A. CREMIN, *THE TRANSFORMATION OF THE SCHOOL: PROGRESSIVISM IN AMERICAN EDUCATION, 1876–1957* 13 (1964); REBELL, *supra* note 59, at 52.

³⁴¹ REBELL, *supra* note 59, at 52.

The fight for free schools was a bitter one, and for twenty-five years the outcome was uncertain. Local elections were fought, won, and lost on the school issue. The tide of educational reform flowed in one state, only to ebb in another. Legislation passed one year was sometimes repealed the next. . . .

Yet by 1860 a design had begun to appear, and it bore upon it the marks of Mann's ideal. A majority of the states had established public school systems, and a good half of the nation's children were already getting some formal education.³⁴²

Several factors accounted for the eventual success of the common school movement. Public demand for education grew "as trade and capitalism elevated the value of an education, even in the countryside."³⁴³ In the cities, "the demand for education accelerated due to higher rates of urbanization and industrialization."³⁴⁴ Apart from economic factors, however, there was also a growing recognition that the democratization of children was too important to "be haphazardly left to the family, the church or even simple participation in the life of the community."³⁴⁵ The people began to envision schools, which "had previously been valued for both economic and religious reasons," as a "cornerstone of republican self-government."³⁴⁶

Ours was a nation "born in revolution [that] had weathered decades of anxiety that the system would collapse because of the insufficient virtue of its citizens."³⁴⁷ And so, the simplest explanation for the success of the common school movement is that the people began to entrust schools "with a responsibility on which depended the perpetuation and progress of the society."³⁴⁸ The common school, they trusted, would be that "democratizing institution."³⁴⁹

If indeed the state's very existence depended on that democratization, then the common school movement's leaders reasoned it was "the correlative duty of every government to see that the means of that education are provided for all."³⁵⁰ Aspiring to guarantee that duty in each state's supreme law, common school proponents drafted the education clauses in state constitutions.³⁵¹ "The primary purpose for public education,"

³⁴² CREMIN, *supra* note 340, at 13.

³⁴³ Friedman & Solow, *supra* note 300, at 122.

³⁴⁴ *Id.*; O'Brien, *supra* note 317, at 373.

³⁴⁵ CREMIN, *supra* note 282, at 47–48.

³⁴⁶ O'Brien & Woodrum, *supra* note 318, at 591.

³⁴⁷ KAESTLE, *supra* note 282, at 81.

³⁴⁸ CREMIN, *supra* note 282, at 47–48.

³⁴⁹ *Id.* at 48.

³⁵⁰ *Id.* at 77 (quoting Horace Mann, *Tenth Annual Report*).

³⁵¹ REBELL, *supra* note 59, at 52, 55; see CREMIN, *supra* note 84, at 138; Allen W. Hubsch, *Education and Self-Government: The Right to Education Under State Constitutional Law*, 18 J.L. & EDUC. 93, 96–98 (1989); O'Brien, *supra* note 317, at 370–71.

reiterated in several state constitutional conventions, was to democratize schoolchildren so “that the common citizenry was capable of exercising its republican obligations.”³⁵²

Common school proponents were remarkably successful in constitutionalizing the duty to educate democratically.³⁵³ When the movement took hold in the 1830s “only eleven out of twenty-four state constitutions, or just under fifty percent, had contained any language on education.”³⁵⁴ “By 1868, thirty-six out of thirty-seven states, or ninety-seven percent, included constitutional provisions obligating state governments to provide public education to all students.”³⁵⁵ The education clauses also evolved, going “from relatively simple to much lengthier and more detailed” provisions.³⁵⁶ No longer were those education clauses written, for instance, to “simply ‘encourage’ the legislature to support schools, states now required their legislatures to establish or maintain schools, and to provide enough financial support such that public school education would be free.”³⁵⁷

The common school movement got some help from Congress following the Civil War.³⁵⁸ The Reconstruction Act of 1867 conditioned the readmission of Southern states to the Union on guaranteeing a republican form of government in their state constitutions, which was widely understood as requiring states to commit to providing a public education for all children, white and newly freed blacks.³⁵⁹ “The affirmative duty to provide public education to all became an animating feature, if not the *raison d’être*, of Southern state constitutional conventions.”³⁶⁰ And when three states—Mississippi, Texas, and Virginia—balked, Congress passed legislation making “explicit what had been implicit all along: Education was a condition of readmission. Moreover, education was a condition because education was central to a republican form of government.”³⁶¹

The linkage between a commitment to public education and a republican form of government “took hold in the North and only accelerated following the ratification of the Fourteenth Amendment.”³⁶² For decades to come, “newly admitted states included education clauses in their constitutions” and several existing states would

³⁵² John C. Eastman, *When Did Education Become A Civil Right? An Assessment of State Constitutional Provisions for Education 1776–1900*, 42 AM. J. LEGAL HIST. 1, 24 (1998).

³⁵³ See Friedman & Solow, *supra* note 300, at 124.

³⁵⁴ *Id.*

³⁵⁵ *Id.*

³⁵⁶ Paul L. Tractenberg, *Education*, in STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM 241, 245 (G. Alan Tarr & Robert F. Williams eds., 2006).

³⁵⁷ See Friedman & Solow, *supra* note 300, at 125.

³⁵⁸ See Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 772 (2018).

³⁵⁹ See *id.* at 778–83.

³⁶⁰ *Id.* at 783.

³⁶¹ *Id.*

³⁶² *Id.* at 790.

come to amend their state constitutions to strengthen their education provisions.³⁶³ In all of this, the message of public schools being a democratizing force was not lost.³⁶⁴ “The drafters of these early twentieth-century constitutional clauses, like the drafters of state constitutional provisions in the eighteenth and nineteenth centuries, also clearly saw preparation for civic participation as the main purpose of public education.”³⁶⁵

3. The Precedents

The duty to educate democratically has been hiding in plain sight in the precedents interpreting state constitution education clauses. Consistent with the text and history of those clauses, the highest courts in more than thirty-five states recognize that the right to education contained in these clauses imposes a correlative duty on the state to educate.³⁶⁶ In the remaining minority of states, the highest courts either have deemed that right nonjusticiable or have yet to interpret the right, but the text of the education clause itself evinces a right-duty correlation.³⁶⁷ A majority of courts have further concluded that the duty is not just to educate but to educate *adequately* and *equitably* to meet qualitative standards coextensive with equality guarantees.³⁶⁸

Courts have not described the duty as a duty to educate *democratically*, in those exact terms, most likely because it would be superfluous to say so. The duty to educate democratically is the unambiguous import of the logic which justifies the duty to educate in the first place. Recall that all of the highest state courts to have considered the matter—“100 percent of the courts”—have recognized that the “primary purpose or a primary purpose” of public education is to democratize schoolchildren, to prepare them for “capable citizenship.”³⁶⁹ The duty to educate exists to effectuate this purpose. And several courts have said as much.³⁷⁰

The New Jersey Supreme Court put it succinctly: “[The education clause’s] purpose was to impose on the legislature a duty of providing for a thorough and efficient system of free schools, capable of affording to every child such instruction as is necessary to fit it for the ordinary duties of citizenship.”³⁷¹

³⁶³ *Id.* at 793.

