

# ARTICLES

## TRANSCENDING EQUALITY *VERSUS* ADEQUACY

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*A debate about whether all children are entitled to an “equal” or an “adequate” education has been waged at the forefront of school finance policy for decades. In an era of budget deficits and harsh cuts in public education, I submit that it is time to move on.*

*Equality of educational opportunity has been thought to require equal spending per pupil or spending adjusted to the needs of differently situated children. Adequacy has been understood to require a level of spending sufficient to satisfy some absolute, rather than relative, educational threshold. In practice, however, many courts interpreting their states’ constitutional obligations have fused the equality and adequacy theories. Certain federal laws express principles of both doctrines. And gradually, more advocates and scholars have come to endorse hybrid equality-adequacy approaches. Still, the debate persists over seemingly intractable conceptual precepts and their political and legal ramifications.*

*Tracking the philosophical origins and evolution of equality and adequacy as legal doctrines, I explain the significance of their points of convergence and argue that the few points of divergence are untenable in practice. Equality of ed-*

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*educational opportunity should not be interpreted as pursuing equal chances for educational achievement for all children, because that ideal is infeasible. Nor should educational adequacy be interpreted as completely indifferent to objectionable inequalities that can be feasibly curtailed. Properly conceived, equality and adequacy are not merely congruent but reciprocal. That is, children are owed an education that is adequately equal and equally adequate.*

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## INTRODUCTION

In the pursuit of educational justice, practice often outpaces theory. Educational equality and adequacy theories have been understood to impose different demands. As generally conceived by equality theorists, justice dictates that all children have equal educational opportunities. Adequacy theorists typically construe the demands of justice as requiring that all children have access to a certain threshold of educational opportunities. For decades, however, a number

of courts have incorporated or invoked equality and adequacy in tandem,<sup>1</sup> even as a burgeoning literature has contrasted the two theories.<sup>2</sup> A few scholars perceived the convergence early on,<sup>3</sup> but the trend to embrace the theories as complementary is relatively recent.<sup>4</sup> Some commentators now propose theories that merge equality and adequacy toward “equity plus,”<sup>5</sup> “‘meaningful’ educational opportunity,”<sup>6</sup> or “comparability.”<sup>7</sup> Even among staunch proponents of equality

1. Richard Briffault, *Adding Adequacy to Equity*, in *SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY* 25, 27 (Martin R. West & Paul E. Peterson eds., 2007); see also William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-Examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 SANTA CLARA L. REV. 1185, 1283-96 (2003) (explaining that no clear line divides equality theories from adequacy theories and that, in fact, both theories are present in most education finance cases).

2. For general discussions of the equality-adequacy debate, see Derrick Darby & Richard E. Levy, *Slaying the Inequality Villain in School Finance: Is the Right to Education the Silver Bullet?*, 20 KAN. J.L. & PUB. POL'Y 351 (2011); and William S. Koski & Rob Reich, *When “Adequate” Isn’t: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545 (2006).

3. See Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, 1997 BYU EDUC. & L.J. 1, 27 (describing “hybrid” equality-adequacy lawsuits as “using the language of equality as just one measure of adequacy to advance the quality of education” (citation omitted) (internal quotation marks omitted)); Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 58 (1969) (finding educational inequality to be closely related to “educational deprivation”); Julie K. Underwood, *School Finance Adequacy as Vertical Equity*, 28 U. MICH. J.L. REFORM 493, 493, 516-19 (1995) (suggesting that “adequacy” is merely a form of “vertical equity”).

4. See Derek Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally Protected Right*, 51 WM. & MARY L. REV. 1343, 1372-73 (2010) (“[Reformers] have thus far largely experimented with equity and adequacy as separate theories and remedies, but in many respects the two are intertwined.”); Darby & Levy, *supra* note 2, at 369 (“[A] fully satisfactory theory of justice in education should account for the importance of both adequacy and equality.”); James E. Ryan & Thomas Saunders, *Foreword to Symposium on School Finance Litigation: Emerging Trends or New Dead Ends?*, 22 YALE L. & POL'Y REV. 463, 469 (2004) (“Adequacy and equity may be distinct legal theories, but they blur considerably in practice.”).

5. William H. Clune, *The Shift from Equity to Adequacy in School Finance*, 8 EDUC. POL'Y 376, 379-80 (1994).

6. Michael A. Rebell, *Poverty, “Meaningful” Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1470 (2007).

7. JAMES E. RYAN, *FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA* 150-51 (2010); James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1232-39 (2008).

or adequacy, there is an emerging recognition that the theories are not entirely incompatible.<sup>8</sup>

Nevertheless, several equality and adequacy advocates remain entrenched, insisting that one theory should override or constrain the other.<sup>9</sup> And, although some courts have linked equality and adequacy, judges and legislatures continue to “struggle with a remedy” in part because the paradigms are elusive.<sup>10</sup> The concern that these concepts elude judicially discoverable and manageable standards further obfuscates the controversy and contributes to the growing reluctance of state courts to intervene when legislatures fail to fulfill their affirmative obligations to provide an adequate or equal education.<sup>11</sup> Hence, the decades-long equality versus adequacy debate lingers over seemingly irreconcilable conceptual differences and legal impracticalities.

My aim in this Article is to enumerate the points of convergence between equality and adequacy and to show that their residual conflicting tenets are unsustainable in practice. Equality and adequacy are not mutually exclusive; indeed, I contend that they are mutually reinforcing. To apprehend their symbiosis, we must delve deeper into each theory’s philosophical foundations without losing sight of how the concepts are operationalized in law and policy. I suspect that part of the reason that the equality versus adequacy debate persists is that the practitioners, legal academics, and political philosophers who have engaged in it have done so within their respective disciplines. Although a few scholars have observed parallel themes and polemics, they have declined to confront them in depth.<sup>12</sup>

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8. See Harry Brighouse & Adam Swift, *Educational Equality Versus Educational Adequacy: A Critique of Anderson and Satz*, 26 J. APPLIED PHIL. 117, 118 (2009) (“Justice . . . demands adequacy, but it also demands equality—even if those demands must sometimes be balanced against each other, and against other demands it makes.”); Debra Satz, *Equality, Adequacy, and Educational Policy*, 3 EDUC. FIN. & POL’Y 424, 435 (2008) (“Adequacy for citizenship has egalitarian dimensions. . . . Many of its practical implications are likely to be similar to those endorsed by vertical equality of opportunity theorists.”).

9. See Elizabeth Anderson, *Fair Opportunity in Education: A Democratic Equality Perspective*, 117 ETHICS 595, 597, 614-20 (2007); Harry Brighouse & Adam Swift, *Putting Educational Equality in Its Place*, 3 EDUC. FIN. & POL’Y 444, 446-48 (2008); Koski & Reich, *supra* note 2, at 606-13; Satz, *supra* note 8, at 435-36.

10. See Koski & Reich, *supra* note 2, at 566.

11. See Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701, 741 (2010); Julia A. Simon-Kerr & Robynn K. Sturm, *Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education*, 6 STAN. J. C.R. & C.L. 83, 95-120 (2010).

12. See Darby & Levy, *supra* note 2, at 369 (“Although there is much to be said for and against each of these philosophical conceptions . . . , our present concern is not to pick a side in this debate . . . .”); Koski & Reich, *supra* note 2, at 595 (“It would be impossible to do justice here to the complexity of the philosophical arguments in favor of egalitarianism over sufficientarianism or for equality over adequacy.”).

By pairing the philosophical and doctrinal analysis, however, we can perceive that equality and adequacy are reciprocal in theory, as they have been at times in practice. I negotiate this dual analysis by surveying the development of equality and adequacy as legal doctrines reflective of their philosophical heritages but constrained in their real-world application.<sup>13</sup>

Part I thus begins on the equality side of the debate with a review of equality of opportunity as the favored distributive principle of many contemporary egalitarians. John Rawls pioneered a substantive “fair equality of opportunity” theory, which entails, among other things, a universal education system devised to counteract the differential effects of children’s social circumstances (e.g., class and race), so that their educational achievement is solely a function of innate talent and effort. Rivaling Rawlsian equality of opportunity, luck egalitarianism demands the neutralization of all unchosen social *and natural* circumstances (i.e., luck), so that educational achievement is solely a function of individual choice.

The evolution of equality of educational opportunity as it has been embodied in the law suggests that it is conceptually more ambitious than Rawlsian equality of opportunity but less demanding in practice than luck egalitarianism. Increasingly, scholars, advocates, and courts think the concept is best expressed through “vertical equity,” a remedial school finance scheme that aims to mitigate natural and social disadvantages by allocating greater resources to the neediest students.<sup>14</sup> I assess a defense of this view by educational equality theorists Harry Brighouse and Adam Swift against the potentially fatal parental liberty objection—the argument that equality of educational opportunity cannot be realized without unduly infringing on the liberty of parents.

In Part II, I conduct a similar review of the adequacy theory, noting that it is philosophically consonant with the sufficiency doctrine. Sufficiency theorists subscribe to the notion that “what *is* important from the point of view of morality is not that everyone should have *the same* but that each should have *enough*.”<sup>15</sup> Elizabeth Anderson’s “democratic equality” is perhaps the most comprehensive account of sufficiency as a distributive principle, demanding that all children

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13. In philosophy parlance, I employ a “nonideal” methodology that analyzes principles against feasibility constraints to determine whether they are likely to be effective given the injustices of our imperfect world and assuming less than full compliance. See A. John Simmons, *Ideal and Nonideal Theory*, 38 PHIL. & PUB. AFF. 5 (2010) (explaining Rawls’s distinction between ideal and nonideal theories of justice).

14. Underwood, *supra* note 3, at 495 (“These two forms of inequality, innate and environmental, bring forth the need for vertical equity—the rationale for treating individuals differently in an attempt to mitigate these inequalities.” (citation omitted)).

15. Harry Frankfurt, *Equality as a Moral Ideal*, 98 ETHICS 21, 21 (1987); see also JOSEPH RAZ, *THE MORALITY OF FREEDOM* 240 (1986).

have a sufficient level of capabilities to function as equal citizens.<sup>16</sup> Also concerned with “civic equality,” Debra Satz joins Anderson in advocating for an adequacy threshold in education.<sup>17</sup>

Adequacy has been considered the “dominant legal theory” since the influx of the “third wave” of school finance litigation; the first two waves were thought to surge predominantly toward equality.<sup>18</sup> Yet the theory is assailed for its inherent ambiguity<sup>19</sup> and, more fundamentally, for its indifference to inequalities above the threshold that can “exacerbate the positional advantage of some students from better off school districts over disadvantaged students from worse off school districts.”<sup>20</sup> I assess Anderson’s and Satz’s responses to this criticism, which I call the fairness objection.

Notwithstanding the philosophical and legal conduits of the equality-adequacy stalemate, I argue in Part III that the theories share at least four significant points of convergence. First, most theorists and practitioners grant that equality and adequacy should not be construed as absolute, a priori moral principles. Rather, they have been conceived and employed in ways that are consistent with value pluralism. Second, despite conventional wisdom juxtaposing equality as the archetypal relational concept and adequacy as inherently non-relative, adequacy’s comparative qualities have been repeatedly demonstrated in its application. Third, egalitarians agree with a central tenet of adequacy—that absolute educational deprivation is morally wrong and that all children are entitled to a minimally adequate education. Fourth, sufficientarians agree with a central tenet held by many egalitarians—that public education should advance social equality.

As I explain, these four intersections pave a way to abandon equality’s and adequacy’s most extreme and problematic elements, which are exposed by the parental liberty and fairness objections. Specifically, the viability of the equality theory is diminished insofar as the objective is to ensure equal chances for educational achievement for all children. The adequacy theory is conversely flawed in its indifference to objectionable inequalities in educational opportuni-

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16. Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 289, 316 (1999).

17. Satz, *supra* note 8, at 425.

18. Ryan & Saunders, *supra* note 4, at 466 & n.19, 467 (citing William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219 (1990)) (explaining legal theories advanced in school finance litigation and crediting William Thro with developing wave metaphor, which “has subsequently become ubiquitous”).

19. See Amy L. Moore, *When Enough Isn’t Enough: Qualitative and Quantitative Assessments of Adequate Education in State Constitutions by State Supreme Courts*, 41 U. TOL. L. REV. 545, 548-55, 562-75 (2010) (discussing theoretical and practical difficulties in defining adequacy).

20. Darby & Levy, *supra* note 2, at 368.

ties above the guaranteed threshold. Some courts seem to appreciate these complementary defects, which explains why “‘equity’ cases tend to call for equity up to a point,” while “‘adequacy’ cases tend to be more tolerant of inequalities in resources but only up to a point.”<sup>21</sup>

Amending these unsound premises not only resolves the most forceful objections to equality and adequacy but also provides space to accommodate their respective normative appeals to fairness, responsibility, and a social basis for respect. The picture of educational justice that emerges, then, is one in which all children are owed an adequately equal and equally adequate education. The practical significance of that symbiosis is that policymakers are not conceptually bound to either equality *or* adequacy. That conclusion has not been lost on a few courts that have geared education policy toward equality *and* adequacy—conceivably, a less vexing and more determinate standard. Transcending the debate in this manner affords advocates and lawmakers latitude to advance educational justice along the points where equality and adequacy intersect.

## I. EQUALITY

The principle of equality of educational opportunity as we know it today in the United States is the product of many variables—economic development, cultural shifts, demographic changes, and social movements—that provoked remedial legislation and pathbreaking lawsuits. Along the way, equality advocates have sought justice through tangible and meaningful reforms, such as ending racial segregation, securing more money for poor school districts, and establishing procedural and substantive educational rights for children with disabilities. To be sure, those advocates did not consult Rawls for their litigation strategies, legislatures did not assess whether their education budgets comported with the aims of luck egalitarianism, and judges did not resort to the political philosophy du jour to decide school finance cases.

Nevertheless, it is no coincidence that the arguments litigants make, the rationales courts provide, and the language legislatures adopt frequently echo philosophical principles derived from logic and widely shared intuitions. Armchair theorizing may be a methodology unique to philosophy, but it tends to yield notions of fairness and morality that confirm and substantiate our preconceived and evolving judgments. Thus, we should reflect on the philosophical undercurrent that pervades our sense of educational justice.<sup>22</sup>

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21. Ryan, *supra* note 7, at 1251.

22. Obviously, there are philosophies, such as libertarianism, that do not regard education as an individual right or duty of the state and tend to see “educational justice” in a much different light. I do not mean to dismiss these viewpoints entirely by omitting them from this discussion. Rather, because equality and adequacy are the focus of this Article, and those theories have been understood and applied in ways that presuppose the state’s obligation to

To that end, the starting point of contemporary egalitarianism is the proposition that everyone should be treated with “equal concern and respect.”<sup>23</sup> Indeed, “[n]early all agree with the principle that members of a political community should be treated as equals . . . . What they disagree about is what ‘treatment as an equal’ amounts to.”<sup>24</sup>

Despite their disagreement over the proper object of equalization, egalitarians are virtually unanimous in their rejection of absolute equality of results (or outcomes)—the idea that everyone should realize the *same* economic and social conditions.<sup>25</sup> Liberty would be the first fatality of a regime pursuing equality of results.<sup>26</sup> Moreover, equalizing results does not respect individuality, personal responsibility, or difference; it values only equality.<sup>27</sup> On a larger scale, it is inefficient: with little or no incentive for competition, a society’s productivity and progression would stagnate.<sup>28</sup> Accordingly, we might begin to understand equality of opportunity by appreciating that it is not, strictly speaking, equality of results.<sup>29</sup>

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provide education to all children, I have confined my analysis to philosophies that entail a great deal of public intervention.

23. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 180 (1977); see Louis Pojman, *On Equal Human Worth: A Critique of Contemporary Egalitarianism*, in *EQUALITY: SELECTED READINGS* 282, 282 (Louis P. Pojman & Robert Westmoreland eds., 1997) (“While there are differences between contemporary egalitarian arguments, they all accept . . . that each person is of equal intrinsic value, of ‘dignity’ and thus ought to be treated with equal respect and be given equal rights.”). Dworkin coined the phrase “equal concern and respect” and elaborated on its meaning over the course of three decades. See RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 351-63 (2011); RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 2* (2000) [hereinafter DWORKIN, *SOVEREIGN VIRTUE*].

24. ADAM SWIFT, *POLITICAL PHILOSOPHY: A BEGINNERS’ GUIDE FOR STUDENTS AND POLITICIANS* 93 (2001); see also Koski & Reich, *supra* note 2, at 594 (citing seminal works in the debate over the proper equalisandum).

25. See Paula Casal & Andrew Williams, *Equality*, in *ISSUES IN POLITICAL THEORY*, 149, 163-65 (Catriona McKinnon ed., 2008); Kasper Lippert-Rasmussen, *Egalitarianism, Option Luck, and Responsibility*, 111 *ETHICS* 548, 550 (2001); Peter Vallentyne, *Brute Luck, Option Luck, and Equality of Initial Opportunities*, 112 *ETHICS* 529, 530-31 (2002). But see Anne Phillips, *Defending Equality of Outcome*, 12 *J. POL. PHIL.* 1, 18 (2004).

26. See JAMES S. FISHKIN, *JUSTICE, EQUAL OPPORTUNITY, AND THE FAMILY* 132 (1983).

27. See LLOYD L. WEINREB, *NATURAL LAW AND JUSTICE* 177 (1987).

28. See PAUL H. RUBIN, *DARWINIAN POLITICS: THE EVOLUTIONARY ORIGIN OF FREEDOM* 28 (2002).

29. See DOUGLAS RAE ET AL., *EQUALITIES* 64 (1981); Ferenc Feher & Agnes Heller, *Forms of Equality*, in *JUSTICE* 149, 152-53 (Eugene Kamenka & Alice Erh-Soon Tay eds., 1980). But see Lawrence B. Joseph, *Some Ways of Thinking About Equality of Opportunity*, 33 *W. POL. Q.* 393, 393 (1980) (explaining that certain conceptions of equality of opportunity can be compatible with equality of results); David A. Strauss, *The Illusory Distinction Between Equality of Opportunity and Equality of Result*, in *REDEFINING EQUALITY* 51, 51-52, 62-63 (Neal Devins & Davison M. Douglas eds., 1998) (arguing that the familiar distinction between equality of opportunity and equality of results is illusory).



Similarly, equality of educational opportunity does not insist that all children reach the *same* educational attainment.<sup>30</sup> To be sure, equality advocates want to reduce disparities in educational outcomes (e.g., graduation rates and test scores), but even those who propose that legislatures and courts take an “outcomes-based approach” aim merely to improve educational outcomes overall, especially for disadvantaged children; they have no delusion that all children can or want to achieve the same outcomes.<sup>31</sup> Rather, most educational equality theorists and egalitarians, as well as many Americans,<sup>32</sup> think that everyone should have a fair and equal chance—an equal opportunity—to achieve certain desired educational, economic, and social outcomes.

### A. *Equality of Opportunity*

Endorsed by Supreme Court Justices,<sup>33</sup> codified in federal laws,<sup>34</sup> and revered by everyday believers in the “American Dream,”<sup>35</sup> equality of oppor-

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30. See Satz, *supra* note 8, at 427 (“Few people support the idea that educational *outcomes* for all children should be equal: not only is such an ideal unrealistic, but it is also evident that not all children will be equally capable or equally motivated to learn.”); Mark G. Yudof, *Equal Educational Opportunity and the Courts*, 51 TEX. L. REV. 411, 420 (1973) (“Apparently no one is willing to urge the preposterous notion that equal educational opportunity requires that every child, regardless of ability, perform at the same level.”).

31. See Darby & Levy, *supra* note 2, at 378-82, 387.

32. See *United States v. Virginia*, 518 U.S. 515, 530 (1996) (“Women need not be guaranteed equal ‘results,’ . . . but the Equal Protection Clause does require equal opportunity . . . .” (quoting *United States v. Virginia*, 52 F.3d 90, 93 (4th Cir. 1995) (Motz, J., dissenting from denial of rehearing en banc)) (internal quotation marks omitted)); DEREK BOK, *THE STATE OF THE NATION: GOVERNMENT AND THE QUEST FOR A BETTER SOCIETY* 10 (1996) (“Americans may not care a great deal about equality of results; in fact, they have tolerated greater disparities in income and wealth than citizens of any other industrial democracy . . . . What they do believe in strongly, however, is equality of opportunity.” (citation omitted)).

33. See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring) (“This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children.”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511 (1989) (Stevens, J., concurring) (“A central purpose of the Fourteenth Amendment is to further the national goal of equal opportunity for all our citizens.”); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 319 n.53 (1978) (opinion of Powell, J.) (“Fairness in individual competition for opportunities . . . is a widely cherished American ethic.”); *Milliken v. Bradley*, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting) (“We deal here with the right of all of our children, whatever their race, to an equal start in life and to an equal opportunity to reach their full potential as citizens.”).

34. See, e.g., *Age Discrimination in Employment Act of 1967*, 29 U.S.C. §§ 621-634 (2012); *Fair Housing Act*, 42 U.S.C. §§ 3601-3619 (2011); *Americans with Disabilities Act of 1990*, 42 U.S.C. §§ 12101-12213 (2011); *Civil Rights Act of 1964*, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.).

tunity is an ideal ingrained in the American psyche.<sup>36</sup> What exactly does a commitment to equality of opportunity entail? Canvassing the answers to that question would be an unforgiving task because the principle is susceptible to many, often contradictory, meanings.<sup>37</sup> So, instead of defending a particular interpretation, I offer a general account that features three views traditionally associated with the principle—nondiscrimination, meritocracy, and equal life chances.

### 1. *Nondiscrimination*

Equality of opportunity in its most austere form demands simply that “careers . . . be open to talents.”<sup>38</sup> A product of the Enlightenment, the concept was originally directed at the aristocracy’s practice of barring nonaristocrats from certain occupations or prestigious positions.<sup>39</sup> It has since evolved to require the elimination of formal barriers to public services, privileges, positions, and accommodations based on arbitrary factors such as race, gender, age, disability, ethnicity, national origin, and sexual orientation—in other words, nondiscrimination.<sup>40</sup>

35. JENNIFER L. HOCHSCHILD, *FACING UP TO THE AMERICAN DREAM: RACE, CLASS, AND THE SOUL OF THE NATION*, at xvii (1995).

36. NICHOLAS LEMANN, *THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY* 50 (1999) (describing opportunity for all as “that distinctive national preoccupation”); RAE ET AL., *supra* note 29, at 64 (noting that equality of opportunity is “the most . . . compelling element of our national ideology”); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 139-40 (1993) (suggesting that the Constitution embodies the principle of “rough equality of opportunity” and that the principle “was a central theme in the framing period”).

37. Christopher Jencks, *Whom Must We Treat Equally for Educational Opportunity to Be Equal?*, 98 *ETHICS* 518, 532-33 (1988) (concluding that “most Americans support the idea” because “equal opportunity can mean distributing resources either equally or unequally, . . . it can be compatible with inequalities that favor either the initially advantaged or the initially disadvantaged, and [its] relative weight . . . can vary from one situation to the next”). Needless to say, the literature on the various interpretations of equality of opportunity is voluminous. For a recent discussion, see ANDREW MASON, *LEVELLING THE PLAYING FIELD: THE IDEA OF EQUAL OPPORTUNITY AND ITS PLACE IN EGALITARIAN THOUGHT* (2006).

