R PUBLIC SKOOLS GOOD? ANALYZING CALIFORNIA'S PUBLIC EDUCATION REFORM AND PREDICTING ITS ABILITY TO CLOSE ACHIEVEMENT GAPS AND WITHSTAND LEGAL CHALLENGE

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I. INTRODUCTION

> "Today, education is perhaps the most important function of state and local governments. . . . [I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity. . . is a right which must be made available to all on equal terms."[1]

This line from Chief Justice Warren's opinion in *Brown v. Board of Education* is as true in principle today as it was in 1954.[2] Nationwide, public education has made tremendous strides toward equality since the pre-*Brown* days of segregation. In California, the right to a public education is even explicitly included in the state constitution.[3] However, prevailing achievement gaps among student groups call into question the *adequacy* of the education they are entitled to receive.[4] These problems are compounded by troubling statistics indicating that from 1950 to 2003, California experienced a profound slide in educational adequacy rankings when compared to other states.[5] In 2013, California passed the Local Control Funding Formula ("LCFF"), a package of legislation intended to reform public education through changes in spending and administrative requirements.[6] Though heralded as "the most significant change in California education finance and governance in 40 years," the LCFF has received minimal publicity and is plagued by low community involvement.[7] The following analysis both explains how court decisions on constitutional and statutory law inhibited judicial remedies for educational inequalities, leading to the passage of the LCFF, and it analyzes the successes and limitations of

1. Brown v. Board of Education, 347 U.S. 483, 493 (1954).
2. *Id.*
3. CAL. CONST. art. IX, §§ 1, 5.
4. *E.g.*, Campaign for Quality Educ. v. State, 209 Cal. Rptr. 3d 888, 891–92 (2016).
5. STEPHEN J. CARROLL ET AL., RAND CORPORATION, CALIFORNIA'S K-12 PUBLIC SCHOOLS: HOW ARE THEY DOING? XXVIII (2005), https://www.rand.org/content/dam/rand/pubs/monographs/2004/RAND_MG186.sum.pdf.
6. MAC TAYLOR, LEGISLATIVE ANALYST'S OFFICE, UPDATED: AN OVERVIEW OF THE LOCAL CONTROL FUNDING FORMULA (2013), http://www.lao.ca.gov/reports/2013/edu/lcff/lcff-072913.pdf.
7. Daniel C. Humphrey, et al., *How Stakeholder Engagement Fuels Improvement Efforts in Three California School Districts*, POL'Y ANALYSIS FOR CAL. EDUC. (2018), https://edpolicyinca.org/publications/how-stakeholder-engagement-fuels-improvement-efforts-three-california-school-districts.

the LCFF considering the present legal landscape and theories of antidiscrimination. Moreover, the present analysis targets how the development of antidiscrimination doctrines in the American legal system reduced the likelihood of judicial intervention to correct deficiencies in California's K–12 public school achievement, placing the burden on the legislature to reform public school funding and administrative practices to the limited extent it could.

The research and analysis is presented in the following order. First, the theoretical frameworks for evaluating antidiscrimination cases, statutes, and practices are introduced (anticlassification, antisubordination, and antihumiliation). This discussion illuminates the way courts have addressed discrimination, and the limitations of current antidiscrimination jurisprudence.

Next, the progression of case law pertaining to public education is outlined, focusing on landmark doctrinal developments along the path from *Brown* to the LCFF. This includes pivotal referenda that shaped public education funding in California, like Proposition 13.

Third, the LCFF itself is explained and analyzed. The analysis will grapple with issues like legislative motivations, incorporation of anti-discrimination principles in policy-making, the LCFF's vulnerability to legal challenges, budgetary restrictions, and public perception. While each of these issues is complicated enough to merit its own research, this analysis examines the situation unique to California's K–12 public education. In short, the LCFF overhauled the prior, complicated system of funding allocation that frequently resulted in funding disparities among different districts, but whether the funding increase in some districts is enough to overcome decades of declining academic performance resulting from arguably discriminatory funding allocation remains to be seen.

In sum, the LCFF is an incredibly transformative reform that has amounted to a blip on the radar for most Californians. This note seeks to explain from a legal standpoint why the LCFF was necessary in the first place, as well as predict its impact on the future legal landscape.

II. THEORETICAL FRAMEWORKS AND ANTIDISCRIMINATION DOCTRINE

Theories of antidiscrimination doctrine look at statutes and cases to identify how the law operates and whom it protects. Anticlassification and antisubordination principles dominate the discourse, though Bruce Ackerman's "antihumiliation principle" is worth mentioning in the educational realm as well.[8]

A. ANTICLASSIFICATION DOCTRINE

Anticlassification stands for the idea that, without a compelling justification, any distinction drawn upon certain protected characteristics is

8. *See* Bruce Ackerman, WE THE PEOPLE, VOLUME 3: THE CIVIL RIGHTS REVOLUTION 128 (1st ed. 1993).

impermissible.[9] As legal scholars Jack Balkin and Reva Siegel define anticlassification's stance on discrimination, "It is wrong to distribute goods and opportunities on the basis of certain kinds of group membership."[10] Strictly interpreted, this view lacks the wiggle room to pass a value judgment on the principle's application. To wit, even a classification that does not result in societal discrimination is nonetheless prohibited by pure anticlassification doctrine. This can produce paradoxical results. On one hand, this principal eliminates segregation.[11] Yet it also forbids affirmative action based on racial or ethnic classifications.[12] While segregation was intended to exclude minorities from educational opportunities, affirmative action seeks to provide access for the historically underrepresented.

The argument follows that the classification need not result in harm, but is the harm itself because it perpetuates stereotypes and stigmas associated with the classification.[13] For instance, in *Reflections of an Affirmative Action Baby*, Stephen L. Carter provides an account of the stigmatic harm inflicted by a scholarship exclusively for racial minority students.[14] Carter explains how he wanted to be recognized based on his academic performance compared to all other students competing for the national merit scholarship, but was advised to instead apply for the scholarship for minority students, since he would have a better chance at becoming the recipient.[15] This scholarship dilemma instantiated a more pervasive trend—Carter contends he was not evaluated as simply "smart."[16] Or for that matter, as "smart" and "black."[17] Rather, he was described as "*black* and *smart*," with the racial classification preceding the objective description of intelligence.[18] Though this example targeted the highest level of academic achievement, it nonetheless illustrates the profound effect that racial classifications can have at both the individual and group level. Moreover, it raises the question: if a student in the stratosphere of scholastic achievement cannot receive recognition independent of his or her race, then what chance does a minority student of lower aptitude have?

In terms of jurisprudence, anticlassification principles are reflected in numerous statutes and court opinions. For instance, the original text of the 1964 Civil Rights Act prohibits discrimination in federally funded programs based on "race, color, or national origin."[19] Stating the protected classes in such clear terms makes it simple for a court to adjudicate overt discrimination, like school segregation or "whites only" public facilities. However, the inquiry is complicated when discrimination is concealed, or even the product of a large institutional process. In such cases, judges may

9. *Id.* at 129.

10. Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?* 58 U. Miami L. Rev. 9, 15 (2004).

11. *Id.* at 12.

12. *Id.*

13. Stephen L. Carter, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 47 (1991).

14. *Id.* at 48.

15. *Id.* at 49.

16. *Id.* at 48.

