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Breaking the Geographic Barrier Removing Residency Requirements from California Public School Enrollment

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INTRODUCTION

The verdict is in: a child's K-12 education directly impacts her future economic success.¹ If a child is not challenged academically during school² or does not graduate from high school,³ she is less likely to have a life full of employment and economic opportunity. This is not surprising, of course. It makes intuitive sense that attending a school with nurturing teachers and intellectually curious classmates will place a child in a position to succeed after graduation. In fact, this type of reasoning dates back to America's founding, when the country's intellectual and political leaders viewed public education as a building block of democratic society necessary for future generations to be productive members of a growing economy.⁴

It is for this reason that every state in America compels mandatory attendance in its state-administered public schools or in reasonable educational alternatives proscribed by law.⁵ In California, for example, children are subject to "compulsory full-time education" in the school district in which they reside,⁶ and parents are fined up to \$1,000 if their child does not attend that school.⁷ This power to compel public school attendance is rooted in the state's "police power."⁸ Similar to

¹ See, e.g., Eric A. Hanushek, *The Economic Impact of Good Schools*, HOOVER INST. (May 3, 2016), <http://hanushek.stanford.edu/publications/economic-impact-good-schools>.

² See generally Adele E. Gottfried, *Academic Intrinsic Motivation in Elementary and Junior High School Students*, 77 J. EDUC. PSYCHOL. 631 (1985).

³ See Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L.J. 313, 317-22 (2016) (discussing how not graduating from high school leads to increased chances of unemployment); Diane Whitmore Schanzbach et al., *Fourteen Economic Facts on Education and Economic Opportunity*, HAMILTON PROJECT (Mar. 24, 2016), <https://www.brookings.edu/research/fourteen-economic-facts-on-education-and-economic-opportunity-2/> (discussing factors that lead to student achievement in K-12 education).

⁴ LAWRENCE A. CREMIN, *AMERICAN EDUCATION: THE NATIONAL EXPERIENCE, 1783-1876*, at 103 (1980). Thomas Jefferson believed education enabled commerce, morality, civic duty, and the exercise of personal rights. *Id.* at 110-11.

⁵ Compulsory school attendance laws were not generally adopted until after the ratification of the Fourteenth Amendment, and it was not until 1918 that such laws were in force in all the states. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 n.4 (1954). Modern statutes uniformly set minimum and maximum ages for attendance, define the length of the school year, and set penalties for noncompliance. Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 823-24 (1985).

⁶ CAL. EDUC. CODE § 48200 (2019).

⁷ *Id.* § 48293 (2019).

⁸ See *Nat'l Fed'n of Indep. Buss. v. Sebelius*, 567 U.S. 519, 535-36 (2012) (listing examples of the state's plenary power to govern in areas not delineated by the federal Constitution, including "punishing street crime, running public schools, and zoning

how a state manages sewage or policing within its borders, states have the general authority to govern all powers not expressly delegated to the federal government.⁹ The Framers granted this expansive power to states so that local, more accountable governmental units — as opposed to a distant federal bureaucracy — would oversee citizens' daily lives.¹⁰ Accordingly, states have broad authority to enact legislation for the “public good” of its citizens.¹¹ The administration of public schools is a primary example of states effectuating this power.¹²

To effectively provide public education to its children, a state assigns its “police power” to counties, cities, and other local governmental units — like school districts.¹³ School districts developed during America's agrarian economy and were financed by a combination of property taxes, tuition payments, and state aid.¹⁴ It was from this period that “local control” over the operation of public school education became “deeply rooted” in American tradition.¹⁵ By 1880, as Americans moved to urban centers, state legislatures began centralizing the state's provision of public education.¹⁶ Yet even as

property for development”).

⁹ *Id.*; see also U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

¹⁰ See *Sebelius*, 567 U.S. at 536; THE FEDERALIST No. 45 (James Madison) (“The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.”).

¹¹ *Bond v. United States*, 572 U.S. 844, 854 (2014) (“The States have broad authority to enact legislation for the public good — what we have often called a ‘police power.’”).

¹² *Campaign for Quality Educ. v. State of California*, 209 Cal. Rptr. 3d 888, 926 (Ct. App. 2016), *petition for rev. denied*, (Liu, J., dissenting) (“The challenges facing California's K-12 education system remain within the purview of the Governor, the Legislature, the Superintendent of Public Instruction, and other state and local officials.”).

¹³ See, e.g., CAL. CONST. art. 11, § 7 (providing that “[a] county or city may make and enforce within its limits all local, police, sanitary and other ordinances and regulations”); see also *Big Creek Lumber Co. v. Cty. of Santa Cruz*, 136 P.3d 821, 828 (Cal. 2006) (describing local government's police power as an exercise of the sovereign right to protect the lives, health, morals, comfort, and general welfare of the people).

¹⁴ CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780-1860*, at 13, 26 (1983).

¹⁵ See *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974) (“[L]ocal autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.”).

¹⁶ Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 124 (2013).

state regulation of public education increased,¹⁷ school districts remained the primary medium through which states administered public schools, requiring children to attend a school in their district of residence.

Today, school districts persist as autonomous political bodies run by a governing board that is popularly elected within that specific district.¹⁸ School districts hold the state's plenary power to make rules and regulations for the operation of that district's public schools. This authority includes control over the length of school terms,¹⁹ the power to impose district-wide taxes,²⁰ to acquire real property,²¹ and to control student admission policies.²² Unfortunately, despite the benefits that come with "local control" of education,²³ the overwhelming grant of authority to school districts contributes to a growing divide between "successful" and "failing" public schools across America.²⁴

Because school districts may tax their own residents, there is interdistrict variance in per pupil spending across any particular state. Consequently, some districts are "rich" while others are "poor."²⁵

¹⁷ *Id.* at 135-36 (describing the centralization of education through the imposition of statewide school taxes) ("States now outspend localities . . . [and] contribute approximately forty-seven percent of all funds for public elementary and secondary schools").

¹⁸ Aaron J. Saiger, *The School District Boundary Problem*, 42 URB. LAW. 495, 496, 532 (2010).

¹⁹ See, e.g., Abigail Hess, *Colorado School District Introduces Four-Day Weeks to Cut Costs*, CNBC.COM (Aug. 17, 2018, 3:30 PM ET), <https://www.cnbc.com/2018/08/17/colorado-school-district-introduces-4-day-weeks-to-cut-costs.html>.

²⁰ Saiger, *supra* note 18, at 500.

²¹ See, e.g., CAL. EDUC. CODE § 35270.5 (2019) ("The governing board of any school district may acquire by eminent domain any property necessary to carry out any of the powers or functions of the district.").

²² See, e.g., CAL. EDUC. CODE §§ 48300-16 (2019).

²³ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49-50 (1973) (providing that local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local need, and encourages "experimentation, innovation, and a healthy competition for educational excellence"). Educational efficiency has also been thought to be one of the primary motivators for the "local control" model of school districting. See Aaron Y. Tang, *Privileges and Immunities, Public Education, and the Case for Public School Choice*, 79 GEO. WASH. L. REV. 1103, 1124-27 (2011).

²⁴ ESEA: *Ten Percent of U.S. Schools Labeled "Failing,"* FAIR TEST, <https://www.fairtest.org/esea-ten-percent-u-s-schools-labeled-failing> (last visited Dec. 8, 2018).

²⁵ See Saiger, *supra* note 18, at n.41 ("[D]ifferences in the size of school districts' tax bases account for only half the interdistrict variance in per-pupil funding; the rest

As a result, two children who are close neighbors may have access to vastly different educational opportunities simply because a school district boundary separates their homes.²⁶ School district boundaries thus control the state's allocation of educational opportunity according to a child's residence.

The Equal Protection Clause of the Fourteenth Amendment directs that "all persons similarly circumstanced shall be treated alike."²⁷ The Amendment was intended to offer the guarantee of equal protection to all residents upon whom the state would impose obligations under its laws.²⁸ Unlike typical governmental benefits like sewage or police protection, however, education laws impose restraints on a child's movement for six to eight hours per day, for ten to twelve years.²⁹ The implications of these restrictions during a child's most formative years are relevant when considering the relative weight of the state's interest in providing public education.³⁰

There are severe consequences when children are not "treated alike" based on their residency. Because of residency requirements, families make housing decisions based on the quality of schools available across districts in the state.³¹ The resulting competitive housing market, along with school districts raising taxes on their residents, effectively excludes low-income families from certain schools. As a result of this legally sanctioned exclusionary practice, school districts facilitate increased rates of racial and economic segregation in America's schools³² and contribute to the growing dichotomy between "desirable" and "undesirable" schools in the country.³³ Predictably,

is accounted for by political decisions at the district level.").