38. Strauss, *supra* note 29, at 52. For a well-known explication of Napoleon’s maxim *la carrière ouverte aux talents*, see HENRY SIDGWICK, *THE METHODS OF ETHICS* 285 n.1 (Hackett Publ’g Co. photo. reprint 1981) (7th ed. 1907). The phrase was later employed by Rawls as part of his exposition of “formal equality of opportunity.” JOHN RAWLS, *A THEORY OF JUSTICE* 66, 72-73 (1971).

39. S.I. BENN & R.S. PETERS, *PRINCIPLES OF POLITICAL THOUGHT* 132 (1959).

40. *Id.*; see also JOHN E. ROEMER, *EQUALITY OF OPPORTUNITY* 1-2 (1998); Strauss, *supra* note 29, at 52; statutes cited *supra* note 34.

Justifications for the nondiscrimination principle vary depending on what is perceived to be wrong with considering arbitrary factors.<sup>41</sup> We might find it unfair because arbitrary factors are regarded as beyond people's control.<sup>42</sup> Alternatively, we might justify nondiscrimination by focusing on the harm committed when a person with arbitrary factor *X* is passed over or excluded due to the belief that all persons with *X* are somehow morally inferior. We might object to such discrimination because it projects moral superiority and prejudice.<sup>43</sup> Instead, we might ground our justification for nondiscrimination on the idea that consideration of arbitrary factors is irrational; thus, it would be irrational to deny a person a position on account of, say, race because that factor is irrelevant to how well he can perform in the position.<sup>44</sup> Notwithstanding the differing justifications, nondiscrimination is firmly linked with equality of opportunity.

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41. For a description of the various justifications, see Andrew Altman, *Discrimination*, STAN. ENCYCLOPEDIA PHIL. (Feb. 1, 2011), <http://plato.stanford.edu/entries/discrimination/#WroDirDis>.

42. See *Mathews v. Lucas*, 427 U.S. 495, 505 (1976) (disapproving of discrimination on the basis of illegitimacy as arbitrary because, inter alia, it is, "like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual"); Altman, *supra* note 41 (citing RICHARD D. KAHLBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* 54-55 (1996)). *But see* BERNARD R. BOXILL, *BLACKS AND SOCIAL JUSTICE* 15 (1992) (suggesting that there are situations in which it might be acceptable to consider factors beyond individual control); Strauss, *supra* note 29, at 53-54 (contending that there are many factors that might be deemed beyond individual control, including talent).

43. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 153-59 (1980); DEBORAH HELLMAN, *WHEN IS DISCRIMINATION WRONG?* 172 (2008); Altman, *supra* note 41 (citing Patrick S. Shin, *The Substantive Principle of Equal Treatment*, 15 *LEGAL THEORY* 149, 169-70 (2009)); see also *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994) (observing that race or gender discrimination in jury selection risks perpetuation of "prejudice" and "invidious group stereotypes"); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) ("[T]he fundamental object of Title II [of the Civil Rights Act of 1964] was to vindicate the deprivation of personal dignity that surely accompanies denials of equal access . . ." (internal quotation marks omitted)).

44. See Altman, *supra* note 41 (citing ANNE-MARIE MOONEY COTTER, *RACE MATTERS: AN INTERNATIONAL LEGAL ANALYSIS OF RACE DISCRIMINATION* 10 (2006)); see also Harry Frankfurt, *Equality and Respect*, 64 *SOC. RES.* 3, 8, 11-12 (1997); Harry Frankfurt, *The Moral Irrelevance of Equality*, 14 *PUB. AFF. Q.* 87, 97, 102-103 (2000); cf. ALAN H. GOLDMAN, *JUSTICE AND REVERSE DISCRIMINATION* 34 (1979) (arguing that discrimination is wrong because "the most competent individuals have prima facie rights to positions").

## 2. *Meritocracy*

From “careers open to talents” we derive not only nondiscrimination but also the meritocracy view.<sup>45</sup> If talent is the determinative factor, then the person with the most talent should obtain the open position. Some argue that a meritocratic system maximizes utility, producing many morally desirable outcomes for society.<sup>46</sup> Others propose that meritocracy is grounded in desert, that past accomplishments should determine whether one is morally deserving of a position.<sup>47</sup> Still others think meritocracy preserves respect for persons because talents and abilities are constitutive of personhood; when these qualities are disregarded, the person has been insulted and disrespected.<sup>48</sup> Although much more can be said about each of these positions, I merely wish to point out that meritocracy is compatible with equality of opportunity.<sup>49</sup>

Together, nondiscrimination and meritocracy have been said to make the competition for careers procedurally fair.<sup>50</sup> Rawls deems this “*formal equality of opportunity*,”<sup>51</sup> which some contend is the most society can and should pursue.<sup>52</sup> Rawls, however, argued that formal equality of opportunity is necessary but not sufficient.<sup>53</sup> He echoed the egalitarian rallying cry for substantive equality of opportunity as a measure of distributive justice.

## 3. *Equal life chances*

The insufficiency of formal equality of opportunity is frequently illustrated by Bernard Williams’s example of a hypothetical society that has been domi-

45. See DAVID MILLER, *PRINCIPLES OF SOCIAL JUSTICE* 177 (1999); RAWLS, *supra* note 38, at 106 (citing MICHAEL YOUNG, *THE RISE OF THE MERITOCRACY 1870-2033: AN ESSAY ON EDUCATION AND EQUALITY* (1958)).

46. See, e.g., Norman Daniels, *Merit and Meritocracy*, 7 *PHIL. & PUB. AFF.* 206, 207, 209-10 (1978) (explaining that merit is justified by efficiency and productivity).

47. See, e.g., DANIEL BELL, *THE COMING OF POST-INDUSTRIAL SOCIETY: A VENTURE IN SOCIAL FORECASTING* 453-54 (1973); JOEL FEINBERG, *Justice and Personal Desert*, in *DOING & DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 55, 55-94 (1970); Fred Feldman, *Justice, Desert, and the Repugnant Conclusion*, 7 *UTILITAS* 189, 189 (1995).

48. See Andrew Mason, *Equality of Opportunity, Old and New*, 111 *ETHICS* 760, 771 (2001); George Sher, *Qualifications, Fairness, and Desert*, in *EQUAL OPPORTUNITY* 113, 123-25 (Norman E. Bowie ed., 1988).

49. See RICHARD T. LONGORIA, *MERITOCRACY AND AMERICANS’ VIEWS ON DISTRIBUTIVE JUSTICE* 4 (2009).

50. See MASON, *supra* note 37, at 38.

51. RAWLS, *supra* note 38, at 72 (emphasis added).

52. See Daniel Bell, *On Meritocracy and Equality*, 29 *PUB. INT.* 29, 53-56, 65 (1972); Irving Kristol, *About Equality*, *COMMENTARY*, Nov. 1972, at 41, 42, 46. *Contra* MATT CAVANAGH, *AGAINST EQUALITY OF OPPORTUNITY* (2002).

53. RAWLS, *supra* note 38, at 72-73.

nated for generations by a prestigious warrior class selected exclusively from wealthy families.<sup>54</sup> Eventually, the society decides to reform itself and adopt formal equality of opportunity. From that point on, membership in the warrior class is determined by an open and fair competition. The wealthy families, however, continue to overwhelmingly triumph in the competition over the lower classes because the children of the lower classes continue to be undernourished and weak while the children of the wealthy are well nourished and strong. So, although the procedure does not permit discrimination and selects the best warriors, the conditions under which each class prepares for the competition denies the lower classes a meaningful opportunity to succeed.<sup>55</sup> In such a case, “the supposed equality of opportunity is quite empty—indeed, one may say that it does not really exist.”<sup>56</sup> Therefore, equality of opportunity seems to demand not only a procedurally fair competition but also a meaningful opportunity to develop qualifications necessary for success in the competition.

Combining both conditions would be necessary to achieve what Rawls termed “*fair* equality of opportunity,” such that “those who are at the same level of talent and ability, and have the same willingness to use them, [will] have the same prospects of success regardless of their initial place in the social system, that is, irrespective of the income class into which they are born.”<sup>57</sup> Fair equality of opportunity demands, for example, that

if Smith and Jones have the same native talent, and Smith is born of wealthy, educated parents of a socially favored ethnicity and Jones is born of poor, uneducated parents of a socially disfavored ethnicity, then if they develop the same ambition to become scientists or Wall Street lawyers, they will have the same prospects of becoming scientists or Wall Street lawyers . . . .<sup>58</sup>

It is this notion of the equal “life prospects”<sup>59</sup> or “equal life chances”<sup>60</sup> that many believe completes the ideal of equality of opportunity.<sup>61</sup>

54. BERNARD WILLIAMS, *PROBLEMS OF THE SELF: PHILOSOPHICAL PAPERS 1956-1972*, at 244-45 (1973).

55. Although Williams’s example is fictional, some would argue it parallels conditions in many modern democracies that have public and private educational systems. See HARRY BRIGHOUSE, *JUSTICE* 48-49 (2004) (“So, for example, someone who is talented and well born will be well rewarded, which will enable him to buy for his less talented child an expensive education which will enable him to do better than an equally talented but less well-born child . . . .”). See generally YOUNG, *supra* note 45 (satirizing a meritocracy the rules of which are established by dominant elites to retain their privilege while convincing the winners and the losers that they deserve their fate despite the inequities inherent in the merit criteria).

56. Bernard Williams, *The Idea of Equality*, in *PHILOSOPHY, POLITICS AND SOCIETY* 110, 126 (Peter Laslett & W.G. Runciman eds., 1962).

57. RAWLS, *supra* note 38, at 73 (emphasis added).

58. Richard Arneson, *Equality of Opportunity*, *STAN. ENCYCLOPEDIA PHIL.* (Aug. 29, 2008), <http://plato.stanford.edu/archives/fall2008/enries/equal-opportunity>.

59. See RAWLS, *supra* note 38, at 301.

### B. Rawlsian Equality of Opportunity

On Rawls's view, attempting to achieve equal life chances would require counteracting the effects of morally arbitrary social circumstances, primarily class.<sup>62</sup> As relevant here, Rawls explained that to implement fair equality of opportunity it is essential that society guarantee "equal opportunities of education for all."<sup>63</sup> That is, "the government tries to insure equal chances of education and culture for persons similarly endowed and motivated either by subsidizing private schools or by establishing a public school system."<sup>64</sup> Either way, the education system "should be designed to even out class barriers."<sup>65</sup>

Rawls acknowledged, however, that fair equality of opportunity "can be only imperfectly carried out" because of the influence of family life on a child's prospects.<sup>66</sup> Government can provide an education system, but it cannot possibly match the resources that wealthier parents can spend to improve their children's lives and education. And, even if such extra educational spending were prohibited, parental values and preferences "vary considerably from one family to another, differentially affecting children's life prospects in a signifi-

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60. FISHKIN, *supra* note 26, at 32-35; James Fishkin, *Liberty Versus Equal Opportunity*, in EQUAL OPPORTUNITY 32, 37 (Ellen Frankel Paul et al. eds., 1987); Cass R. Sunstein, *Administrative Substance*, 1991 DUKE L.J. 607, 615 ("[Modern liberals] insist that the life prospects of a child born to one family in one part of the country ought not to be radically different from those of another child born to another family elsewhere.").

61. See James S. Fishkin, *Do We Need a Systematic Theory of Equal Opportunity?*, in EQUAL OPPORTUNITY, *supra* note 48, at 15, 18 ("Equal life chances and merit together define equal opportunity in the strong sense. Either component without the other is a severe sacrifice . . ."); cf. ISAIAH BERLIN, *Two Concepts of Liberty*, in FOUR ESSAYS ON LIBERTY 118, 122-34 (1969) (distinguishing between negative freedom—"freedom from," inter alia, discrimination, implying formal equality of opportunity—and positive freedom—"freedom to" flourish, necessitating a more substantive equality of opportunity).

62. RAWLS, *supra* note 38, at 73. Rawls did not include other social contingencies such as race and gender because his "ideal" theory of justice operated in a "well-ordered society under favorable conditions" where "gender and race would not specify relevant points of view." See JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* §§ 18.5-.6, at 65-66 (Erin Kelly ed., 2001). Nevertheless, as others have pointed out, Rawls's account could be fairly extended to include other social factors, particularly assuming unfavorable conditions in a society with a history of racial and gender-based injustices. See Norman Daniels, *Democratic Equality: Rawls's Complex Egalitarianism*, in THE CAMBRIDGE COMPANION TO RAWLS 241, 249-50 (Samuel Freeman ed., 2003) (suggesting that Rawls's fair equality of opportunity can address unfair racial and gender-based social practices through public education that can minimize their effect on life prospects).

63. RAWLS, *supra* note 38, at 73.

64. *Id.* at 275.

65. *Id.* at 73. Rawls does not say exactly how education is to level class barriers.

66. *Id.* at 74.

cant way.”<sup>67</sup> As Rawls observed, “[e]ven the willingness to make an effort . . . is itself dependent upon happy family and social circumstances.”<sup>68</sup> Numerous studies substantiate the differential effects of family life on educational achievement.<sup>69</sup> Therefore, even if government could establish formal equality of opportunity and “fair equality of opportunity underwritten by education for all,”<sup>70</sup> it cannot assure truly equal life chances without “a systematic sacrifice in the autonomy of the family or a systematic achievement of [equality of results]”<sup>71</sup>—and either option, most everyone agrees, is unacceptable.

A second difficulty with Rawls’s fair equality of opportunity is that it is only concerned with the differential effects of social circumstances. But, undoubtedly, differences in people’s innate talents and abilities, or so-called natural endowments, also affect their life chances. Moreover, as Rawls admitted, natural endowments are as “equally arbitrary,” from a moral standpoint, as social circumstances.<sup>72</sup> Nevertheless, Rawls regarded natural endowments as a “common asset” that should be promoted to benefit society at large.<sup>73</sup> So, rather than fully embrace a “principle of redress” that seeks to eliminate or neutralize the effect of inequalities in natural endowments, Rawls advanced “the difference principle.”<sup>74</sup>

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67. Andrew Mason, *Equality of Opportunity and Differences in Social Circumstances*, 54 PHIL. Q. 368, 369 (2004).

68. RAWLS, *supra* note 38, at 74.

69. See, e.g., JAMES S. COLEMAN ET AL., U.S. DEP’T OF HEALTH, EDUC. & WELFARE, *EQUALITY OF EDUCATIONAL OPPORTUNITY* (1966); FIONA DEVINE, *CLASS PRACTICES: HOW PARENTS HELP THEIR CHILDREN GET GOOD JOBS* (2004); CHRISTOPHER JENCKS ET AL., *INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA* (1972); ANNETTE LAREAU, *UNEQUAL CHILDHOODS: CLASS, RACE, AND FAMILY LIFE* (2003); SUSAN E. MAYER, *WHAT MONEY CAN’T BUY: FAMILY INCOME AND CHILDREN’S LIFE CHANCES* (1997); *UNEQUAL CHANCES: FAMILY BACKGROUND AND ECONOMIC SUCCESS* (Samuel Bowles et al. eds., 2005); D. Henderson, *Contextual Specificity, Discretion and Cognitive Socialization: With Special Reference to Language*, in 2 CLASS, CODES AND CONTROL: APPLIED STUDIES TOWARDS A SOCIOLOGY OF LANGUAGE 48, 48-53 (Basil Bernstein ed., 1973); Nancy E. Hill & Lorraine C. Taylor, *Parental School Involvement and Children’s Academic Achievement: Pragmatics and Issues*, 13 CURRENT DIRECTIONS PSYCHOL. SCI. 161 (2004).

70. RAWLS, *supra* note 38, at 87.

71. FISHKIN, *supra* note 26, at 51.

72. RAWLS, *supra* note 38, at 75.

73. *Id.* at 101.

74. *Id.* at 100-01. Rawls does not reject the principle of redress. Indeed, it is implicit in his theory of justice:

[T]he difference principle gives some weight to the considerations singled out by the principle of redress . . . [which] holds that in order to treat all persons equally, to provide genuine equality of opportunity, society must give more attention to those with fewer native assets and to those born into the less favorable social positions.

Simply put, the difference principle holds that inequalities, particularly of wealth and income, must work to the “greatest benefit of the least advantaged.”<sup>75</sup> That way, the winners of the natural lottery, those who are blessed with socially valued talents and abilities, can benefit “from their good fortune only on terms that improve the situation of those who have lost out.”<sup>76</sup> In practice, implementing the difference principle might involve a progressive taxation scheme and redistribution to improve the welfare of the least advantaged members of society.<sup>77</sup>

Essentially, then, fair equality of opportunity is meant to counteract the effects of social circumstances while the difference principle “mitigates the arbitrary effects of [natural endowments].”<sup>78</sup> The implications of Rawlsian equality of opportunity on education policy comes into focus when understanding the interplay between fair equality of opportunity and the difference principle. At least in his early writings, Rawls thought fair equality of opportunity should be “lexically prior” to the difference principle, meaning that fair equality of opportunity must be satisfied before the difference principle.<sup>79</sup> Translating this lexical priority to the education context would mean that we should prefer a distribution that allocates resources so that equally motivated and talented children enjoy equal chances for educational achievement over a distribution that allocates resources in such a way as to benefit the worst-off children.

Beyond making provision for universal education, government must provide certain children with educational resources to counteract the effects of educationally detrimental social circumstances so that educational achievement is solely a function of talent and effort. Once the demands of fair equality of opportunity are fulfilled as much as possible, the difference principle regulates the

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*Id.* at 100. Rawls suggests that a principle of redress could be effectuated by providing more educational resources to “the less rather than the more intelligent, at least over a certain time of life, say the earlier years of school.” *Id.* at 101. Nevertheless, for Rawls, the principle of redress is subordinate to the difference principle. *See Daniels, supra* note 62, at 251.

75. RAWLS, *supra* note 38, at 83.

76. *Id.* at 101.

77. *See id.* at 275-78; RAWLS, *supra* note 62, at 161 (“The difference principle might, then, roughly be satisfied by raising and lowering this minimum and adjusting the constant marginal rate of taxation.”).

78. RAWLS, *supra* note 38, at 74 (emphasis added); *see also* MASON, *supra* note 37, at 87 (“The principle of fair equality of opportunity aims to counteract the effects of differences in people’s social circumstances on their access to advantage, whereas the difference principle is intended to counteract the effects of differences in natural endowments on access to advantage.”).

79. RAWLS, *supra* note 38, at 89, 302-03. Rawls later expressed uncertainty about the lexical priority. *See* RAWLS, *supra* note 62, at 163 n.44 (“Some think that the lexical priority . . . is too strong . . . . At present I do not know what is best here and simply register my uncertainty.”).



distribution of educational resources.<sup>80</sup> Because it is not a principle of redress, the difference principle does not “try to even out handicaps as if all were expected to compete on a fair basis.”<sup>81</sup> Indeed, the difference principle could justify providing more resources and “giving more attention to the better endowed”—provided that would “improve the long-term expectation of the [worst off].”<sup>82</sup> Hence, Rawlsian equality of opportunity does not require “any compensatory education for the worst-off . . . individual” so long as those with similar talent and motivation have the same prospects for educational achievement.<sup>83</sup>

In response to the professed shortcomings of Rawlsian equality of opportunity, so-called luck egalitarians have proposed a view that doubles down on the notion of equal life chances yet esteems personal responsibility.

### C. *Luck Egalitarianism*

In recent decades, luck egalitarianism has ascended within the ranks of political philosophy.<sup>84</sup> The theory emerged, in part, to co-opt criticism from conservatives and libertarians that egalitarianism was hostile to capitalism, failed to hold people responsible for how well they live their lives, and sought to compensate the undeserving.<sup>85</sup> Although luck egalitarians may differ in belief in significant respects,<sup>86</sup> they generally share the conviction that inequality is

80. See Catherine Beattie, *Rawls and the Distribution of Education*, 7 CAN. J. EDUC., no. 3, 1982, at 39, 42.

81. RAWLS, *supra* note 38, at 101.

82. *Id.* Nevertheless, in deciding how to direct resources for education, Rawls cautions that the “value of education should not be assessed solely in terms of economic efficiency and social welfare,” but also in terms of its role “in enabling a person to enjoy the culture of his society and to take part in its affairs” and, in so doing, to build a social basis for self-respect. *Id.*

83. Richard J. Arneson, *Against Rawlsian Equality of Opportunity*, 93 PHIL. STUD. 77, 82-83 (1999).

84. Samuel Scheffler, *What Is Egalitarianism?*, 31 PHIL. & PUB. AFF. 5, 14 (2003); see also Jonathan Wolff, *Equality: Equality in the History of Political Philosophy*, in THE OXFORD HANDBOOK OF THE HISTORY OF POLITICAL PHILOSOPHY 611, 620 (George Klosko ed., 2011); Nir Eyal, *Egalitarian Justice and Innocent Choice*, J. ETHICS & SOC. PHIL., Jan. 2007, at 1, 2.

85. Anderson, *supra* note 16, at 290-91; Nicholas Barry, *Reassessing Luck Egalitarianism*, 70 J. POL. 136, 136-37 (2008).

86. Elizabeth Anderson, who coined the phrase luck egalitarianism, identified the following influential luck egalitarian works, see Anderson, *supra* note 16, at 287-88, 290; Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981) [hereinafter Dworkin, *What Is Equality?*]; G.A. Cohen, *On the Currency of Egalitarian Justice*, 99 ETHICS 906, 922-23, 930-31 (1989); Richard J. Arneson, *Equality and Equal Opportunity for Welfare*, in EQUALITY: SELECTED READINGS, *supra* note 23, at 229, 231; THOMAS NAGEL, EQUALITY AND PARTIALITY 71 (1991); JOHN E. ROEMER, *A Pragmatic Theo-*

permissible when it derives from people's voluntary choices but is unjust when it is the product of people's unchosen circumstances or luck.<sup>87</sup>

Luck egalitarians distinguish between "brute luck" and "option luck."<sup>88</sup> Brute luck refers to an outcome (good or bad) that occurs independent of a person's choice—an outcome that is not reasonably avoidable.<sup>89</sup> It is the luck traceable to circumstances that lie beyond a person's control, such as genetic inheritance (physical and some personality traits), natural endowments (innate talents and abilities), environment (class, schooling, family life, and geography), or unforeseen events (accidents and natural disasters). Luck egalitarians believe that the victims of bad brute luck deserve compensation, seizing on the egalitarian impulse that "it is a bad thing—unjust and unfair—for some to be worse off than others through no fault of their own."<sup>90</sup>

Option luck refers to an outcome (good or bad) to which a person deliberately chooses to expose herself.<sup>91</sup> In other words, option luck "is a matter of how deliberate and calculated gambles turn out."<sup>92</sup> Luck egalitarians think that people ought to bear all or some of the cost of the bad option luck for which they are responsible.<sup>93</sup>

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*ry of Responsibility for the Egalitarian Planner*, in *EGALITARIAN PERSPECTIVES: ESSAYS IN PHILOSOPHICAL ECONOMICS* 179, 179-80 (1994); and PHILLIP VAN PARIJS, *REAL FREEDOM FOR ALL* 127 (1995). Anderson separates the different strands of luck egalitarianism into two camps: those advocating equality of welfare (Arneson, Cohen, Roemer, and Nagel) and those favoring equality of resources (Dworkin, Rakowski, and Van Parijs). Anderson, *supra* note 16, at 293. It is not entirely clear whether each of these theorists deserves the luck egalitarian label. Indeed, Dworkin, who was often regarded as the founder of luck egalitarianism, rejected the brand. See Ronald Dworkin, *Equality, Luck and Hierarchy*, 31 *PHIL. & PUB. AFF.* 190, 192 (2003). Nevertheless, I will adopt the label for the limited purposes of this Article.