³⁶⁴ *See id.*

³⁶⁵ REBELL, *supra* note 59, at 55.

³⁶⁶ *See* Joshua E. Weishart, *Reconstituting the Right to Education*, 67 ALA. L. REV. 915, 948–49 nn.206–11 (2016).

³⁶⁷ *See id.*

³⁶⁸ *See* Weishart, *supra* note 17, at 235–36, 268–69.

³⁶⁹ *See id.*; *see also* cases cited *supra* note 280.

³⁷⁰ *See* REBELL, *supra* note 59, at 57.

³⁷¹ *Robinson v. Cahill*, 355 A.2d 129, 173 (N.J. 1976); *accord* *Serrano v. Priest*, 487 P.2d 1241, 1266 (Cal. 1971) (The “right to an education . . . proves the correlative duty of every government to see that the means of that education are provided for all.”); *Eugene Sch. Dist. No. 4 v. Fisk*, 79 P.2d 262, 267 (Or. 1938) (“[T]he Constitution of our state, in recognition of the fact that an indispensable essential of a democracy is an educated citizenry, enjoins upon the Legislature the duty to establish ‘a uniform and general system of common schools.’”).

Several state court decisions relate the duty to educate with the democratizing purpose of education.³⁷² “The immediate purpose of the establishment of the duty [and its] ultimate end,” the Massachusetts Supreme Court explained, “is the preservation of rights and liberties. Put otherwise, an educated people is viewed as essential to the preservation of the entire constitutional plan: a free, sovereign, constitutional democratic State.”³⁷³ Or, in even fewer words, “education is a ‘duty’ of government, [which] the framers conceived of . . . as fundamentally related to the very existence of government.”³⁷⁴

The New Hampshire Supreme Court similarly emphasized that “the framers and general populace [understood] the language contained in [the education clause] to impose a duty on the State to support the public schools and ensure an educated citizenry.”³⁷⁵ Years later, the court reaffirmed the significance of this “duty of State government expressly created by the State’s highest governing document, the State Constitution . . . in developing and maintaining a citizenry capable of furthering the economic, political, and social viability of the State.”³⁷⁶

The Vermont Supreme Court also stressed “the importance of education to self-government and the state’s duty to ensure its proper dissemination.”³⁷⁷ Or, as the Arkansas Supreme Court put it, “the inherent value of education in creating a virtuous citizen and the crucial role of an educated citizenry in a functioning democracy.”³⁷⁸

In deciding constitutional challenges to charter schools and vouchers, courts have also made certain that “a legislature does not satisfy its obligations merely by enacting measures relative to education, but only by passing laws ensuring *public* schools and *public* education.”³⁷⁹ These courts have defined “public-ness” to include, at a minimum, “public purpose, public access, public accountability, and public curriculum.”³⁸⁰ It

³⁷² See, e.g., *McDuffy v. Sec’y of Exec. Office of Educ.*, 615 N.E.2d 516, 524 (Mass. 1993); *Eugene Sch. Dist. No. 4*, 79 P.2d at 267; *Campbell Cty. Sch. Dist. v. State*, 907 P.2d 1238, 1259 (Wyo. 1995).

³⁷³ *McDuffy*, 615 N.E.2d at 524.

³⁷⁴ *Id.* at 526–27; *accord Campbell Cty. Sch. Dist.*, 907 P.2d at 1259 (“[W]e can conclude the framers intended the education article as a mandate to the state legislature to provide an education system of a character which provides Wyoming students with a uniform opportunity to become equipped for their future roles as citizens, participants in the political system, and competitors both economically and intellectually.”).

³⁷⁵ *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1380 (N.H. 1993); *Campbell Cty. Sch. Dist.*, 907 P.2d at 1381 (“[O]ur constitution expressly recognizes education as a cornerstone of our democratic system.”).

³⁷⁶ *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1356 (N.H. 1997).

³⁷⁷ *Brigham v. State*, 692 A.2d 384, 394 (Vt. 1997).

³⁷⁸ *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 491 (Ark. 2002); *accord Davis v. State*, 804 N.W.2d 618, 622 (S.D. 2011) (“Because we are a state, republican in form, education of all the people becomes the highest duty of the state. Nothing can be so important except the struggle for the very existence of the republic.”).

³⁷⁹ *Mead*, *supra* note 299, at 728.

³⁸⁰ *Id.* at 743.

cannot be credibly disputed that the public purpose of public schools is to democratize schoolchildren.³⁸¹

It is therefore time to draw the logical and unassailable conclusion from this long line of precedents reflecting the text and history of the education clauses: states have a constitutional duty to educate democratically through public schooling.

B. The Remedy

We should not expect any single remedy to fully effectuate a state's duty to educate democratically. The approaches to democratic education are contested, and we lack a sufficient knowledge base grounded in research to select the best pedagogy.³⁸² A constitutional remedy is not the appropriate vehicle for taking sides anyway; democratic constitutions are supposed to support a "healthy pluralism" even as they uphold the equal rights of all under the rule of law.³⁸³ Thus, any initial remedy to renew democratic education should (1) inform, without aiming to settle, these contested approaches (2) even as it enlarges the knowledge base to reconcile their differences or abandon unproven elements towards improving democratic education.

The IEPs-for-all remedy can negotiate these contested spaces. It aligns with the education *for* and *through* approaches.³⁸⁴ The education *for* democracy "perspective interprets democracy as a universal normative imperative and education as an 'instrument' for achieving this goal."³⁸⁵ The IEPs-for-all remedy serves as a tool to help states prepare children *for* democratic citizenship through IEP-generated datasets that can inform educators and democratic decision-makers about the educational needs of students and the effective instructional practices of teachers.³⁸⁶

The education *through* democracy approach does not simply "conceptualize education as a tool for . . . democracy" but rather imagines education and democracy together.³⁸⁷ Under this approach, "democratic learning is enacted through democratic participation" as part of a "student-centered" pedagogy in which students "have a voice and can participate."³⁸⁸ Here as well, the IEPs-for-all remedy works *through*

³⁸¹ See Amanda Harmon Cooley, *Inculcating Suppression*, 107 GEO. L.J. 365, 373 (2019) ("This educational inculcation of core democratic and social values is reflective of the unique function that public schools serve to provide a training ground for instilling the duties of American citizenship.").