²⁶ *Id.* at 501-02 (noting that this problem is described as a "school-housing connection").

²⁷ *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

²⁸ *Id.* at 214.

²⁹ Mark G. Yudof, *Equal Educational Opportunity and the Courts*, 51 TEX. L. REV. 411, 494 (1973).

³⁰ See *Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972) (holding that a state's provision of public education "ranks at the very apex of the function of a State," but that "a State's interest in universal education, however highly we rank it, is not totally free from a balancing process").

³¹ See Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 750-51 (2018).

³² This segregation occurs on the inter-district, rather than intradistrict level. See James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2096 (2002) (providing data on a study of over 33,000 schools, showing that poor students are clustered in majority-poor districts).

³³ See *Parents Involved in Cmty. Schls. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701,

graduation rates vary across school districts, with “wealthy” school districts and “desirable” schools having higher graduation rates than “poor” districts.³⁴ A child’s educational opportunity — and resulting future economic opportunity — is therefore dependent on where his or her parents live.

Despite the historical and modern-day importance of cultivating a well-educated citizenry, it is curious that the United States does not provide meaningful educational opportunities to all of its children. In fact, the American education system increasingly mirrors the growing divide between the “haves” and “have nots” in the American economy.³⁵ Children living in low-income school districts, unlike their wealthier neighbors, are forced to attend schools with lower graduation rates and thus have a lower chance for intergenerational mobility.³⁶ Consequently, residency requirements in public education laws add to an alarmingly growing “caste” in American society consisting of low-income children and young adults who cannot access similar economic opportunities as their wealthier peers.³⁷

This Article argues that public education laws benefitting some children over others based on residency run contrary to the Equal Protection Clause. With its primary focus on California school districting, this Article demonstrates that a state impermissibly infringes on a child’s constitutional rights when it classifies that child, and distributes benefits to her, based on residency. Part I provides a

711 (“Some schools are more popular than others.”) (Roberts, C.J.).

³⁴ See Nance, *supra* note 3, at 334. (noting that poverty is a “critical contributor” to underachievement in school). Similarly alarming is that forty percent of poor urban youth are “functionally illiterate.” See Peter S. Smith, Note, *Addressing the Plight of Inner-City Schools: the Federal Right to Education after Kadrmas v. Dickinson Public Schools*, 18 WHITTIER L. REV. 825, 831 (1997).

³⁵ See, e.g., Carmen Reinicke, *US Income Inequality Continues to Grow*, CNBC.COM (5:06 PM EDT), <https://www.cnbc.com/2018/07/19/income-inequality-continues-to-grow-in-the-united-states.html>.

³⁶ See Raj Chetty et al., *Where is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States* 36-38 (Nat’l Bureau of Econ. Research, Working Paper No. 19843, 2014), <https://www.nber.org/papers/w19843.pdf> (describing how upward intergenerational mobility correlates with attending affluent schools).

³⁷ See *Caste*, MERRIAM-WEBSTER DICTIONARY (last visited Dec. 8, 2018), <https://www.merriam-webster.com/dictionary/caste> (“Caste” is a rigid social stratification characterized by hereditary status and social barriers sanctioned by custom and law. Caste is also defined as “a division of society based on differences of wealth, inherited rank or privilege, profession, occupation, or race.”). Concern over the creation of a permanent caste of uneducated undocumented people was a factor in the Supreme Court’s reasoning in a case involving school funding. *Plyler v. Doe*, 457 U.S. 202, 218-219 (1982).

brief history of school districting from the founding era through today, and presents the modern barriers facing children seeking to attend a public school outside of the district in which they reside. In addition to discussing these legal barriers, Part I addresses the growing divide in educational opportunity that results from residency classifications. Part II focuses on California's legislative districting scheme and presents a case study of a student seeking to transfer school districts to highlight the Equal Protection violations existent under California law. In doing so, Part II examines the caste of low-income youth that California school districts perpetuate under the authority of state law. Part III presents a legislative solution to the current Equal Protection violations under California law. This Article concludes with a brief discussion on how to address similar constitutional violations taking place in states across the country.

I. CHARTING THE HISTORY AND TRADITION OF SCHOOL DISTRICTS

The American people have always considered education to be of great importance.³⁸ Thomas Jefferson proposed a "bill for free schools" so that Virginia would have an "educated and virtuous" citizenry.³⁹ In Pennsylvania, Benjamin Rush proposed legislation that would create "free schools in every town."⁴⁰ Congress even explicitly affirmed the states' primacy in providing education when it passed the Land Ordinance of 1785, outlining the procedures by which territories acquired in the Treaty of Paris could apply for statehood.⁴¹ To join the Union, each territory was required to divide into townships of 36 square miles and dedicate a lot in each township "for the maintenance of public schools."⁴²

While only six of the original 13 states included education clauses in their founding constitutions,⁴³ by 1868, 97% of the states had constitutional provisions obligating their respective governments to

³⁸ See *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

³⁹ KAESTLE, *supra* note 14, at 4-6. Jefferson's bill ultimately failed, however, because of people's aversion to increased taxation. *Id.* at 8.

⁴⁰ Friedman & Solow, *supra* note 16, at 113-14.

⁴¹ See *Papasan v. Allain*, 478 U.S. 265, 268 (1986) (citing to 1 LAWS OF THE UNITED STATES 565 (1815)).

⁴² Friedman & Solow, *supra* note 16, at 114-15. Similarly, the Northwest Ordinance of 1787 declared: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Together, these ordinances laid the framework for states to provide free, universal public education. *Id.* at 115.

⁴³ *Id.* at 116.

provide free public education to all children.⁴⁴ Today, every state constitution contains a provision guaranteeing free public education to its youth.⁴⁵ States accomplish this guarantee through school districting laws, which serve to delegate the efficient administration of the state's public school system.⁴⁶

A. *From “One-Room Schools” to “Common Schools”*

The concept of a “school district” originated during the American agrarian age. In 1790, 95% of Americans lived in farm communities and small towns of less than 2,500 inhabitants.⁴⁷ By 1830, 91% of Americans still lived in these rural communities.⁴⁸ A school district would thus form when farms in the same region decided to construct a public building where their children could gather and be taught together.⁴⁹ In an era in which transportation was difficult to come by, the size of a rural school district was confined to the distance a child could reasonably be expected to walk.⁵⁰ These districts were called “one-room” school districts: the schools only had one room, most districts only had one school,⁵¹ and all decisions were made at the “most local levels.”⁵² Until 1830, these one-room school districts

⁴⁴ *Id.* at 124.

⁴⁵ *Id.* at 129.

⁴⁶ Saiger, *supra* note 18, at 509-10 (“The blackest of black-letter doctrine insists that school districts, like other local governments, are but ‘creatures of the state.’ They are created by states; whatever powers they exercise must be delegated to them by states: states may alter or withdraw such delegations at will.”).

⁴⁷ KAESTLE, *supra* note 14, at 13.

⁴⁸ *Id.*

⁴⁹ See Friedman & Solow, *supra* note 16, at 112.

⁵⁰ William A. Fischel, *Neither “Creatures of the State” nor “Accidents of Geography”*: *The Creation of American Public School Districts in the Twentieth Century*, 77 U. CHI. L. REV. 177, 187 (2010).

⁵¹ *Id.* at 177-78.

⁵² See KAESTLE, *supra* note 14, at 22 (“Parents had considerable power in early rural education. They directly controlled what textbooks their children would use . . . they controlled what subjects would be taught, who the teacher would be, and how long school would be in session.”). The result of such local control of education was that it was often a “patchy affair” within each state, and across all states. As community values and concerns varied from state to state, the curriculum and pedagogy for America’s youth similarly varied. See Friedman & Solow, *supra* note 16, at 117 (“The decisions over where to site schools were made at the most local levels, not by any state or federal decisionmaker.”); see also Molly O’Brien & Amanda Woodrum, *The Constitutional Common School*, 52 CLEV. ST. L. REV. 581, 592 (2004) (“Schooling in the new states continued much as it had during the colonial period: intermittent, unevenly distributed, and supported by parental initiative and tuition

accounted for almost all of public education in the country and received state approval and funding to operate.⁵³

The decline of one-room school districts began with the rise in urbanization leading up to the Industrial Revolution and the concomitant decline in American farming.⁵⁴ To illustrate the sharp decline in America's rural population, farmers constituted 39% of the country's population in 1900. By 1950, the farming population had decreased to 15%, and by the turn of the twenty-first century, constituted only 1% of the nation's population.⁵⁵ With the decline in rural school enrollment, one-room school districts were no longer economically feasible.⁵⁶ Consequently, the number of school districts shrunk from 200,000 to 15,000 between 1870 and 1970.⁵⁷ By 2016, there were 13,584 school districts across America.⁵⁸ This era of school district consolidation was marked by American leaders seeking to centralize public school administration in the pursuit of making schools "common" and free for all children.⁵⁹ State laws governing public schools "mushroomed" during this timeframe, with the state immersing itself in every part of public education, including curriculum development and oversight of student attendance by a

money rather than by state organization.").