87. 1 *ENCYCLOPEDIA OF POLITICAL THEORY* 453-54 (Mark Bevir ed., 2010); Scheffler, *supra* note 84, at 5.

88. Dworkin originally formulated the brute-luck-option-luck distinction. See DWORKIN, *SOVEREIGN VIRTUE*, *supra* note 23, at 73-77; Dworkin, *What is Equality?*, *supra* note 86, at 293-98. Several theorists have since offered modifications to the distinction. See, e.g., Lippert-Rasmussen, *supra* note 25, at 551-57; Michael Otsuka, *Luck, Insurance, and Equality*, 113 *ETHICS* 40, 45 (2002); Martin E. Sandbu, *On Dworkin's Brute-Luck-Option-Luck Distinction and the Consistency of Brute-Luck Egalitarianism*, 3 *POL. PHIL. & ECON.*, 283, 294-99 (2004). See generally Vallentyne, *supra* note 25.

89. See Nicholas Barry, *Defending Luck Egalitarianism*, 23 *J. APPLIED PHIL.* 89, 90 (2006); Vallentyne, *supra* note 25, at 531.

90. Larry S. Temkin, *Inequality*, 15 *PHIL. & PUB. AFF.* 99, 101 (1986).

91. See Barry, *supra* note 89, at 90; Vallentyne, *supra* note 25, at 531, 533.

92. DWORKIN, *SOVEREIGN VIRTUE*, *supra* note 23, at 73.

93. Compare *id.* at 74, 287 (arguing that government has no obligation to compensate those who suffer bad option luck), with MARC FLEURBAEY, *FAIRNESS, RESPONSIBILITY AND WELFARE* 153 (2008) (contending that justice requires compensation for those who are left very badly off by their option luck).

Enriched by the choice-luck distinction, luck egalitarianism “[is] sometimes regarded as offering a better interpretation of [equality of opportunity].”<sup>94</sup> Unlike Rawlsian equality of opportunity, luck egalitarianism holds that *all forms* of bad brute luck must be neutralized, not simply mitigated. The theory “suggests that if we are to take the idea of equality of opportunity seriously, we need to neutralize as best we can not only the effects of social class but also the effects of the distribution of natural talents and (dis)abilities and other accidents of fortune.”<sup>95</sup>

At the point at which social circumstances and natural endowments are neutralized, people’s life prospects will be influenced only by their ambitions and choices.<sup>96</sup> Inequalities resulting from option luck will then be acceptable as a product of individual choice and personal responsibility.<sup>97</sup> Hence, “luck egalitarianism is attractive because it gives an account of what it means to level the playing field that goes further than other theories of equality of opportunity, but which at the same time aims to hold people accountable for how well their lives are going.”<sup>98</sup>

Yet, for all of its perceived advantages, luck egalitarianism has as many detractors as disciples.<sup>99</sup> I could devote the rest of this Article and others to the criticisms of luck egalitarianism, but I will mention only two that seem most

94. Mason, *supra* note 37, at 760.

95. SAMUEL FREEMAN, *Rawls and Luck Egalitarianism*, in *JUSTICE AND THE SOCIAL CONTRACT: ESSAYS ON RAWLSIAN POLITICAL PHILOSOPHY* 111, 111 (2006). Dworkin considers Rawlsian equality of opportunity “fraudulent because in a market economy people do not have equal opportunity who are less able to produce what others want.” See RONALD DWORKIN, *A MATTER OF PRINCIPLE* 207 (1985).

96. Or, as Dworkin put it, the distribution of resources over time among individuals must be “ambition-sensitive” and not unfairly “endowment-sensitive.” See DWORKIN, *SOVEREIGN VIRTUE*, *supra* note 23, at 89, 108.

97. Equality of results is not desired. See Anderson, *supra* note 16, at 291 (“[L]uck egalitarians have moved from an equality of outcome to an equality of opportunity conception of justice: they ask only that people . . . start off with an equal share of resources. But they accept the justice of whatever inequalities result from adults’ voluntary choices.” (citation omitted)); see also Cohen, *supra* note 86, at 908 (“[T]he primary egalitarian impulse is to extinguish the influence . . . of both exploitation and brute luck.”).

98. 1 *ENCYCLOPEDIA OF POLITICAL THEORY*, *supra* note 87, at 454; see also KOK-CHOR TAN, *JUSTICE, INSTITUTIONS, AND LUCK: THE SITE, GROUND, AND SCOPE OF EQUALITY* 91 (2012) (“Recognized as the more complex idea that persons presumed as moral equals are entitled to equal life chances unless personal choice and not luck dictates otherwise, luck egalitarianism is in this sense capable of providing a grounding for the egalitarian default as well as specifying what egalitarianism is, what equality should aim for.”); Barry, *supra* note 89, at 90 (“[L]uck egalitarianism targets directly the key source of inequality in the world today whilst respecting the idea of individual choice.”).

99. Zofia Stemplowska, *Luck Egalitarianism*, in *THE ROUTLEDGE COMPANION TO SOCIAL AND POLITICAL PHILOSOPHY* 389, 393 (Gerald Gaus & Fred D’Agostino eds., 2013).

relevant to the equality-adequacy debate because they do not apply with equal force to adequacy-based theories.

First, critics charge that the distinction between brute luck and option luck is tenuous because “people’s voluntary choices are routinely influenced by unchosen features of their personalities, temperaments, and the social contexts in which they find themselves.”<sup>100</sup> If our choices can be shaped by features that are largely a matter of brute luck, then is it appropriate to regard them as within our control? If Michael’s parents are apathetic about his education or are unable to provide him the resources and conditions to cultivate any academic interests, then is it fair to hold Michael responsible for his lack of effort and ambition?

Some luck egalitarians think that people should indeed be held responsible for such factors because the brute-luck-option-luck “distinction tracks ordinary people’s ethical experience. Ordinary people, in their ordinary lives, take consequential responsibility for their own personalities.”<sup>101</sup> Other luck egalitarians acknowledge that there are some preferences that are beyond our control and must therefore fall on the brute-luck side of the equation.<sup>102</sup> But, of course, that view prompts a further inquiry: is it practical or even possible to separate preferences that are and are not influenced by external forces? Needless to say, ambiguities about the concept of choice deployed by luck egalitarians provoke deep metaphysical questions about free will and personal identity.<sup>103</sup>

Second, luck egalitarianism has been accused of betraying the egalitarian axiom of equal respect. Specifically, Anderson and others assert that luck egalitarianism permits expressions of pity to be directed at the victims of bad brute luck who “lay claim to [compensation] in virtue of their inferiority to others, not in virtue of their equality to others.”<sup>104</sup> That is, luck egalitarianism is said to force the victim of bad brute luck “to look inward in deciding whether she

100. Scheffler, *supra* note 84, at 18.

101. DWORKIN, SOVEREIGN VIRTUE, *supra* note 23, at 289-90.

102. See, e.g., G.A. Cohen, *Expensive Taste Rides Again*, in DWORKIN AND HIS CRITICS: WITH REPLIES BY DWORKIN 3, 8 (Justine Burley ed., 2004); Cohen, *supra* note 86, at 934.

103. See SAMUEL SCHEFFLER, EQUALITY AND TRADITION: QUESTIONS OF VALUE IN MORAL AND POLITICAL THEORY 217-19 (2010) (claiming that the conception of choice employed by luck egalitarians depends on a libertarian understanding of choice and offering an alternative metaphysical view of choice); Marc Fleurbaey, *Egalitarian Opportunities*, 20 LAW & PHIL. 499 (2001).

104. Anderson, *supra* note 16, at 306; cf. Jonathan Wolff, *Fairness, Respect and the Egalitarian Ethos*, 27 PHIL. & PUB. AFF. 97, 113-15 (1998) (suggesting that conditioning compensation on evidence of bad brute luck forces the misfortunate to reveal shameful information about their lack of innate talent and abilities in order to “make out a convincing case that one is a failure,” a self-awareness that is “demeaning and also undermining of self-respect”).

has a legitimate claim on fellow citizens” and thereby view her bad brute luck as constitutive of her identity.<sup>105</sup>

There is some empirical support for the notion that many people attribute instances of bad brute luck—for example, poverty—to personal failings or defects.<sup>106</sup> In the education context, studies have suggested that “pull-out” programs, which target disadvantaged students for compensatory aid, stigmatize those students.<sup>107</sup> Even when efforts are made to make it harder to distinguish students in that regard, stigmatization persists.<sup>108</sup> Moreover, teacher expectations of students marked as “educationally disadvantaged” are lower, and, perhaps consequently, so is student performance.<sup>109</sup>

Luck egalitarians have offered various responses to the equal-respect criticism, reiterating that their theories are motivated by equal concern and respect, not pity.<sup>110</sup> Undoubtedly, luck egalitarians are committed to showing “recogni-

105. Scheffler, *supra* note 84, at 18, 21; *see also* Elizabeth Anderson, Reply to Commentators on *What Is the Point of Equality?*, BROWN U. (Dec. 22, 1999), <http://www.brown.edu/Departments/Philosophy/bears/9912ande.html> (critiquing luck egalitarianism as “express[ing] pity and disrespect for the less fortunate”).

106. *See, e.g.*, Lauren D. Appelbaum et al., *When Effort Is Threatening: The Influence of the Belief in a Just World on Americans’ Attitudes Toward Antipoverty Policy*, 27 POL. PSYCHOL. 387, 390 (2006) (explaining beliefs in “a just world” in which “people get what they deserve and deserve what they get”); Heather E. Bullock, *Attributions for Poverty: A Comparison of Middle-Class and Welfare Recipient Attitudes*, 29 J. APPLIED SOC. PSYCHOL. 2059, 2060 (1999) (concluding that most Americans hold individualist explanations of poverty, which “focus on how poor people themselves are responsible for their poverty” because of negative personal qualities); Christina Fong, *Social Preferences, Self-Interest, and the Demand for Redistribution*, 82 J. PUB. ECON. 225, 232-33 (2001) (finding that high-income respondents were more likely to think self-determination rather than luck causes poverty); Susan J. Popkin, *Welfare: Views from the Bottom*, 37 SOC. PROBS. 64, 72 (1990) (observing that negative views of welfare recipients include feelings of shame).

107. *See* Kenneth K. Wong & Stephen J. Meyer, *Title I Schoolwide Programs: A Synthesis of Findings from Recent Evaluation*, 20 EDUC. EVALUATION & POL’Y ANALYSIS 115, 115 (1998) (citing GENE V. GLASS & MARY LEE SMITH, UNIV. OF COLO. LAB. FOR EDUC. RESEARCH, “PULL OUT” IN COMPENSATORY EDUCATION (1977)).

108. *See* Sandra J. Stein, “*These Are Your Title I Students*”: *Policy Language in Educational Practice*, 34 POL’Y SCI. 135, 144 (2001) (“Students eligible for Title I are seen as outside of [the middle-class] norm, different, and deficient before they arrive at school.”).

109. *Id.* at 150; *see* SANDRA J. STEIN, *THE CULTURE OF EDUCATION POLICY* 22-23 (2004).

110. *See* TAN, *supra* note 98, at 129 (“The [luck egalitarian] guarantee to all persons of their legitimate entitlement is a mark of equal respect, not disrespect or contempt.”); Richard J. Arneson, *Luck Egalitarianism and Prioritarianism*, 110 ETHICS 339, 344 (2000) (“One expresses due respect for persons and treats them respectfully by acting toward persons in accordance with the moral principles that are best supported by reasons.”); Barry, *supra* note 89, at 97 (“Rather than disparaging or pitying the unlucky, the whole point of luck egalitarianism is that inequalities reflecting brute bad luck are unjust, illegitimate and unacceptable.”); Ronald Dworkin, *Sovereign Virtue Revisited*, 113 ETHICS 106, 116-17 (2002) (ex-

tion respect” to the victims of bad brute luck, meaning that they “give proper weight to the fact that they are persons” worthy of equal life chances and self-respect.<sup>111</sup> But perhaps Anderson and other critics worry that luck egalitarianism, as applied, deprives those with bad brute luck of “appraisal respect,” expressed to persons with manifested characteristics that make them deserving of positive appraisal.<sup>112</sup>

Although appraisal respect “is not owed to everyone, for it may or may not be merited,”<sup>113</sup> the converse is surely true as well: the victims of bad brute luck do not deserve negative evaluations of personal features that they cannot control. The danger is that negative assessments erode “attitudes which one can bear to oneself”—not only appraisal self-respect (i.e., self-esteem) but also recognition self-respect, that is, the self-valuation of “the rights and responsibilities of being a person.”<sup>114</sup>

The Finnish comprehensive-school model suggests one possible solution to this dilemma: take the “special” out of special education by subjecting most students at one point or another to remedial educational services.<sup>115</sup> As explained in Part III, by incorporating vertical equity principles while maintaining high adequacy thresholds, this approach can resemble both equality and adequacy.

Before exploring that possibility, let us assess how the Rawlsian and luck egalitarian versions of equality of opportunity have been expressed in education law and policy in the United States.

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plaining that the redistribution of resources that he advocates is based precisely on respect and concern for those who have not had a fair opportunity to protect themselves from bad luck); Thomas Christiano, *Commentary on What Is the Point of Equality?*, BROWN U. (July 22, 1999), <http://www.brown.edu/Departments/Philosophy/bears/9904chri.html> (contending that Anderson’s critique “miscast[s] the [luck] egalitarian position” that those with inferior talents and abilities simply have “less with which to pursue a decent life” and that this “is in no way incompatible with the idea of equality of respect and concern”).

111. See Stephen L. Darwall, *Two Kinds of Respect*, 88 ETHICS 36, 39 (1977).

112. See *id.* at 38-39.

113. *Id.* at 45.

114. See *id.* at 47; see also THOMAS E. HILL, JR., *AUTONOMY AND SELF-RESPECT* 19 (1991) (“A person may lack self-respect not merely by underestimating his merits and achievements but also by misunderstanding and undervaluing his equal rights as a human being.”).

115. Pasi Sahlberg, *A Model Lesson: Finland Shows Us What Equal Opportunity Looks Like*, AM. EDUCATOR, Spring 2012, at 20, 24 (2012) (“[Because] up to half of those students who complete their compulsory education [in Finland] have been in special education at some point in their schooling[,] it is nothing special anymore for students. This fact significantly reduces the negative stigma that is often brought on by special education.”).

#### D. *Equality of Educational Opportunity*

##### 1. *The historical and legal perspectives*

Proponents of equality of educational opportunity tend to exalt the declaration in *Brown v. Board of Education* that “the opportunity of an education . . . is a right which must be made available to all on equal terms.”<sup>116</sup> Ironically enough, the Supreme Court’s first inclination toward the ideal came in the infamous opinion *Brown* overruled, *Plessy v. Ferguson*: “When the government, therefore, has secured to each of its citizens equal rights before the law and *equal opportunities for improvement and progress*, it has accomplished the end for which it was organized and performed all of the functions respecting social advantages with which it is endowed.”<sup>117</sup>

The *Plessy* Court basically regarded the Fourteenth Amendment’s Equal Protection Clause as requiring nominal forms of political equality and formal equality of opportunity.<sup>118</sup> In reality, of course, African Americans were denied basic rights of citizenship, “separate but equal” was inherently discriminatory, and virtually no one at the time considered African Americans better qualified than whites in any respect.<sup>119</sup>

It would take another half century for the Court to fully realize the hypocrisy of the ideal of equality of opportunity to which *Plessy* gave lip service.<sup>120</sup> Although the 1954 *Brown* decision declared that education “must be made available to all on equal terms,” its holding legally invalidated only one aspect of discriminatory education policy—state-sanctioned racial segregation.<sup>121</sup> Emboldened by *Brown*, however, “scholars and advocates began turning their attention” to another form of discrimination—“unequal school funding.”<sup>122</sup> Ini-

116. 347 U.S. 483, 493 (1954).

117. 163 U.S. 537, 551 (1896) (quoting *People ex rel. King v. Gallagher*, 93 N.Y. 438, 448 (1883)) (emphasis added), *overruled by Brown*, 347 U.S. 483.

118. See Kathryn Abrams, *The Legal Subject in Exile*, 51 DUKE L.J. 27, 47 n.62 (2001); Daniel Gordon, *Happy Anniversary Brown v. Board of Education: In Need of a Remake After Forty Years?*, 25 COLUM. HUM. RTS. L. REV. 107, 109-10 (1993).

119. See Daniel R. Gordon, *One Hundred Years After Plessy: The Failure of Democracy and the Potentials for Elitist and Neutral Anti-Democracy*, 40 N.Y.L. SCH. L. REV. 641, 658-59 (1996).

120. For a discussion of the development of the ideal of equality of educational opportunity before *Brown*, see Michael Heise, *Equal Educational Opportunity by the Numbers: The Warren Court’s Empirical Legacy*, 59 WASH. & LEE L. REV. 1309, 1312-16 (2002).

121. For several years following *Brown*, the Supreme Court upheld comprehensive desegregation plans. See *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Dowell v. Bd. of Educ.*, 396 U.S. 269 (1969); *Green v. Cnty. Sch. Bd.*, 391 U.S. 430 (1968); *Cooper v. Aaron*, 358 U.S. 1 (1958).

122. William S. Koski & Jesse Hahnel, *The Past, Present, and Possible Futures of Educational Finance Reform Litigation*, in HANDBOOK OF RESEARCH IN EDUCATION FINANCE

tially, progress was made on the legislative front with the passage of the Elementary and Secondary Education Act of 1965 (ESEA),<sup>123</sup> and, specifically, Title I of the Act, which provided compensatory aid for low-income children.<sup>124</sup> Even when properly allocated and spent, however, Title I assistance was insufficient to reduce vast disparities between wealthy and poor school districts funded primarily through local property taxes.<sup>125</sup> Equality of educational opportunity activists thus began to seek remedies in the courts.

During what is commonly called the first wave of school finance litigation (late 1960s-1973), when funding schemes were challenged as violating the U.S. Constitution's Equal Protection Clause, the early reform theories sounded in *formal* equality of opportunity. Equality of educational opportunity meant simply nondiscrimination: students should not be discriminated against based on their school district's wealth.<sup>126</sup> That legal theory gained traction when a few lower courts held that school finance schemes violated federal and/or state equal protection guarantees by discriminating "against the poor" in making "the quality of a child's education a function of the wealth of his parents and neighbors."<sup>127</sup> But the theory derailed at the federal level when the Supreme Court ruled in *San Antonio Independent School District v. Rodriguez* that education was not a fundamental right under the U.S. Constitution and that strict scrutiny did not apply because those who reside in poor school districts did not consti-

AND POLICY 42, 43 (Helen F. Ladd & Edward B. Fiske eds., 2008); *see also* Heise, *supra* note 120, at 1325.

123. Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.).

124. *See* 20 U.S.C. §§ 7301-7372 (2012). The stated intent of Title I was to "provide financial assistance . . . to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means . . . which contribute particularly to meeting the . . . needs of educationally deprived children." Elementary and Secondary Education Act of 1965, sec. 201, § 239, 79 Stat. 27, 27.

125. *See* Black, *supra* note 4, at 1358; Anita F. Hill, *A History of Hollow Promises: How Choice Jurisprudence Fails to Achieve Educational Equality*, 12 MICH. J. RACE & L. 107, 121-22 (2006).

126. *See* Koski & Hahnel, *supra* note 122, at 45.

127. *Serrano v. Priest* (*Serrano I*), 487 P.2d 1241, 1244 (Cal. 1971); *see* *Van Duzart v. Hatfield*, 334 F. Supp. 870, 877 (D. Minn. 1971) (holding that Minnesota's school financing system of making "spending per pupil a function of the school district's wealth violates the equal protection guarantee of the 14th Amendment"); *Milliken v. Green*, 203 N.W.2d 457, 469-72 (Mich. 1972) (treating wealth as a suspect classification and holding that Michigan's school financing system violated the equal protection guarantees of the state constitution); *Robinson v. Cahill*, 287 A.2d 187, 217 (N.J. Super. Ct. Law Div.) (concluding that New Jersey's school financing system "discriminates against pupils in districts with low real property wealth . . . [and] discriminates against taxpayers by imposing unequal burdens for a common state purpose," thereby contravening the federal and state constitutions), *supplemented*, 289 A.2d 569 (N.J. Super. Ct. Law Div. 1972), *modified*, 303 A.2d 273 (N.J. 1973).



tute a suspect class for equal protection purposes.<sup>128</sup> Moreover, the 5-4 majority found that the funding disparities in question were rationally related to the preservation of “local control” over school districts—a “vital” interest worth “some inequality.”<sup>129</sup>

Eschewing *Rodriguez*’s interpretations of the U.S. Constitution, plaintiffs resorted to the education clauses and equal protection provisions of their state constitutions.<sup>130</sup> During this second wave (1973-1989), the focus was still formal equality of educational opportunity—“to achieve either horizontal equity among school districts, such that per-pupil revenues were roughly equalized by the state, or at least fiscal neutrality, such that the revenues available to a school district would not depend solely on the property wealth of the school district.”<sup>131</sup> And several state courts discerned the arbitrariness of allowing educational opportunities to be dictated, in part, by the school district in which a student happened to reside.<sup>132</sup> Although plaintiffs prevailed in only seven of the

128. 411 U.S. 1, 28, 35 (1973).

129. *Id.* at 49-51 (quoting *Wright v. Council of Emporia*, 407 U.S. 451, 478 (1972) (Burger, C.J., dissenting); *McGowan v. Maryland*, 366 U.S. 420, 426 (1961)) (internal quotation marks omitted). Deference to local control also helped dismantle desegregation efforts. See Goodwin Liu, Brown, Bollinger, and *Beyond*, 47 *How. L.J.* 705, 718-19 (2004).

130. For a collection of state education clauses and equal protection provisions, see R. CRAIG WOOD & DAVID C. THOMPSON, *EDUCATIONAL FINANCE LAW: CONSTITUTIONAL CHALLENGES TO STATE AID PLANS—AN ANALYSIS OF STRATEGIES* 111-32 (2d ed. 1996); Anna Williams Shavers, *Rethinking the Equity vs. Adequacy Debate: Implications for Rural School Finance Reform Litigation*, 82 *NEB. L. REV.* 133, 150 n.62 (2003); and Underwood, *supra* note 3, at 511 n.101.