17. *Id.*

18. *Id.*

19. Civil Rights Act, 42 U.S.C. § 2000(d) (1964).

be hesitant to infer discrimination when other justifications are present. Alternatively, the group affected by the discrimination may be too heterogeneous to be actionable under a single classification category for anticlassification-based statutes.[20] These complications are examined in depth below, and are arguably causes for growing achievement gaps among public school children.

B. ANTISUBORDINATION DOCTRINE

In contrast with anticlassification doctrine, Balkin and Siegel contend that the antisubordination principle states "guarantees of equal citizenship cannot be realized under conditions of pervasive social stratification. . . . [L]aw should reform institutions and practices that enforce the secondary social status of historically oppressed groups."[21] Antisubordination targets societal discrimination of certain groups that creates castes, or second-class citizenship.[22] Here, a facially neutral policy, though valid under formalistic anticlassification, would be rejected by antisubordination if it produced the effect of creating castes among the population. Accordingly, antisubordination allows affirmative action programs that remedy historic discrimination, even if those programs make facial distinctions that favor certain protected classes.

One of the main limitations of antisubordination doctrine is it does not fit neatly into statutory text. Anticlassification at least provides specific categories where discrimination is illegal.[23] But for antisubordination, a statute would hardly be practical if it read something like: discrimination that creates subordinate citizenship or significant social stratification is forbidden. In the modern era of notice pleading, courts would be jammed with plaintiff classes alleging civil rights violations. Moreover, the precedent that would come out of cases over such a statute would ultimately form classifications for where discrimination subordinated citizenship and where it did not. The point this illustrates is that in order for a policy to be applicable across the board, it needs a certain degree of classification. However, an intuitive notion of when a group is being subordinated remains important in any discrimination proceeding. In operation, this type of intuition resembles an inquiry into discriminatory intent.[24]

C. ANTIHUMILIATION DOCTRINE

Finally, Ackerman's antihumiliation principle has roots in *Brown*, where the crucial support for rejecting separate but equal education was the humiliation endured by schoolchildren brought up in an education system

20. *See e.g.*, San Antonio Indep. Sch. Dist. v. Rodriquez*,* 411 U.S. 1 (1973) (holding that poverty is not a protected class entitled to relief under the 14th Amendment's Equal Protection Clause).

21. Balkin & Siegel, *supra* note 10, at 9.

22. *Id.*

23. *E.g.*, Civil Rights Act, 42 U.S.C. § 2000(d) *et seq.* (1964). This section specifically names "race, color, or national origin" as prohibited categories of discrimination.

24. U.S. DEP'T OF JUSTICE, TITLE VI LEGAL MANUAL, *available at* https://www.justice.gov/crt/fcs/T6Manual6.

where they were categorically excluded from white schools.[25] An important point is that antihumiliation does not endorse or condemn the validity of Warren's reasoning. It simply recognizes that humiliation was at the very core of that reasoning, rather than distorting the *Brown* holding in order to comport with anticlassification or antisubordination principles.[26] In so doing, Ackerman argues that antihumiliation was the driving force behind the *Brown* decision, leading a decade later to the 1964 Civil Rights Act.[27]

III. STARE DECISIS LIMITS THE JUDICIAL REMEDIES AVAILABLE FOR PLAINTIFFS BRINGING DISCRIMINATION CLAIMS

A. POST-*BROWN* DESEGREGATION CASES AND THE 1964 CIVIL RIGHTS ACT

Decided in 1954, *Brown* overturned *Plessy v. Ferguson*[28] by holding "[s]eparate educational facilities are inherently unequal," violating the Fourteenth Amendment's equal protection clause.[29] This outcome was the result of years of legal challenges to "separate but equal" educational practices, each of which chipped away at *Plessy* until its application to school segregation crumbled. Though many praise the *Brown* decision as completely ending separate but equal, it is crucial to remember the holding was limited to education, and was broadened to other social contexts in subsequent cases until the passage of the Civil Rights Act of 1964.[30] This clarification is relevant because it suggests that the court recognized the special function education serves in driving social change. As stated in *Brown*, childhood education is "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."[31] Therefore, it follows that variations in per-pupil education funding across different districts within California—though not as serious as outright segregation, will have pronounced effects on each student's long-term success and well-being.

On a theoretical level, *Brown* is best described as a combination of anticlassification and antisubordination principles. The antisubordination values that underpinned school integration were operationalized through anticlassification language in Warren's holding. In this sense, the court recognized the system treated black students as second-class citizens, yet targeted the racial classification resulting in disparate treatment as the unconstitutional practice.

Given the opposition to *Brown*, mainly concentrated in Southern states, it is unsurprising that many school districts lagged–or even outright refused–to integrate. Thirteen years later, in *Green v. County School Board*, the

25. Ackerman, *supra* note 8, at 150.
26. *Id.*
27. *Id.*
28. Plessy v. Ferguson, 163 U.S. 537 (1896).
29. Brown v. Board of Education, 347 U.S. 483, 493 (1954). I refer to this case as *Brown* or *Brown I* unless otherwise indicated.
30. 42 U.S.C. §§ 2000(d)-1–(d)-7.
31. *Brown*, 347 U.S. at 493.

Supreme Court held that the implementation of a plan that allowed students to select which school to attend was unconstitutional because it was effectively a mechanism to maintain Eastern Virginia's segregated status quo.[32] In the abstract, a structure like free choice appears to be the ultimate recognition of the anticlassification principle in education since it does not affirmatively sort students based on a characteristic like race.[33] Yet, in reality, the notion of "free" choice is a fallacy because the cost for a black child to attend a traditionally white school is the intense hostility that child would encounter.[34] The holding effectively required affirmative integration on schools; it was insufficient for an institution to claim it merely refrained from segregating.

Framing the racial disparity at that time, Ackerman points out, "[b]y 1964, only 2 percent of black students were attending white schools in the old Confederacy."[35] This social context made it reasonable, and even simple, for the court to make what Ackerman terms a "common-sense" inference of discrimination.[36] Ackerman acknowledges the similarity this bears to Carl Llewellyn's "situation sense" which judges must use to "determine whether a defendant was a charlatan who had defrauded an innocent victim or whether he was acting reasonably under the circumstances."[37] While this common-sense evaluation of evidence was straightforward in *Green*, where the state's action was transparently discriminatory, the subsequent case law highlights the court's increased reluctance to infer discrimination where evidence is still present but less obvious. The practical effect of this reluctance is to allow more devious state policies, like "charlatans," to escape judicial scrutiny. In this way, the *Green* decision represents antisubordination to the extent it recognized the caste structure created by the prevailing segregation and sought to uproot it.