⁵³ See KAESTLE, *supra* note 14, at 26 (Rural one-room districts "received legislative sanction in various laws," including Connecticut in 1760, Vermont in 1782, Massachusetts in 1789, and New York in 1814.).

⁵⁴ See Fischel, *supra* note 50, at 180.

⁵⁵ With the increased mechanization of farm work, there was a reduced demand for child labor. As a result, rural birth rates dropped and the total number of children within walking distance of a given school declined. *Id.* at 180-81.

⁵⁶ In addition, as road conditions continued to improve, it became easier for rural children to attend school in urban areas. *Id.*

⁵⁷ Saiger, *supra* note 18, at 510. This trend of consolidating school districts "continued through crisis and war: the 119,000 school districts still operating at the height of the Great Depression were consolidated at a fairly constant rate." *Id.* at 511. Consolidation of the districts was not always neat. For example, while many of the Northeast states consolidated their schools along county lines, none of Iowa's school districts are within a single county. See Fischel, *supra* note 50, at 196.

⁵⁸ Table 214.30: *Number of Public Elementary and Secondary Education Agencies, by Type of Agency and State or Jurisdiction: 2014-15 and 2015-16*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/digest/d17/tables/dt17_214.30.asp (last visited Apr. 7, 2019 5:47 PM PDT).

⁵⁹ For instance, Horace Mann "persistently urged consolidation of the rural schools" as the first state superintendent in Massachusetts. See Fischel, *supra* note 50, at 194; see also Friedman & Solow, *supra* note 16, at 121-25 (discussing how state governments began to increase funding to schools so that they could be "open and free for all.").

state superintendent or state department of education.⁶⁰ Moreover, states began licensing teachers according to newly crafted professional standards, and began setting curriculum and educational achievement standards.⁶¹ Altogether, this “common school” era was marked by a combination of centralized state control of specific standards with delegated local control in a school’s daily operations vested in individual districts.

B. Residency Requirements and the Illusion of “Open Enrollment”

1. District Enrollment and the Foreclosure of District Transfers

The majority of states direct school districts to facilitate a process called “open enrollment.” Under this legislative directive, students may petition a school district to (1) transfer to another school within their resident district, or (2) transfer to a school outside of their resident district.⁶² The former, called an “intradistrict transfer,” is the most frequently used and allows a student to attend a non-neighborhood school so long as that school is located within the same school district.⁶³

Intradistrict transfers are limited in a number of ways. To begin, even if a state statutorily requires school districts to enact an intradistrict transfer scheme,⁶⁴ these laws are typically “riddled with loopholes,” effectively foreclosing a child’s option to transfer.⁶⁵ For example, while California requires a district to allow parents to choose a school within the district regardless of where the parent lives,⁶⁶ students who live in a school’s “attendance area” must be given priority to attend that school over children attempting to transfer from

⁶⁰ See Friedman & Solow, *supra* note 16, at 121-22.

⁶¹ *Id.* at 135-36.

⁶² See *Fifty-State Comparison: Does the State Have Open Enrollment Programs?*, EDUC. COMM’N STATES (Oct. 2018), <http://ecs.force.com/mbdata/MBQuestNB2n?rep=OE1801>.

⁶³ Ryan & Heise, *supra* note 32, at 2063.

⁶⁴ Seventeen states do not provide for intradistrict transfers. They are: Alabama, Arkansas, Iowa, Kansas, Maryland, Minnesota, Mississippi, Missouri, Nevada, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, and South Carolina. See *Fifty-State Comparison: Does the State Have Open Enrollment Programs?*, *supra* note 62.

⁶⁵ Tang, *supra* note 23, at 1111 (providing examples of state statutes that allow school districts to force children to attend their neighborhood schools based on attendance capacity or academic criteria established by the district’s governing board).

⁶⁶ See CAL. EDUC. CODE § 35160.5(b)(1) (2019).

outside that attendance area.⁶⁷ Moreover, the California “open enrollment” law permits the school district to decide the available space in a specific school within that district.⁶⁸ In addition to these statutory loopholes, intradistrict transfers are confined to districts where there are a sufficient number of alternative schools for children to choose from. For instance, 76% of school districts nationwide have only one high school, and around 90% of schools districts have only two high schools.⁶⁹ Not surprisingly, transfers within these districts are less likely than in another school district with a greater number of schools. Finally, even if there are enough schools to choose from, some schools are more “desirable” than others, resulting in the “desirable” schools being oversubscribed and not actually open to students looking to transfer.⁷⁰ Altogether, it is not surprising that only 8-9% of the country’s 50.7 million students who attend public school each year take advantage of an intradistrict transfer.⁷¹

Less than 1% of American children attend school outside of their resident district.⁷² Like intradistrict statutory provisions, interdistrict transfers are similarly circumscribed by the wide discretion provided to a school district governing board to accept or reject a transferee.⁷³

⁶⁷ *Id.* § 35160.5(b)(2)(C).

⁶⁸ *Id.* § 35160.5(b)(2)(B). This is yet another instance of children not being treated alike because of residency. While intradistrict transfer laws pose similar Equal Protection concerns, this Article looks exclusively at interdistrict transfer laws.

⁶⁹ See Tang, *supra* note 23, at 1112 (providing data from 2008).

⁷⁰ See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 711 (2007) (“Some schools are more popular than others.”) (Roberts, C.J.); see also Ryan & Heise, *supra* note 32, at 2065 (discussing how, even in districts that provide for an open enrollment period geared toward creating racially or socioeconomically integrated schools, first priority is still given to neighborhood children, and that “there is usually no space for outsiders, rendering school choice in this context more theoretical than real”).

⁷¹ Ryan & Heise, *supra* note 32, at 2064; see also *Fast Facts*, NAT’L CTR. FOR EDUC. STAT., <https://nces.ed.gov/fastfacts/> (last visited Mar. 15, 2019).

⁷² See Tang, *supra* note 23, at 1114 (citing sources providing for this approximation); see also Sarah Tully, *Interdistrict Enrollment is Appealing but Tricky*, EDUC. WEEK (May 17, 2016), <https://www.edweek.org/ew/articles/2016/05/18/interdistrict-enrollment-appealing-tricky.html> (discussing the challenging facing students interested in pursuing an interdistrict transfer). Surprisingly, more states provide for interdistrict transfers than intradistrict transfers. Compared to intradistrict transfers, only six states do not provide for interdistrict transfers. They are: Alabama, Alaska, Illinois, Maryland, North Carolina, and Virginia. See *Fifty-State Comparison: Does the State Have Open Enrollment Programs?*, *supra* note 62.

⁷³ Tang, *supra* note 23, at 1115-16 (“Every ‘mandatory’ open enrollment law, with the slight exception of Minnesota’s, has statutory or regulatory language that enables a school district to reject every single out-of-district transfer applicant with complete

For example, California provides for “voluntary” interdistrict enrollment, unless a school district receives an application for transfer from a student enrolled in a “low-achieving school” under the California Open Enrollment Act.⁷⁴ Even if a student applies for an interdistrict transfer under this Act, a district may still reject the student if he or she does not meet the district’s “specific, written standards for acceptance and rejection of applications,” which may include “consideration of the capacity of a program, class, grade level, school building, or adverse financial impact.”⁷⁵ Accordingly, it is clear that interdistrict guidelines providing for “open enrollment” are “form without substance.”⁷⁶ As a result, children often do not have a meaningful opportunity to attend either a school in another district or a more desirable school in their own district.

2. Consequences of Foreclosing District Transfers

The boundaries of school districts across America define a kind of “territorial sovereignty.”⁷⁷ For example, school districts hold their own elections and permit popularly elected officials to tax local resources to pay for local benefits for those living within the district’s boundaries.⁷⁸ In addition, school districts deploy zoning and school quality reforms independent of statewide policies in order to compete for residents who can bring in taxable wealth.⁷⁹ In doing so, school districts *de facto* exclude low-income citizens from renting or purchasing a home in that district.⁸⁰ As residents sort themselves across school districts by income, the districts that succeed the most in this competition become increasingly wealthy, while those that fail become increasingly poor and distressed. The result is interdistrict

impunity.”) (emphasis in original).

⁷⁴ See CAL. EDUC. CODE § 48354 (2019). This “mandatory” enrollment is pursuant to the Open Enrollment Act of 2010. *Id.* § 48350 (2019).