³⁸² See *supra* notes 42 and 49 and accompanying text.

³⁸³ See generally William N. Eskridge, Jr., *A Pluralist Theory of the Equal Protection Clause*, 11 U. PA. J. CONST. L. 1239 (2009); William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279 (2005); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988).

³⁸⁴ See Sant, *supra* note 12, at 669, 674.

³⁸⁵ *Id.* at 681.

³⁸⁶ See *id.* at 682.

³⁸⁷ *Id.*

³⁸⁸ *Id.* at 684.

democracy by fostering a student-centered focus through the IEP development process which models democratic participation by giving students a voice in their education and teachers more autonomous choices to respond to their students' needs, capacities, and interests.

The IEPs-for-all remedy is not as neatly aligned with the education *within* democracy approach, which renders education an instrumental value to liberty in a “market society.”³⁸⁹ Education *within* democracy is rooted in “(negative) individual freedom,” as well as “individualism and competition” to “respond to the demands of individual citizens.”³⁹⁰ History suggests that public schooling was meant to counteract the “tendencies of economic individualism.”³⁹¹ Nevertheless, if education within democracy is actually meant to respond to the demands of individuals and enhance individual freedom, the IEPs-for-all remedy can support those ends. The IEPs-for-all remedy is indeed singularly focused on addressing individual needs, capacities, and interests. And the collaborative IEP-development process gives students a voice and choice, i.e., more freedom, over their own education.

By modeling democratic participation and informing democratic decision-making, the IEPs-for-all remedy serves the mission of public schools to cultivate children in the moral obligations of citizenship. It does so not by dictating a moral education curriculum that flouts our pluralistic traditions, but by making children *participants*, rather than passive *recipients*, of educational justice.³⁹² After all, education should not be something done *to* students but *with* them.³⁹³ Such emphasis echoes that of common school proponents who sought to inculcate “a common core of sentiment, of value, and of practice *within which* pluralism” can coexist within a democratic community that functions, “not at the expense of *individualism*, but rather as a firm framework within which *individuality* might be most effectively preserved.”³⁹⁴

III. THE EDUCATION OF DEMOCRACY

Americans have long believed that the best “remedy for democracy is more democracy.”³⁹⁵ But in our public schools, we have never practiced what we preach.

³⁸⁹ See *id.* at 685.

³⁹⁰ *Id.* at 682.

³⁹¹ CREMIN, *supra* note 282, at 62; see also DONALD PARKERSON & JO PARKERSON, THE EMERGENCE OF THE COMMON SCHOOL IN THE U.S. COUNTRYSIDE 6 (1998) (noting that early education activists, such as Benjamin Rush, believed public schools “help[ed] control the innate selfishness of the individual”).

³⁹² See Anthony Simon Laden, *Learning to Be Equal: Just Schools as Schools of Justice*, in EDUCATION, JUSTICE & DEMOCRACY 66 (Danielle Allen & Rob Reich eds., 2013).

³⁹³ See Steven D. Taff & Scot Danforth, *Dewey and Philosophy of Disability*, in ENCYCLOPEDIA OF EDUCATIONAL PHILOSOPHY & THEORY 3 (2016).

³⁹⁴ CREMIN, *supra* note 282, at 221 (emphasis added).

³⁹⁵ CARL LOTUS BECKER, OUR GREAT EXPERIMENT IN DEMOCRACY: A HISTORY OF THE UNITED STATES 85–86 (1927).

Rather we have allowed our selfishness, ignorance, and passion to corrode public education so that, in form and fashion, if not function, it looks more authoritarian than democratic. That the United States has been “nominally democratic for so long” perhaps gives us a false sense of security with the “false assumption that citizens just happen.”³⁹⁶ If, however, “democrats are not born but educated,”³⁹⁷ then we must begin to take seriously whether the ways we learn democracy are actually conducive to the ways we are supposed to live democracy.

We can debate various educational reforms to promote citizenship education, but we should not be naïve: The success of democratic education does not depend on any particular policy proposal but on whether we are willing to fully embrace and aspire to the virtues of democratic education. That is, whether we are willing to extend our generosity to enrich the growth of every individual, whether we are willing to practice wisdom by educating ourselves with the practical knowledge needed to make sound judgments that lead to good ends, and whether we are willing to build a basis for respecting ourselves and each other. The IEPs-for-all remedy can be the first step to a path-clearing view that lets us see these democratic virtues again, or for the first time.

A. Generosity: One-for-All Individuality

Educating to the needs, capacities, and interests of each child is an act of utmost generosity that restores faith in the moral equality of humans by recognizing unique individual capabilities and contributions.³⁹⁸ “Only by being true to the full growth of all the individuals who make it up, can [a democratic] society by any chance be true to itself.”³⁹⁹ The center of gravity, as Dewey would say, must be the needs, capacities, and interests of each child around which education should find its orbit.⁴⁰⁰ Or perhaps a better take on that metaphor: education should permit all children to find their own orbits.

Providing all schoolchildren with an IEP would be a first-step remedial measure towards that end. The IEP development process can empower students to be more active participants in their own learning, providing them an opportunity to collaborate with their teachers to set their own academic, personal, and social goals. Such goal setting, the research shows, has a positive impact on student performance.⁴⁰¹ It could

³⁹⁶ Benjamin Barber, *America Skips School*, HARPER’S MAGAZINE, Nov. 1993, at 44.

³⁹⁷ James A. Banks, *Foreword* to EDUCATING THE DEMOCRATIC MIND, at xi, xi (Walter C. Parker ed., 1996).

³⁹⁸ See Garrison, *supra* note 98, at 372–73.

³⁹⁹ DEWEY, *supra* note 160, at 3–4.

⁴⁰⁰ See *id.* at 35.