In 1964 Congress passed the Civil Rights Act, which gave legislative and executive strength to the school integration mandate from *Brown*.[38] Title IV of the Civil Rights Act prohibited race based discrimination in public schools.[39] The Act's teeth are found in Title VI, which prohibits recipients of federal funds from discriminating on the basis of race.[40] The risk of losing funding ultimately prompted schools that were previously resistant to *Brown* to change their policies to conform with the new constitutional standard.[41] Indeed, this change compelled the defendant school in *Green* to adopt the free choice practice. Though the free choice itself was still discriminatory, this Act was the catalyst for change among some of the schools most entrenched in segregation.[42]

32. Green v. County School Board, 391 U.S. 430, 439–42 (1968).
33. Ackerman, *supra* note 8, at 132.
34. *Id.*
35. Ackerman, *supra* note 8, at 156.
36. Ackerman, *supra* note 8, at 131.
37. *Id.*
38. *Title VI of the Civil Rights Act of 1964*, U.S. DEP'T OF JUSTICE (Updated Jan. 22, 2016), https://www.justice.gov/crt/fcs/TitleVI-Overview.
39. *Id.*
40. Ackerman, *supra* note 8, at 159.
41. *Id.*
42. *Id.*

B. LANDMARK FEDERAL AND STATE JUDICIAL DECISIONS IN THE 1970S

Doctrinally speaking, the 1970s represent a step back from the degree to which courts were willing to strike down state practices challenged on discrimination grounds. Impacting California, *San Antonio Independent School District v. Rodriguez*[43] and *Serrano v. Priest*[44] were landmark decisions on the federal and state constitutionality of public education funding structures. Worth mention in this discussion is California's Proposition 13, which passed in 1978 and limited property tax revenues, shifting the funding source for public schools.[45] Together, these events set the stage for the progression (or regression) of public education adequacy for decades.

Decided in 1973, *San Antonio v. Rodriguez* was a class action suit brought by Texas school children who were racial minority group members residing in school districts with a low property tax base.[46] The District Court determined that Texas' education funding scheme was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment because the property tax funding scheme produced significantly differently funded districts. But, the U.S. Supreme Court reversed that decision and held for the school district.[47]

The District Court's opinion in *Rodriguez* relied on two theories: wealth was a suspect classification and education was a fundamental right.[48] Both these determinations meant the state practice would be subject to strict scrutiny, which Texas admitted it could not satisfy. But, writing for the majority, Justice Powell reasoned that wealth was not a suspect classification, nor was education a fundamental right.[49] Though he quoted extensively from *Brown*, identifying the significance of education as a government function, Powell's reasoning rested on the claim that, "the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause."[50] Powell handled the issue with apparent awareness of the increased judicial activism that was present in *Brown*, tempering it by stopping short of identifying education as a fundamental Constitutional right. Indeed, he expressed reluctance that in exalting education to the status of fundamental right, he would be "making [the] Court a 'super-legislature.'"[51] The move halted the potential for

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

44. Serrano v. Priest, 557 P.2d 929 (1976).

45. *California Proposition 1 (1978)*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_13_(1978) (last visited May 30, 2019).

46. *Rodriguez*, 411 U.S. at 5.

47. *Id.*.

48. *Id.* at 16.

49. *Id.* at 25.

50. *Id.* at 30.

51. *Id.* at 31 (quoting *Shapiro v. Thompson*, 394 U.S. 655, 661 (1969) (Harlan, J., dissenting) ("Virtually every state statute affects important rights.")). In the same opinion, Harlan stated, "[T]he Court today does not 'pick out particular human activities, characterize them as 'fundamental,' and give them added protection . . . .' To the contrary, the Court simply recognizes, as it must, an established

antisubordination-based adjudication, since that type of determination often requires that courts look beyond an institution's stated purpose to address the claimed inequality. Under rational basis review, this would have meant the Court identified something akin to discriminatory purpose in the Texas school district's funding system to undermine the discriminatory impact of the funding disparities.

Justice Marshall's dissenting opinion in *Rodriguez* highlights how a continuation of antisubordination jurisprudence themes recognized in *Brown* would have led to an affirmation of the lower court.[52] Marshall called the majority decision an "abrupt departure from the mainstream of recent state and federal court decisions concerning the unconstitutionality of state educational financing schemes dependent upon taxable local wealth."[53] Moreover, he condemns the state scheme as one "which arbitrarily channels educational resources in accordance with the fortuity of the amount of taxable wealth within each district."[54] Regarding the alleged disparity, the richest districts "raised through local effort an average of $610 per pupil,"[55] while the poorest districts, "raise[d] only an average of $63 per pupil."[56] The case is more troubling considering to raise those funds, the richest districts had the lowest property tax rates while the poorest had the highest.[57] Below is a more targeted account of Justice Marshall's reasoning on the separate issues presented, those being the fundamentality of education and wealth as a suspect classification.

Regarding education as a fundamental right, Marshall rejects the majority's claim that all fundamental rights are derived from the text of the Constitution. Marshall highlights interstate travel as a fundamental right that, "although nowhere expressly mentioned in the Constitution, has long been recognized as implicit in the premises underlying that document: the right 'was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.'"[58] Further, Marshall draws on both the anticlassification and antisubordination principles that "'race, nationality, or alienage is 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose.' Instead, lines drawn on such bases are frequently the reflection of historic prejudices rather than legislative rationality."[59] The clear anticlassification aspect of this statement targets the use of race as an unacceptable legislative tool. Additionally, the judicial insight, or situation-sense, that legislation on this basis unconstitutionally targets and perpetuates historically discriminated classes is an exercise in antisubordination.

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constitutional right, and gives to that right no less protection than the Constitution itself demands." 394 U.S. at 642.

52. *Id.* at 70–71 (Marshall, J., dissenting).
53. *Id.* at 70.
54. *Id.* at 71.
55. *Id.* at 74–75.
56. *Id.*
57. *Id.*
58. *Id.* at 99 (quoting United States v. Guest, 383 U.S. 745, 758 (1966)).
59. *Id.* at 105 (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943) (citation omitted)).

Marshall contends that the Court has previously considered that wealth "may create a classification of a suspect character and thereby call for exacting judicial scrutiny."[60] The majority opinion addresses this point, but it claims the wealth-related cases are sufficiently distinguishable from the present case.[61] Marshall attacks this claim in detail, moving through each wealth case cited to show how the majority's position does not hold up. Here, it is most likely that the majority feared that an articulation of wealth as suspect in this context would not only be super-legislative, but it may also expose states to an influx of claims brought by indigent defendants in other social spheres. The idea of wealth as a suspect or protected class will be expanded upon below as it pertains to the LCFF, but for now, it is important to establish that wealth did not receive any heightened protection.

Three years after the U.S. Supreme Court's decision in *Rodriguez*, the Supreme Court of California ruled on a similar case, *Serrano v. Priest*—this time reaching the opposite result under the California State Constitution.[62] The facts in *Serrano* were similar to those in *Rodriguez*—the property tax funding system was alleged to be discriminatory since it disproportionately impacted school districts in poorer communities.[63] Not only did these communities have lower property values to tax in the first place, but the amount of tax levied was met by these residents' lower ability to pay.[64] Essentially, property taxation for public education was highly regressive, as opposed to progressive—the poorer a resident was, the larger that resident's per capita tax burden.

In *Serrano*, the court began by recognizing that local property taxes constituted the majority of California's education funding, and that the amount raised by those taxes was "primarily a function of the value of the realty within a particular school district . . ."[65] Next, citing specific examples of disparate education expenditures, the court explained that "[a]lthough equalization aid and supplemental aid temper the disparities which result from the vast variations in real property assessed valuation, wide differentials remain in the revenue available to individual districts."[66] The

60. *Id.* at 117.

61. *Id.*

62. Serrano v. Priest, 557 P.2d 929, 958 (1976). "Opposite result" indicates that, unlike *Rodriguez*, the *Serrano* court determined that under California's Constitution, (1) education was a fundamental right and (2) wealth-based discrimination involves a suspect class.

63. *Id.* at 934–35.