⁷⁵ *Id.* § 48356 (2019).

⁷⁶ Tang, *supra* note 23, at 1112 (recognizing that choice under these “open” enrollment plans is available only on a limited basis to the few students who qualify and are approved by administrators).

⁷⁷ Saiger, *supra* note 18, at 502. Like a state, a school district “seeks to advance the welfare of its citizens while bearing no or very limited duties to outsiders.” *Id.* at 509. “Like a state, it addresses its territorial problems with its own resources” and with aid from the federal government. *Id.*

⁷⁸ *Id.* at 501 (“This [territoriality] ineluctably generates inequities in the provision of all sorts of goods, not just education: the rich get more and better public goods than the poor”).

⁷⁹ *Id.* at 500.

⁸⁰ *Id.*

inequity and intradistrict homogeneity, with schools reflecting the economic and racial composition of the neighborhoods in which they are located.⁸¹

The advantages for a school district to concentrate wealth and create a higher tax base are immediately tangible. An increased tax base means increased funding for school improvements, higher salaries for teachers, and better uniforms for athletes, thus perpetuating a district's competitive advantage over other districts. To preserve and maximize this advantage, wealthy districts are thus incentivized to exclude low-income families.⁸² To this end, a school district might intentionally keep its boundaries small and exclusive, refuse to zone in a new neighborhood, or pressure local housing authorities to block new residential developments.⁸³ Governing boards of school districts thus shuttle "undesirable" families onto other districts that are already disadvantaged, further widening the gap between the "rich" and "poor" districts. Moreover, in recent years, small communities have sought to "secede" from their existing school district to create their own smaller, even more privileged district.⁸⁴ As wealthier families with children make housing decisions based on the quality of schools available across districts in the state,⁸⁵ a state's provision of education becomes more entrenched in the dichotomy between "desirable and undesirable districts and schools."⁸⁶

School districts use these legally sanctioned exclusionary practices to facilitate increased rates of racial and economic segregation in America's schools.⁸⁷ For instance, segregation between school districts increased by 15% from 1990 to 2010,⁸⁸ and the percentage of racially segregated nonwhite schools has more than tripled over the last 25-years.⁸⁹ Today, the average African-American student attends a state-

⁸¹ *Id.* at 500; Ryan & Heise, *supra* note 32, at 2093 (adding that "neighborhoods in most metropolitan areas remain remarkably segregated by income and race").

⁸² *See* Black, *supra* note 31, at 750.

⁸³ *Id.* at 750-51.

⁸⁴ *Id.* at 751.

⁸⁵ Families similarly make housing decisions *within* each unique school district. *Id.* (noting that these decisions intensify segregation across school districts, and that these families are, "in effect, buying their way into favored schools and systems").

⁸⁶ *See id.*

⁸⁷ This segregation occurs on the interdistrict, rather than intradistrict level. *See* Ryan & Heise, *supra* note 32, at 2096 (providing data on a study of over 33,000 schools, showing that poor students are clustered in majority-poor districts).

⁸⁸ *See* Black, *supra* note 31, at 751 (citing a study conducted by the Stanford Center for Education Policy Analysis).

⁸⁹ *See id.* at 738.

administered public school where nearly 70% of his peers are poor.⁹⁰ Further, economic segregation corresponds with racial segregation. Therefore, although 50% of poor families are white, 75% of poor whites live in middle-class neighborhoods and thus attend schools outside of impoverished urban centers that are quickly becoming known as “black ghettos or Hispanic barrios.”⁹¹ Accordingly, even if barriers to intradistrict transfers were removed, integration *across* districts is required to ensure meaningful school choice and educational opportunity for low-income students.⁹²

II. CALIFORNIA DISTRICT TRANSFER LAWS FAIL INTERMEDIATE
SCRUTINY UNDER THE FOURTEENTH AMENDMENT EQUAL PROTECTION
CLAUSE

California Educ. Code section 48200 provides:

“Each person between the ages of 6 and 18 years . . . is subject to compulsory full-time education [and] shall attend the public full-time day school . . . of the school district in which the residency of either the parent or legal guardian is located.”

— CAL. EDUC. CODE § 48200

There are 1,026 school districts in California,⁹³ each of which is governed by a popularly elected board.⁹⁴ Subject to certain exceptions, all children in California are required to attend a school in their district of residence.⁹⁵ And, as evidenced from section 48200, subject

⁹⁰ *Id.* One-third of all African-Americans now live in “hyper-segregated” conditions, living in large, contiguous, and racially homogenous neighborhoods clustered around city centers. See Ryan & Heise, *supra* note 32, at 2093-94 (identifying Atlanta, Baltimore, Chicago, Dallas, Detroit, Los Angeles, Milwaukee, and New York as some of the more populated urban centers for African-Americans). *Id.* at 2095 (“As of 1995, all of the students in East St. Louis, Illinois and Compton, California, were minority. . . . In Chicago, as of 1996-1997, just under [ninety percent] of the students were minority, while in Detroit in the same year, close to [ninety-five percent] of the students were minority. In New York, meanwhile, nearly [eighty-four percent] of the over one million public school students are minorities.”).

⁹¹ See Ryan & Heise, *supra* note 32, at 2094.

⁹² See *id.* at 2096.

⁹³ *Fingertip Facts on Education in California*, CAL. DEP’T OF EDUC. (July 10, 2018), <https://www.cde.ca.gov/ds/sd/cb/ceffingertipfacts.asp>.

⁹⁴ CAL. EDUC. CODE § 35010 (2019) (providing that the governing board of each school district may prescribe and enforce rules consistent with California law and in accordance with the policies established by the state Board of Education).

⁹⁵ *Id.* § 48200 (2019). A child may attend school in a district where a parent or legal guardian works and lives for a minimum of three days during the school week. *Id.* § 48204(7) (2019).

to the provisions around intradistrict and interdistrict school transfers,⁹⁶ a student must attend the school to which he or she is assigned.⁹⁷

The Fourteenth Amendment provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁹⁸ The Fourteenth Amendment, written during Reconstruction after the Civil War, was intended to abolish all “caste-based and invidious class-based legislation,” and extends to all people who are required to meet the obligations of a state’s laws.⁹⁹ To ensure that state laws do not target specific classes of individuals, the Equal Protection Clause directs that “all persons similarly circumstanced shall be treated alike.”¹⁰⁰ Nevertheless, because of the diverse composition of people across the nation, the Equal Protection Clause does not require “things which are different in fact” to be treated in law as though they were the same.¹⁰¹ For example, laws having different effects on wealthy and poor individuals are not “on that account alone” subject to strict equal protection scrutiny.¹⁰² A state legislature thus has “substantial latitude to establish classifications” so that it may address the many public concerns facing the state.¹⁰³

The Supreme Court has articulated three types of judicial review for determining if a legal classification violates the Equal Protection Clause. The first type of review, referred to as strict scrutiny, applies to classifications that disadvantage a “suspect class” or encroach on the exercise of a “fundamental right.”¹⁰⁴ Strict scrutiny prohibits a classification unless the law’s classification is “precisely tailored to serve a compelling governmental interest.”¹⁰⁵ The second type of review, referred to as intermediate scrutiny, applies to legislative

⁹⁶ See *supra* Part I.B and accompanying discussion on California district transfer provisions.

⁹⁷ See CAL. EDUC. CODE §§ 35160.5(b), 48200 (2019).

⁹⁸ U.S. CONST. amend XIV, § 1.

⁹⁹ See *Plyler v. Doe*, 457 U.S. 202, 213-14 (1982) (discussing the legislative history of the Fourteenth Amendment).

¹⁰⁰ *Id.* at 216 (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)); see also U.S. CONST. amend XIV, § 1.

¹⁰¹ *Id.* (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)).

¹⁰² See *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 458 (1988).

¹⁰³ *Plyler*, 457 U.S. at 216.

¹⁰⁴ *Id.* at 216-17. This paper takes no position on whether public school education is a “fundamental right” granted under the federal Constitution, while at the same time acknowledging that current federal law declines to categorize public education as such. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

¹⁰⁵ *Plyler*, 457 U.S. at 217.

classifications that “while not facially invidious, nonetheless give rise to recurring constitutional difficulties.”¹⁰⁶ Intermediate scrutiny thus requires that the classification further a substantial governmental interest to meet the requirements of the Equal Protection Clause.¹⁰⁷ The third type of review, referred to as rational basis review, prohibits legal classifications unless the classification is “rationally related” to a legitimate governmental interest.¹⁰⁸ Because California law classifies children by their residence in a particular school district and thereby encompasses *all* children living in a particular school district, the legal classification does not disadvantage a “suspect class.”¹⁰⁹

A. *Case Study: Student Transfers from Oakland School District to Piedmont School District*

Imagine an 8th grade student named Michelle who attends Claremont Middle School in Oakland, California. Michelle’s middle school is one of the 87 public schools that comprise the Oakland Unified School District (“OUSD”), which reaches a total of 36,900 children.¹¹⁰ OUSD is a relatively low-income school district, with 74.5% of the district’s students eligible for “free and reduced lunch.”¹¹¹ Michelle is a bright student and knows that only 30% of the district’s 2016 graduating high school class enrolled in a four-year college.¹¹² Michelle thus understands that her chances of pursuing a college degree and securing long-lasting employment will be greater if she transfers to a different school district.¹¹³ Michelle is tired of attending a school with underpaid teachers,¹¹⁴ disinterested classmates,¹¹⁵ and

¹⁰⁶ *Id.* (maintaining that these legislative classifications arise in “limited circumstances”).