131. Koski & Hahnel, *supra* note 122, at 47; see Ryan & Saunders, *supra* note 4, at 466. Under the fiscal neutrality approach, developed by John E. Coons, William H. Clune III, and Stephen D. Sugarman, all school districts would have access to the same amount of school funding, but the exact level of expenditures would depend on the tax rates adopted in the school districts. See JOHN E. COONS ET AL., *PRIVATE WEALTH AND PUBLIC EDUCATION* 201-02 (1970).

132. See *DuPree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 93 (Ark. 1983) (“[T]he educational opportunity of the children in this state should not be controlled by the fortuitous circumstance of residence . . . . Such a system only promotes greater opportunities for the advantaged while diminishing the opportunities for the disadvantaged.”); *Serrano v. Priest (Serrano II)*, 557 P.2d 929, 939 (Cal. 1976) (“Substantial disparities in expenditures per pupil among school districts cause and perpetuate substantial disparities in the quality and extent of availability of educational opportunities. For this reason the school financing system before the court fails to provide equality of treatment to all the pupils in the state.”); *Horton v. Meskill*, 376 A.2d 359, 373 (Conn. 1977) (“The discrimination is relative rather than absolute. Further, the children living in towns with relatively low assessable property values are afforded public education but, as the trial court found, the education they receive is to a substantial degree narrower and lower in quality than that which pupils receive in comparable towns with a larger tax base and greater ability to finance education.”); *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684, 690 (Mont. 1989) (“[S]pending disparities among the State’s school districts translate into a denial of equality of educational opportuni-

twenty-two second-wave decisions, they succeeded in obtaining greater per-pupil spending equity across districts in those states that had their school financing systems overturned.<sup>133</sup> But, in some cases, the greater equity arguably came at a high cost—the leveling down of education spending overall.<sup>134</sup>

The third wave of school finance litigation (1989-present) was triggered by the Supreme Court of Kentucky's decision that the state's "entire system of common schools [was] unconstitutional."<sup>135</sup> The court concluded that significant inadequacies in educational opportunities violated the state constitution's education clause, which required the state legislature to "provide for an efficient system of common schools throughout the State."<sup>136</sup> Although the court discussed the impact of funding inequalities, it resolved the case by obligating the state legislature to provide all students with an "adequate" education.<sup>137</sup> According to traditional accounts, the Kentucky decision, along with similar

ty."); *Edgewood Indep. Sch. Dist. v. Kirby (Edgewood I)*, 777 S.W.2d 391, 397 (Tex. 1989) ("[D]istricts must have substantially equal access to similar revenues per pupil at similar levels of tax effort. Children who live in poor districts and children who live in rich districts must be afforded a substantially equal opportunity to have access to educational funds."); *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979) ("[A]ny discriminatory classification found in the educational financing system cannot stand unless the State can demonstrate some compelling State interest to justify the unequal classification."); *Washakie Cnty. Sch. Dist. No. One v. Herschler*, 606 P.2d 310, 334 (Wyo. 1980) ("The respective tax bases of the school districts of this state and their per-student resources reflect discordant correlations which plainly demonstrate the failure of the current system to provide equal educational opportunity.").

133. See William N. Evans et al., *The Impact of Court-Mandated School Finance Reform*, in *EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES* 72, 75-98 (Helen F. Ladd et al. eds., 1999); Richard E. Levy, *Gunfight at the K-12 Corral: Legislative vs. Judicial Power in the Kansas School Finance Litigation*, 54 U. KAN. L. REV. 1021, 1030 & n.45, 1031 (2006) (estimating that plaintiffs in second-wave cases "were successful only about one-third of the time" but noting that counts of plaintiff victories vary because they "are inherently difficult and somewhat subjective" and, moreover, that successful suits nevertheless "encouraged plaintiffs in other states to challenge their systems of school finance").

134. See Koski & Hahnel, *supra* note 122, at 47 (citing conflicting studies); see also Melissa C. Carr & Susan H. Fuhrman, *The Politics of School Finance in the 1990s*, in *EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES*, *supra* note 133, at 136, 145-46 (citing a 1978 study that found that eight of eleven states that had enacted significant school funding reforms in the 1970s along with significant property tax relief saw per-pupil expenditures fall relative to the national average); Aaron Y. Tang, *Broken Systems, Broken Duties: A New Theory for School Finance Litigation*, 94 MARQ. L. REV. 1195, 1205 (2011) ("[T]he lesson from California is that even if school funding is equalized, the equity theory does nothing to prevent a state from 'leveling down' school funding to some equally insufficient amount.").

135. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 215 (Ky. 1989).

136. KY. CONST. § 183.

137. *Rose*, 790 S.W.2d at 212.

decisions that same year in Montana and Texas,<sup>138</sup> turned the tide, suggesting to plaintiffs in other states that they could prevail by seeking adequate, instead of equal, educational opportunities based on their state constitutions' education clauses.<sup>139</sup> I will return to the adequacy movement in Part II. For now, it should be understood that plaintiffs continued to pursue, and some courts continued to invoke, equality of educational opportunity "deep into the third wave."<sup>140</sup>

Even before the third wave, however, advocates and courts had recognized the limitations of formal equality of educational opportunity through horizontal equity or fiscal neutrality.<sup>141</sup> Attempting to equalize funding across districts did not directly address the educational needs of disadvantaged students, who entered the schoolhouse door already on unequal footing. Hence, many of the same courts that demanded greater funding equity also acknowledged that the state could (and probably should) account for the different "costs associated with providing an equalized educational opportunity to . . . disadvantaged students."<sup>142</sup> Paralleling the lessons from Bernard Williams's warrior class hypo-

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138. See *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684, 690 (Mont. 1989); *Edgewood I*, 777 S.W.2d 391, 396 (Tex. 1989).

139. See William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 603-04 (1994); Thro, *supra* note 18, at 221-22; Julie K. Underwood & William E. Sparkman, *School Finance Litigation: A New Wave of Reform*, 14 HARV. J.L. & PUB. POL'Y 517, 520-35 (1991); Gail F. Levine, Note, *Meeting the Third Wave: Legislative Approaches to Recent Judicial School Finance Rulings*, 28 HARV. J. ON LEGIS. 507, 507-08 (1991).

140. Ryan & Saunders, *supra* note 4, at 467, 468 & n.35 (citing cases utilizing the equality-of-educational-opportunity approach into the third movement).

141. See Walter I. Garms & Mark C. Smith, *Educational Need and Its Application to State School Finance*, 3 J. HUM. RESOURCES 304, 305 (1970) ("The realization is coming gradually that even if state aid programs were to distribute money to school districts in such a way that all districts would have an equal expenditure per pupil with equal local tax effort, we would still not be guaranteeing equality of educational opportunity."); Koski & Hahnel, *supra* note 122, at 44 (observing that even one of the early architects of horizontal equity, Arthur Wise, found it unsatisfying).

142. *Edgewood I*, 777 S.W.2d at 398; see *Serrano II*, 557 P.2d 929, 939 (Cal. 1976) ("[A]n equal expenditure level per pupil in every district is not educationally sound or desirable because of differing educational needs . . ."); *Horton v. Meskill*, 376 A.2d 359, 376 (Conn. 1977) ("Logically, the state may recognize differences in educational costs based on relevant economic and educational factors and on course offerings of special interest in diverse communities. None of the basic alternative plans to equalize the ability of various towns to finance education requires that all towns spend the same amount for the education of each pupil."); *Washakie Cnty. Sch. Dist. No. One v. Herschler*, 606 P.2d 310, 336 (Wyo. 1980) ("We hold that exact or absolute equality is not required. There must be allowance for variances in individuals, groups and local conditions."); see also *Robinson v. Cahill*, 303 A.2d 273, 297-98 (N.J. 1973) ("Although we have dealt with the constitutional problem in terms of dollar input per pupil, we should not be understood to mean that the State may not recognize differences in area costs, or a need for additional dollar input to equip classes of disadvantaged children for the educational opportunity.").

thetical, some courts recognized that, because “education is a major determinant of an individual’s chances for economic and social success in our competitive society,”<sup>143</sup> states had a duty to provide “that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market.”<sup>144</sup> Otherwise, the right to educational opportunities would be “hollow indeed if the possessor of the right could not compete adequately.”<sup>145</sup> Or, in the words of one dissenting judge, “the phrase ‘equal opportunities,’ in practical terms, means substantially equal opportunities.”<sup>146</sup>

Despite the apparent recognition that horizontal equity and fiscal neutrality are insufficient, the evolution to substantive equality of educational opportunity—or “vertical equity,” as it became known—has been gradual.<sup>147</sup> In the 1960s, the “war on poverty”<sup>148</sup> jumpstarted the effort with the ESEA and its subsequent amendments, which directed funding to low-income, disabled, and limited English proficient (LEP) students. The ESEA was followed by the Equal Educational Opportunities Act of 1974 (EEOA)<sup>149</sup> and the Education for All Handicapped Children Act of 1975, later renamed the Individuals with Dis-

143. *Serrano I*, 487 P.2d 1241, 1255-56 (Cal. 1971); see also *id.* at 1257 (“Unequal education . . . leads to unequal job opportunities, disparate income, and handicapped ability to participate in the social, cultural, and political activity of our society.” (quoting *S.F. Unified Sch. Dist. v. Johnson*, 479 P.2d 669, 676 (Cal. 1971)) (internal quotation marks omitted)); cf. *DuPree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 93 (Ark. 1983) (“Education becomes the essential prerequisite that allows our citizens to be able to appreciate, claim and effectively realize their established rights.”); *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W. Va. 1979) (“[A] thorough and efficient system of schools . . . develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically.”).

144. *Robinson*, 303 A.2d at 295; see also *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 94 (Wash. 1978) (“[T]he State’s constitutional duty goes beyond mere reading, writing and arithmetic. It also embraces broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today’s market as well as in the market place of ideas.” (citing *Robinson*, 303 A.2d at 295)).

145. *Seattle Sch. Dist. No. 1*, 585 P.2d at 94.

146. *Leandro v. State*, 488 S.E.2d 249, 263 (N.C. 1997) (Orr, J., dissenting in part and concurring in part); see also *Brigham v. State*, 692 A.2d 384, 397 (Vt. 1997) (concluding that Vermont has an obligation to “ensure *substantial* equality of educational opportunity”).

147. See ROBERT BERNE & LEANNA STIEFEL, *THE MEASUREMENT OF EQUITY IN SCHOOL FINANCE: CONCEPTUAL, METHODOLOGICAL, AND EMPIRICAL DIMENSIONS* (1984) (presenting a seminal analysis of three economic measures of equity in school finance—horizontal equity, vertical equity, and equal opportunity); Ryan & Saunders, *supra* note 4, at 469 (“Despite its promise, the movement toward vertical equity has been slow.”).

148. See Annual Message to Congress: The Economic Report of the President, 1 PUB. PAPERS 155, 164 (Jan. 20, 1964); Annual Message to the Congress on the State of the Union, 1 PUB. PAPERS 112, 114 (Jan. 8, 1964).

149. Pub. L. No. 93-380, 88 Stat. 514 (codified as amended at 20 U.S.C. §§ 1228, 1701-1758 (2012)).

abilities Education Act (IDEA).<sup>150</sup> Those laws established rights for LEP students and children with disabilities to remedial educational resources. Significantly, the EEOA also codified the “policy of the United States that . . . all children enrolled in public schools are entitled to *equal educational opportunity* without regard to race, color, sex, or national origin.”<sup>151</sup>

Meanwhile, state courts in the early and mid-1980s were inclined to uphold school finance schemes and give deference to the legislative process.<sup>152</sup> Nevertheless, vertical equity regained momentum in the 1990s and early 2000s when the supreme courts of four states—New Jersey, Wyoming, North Carolina, and Kansas—incorporated vertical equity principles.<sup>153</sup> The Supreme Court of New Jersey, for instance, determined that the state’s education clause obligated the legislature not only “to assure that poorer urban districts’ educational funding is substantially equal to that of property-rich districts” but also to provide additional funding “for the special educational needs of these poorer urban districts and address their extreme disadvantages.”<sup>154</sup> The court later found the legislature’s supplemental aid program inadequate because, among other reasons, it was based on a “model district” that failed to “provide the special and extra-

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150. Pub. L. No. 94-142, 89 Stat. 773 (codified as amended in scattered sections of 20 U.S.C.).

151. 20 U.S.C. § 1701(a) (2012) (emphasis added). When the EEOA legislation was introduced in 1972, President Richard Nixon called upon the nation to provide “equal educational opportunity to every person,” including the many “poor” and minority children long “doomed to inferior education” as well as those “who start their education under language handicaps.” Educational Opportunity and Busing: The President’s Address to the Nation Outlining His Proposals, 8 WEEKLY COMP. PRES. DOC. 590, 591 (Mar. 16, 1972).

152. Paul A. Minorini & Stephen D. Sugarman, *School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact, and Future*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES, *supra* note 133, at 34, 55.

153. See Preston C. Green, III et al., *Race-Conscious Funding Strategies and School Finance Litigation*, 16 B.U. PUB. INT. L.J. 39, 65-67, 69-70 (2006) (discussing decisions of the supreme courts of New Jersey, Wyoming, Kansas, and North Carolina); Ryan & Saunders, *supra* note 4, at 469-70 (discussing, in addition to New Jersey and North Carolina court decisions, a Maryland case resolved in a settlement agreement that resulted in “supplemental funding for at-risk students” and precipitated the state’s “new funding formula weighted to provide twice the normal amount of funding for poor, disabled, and Limited English Proficiency students”).

154. *Abbott v. Burke (Abbott II)*, 575 A.2d 359, 408 (N.J. 1990). As foreseen in the *Abbott II* decision, New Jersey had to later grapple with the disadvantages faced by poor students in its rural school districts. See Kyle E. Gruber, *Bringing Home the Bacon: A Case for Applying the New Jersey Urban School Funding Remedy from Abbott v. Burke to Poor Rural School Districts*, 2 COLUM. J. RACE & L. 167, 185-91 (2012).

For informative discussions of the unique challenges facing rural poor students, see John Dayton, *Rural Children, Rural Schools, and Public School Funding Litigation: A Real Problem in Search of a Real Solution*, 82 NEB. L. REV. 99 (2003); and Shavers, *supra* note 130. Cf. Lisa R. Pruitt, *Spatial Inequality as Constitutional Infirmary: Equal Protection, Child Poverty and Place*, 71 MONT. L. REV. 1 (2010).

educational programs and services required” for disadvantaged children to take equal advantage of educational opportunity.<sup>155</sup> The Supreme Court of Kansas made similar findings with respect to its school financing formula.<sup>156</sup>

Encapsulating the contemporary egalitarian mandate for equal life chances, the Supreme Court of Wyoming proclaimed:

An equal opportunity for a proper education necessarily contemplates the playing field will be leveled so each child has an equal chance for educational success. Educational success must be defined as graduating from high school equipped for a role as a citizen, participant in the political system and competitor both intellectually and economically. . . .

Children with an impaired readiness to learn do not have the same equal opportunity for a quality education as do those children not impacted by personal or social ills simply because they do not have the same starting point in learning. A legislatively created finance system which distributes dollars without regard for the need to level the playing field does not provide an equal opportunity for a quality education.<sup>157</sup>

More recently, the No Child Left Behind Act of 2001 (NCLB),<sup>158</sup> which reauthorized the ESEA, was enacted “to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education.”<sup>159</sup> One of the NCLB’s stated purposes is to close “the achievement gap between high- and low-performing children, especially the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers.”<sup>160</sup> Congress aimed to achieve that goal by, among other things, “distributing and targeting resources sufficiently to make a differ-

155. *Abbott v. Burke (Abbott IV)*, 693 A.2d 417, 431 (N.J. 1997).

156. *Montoy v. State*, 102 P.3d 1160, 1164 (Kan. 2005) (“[T]he district court found that the financing formula was not based upon actual costs to educate children but was instead based on former spending levels and political compromise. This failure to do any cost analysis distorted the low enrollment, special education, vocational, bilingual education, and the at-risk student weighting factors. . . . [T]here is substantial competent evidence to support the district court’s findings . . .”).

157. *Campbell Cnty. Sch. Dist. v. State*, 907 P.2d 1238, 1278-79 (Wyo. 1995) (citation omitted); *see also Hoke Cnty. Bd. of Educ. v. State*, 599 S.E.2d 365, 397 (N.C. 2004) (“The world economy and technological advances of the twenty-first century mandate the necessity that the State step forward, boldly and decisively, to see that all children, without regard to their socio-economic circumstances, have an educational opportunity and experience that not only meet the constitutional mandates . . . but fulfill the dreams and aspirations of the founders of our state and nation. Assuring that our children are afforded the chance to become contributing, constructive members of society is paramount. Whether the State meets this challenge remains to be determined.”).

158. Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.).

159. 20 U.S.C. § 6301 (2012) (emphasis added).

160. *Id.* § 6301(3).

ence to local educational agencies and schools where needs are greatest.”<sup>161</sup> As part of the NCLB’s accountability system, schools are also required to disaggregate data on adequate yearly progress (AYP) for “economically disadvantaged students,” “students from major racial and ethnic groups,” “students with disabilities,” and “students with limited English proficiency.”<sup>162</sup> Although, in reality, the NCLB demands only modest educational adequacy, as explained below, it nevertheless reinforces vertical-equity principles by affirming the ideal that all children are entitled to an “equal” education and by including provisions that target the disadvantaged.

Accordingly, the ideal of equality of educational opportunity arising from these legislative and judicial incorporations of vertical equity principles is that

all students should have an equal chance to succeed, with actual observed success dependent on certain personal characteristics, such as motivation, desire, effort, and to some extent ability . . . [, and not] on circumstances outside the control of the child, such as the financial position of the family, geographic location, ethnic or racial identity, gender, and disability.<sup>163</sup>

Such a conception is in one sense more demanding than Rawlsian equality of opportunity. Recall that Rawls’s fair equality of opportunity entails some degree of compensatory education to counteract the differential effects of unequal social circumstances, particularly class barriers, so that those with the same level of talent and motivation face the same prospects. But it does not require additional compensatory education to neutralize the unequal distribution of natural endowments; there is no obligation to ensure, for instance, that the less talented enjoy the same chances for success as the more talented. Rather, those blessed by nature are to profit from their natural endowments so long as the resulting inequalities work to the greatest benefit of the less talented. If that outcome can be achieved by providing additional educational opportunities to the more talented, then, in keeping with the difference principle, so be it.

By contrast, lawmakers construing equality of educational opportunity have apportioned additional resources to compensate directly for natural inequalities, without first assessing whether fair equality of opportunity obtains or whether the compensation accords with the difference principle.<sup>164</sup> Consequently, their conception incorporates the principle of redress—“undeserved

161. *Id.* § 6301(5).

162. *Id.* § 6311(b)(2)(C)(v)(II).

163. Robert Berne & Leanna Stiefel, *Concepts of School Finance Equity: 1970 to the Present*, in *EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES*, *supra* note 133, at 7, 13.

164. See Harry Brighouse, *Educational Equality and School Reform*, in *EDUCATIONAL EQUALITY* 15, 29 (Graham Haydon ed., 2010) (“[The U.S.] education system expends far more resources per pupil on children with disabilities than on children who are socially disadvantaged; in fact, social disadvantage gives a student no claim to extra resources . . . whereas ‘natural’ disadvantage does.”).

inequalities . . . of birth and natural endowment . . . are to be somehow compensated for”<sup>165</sup>—which Rawls did not fully endorse.

Although equality of educational opportunity as it has been conceived and applied is theoretically more ambitious than Rawlsian equality of opportunity, it is not quite the educational analogue of luck egalitarianism. Despite the rhetoric that “all children” deserve “equal” chances for educational achievement, lawmakers have not sought to neutralize all forms of bad brute luck. In practice, the objective has instead been to mitigate rather than neutralize the differential effects of natural and social inequalities. Indeed, it might be too generous to suggest that mitigation is the actual goal given the relatively modest commitment of government resources to high-poverty school districts. Although public education is often the largest appropriation in state budgets, funding disparities between high- and low-poverty school districts persist,<sup>166</sup> even in states in which courts have mandated full funding.<sup>167</sup> Part of the problem is the growing reluctance of state courts to continue to supervise school finance cases and consistently intervene in budgetary considerations thought properly reserved for the political branches, especially during times of economic downturn.<sup>168</sup> Moreover, some of the courts that have invoked educational “equality” have meant “an equal opportunity to have an *adequate* education.”<sup>169</sup>

165. See RAWLS, *supra* note 38, at 100.

166. See Rebell, *supra* note 6, at 1476-79; see also BRUCE D. BAKER & SEAN P. CORCORAN, CTR. FOR AM. PROGRESS, THE STEALTH INEQUITIES OF SCHOOL FUNDING: HOW STATE AND LOCAL SCHOOL FINANCE SYSTEMS PERPETUATE INEQUITABLE STUDENT SPENDING 51-52, 85-86 (2012), available at <http://www.americanprogress.org/wp-content/uploads/2012/09/StealthInequities.pdf>; EQUITY & EXCELLENCE COMM’N, U.S. DEP’T OF EDUC., FOR EACH AND EVERY CHILD: A STRATEGY FOR EDUCATION EQUITY AND EXCELLENCE 15 (2013), available at <http://www2.ed.gov/about/bdscomm/list/eec/equity-excellence-commission-report.pdf> (recognizing that America “spend[s] as much as or even more as a share of [its] GDP than do other nations” on education but observing “that schools in poor communities spend less per pupil—and often many thousands of dollars less per pupil—than schools in nearby affluent communities”).

167. See Laurie Reynolds, *Full State Funding of Education as a State Constitutional Imperative*, 60 HASTINGS L.J. 749, 776-80 (2009).

168. See RYAN, *supra* note 7, at 155 (concluding that, because state legislatures are loath to increase funding or redistribute it, “courts would have to be quite aggressive and remain actively engaged in school funding litigation, over a long period of time, if interested in truly equalizing access to funding” but recognizing that “[f]ew courts have shown such zeal or commitment”); Michael A. Rebell, *Safeguarding the Right to a Sound Basic Education in Times of Fiscal Constraint*, 75 ALB. L. REV. 1855, 1886-96 (2012); Reynolds, *supra* note 167, at 763-66.

169. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 211 (Ky. 1989) (emphasis added); see also *Abbott IV*, 693 A.2d 417, 428 (N.J. 1997) (defining “a constitutionally *adequate* education” (emphasis added)); *Hoke Cnty. Bd. of Educ. v. State*, 599 S.E.2d 365, 396 (N.C. 2004) (concluding that the State had failed in its “constitutional duty to provide . . . students with the opportunity to obtain a sound basic education”).



At the federal level, the NCLB aims for all students to have an “equal . . . opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.”<sup>170</sup> Obtaining “a high-quality education” and reaching “proficiency” do not necessitate that all children have equal chances for educational achievement. Similarly, although the IDEA directs remedial resources to students with disabilities, it guarantees them only a “free *appropriate* public education”—not chances for educational success equal to that of their nondisabled peers.<sup>171</sup>

Still, I presume that the equality faithful are committed to the ideal implicit in some federal and state law, which can be satisfied only by neutralizing most, if not all, natural and social disadvantages to ensure, as much as possible, that all children have equal chances for educational achievement. That view is subject to a number of philosophical and practical objections,<sup>172</sup> but to juxtapose the equality and adequacy theories, I need review only one.