⁴⁰¹ See Jessica DeMink-Carthew et al., *An Analysis of Approaches to Goal Setting in Middle Grades Personalized Learning Environments*, 40 RES. MIDDLE LEVEL EDUC. 1, 1 (2017); Suk-Hyang Lee et al., *Goal Setting and Self-Monitoring for Students with Disabilities: Practical Tips and Ideas for Teachers*, 44 INTERVENTION IN SCH. & CLINIC 139, 139 (2009);

also empower students to better understand their own needs, capacities, and interests.⁴⁰² All this in turn creates space for a more participatory learning environment in which students have a voice and more choices and thereby develop democratic attitudes and practices. Supporting student autonomy not only makes for better learning outcomes,⁴⁰³ it makes for better democratic citizens.⁴⁰⁴

To be sure, youth, poverty, and systemic racism will pose significant obstacles, restricting children's awareness and appreciation of their needs, capacities, and interests.⁴⁰⁵ Goal setting must therefore be guided by educators, parents, and well-placed mentors, even as students should be empowered to regard their role as essential to the process. But we simply cannot accept the alternative—to deprive young, poor children of color a voice, an opportunity to set their own goals “because they don't know better.”

The IEPs-for-all remedy can also empower teachers with an “authentic assessment” tool they can use to “document both the academic performance of students and the social-emotional aspects of learning,” including character development, focused on “growth or progress over time.”⁴⁰⁶ IEPs can be retooled for that diagnostic purpose, documenting a range of student performance and growth metrics.⁴⁰⁷ Such documentary practices, write Beverly Falk and Linda Darling-Hammond, “support[] the development of democratic education by making it possible for teachers to understand and teach their students well and for students to understand themselves and each other, both as learners and as members of a collective community.”⁴⁰⁸

Repurposed and retooled, the IEPs-for-all remedy could offset standardization's selfish and competitive proclivities by facilitating more “vertical” assessments, comparing each student's growth over time, rather than “horizontal” assessments like test scores, used to make comparisons between students.⁴⁰⁹ Drawing on a wider

Michael L. Wehmeyer et al., *A National Survey of Teachers' Promotion of Self-Determination and Student-Directed Learning*, 34 J. SPECIAL EDUC. 58, 58 (2000).

⁴⁰² See Ryan & Niemiec, *supra* note 150, at 270.

⁴⁰³ See Yu-Lan Su & Johnmarshall Reeve, *A Meta-analysis of the Effectiveness of Intervention Programs Designed to Support Autonomy*, 23 EDUC. PSYCH. REV. 159, 160 (2011).

⁴⁰⁴ See Eva Dobozy, *Effective Learning of Civic Skills: Democratic Schools Succeed in Nurturing the Critical Capacities of Students*, 33 EDUC. STUD. 115, 115 (2007); David Lefrançois & Marc-Andre Ethier, *Translating the Ideal of Deliberative Democracy into Democratic Education: Pure Utopia?*, 42 EDUC. PHIL. & THEORY 271, 272–73 (2010); Brett L. M. Levy, *Fostering Cautious Political Efficacy Through Civic Advocacy Projects: A Mixed Methods Case Study of an Innovative High School Class*, 39 THEORY & RES. SOC. EDUC. 238, 238 (2011).

⁴⁰⁵ See AU, *supra* note 114, at 96–99.

⁴⁰⁶ See Liew & McTigue, *supra* note 134, at 467.

⁴⁰⁷ See Beverly Falk & Linda Darling-Hammond, *Documentation and Democratic Education*, 49 THEORY INTO PRACTICE 72, 79 (2010).

⁴⁰⁸ *Id.* at 73.

⁴⁰⁹ See Ke Yu & George Frempong, *Standardise and Individualise—An Unsolvable Tension in Assessment?*, 16 EDUC. AS CHANGE 143, 149 (2012).

range of continuous improvement assessments (e.g., teacher-created assessments, writing portfolios) would also provide “a much fuller portrait of student learning,” than the standardized assessments.⁴¹⁰

Linda Darling-Hammond underscores that the success of democratic education may ultimately depend on how well we harness “our growing ability to produce knowledge *for* and *with* educators and policymakers in ways that provide a foundation for a more complex form of teaching practice.”⁴¹¹ IEP development and monitoring can, when combined with individual and school-level measures, provide educators and policymakers with information they need to improve interventions and instructional practices.⁴¹²

Above all, information can empower teachers with greater autonomy to adjust their approach and build positive relationships with their students.⁴¹³ Such relationships built on trust and care are essential to fostering generosity in children.⁴¹⁴

Skeptics might understandably doubt these possibilities given the track record of IEP development and monitoring in the special education context.⁴¹⁵ “Special educators and administrators exert considerable control over the direction of IEP meetings and content, while families are frequently passive participants.”⁴¹⁶ Moreover, “research indicates that schools continue to struggle with the basic procedural and substantive requirements of IEPs.”⁴¹⁷ Research further suggests, “mixed perceptions regarding the usefulness of IEPs in the planning and instruction of students with disabilities.”⁴¹⁸ Anecdotally, many parents perceive the pitfalls of IEPs in which “meticulous attention to paperwork requirements” substitutes for “meaningful compliance”

⁴¹⁰ See Amanda Datnow & Vicki Park, *Opening or Closing Doors for Students? Equity and Data Use in Schools*, 19 J. EDUC. CHANGE 131, 140 (2018).

⁴¹¹ Darling-Hammond, *supra* note 144, at 8 (“We need to worry more intensely and more productively about how research connects to policy and practice, how productive change occurs, and what must happen to move schools from where they are to where research suggests they could be.”).

⁴¹² See Phelps et al., *supra* note 105, at 22.

⁴¹³ See Darling-Hammond, *supra* note 144, at 8.

⁴¹⁴ See Maria Isabel Pomar & Carme Pinya, *Learning to Live Together. The Contribution of School*, 28 CURRICULUM J. 176, 186 (2017); Vicki Zakrzewski, *How to Foster Generosity in Students: Science-Based Suggestions for Keeping Your Students’ Holiday Spirit Going Throughout the Year*, GREATER GOOD MAGAZINE (Dec. 18, 2013), https://greatergood.berkeley.edu/article/item/fostering_generosity_and_kindness_in_students_throughout_the_year [<https://perma.cc/GB2D-MTXP>].

⁴¹⁵ See generally William H. Blackwell & Zachary S. Rossetti, *The Development of Individualized Education Programs: Where Have We Been And Where Should We Go Now?*, 4 SAGE OPEN 1 (2014).

⁴¹⁶ *Id.* at 11.