¹⁰⁷ *Id.* at 217-18.

¹⁰⁸ Ratner, *supra* note 5, at 828-30 (describing the three tests under Supreme Court precedent for determining if a classification meets Equal Protection standards).

¹⁰⁹ Classifications of people by religion, nationality, and race have been considered “suspect.” See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). To be considered a “suspect” classification, the classification generally must be of an “absolutely immutable characteristic.” See *Plyler*, 457 U.S. at 220.

¹¹⁰ *OUSD Fast Facts*, OAKLAND UNIFIED SCH. DISTRICT, <http://www.ousddata.org/announcements/new-fast-facts-2017-18-now-available> (last visited Mar. 16, 2019). This figure does not include the 13,219 students attending 35 OUSD district charter schools.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See Nance, *supra* note 3. OUSD has an average graduation rate of only 65.7%. *OUSD Fast Facts*, *supra* note 110.

¹¹⁴ The average teacher salary in OUSD is \$63,611. See *OUSD Fast Facts*, *supra* note

School Resource Officers who roam the hallway looking to find any sign of youthful misbehavior.¹¹⁶

Michelle's middle school is ranked 684th out of all the public schools in California.¹¹⁷ Next year, she wants to attend Piedmont High School, which is ranked 28th in the state¹¹⁸ and is only 2.4 miles away from her current middle school.¹¹⁹ Unlike her current school district, Piedmont Unified School District ("PUSD") teaches only 2,700 students across its six public schools,¹²⁰ 95% of the district's 2016 graduating high school class entered four-year colleges.¹²¹

Eager to transfer districts to help avoid a life of poverty, Michelle investigates further. Upon visiting the PUSD website, Michelle finds the following message:

The schools of this district shall be operated for the benefit of the children residing in the district with such exceptions as are permitted by law and District policy. The Board of Education may enter into interdistrict transfer agreements with other school districts regarding the enrollment of non-resident students only when specific "Categories of Eligible Non-resident Students" and "Limitations of Interdistrict Transfer"

110. Teachers are paid more in wealthier school districts because of the district's higher tax-base. See Moriah Balingit, *Teachers Can Make \$15,000 More Just by Moving to the District Next Door*, WASH. POST (Nov. 22, 2015), https://www.washingtonpost.com/local/education/teachers-can-make-15000-more-just-by-moving-to-the-district-next-door/2015/11/22/9a70832e-8fd6-11e5-ae1f-af46b7df8483_story.html?utm_term=.a3b30ea82718.

¹¹⁵ See Richard D. Kahlenberg, *From All Walks of Life: New Hope for School Integration*, 40 AM. EDUCATOR 2, 13 (Winter 2012-13) ("In high-poverty schools, a child is surrounded by classmates who are less likely to have big dreams and, accordingly, are less academically engaged and more likely to act out and cut class.").

¹¹⁶ See, e.g., Nance, *supra* note 3, at 338-44 (describing the growing practice of hiring police officers to patrol school grounds in predominantly poor school districts).

¹¹⁷ *Best Public Schools in Oakland, CA*, SCHOOLDIGGER, <https://www.schooldigger.com/go/CA/city/Oakland/search.aspx> (last visited Mar. 16, 2019).

¹¹⁸ *Best Public Schools in Piedmont, CA*, SCHOOLDIGGER, <https://www.schooldigger.com/go/CA/city/Piedmont/search.aspx> (last visited Mar. 16, 2019).

¹¹⁹ *Driving Directions from Claremont Middle School to Piedmont High School*, GOOGLE MAPS, <https://maps.google.com> (search starting point field for "Claremont Middle School" and search destination field for "Piedmont High School") (last visited April 11, 2019).

¹²⁰ *District Info*, PIEDMONT UNIFIED SCHOOL DISTRICT, <http://www.piedmont.k12.ca.us/district-info> (last visited Mar. 16, 2019). PUSD has three elementary schools, one middle school, one high school, and one alternative high school. *Id.*

¹²¹ *Id.* The PUSD website did not provide the average teacher salary or dropout rate.

conditions are met as defined in Board Policy and Administrative Regulations (BP/AR 5117).¹²²

Being the diligent student that she is, Michelle looks up AR 5117, and learns that the following children are eligible to apply for an interdistrict transfer to PUSD:

1. Children with parents constructing or remodeling a home in Piedmont;¹²³
2. Children with parents purchasing a home in Piedmont;¹²⁴
3. Children of Piedmont Unified School District employees;¹²⁵
4. High school juniors and seniors who have moved out of the district;¹²⁶
5. Children of the City of Piedmont government employees;¹²⁷
6. Children of the Piedmont Education Foundation (PEF) Director;¹²⁸
7. Children residing in Calvert Court;¹²⁹
8. Children living in residences on approved “split parcel” properties.¹³⁰

To Michelle’s disappointment, she does not qualify for any of these conditions. Michelle and her mother live in Rockridge — a neighborhood in Oakland, California — and certainly cannot afford to purchase, construct, or remodel a home in Piedmont.¹³¹ Michelle’s

¹²² *PUSD Transfer Policies*, PIEDMONT UNIFIED SCH. DISTRICT, <http://www.piedmont.k12.ca.us/district-info/enrollment/transfers> (last visited Mar. 16, 2019).

¹²³ PIEDMONT UNIFIED SCH. DIST., AR 5117, at 2 (2016), <http://www.piedmont.k12.ca.us/wp-content/uploads/2018/12/BP-AR-5117-Inter-District-Transfers.pdf>.

¹²⁴ *Id.* at 3.

¹²⁵ *Id.* at 4.

¹²⁶ *Id.* at 3-4.

¹²⁷ *Id.* at 4-5.

¹²⁸ *Id.* at 5.

¹²⁹ *Id.* Ingress and egress to all properties on Calvert Court are through the City of Piedmont, even though some of the properties are located in Oakland. *Id.*

¹³⁰ *Id.* at 6-7. This regulation applies to children of homeowners whose residential property is located both within the City of Piedmont and the City of Oakland boundaries. *Id.*

¹³¹ The median price for a home sold in Piedmont, California is \$999,000. *Home Values in Piedmont, CA*, REALTOR.COM, https://www.realtor.com/local/Piedmont_CA (last visited Mar. 16, 2019).

mother works as an assistant nurse at the Kaiser Permanente Oakland Medical Center, and her father has been in prison since she was three years old.¹³² Finally, because Claremont Middle School was not one of the 1,000 most “low-achieving” schools in the state, she does not qualify for a transfer-exception under the Open Enrollment Act of 2010.¹³³ Michelle is therefore required to attend a public school within the OUSD.

B. California Education Code section 48200 Creates a Caste of Low-Income Youth

The Supreme Court’s decision in *Plyler v. Doe*¹³⁴ provides a window into the Equal Protection challenges to California’s residency requirement for compulsory education. In *Plyler*, the Court addressed a Texas law that withheld from school districts any state funds for the education of children who were not legally admitted into the United States.¹³⁵ The Tyler Independent School District in Texas had adopted a policy requiring undocumented children to pay a “full tuition fee” in order to enroll in its public schools.¹³⁶ Certain children of Mexican descent who could not establish that they had been legally admitted into the United States were charged tuition to enroll in Tyler public schools.¹³⁷ In a 5–4 decision, the *Plyler* Court found that the Texas law violated the Equal Protection Clause under intermediate scrutiny.¹³⁸ The Court acknowledged that the children were not part of a

¹³² Single parent households are an unfortunate reality for many low-income youth. See Nicole Puglise, *Black Americans Incarcerated Five Times More Than White People*, GUARDIAN (June 18, 2016, 8:00 AM EDT), <https://www.theguardian.com/us-news/2016/jun/18/mass-incarceration-black-americans-higher-rates-disparities-report>; Gretchen Livingston, *About One-Third of U.S. Children are Living With an Unmarried Parent*, PEW RES. CTR. (April 27, 2018), <https://www.pewresearch.org/fact-tank/2018/04/27/about-one-third-of-u-s-children-are-living-with-an-unmarried-parent/>.