## 2. *The parental liberty objection*

It has long been understood that “complete equality of [educational] opportunity can be reached only if *all* the divergent out-of-school influences vanish.”<sup>173</sup> But, even if it were possible to eliminate the differential effects of social circumstances and natural endowments on a child’s chances for educational achievement, one influence would inevitably remain—the family. As previously explained, the family’s profound influence on a child’s prospects convinced Rawls that fair equality of opportunity could not be fully achieved. James Fishkin punctuated the point, explaining that a “trilemma” occurs between formal equality of opportunity (nondiscrimination and meritocracy), substantive

170. 20 U.S.C. § 6301 (2012) (footnote omitted).

171. *Id.* § 1400(d)(1)(A) (emphasis added); *see id.* §§ 1400(d)(1)(B), 1401(9), 1412(a)(1) (defining and elaborating the standard for a “free appropriate education”); *Bd. of Educ. v. Rowley*, 458 U.S. 176, 197 n.21, 199-200 (1982) (holding that “appropriate education” does not mean a “potential-maximizing education” but rather “some educational benefit,” a “basic floor of opportunity” (internal quotation marks omitted)); *see also* Maureen A. MacFarlane, *The Shifting Floor of Educational Opportunity: The Impact of Educational Reform on Rowley*, 41 J.L. & EDUC. 45, 46 & n.6, 47 (2012) (suggesting that “[t]he *Rowley* standard appears to remain intact” but citing articles contending that “legislative changes to the IDEA and/or the NCLB” have redefined “free appropriate public education”).

172. *See, e.g.*, Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 143-66 (1995) (critiquing equality on grounds of “simplicity,” “normativity,” and “textual conflicts”).

173. James Coleman, *The Concept of Equality of Educational Opportunity*, 38 HARV. EDUC. REV. 7, 21-22 (1968) (emphasis added).

equality of opportunity (equal life chances), and family autonomy, such that a commitment to any two of these principles precludes the third.<sup>174</sup>

To illustrate, imagine Jessie and Stephen are identical twins who have roughly the same natural endowments but were adopted by different families at birth. Both were adopted by upper-middle-class parents and both attend academically successful schools in the same district. However, Stephen's parents greatly value and encourage his education whereas Jessie's parents are less supportive. As a result, Stephen exerts more effort in school and graduates at the top of his class whereas Jessie receives average marks and graduates in the middle. Here, formal equality of opportunity and family autonomy obtain but substantive equality of opportunity does not because Stephen and Jessie do not enjoy the same chance for success. Equal life chances can be achieved only by (1) interfering with how Stephen and Jessie are raised, thus infringing on family autonomy, or (2) maintaining family autonomy but instituting a job lottery or guaranteeing equality of results in some other fashion, thus forgoing formal equality of opportunity.

Recognizing the limitations of educational equality, Brighthouse and Swift offer an account "closely connected to Rawls's principle of fair equality of opportunity."<sup>175</sup> Their "meritocratic conception" maintains that equality of educational opportunity is satisfied when a child's "prospects for educational achievement" depend only on her "talent and effort" and not on her "social class background."<sup>176</sup> Like Rawls, Brighthouse and Swift accept that their conception of educational equality is "bound to be inadequate."<sup>177</sup> Nevertheless, they contend that just because it cannot be fully implemented "does not mean that it is false" and not worth pursuing.<sup>178</sup> Rather, they propose that educational equality should be implemented "as far as possible without undermining other more important values" like family autonomy, which they generally refer to as parental liberty.<sup>179</sup>

Brighthouse and Swift, nevertheless, reject the notion that educational equality must always yield to parental liberty. In their view, some educational equality measures that interfere with parental liberty could be justified, provided the liberty interest is not one to which parents are entitled "as a matter of

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174. FISHKIN, *supra* note 26, at 4-6.

175. Brighthouse & Swift, *supra* note 9, at 448.

176. *Id.* at 447. Such a "conception of educational equality requires that the government concentrate extra resources on children from less advantaged social backgrounds to compensate for their background disadvantage, up to the point that their prospects for achievement are equal to those of children from more advantaged backgrounds." *Id.* at 459.

177. Brighthouse & Swift, *supra* note 8, at 118.

178. *Id.*

179. Brighthouse & Swift, *supra* note 9, at 449-50.

justice.”<sup>180</sup> Brighthouse and Swift think that parents do have a right to develop intimate and loving relationships with their children, and this right would “allow parents to spend a good deal of time with their children” and “share their values and enthusiasms with their children.”<sup>181</sup> These parental liberty interests should be safeguarded, they argue, even if they confer educational advantages on children. So, for example, reading bedtime stories to children is a “legitimate parental partiality” because it is conducive to intimate familial relationships as well as a child’s emotional development.<sup>182</sup> But Brighthouse and Swift doubt that parents have a countervailing right to invest their resources to secure a competitive advantage for their children. They argue, for instance, that sending children to elite private schools, investing in trust funds, or interacting with children about “how best to develop [their] human capital” are not essential to establishing valuable family relationships, meeting a child’s fundamental interests, or satisfying parents’ fiduciary responsibilities.<sup>183</sup>

To put it mildly, their argument is controversial. Perhaps the least radical implication of their view—abolishing private schools—is unconstitutional because it “unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.”<sup>184</sup> Thus, even assuming their theory of legitimate parental partiality is philosophically sound, many of its implications are simply unworkable or political nonstarters. And, as I noted at the outset, the theories with which I wish to engage here must be able to withstand feasibility constraints.

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180. *Id.* at 456-57.

181. *Id.* at 457.

182. See Harry Brighthouse & Adam Swift, *Legitimate Parental Partiality*, 37 PHIL. & PUB. AFF. 43, 57 (2009) (“The parent reading the bedtime story is doing several things simultaneously. He is intimately sharing physical space with his child; sharing with her the content of a story selected by one of them; providing the background for future discussions; preparing her for her bedtime and, if she is young enough, calming her; and reinforcing the mutual sense of identification one with another. He is giving her exclusive attention in a space designated for that exclusive attention at a particularly important time of her day.”).

183. *Id.* at 58.

184. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925). But see Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 AM. U. L. REV. 1461, 1473-74 (2003) (arguing that abolishing private education satisfies strict scrutiny because there is “a compelling interest in achieving equality of educational opportunity” but acknowledging that his proposal does not have “the slightest chance of implementation for the foreseeable future”); Mark Tushnet, *Public and Private Education: Is There a Constitutional Difference?*, 1991 U. CHI. LEGAL F. 43, 54 (suggesting that Congress, acting pursuant to Section 5 of the Fourteenth Amendment, could abolish private schools if it concluded that “the availability of private schools interfered with society’s ability to reach a point of social integration where judgments about people’s worth are made solely on the basis of individual merit”).

Brighthouse and Swift, nevertheless, convincingly argue that parental liberty should not be treated as an absolute principle that admits of no exception. They have attempted to strike a balance between parental liberty and another *prima facie* principle, educational equality. As I explain in Part III, the idea that “conflicting *prima facie* principles [should] be traded off in particular cases”<sup>185</sup> is a point of convergence for the equality and adequacy theories. Having examined the normative and descriptive accounts of the former, equality of educational opportunity, let us undertake a similar analysis of the latter, educational adequacy.

## II. ADEQUACY

The adequacy movement is a manifestation of the sufficiency doctrine. That doctrine can be understood as an expression of two theses, one positive and one negative. In short, “[t]he *positive thesis* stresses the importance of people living above a certain threshold, free from deprivation. The *negative thesis* denies the relevance of certain additional distributive requirements.”<sup>186</sup> Positively, sufficientarians think that it is morally valuable for all people to live at or above a certain threshold, even if they disagree about where that threshold should be set. On their view, it is wrong for some people to live below the threshold not because other people live above it (i.e., because inequality in itself is unjust) or because those below the threshold stand to benefit more than others (i.e., because the worst off should be given priority). Rather, sufficientarians think it is simply unjust for people to have to live in deprivation. Few take issue with that general sentiment.<sup>187</sup>

Sufficientarian critics do, however, reject the negative thesis, which serves as a further indictment of egalitarianism and prioritarianism. Negatively, sufficientarians deny the moral significance of any inequalities once everyone has secured enough. At that point, whatever inequalities remain are not morally offensive, and we have no reason to give priority to the least advantaged; what matters is that all have a sufficient level of advantage, not that the least advantaged are as advantaged as possible. Though sufficientarianism has attracted several eminent theorists,<sup>188</sup> I have chosen to feature Elizabeth Anderson’s ac-

185. FISHKIN, *supra* note 26, at 192.

186. Paula Casal, *Why Sufficiency Is Not Enough*, 117 *ETHICS* 296, 297-98 (2007).

187. *Id.* at 299 (“[I]t is increasingly difficult to find views that do not accept *some* version of the positive thesis . . . Few deny that the elimination of certain types of deprivation, such as hunger, disease, and ignorance, are very weighty political requirements.”).

188. *See, e.g.*, AMY GUTMANN, *DEMOCRATIC EDUCATION* 136-39 (1987); MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* 92-95, 380-84 (2006); RAZ, *supra* note 15, at 240-41; Roger Crisp, *Equality, Priority, and Compassion*, 113 *ETHICS* 745, 762 (2003); Frankfurt, *supra* note 15, at 24.

count because it coincides with her critique of luck egalitarianism and because her sufficientarian conception of justice aligns with educational adequacy.

### A. *Democratic Equality*

In her provocative essay, *What Is the Point of Equality?*, Anderson contends that the luck egalitarian preoccupation with compensating people for “undeserved bad luck—being born with poor native endowments, bad parents, and disagreeable personalities, suffering from accidents and illnesses, and so forth”—is misplaced.<sup>189</sup> What troubles us about inequality is not so much the disparity in the distribution of goods, resources, or welfare but rather the “relations between superior and inferior persons.”<sup>190</sup> That is, inequality is objectionable when the better off are able to subjugate the worst off politically and socially.

Echoing the positive thesis, Anderson believes egalitarians should aim to ensure that all persons (1) “have *sufficient* internal capacities and external resources to enjoy security against oppression—violence, domination, material deprivation, social exclusion, stigmatization, and the like” and (2) “have *enough* to function as an equal in society—to fulfill a respected role in the division of labor, participate in democratic discussion, appear in public without shame, and enjoy equal moral standing to make claims on others.”<sup>191</sup>

Anderson explains that to sustain such relational equality, which she dubs “democratic equality,” people must have the “capabilities” necessary to escape deprivation and maintain standing as equal citizens in a democratic society.<sup>192</sup> Anderson adopts Amartya Sen’s definition of capabilities as people’s real freedoms to achieve certain states of being or doing—“functionings”—given their personal, social, and material resources.<sup>193</sup> Functionings range from the elementary (e.g., being nourished and literate) to more complex achievements (e.g., having self-respect and taking part in the life of the community).<sup>194</sup> Following Sen, Anderson’s democratic equality aims not for equal levels of

189. Anderson, *supra* note 16, at 288.

190. *Id.* at 312.

191. Anderson, *supra* note 9, at 620 (emphasis added); *see also* NANCY FRASER, *JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE “POSTSOCIALIST” CONDITION* (1997) (advocating equality of recognition and redistribution); IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 33-34 (1990) (“[J]ustice is primarily the virtue of citizenship, of persons deliberating about problems and issues that confront them collectively in their institutions and actions, under conditions without domination or oppression, with reciprocity and mutual tolerance of difference.”).

192. *See* Anderson, *supra* note 16, at 289, 316.

193. *Compare* AMARTYA SEN, *INEQUALITY REEXAMINED* 40 (1992), *with* Anderson, *supra* note 16, at 316.

194. SEN, *supra* note 193, at 39.

functionings but rather for “equality for all in the space of capabilities,” that is, “effective access to the goods and relationships of civil society”—the freedom to choose and achieve certain valued functionings by utilizing one’s resources, broadly defined.<sup>195</sup>

Whereas Sen would put his faith in a democratic selection process to value and order the essential capabilities, Anderson thinks that we can independently identify at least some capabilities that are necessary for equal standing and respect.<sup>196</sup> To function as a human being, for instance, Anderson suggests a person needs effective access to (1) “the means of sustaining [her] biological existence,” such as “food, shelter, clothing, [and] medical care,” and (2) “the basic conditions of human agency.”<sup>197</sup> To stand as an equal citizen requires certain political rights—free speech, free association, voting, etc.—and effective access to civil society, including the economy. This entails nondiscrimination, access to public accommodations and the means of production, and the freedom to enter into contracts and other cooperative agreements.

Significantly, although all citizens are guaranteed *access* to civil society, citizens are not guaranteed *full participation*. Certain functionings of citizenship require an income, Anderson explains, and “[f]or those capable of working and with access to jobs, the actual achievement of these functionings is, in the normal case, conditional on participating in the productive system.”<sup>198</sup>

Although there is much here to digest, I briefly introduce Anderson’s democratic equality because it reflects a sufficientarian image of social justice and because it is helpful to understand how Anderson’s defense of adequacy thresholds in education fits into the overall framework of her theory.

195. See Anderson, *supra* note 16, at 316, 318.

196. Compare SEN, *supra* note 193, at 44 (“There is no escape from the problem of evaluation in selecting a class of functionings . . .”), with Anderson, *supra* note 16, at 316 (arguing that “[r]eflection on the negative and positive aims of egalitarianism helps” identify the goods “that are of special egalitarian concern”).

197. Anderson, *supra* note 16, at 317. Anderson here provides only a partial listing of capabilities. Consistent with Sen, Anderson thinks we arrive at a more complete listing through the collective will of citizens, specifically through democratic legislation. See *id.* at 332 (“[W]here the concepts of equal standing and respect don’t yield a determinate answer to how capabilities should be ranked, the ranking may legitimately be left up to democratic legislation.”).

198. *Id.* at 321. Anderson envisions a “system of cooperative production” in which people regard every product of the economy as jointly produced by everyone working together. Everyone’s productive contribution is dependent on what everyone else is doing. Each worker, even one in a low-wage position, is essential to the system. See *id.* at 321-26.

B. “*Sufficientarian Standard for Fair Educational Opportunity*”<sup>199</sup>

Effective access to education does not translate into “equal education.”<sup>200</sup> Anderson doubts that equal educational opportunities are necessary to realize the democratic equality that she esteems.<sup>201</sup> Instead, there need only be “fair educational opportunities”—“a sufficientarian or adequacy standard” that obtains when “every student with the potential and interest . . . receive[s] a K-12 education sufficient to enable him or her to succeed at a college that prepares its students for postgraduate education.”<sup>202</sup> Specifically, “primary and middle schools” must prepare every student “to successfully complete a college preparatory high school curriculum,” and high schools must offer such a curriculum.<sup>203</sup> Anderson regards this as a “high but not unattainable” threshold that will equip students with the capabilities they need to access civil society and function as equal citizens.<sup>204</sup>

Anderson sets the threshold high—“education sufficient to qualify [students] for success at a four-year residential college”—because she regards a college education as essential to attaining “elite” status.<sup>205</sup> For democratic equality to endure, “those who occupy positions of responsibility and leadership in society” must be socially integrated and responsive to “all sectors of society, not just themselves.”<sup>206</sup> So disadvantaged students must have effective access to the elite ranks, meaning “access within the realistic reach of students exercising substantial but not extraordinary effort and within the financial reach of their families.”<sup>207</sup>

Just as important, the socially advantaged and disadvantaged must be educated together. Such integration, Anderson contends, will cultivate (1) an “awareness of the interests and problems of people from all sectors,” (2) “a disposition to serve those interests,” (3) the “technical knowledge of how to advance these interests,” and (4) “competence in respectful interaction with people from all sectors.”<sup>208</sup> But, of course, the implications of this view are quite dramatic—“comprehensive social integration of schools . . . requires disman-

199. Anderson, *supra* note 9, at 614.

200. *Id.* at 615.

201. See Elizabeth Anderson, *Rethinking Equality of Opportunity: Comment on Adam Swift’s How Not to Be a Hypocrite*, 2 *THEORY & RES. EDUC.* 99, 105-07 (2004).

202. Anderson, *supra* note 9, at 597-98.

203. *Id.* at 615.

204. *Id.*

205. *Id.* at 614.

206. *Id.* at 596.

207. *Id.* at 614-15.

208. *Id.* at 596.

ting the laws and practices that currently enable advantaged communities to segregate themselves from the less advantaged.”<sup>209</sup>

Perhaps because Anderson’s adequacy threshold is so high, she has little trouble pledging to the negative thesis. In principle, she does not perceive any injustice in permitting “inequalities in educational access above the sufficiency threshold.”<sup>210</sup> Although Anderson proposes ways to circumvent racial and class segregation (e.g., recognizing the rights of children to cross municipal lines to attend public schools in other districts), she does not find it objectionable for parents or school districts to decide to spend more on their own children’s education, provided the threshold is met for all children. A complaint registered by a student teetering at or just over the threshold to a student sailing high above the threshold is, on Anderson’s view, motivated by envy.<sup>211</sup> Moreover, to prevent expenditures above the threshold would level down “educational opportunities to the lowest common denominator in the name of equality.”<sup>212</sup> Leveling down thus compromises the degree to which education works as a private and public good, “a good to the person who has it, and a good to others,” who, in turn, are able to serve more people “in demanding jobs and volunteer service positions.”<sup>213</sup> As observed in the next Subpart, many of the intuitions that reinforce Anderson’s sufficientarian platform have resonated with courts that have instituted educational adequacy.

### C. Educational Adequacy

#### 1. Historical and legal perspectives

Few would be surprised by the revelation that the concept of educational adequacy predates the 1989 Supreme Court of Kentucky decision that is said to have propelled the third wave of school finance litigation. But educational adequacy goes back much further; in fact, it precedes *Brown*’s affirmation of equality of educational opportunity. Indeed, in two states—Massachusetts and New Hampshire—educational adequacy predates the ratification of the U.S.

209. *Id.* at 619.

210. *Id.* at 615; *cf.* Anderson, *supra* note 16, at 326 (“Once all citizens enjoy a decent set of freedoms, sufficient for functioning as an equal in society, income inequalities beyond that point do not seem so troubling in themselves . . . . The stronger the barriers against commodifying social status, political influence, and the like, the more acceptable are significant income inequalities.” (citing MICHAEL WALZER, *SPHERES OF JUSTICE* (1983); MICKEY KAUS, *THE END OF EQUALITY* (1992))).

211. Anderson, *supra* note 201, at 105 (“The objection conceives of the development of others’ talents as an injury to oneself.”); *see also* Anderson, *supra* note 16, at 307.

212. Anderson, *supra* note 9, at 615.

213. *Id.*



Constitution.<sup>214</sup> In those states and others, courts have concluded that adequacy is embodied in their state constitutions' education clauses, some of which were approved while the nation was still in its infancy, others during the common-school reforms of the nineteenth century.<sup>215</sup> Virtually all state constitutions now require state governments to establish and maintain a public school system.<sup>216</sup> And some state constitutions actually specify a particular level or quality of education the state must provide.<sup>217</sup>

The language of these once-dormant education clauses vary. Some require simply a "free" or "liberal" school system; others demand an education that is "general," "uniform," "thorough," "efficient," or some permutation thereof; and still others are more particular, as in the case of Massachusetts and New Hampshire, obliging their states to "cherish the interests of literature and the sciences."<sup>218</sup> Despite the variation, adequacy lawsuits have been successful across the spectrum.<sup>219</sup> Although the Kentucky court decision may be fairly characterized as the first to formally acknowledge educational adequacy as a constitutional obligation, courts during the first wave "awarded victories to plaintiffs on what could be called adequacy grounds."<sup>220</sup>

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214. See *McDuffy v. Sec'y of Exec. Office of Educ.*, 615 N.E.2d 516, 523-24 (Mass. 1993); *Claremont Sch. Dist. v. Governor (Claremont I)*, 635 A.2d 1375, 1376-77 (N.H. 1993).

215. See Michael A. Rebell, *The Right to Comprehensive Educational Opportunity*, 47 HARV. C.R.-C.L. L. REV. 47, 81 & n.139 (2012) (citing John Dinan, *The Meaning of State Constitutional Education Clauses: Evidence from the Constitutional Convention Debates*, 70 ALB. L. REV. 927, 939 (2007); John C. Eastman, *Reinterpreting the Education Clauses in State Constitutions*, in *SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY*, *supra* note 1, at 55); see also Rosemary C. Salomone, *The Common School Before and After Brown: Democracy, Equality, and the Productivity Agenda*, 120 YALE L.J. 1454, 1466-67 (2011).

216. See Regina R. Umpstead, *Determining Adequacy: How Courts Are Redefining State Responsibility for Educational Finance, Goals, and Accountability*, 2007 BYU EDUC. & L.J. 281, 289 n.20 ("Iowa's constitution is the only state constitution to make no provisions for educational responsibilities."); cf. *King v. State*, 818 N.W.2d 1, 14 (Iowa 2012) (observing that the Iowa Supreme Court had previously found that "no aspect of the Iowa Constitution, including the education clause, authorized the legislature to provide for public schools (as opposed to merely funding them)" and surmising that, if "the education clause did not even allow the legislature to *establish* public schools, . . . the clause [cannot be viewed] as a source of enforceable minimum standards for such schools").

217. Umpstead, *supra* note 216, at 289-90.

218. *Id.* at 290-91.

219. *Id.* at 287, 290 (defining "a court decision [as] an adequacy case if (1) the plaintiffs argued a state duty to provide an adequate education under the education clause of the state constitution, (2) the court agreed that there was a duty, and (3) the court found a possible or actual violation of that duty").

220. Briffault, *supra* note 1, at 26 (citing *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 102 (Wash. 1978); *Pauley v. Kelley*, 255 S.E.2d 859, 878 (W. Va. 1979)).

Yet adequacy did not become a full-fledged litigation strategy until some state courts started to resist formal equality of educational opportunity in the late 1970s and early 1980s.<sup>221</sup> Around the same time, several comparative studies—including *A Nation at Risk: The Imperative for Educational Reform*, a 1983 report by the National Commission on Excellence in Education—exposed a crisis in the quality of public schools, in both wealthy and impoverished districts, that jeopardized the American economy and the country’s ability to compete internationally.<sup>222</sup> State governments responded by focusing on academic standards and accountability schemes, diverting attention away from the demands for horizontal equity.<sup>223</sup> That shift in focus suited legislators and governors, who did not have the political will to raise taxes or level down and cap district spending to guarantee more equitable expenditures.<sup>224</sup>

The federal government further incentivized states to welcome standards-based reform and accountability. In 1994, Congress passed the Goals 2000 Act and the Improving America’s Schools Act, providing funding and support to states that developed “challenging” reading and math standards and assessments designed to measure student performance.<sup>225</sup> Seven years later, the NCLB propelled standards and accountability to the forefront of national education policy. The NCLB is more demanding than its predecessors, particularly in its accountability requirements that levy serious consequences on schools failing to make adequate yearly progress toward proficiency on state standards.<sup>226</sup> Yet the NCLB left to the states “virtually unfettered discretion to define and revise the standards for measuring proficiency.”<sup>227</sup>

On that front, education advocates had carried the standards-based reform momentum into state courts, contending that education clauses in state constitutions provided a basis for imposing standards that states had to establish and

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221. See Minorini & Sugarman, *supra* note 152, at 55.