⁴¹⁷ *Id.*

⁴¹⁸ Laura E. Bray & Jennifer Lin Russell, *The Dynamic Interaction Between Institutional Pressures and Activity: An Examination of the Implementation of IEPs in Secondary Inclusive Settings*, 40 EDUC. EVAL. & POL’Y ANALYSIS 243, 244 (2018).

and a “kind of magical thinking” pervades “in which simply describing a program becomes the same as actually delivering services.”⁴¹⁹

Yet these implementation problems are a bug, not a feature, of individualized education planning and instruction. That bug has festered because special education remains chronically underfunded and because the pervasive effects and institutional pressures of standardization have crept into the IEP process.⁴²⁰ With some democratic imagination, will, and purpose, we can fix this bug.

The IEP development process itself needs to be more democratic and participatory. “The research has provided substantial evidence that the process of engaging students . . . to participate in the IEP process is an effective strategy for building self-determination skills, increasing participation in IEP meetings, and engaging in the development of their own IEPs” all of which leads to “increases in academic achievement.”⁴²¹ The IEP development process should also be further streamlined to attend to actual student needs, interests, and capacities. Despite the negative associations reportedly held by educators about IEPs, general and special education teachers actually find them moderately useful in lesson planning and believe IEPs could be even more useful if simplified with “truly individualized information relevant to their classrooms and the student’s needs.”⁴²²

Fixing the IEP bug will require more than tweaks to the process and form of the plan, however; it will also take a considerable infusion of resources. A report prepared for the U.S. Department of Education estimated the cost of developing an IEP at \$2,000 per student in 1989–90 dollars.⁴²³ Adjusted for inflation, the cost could be double in today’s dollars, at \$4,000 per student.⁴²⁴ But this inflation-adjusted estimate is likely inflated for nondisabled students. The \$4,000 estimate is, after all, based on the costs of developing an IEP for students with disabilities.⁴²⁵ Their IEP development process entails more expense given the involvement of professionals and specialists and the additional time to identify educational needs, document academic and functional goals, and settle on required services.⁴²⁶ The \$4,000 estimate derived

⁴¹⁹ See Tracy Thompson, *The Special-Education Charade*, ATLANTIC (Jan. 3, 2016), <https://www.theatlantic.com/education/archive/2016/01/the-charade-of-special-education-programs/421578/> [<https://perma.cc/96Z8-BLWW>].

⁴²⁰ See Bray & Russell, *supra* note 418, at 260–62.

⁴²¹ Blackwell & Rossetti, *supra* note 415, at 12.

⁴²² Kathleen Rotter, *IEP Use by General and Special Education Teachers*, SAGE OPEN 5–6 (Apr.–June 2014), <https://journals.sagepub.com/doi/pdf/10.1177/2158244014530410> [<https://perma.cc/L2RE-H5LD>].

⁴²³ See JUDY A. SCHRAG, THE IEP: BENEFITS, CHALLENGES, AND FUTURE DIRECTIONS, NATIONAL ASSOCIATION OF STATE DIRECTORS OF SPECIAL EDUCATION 13 (1996), <https://files.eric.ed.gov/fulltext/ED399734.pdf> [<https://perma.cc/47Z7-WZ3X>].

⁴²⁴ See *generally Inflation Calculator*, U.S. INFLATION CALCULATOR, <https://www.usinflationcalculator.com/> [<https://perma.cc/NA8A-957X>] (using CPI data to adjust for inflation on a certain amount of money between two given years).

⁴²⁵ See SCHRAG, *supra* note 423, at 13.

⁴²⁶ See *id.* at 16.

from a thirty-year-old estimate also excludes any discount for efficiencies that have since been gained in the IEP development process. For instance, a growing number of school districts now make use of IEP software or web-based systems that reduce costs and streamline their processes.⁴²⁷

Moreover, the costs to develop an IEP for nondisabled students would be marginal, if the IEP merely becomes part of the agenda for parent-teacher conferences,⁴²⁸ which are already a widespread and established practice. In 2016, 78 percent of K–12 parents reported having attended a parent-teacher conference.⁴²⁹ To the extent that requiring an IEP would increase the quality and prevalence of parent-teacher conferences or parental involvement more generally, we could expect to see gains in student engagement and achievement,⁴³⁰ especially so if students are made active participants in those conferences.⁴³¹

Supposing then the estimated cost to develop IEPs is some small fraction of \$4,000 per student, the cost to monitor IEP progress going forward must also be accounted for. Successful implementation that does not saddle already-overburdened, resource-strapped educators will require smaller class sizes and thus more quality teachers and assistants, as well as professional training and more time set aside during the school day for teacher planning, collaboration, and performance assessment. Without these essential elements, the IEPs-for-all remedy simply will

⁴²⁷ See Cori M. More & Juliet E. Hart, *Maximizing the Use of Electronic Individualized Education Program Software*, 45 TEACHING EXCEPTIONAL CHILDREN 24 (2013); David Ulric, *Computerized IEP Generators: The Promise and the Peril*, 40 RUTGERS COMPUTER & TECH. L.J. 106, 107 (2014); see also William B. Bonner, *Evaluating The Efficiency And Effectiveness Of Online Individual Education Plans: A Case Study From A South Texas Elementary School* (May 2017) (unpublished Ph.D dissertation, Texas A&M University–Corpus Christi), <https://tamucc-ir.tdl.org/handle/1969.6/1168> [<https://perma.cc/W3MY-H4SE>]; Evan D. Borisinkoff, *Experiences Of Teachers Using An IEP Software Program For Students With Disabilities* (2014), <http://repository.unm.edu/handle/1928/23537> [<https://perma.cc/SXG8-F9RP>].

⁴²⁸ See John Farago, *A Free, Appropriate Public Education for All* (1996) (report prepared for New York City School Board and Chancellor) (on file with the author).

⁴²⁹ See Meghan McQuiggan & Mahi Megra, *Parent and Family Involvement in Education: Results from the National Household Education Surveys Program of 2016*, NAT'L CTR. EDUC. STAT. 8tbl.2 (2017), <https://nces.ed.gov/pubs2017/2017102.pdf> [<https://perma.cc/T85C-SENA>].

⁴³⁰ See generally Peter Bergman & Eric W. Chan, *Leveraging Parents: The Impact of High-Frequency Information on Student Achievement*, 56 J. HUM. RESOURCES 125 (2019); Matthew A. Kraft & Shaun M. Dougherty, *The Effect of Teacher-Family Communication on Student Engagement: Evidence from a Randomized Field Experiment*, 6 J. RES. ON EDUC. EFFECTIVENESS, 199, 199 (2013); Matthew A. Kraft & Todd Rogers, *The Underutilized Potential of Teacher-to-Parent Communication: Evidence from a Field Experiment*, 47 ECON. EDUC. REV. 49, 49–50 (2015).