¹³³ See *supra* notes 72-76 and accompanying text.

¹³⁴ *Plyler v. Doe*, 457 U.S. 202 (1982).

¹³⁵ *Id.* at 205 & n.1 (describing TEX. EDUC. CODE ANN. § 21.031 (1981)).

¹³⁶ *Id.* at n.2. School-age children of Mexican origin residing within the Tyler District filed a class action suit challenging the tuition requirement. *Id.* at 206.

¹³⁷ See *Doe v. Plyler*, 458 F. Supp. 569, 571 (E.D. Tex. 1978), *aff’d* 628 F.2d 448 (5th Cir. 1980), *aff’d*, 457 U.S. 202 (1982) (“The defendant Board of Trustees of Tyler [Independent School District] had refused to enroll any undocumented child, absent a tuition fee of \$1,000 per year, pursuant to section 21.031 of the Texas Education Code.”).

¹³⁸ See *Plyler*, 457 U.S. at 230 (“If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some *substantial* state interest. No such showing was made here.” (emphasis added)).

“suspect” class,¹³⁹ but rather were members of a “caste” being denied benefits that society made available to other citizens.¹⁴⁰ The Court held that even when a particular classification of individuals is not “suspect,” legislation that imposes disabilities upon groups disfavored by virtue of “circumstances beyond their control” signifies the kind of “class or caste treatment that the Fourteenth Amendment was designed to abolish.”¹⁴¹

After finding that the Texas law triggered intermediate scrutiny, the Court then turned to the state’s proffered justifications to determine if the classification furthered a substantial state interest. The *Plyler* Court did not find Texas’s arguments persuasive. The Court methodically undermined the state’s reasoning that it may exclude the children from its public schools (1) to protect the state from an influx of illegal immigrants; (2) because undocumented children would impose special burdens on the state’s ability to provide high-quality public education; and (3) because undocumented children would be less likely than other children to stay in Texas upon graduating from school.¹⁴²

In its holding, the *Plyler* Court affirmed its decision in *Brown v. Board of Education*,¹⁴³ maintaining that “where the state has undertaken to provide [the opportunity of an education], it is a right which must be made available to all on equal terms.”¹⁴⁴ The *Plyler* Court held that a classification’s burden falling disproportionately on children simply because of their parents’ conduct ran afoul of the Equal Protection Clause.¹⁴⁵ The Texas legislation at issue directed the burden of a parent’s decision against her child, and the *Plyler* Court maintained that disadvantaging a child for her parents’ mistakes did not “comport with fundamental conceptions of justice.”¹⁴⁶

¹³⁹ *Id.* at 220, 224 (holding that the children’s “undocumented status [is not] an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action”).

¹⁴⁰ *Id.* at 219 (describing the culpability of American society in encouraging undocumented aliens to remain in the country as a source of “cheap labor”).

¹⁴¹ *Id.* at 216 n.14 (quotations omitted).

¹⁴² *See id.* at 228-30.

¹⁴³ 347 U.S. 483 (1954).

¹⁴⁴ *Plyler*, 457 U.S. at 222 (quoting *Brown*, 347 U.S. at 493).

¹⁴⁵ *Id.* at 220 (“[V]isiting . . . condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.”) (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)).

¹⁴⁶ *Id.*

The Court's focus on the Texas law's tendency to perpetuate a "caste" of undocumented children has important overlaps with California's current school districting scheme. Similar to the children in *Plyler*, the children of the Oakland School District are in danger of becoming a caste of poor, uneducated individuals who will likely struggle to achieve intergenerational mobility.¹⁴⁷ The socioeconomic background of a school's student body is a "strong predictor" of a student's opportunity for upward mobility.¹⁴⁸ Consequently, attending a school with wealthy children, as opposed to poor children, paves the way for a future of economic earning and an escape from poverty.¹⁴⁹ Section 48200 of the California Education Code prevents low-income children from accessing this opportunity. In doing so, the law firmly roots children like Michelle and her Oakland classmates in a perpetual "division of society" that, like the undocumented children in *Plyler*, eventually serves as a source of "cheap labor" but are denied the benefits afforded others.¹⁵⁰ By foreclosing any opportunity for OUSD students like Michelle to attend a public school in PUSD, section 48200 has a tendency to create a caste of predominantly poor, minority children through the imposition of "disabilities upon [a group] disfavored by virtue of circumstances beyond their control."¹⁵¹ Like the children in *Plyler*, Michelle and her classmates may not be treated differently under state law simply because of their parents' decision or life circumstance.

Of course, there are "infinite variables affecting the educational process" for students.¹⁵² For example, parental attitudes toward education are transmitted to children and may impact a child's achievement and likelihood to attend a four-year college after graduation.¹⁵³ Similarly, the daily nutrition a child receives may significantly affect a child's ability to learn and behave throughout the school day.¹⁵⁴ For instance, children attending school in urban "food

¹⁴⁷ It is arguable that the children of Oakland Unified School District have not already become a "caste" in American society. See Chetty et al., *supra* note 36, at 31-42.

¹⁴⁸ See, e.g., GROVER J. "RUSS" WHITEHURST ET AL., BROOKINGS INST., SEGREGATION, RACE, AND CHARTER SCHOOLS: WHAT DO WE KNOW? 45 (2016).

¹⁴⁹ See *id.* at 45 fig.12 (demonstrating the correlation between upward mobility and socioeconomic wealth).

¹⁵⁰ See *Plyler*, 457 U.S. 202 at 219-20; see also *Caste*, *supra* note 37.

¹⁵¹ See *Plyler*, 457 U.S. 202 at 216 n.14.

¹⁵² See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973).

¹⁵³ See WHITEHURST ET AL., *supra* note 148, at 39.

¹⁵⁴ See, e.g., Grace Chen, *How Diet and Nutrition Impact a Child's Learning Ability*, PUB. SCH. REV. (July 25, 2017), <https://www.publicschoolreview.com/blog/how-diet-and-nutrition-impact-a-childs-learning-ability> (noting that many popular foods may

deserts” face additional challenges that students in wealthier school districts do not encounter.¹⁵⁵ Furthermore, the increase in the number of children living in single-parent families similarly negatively impacts a child’s learning.¹⁵⁶

Despite the myriad of “infinite variables” that might be external to California’s districting laws, the state’s *de facto* exclusion of Michelle from Piedmont schools effectively ensures that she will not advance from her lower-class status. Regardless of the other factors that may or may not hurt Michelle’s chances of success in school, section 48200 forces her to attend the 684th ranked school that, on average, will “fail to provide [her] the basic skills necessary for meaningful participation in society.”¹⁵⁷ It is therefore unsurprising that in states like California, the achievement levels of low-income children lag “significantly below that of their counterparts.”¹⁵⁸ Children from “poor” school districts graduate at lower rates than their peers in wealthier districts.¹⁵⁹ Not graduating from high school leads to “a multitude of other social ills, such as unemployment, poverty, bad health, and future involvement in the criminal justice system.”¹⁶⁰

hinder children’s academic performance).

¹⁵⁵ See David Just, *Three Ways Nutrition Influences Student Learning Potential and School Performance*, EXTENSION (June 26, 2014), <https://articles.extension.org/pages/68774/3-ways-nutrition-influences-student-learning-potential-and-school-performance>; Scott Morris, *West Oakland’s Food Desert Remains*, E. BAY EXPRESS (Mar. 14, 2018), <https://www.eastbayexpress.com/oakland/west-oaklands-food-desert-remains/Content?oid=14130481>; *USDA Defines Food Deserts*, AM. NUTRITION ASS’N, <http://americannutritionassociation.org/newsletter/usda-defines-food-deserts> (last visited Mar. 16, 2019).

¹⁵⁶ See Eric A. Hanushek, *The Failure of Input-Based Schooling Policies*, 113 *Econ. J.* F 64, F69 (2003) (noting that between 1970 and 1990, the percentage of children living with both parents declined from eighty-five to seventy-three percent, and that children living in poverty rose from fifteen to twenty percent).

¹⁵⁷ See Smith, *supra* note 34, at 825.

¹⁵⁸ See Derek W. 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, 1352-57 (2010). For example, forty percent of poor urban youth are “functionally illiterate.” Smith, *supra* note 34, at 831.

¹⁵⁹ See, e.g., graduation rates for Oakland Unified School District (34.3%) and Piedmont Unified School District (95%), *supra* Part II.A & note 110.

¹⁶⁰ See Nance, *supra* note 3, at 322-24. Furthermore, underachievement standing alone makes it more likely that students will be incarcerated at some point in their lives. *Id.* at 324.