222. See Melissa C. Carr & Susan H. Fuhrman, *The Politics of School Finance in the 1990s*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES, *supra* note 133, at 136, 147.

223. *Id.*

224. *Id.* at 147, 150; see also James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2060 (2002) (noting the political difficulties of equalizing school funding).

225. See Ryan, *supra* note 7, at 1227 (citing Improving America’s Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (codified as amended in scattered sections of 20 U.S.C.); Goals 2000: Educate America Act, Pub. L. No. 103-227, 108 Stat. 125 (1994) (codified as amended in scattered sections of 20 U.S.C.)).

226. *Id.* at 1228.

227. See Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 401 (2006).

maintain for all students.<sup>228</sup> A number of state courts agreed.<sup>229</sup> Consistent with the sufficientarian positive thesis, those courts determined that their states have a duty to provide enough resources to every school district so that all students have access to a “substantive level of education . . . mandated by the state constitution.”<sup>230</sup> Some courts deferred, in whole or in part, to their state legislatures to specify the content of that constitutional duty.<sup>231</sup> Other courts undertook the task of articulating educational adequacy by reference to broad qualitative standards (e.g., “adequate education” or “a sound basic education”) or to “specific, though abstract, capacities and skills.”<sup>232</sup> The Supreme Court of Kentucky, for example, enumerated seven core capacities.<sup>233</sup>

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228. See Martin R. West & Paul E. Peterson, *The Adequacy Lawsuit: A Critical Appraisal*, in *SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY*, *supra* note 1, at 1, 7.

229. See Bauries, *supra* note 11, at 741 (“[T]he highest courts of twenty-six states have addressed education finance constitutional challenges at least partly founded on theories of adequacy, and they have issued rulings as to justiciability or have adjudicated the merits and either issued or abstained from issuing a remedy.”); West & Peterson, *supra* note 228, at 2-3, 6. Courts in eight states—Alabama, Florida, Illinois, Indiana, Nebraska, Oklahoma, Pennsylvania, and Rhode Island—declined to reach the merits of an adequacy challenge, relying on separation of powers principles in reasoning that their respective state legislatures were the appropriate forum in which the plaintiffs should seek their remedy. See Bauries, *supra* note 11, at 741; Tang, *supra* note 134, at 1195, 1208 & n.60.

230. Umpstead, *supra* note 216, at 297. But see Scott R. Bauries, *The Education Duty*, 47 *WAKE FOREST L. REV.* 705, 736 (2012) (contending that the affirmative provisions in state education clauses are most often adjudicated “as purely duty provisions . . . [that] obligate government to pursue the ends identified but do not necessarily entitle any person to a particular level of government service”).

231. Bauries, *supra* note 11, at 742 (“Courts in eleven states . . . [have] found a constitutional violation . . . [but] abstained from the remediation of the identified constitutional infirmity, leaving it up to the legislative body . . . to construct a remedy.”).

232. Koski & Reich, *supra* note 2, at 562-63.

233. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989) (“[E]ach and every child . . . [must have access to] the seven following capacities: (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; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.”).

Nevertheless, the common thread running through these decisions is an abiding concern for absolute educational deprivation.<sup>234</sup> The adequacy lawsuit, like the equality lawsuit before it, is a response to persistent disparities in educational achievement and the failings of public school systems.<sup>235</sup> Moreover, despite different judicial approaches and considerable variation in the language of education clauses, there has been wide agreement among state courts attempting to define educational adequacy that public schools should equip their students with the capability to function as responsible citizens.<sup>236</sup>

In these two respects, educational adequacy tracks the twin aims of Anderson's democratic equality—sufficient capability to (1) escape deprivation and (2) function as an equal citizen. Of course, no adequacy decision embraces Anderson's all-encompassing theory; courts are constrained by the facts of the cases before them and the language of the relevant education clauses. For instance, courts have not necessarily emphasized, in Anderson's terms, the significance of social integration and effective access to elite status. But, in line with Anderson's fair educational opportunity standard, a considerable number of courts favoring adequacy have stressed the importance of preparing students to be competitive in higher education and/or in the job market.<sup>237</sup> Moreover, sev-

234. See Darby & Levy, *supra* note 2, at 366; Koski & Reich, *supra* note 2 at 615; West & Peterson, *supra* note 228, at 7-8.

235. ELAINE M. WALKER, EDUCATIONAL ADEQUACY AND THE COURTS: A REFERENCE HANDBOOK 51 (2005); see Briffault, *supra* note 1, at 27 (“A judicial determination of educational inadequacy in a particular school district is almost always predicated on some finding of inequity.”).

236. See Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell, 990 A.2d 206, 253 (Conn. 2010) (concluding education clause entitles “public school students to an education suitable to give them the opportunity to be responsible citizens”); Rebell, *supra* note 6, at 1515; Umpstead, *supra* note 216, at 307-08 (citing Campaign for Fiscal Equity v. State (*Campaign I*), 655 N.E.2d 661, 666 (N.Y. 1995); Leandro v. State, 488 S.E.2d 249, 255 (N.C. 1997); *Abbott II*, 575 A.2d 359, 397 (N.J. 1990); *Rose*, 790 S.W.2d at 212; Pinto v. Ala. Coal. for Equity, 662 So. 2d 894, 896 (Ala. 1995); Claremont Sch. Dist. v. Governor (*Claremont II*), 703 A.2d 1353, 1359 (N.H. 1997); McDuffy v. Sec’y of the Exec. Office of Educ., 615 N.E.2d 516, 554 (Mass. 1993); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 94 (Wash. 1978); Pauley v. Kelley, 255 S.E.2d 859, 877 (W. Va. 1979)); see also DeRolph v. State, 677 N.E.2d 733, 736 (Ohio 1997) (“[T]he education of our citizenry has been deemed vital to our democratic society and to our progress as a state.”).

237. See Opinion of the Justices, 624 So. 2d 107, 166 (Ala. 1993) (defining adequate educational opportunities as, inter alia, “sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts . . . in academics or in the job market”); Rell, 990 A.2d at 253 (“A constitutionally adequate education also will leave Connecticut’s students prepared to progress to institutions of higher education, or to attain productive employment and otherwise contribute to the state’s economy.”); Campaign for Fiscal Equity, Inc. v. State (*Campaign II*), 801 N.E.2d 326, 353 (N.Y. 2003) (“[T]he Education Article requires the opportunity for a sound high school education that should prepare students for higher education, or to compete in the employment market of high school graduates.”); DeRolph, 677 N.E.2d at 737 (“The mission of education is to pre-

eral of these courts have recognized that education also contributes to children's self-respect and their ability to interact with others.<sup>238</sup>

Many of the courts that have considered adequacy a constitutional obligation have also agreed that the relevant education clauses are not offended when local school districts or parents decide to offer opportunities above the state-mandated threshold or "a better-than-adequate education."<sup>239</sup> In this regard, educational adequacy comports with the sufficientarian negative thesis—at least the version of that thesis touted by Anderson. It is this particular alignment with the sufficiency doctrine that rouses the most forceful objection to educational adequacy. There are other notable criticisms of educational adequacy,<sup>240</sup> but what I will call the fairness objection strikes at the heart of the current equality-adequacy conceptual divide.

## 2. *The fairness objection*

The central premise of the fairness objection is that education is, in part, a positional good. Particularly in the competition for selective-college admissions and high-quality jobs, the instrumental value of a person's education depends on the quantity and quality of education she has compared to others.<sup>241</sup> That is,

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pare students of all ages to meet, to the best of their abilities, the academic, social, civic, and employment needs of the twenty-first century . . . ." (citing STATE BD. OF EDUC., *PREPARING OHIO SCHOOLS FOR THE 21ST CENTURY*, at ii (1990)) (internal quotation marks omitted)); *Rebell*, *supra* note 6, at 1515; *Umpstead*, *supra* note 216, at 309 & nn.179-81 (citing *Pinto*, 662 So. 2d at 896; *Rose*, 790 S.W.2d at 212; *McDuffy*, 615 N.E.2d at 554; *Claremont II*, 703 A.2d at 1359; *Leandro*, 488 S.E.2d at 255; *Pauley*, 255 S.E.2d at 877).

238. See *Opinion of the Justices*, 624 So. 2d at 166 (interpreting the state constitution to require, among other enumerated requirements for "adequate educational opportunities," "sufficient support and guidance so that every student feels a sense of self-worth and ability to achieve, and so that every student is encouraged to live up to his or her full human potential"); *Umpstead*, *supra* note 216, at 307 & n.163, 308 & nn.164-66 (citing *Pinto*, 662 So. 2d at 896; *Rose*, 790 S.W.2d at 212; *McDuffy*, 615 N.E.2d at 554; *Claremont II*, 703 A.2d at 1359; *Abbott II*, 575 A.2d at 397; *Leandro*, 488 S.E.2d at 255; *Seattle Sch. Dist. No. 1*, 585 P.2d at 94; *Pauley*, 255 S.E.2d at 877).

239. *Umpstead*, *supra* note 216, at 298, 299 & n.85 (citing *Rose*, 790 S.W.2d at 211-12; *Claremont II*, 703 A.2d at 1360; *Leandro*, 488 S.E.2d at 256; *DeRolph*, 677 N.E.2d at 746); see also *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 815 (Ariz. 1994) ("Disparities caused by local control do not run afoul of the state constitution because there is nothing in art. XI that would prohibit a school district or a county from deciding for itself that it wants an educational system that is even better than the general and uniform system created by the state.").

240. See generally *Koski & Reich*, *supra* note 2; *Moore*, *supra* note 19; *Tang*, *supra* note 134.

241. See *Harry Brighouse & Adam Swift, Equality, Priority, and Positional Goods*, 116 *ETHICS* 471, 474-75 (2006); *Koski & Reich*, *supra* note 2, at 597-99.

she will be competitive only if her educational attainment is equivalent to or greater than that of her peers.<sup>242</sup>

Certainly, education is not a purely positional good, because there is an intrinsic value to being an educated person.<sup>243</sup> Education can also be regarded as a public good to the extent it benefits society in terms of “higher political participation, greater income and productivity, and better health.”<sup>244</sup> So long as education confers competitive benefits, however, it would be difficult, if not impossible, “to disentangle the positional from the nonpositional aspects of education in the distribution of educational resources.”<sup>245</sup> In terms of that distribution, the fairness objection to adequacy is simply this: “getting ‘enough’ will not give one a fair chance in competitions to which education is relevant, if others are getting more than enough.”<sup>246</sup> Equally troubling for adequacy critics is the prospect that those students who receive educational opportunities above the threshold will be able “to protect, enhance, and entrench their advantage” in the competition.<sup>247</sup>

In defense of adequacy, Satz questions the degree to which education is a positional good, noting that “admission to most colleges in the United States is not competitive: almost any high school graduate who applies will be admitted.”<sup>248</sup> Still, she concedes that “[e]ducation is probably positional at its upper ends”—for example, in the case of admission to selective colleges and universities.<sup>249</sup> And the upper end is pivotal to Satz, who, like Anderson, believes that

242. As Koski and Reich observe, there is some evidence to support the positional nature of education. *See* Koski & Reich, *supra* note 2, at 599-602. For instance, students from private schools or wealthy school districts hold an advantage over students from low-income families and poorly financed public schools in the competition for admission to selective universities and graduate schools. *See id.* at 599-600. *But see* Charles Howell, *Education as a Positional Good Reconsidered*, 1 J. PHIL. STUDY EDUC. 19, 29-30 (2011) (contending that the positional goods argument is misleading because it assumes “everyone competes with everyone else in a particular regional or local employment pool” and “treats competitive interaction as a dyadic relationship, in which one party gains at the expense of another,” when, in reality, “there is always a third party[:]. . . . the employer”).

243. Koski & Reich, *supra* note 2, at 598-99; *see also* Brighthouse & Swift, *supra* note 241, at 482 (“The educated person has a world of culture, complexity, and enjoyment opened to her, engaging in which is valuable in ways that are not competitive.”).

244. Koski & Reich, *supra* note 2, at 598.

245. Brighthouse & Swift, *supra* note 241, at 483.

246. Brighthouse & Swift, *supra* note 9, at 462; *see also* Johannes Giesinger, *Education, Fair Competition, and Concern for the Worst Off*, 61 EDUC. THEORY 41, 42 (2011) (“[T]he main egalitarian objection against the adequacy view is that it does not provide an adequate answer to the problem of fair competition.”).

247. Koski & Reich, *supra* note 2, at 611.

248. Satz, *supra* note 8, at 437.

249. *Id.*; *see also* Liu, *supra* note 227, at 347 n.67 (contending that the fairness objection “has its bite primarily at the upper end of the educational distribution, where the positional features of education are most apparent”).

education must serve “to integrate such privileged positions in universities and employment across class and racial lines.”<sup>250</sup> Otherwise, “adequacy is not adequate to its purpose.”<sup>251</sup>

Anderson’s answer to the fairness objection is for selective colleges and universities to engage in race- and class-based affirmative action.<sup>252</sup> She proposes that college admissions committees “discount the positional advantages” of those students whose better-than-adequate education would add comparatively little value to the makeup of the college class.<sup>253</sup>

Recall that, on Anderson’s view, academic knowledge is but one type of knowledge that elites must have to be responsive to the interests and concerns of others. And “[a]cquiring the other types of knowledge requires that elites be drawn from all social groups and be educated together, in integrated settings that foster intergroup communication and cooperation on terms of equality.”<sup>254</sup> Hence, students receiving a better-than-adequate education should not be the admissions committee’s automatic choice in a “head-to-head competition with sufficiently academically prepared students from disadvantaged social backgrounds.”<sup>255</sup> Rather, the admissions committee should “give substantial weight to the imperative of integration” so that there will be a “substantial representation of disadvantaged groups” in the college class.<sup>256</sup> Anderson concludes that such affirmative-action-type measures would resolve the fairness objection by “giving the less advantaged a positional good that counterbalances the positional advantages the prosperous obtain from investing more resources in their children’s academic preparation.”<sup>257</sup>

Like Brighthouse and Swift’s response to the parental liberty objection (e.g., abolish private schools), Anderson’s reply to the fairness objection (expand affirmative action measures) is highly contentious and rests on shaky constitutional ground. Although Anderson does not believe that her “integrationist theory” is “impossible or unreasonably difficult for people to meet,” she acknowledges the trend among legislatures, courts, and voters to curtail or eliminate affirmative action programs in higher education and impede integra-

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250. Satz, *supra* note 8, at 438.

251. *Id.*

252. See Anderson, *supra* note 9, at 616-18; see also ELIZABETH ANDERSON, *THE IMPERATIVE OF INTEGRATION* 135-54 (2010) (advocating an “integrative model” of affirmative action requiring “institutions capable of promoting racial integration” to seek “a critical mass of any segregated and stigmatized racial group”).

253. Anderson, *supra* note 9, at 616.

254. *Id.*

255. *Id.*

256. *Id.* at 617-18.

257. *Id.* at 618.

tion efforts in K-12 schools.<sup>258</sup> Moreover, the impulse behind Anderson's integrationist theory—that elites should be constituted to “serve all sectors of society, not just themselves”<sup>259</sup>—seems to run afoul of the individualistic leanings of American culture and perhaps puts too much faith in the educated elite to serve the disadvantaged.<sup>260</sup>

Notwithstanding the political feasibility concerns, Anderson's response to the fairness objection is telling, suggesting that she is not fully committed to the negative thesis. Indeed, rather than being completely indifferent to educational inequalities above the adequacy threshold, Anderson proposes an integration imperative to “counterbalance” them.<sup>261</sup> Satz shares Anderson's concern for educational inequalities above the threshold, recognizing that “large inequalities regarding who has a real opportunity for important goods above citizenship's threshold relegate some members of society to second-class citizenship, where they are denied effective access to positions of power and privilege in the society.”<sup>262</sup> Satz would avoid this disparate effect by making the adequacy threshold elastic, dependent on the educational resources “that others have and [on] what they can do with those resources.”<sup>263</sup>

We will revisit Anderson's and Satz's responses to the fairness objection in Part III. For now, it is important to appreciate that the objection forces Anderson and Satz to forsake the part of the sufficientarian negative thesis that denies the moral significance of inequalities above the threshold. Much like the concessions made by Brighthouse and Swift to the parental liberty objection, Anderson's and Satz's digression from the negative thesis in the face of the fairness

258. ANDERSON, *supra* note 252, at 189-90; *see* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2419-20 (2013) (reaffirming that colleges and universities have a compelling interest in achieving a diverse student body but insisting that race-conscious measures satisfy strict scrutiny—which requires a finding that “no workable race-neutral alternatives would produce the educational benefits of diversity”—and that universities are not entitled to deference on this narrow tailoring requirement); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 735 (2007) (striking down voluntary desegregation plans relying on racial classification as failing to satisfy strict scrutiny); Todd Donovan, *Direct Democracy and Campaigns Against Minorities*, 97 MINN. L. REV. 1730, 1741 n.64 (2013) (describing state referendums and initiatives aimed at repealing affirmative action programs); James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 133 (2007) (observing that, post-*Parents Involved*, the Court seems hostile to integration, noting that “four Justices make the goal itself seem dastardly, while Justice Kennedy accepts the goal but voices intense distaste over the most straightforward means of achieving it” (footnote omitted)).

259. Anderson, *supra* note 9, at 596.

260. Derrick Darby, *Adequacy, Inequality, and Cash for Grades*, 9 THEORY & RES. EDUC. 209, 217 (2011).

261. Anderson, *supra* note 9, at 618.

262. Satz, *supra* note 8, at 434.

263. *Id.*



objection splinters the equality-adequacy divide, creating the possibility that these theories can occupy the same conceptual terrain.

### III. EQUALITY AND ADEQUACY

Thus far I have traced the philosophical pedigrees of equality and adequacy and observed how the theories have been reflected in the law. Ending the discussion there would reinforce the traditional view that, although equality and adequacy attempt to remedy similar forms of educational injustice, they remain theoretically and practically incompatible. The emerging contemporary view, however, recognizes that the theories tend to overlap conceptually and that “the equality and adequacy cases borrow heavily from each others’ doctrinal underpinnings and normative rationales.”<sup>264</sup> I specify four such points of convergence, which I think demonstrate that the theories are not diametric opposites. Rather, as discussed further below, equality and adequacy can maintain a cohesive, symbiotic relationship.

#### A. *Points of Convergence for Equality and Adequacy*

Although there is ample literature contrasting equality and adequacy, there has been relatively little exploration of the confluence of the two theories. I argue that equality and adequacy converge along four significant points: (1) educational equality and adequacy theorists and practitioners embrace value pluralism, acknowledging that neither equality nor adequacy is an a priori moral principle; (2) contrary to the conventional understanding, adequacy, like equality, can be relational or comparative—in fact, its relativity has been apparent in its application; (3) educational egalitarians agree with the sufficientarian positive thesis that it is wrong for children to be deprived of a minimally adequate education; and, likewise, (4) educational sufficientarians agree with many egalitarians that public education should advance social equality.

#### 1. *Pluralism*

Recall that contemporary egalitarians reject equality of results in favor of equality of opportunity because they recognize that strict equality extinguishes liberty, fosters irresponsibility, snubs diversity, and stifles productivity. Although equality is an important ideal, it is not worth sacrificing other values deemed necessary for a moral and progressive society.<sup>265</sup> Similarly, the leading

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264. Reynolds, *supra* note 167, at 750 n.9.

265. See Alan Carter, *Value-Pluralist Egalitarianism*, 99 J. PHIL. 577, 578 (2002); Derek Parfit, *Equality or Priority?*, in *THE IDEAL OF EQUALITY* 81, 107 (Matthew Clayton & Andrew Williams eds., 2002).

educational equality and adequacy theorists are pluralists.<sup>266</sup> They do not regard either equality or adequacy as absolute principles that must be pursued at all costs. Rather, they acknowledge that there are other competing values that should factor into the demands of educational justice.

Brighthouse and Swift, for instance, consider educational equality to be “a lesser value” than two other principles: (1) in the distribution of educational resources, priority ought to be given to the least advantaged children, and (2) “parents and children should be able to enjoy successful intimate relationships with one another.”<sup>267</sup> Similarly, Anderson and Satz think that educational adequacy must yield to the aims of democratic or civic equality. Some intervention is necessary, in their view, when inequalities above the adequacy threshold “effectively bar[] a social subgroup of citizens from aspiring to more than sufficient wealth or better than sufficient jobs.”<sup>268</sup> Consequently, the equality and adequacy theories tolerate a certain degree of educational inequality in capitulation to some other principle (e.g., liberty or relational equality).

In adjudicating educational obligations, courts also weigh equality or adequacy against other values—individual freedoms, separation of powers, local control, and financial efficiencies.<sup>269</sup> Indeed, even courts that have recognized education as a fundamental right consider other compelling state interests when they apply strict scrutiny.<sup>270</sup> Therefore, in theory and in practice, equality and

266. See, e.g., ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 1 (1993) (advocating a pluralist-expressive theory of value); Brighthouse & Swift, *supra* note 8, at 118 (“[E]galitarians are not only egalitarians. . . . [T]hey should be pluralists about value, believing only that equality is one value to be weighed against others.”); Koski & Reich, *supra* note 2, at 613 (“Equality is not all that theorists, practitioners, or citizens care about. We should be pluralists.”).

267. Brighthouse & Swift, *supra* note 8, at 120.

268. Anderson, *supra* note 201, at 106; see also Satz, *supra* note 8, at 434 (“[A]n education system that precludes the children of poorer families from competing in the same market and society as their wealthier peers cannot be adequate.”).

269. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (“[A] State’s interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment . . . .”); *DuPree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 93 (Ark. 1983) (balancing right to education against government’s financing plan); *Olsen v. State*, 554 P.2d 139, 148-49 (Or. 1976) (upholding state financing system after balancing interest in educational opportunity against state’s objective of furthering local control).