⁴³¹ See generally Janette Boazman, *It's Time to Revamp the Parent-Teacher Conference Process: Let's Include the Child!*, 4 PARENTING FOR HIGH POTENTIAL 10 (2014); Patti Kinney, *Student-Led Conferences Support Learning*, 13 PRINCIPAL LEADERSHIP 55 (2012); Emily Richmond, *When Kids Lead Their Parent-Teacher Conferences*, ATLANTIC (Apr. 6, 2016).

not work. The total price tag, therefore, could well be billions annually. Can we afford it? Is the IEPs-for-all remedy worth it?

Yes and yes. Elementary and secondary public school expenditures account for less than five percent of the gross domestic product (GDP) of the United States.⁴³² A majority of states spend around three percent or less as a percentage of their GDP.⁴³³ State and local tax revenue as a share of personal income were lower in 2017 than in 1987.⁴³⁴ Most states can afford to invest more in public education.⁴³⁵ But more immediately, in the midst of the COVID-19 pandemic, because most states are prohibited from deficit spending, they will need assistance from the federal government.⁴³⁶ The hundreds of billions needed to mitigate the harm inflicted by the pandemic is nevertheless “well within the range of federal budgetary expenditures.”⁴³⁷ So the real challenge is not a lack of fiscal capacity but a lack of political will.

The IEPs-for-all remedy can help build some political will through interest convergence, appealing directly to parents because all children stand to benefit. Even before the pandemic, there was a recognized need for, among other things, “genuine personalized learning plans for students grounded in teacher-student relationships that meet the students where they are and provide rigorous tailored learning to exceed minimum grade-level learning standards.”⁴³⁸ The IEPs-for-all remedy is also well-positioned to co-opt the personalized learning agenda which is already sweeping the nation.⁴³⁹ We have every reason to be deeply skeptical of some of these personalized learning initiatives because they are backed by the tech industry which stands to profit

⁴³² See National Science Board, *Elementary and Secondary Public School Expenditures as a Percentage of Gross Domestic Product*, NAT'L SCI. FOUND. (2019), <https://nces.nsf.gov/indicators/states/indicator/public-school-expenditures-to-state-gdp> [<https://perma.cc/N9HW-Q8A5>].

⁴³³ *Id.*

⁴³⁴ See *Annual Survey of State and Local Government Finances, 1977 to 2017*, U.S. CENSUS BUREAU, <https://www.taxpolicycenter.org/statistics/state-and-local-tax-revenue-percentage-personal-income> [<https://perma.cc/TWR5-6FXR>].

⁴³⁵ See National Science Board, *supra* note 432 (revealing what a small percentage of state GDP is currently spent on public education).

⁴³⁶ Adamson et al., *supra* note 73, at 7.

⁴³⁷ *Id.* at 8 (Consider that “the four major airline corporations alone received \$25 billion in federal grants and low-interest loans from the CARES Act in response to the pandemic, and in 2008 banks received an initial \$700 billion in federal bailout money with a federal commitment of up to \$16.8 trillion to protect the private banking industry from failing. U.S. military expenditures have increased by \$166 billion since 2016 to \$934 billion in 2020, which is more than . . . the next 10 largest government expenditures combined. The 2017 Tax Cut [sic] and Jobs Act is predicted by Congress’ Joint Committee on Taxation to add \$1 trillion to the deficit over the next 10 years.”) (footnotes omitted).

⁴³⁸ *Id.* at 10.

⁴³⁹ See Faith Boninger et al., *Personalized Learning and the Digital Privatization of Curriculum and Teaching*, NAT'L EDUC. POL'Y CENTER 7 (Apr. 30, 2019); Phelps et al., *supra* note 105, at 7.

substantially from digital personalized learning platforms.⁴⁴⁰ The concept of personalized learning is also unsettled and open-ended and thus can be manipulated to serve for-profit interests and displace teachers in ways that evade oversight and transparency, as we have seen in the charter school reform movement.⁴⁴¹

But the horse is out of the gate. “In 2014–15, 65 percent of high schools nationwide developed personalized learning plans.”⁴⁴² Nineteen states have since pledged that all students will have a personalized learning plan that aligns with their educational needs and interests.⁴⁴³ The COVID-19 pandemic, which forced schools to develop online distance education programming, has only increased calls for more personalized learning experiences.⁴⁴⁴ This momentum can and should be redirected to providing all schoolchildren IEPs, which have been used for decades with procedural safeguards, are familiar to general and special education teachers alike as well as administrators, and are more substantive than personalized learning plans.⁴⁴⁵ The more generous we can be with such individualized planning and instruction to support teacher-student relationships, the more generosity we will instill in our children.

B. Wisdom: Practical Knowledge Put to Good Ends

Emulating the virtue of wisdom in education requires first building a base of practical knowledge from which educators and policymakers can make sound judgments put to good ends.⁴⁴⁶ Information gleaned from the IEP development and monitoring process is, in fact, necessary to make such judgments through democratic decision-making about educational equality and adequacy, which are the state constitutional bulwarks of protection for democratic equality. Retooled for data collection purposes, the IEPs-for-all remedy can build a much-needed knowledge base about educational needs, WSF allocations, and the adequacy of those allocations.

IEPs are already designed to assess educational needs and document interventions and remedial services.⁴⁴⁷ Hence, providing IEPs to all students so as to permit the

⁴⁴⁰ See Boninger et al., *supra* note 439, at 13–14, 19–23.

⁴⁴¹ See *id.* at 13–23.

⁴⁴² See U.S. DEP’T OF EDUC., ISSUE BRIEF: PERSONALIZED LEARNING PLANS 2 (Dec. 2017).

⁴⁴³ See *Personalized Learning*, *supra* note 66.

⁴⁴⁴ See Kim Hart & Alison Snyder, *How the Coronavirus Pandemic Will Transform Teaching*, AXIOS (May 9, 2020), <https://www.axios.com/coronavirus-teachers-school-education-85ba24a3-bb5c-4d4f-bf0d-90b0a20056d2.html> [<https://perma.cc/CSJ4-H6AV>]; Valerie Strauss, *How Past Crises Changed America’s Public Schools—‘And So Too Will COVID-19,’* WASH. POST (Apr. 26, 2020).

⁴⁴⁵ See U.S. DEP’T OF EDUC., *supra* note 442, at 5 (noting types of information included in personalized learning plans were post-secondary goals, identification of courses to achieve goals, personal goals, interests, students’ self-assessment of learning strengths and weaknesses).