C. California's Interest in Residency-Based School Districting Laws

1. Intermediate Scrutiny Applies to the Classification Under section 48200

Say Michelle brings suit against the state, arguing that section 48200 is unconstitutional under the Equal Protection Clause. Before asserting any particular state interest, California will most likely argue that classifying Michelle and others similarly situated to her in the OUSD should not be reviewed under intermediate scrutiny. The state will argue that, like in *Kadrmas v. Dickinson Public Schools*,¹⁶¹ social and economic legislation “carries with it a presumption of rationality” that requires Michelle to show that her classification is arbitrary and irrational.¹⁶² In addition, California may argue that Michelle's claim is indistinguishable from the class action brought in *San Antonio Independent School District v. Rodriguez*.¹⁶³

To begin, unlike in *Kadrmas*, California districting laws do not classify Michelle and others similarly situated solely based on wealth. All people living in the Oakland Unified School District — even those who are wealthy — are excluded from Piedmont schools.¹⁶⁴ While the classification in *Kadrmas* was most certainly one directed toward wealth,¹⁶⁵ section 48200 classifies schoolchildren based on residency. Of course, the classification under California law might have a disparate impact on poor and wealthy children living in the Oakland School District.¹⁶⁶ The evil of the classification, however, derives from its distinctions based on residency, not on wealth.

Next, Michelle's claim that section 48200 violates the Fourteenth Amendment differs substantially from the allegations made in *Rodriguez*. First, appellees in *Rodriguez* sought to be classified as

¹⁶¹ *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450 (1988).

¹⁶² *See id.* at 462-63.

¹⁶³ *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 19-20 (1973) (refusing to extend heightened scrutiny to schoolchildren throughout the state who (1) were functionally indigent, (2) relatively poorer than others, or (3) irrespective of their personal incomes, happened to reside in relatively poorer school districts).

¹⁶⁴ Subject to the exceptions outlined in AR 5117, *supra* Part II.A.

¹⁶⁵ *See Kadrmas*, 487 U.S. at 458.

¹⁶⁶ For example, wealthy families may be able to afford to send their children to private schools in the area, like Redwood Day (\$27,310 per year), Julia Morgan School for Girls (\$29,975 per year), or St. Paul's Episcopal School (\$28,750 per year). For a list of private schools in Oakland, CA, see *California Private Schools by Tuition Cost*, PRIV. SCH. REV., <https://www.privateschoolreview.com/tuition-stats/california> (last visited Mar. 17, 2019).

“suspect.”¹⁶⁷ Here, Michelle is not alleging that she is part of a “suspect” class. Rather, she alleges that section 48200 will have a tendency to perpetuate her status in a “caste” in American society by requiring her to attend an OUSD public school. Second, unlike appellees in *Rodriguez*, Michelle does in fact undergo an “absolute deprivation” of a benefit afforded others similarly situated to her — the opportunity to attend school in the Piedmont School District. While the *Rodriguez* Court looked at “education” as the allegedly deprived benefit,¹⁶⁸ here, Michelle is deprived of attending public school in the Piedmont District. Therefore, unlike in *Rodriguez*, section 48200 does in fact trigger “an absolute deprivation of the desired benefit.”

Finally, it does not matter that section 48200 affords some members of the class — other than Michelle — to possibly attend school in the Piedmont School District.¹⁶⁹ The *Plyler* Court, for example, found that the class was deserving of heightened scrutiny even though two of the class members were paying the \$1,000 school tuition to attend Tyler public schools.¹⁷⁰ Similarly here, just because some class member might meet the conditions for enrolling in Piedmont Unified schools does not diminish the harm caused by section 48200.¹⁷¹

2. Piedmont Unified School District Does Not Have a Substantial Interest in section 48200

Even if a court holds that section 48200 forms a classification that triggers judicial review under intermediate scrutiny, Piedmont might argue that, as an arm of the state, it has a substantial interest in excluding students based on residency considerations.¹⁷² For example,

¹⁶⁷ See *Rodriguez*, 411 U.S. at 28. The *Rodriguez* Court recognized that the schoolchildren who lived in school districts with a lower tax base did not, as a class, hold any of the “traditional indicia of suspectness.” *Id.* (noting how the class was “unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts” and that it was not “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection”).

¹⁶⁸ *Id.* at 23-24.

¹⁶⁹ For example, some members of the class may have a parent who works in Piedmont, and thus satisfy AR 5117. See *supra* Part II.A.

¹⁷⁰ See *Doe v. Plyler*, 458 F. Supp. 569, 575 (E.D. Tex. 1978), *aff'd* 628 F.2d 448 (5th Cir. 1980), *aff'd*, 457 U.S. 202 (1982).

¹⁷¹ If the state of California is to provide education to its citizens, it is a “right which must be made available to all on equal terms.” See *Plyler v. Doe*, 457 U.S. 202, 223 (1982) (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

¹⁷² Cf. *Craig v. Boren*, 429 U.S. 190, 197-98 (1976) (applying intermediate scrutiny

Piedmont Unified School District may argue that excluding nonresidents (1) allows it to maintain the quality of its schools, (2) ensures that it can preserve its resources and maintain reasonable costs for education, and (3) permits Piedmont parents to retain “local control” over education in their district.

First, Piedmont might argue that requiring it to accept nonresident students would lead to a “floodgate” of nonresident students enrolling in its schools, leaving schools overcrowded and thus unable to meet the educational demands accompanying this influx of students. In response to Piedmont’s concern that there would be a “floodgate” of students, the legislative scheme proposed in this Article does not change the enrollment capacity of particular schools.¹⁷³ Rather, when accepting students in kindergarten or as transfers, the schools within PUSD will be required to make enrollment decisions with only *partial* consideration of residency. Under section 48200, Piedmont schools are statutorily required to enroll students who reside in the school district.¹⁷⁴ Under the proposed legislative scheme, PUSD residents will not automatically be entitled to enroll in one of Piedmont’s schools. Rather, residency will simply be one of many factors used by schools to make enrollment decisions, along with racial and ethnic balances, the enrollment of siblings, and other relevant considerations.¹⁷⁵

Second, Piedmont might point to *Martinez v. Bynum*¹⁷⁶ to justify excluding “nonresident” students. In *Martinez*, the Court held that states have a legitimate interest in establishing residential criteria for school enrollment. The *Martinez* Court maintained that a state has a substantial interest in providing quality education to its residents and may therefore favor its residents over nonresidents of that state.¹⁷⁷ Piedmont’s argument that *Martinez* permits it to treat “nonresidents” differently than “residents” misunderstands the *Martinez* Court’s decision, however. In *Martinez*, the issue of residency was between an in-state resident and an out-of-state resident.¹⁷⁸ The *Martinez* Court explicitly undertook the question of whether a state may require in-

to gender-based classification).

¹⁷³ See *infra* Part III.

¹⁷⁴ See CAL. EDUC. CODE § 35160.5 (2019).

¹⁷⁵ For further exploration of the proposed scheme, see *infra* Part III.

¹⁷⁶ 461 U.S. 321 (1983).

¹⁷⁷ See *id.* at 326-33.

¹⁷⁸ See *id.* at 322-23 (describing how petitioner Oralia Martinez had left Mexico and moved to Texas to live with his sister for the primary purpose of attending public school in the McAllen Independent School District).

state residency of a nonresident *of that state*.¹⁷⁹ Here, on the other hand, Michelle and others in OUSD are California residents. They are therefore similarly situated to other California residents in PUSD. *Martinez* simply did not stand for the proposition that a state may discriminate between two residents of the same state based on school district, county, or township residency.

Next, Piedmont's concern for the preservation of resources cannot justify the residential classification used to allocate those resources.¹⁸⁰ A school district may not reduce expenditures for education by barring an arbitrarily chosen class of students from its schools. And, even if barring some *number* of children from its school would help Piedmont conserve resources, Piedmont would need to present evidence that selecting OUSD students as the appropriate target for exclusion served its substantial interest. This argument will eventually fail, however, because with respect to cost and need, students from OUSD are "basically indistinguishable" from PUSD students.¹⁸¹

Lastly, Piedmont may argue that its parents have the right to exert "local control" over the district's education, and that admitting students from outside the district diminishes this right. However, this argument presupposes that "local control" requires a residential nexus to the district. Local decisionmaking authority over school policy and fiscal control over school revenues and expenditures¹⁸² does not necessarily require residency within the district's boundaries. For example, Michelle's mother, living only three to five miles away from the schools in Piedmont, should have the same right to exert "local control" over her daughter's school in PUSD as another parent who happens to live within the district's geographic boundary. Finally, if parents who live in Piedmont were concerned with the extra tax they pay by virtue of living within the district's boundaries, it would be

¹⁷⁹ *Id.* at 327, 329-30 (holding that the state has a substantial interest in imposing "bona fide residence requirements to maintain the quality of local public schools" and that the state may establish "such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state rates").