270. See, e.g., *Opinion of the Justices*, 624 So. 2d 107, 159 (Ala. 1993) (“Because education is a fundamental right under the Alabama constitution, the stark inequities in educational opportunity offered schoolchildren in this state must be justified under strict scrutiny by a compelling state interest . . . .”); *Serrano II*, 557 P.2d 929, 951 (Cal. 1976) (“[T]he school financing system before us must be examined . . . with that strict and searching scrutiny appropriate to such a case.”); *Horton v. Meskill*, 376 A.2d 359, 373 (Conn. 1977) (“[I]n Connecticut the right to education is so basic and fundamental that any infringement of that

adequacy function as “prima facie” principles that can be counterbalanced or overridden by one another or by other moral principles “in particular cases.”<sup>271</sup>

## 2. *Relativity*

“The fundamental conceptual difference between equality and [adequacy],” according to equality defenders William Koski and Rob Reich, “is that equality is necessarily comparative or relational while [adequacy] is not.”<sup>272</sup> In determining whether students *X* and *Y* have an equal distribution of an educational resource, we must ask: do *X* and *Y* each have the same amount of the resource?<sup>273</sup> However, in deciding whether students *X* and *Y* have adequate educational resources, we do not judge how much of the resource *X* has compared to *Y* but rather simply ask: do *X* and *Y* each have a sufficient amount of the resource to satisfy some threshold?<sup>274</sup> Proponents of educational adequacy object that this commonly accepted characterization of adequacy is “artificially thin.”<sup>275</sup> As noted in Satz’s response to the fairness objection above, adequacy must be relational and dynamic because what it takes to be an equal citizen—that is, where to set the adequacy threshold—invariably turns on what educational resources others have.<sup>276</sup>

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right must be strictly scrutinized.”); *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979) (“Because education is a fundamental constitutional right . . . , any discriminatory classification found in the educational financing system cannot stand unless the State can demonstrate some compelling State interest to justify the unequal classification.”); *Washakie Cnty. Sch. Dist. No. One v. Herschler*, 606 P.2d 310, 335 (Wyo. 1980) (holding that the state had failed to meet its “burden of demonstrating a compelling interest” to justify an unequal school finance system).

271. Cf. FISHKIN, *supra* note 26, at 192-93. Fishkin concludes that “a defensible liberalism” is one that recognizes that the trilemma—of formal equality of opportunity (nondiscrimination and meritocracy), substantive equality of opportunity (equal life chances), and the autonomy of the family—requires balancing of these prima facie principles “in particular cases as they present themselves.” *Id.* at 192-93. Although this does not provide a “single vision of social justice,” Fishkin argues that it “may be the most honest response to the true difficulties of distributive justice.” *Id.* at 193.

272. Koski & Reich, *supra* note 2, at 589.

273. *Id.*

274. *See id.*

275. *See, e.g.,* Liu, *supra* note 227, at 347.

276. *See* GUTMANN, *supra* note 188, at 136 (“[I]nequalities in the distribution of educational goods can be justified if, but only if, they do not deprive any child of the ability to participate effectively in the democratic process . . . .”); Aaron Jay Saiger, *The Last Wave: The Rise of the Contingent School District*, 84 N.C. L. REV. 857, 895-96 (2006) (observing that “adequacy is a fuzzy concept not at all distinct from equality,” because what is adequate “is not an objective question” but one to be determined in part by reviewing what well-financed, high-performing schools propose and achieve); Satz, *supra* note 8, at 434 (“When some peo-

To their credit, Koski and Reich accurately observe that the version of adequacy that is consistent with the sufficientarian negative thesis is non-relational. Indeed, that seems to be the whole point of the negative thesis. But, as previously explained, the construal of adequacy endorsed by Satz and Anderson, its leading theorists, is not fully committed to the negative thesis. Anderson and Satz are concerned with large-scale inequalities above the threshold that undermine democratic equality. Thus, they seem to believe it is necessary at times to recalibrate the threshold to ensure that the students obtaining an adequate education are not subordinated to second-class citizenship and can function as equal citizens with students obtaining a better-than-adequate education. Indeed, some courts have said as much, suggesting that “what the Legislature today considers to be ‘supplementation’ may tomorrow become necessary to satisfy the constitutional mandate.”<sup>277</sup>

At bottom, the debate over adequacy’s relativity is mostly academic at this point because, as James Ryan has pointed out, “[m]ost courts that have ruled in favor of school finance plaintiffs seem to recognize, either implicitly or explicitly, that the sufficiency of a student’s education is necessarily a relative concept.”<sup>278</sup> Even court decisions that “focus more on the adequacy of inputs or outcomes still have a comparative aspect, either in the proof relied upon or in the definition of the adequacy standard.”<sup>279</sup> Again, the “driving force” in successful adequacy cases has been “the lack of comparable resources and opportunities among different schools.”<sup>280</sup> That comparative element is particularly pronounced in the decisions that articulate adequacy in terms of preparing students in the competition for admission to higher education and high-quality jobs.<sup>281</sup>

Accordingly, adequacy is construed more in line with the version advanced by Anderson and Satz than the one scrutinized by Koski and Reich. In practice, then, adequacy, like educational equality, has entailed relational or comparative elements.

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ple have a lot more than others, this may affect what others need to take part in community life.”).

277. *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 732 (Tex. 1995).

278. Ryan, *supra* note 7, at 1239 (“The basic idea is simple: to determine whether one child is receiving a sufficient education, you have to know what others are learning.”).

279. *Id.* at 1232 (citing *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 197-98 (Ky. 1989); *Claremont II*, 703 A.2d 1353, 1356-57, 1360 (N.H. 1997); *Abbott IV*, 693 A.2d 417, 433 (N.J. 1997); *State v. Campbell Cnty. Sch. Dist.*, 32 P.3d 325, 330-31 (Wyo. 2001)).

280. Ryan, *supra* note 7, at 1233.

281. *Id.* at 1237-38, 1241 (“Clearly, one’s ability to compete for employment or admission to higher education requires comparable educational opportunities at the elementary and secondary level.”); *see also* Briffault, *supra* note 1, at 28 (“Adequacy defined in terms of competitiveness necessarily has a comparative and egalitarian component.”).

### 3. *A positive thesis*

Sufficientarians do not monopolize the positive thesis. Many egalitarians, for instance, “accept Rawls’s view that a just society will guarantee a social minimum and may even agree that *any* reasonable conception of justice will favor ‘measures ensuring for all citizens adequate . . . means to make effective use of their freedoms.’”<sup>282</sup> Self-professed “educational egalitarians” Brighthouse and Swift also have little trouble accepting the positive thesis, arguing that “[e]veryone should receive an education sufficient for them to become effective and deliberative participants in the political process, to be able to be productive and self-confident members of the workforce, and to deal with those more advantaged than they are as peers.”<sup>283</sup>

Of course, courts, legislatures, and advocates wrestle with the contours of the positive thesis, particularly in determining what is “enough” education. Mere recognition that educational deprivation is wrong does not yield a determinate threshold or a judicially manageable standard. And, as previously explained, the vague and often broadly worded education clauses in state constitutions offer little guidance to policymakers. Recall that Anderson thinks that part of the threshold can be derived objectively based on the capabilities believed necessary for people to function as equal citizens. Some courts, most notably the Supreme Court of Kentucky, have taken that approach and articulated their view of the core capabilities that an adequate education should advance. Other courts defer to their legislatures, occasioning the democratic selection process favored by Sen. Pragmatically, both courts and legislatures have employed methodologies for determining the cost of an adequate education by focusing on educational inputs and outputs.<sup>284</sup>

Notwithstanding the persistent struggle to define the threshold, there seems to be widespread consensus that students are at least entitled to an adequate education. And the consensus is largely due to near universal agreement with the positive thesis.

282. Casal, *supra* note 186, at 299 (quoting JOHN RAWLS, *The Idea of Public Reason Revisited*, in JOHN RAWLS: COLLECTED PAPERS 573, 582 (Samuel Freeman ed., 1999)).

283. Brighthouse & Swift, *supra* note 9, at 462; see Kenneth A. Strike, *Equality of Opportunity and School Finance: A Commentary on Ladd, Satz, and Brighthouse and Swift*, 3 EDUC. FIN. & POL’Y 467, 472 (2008) (“[W]e must provide an adequate education to everyone. There is a threshold we must not fall below . . . to meet certain minimal requirements of justice as well as to secure other elective social goals.”).

284. See William S. Koski, *Achieving “Adequacy” in the Classroom*, 27 B.C. THIRD WORLD L.J. 13, 22-23 (2007) (describing the professional judgment, evidence-based, successful schools, and cost-function models); see also Bruce D. Baker & Preston C. Green, III, *Conceptions, Measurement, and Application of Educational Adequacy and Equal Educational Opportunity*, in HANDBOOK OF EDUCATION POLICY RESEARCH 438, 442-44 (Gary Sykes et al. eds., 2009).

#### 4. *Social equality*

Egalitarians do not monopolize the concern for social equality. Indeed, sufficientarians Anderson and Satz ostensibly believe that “*the most urgent consideration of justice* is to create egalitarian relationships among the members of the democratic community.”<sup>285</sup> Again, from Anderson’s perspective, the trouble with inequality is the consequent relations between “superior” and “inferior” persons, not disparities in the distribution of goods or opportunities. Similarly, Satz’s “equal-citizenship view targets inequality at salient and injurious lines of social division that lead to *disadvantage*.”<sup>286</sup>

Consistent with the social-equality platform, Anderson and Satz would assent to equality of opportunity’s nondiscrimination principle, because prohibiting discrimination would eliminate one mechanism for social oppression.<sup>287</sup> Their fidelity to nondiscrimination would perhaps also lead them to agree with several of the first- and second-wave school-finance decisions that found wealth discrimination in public school funding contravened equal protection guarantees in state constitutions. But neither Anderson nor Satz would approve of horizontal equity as the remedy for such discrimination.<sup>288</sup> In fact, Anderson and Satz seem to endorse a prominent mechanism of fiscal neutrality known as “power equalization”—“an ‘equal tax rates, equal spendable dollars’ criterion of equity in public school finance, according to which communities should be entitled to draw funds from a common tax base in proportion to their willing-

285. Giesinger, *supra* note 246, at 51; *see also* Anderson, *supra* note 201, at 106 (“Democratic equality is egalitarian in its conception of just relationships among citizens, but sufficientarian in its conception of justice in the distribution of resources and opportunities.”).

286. Debra Satz, *Unequal Chances: Race, Class and Schooling*, 10 THEORY & RES. EDUC. 155, 167 (2012).

287. *See* Anderson, *supra* note 16, at 317 (“[E]nabling all citizens to stand as equals to one another in civil society . . . requires that careers be open to talents.”); *see also* Anderson, *supra* note 9, at 605 (noting the negative effects of stereotypes that cause “discrimination against members of disadvantaged groups, especially when they have or seek access to elite positions”).

Sufficientarians, of course, can offer nonegalitarian reasons for opposing discrimination. *See supra* note 44. Frankfurt, for instance, believes that discrimination is wrong because it entails failing to treat persons with respect by failing to consider them based only on the characteristics and circumstances that are relevant to the position or circumstance in question. *See* Casal, *supra* note 186, at 301-02.

288. *See* Anderson, *supra* note 9, at 615 (“[T]he consequence of implementing an equality-of-resources criterion of fair educational opportunity would be to level down opportunities to the tastes of the median voter . . . at a significant cost to human development.”); Satz, *supra* note 8, at 426-27 (arguing against horizontal equity because (1) it “is compatible with leveling educational resources downward for all,” (2) “equal financial inputs do not yield equal resources,” and (3) “equal funding may not translate into equal education, insofar as the school’s organization and infrastructure ensure that the money is badly spent”).

ness to tax themselves, with equal tax rates yielding equal tax revenues.”<sup>289</sup> Implicit in their endorsement of power equalization is the recognition that wealth discrimination undercuts the social equality agenda.<sup>290</sup> Otherwise, they would regard even vast funding disparities between districts as immaterial, provided that all districts had enough funding to deliver an adequate education.

Anderson and Satz, of course, set their sights much higher than nondiscrimination. Both consider racial and class integration as an imperative of K-12 and higher education. On that score, Satz contends that adequacy actually holds an advantage because, from the adequacy perspective, “integration is a *constitutive* part of education for citizenship” whereas, from the equality of educational opportunity viewpoint, integration is “*instrumental* to achieving more equal opportunities for poor children.”<sup>291</sup> But Brighthouse and Swift observe that “there are also distinctively egalitarian reasons to argue for integration.”<sup>292</sup>

For present purposes, it is unnecessary to judge who has the better argument for integration. The point I want to make, put simply by Satz, is that “[a]dequacy for citizenship has egalitarian dimensions” in its concern for social equality.<sup>293</sup> That concern “may also be a necessary element for achieving an equality-based right to education, thereby helping to bridge the gap between the adequacy and equality approaches.”<sup>294</sup>

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289. Anderson, *supra* note 9, at 618 n.41 (citing COONS ET AL., *supra* note 131); see also Satz, *supra* note 8, at 439. Coons, Clune, and Sugarman were the first to outline the district-power-equalizing scheme for implementing fiscal neutrality. See COONS ET AL., *supra* note 131, at 202. Coons and Sugarman later expanded on the concept, proposing “family power equalizing,” which bases tuition for school vouchers on a family’s ability to pay. See JOHN E. COONS & STEPHEN D. SUGARMAN, *EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL* 198 (1999).

290. See Satz, *supra* note 286, at 165 (“[W]hat is needed is a way of ensuring that the gap between the least advantaged and the most advantaged is not so great that it undermines the conditions for equal citizenship . . . [E]veryone must have a reasonably high proportion of what others have.”); see also GUTMANN, *supra* note 188, at 127 (“In its application to primary schooling, whose social purpose is to develop democratic character in all citizens, the principle of nondiscrimination becomes a principle of nonexclusion: no educable child may be excluded from an education adequate to participating in the processes that structure choice among good lives.”).

291. Satz, *supra* note 8, at 436.

292. Brighthouse & Swift, *supra* note 8, at 122. For instance, they suggest that integration would benefit disadvantaged children by giving them access to the greater educational resources demanded by the parents of more advantaged children. *Id.*

293. Satz, *supra* note 8, at 435.

294. Darby & Levy, *supra* note 2, at 370.

B. *Projecting an Equality and Adequacy Alliance*

In this last Subpart, I want to entertain the notion that has garnered support in recent years—that “a fully satisfactory theory of justice in education should account for the importance of both adequacy and equality.”<sup>295</sup>

1. *Adequately equal: equality of educational opportunity without “equal” life chances*

In his second inaugural address, President Barack Obama reiterated what many other Presidents and American political leaders have in essence said before him, that we as a nation

are true to our creed when a little girl born into the bleakest poverty knows that she has the *same chance to succeed* as anybody else, because she is an American; she is free and she is equal, not just in the eyes of God, but also in our own.<sup>296</sup>

Such rhetoric evoking equal life chances enjoys broad political appeal in the United States, where the American Dream remains gospel. Indeed, Koski and Reich regard the American Dream as so integral to our national ethos that it “provide[s] an independent argument” for equality of educational opportunity because “the schoolhouse is the main engine to realize [that] Dream.”<sup>297</sup> It may be imprudent to challenge such a cherished ideal, but I do not believe that equal life chances—or, in this context, equal chances for educational achievement—should be a guiding principle in the pursuit of educational equality.

It seems to be an accepted but often deliberately ignored truth that equal chances for educational achievement among all children is impossible. As previously discussed, that goal cannot be attained without completely neutralizing all of the differential effects of social circumstances (e.g., race, class, and gender) and natural endowments (innate talents and (dis)abilities) on *every* child’s chances for educational achievement. We simply cannot marshal enough resources to make that happen. Indeed, for some children, the resources that they would need would be virtually insatiable.<sup>298</sup> And, even if scarcity were not an issue and all social and natural factors could somehow be neutralized, equal chances for educational achievement still could not be realized without eliminating the influence of family life on a child’s prospects through a “massive

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295. *Id.* at 369; see also Brighthouse & Swift, *supra* note 8, at 118 (“[A]dequacy . . . is not . . . the only principle of justice in education . . . [T]here is a place for a principle of educational equality in a fully specified conception of justice in education.”).

296. Inaugural Address, 2013 DAILY COMP. PRES. DOC. 32, at 2 (Jan. 21, 2013) (emphasis added).

297. Koski & Reich, *supra* note 2, at 608, 611.

298. See Lesley Jacobs, *Equality, Adequacy, and Stakes Fairness: Retrieving the Equal Opportunities in Education Approach*, 8 THEORY & RES. EDUC. 249, 253-54 (2010).



system of collectivized child-rearing” at the expense of parental liberty.<sup>299</sup> Even then, as Brighthouse points out, unavoidable differences in the operation of such state-run orphanages would produce unequal chances.<sup>300</sup>

Notably, Brighthouse and Swift’s “meritocratic conception” of equality of educational opportunity does not require that each child’s chances for educational achievement are equal to those of every other child. They realize that differences in, *inter alia*, the level of innate talent and motivation make that an impracticable goal. So their conception tolerates “considerable inequality” in “educational achievement” among all children.<sup>301</sup> But, among children with the same measure of talent and motivation, Brighthouse and Swift think that the “children from less advantaged social backgrounds” should be brought “up to the point that *their prospects for achievement are equal* to those of children from more advantaged backgrounds.”<sup>302</sup>

Given Brighthouse and Swift’s response to the parental liberty objection, I take it that they would admit that literally equal chances for educational achievement cannot be secured even among the similarly talented and motivated. Rather, equality of educational opportunity “can only be approached and never fully reached.”<sup>303</sup> That assessment is unlikely to trouble Brighthouse and Swift, who, as pluralists, believe that “equality is one value to be weighed against others.”<sup>304</sup> So, in their view, we should attempt to implement equal chances for educational achievement among the similarly talented and motivated “*as far as possible* without undermining other more important values.”<sup>305</sup> However, the coupling of the belief on the one hand that *equal* chances for educational achievement should be a guiding moral principle with the recognition on the other hand that realization of that principle is infeasible seems to violate the maxim “ought implies can.”<sup>306</sup> That is, if we have a moral obligation to ensure equal chances for educational achievement, then we should be able to bring that about.<sup>307</sup>

299. See FISHKIN, *supra* note 26, at 64-65. Alternatively, we could forgo formal equality of opportunity (nondiscrimination and meritocracy) in favor of some mechanism for achieving equality of results.

300. See BRIGHOUSE, *supra* note 55, at 55-56.

301. Brighthouse & Swift, *supra* note 9, at 448.

302. *Id.* at 459 (emphasis added).

303. Coleman, *supra* note 173, at 22.

304. Brighthouse & Swift, *supra* note 8, at 118.

305. Brighthouse & Swift, *supra* note 9, at 449 (emphasis added).

306. See IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON* (1788), *reprinted in PRACTICAL PHILOSOPHY* 133, 163-64 (Mary J. Gregor ed. & trans., 1996).

307. Brighthouse and Swift might take exception to my assumption that they would regard equal chances for educational achievement among the similarly talented and motivated as impossible. Elsewhere, Brighthouse has suggested that we could achieve equal educational opportunity by “either handicap[ing] the advantaged or compensat[ing] the disadvantaged

In response, Brighouse and Swift might suggest that *equal* chances for educational achievement is somewhat of a misnomer. What equality of educational opportunity requires is not literally equal chances but approximately equal chances.<sup>308</sup> If so, then equality of educational opportunity begins to look remarkably like high-threshold adequacy.<sup>309</sup> To be sure, even high-threshold adequacy does not aim to approximate equal chances, but that seems to be the upshot of setting the threshold so high.

For instance, we could expect a considerable reduction of inequalities in educational achievement if the threshold were, as Anderson proposes, a K-12 education that will enable students to complete a four-year residential college curriculum designed to prepare them for success in pursuing a postgraduate or professional education.<sup>310</sup> High thresholds can diminish positional advantages.

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with much greater attention and resources, sufficiently to equalize their prospects.” HARRY BRIGHOUSE, *SCHOOL CHOICE AND SOCIAL JUSTICE* 143 (2000). But his more recent scholarship with Swift seems to recognize that there would be feasibility constraints even assuming the best possible circumstances. Some might deny that ought always implies can, asserting instead that we have weighty moral reasons to pursue equal chances for educational achievement even if we could never fulfill its demands. *See* MASON, *supra* note 37, at 98-99. I do not find that argument compelling; indeed, I find it incoherent. *See* Colin Farrelly, *Justice in Ideal Theory: A Refutation*, 55 *POL. STUD.* 844, 845 (2007). And, based on my reading, Brighouse and Swift convey, to varying degrees, a healthy respect for the ought-implies-can principle. *See* BRIGHOUSE, *supra* note 55, at 28 (“No principle of justice can be a true principle if, in the most favourable circumstances possible, it would be impossible to implement that principle to the full extent demanded by its place in the theory of justice.” (internal quotation marks omitted)); Adam Swift, *The Value of Philosophy in Nonideal Circumstances*, 34 *SOC. THEORY & PRAC.* 363, 369 (2008) (“On my conception of how things fit together, philosophy provides the careful conceptual and evaluative thinking needed to rank the options that social science tells us to be within the feasible set. Only by bringing the two together can we sensibly judge what to do.”).

308. *See* Strike, *supra* note 283, at 481 (“What [educational egalitarians] are trying to do is to create a basic structure of opportunity that provides approximate equality among groups characterized by educationally irrelevant criteria (such as race) as far as access to the prized goods and position of our society is concerned.”).

309. *See* Liu, *supra* note 279, at 347 n.67; *cf.* Lisa R. Pruitt, *Human Rights and Development for India’s Rural Remnant: A Capabilities-Based Assessment*, 44 *U.C. DAVIS L. REV.* 803, 845-46 (2011) (drawing on Nussbaum’s capabilities approach, proposing “parity” as a “hybrid concept” of adequacy and equality, “a standard lower than strict equality that nevertheless is relative”).

310. *See* Randall R. Curren, *Justice and the Threshold of Educational Equality*, in *THE ETHICS OF TEACHING* 331, 333 (Michael A. Boylan ed., 2006) (contending that the higher the threshold, the more adequacy converts to pure relational equality); Rob Reich, *Equality, Adequacy, and K-12 Education*, in *EDUCATION, JUSTICE, AND DEMOCRACY* 43, 55 (Danielle Allen & Rob Reich eds., 2013) (“Defining the equal standing of citizens in a robust manner, such that opportunities to participate in civic life are roughly equal, will bring the adequacy orientation much closer to the equality orientation in practice.”); *see also* RYAN, *supra* note 7, at 176 (suggesting that if funding levels in wealthy districts sets the “benchmark against which equity and adequacy of funding should be judged,” then that should prompt “states to

They cannot eliminate them, but neither can a school system pursuing approximately equal chances. The question then “becomes one of degree of proximity” to equal chances.<sup>311</sup>

Equality defenders nevertheless maintain that adequacy sends the wrong message to those receiving the threshold level of education:

We have provided an education that has enabled you to compete for these prized positions. Granted that you have certain disadvantages in competing and others have certain advantages, so we do not expect that you will succeed at the same rate as more favored populations. Nevertheless our duty to create a just society is met by an education that is good enough to enable you to compete even if this competition is unequal.<sup>312</sup>

But that message is no more harmful than the one equality of educational opportunity conveys by perpetuating the fiction that equal chances for educational achievement is attainable. That theme “creates deep misunderstandings and . . . political tensions,” for the promise of the American Dream often resonates not as an ideal but as reality.<sup>313</sup> Hence, those “who fail are further stigmatized because they presumably manifest—to winners more than to losers, to be sure—weakness of will or lack of talent.”<sup>314</sup>

If neither adequacy nor equality alone expresses a fair or truthful idea, then perhaps their joint expression can. We say to the student,

You are entitled to an education that will provide a reasonably high chance of educational achievement in K-12 and postsecondary schooling. Inevitably, your chance of educational success may be somewhat greater or less than others. Nevertheless, when the achievement gap becomes so disproportionate that

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level up spending in property-poor districts so that it is at least ‘substantially equal’ or comparable to spending in property-rich districts”).