⁴⁴⁶ Compare Gert Biesta, *The Future of Teacher Education: Evidence, Competence or Wisdom?*, 3 RES. ON STEINER EDUC. 8, 18–19 (2012), with Sharon Ryan, *Wisdom*, STAN. ENCYCLOPEDIA OF PHIL. (2018), <https://stanford.io/37D2zPp> [<https://perma.cc/T4ZA-2J2Z>].

⁴⁴⁷ See Phelps et al., *supra* note 105, at 8–9.

collection of a wider range of information can illuminate the demands of needs-based equity and adequacy, not just in terms of inputs and outcomes but also the throughputs, e.g., programs, intervention strategies, peer influences, teacher quality, of which we have little comprehensive data at the individual student level. It is only at that individual student level where “one can get at identifying appropriately differing levels of educational investment for different student populations.”⁴⁴⁸ From this, researchers and policymakers might be able to derive “dynamic weights” that “correspond to student need and the concentration of student need within the specific school.”⁴⁴⁹

IEPs can also be retooled for measuring constitutional benchmarks that cannot be captured by standardized test scores and graduation rates—for example, some of the individual capacities identified in educational adequacy decisions—self-knowledge, character development, cultivation of civic values like empathy and tolerance, appreciation of culture and heritages, social ethics, and leadership.⁴⁵⁰ If the state is required to cultivate such individual capacities in order to fulfill its duty to provide a constitutionally adequate education, then we should be collecting this information, through observational measures or other teacher-created forms of assessment.

Acquiring more information at the individual student level on educational needs, interventions, and capacities can then help researchers more accurately estimate the costs of providing that adequate education and set spending targets for WSF plans.⁴⁵¹ “More research is needed to increase understanding of how various interventions or opportunities map onto individual student needs that are rooted in context.”⁴⁵² Again, we have some limited outcome data and we will have more spending data, but a critical component is missing, namely, relevant information on students’ individual needs in relation to spending and outcomes. We need to create a feedback loop, “a link between outcomes and funding” so that we can see “how well needs are actually being met” while also raising “awareness of the educational process.”⁴⁵³

⁴⁴⁸ Rodriguez, *supra* note 178, at 13.

⁴⁴⁹ See Justin Dayhoff & Kristy Miller, *School-Level Dynamic Weighting: A New Approach to Weighted-Student Funding Models*, ANNUAL MEETING OF ASS’N FOR EDUC. FIN. & POL’Y 3 (2018), <https://bit.ly/2U4xjWc> [<https://perma.cc/25ZC-SMWU>].

⁴⁵⁰ See, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 189–90 (Ky. 1989); *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W. Va. 1979).

⁴⁵¹ See Rodriguez, *supra* note 178, at 16; see also Frances Contreras & Maria Oropeza Fujimoto, *College Readiness for English Language Learners (ELLs) in California: Assessing Equity for ELLs under the Local Control Funding Formula*, 94 PEABODY J. EDUC. 209, 210 (2019).

⁴⁵² NAT’L ACADEMIES OF SCIENCES, ENG’G, AND MED., *MONITORING EDUCATIONAL EQUITY* 49 (Christopher Edley et al. eds., 2019), <https://doi.org/10.17226/25389> [<https://perma.cc/AN4W-9V7Z>].

⁴⁵³ Gilead & David-Hadar, *supra* note 184, at 1098; see also Rodriguez, *supra* note 178, at 22 (“Matching specific outcome goals with a set of assumptions about students that resist the adherence to cultural deficit model thinking could result in significantly more informative insights from schools that have an equitable approach to their work.”) (citations omitted).

That educational process is not (nor should it be) entirely individualized: “Individual student background attributes are but one small piece of a complex integrated puzzle in which the specific educational needs of individual students interact . . . with the context in which children are schooled.”⁴⁵⁴ The social context and the various school complexities must be taken into account because “certain aspects of schooling may require more resources to be truly responsive to the diverse needs that students bring to the classroom.”⁴⁵⁵ So, the IEPs-for-all remedy is but one piece of a state’s “reasonable *knowledge-production plan* concerning the constitutional quality of the educational system.”⁴⁵⁶ But it is a necessary piece coming at “an auspicious time for state courts to establish a knowledge-production planning requirement [given that] the U.S. Department of Education is creating benchmarks for high-quality research [and there] has been the improvement of state data systems.”⁴⁵⁷

Even before IEP-generated data reaches the state level, however, it can be used immediately in the classrooms to guide instruction and intervention and in the schools to shape policy and reallocate resources. IEP-generated data could have its greatest potential in the ways it informs local democratic decision-making, among teachers in relation to their students and parents and among school administrators in relation to their constituents.

In sum, we can meet the demands of democratic education only by educating ourselves about educational needs, WSF allocations, and adequate educational costs. By assembling this practical knowledge, the IEPs-for-all remedy can help us understand and operationalize needs-based equity and educational adequacy at the individual student level, classroom and school levels, and eventually at the system level to best position the state and its educators to make wise judgments about how to progress democratic equality.

C. Respect: The Finnish Way

We cannot build a basis for self- and mutual respect among all public school-children until we end the literal and figurative separation between special and general education. Special education is fraught with inequities and its stigma cannot be excised under the current structure. Indeed, the only way to remove that stigma is to make all students recipients of a special education and make all education special. The IEPs-for-all remedy can make a sizeable dent in both directions, possibly enough to expose the first cracks in the wall that divides special and general education students.

First, the IEPs-for-all remedy makes all students recipients of special education namely by providing all students an IEP—“the cornerstone . . . heart . . . *sine qua non*

⁴⁵⁴ Bruce D. Baker & Preston C. Green, *Conceptions of Equity and Adequacy in School Finance*, in *HANDBOOK OF RESEARCH IN EDUCATION FINANCE AND POLICY* 231, 237 (Helen F. Ladd & E.B. Fiske eds., 2008).

⁴⁵⁵ Rodriguez, *supra* note 178, at 19; *see also id.* at 24.

⁴⁵⁶ See Elmendorf & Shanske, *supra* note 48, at 736.