¹⁸⁰ *Cf. Plyler v. Doe*, 457 U.S. 202, 227 (1982) ("The State must do more than justify its classification with a concise expression of an intention to discriminate." (citation omitted)).

¹⁸¹ *Id.* at 229 (requiring that Texas show that excluding "*this* group [of undocumented aliens] as the appropriate target for exclusion.").

¹⁸² These have been considered "the mantle" of local control. *See Tang, supra* note 23, at 1156 (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 126-28 (1973) (Marshall, J., dissenting)).

reasonable to ask Michelle's mother to meet that financial requirement. Regardless, "local control" does not necessarily require a residential nexus. Altogether, it seems clear that the State's interests of excluding Michelle from the Piedmont School District do not meet constitutional standards under the Equal Protection Clause of the Fourteenth Amendment.

III. LEGISLATIVE & ADMINISTRATIVE SOLUTION: TREATING SIMILARLY SITUATED CHILDREN ALIKE

The legislative solution to section 48200 is simple: maintain compulsory attendance in schools, and delete the clause requiring students to attend schools in the district in which their parent or legal guardian resides. Interdistrict school choice will ensure the immediate halt to the ever-growing caste of poor, predominantly minority children who are forced to attend underachieving schools.¹⁸³ When the "clear majority" of students in a school district are low-income, schools in that district begin to suffer, and as a result, students unreasonably suffer.¹⁸⁴

The education field has struggled to figure out how to ensure that, within the larger confines of the exclusionary legal structure of district laws, schools in low-income areas "work."¹⁸⁵ This Article adopts a simple answer to this confounding problem: it is *impossible* to make high-poverty schools "work at scale."¹⁸⁶ The success stories¹⁸⁷ are exceptions to the rule: there is an undeniable correlation between a school district with low-income families and low-achieving schools. There are "infinite variables"¹⁸⁸ that stand in the way of these low-

¹⁸³ Interdistrict integration strategies have been the subject of intervention strategies in the academic field. *See, e.g.,* Kahlenberg, *supra* note 115, at 12 ("[A] great deal could be done to reduce the proportion of high-poverty public elementary schools in the United States, especially if we pursued interdistrict socioeconomic integration strategies.").

¹⁸⁴ *See id.* at 5 (discussing the negative effects of "concentrated poverty").

¹⁸⁵ *See id.* at 3 ("[N]o one knows how to make high-poverty schools work at scale.").

¹⁸⁶ *See id.* at 7 ("[D]istrict leaders know that it is 'extremely difficult' to make high-poverty schools work on a systemwide, long-term basis.").

¹⁸⁷ *See, e.g.,* Dan Porterfield, *Twenty Years of KIPP: Lessons for Success in Public Education*, FORBES (July 30, 2014, 4:29 PM), <https://www.forbes.com/sites/dporterfield/2014/07/30/20-years-of-kipp-lessons-for-success-in-public-education/#2b93ab15453c> (discussing the success of the Knowledge is Power Program (KIPP)).

¹⁸⁸ *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 24 (1973); *supra* Part II.B (discussing the non-school specific factors that stand in the way of a child's academic success in a low-income urban environment).

income districts from “picking themselves up by the bootstraps.” Families may live in areas with insufficient access to healthy food; parents sometimes need to work two or three jobs just to pay rent; etc. It is therefore unreasonable to expect that low-income school districts will provide educational learning that would be considered a “state benefit.” It is unsurprising that “poor” districts have lower graduation rates, lower standardized test scores, and fewer students demonstrating long-term economic success than wealthy districts.¹⁸⁹ Consequently, laws like section 48200 serve to perpetuate a permanent caste of American children who will never be afforded any real opportunity of intergenerational upward mobility.¹⁹⁰

While the legislative fix seems simple, the administrative overhaul will more likely be difficult.¹⁹¹ This Article proposes an administrative solution rooted in the “bill for free schools” once considered by Thomas Jefferson and the Virginia legislature, and is premised on a statewide system of education that does not exclude based on district residency.¹⁹² Below is the general structure:

Removing the Geographic Barrier to School Enrollment. To begin, children will not be foreclosed from attending a school simply because of their residency. While residency may be a consideration for enrollment, children living in a specific district will no longer be entitled to attend a school in that district. Enrollment decisions will necessarily take into account other relevant considerations, such as the child’s racial and economic status, desire to participate in a particular school club or activity, siblings that might attend the school, etc. By removing residency requirements from a state’s school districting laws, children who live in “poor” districts will attend schools in “wealthy” districts, and vice versa. Currently, children from wealthy and low-income families are concentrated in their respective districts; the result of removing residency requirements for school districts will break up this concentration and diffuse students across the state. As a result, the quality of schools will rise throughout all districts, as children from wealthy districts — and their involved parents — bring up the quality of a school in an impoverished district. The result of this scheme will be to diffuse educational quality across the state, bringing up the level of schools in each district.

¹⁸⁹ See discussion *supra* Part II.B.

¹⁹⁰ See generally Chetty et al., *supra* note 36 (discussing factors that may affect intergenerational mobility).

¹⁹¹ The proposed legislation is adopted from CAL. EDUC. CODE § 35160.5(b) (2019).

¹⁹² See KAESTLE, *supra* note 14, at 6-9.

Removing State Power to Tax. School districts will no longer have the authority to acquire property, impose taxes, or perform any other state functions other than those required for the administration of public schooling. This provision ensures that families cannot elect governing boards that raise impermissibly high taxes over a number of districts, thereby further removing low-income children from their geographic area. Even if the legislature allowed for districts to tax, under this new scheme a child from a low-income district could still travel to the wealthier district. Nevertheless, removing the power to tax forecloses a district's insipid conduct of excluding low-income families with prohibitively high living costs.

Open Enrollment. The state will adopt rules and regulations establishing a policy of *true* open enrollment in each district.¹⁹³ The enrollment program will be administered each year in May in anticipation for the following school year. Under the enrollment policy, parents may select the schools in any district where want their child to be considered for enrollment. After parents make their selections, the governing board of the districts will allocate students to the various schools within the region, subject to certain racial and economic balancing guidelines instituted by the state department of education. As indicated above, enrollment decisions will be made in accordance with a number of factors, including but not exclusive to a child's residency.

Grandfathering of Enrollment. Importantly, before any legislative changes take effect, these changes may not impact students already enrolled in their current school. Once the proposed legislation is adopted, those students interested in entering the Open Enrollment program may do so. Alternatively, students may choose to stay in their current school. By providing for this "grandfathering" of enrollment, full integration of the proposed legislation will take twelve years to fully come into effect.

There is no doubt that this legislative scheme will come under great scrutiny and parental anger. Parents will be concerned that their local schools will be required to take in "low achieving" students, thereby changing the "character" of their neighborhood and lowering the quality of education in the school. Other parents whose children are required to attend a school outside of their "wealthy" district might

¹⁹³ Cf. EDUC. CODE § 35160.5(b)(1) (providing that the governing board of each school district, as a condition for receiving school apportionments from the state school fund, "shall adopt rules and regulations establishing a policy of open enrollment").

argue that they are entitled to send their child to a school close to home and in their district.

The response to these concerns is concise and frank: American residents may not benefit at the expense of other American residents under sanction of law. The combination of school district taxing autonomy and residency requirements for compulsory school education is a violation of the Equal Protection Clause. The state may not, by delegating its “police power” to school districts, create a caste of low-income youth who do not have a realistic opportunity for intergenerational mobility. Legislative change will most certainly be inconvenient to those living in “wealthy” districts. Nevertheless, families in wealthy districts may not receive a state-granted benefit (public education) at the expense of those in low-income districts. By foreclosing the opportunity for children to attend schools in wealthy districts, the California residency requirement under section 48200 creates a caste of low-income youth and young adults in violation of the Equal Protection Clause.

CONCLUSION

Today, California and other state laws classifying student enrollment based on residency yields a dichotomy of “failing” and “succeeding” public schools. A legislative scheme that leads to children accessing vastly different educational opportunities simply because of their residency runs afoul of the Equal Protection Clause. In California, Education Code section 48200 perpetuates a caste of low-income, predominantly minority children that will find it increasingly difficult to attain economic success and intergenerational upward mobility. To correct this harm, the state may not allow school districts to tax its residents and discriminate across artificial boundaries based on residency. The legislative solution provided in Part III lays out the beginnings of what could be a solution to one of the intractable challenges California faces, and may serve as a paradigm of legislative change to take place in other states across the country.