64. *Id.* at 938. "[I]t is clear that substantial disparities in expenditures per pupil resulting from differences in local taxable wealth will continue to exist. . . . The reason for this is that essentially local wealth is the principal determinant of revenue, that high wealth districts do not need to make the same tax effort as low wealth districts in order to reach, let alone exceed, the level of the foundation program and that in this setting, basic aid becomes antiequalizing [sic] and 'convergence' of doubtful achievement."

65. *Id.* at 933. The minority of education funding came from the state contribution. "The state contribution is supplied in two principle forms. 'Basic state aid' consists of a flat grant to each district of $125 per pupil per year, regardless of the relative wealth of the district. (Cal. Const., art IX, § 6, par. 4; Ed. Code, §§ 17751, 17801.) 'Equalization aid' is distributed in inverse proportion to the wealth of the district."

66. *Id.* at 934 ("In Los Angeles County . . . the Baldwin Park Unified School District expended only $ 577.49 to educate each of its pupils in 1968-1969; during the same year the Pasadena Unified School District spent $840.19 on every student; and the Beverly Hills Unified School District paid out $1,231.72 per child.").

court acknowledged that California changed its old funding standards by raising the amount of state contribution across the board and creating minimum revenue limits for districts unable to raise an acceptable amount in property taxes.[67] However, these alterations were still based upon the foundational principle that allowed disparate funding among high and low property value districts.[68] Moreover, the court identified a number of alternative, acceptable funding schemes.[69] In the end, the Supreme Court of California concluded the funding formula violated equal protection under the California Constitution, "because it establishes and perpetuates a classification based upon district wealth which affects the fundamental interest of education."[70] In other words, the property tax funding system failed to meet strict scrutiny.[71]

Though the holding in *Serrano* explicitly uses anticlassification terminology, and operates as such a principle, antisubordination remains imbedded within the "wealth" language. Wealth casts a broader net than race, so a distinction based on wealth can functionally account for underrepresented minority populations that may not reach the status of *protected* for state or federal equal protection purposes alone. Particularly in the education context—where *Brown* ensures a school cannot be solely comprised of a single class—the *Serrano* holding appeared to ensure equal per student funding in public K–12 education. Yet, as will be discussed below, that was hardly the case.

C. PROP 13: PROPERTY TAX REDUCTIONS SLASH K–12 PUBLIC EDUCATION FUNDING

Though not a judicial decision directing antidiscrimination doctrine, California's Proposition 13 is apropos to a discussion of public education equality because taxpayers voted to limit property taxes,[72] in turn slashing public education revenues. Approved in 1978, Proposition 13 decreased property tax revenue by roughly twenty percent. Adjusted to 2014–15 dollars, this amounts to over $20 billion.[73] Whereas in *Serrano*, property taxes accounted for the majority of public education funding, after Proposition 13, the state was left to make up for the difference. The effect was dramatic: in year 1999–2000 dollar terms, California K–12 public education spending was over $600 higher than the national average in 1977–78.[74] By the next school year, it dropped to $400 over the national average.[75] The steady decline continued until 1983 when funding dropped below the national average.[76] This trend continued rapidly until 1995–96, at which

67. *Id.* at 935.
68. *Id.* at 936–37.
69. *Id.* at 952.
70. *Id.*
71. *Id.* at 958.
72. MAC TAYLOR, LEGISLATIVE ANALYST'S OFFICE, COMMON CLAIMS ABOUT PROPOSITION 13, at iii (2016), http://lao.ca.gov/Publications/Report/3497.
73. *Id.*
74. CARROLL ET AL., *supra* note 5, at xxviii.
75. *Id.*
76. *Id.*

point California's per-pupil spending dropped to $800 below the national average.[77] By 1999–2000, California recovered slightly so that per pupil spending was roughly $600 under the national average.[78] Proposition 13 did not endorse a particular anticlassification or antisubordination pertaining to antidiscrimination, but these statistics frame the background upon which legal challenges to public educational adequacy were made.

D. DECLINING ACADEMIC ACHIEVEMENT INTO THE 21ST CENTURY

The decline in per pupil funding was matched by a similar, if not worse, decline in student achievement. As California Supreme Court Justice Liu noted in his dissent to the denial of review in *Campaign for Quality Education v. State of California*, "Fifty years ago, California's public schools were the envy of the nation."[79] By his account, public schools were built rapidly to create a foundation for what California hoped would become the best public university system in the nation or even the world.[80] Unfortunately, "by the early 1990s, California had dropped to the lowest rankings in terms of scores and dollars spent on K–12 education."[81] Liu quotes Kevin Starr, a scholar of California history, who quipped that "'[i]n 1993 . . . fourth-graders in California were vying with fourth-graders in Mississippi for the dubious distinction of being the worst readers in the nation.'"[82] And the situation hardly improved since 1993—the publication *Education Week* reports that California "trailed most states on student achievement and education funding" from 1997–2016.[83]

Another determinant of academic achievement is reported by the National Assessment of Educational Progress (NAEP), which collects data for educational comparison across states based on average performance in reading and mathematics.[84] Using this metric, from the period of 1990–2003, California ranked forty-eighth out of fifty[85] Populous states like Illinois, New York, and Texas significantly outperformed California; only Louisiana and Mississippi were ranked worse.[86] Critics may point out that family dynamics are to blame for California's testing achievement, especially considering how many students' parents may not be English speakers. But as if the ranking alone were not troubling enough, when NEAP statistical analysis controls for the family backgrounds of California's high percentage of minority students, the scores actually drop to dead last in the nation.[87] The

77. *Id.*
78. *Id.*
79. Campaign for Quality Educ. v. State of California, 209 Cal. Rptr. 3d 888, 921 (2016).
80. *Id.* (quoting KEVIN STARR, GOLDEN DREAMS: CALIFORNIA IN AN AGE OF ABUNDANCE 217–44, (2009)).
81. *Id.*
82. *Id.* (quoting KEVIN STARR, CALIFORNIA: A HISTORY 335 (2005)).
83. *Id.* (citing EDUCATION WEEK, QUALITY COUNTS, https://www.edweek.org/ew/qc/).
84. *Id.* at 922 (citing U.S. DEPT. EDUC., NAT'L CTR. FOR EDUC. STATISTICS, STATE PROFILES, https://www.nationsreportcard.gov/profiles/stateprofile?chort=1&sub=MAT&sj=&sfj=NP&st=MN&year=2017R3 (last visited May 30, 2019)).
85. *Id.* Testing targeted grades 4, 8, and 12 using standard deviation units to compare states.
86. *Id.*
87. CARROLL, *supra* note 5, at xxxiv–xxxv.

NEAP takeaway is that institutions, not family dynamics, are responsible for the declined achievement.[88]

As Justice Liu put it, the statistics detailing California's decline in academic achievement are "sobering."[89] Though review was denied in the *Campaign for Quality Education* case, the majority opinion for the First Circuit Court of Appeal and Justice Liu's dissenting statement following the California Supreme Court's denial of review illuminates the current state of educational adequacy litigation in California. Accordingly, a full discussion of the *Campaign for Quality Education* case is included in its own section below.