311. See Coleman, *supra* note 173, at 22; see also Helen Ladd & Susanna Loeb, *The Challenges of Measuring School Quality: Implications for Educational Equity, in EDUCATION, JUSTICE, AND DEMOCRACY*, *supra* note 310, at 19, 40 (“[W]hile equity as equal opportunity and equity as adequacy differ conceptually, the use of proximal outcome measures of quality makes them quite similar in terms of the relative merits of different approaches to measuring quality.”).

312. Strike, *supra* note 283, at 486; see also Koski & Reich, *supra* note 2, at 606 (“Equality is better than adequacy in that unequal schooling can create stigma, insult an individual’s self-worth, and undermine the social bases of self-respect.”); Reich, *supra* note 310, at 57 (“There is something objectionable about the use of formal public institutions, such as public schools, to deliver resources over and above the level of sufficiency. . . . [By endorsing adequacy], the state confers its imprimatur on the advantage, and this can constitute a dignitary harm to individuals.”).

313. Jennifer L. Hochschild, *The Word American Ends in “Can”: The Ambiguous Promise of the American Dream*, 34 WM. & MARY L. REV. 139, 151 (1992).

314. *Id.* at 161; see also KAUS, *supra* note 210, at 37 (contending that a strict adherence to meritocracy against a supposed backdrop of equal opportunity encourages distinctions between the successful and unsuccessful, such that the successful can not only boast of their success but also claim they are more valuable).

you and other students similarly situated cannot compete, then we will augment your educational opportunities to put you and your peers on more equitable footing.

Equality and adequacy expressed in this manner are consistent with a number of court decisions that have recognized that “absolute equality or precisely equal advantages are not required and cannot be attained except in the most relative sense.”<sup>315</sup> Rather, the state’s obligation is to “provide an excellent education program for all K thru 12 students throughout the State and provide substantially equal educational opportunities for those students.”<sup>316</sup>

2. *Equally adequate: educational adequacy with a presumptive negative thesis*

As conceived by its leading theorists, educational adequacy partly cedes the sufficientarian negative thesis. Specifically, in response to the fairness objection, Anderson and Satz acknowledge that, at a certain point, large-scale inequalities in educational opportunities above the threshold do matter. For her part, Satz suggests that the mechanism for addressing large inequalities must be accounted for in the definition of adequacy itself.<sup>317</sup> Furthermore, the “educational gap between the least advantaged and the middle range” could be diminished if “everyone [had] a reasonably high proportion of what others have” and if we were to “unbundle the high-stakes rewards from educational success”—rewards such as access to health care, a decent standard of living, and meaning-

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315. *Horton v. Meskill*, 376 A.2d 359, 376 (Conn. 1977); *see also* *Bd. of Educ. v. Rowley*, 458 U.S. 176, 198 (1982) (“The requirement that States provide ‘equal’ educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons.”); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973) (“[T]he Equal Protection Clause does not require absolute equality or precisely equal advantages.”); *Opinion of the Justices*, 624 So. 2d 107, 114 (Ala. 1993) (“‘Equal’ educational opportunities need not necessarily be strictly equal or precisely uniform, whether these opportunities are discussed in terms of school funding, of the programs purchased with such funds, or of the actual educational benefits offered.”).

316. *Tenn. Small Sch. Sys. v. McWherter*, 894 S.W.2d 734, 738 (Tenn. 1995); *see* *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 500 (Ark. 2002) (“It is the State’s responsibility, first and foremost, to develop forthwith what constitutes an adequate education . . . . It is, next, the State’s responsibility to assess, evaluate, and monitor . . . the entire spectrum of public education across the state to determine whether equal educational opportunity for an adequate education is being substantially afforded to . . . school children. It is, finally, the State’s responsibility to know how state revenues are being spent and whether true equality in opportunity is being achieved. Equality of educational opportunity must include as basic components substantially equal curricula, substantially equal facilities, and substantially equal equipment for obtaining an adequate education.”).

317. Satz, *supra* note 8, at 434 (“[A]n education system that precludes the children of poorer families from competing in the same market and society as their wealthier peers cannot be adequate.”).

ful work.<sup>318</sup> Recall that Anderson proposes class- and race-based affirmative action in higher education to counterbalance positional advantages obtained from inequalities above the threshold. In an earlier piece, Anderson submitted that “opportunities to compete . . . beyond the sufficiency threshold must be genuinely open to all”; that is, there must be “a fair chance at being successful in the competition.”<sup>319</sup>

In practice, educational adequacy also does not exhibit an unwavering commitment to the negative thesis. Courts “generally do not seek to enforce some absolute notion of adequacy, where disparities in resources are ignored.”<sup>320</sup> Rather, courts tend to view adequacy as a “dynamic standard,” recognizing “that, at some point, [spending above the threshold] will create intolerable disparities in opportunities.”<sup>321</sup> All this suggests that the negative thesis operates, both conceptually and practically, as a rebuttable presumption in adequacy cases. At the top of the distribution, inequalities above the threshold are presumptively valid unless they undermine the ability of students to function as equal citizens and compete for admission to higher education and high-quality jobs on comparable terms—that is, undermine democratic equality, however broadly or narrowly defined.

This is not to suggest that the negative thesis is a weak presumption that can always be rebutted. For instance, I suspect that Anderson and Satz would hold steadfast to the negative thesis in response to the more general argument that the thesis “fails to establish that *when everyone has enough, it does not matter how unequally additional resources are distributed.*”<sup>322</sup> Brighthouse and Swift illustrate this alleged shortcoming:

Suppose that all children have an adequate education . . . and that there is some leeway such that even the least well-educated children are being educated better than adequacy demands. Suppose, now, that a bounty of unexpected resources enters the system . . . . Wherever the resources are spent within the system, they will not undermine adequacy. How should they be distributed? The principle of adequacy makes no comment at all on this.<sup>323</sup>

Brighthouse and Swift think that such indifference demonstrates adequacy’s inadequacy because a sense of fairness should motivate us to direct “the new educational resources [to] those with lower than the median prospects.”<sup>324</sup> But as long as those with lower chances for educational achievement are still able to function as equal citizens and compete for admission to higher education and

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318. Satz, *supra* note 286, at 165.

319. Anderson, *supra* note 201, at 106.

320. Ryan, *supra* note 7, at 1237.

321. *See id.*

322. Casal, *supra* note 186, at 307.

323. Brighthouse & Swift, *supra* note 8, at 125.

324. *Id.*

high-quality jobs, Anderson and Satz are unlikely to accept that fairness necessitates spending the additional resources on them. Anderson could observe that, on balance, the resources might be better spent on educating the elite, who will then be able to serve the interests and concerns of those with lower chances for educational achievement. Similarly, Satz might suggest that the new educational resources be spent in a way that maximizes the development of human talent so that it will “redound to everyone’s absolute advantage . . . [by] increas[ing] the size of the social surplus.”<sup>325</sup>

There is no urgency in deciding which of these arguments fares best because the factual predicate of the disagreement—“[s]uppose that all children have an adequate education”—is unlikely to happen any time soon, if ever. Perhaps a more apt criticism is that adequacy supposes that “*when not everyone can have enough, egalitarian considerations have no relevance.*”<sup>326</sup> Once again, Brighouse and Swift illustrate the point, inviting us to imagine a scenario in which

many children do not receive an education that is adequate in Anderson and Satz’s senses. . . . Reform A will have the effect of making the children who are destined for elite membership more responsive to the interests of those over whose lives they have asymmetric power, and it will also increase the level of social mobility, such that there will be a small increase in the percentage of children from disadvantaged backgrounds joining the elites. It will, in other words, produce a slight improvement in the level of adequacy. Reform B will make no improvement in the level of adequacy, but it will improve the prospects for secure, if ill-paid, employment for the lowest 10% of achievers, by improving their prospects of acquiring the soft skills valued by low-wage employers before they drop out of high school.<sup>327</sup>

Brighouse and Swift think there are “reasons of justice” to choose Reform B over Reform A.<sup>328</sup> Consistent with Rawls’s difference principle, they believe that educational inequalities can be justified only “when they redound to the benefit of the less advantaged.”<sup>329</sup> Unlike Rawls, however, they do not regard the principle of fair equality of opportunity as lexically prior to the difference principle. So, on their prioritarian view, when faced with a choice between benefitting the worst off and promoting greater educational equality overall, the

325. Debra Satz, *Equality, Adequacy, and Education for Citizenship*, 117 ETHICS 623, 632, 645 (2007). This debate mimics one that has been around since the times of Plato, who thought the “best and brightest [children] should be educated in a distinguished way for the leadership roles in society,” and Aristotle, who “believed that education should be the same for all children of citizens.” Eric Thomas Weber, *Dewey and Rawls on Education*, 31 HUM. STUD. 361, 372 (2008).

326. Casal, *supra* note 186, at 307.

327. Brighouse & Swift, *supra* note 8, at 125.

328. *Id.* at 125-26.

329. Brighouse & Swift, *supra* note 9, at 455.

latter principle must yield.<sup>330</sup> Likewise, for them, advancing the interests of the worst off should trump adequacy even if that adequacy has the effect of achieving more social equality.

It may be safe to assume that, all things considered, Anderson and Satz would prefer Reform A over B.<sup>331</sup> Nevertheless, Brighthouse and Swift acknowledge that their hypothetical shows, at best, that adequacy cannot be “the sole principle of justice in the distribution of education” when not everyone can have an adequate education.<sup>332</sup> As an initial matter, I suspect that Anderson and Satz are unwilling to concede that achieving adequacy is an impossible task.<sup>333</sup> Moreover, the presumptive negative thesis would not preclude egalitarian considerations until all children have an adequate education. So there is no conceptual barrier to deploying egalitarian principles that facilitate adequacy.<sup>334</sup> Indeed, in practice, educational adequacy has been conspicuously infused with vertical equity.<sup>335</sup> For “if adequacy requires getting all students above a certain threshold, it will tend to focus disproportionate resources on

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330. *See id.* at 451. This has led some to question “how a theory that subordinates the meritocratic principle to the principle of concern for the worst off is distinct from a conception that gives up the meritocratic principle completely.” Giesinger, *supra* note 246, at 46; *see also* Gina Schouten, *Fair Educational Opportunity and the Distribution of Natural Ability: Toward a Prioritarian Principle of Educational Justice*, 46 J. PHIL. EDUC. 472, 486 (2012).

331. Notably, however, Anderson claims that her sufficientarian conception of fair educational opportunity advances the difference principle, albeit “to different ends” than Rawls. Anderson, *supra* note 9, at 621. Moreover, Satz is willing to entertain the possibility that “there are indeed considerations concerning the lives of the worst off that can trump the value of fair equality of opportunity.” Satz, *supra* note 286, at 164.

332. Brighthouse & Swift, *supra* note 8, at 125-26.

333. *See* Satz, *supra* note 286, at 167 (“[T]he idea of an education adequate for equal citizenship is a harder idea to operationalize than strict [or horizontal] equality, but it is not impossible.”).

334. Roger Crisp, for instance, favors a sufficientarian-prioritarian hybrid, which gives “*absolute* priority . . . to those below the threshold.” Crisp, *supra* note 188, at 758 (emphasis added); *see also* Casal, *supra* note 186, at 318-23 (discussing three hybrids of sufficiency encompassing egalitarian and prioritarian principles and proposing that the negative thesis be revised “so that it merely denies that equality and priority should stand unaccompanied by sufficiency”); Crisp, *supra* note 188, at 758 (“Below the threshold, benefiting people matters more the worse off those people are, the more of those people there are, and the greater the size of the benefit in question. Above the threshold, or in cases concerning only *trivial benefits* below the threshold, no priority is to be given.” (emphasis added)); Koski & Reich, *supra* note 2, at 590 (“[T]he sufficiency framework can justify equality-enhancing transfers from the well off to the needy. If many people have more than enough and a few have less than enough, then taking from the many to boost the few above the threshold that marks the level of adequacy looks like a good thing.”).

335. *See* Koski & Reich, *supra* note 2, at 616.

students who are less able to profit from instruction if this is required to get them above the specified threshold.”<sup>336</sup>

Accordingly, several adequacy-based court decisions have approved of vertical equity funding “to compensate for differences in regional costs and student needs that translate into higher costs to supply the same quality of education throughout the state.”<sup>337</sup> Moreover, courts and legislatures have imported vertical equity principles in utilizing the methods for “costing-out an adequate education.”<sup>338</sup> So, as Satz has pointed out, adequacy can import egalitarian considerations that “explain why some inequalities require greater remedial attention than others—namely, those inequalities that affect the prospects of the least well off.”<sup>339</sup>

### 3. *Adequacy, meritocracy, and luck egalitarian responsibility*

It would seem that adequacy can accommodate two of the three principles associated with equality of opportunity—nondiscrimination and equal life chances (as high thresholds achieving approximately equal chances and vertical equity). Regarding the third, meritocracy, Anderson contends that a meritocratic conception of equality of opportunity “cannot guide us in the allocation of

336. Strike, *supra* note 283, at 476; see Black, *supra* note 4, at 1373 (“[I]t may be the case that adequacy is impossible without certain levels of equity. So long as gross disparities are permitted to exist between schools, the schools on the lower end will always have to compete against other schools for vital resources, such as teachers, principals, and administrators, and struggle to attract racially and socioeconomically diverse student populations, which have significant effects on the overall achievement of a school and its individual students.” (citation omitted)); Ryan & Saunders, *supra* note 4, at 469 (“The line between adequacy and equity becomes especially hazy when a court acknowledges that underprivileged children may need more resources to succeed than other children.”); Satz, *supra* note 8, at 435 (“Many of [adequacy’s] practical implications are likely to be similar to those endorsed by vertical equality of opportunity theorists.”); see also TAN, *supra* note 98, at 10 (“To be sure, sufficiency and equality are not independent of each other, and in fact in practice they are often closely related. It is possible that the meeting of some sufficiency criteria entails distribution toward greater equality in order to meet the needs of those falling short of the benchmark. In this way sufficiency can lead to a commitment to equality.”).

337. Umpstead, *supra* note 216, at 298; see Briffault, *supra* note 1, at 38 (describing this version of adequacy as “equity plus,” which focuses “on the need for school financing systems to provide more than equal funding to certain groups of schoolchildren, particularly the urban poor, in order for those children to receive a truly adequate education” (internal quotation marks omitted)); see also R. Craig Wood, *Justiciability, Adequacy, Advocacy, and the “American Dream,”* 98 KY. L.J. 739, 769 (2009-2010) (suggesting that some of these adequacy lawsuits are “adequacy masquerading as equity”).

338. Koski, *supra* note 284, at 21-23; see Meaghan Field, Note, *Justice as Fairness: The Equitable Foundations of Adequacy Litigation*, 12 SCHOLAR 403, 409 (2010) (“The fact that funding equity remains a standard part of adequacy suits, while general education goals and implementation methods shift, is what allows adequacy suits to be equitable.”).

339. Satz, *supra* note 8, at 436.



K-12 educational opportunities, where both the talent and motivation of those seeking education, and the structure of educational opportunities, are *endogenous* to the decision being made.”<sup>340</sup> Satz agrees, explaining that meritocracy: (1) “cannot tell us what the structure of educational opportunities should be, since that structure will itself help determine who comes to have merit”; (2) “would not offer a sufficient education with respect to either children with little inborn talent or those children who early on make poor choices”; and (3) “seems overly moralistic,” especially when it means “withhold[ing] educational opportunities from a young child who fails to work hard or is less talented than his peers.”<sup>341</sup>

Anderson’s and Satz’s points are well taken; in response, Brighthouse and Swift admit that their “meritocratic principle” cannot be “the sole principle of educational justice.”<sup>342</sup> Nevertheless, adequacy “does not rule out a restricted form of meritocracy in which educational resources above the level that is adequate for citizenship are distributed in proportion to children’s demonstrated intellectual ability and willingness to learn.”<sup>343</sup> In other words, although meritocracy should not be the distributive principle employed to determine the threshold or to allocate educational resources to enable children to reach the threshold, it could shape opportunities for those children achieving above the threshold.

Conceivably, Anderson could embrace this restricted meritocracy as a way to introduce the additional opportunities that she thinks are needed above the threshold to help diminish positional advantages. And, if children from advantaged and disadvantaged backgrounds must utilize such effective opportunities together, it could advance her integration imperative as well. A full complement of effective opportunities might also facilitate the affirmative action programs Anderson envisions in higher education. Children from disadvantaged social backgrounds would not earn admission based merely on their adequate education and their disadvantaged status; they could earn a spot by benefiting from the effective opportunities above the threshold. This would present an outlet for fostering the type of appraisal respect that luck egalitarian critics worry would otherwise be denied to children who are often the target of compensatory services.

Incentivizing effective opportunities could also cultivate responsibility and respect for choice. Consistent with luck egalitarianism, inequalities above the

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340. Anderson, *supra* note 201, at 101.

341. Satz, *supra* note 8, at 428-29.

342. Brighthouse & Swift, *supra* note 8, at 118-19.

343. GUTMANN, *supra* note 188, at 134.

threshold that are the product of such option luck would not be unjust.<sup>344</sup> Of course, children cannot be held fully responsible because they are not completely developed moral agents.<sup>345</sup> Moreover, the objection that luck egalitarianism overstates the brute versus option luck distinction has relevance here. If a child's choice to make use of an effective opportunity (option luck) is influenced by preferences over which she has no control (brute luck), then in what sense should we hold her responsible for that choice? So there is some conceptual baggage that comes with luck egalitarian responsibility that cannot be fully addressed here.<sup>346</sup> But we do not need to untangle all of these complexities to see a link between adequacy and meritocracy, at least above the threshold.

#### CONCLUSION

It is time to transcend the equality versus adequacy debate in favor of an earnest discussion about the proper balance of equality and adequacy. There may always be intransigent equality and adequacy theorists unwilling to forsake the equal-chances ideal or a robust negative thesis. But, while that debate has served its purpose, I suspect it is not of much benefit anymore to the advocates and policymakers who must confront the unremitting, living, and breathing tragedies of public education in this country.<sup>347</sup> And “[f]inding a legal and philosophical solution to the problem of educational inequality will be a much more complex undertaking than a stark either-or-dichotomy between pursuing adequacy or equality suggests.”<sup>348</sup> Moreover, as Anderson has recently noted, there is “no urgency in settling the equality versus adequacy dispute” for all time because “any feasible and normatively acceptable policies for making

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344. See Casal, *supra* note 186, at 322 (describing “*sufficiency-constrained luck egalitarianism*, which allows that some inequalities in outcome may arise justly but denies that individuals’ having less than enough is ever justifiable by appeal to voluntary choice”).

345. See Gina Schouten, *Educational Justice: Closing Gaps or Paying Debts?*, 29 J. APPLIED PHIL. 231, 237-39 (2012).

346. I would add only that any meritocracy-driven distribution of effective opportunities above the threshold should account for children’s relative, rather than absolute, effort level. See ROEMER, *supra* note 40, at 13-23. And, although children are not fully responsible moral agents, they can learn about being responsible by having their choices respected. See Jencks, *supra* note 37, at 524-25. Finally, I think there is less reason to be concerned about the consequences of failing to utilize effective opportunities given that the adequacy threshold serves as a safety net.

347. See William S. Koski, *The Politics of Judicial Decision-Making in Educational Policy Reform Litigation*, 55 HASTINGS L.J. 1077, 1154-55 (2004) (observing that the equality versus adequacy debate was “almost irrelevant” to the Ohio Coalition for Adequacy and Equity in School Funding, which employed the “Adequacy and Equity” slogan so that it “could draw in all of those [school] districts that felt aggrieved”).

348. Darby & Levy, *supra* note 2, at 371.

progress toward either goal are liable to largely coincide in the foreseeable future.”<sup>349</sup>

Fortunately, many courts and practitioners seem to have already recognized that “there does not appear to be a significant difference between the equity and adequacy approaches to school finance reform,” at least as those theories are applied in our nonideal world.<sup>350</sup> Indeed, “[a] comparison of the results in equality and adequacy states does not establish the superiority of one approach over the other.”<sup>351</sup> Quite the opposite—“the largest group, in terms of sheer numbers of successful plaintiffs, has used a hybrid approach.”<sup>352</sup>

I have attempted to show that those pursuing equality and adequacy can coalesce behind: (1) a concern for absolute educational deprivation and relative disparity; (2) approximately equal chances for educational achievement, attainable through high adequacy thresholds sensitive to children’s capabilities to function as equal citizens and to compete for admission to higher education and for high-quality jobs; (3) greater vertical equity through distributions of educational resources that mitigate the differential effects of social circumstances and natural endowments to enable all children to meet those thresholds; (4) merit-based distributions of effective opportunities above the thresholds; and (5) so-

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349. Elizabeth Anderson, *Race, Culture, and Educational Opportunity*, 10 *THEORY & RES. EDUC.* 105, 106 (2012).

350. Briffault, *supra* note 1, at 47 (“[C]ourts [have] converge[d] on a common set of goals, including greater state definition of educational requirements; state adoption of performance standards; state monitoring of and accountability for local educational outcomes; requirements that states cost out the price of an adequate education and then ensure provision of the necessary funds; partial equalization of financing, aimed more at bringing up the bottom than holding down the top; and a special concern with the needs of educationally at-risk students or the poorest districts.”).

351. Reynolds, *supra* note 167, at 750; *see also* Christopher Berry, *The Impact of School Finance Judgments on State Fiscal Policy*, in *SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY*, *supra* note 1, at 213, 222-27 (concluding that decisions invalidating school finance systems yield modest additional funding for school districts but failing to find any differential effects between equality and adequacy decisions); Matthew G. Springer et al., *The Impact of School Finance Litigation on Resource Distribution: A Comparison of Court-Mandated Equity and Adequacy Reforms*, 17 *EDUC. ECON.* 421, 440 (2009) (finding no statistically significant difference between resource distribution patterns following court-mandated equity or adequacy reforms).

352. Jensen, *supra* note 3, at 27; *see also* Alexandra Natapoff, *Underenforcement*, 75 *FORDHAM L. REV.* 1715, 1769-70 (2006) (“[T]he dual commands of the Due Process and Equal Protection Clauses, as well as the language of most state constitutions, have shaped the education debate into a dual inquiry of adequacy and equality. The former represents a due process or minimal entitlements type of challenge: Has the state provided an adequate minimum threshold of education? The second is a comparative inquiry reflecting equality demands: Has the state provided equal access to education as between jurisdictions or groups?”).

cial equality, beyond nondiscrimination and toward racial and class-based integration.

This equality-adequacy symbiosis is by no means the solution to all of our educational failures. It does, however, provide a conceptual framework upon which to construct educational opportunities in a principled manner. Although it sets appropriate parameters, it can potentially liberate lawmakers otherwise deadlocked in conflicts over failing schemes of pure equality or adequacy. Fatigued state courts, which continue to struggle with formulating remedies in school finance cases, might particularly welcome the latitude to fashion their relief towards equally adequate and adequately equal educational opportunities responsive to the facts and competing values and interests presented in specific cases.