⁴⁵⁷ *Id.*

of IDEA . . . for special education, there is no document more significant to districts, agencies, administrators, teachers, parent and educational advocates, and students.”⁴⁵⁸ Providing all students with an IEP cannot alone destigmatize special education but it can make a difference. Finland supplies the proof.⁴⁵⁹ “[T]he Finnish school system [is] one of the most individualized school systems in the world.”⁴⁶⁰ All Finnish children have “the right to have personalized support . . . as a normal part of schooling.”⁴⁶¹ Individualized schooling is not special, it is the norm.⁴⁶²

What’s more, support for “special needs” in Finland exists on three tiers: “[G]eneral support, intensified support, and special support. Everyone is entitled to general support.”⁴⁶³ In other words, all Finnish students are eligible for some type of “special” needs support without needing a disability diagnosis.⁴⁶⁴ And because so many students receive special education, “up to half of those students who complete their compulsory education[,] . . . it is nothing that special anymore for students.”⁴⁶⁵ This special education conditioning, in turn, “significantly reduces the negative stigma that is often brought on by special education.”⁴⁶⁶

Why should we care about the Finnish school system? Because it consistently ranks among the best in the world on “every PISA measurement.”⁴⁶⁷ That is no “coincidence but a reflection of its commitment to equity goals, nurtured alongside an inclusive approach [with] the provision of individualized support.”⁴⁶⁸ Equally important for our purposes, Finland ranks in the top five best functioning democracies in the world.⁴⁶⁹

Second, the IEPs-for-all remedy contributes to a sense that all education is special by both including students in their education and focusing on their individual needs, capacities, and interests. The question has been asked before: “Doesn’t every

⁴⁵⁸ Blackwell & Rosetti, *supra* note 415, at 1 (citations omitted).

⁴⁵⁹ See generally PASI SAHLBERG, FINNISH LESSONS 2.0: WHAT CAN THE WORLD LEARN FROM EDUCATIONAL CHANGE IN FINLAND? (2015).

⁴⁶⁰ *Id.* at 53.

⁴⁶¹ *Id.* at 84.

⁴⁶² See *id.*

⁴⁶³ Hannele Niemi, *The Finnish Educational Ecosystem*, in FINNISH INNOVATIONS & TECHNOLOGIES IN SCHOOLS 11 (H. Niemi et al. eds., 2014).

⁴⁶⁴ See Henri Pesonen et al., *The Implementation of New Special Education Legislation in Finland*, 29 EDUC. POL’Y 162, 164 (2015).

⁴⁶⁵ *Id.*

⁴⁶⁶ Pasi Sahlberg, *A Model Lesson: Finland Shows Us What Equal Opportunity Looks Like*, AM. EDUCATOR, Spring 2012, at 20, 24.

⁴⁶⁷ Niemi, *supra* note 463, at 5–6.

⁴⁶⁸ Pei Wen Chong, *The Finnish “Recipe” Towards Inclusion: Concocting Educational Equity, Policy Rigour, and Proactive Support Structures*, 62 SCANDINAVIAN J. OF EDUC. RES. 501, 505 (2018).

⁴⁶⁹ See *Democracy Index 2019: A Year of Democratic Setbacks and Popular Protest*, WORLD DEMOCRACY REPORT (2020).

child deserve an individualized learning plan that charts a course for obtaining an appropriate education and measuring her progress?”⁴⁷⁰

Consider the plight of the twice-exceptional (2e) student, “who has the unique circumstance of meeting the definitions of both ‘child with a disability’ and ‘gifted.’”⁴⁷¹ Although the U.S. Department of Education has taken the position that 2e students should be considered protected under the IDEA, federal law itself does not address 2e students explicitly.⁴⁷² Given the wide variability among states, 2e children often go unidentified and underserved: It is said that “to be a 2e child often means to be misunderstood.”⁴⁷³

There is an immense space between the ceiling-level expectations and prospects for gifted students and the basic floor of opportunity we commit to providing students with disabilities. At some point in between are the thresholds set for nondisabled and nongifted students. Why should this be? All students deserve individualized planning, instruction, and monitoring, no matter the label—special, at-risk, general, gifted, disabled, 2e. Indeed, it was a “grand intention[] of educators that IDEA would lead to individualized learning plans for all students.”⁴⁷⁴ We can finally make good on those intentions with the IEPs-for-all remedy and thereby begin to build a basis for self- and mutual respect for all schoolchildren.

CONCLUSION

Democracy presupposes a faith in individuals to be democratic. That faith is often shaken by the reality that the democratic way of life is difficult, at times even unnatural.⁴⁷⁵ Public schools were created to restore faith that we could live and thrive

⁴⁷⁰ Rosenbaum, *supra* note 65, at 385 (citing, *inter alia*, MARK KELMAN & GILLIAN LESTER, *JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH DISABILITIES* 157 (1997) (“Should markedly higher levels of resources be available, we would recommend the individualization of educational plans and intervention packages for all low-achieving pupils, regardless of disability status, as well as for all pupils where there is reason to believe they are performing below potential in the only sense that ultimately matters—that is, they are performing markedly less well than they would if the interventions were put into place.”)).

⁴⁷¹ Kim Millman, *An Argument for Cadillacs Instead of Chevrolets: How the Legal System Can Facilitate the Needs of the Twice-Exceptional Child*, 34 PEPP. L. REV. 455, 478 (2007).

⁴⁷² U.S. Dep’t of Educ., Opinion Letter (Dec. 20, 2013), <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/122013delislettwiceexceptional4q2013.pdf> [<https://perma.cc/P2MG-X4LS>].

⁴⁷³ Matthew Alessandri, *Private School Placement for the Twice Exceptional Child Under the Individuals with Disabilities Education Act*, 25 CARDOZO J. EQUAL RTS. & SOC. JUST. 489, 501 (2019).

⁴⁷⁴ Dean Hill Rivkin, *Decriminalizing Students with Disabilities*, 54 N.Y. L. SCH. L. REV. 909, 914 n.27 (2010).

⁴⁷⁵ See BENJAMIN R. BARBER, *AN ARISTOCRACY OF EVERYONE: THE POLITICS OF*

democratically so long as we instill in children the virtues of democracy and the moral obligations of citizenship. But public schools cannot just be “the cradle of our democracy,”⁴⁷⁶ they must be democratic, if children are to actually learn democracy.

A simple way to make education more democratic is to give all public school-children a voice, for that expresses regard for an interpersonal equality and worth of individuals. Another way to make education more democratic is let those voices and shared experiences be deliberatively considered in the informed choices made by educators and policymakers, for that assumes a freedom, an enabling agency, to shape collective action. Individualized education plans cannot cure the ills of democracy and education but can encourage the voices and choices to unite them as one, democratic education.

EDUCATION AND THE FUTURE OF AMERICA 5 (1992) (“Democracy [is anything but] a natural form of association. It is an extraordinary and rare contrivance of cultural imagination.”).

⁴⁷⁶ *Adler v. Bd. of Educ.*, 342 U.S. 485, 508 (1952) (Douglas, J., dissenting).