E. AFFIRMATIVE ACTION AND CALIFORNIA'S PROPOSITION 209

Given the bleak public education report in the 1990s, felt especially in lower income communities, one would expect the use of affirmative action policies to vindicate the educational rights of those who were most effected by diminished funding, i.e., the historically discriminated. In higher education, the Supreme Court endorsed an anticlassification position on affirmative action in *Regents of University of California v. Bakke*.[90] Justice Powell—writing for the majority—held that college admissions may consider race as a "plus factor" among others in admitting a student, but that a quota system used to remedy past discrimination violated the Fifth and Fourteenth Amendments' equal protection clauses, as well as Title VI of the Civil Rights Act of 1964.[91]

Though schools could not aspire to racial diversity as a means of remedying past discrimination, the Supreme Court held in *Grutter v. Bollinger* that a university *could* narrowly tailor its use of race to recognize the benefits that flow from a diverse student body.[92] While Reva Siegel's scholarship on the subject essentially claims *Grutter* allows universities to Trojan-horse antisubordination values into admissions policies, the most unique aspect of *Grutter* is how it re-conceptualizes antisubordination. As Rich argues, *Grutter* "displaces [group-based justifications] in favor of a rationale that turns on the instrumental value of diversity to the educational institution and the public that it serves."[93] However, this limited recognition of diversity's utility in this context does not address whether a similar antisubordination policy could be applied in a social sphere beyond public education.[94] While this analysis of *Grutter* and the status of affirmative action is important for understanding the progression of anticlassification and antisubordination principles on a national level, this point is largely moot in California due to Proposition 209.

88. *Id.*
89. *See* 209 Cal. Rptr. 3d at 921.
90. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1979).
91. *Id.* at 270–71, 317.
92. Grutter v. Bollinger, 539 U.S. 306, 327–33 (2003).
93. Stephen M. Rich, *What Diversity Contributes to Equal Opportunity*, 89 S. CAL. L. REV. 1011, 1037 (2016).
94. *Id.*

Passed in 1996, Proposition 209, "amended the California Constitution to prohibit public institutions from discriminating on the basis of race, sex, or ethnicity."[95] The Supreme Court of California upheld Proposition 209's constitutionality in 2000, and a three-judge Ninth Circuit panel did the same in 2012.[96] While this anticlassification provision ends affirmative action in those three categories, more opaque categorizations, like academically low performing individuals or school districts, are likely to remain unaffected. This point will be discussed in greater detail below.

F. PROPOSITION 98: MINIMUM FUNDING GUARANTEE

Proposition 98 was enacted to set "a minimum annual funding level for K–12 schools and community colleges."[97] Though the goal seems straightforward, the mechanism for fund allocation was described as "a complex formula" that increases funding by the "growth in K–12 attendance and growth in the economy (as measured by per capita personal income)."[98] In order to meet the minimum guarantee, three separate formulas were implemented to determine K–14 funding.[99] Test 1 provided "39 percent of General Fund revenues."[100] Test 2 increased prior year funding by per-capita personal income growth.[101] Test 3 increased prior year funding by per-capita *General Fund* revenue.[102] Proposition 98 was notorious for its complicated calculation of how to fund the minimum guarantee. This would be excusable if it at least resulted in predictable funding growth, but that was hardly the case.[103] As the graph in footnote 109 illustrates, the annual growth fluctuated severely from year to year. Given this state of affairs in the late 1990s and early 2000s, it is no surprise the economic recession had such a profound impact of California's ability to finance public schools from the General Fund.

G. THE RECESSION AND CAMPAIGN FOR QUALITY EDUCATION V. STATE

In the wake of the great recession and resulting state budget cuts, the Campaign for Quality Education (CQE) sought declaratory and injunctive relief claiming that the educational funding system that preceded the LCFF violated the California Constitution's right to "an education of 'some quality' for all public school children," and that the Legislature was in violation of its obligations to "'provide for' and 'keep up and support' the 'system of

95. *California Affirmative Action, Proposition 209 (1996)*, BALLOTPEDIA, https://ballotpedia.org/California_Affirmative_Action,_Proposition_209_(1996) (last visited May 30, 2019).

96. *Id.*

97. LEGIS. ANALYST'S OFF., PROPOSITION 98 PRIMER, (2005), *available at* http://www.lao.ca.gov/2005/prop_98_primer/prop_98_primer_020805.htm.

98. *Id.*

99. *Id.*

100. *Id.* Figure 1 indicates that "Test 1 – Share of General Fund" had not been used since 1988–89.

101. *Id.* This is the most common test when the General Fund experiences "strong" revenue growth.

102. *Id.* This test is utilized when economic and General Fund growth are weak or non-existent.

103. *Id.* Year-to-year growth in Proposition 98 spending was extremely erratic between 1990 and 2006. *See supra* Figure 5.

common schools.'"[104] The District Court of Appeal affirmed dismissal of the complaint, stating that while the California Constitution did guarantee the affirmative right to public education, it did not specify a requisite level of quality for the court to enforce.[105] Accordingly, any policy determinations on the quality of education are under the legislature's purview.[106] Plaintiffs appealed to the California Supreme Court, but the petition for review was denied.[107] Contrasting the majority opinion at the appellate level with Justice Liu's statement provides commentary on both sides of the educational adequacy issue.

The parts of the California Constitution relevant to this inquiry are sections 1 and 5 of article IX.[108] Section 1 states, "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement."[109] Section 5 states, "The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established."[110]

Writing the majority opinion for the Court of Appeal, Justice Jenkins stated, "the language of [sections 1 and 5 of article IX of the California Constitution] do not include qualitative or funding elements that may be judicially enforced by the courts."[111] Justice Jenkins contends that the issue of educational adequacy and funding is too "policy-laden" for the court to adjudicate and should be left up to the legislative branch.[112] The majority takes the stance that in order for plaintiffs to state a claim upon which relief can be granted, they must allege violations of the California Constitution.[113] However, if as a matter of law no minimum standards for funding or adequacy exist to give teeth to California's fundamental right to public education, then there is no constitutional violation in the first place.[114]

Justice Jenkins differentiates the application of the federal Constitution from California's Constitution in that while the former "is a grant of power to Congress," the latter "is a limitation or restriction on the powers" of the state legislature.[115] Further, Justice Jenkins quotes *Methodist Hospital of Sacramento v. Saylor* for the rule that "any doubt as to the Legislature's power to act in any given case . . . should be resolved in favor of the Legislature's action. Such restrictions and limitations (imposed by the Constitution) are to be construed strictly, and are not to be extended to

104. Campaign for Quality Educ. v. State, 209 Cal. Rptr. 3d 888, 892 (Ct. App. 2016).
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 906.
109. *Id.* at 895 (quoting Cal. Teachers Assn. v. Hayes, 7 Cal. Rptr. 2d 699, 704–05 (Ct. App. 1992)).
110. *Id.*
111. *Id.* at 892.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 894.

include matters not covered by the language used."[116] While *Methodist Hospital* had a valid point that the constitutional language on education does not explicitly mention minimal acceptable standards, the claim that the "Legislature's power to act" is misstating the issue. Surely, no one contests that the state legislature has the ability to control educational funding, administration, planning, etc. However, the issue at hand is whether that duty has been carried out in compliance with constitutional requirements. As *Serrano* noted, "surely the right to an education today means more than access to a classroom."[117] And after all, "[I]t is emphatically the province and duty of the judicial department to say what the law is."[118]

The plaintiffs argument asserts that the constitutional text, read as a whole, includes the *implicit* right to an education of some minimum quality.[119] However, the court considers such an interpretation to be breaking "new ground," for which the "utmost care" must be exercised.[120] Relying on a lengthy quote from the Illinois Supreme Court—which rejected a similar claim—the court states the following as the likely process for hypothetically adjudicating the present claim:

> It would be a transparent conceit to suggest that whatever standards of quality courts might develop would actually be derived from the constitution in any meaningful sense. Nor is education a subject within the judiciary's field of expertise, such that a judicial role in giving content to the education guarantee might be warranted. Rather, the question of educational quality is inherently one of policy involving philosophical and practical considerations that call for the exercise of legislative and administrative discretion. To hold that the question of educational quality is subject to judicial determination would largely deprive the members of the general public of a voice in a matter which is close to the hearts of all individuals in [the State]. Judicial determination of the type of education children should receive and how it can best be provided would depend on the opinions of whatever expert witnesses the litigants might call to testify and whatever other evidence they might choose to present. Members of the general public, however, would be obliged to listen in respectful silence. We certainly do not mean to trivialize the views of educators, school administrators and others who have studied the problems which public schools confront. But nonexperts—students, parents, employers and other[s]—also have important views and experiences to contribute which are not easily reckoned through formal judicial fact-finding. In contrast, an open and robust public debate is the lifeblood of the political process in our system of representative democracy. Solutions

116. *Id.* (quoting Methodist Hosp. v. Saylor, 488 P.2d 161, 165 (Cal. 1971) (en banc)).
117. *Id.* at 908 (quoting Serrano v. Priest, 487 P.2d 1241, 1257 (Cal. 1971))
118. *Id.* at 915 (quoting Marbury v. Madison, 5 U.S. 137, 177 (1803).
119. *Id.*
120. *Id.*

> to problems of educational quality should emerge from a spirited dialogue between the people of the State and their elected representatives.[121]

Such a take on the activist role the judiciary would need to play in order to adjudicate the present case seems exaggerated. In their complaint, plaintiffs allege that per-pupil funding disparities are at least partly to blame for low academic achievement in certain districts. Accordingly, the appropriate remedy may be injunctive relief compelling a more equal funding system that lacks subordinating overtones. As if the heavy-handed explanation of the judiciary's hypothetical role in education reform was not enough, Justice Jenkins resurrects a point made in *Serrano*, in a case challenging educational adequacy, "[q]uality cannot be defined wholly in terms of performance on statewide achievement tests because such tests do not measure all the benefits and detriments that a child may receive from his educational experience."[122] This justification is exceedingly weak. Frankly, it is reminiscent of the adage that doing something difficult *builds character*,[123] and that is not something that a statewide test can measure. While this principle certainly has some value, it is difficult to reconcile in the context of funding disparities, where the practical effect is that a classroom in one district may not have textbooks for all the students, or sufficient faculty to educate a large English learner population.

Responding to the majority, Justice Pollack's dissenting opinion concludes that the plaintiffs have stated a claim that can survive demurrer.[124] Pollack relies more heavily on the statistical support plaintiffs provide, in addition to recognizing the frequency with which other state courts have inferred minimum adequacy requirements for education.

Looking to similar decisions on education, Pollack notes that "[a]s the majority of state courts addressing this issue has recognized—if the constitutional provision is to have meaning — it must imply that the system of common schools must provide some minimum qualitative level of education. Such a reading of article IX of the California Constitution is fully consistent with—if not compelled by—the importance that our Supreme Court historically has placed on the role of education and the recognition that it is a fundamental right of all the state's children."[125]

As for the funding disparities, Pollack identifies a particularly significant passage from the 2007 report of the Governor's Committee of Education Excellence, which states "California's current K–12 education finance system is the most complex in the nation but yields little benefits. Core funding is based on anachronistic formulas, neither tied to the needs of individual students nor to intended academic outcomes."[126] This report goes

121. *Id.* at 898–99 (quoting Comm. for Educ. Rights v. Edgar, 174 Ill.2d 1 (1996)).

122. *Id.* at 911.

123. E.g., Cartoon Drawing of Calvin Shoveling Snow, *in* BILL WATTERSON, CALVIN & HOBBES, https://vignette.wikia.nocookie.net/candh/images/8/8e/Character_Building.png/revision/latest?cb=20120813020638.

124. 209 Cal. Rptr. 3d at 919.

125. *Id.* at 920 (Pollack, J., dissenting).

126. *Id.* at 909.

on to call the education system "fundamentally flawed. *It is not close* to helping each student become proficient in mastering the state's clear curricular standards, and wide disparities persist between rich and poor, between students of color and others, and between English learners and native English speakers."[127] Such a scathing account of the education system—considered in light of the eminent role courts acknowledge education plays in a person's development—indicates that a minimum standard should be inferred in the California Constitution in order for it to have any practical effect at all.

Pollack goes so far as to say his colleagues overlook "the seemingly obvious point," which is the comparison to the right to counsel.[128] Federal and State Constitutions state the right to "the assistance of counsel," yet it is implicit that the assistance must be "effective or adequate."[129]

Regarding the majority position that a trial on educational adequacy would implicate the judiciary in a complex, policy-laden discussion of how schools should operate, Pollack states "[r]ecognizing that the public schools must operate at some minimum level of proficiency admittedly does not define the quality of the system that must be maintained."[130] Pollack engages in a discussion of several cases in different states like New York and Massachusetts, where courts resolved the issue of implicit minimum education adequacy standards.[131]

While the Justices disagreed as to whether a right to minimum educational adequacy should be implied, one theme united all opinions: they mentioned how the legislature passed public education reform legislation after the CQE filed its complaint. Though no Justice indicated that the reform was the reason for denying review, this surely played into the majority's reluctance to allow the CQE to proceed to trial.

IV. ANALYZING THE LCFF AND EXPLORING THE LEGISLATURE'S MOTIVATIONS

A. THE LOCAL CONTROL FUNDING FORMULA EXPLAINED

> "Today I'm signing a bill that is truly revolutionary. We are bringing government closer to the people, to the classroom where real decisions are made, and directing the money where the need and challenge is greatest. This is a good day for California, it's a good day for school kids, and it's a good day for our future."[132]

The above quote from Governor Jerry Brown punctuated the end of California's former funding system and the beginning of the LCFF. In *Rodriguez*, Justice Marshall wrote, "[E]ven if we accept Texas' general

127. *Id.* at 909–10 (emphasis added).
128. *Id.* at 908.
129. *Id.*
130. *Id.* at 909.
131. *Id.*
132. *E.g.*, *Is There a Better Way to Pay For America's Schools?*, NPR (May 1, 2016), https://www.npr.org/2016/05/01/476224759/is-there-a-better-way-to-pay-for-americas-schools.

dedication to local control in educational matters, it is difficult to find any evidence of such dedication with respect to fiscal matters."[133] Four decades later, the California Legislature adopted the Local Control Funding Formula, with the central goals of providing funding at an equal per pupil basis, along with allowing school districts the flexibility to use supplemental funding where it is needed most.[134] Outlined in more detail below, the LCFF incorporates spending restrictions, a cost formula, and a distributional effects formula to ensure funds are allocated equitably. Cast against the backdrop of Proposition 13 and "No Child Left Behind," policies that were characterized by centralized government control of public education, the LCFF provides significant autonomy to each individual district to implement a spending plan that best fits its needs.

First, the LCFF sets base rates calculated on average daily attendance: K–3 $6,845; 4–6 $6,947; 7–8 $7,154; and 9–12 $8,289.[135] This constitutes the bulk of the funding that districts receive as opposed to the past practice of assigning funding allocations to specific functions. Additional cost of living adjustments ensure that funding accurately represents the cost of education in each district.[136]

Supplemental funding is allocated for English Learning (EL) and Low Income (LI) student in the amount of twenty percent of the adjusted base rate.[137] Districts with high EL/LI populations (above fifty-five percent of enrollment) receive concentration funding in the amount of fifty percent of the adjusted base rate.[138] EL students are identified based on a home language survey and a standardized language development test.[139] LI students include foster children and any child who qualifies for the free or reduced-price meals program (FRPM).[140]

The LCFF also includes short and long term spending requirements. The long term requirements focused on removing categorical programs that may have produced inefficiencies in certain districts, while also ensuring supplemental funding for EL/LI is used proportionally to the amount of EL/LI students in the district.[141] The last thing California needs is a situation where funds granted for EL/LI go toward funding new field turf in the football stadium. Short term requirements focus on ongoing programs like Adult Education to ensure that the change in funding does not jeopardize ongoing learning outcomes.[142]

Understandably, the LCFF "costs significantly more than the previous funding system," since the entire purpose of education spending reform was

133. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 127 (1973) (Marshall, J., dissenting).

134. MAC TAYLOR, UPDATED: AN OVERVIEW OF THE LOCAL CONTROL FUNDING FORMULA, LEGISLATIVE ANALYST'S OFFICE 4–6 (2013), http://www.lao.ca.gov/reports/2013/edu/lcff/lcff-072913.pdf.

135. *Id.* at 2.

136. *Id.* at 9.

137. *Id.*

138. *Id.*

139. *Id.* at 4.

140. *Id.*

141. *Id.* at 6.

142. *Id.* at 7.

to replace the inefficient, underfunded former system.[143] The LCFF handles distributional effects by first setting an economic recovery target (ERT).[144] Districts that already received over the ERT will not receive additional funding, nor will their funding be reduced to the ERT level.[145] Districts under the ERT will have a phase-in period of additional funding until they reach the ERT.[146] Based on 2013 projections, the LCFF would take eight years to fully implement.[147]

B. LOCAL CONTROL ACCOUNTABILITY PLAN (LCAP)

The LCFF recognizes that while funding plays a significant role in improving education quality, long-term success requires multidimensional reform that garners support from both private and public stakeholders. Accordingly, the Local Control Accountability Plan (LCAP) targets eight areas where a school district must have a plan of action for realizing improvement. These priorities are student achievement, student engagement, other student outcomes,[148] school climate, parental involvement, basic services, implementation of common core state standards (CCSS), and course access.[149]

Each LCAP must be updated annually and adapted every three years, and is subject to clearance from the county office of education (COE) before it is approved.[150] The previous funding scheme required that administrators complete menial and time-consuming paperwork that did little to impact learning outcomes. The goal of the LCAP is to allow administrators to create innovative strategies that improve education both inside and outside the classroom by prioritizing family and community involvement. Though ambitious, and surely difficult to administer in communities with traditionally low attendance, the LCAP is a meaningful step in the right direction if taken seriously and handled responsibly.

C. LEGISLATIVE INTENT AND ANTIDISCRIMINATION

Such comprehensive funding and education administration reform, "was the culmination of more than a decade of research and policy work on California's K–12 funding system."[151] Clearly, the LCFF was reactionary as opposed to preemptive. The declining quality of California's K–12 education relative to other states, the increasing number of non-English speaking students, and the recognition of long-standing disparities among per pupil funding are reasonable motivations for passing the LCFF.

In antidiscrimination terms, the LCFF embraces antisubordination principles, since it identifies the second-class education that was present in

143. *Id.* at 8.
144. *Id.* at 9.
145. *Id.*
146. *Id.*
147. *Id.* (citing the text in Figure 6).
148. *Id.* at 12. Other student outcomes are defined as "[o]ther indicators of student performance in required areas of study. May include performance on other exams [sic]."
149. *Id.* at 11–12.
150. *Id.*
151. *Id.* at 1.

many districts. Through the strategic use of funding, the LCFF targets the areas where need is greatest by utilizing programs like the EL/LI initiative to close the achievement gap among all students.[152] An anticlassification principle in this context would have been more akin to a prohibition on disparate per pupil funding allocation, and would not support the specialized aid policies because of the class based distinctions upon which they rely.[153] One could argue that the very reason why anticlassification jurisprudence developed was as a response to *subordination* based legislation, i.e. discriminatory state statutes. However, this appears to be a good faith effort to improve the overall quality of public K–12 education. Further, because California was already so far below the acceptable baseline for K–12 Public Education funding, the LCFF effectively infuses districts in need with revenue to bring them up to the ERT without any reciprocal deduction of other districts' funding. Therefore, the intent appears to be based upon antisubordination concerns that correct the former funding scheme's disparities and provides remedial aid where necessary.

D. LCFF'S ABILITY TO WITHSTAND LEGAL CHALLENGE

There are three vulnerabilities for the LCFF: additional funding targeted for LI students, additional funding for EL students, and abuse of local control. First, a likely complaint in the LI context would focus on the use of wealth as an impermissible classification, or as a proxy for race or ethnicity. Ignoring the public relations fiasco that any party bringing this claim would likely cause, it seems unlikely to achieve success. When courts refuse to recognize indigent plaintiffs as a protected class receiving more than rational basis scrutiny, they often rely on the argument that it is not their place to pass judgment on the wisdom of a statute since that is the function of the legislature.[154] The reverse is present here. The LCFF is a literal representation of the legislature's judgment, so the same reason that denied remedy for indigent plaintiffs in other contexts now protects them. Moreover, *Serrano* expressly states that wealth is a protected class that receives strict scrutiny for any California Constitutional claim in the context of education.[155] Together, the LI provision appears to withstand challenge.

Regarding supplemental EL funding, the same logical reasoning from the section above applies. First, EL is not facially tailored to any race or ethnicity. In California, where the Spanish speaking population is significant, a challenge may argue that EL is effectively a proxy for race or alienage. However, *Plyler v. Doe* struck down a Texas policy denying public education to school age children who were not legally admitted to the United States. Even in his dissent—arguing that the ban was constitutional—Justice Burger conceded that it would be "folly—and wrong," to allow non-English speaking children in the United States to grow up with no or only a limited command of English.[156]

152. For instance, EL/LI programs are disproportionately comprised of racial and ethnic minorities.
153. Though the classes are not suspect in a legal sense, they are classes nonetheless.
154. *See e.g.,* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17–44 (1973).
155. Serrano v. Priest, 557 P.2d 929, 951 (1976) [hereinafter *Serrano II*].
156. Plyler v. Doe, 457 U.S. 202, 242 (1982) (Burger, C.J., dissenting).

The LCFF replaced a categorical funding system that restricted funds to specific uses. One of the main principles underlying the LCFF is the increased efficiency school districts will achieve when they have greater autonomy over the direction of funding.[157] But subject to abuse, this local control could be manipulated so that funds are allocated in a discriminatory, corrupt or fraudulent manner. While the former may give rise to a disparate impact case, since the LCFF is facially neutral, the latter would likely fall outside the scope of a constitutional threat to the LCFF's legitimacy.[158] Prior to the LCFF, the state exercised decades of centralized control and planning in public education. Rather than producing a uniform educational experience across the state, this practice made it difficult for the "boots on the ground" to address the individual needs of students. Whether it is due to the failure of the prior system, or the recognition of teachers' and administrators' ability to make progress when given greater autonomy, delegating control to the district level comes with significant risk.

Finally, in light of the *Campaign for Quality Education* holding, a subsequent challenge to educational adequacy on the same constitutional terms is clearly a dead-end for the immediate future.

E. LCFF AND LCAP OBSTACLES AND LIMITATIONS MOVING FORWARD

One of the most significant obstacles for the LCFF and LCAP is getting everyone involved on the same page—including students and parents. Yet as of August 2015, a "PACE/USC Rossier School of Education poll found that 65% of registered California voters had never heard or read anything about the LCFF," not to mention how few registered voters knew its purpose.[159]

The PACE Policy Brief identifies five areas where the LCAP faces its toughest challenges.[160] First, districts lack clarity regarding the LCAP's purpose.[161] Second, they "are unsure about what funds to include in [the LCAP]."[162] Third, districts have timing issues—misunderstanding the update protocol.[163] Fourth, districts merely consider the LCAP to be a "compliance document," where boxes are checked but little is substantively done.[164] Finally, districts "produce LCAPs that are neither readable by nor accessible

157. *See* JULIA E. KOPPICH ET AL., TWO YEARS OF CALIFORNIA'S LOCAL CONTROL FUNDING FORMULA: TIME TO REAFFIRM THE GRAND VISION, POLICY ANALYSIS FOR CAL. EDUC. (PACE) 2, 10 (2015), https://edpolicyinca.org/sites/default/files/PACE%20Policy%20Brief%2015-2.pdf. The funding scheme that preceded the LCFF operated based on rigid categories that were applied broadly to all school districts with little to no ability to target the specific needs of certain schools. The LCFF changed this by allowing school districts to determine where funds were needed most—this is what Governor Brown was referencing when he claimed the LCFF would be "directing the money where the need and challenge is the greatest." *Id* at 2.

158. Though the fraudulent or corrupt use of general education funds is clearly criminal, it may affect the state to the extent that there are inadequate regulatory mechanisms to monitor and prevent abuse under the LCFF.

159. KOPPICH ET AL., *supra* note 157, at 8.

160. *Id.* at 1.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

to the public.[165] This is a serious concern since part of the LCAP purpose is to create and utilize support networks outside the school itself (community, family, etc.). These issues are complicated further by how extensive many districts' LCAP documents become. PACE reports that some "[balloon] to over several hundred pages," and have been labeled by district representatives as, "'unwieldy,' 'a nuisance,' 'self-defeating,' and 'a beast of a document.'"[166] Moreover, when requirements are unclear, drafting the LCAP moves away from the collaborative experience it was meant to be and toward the typical compliance-related paperwork associated with inefficient bureaucracy.[167] As one COE official put it, "[The LCFF] is a 5 year process to learn. . . . We have a whole generation of ed services administrators who have been geared, programed, and fine tuned to do one thing—be in compliance. They are compliance thinkers." This perspective illustrates how difficult it can be to re-conceptualize one's role in the education process.

One growing concern is the effect of the "squeaky wheel"—that is, the same interest groups that lobbied for specific categorical funding grants under the old funding system may exercise similar power over district officials in charge of the LCAP.[168] This is not to say that their initiatives are unimportant; rather, the significant influence these groups wield could potentially stifle the voices of other, equally important voices in the district. Districts attempt to engage the community, whom they call "stakeholders," by forming advisory groups, distributing surveys, and holding community meetings.[169] Yet, first and second year data indicate that engagement fell below expected levels, and is in need of improvement.[170] It seems that a creative engagement plan could be devised as part of the LCAP, but so long as the LCAP is viewed as a burdensome compliance document, such innovation seems unlikely.

V. CONCLUSION

In closing, California's former funding scheme was handcuffed by complex categorical grant calculations that not only left public education underfunded as a whole, but it also resulted in grave allocation disparities that exacerbated educational achievement issues in predominately low-income areas. Supreme Court decisions like *Brown* and *Green* — along with the Supreme Court of California decision in *Serrano*—seemed to support a trend toward embracing the fusion of anticlassification and antisubordination principles to bring about equal opportunity in the realm of California's public education. However, the anticlassification principle's inherent limits on affirmative action—coupled with judicial hesitation to infer subordination in the context of disparate educational achievement—created a landscape where achieving funding increases by means of judicial remedy was simply not workable. Moreover, short-sighted referendum provisions like

165. *Id.*
166. *Id.* at 5.
167. *Id.* at 6.
168. *Id.* at 7.
169. *Id.* at 7.
170. *Id.* at 7.

Proposition 13 stripped existing K–12 education funds while leaving the legislature unprepared and unwilling to make up the difference.

The LCFF represents a significant step in the direction of utilizing narrowly tailored legislation to help subordinated groups realize their right to education on a more even playing field. Yet, this must be the first, not final, step in education reform. Like a warranty of habitability in property law, the LCFF sets a new baseline for acceptable quality. And while it is commonplace to advocate equal opportunity in education by speaking with a friend or sharing a video over Facebook, a willingness to express that same commitment through an increase in one's own tax burden is significantly rarer.[171] Ultimately, underfunding education is shortsighted because inadequately educated students' burden on state support does not end after twelfth grade (or any grade prior for drop outs).[172] Welfare programs, correctional facilities, and unemployment pay are all examples of tax funded programs that more educated individuals are less likely to need.[173] Therefore, time and money spent on early childhood education, and K–12 education in general, should be considered from the perspective of an investment in human capital.[174]

What is unique about the LCFF is that it does not merely correct the old funding formula. The LCFF goes one step further, so that students receive equal funding across districts by recognizing the unique difficulties posed when educating students from low-income backgrounds, and those who are English learners. Considering antidiscrimination doctrine, these are clearly two classification groups—indeed, they are groups that usually represent the plaintiff classes in dismissed lawsuits challenging public education adequacy.[175] Yet, the same legal standards that prevented these groups from attacking prior practices will now protect them from legal challenge.[176] Accordingly, the LCFF should withstand legal challenge on equal protection grounds. But the question remains: were courts so hesitant that the achievement gaps in California widened to a point beyond repair?

The prior inadequacies in K–12 public education funding had a downward spiral effect on achievement, sending California to the bottom of the charts compared to other states.[177] Now, not only is funding allocated more equitably, but it is not restricted to categories where it may not be best utilized. The adjustment period for the LCFF and accompanying LCAP will surely impact students, faculty, administrators, and especially parents. After all, "California is pioneering something new, bold, and noble."[178] Though it will take time—decades even—policies like the LCFF, that leverage antisubordination principles to increase education funding and accountability, will in the long run increase attendance, community

171. *See* EDWARD D. KLEINBARD, WE ARE BETTER THAN THIS 298 (2015).

172. *See, e.g., id.*

173. *See id.*

174. *Id.*

175. *Cf.* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28–29 (1973) (holding that indigence is not a suspect classification).

176. *See, e.g.*, *id. See generally* Plyler v. Doe, 457 U.S. 202 (1982) (explaining native language is not a suspect class for an Equal Protection challenge).

177. *See e.g.*, STARR, *supra* note 80.

178. KOPPICH ET AL., *supra* note 157, at 12.

involvement, family participation, learning outcomes, and student interest in education which will fuel progress.