

# Racism and the Economy

focus on Education

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Title of proposal: Bending the Arc Toward Justice: Education as a Civil Right of Every Child

George Floyd’s killing has awakened America to the need for fundamental police reform. Police brutality, particularly toward Black men, has been happening for decades. At its core, this police brutality is symptomatic of an abuse of police power and of a justice system that denies communities of color and Indigenous people equal justice under the law. While it can’t be captured in a short, powerful video, our education system, in its own way, has been quietly, persistently, and systematically denying equal educational opportunity and killing the futures of children of color, Indigenous children, and low-income white children for decades. For children at every level, the disparities in core skills such as math and reading are significant, persistent, and devastating.<sup>2</sup>

Is it hyperbolic to make a comparison between the abuse of police power and an education system that is failing so many children across the country? No, it is not. There is a correlation between the racial disparities we see in education and the disparities that exist in incomes, job opportunities, housing, and health care for communities of color. The research is clear: Education is at the root of all of these disparities. It is well-documented that people who have more and higher-quality education have more job opportunities, higher incomes, and better housing options and health care outcomes.<sup>3</sup> They are also far less likely to enter the criminal justice system.

A quality education is without question the most powerful tool we have to break the cycle of poverty and create a society in which everyone can fully participate. It doesn’t just change one child’s life. It has the potential to improve the future for generations to come and leads to a more productive, vibrant society for all of us. In *Brown v. Board of Education*, the U.S. Supreme Court acknowledged “the importance of education to our democratic society.”<sup>4</sup> Education, the Court wrote, “is perhaps the most important function of state and local governments” and “is the very foundation of good citizenship.”<sup>5</sup> The Court concluded: “In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”<sup>6</sup> At

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<sup>2</sup> See National Center for Education Statistics, Proportion of Students At or Above Basic Level in Grades 4 and 8 Reading and Mathematics by Race (1998–2019); Graduate Class Database—ACT Research, College Readiness: Percent of Students Meeting ACT Math and Reading Benchmarks by Race/Ethnicity (2011–2020).

<sup>3</sup> See Institute of Education Sciences, National Center for Education Statistics, *The Condition of Education 2020*, at pp. 202–21 (“Population Characteristics and Economic Outcomes”) (May 2020).

<sup>4</sup> *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

the same time, the Court has declined to recognize education as a fundamental right under the U.S. Constitution.<sup>7</sup>

The constitution of every state requires a system of free public schools. But none guarantees children a fundamental right to a quality public education. It is time we put the interests of children ahead of the interests of the system. That is, we must put children first. In Minnesota, we have proposed a constitutional amendment that would do just that: declare that every child has a fundamental right to a quality public education. Our proposed amendment would also make it a paramount duty of the state to ensure quality public schools that fulfill this fundamental right. Racial and economic disparities in education are a systemic problem that require a systemic solution. We can transform our educational system by amending state constitutions nationwide to establish education as a fundamental right that belongs to every child. Change at this core level can be the catalyst for systemic change that provides each child the individual opportunity to reach their highest potential.

## I.

Two cases decided last year in the federal Courts of Appeals underscore that educational injustice is a national issue without regional boundaries. These cases also underscore that we cannot rely on the federal Constitution for the answer. Instead, we must work to secure the fundamental right to education in the constitution of each individual state.

In Michigan, students from Detroit alleged that they were denied a basic minimum education, citing missing or unqualified teachers; unsafe, unsanitary, and overcrowded classrooms; and outdated, damaged, or nonexistent books and other learning materials.<sup>8</sup> With respect to teaching, “[i]n perhaps the most notable case, ‘an eighth grade student was put in charge of teaching seventh and eighth grade math classes for a month because no math teacher was available.’”<sup>9</sup> And with respect to facilities, students reported rooms inhabited by mice and cockroaches, contaminated drinking water, filthy bathrooms, and crumbling classrooms packed with fifty students at a time.<sup>10</sup> The Detroit students alleged that the result was “abysmal educational outcomes,” with proficiency rates near zero in nearly all subjects and scores far below average.<sup>11</sup>

A thousand miles away, students in Mississippi made identical claims in seeking to enforce rights to “uniform” public schools.<sup>12</sup> Their school districts, with students who are predominantly Black and impoverished, received “D” and “F” letter grades from the state.<sup>13</sup> One parent described her daughter’s school as “old, dark, and gloomy—like a jail.”<sup>14</sup> The students contrasted their

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<sup>7</sup> See, e.g., *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35, 37 (1973).

<sup>8</sup> *Gary B. v. Whitmer*, 957 F.3d 616 (6th Cir. 2020), *reh’g en banc granted, opinion vacated*, 958 F.3d 1216 (6th Cir.).

<sup>9</sup> *Id.* at 625.

<sup>10</sup> *Id.* at 626.

<sup>11</sup> *Id.* at 627–28.

<sup>12</sup> *Williams v. Reeves*, 954 F.3d 729 (5th Cir. 2020), *reh’g en banc denied*, 2020 U.S. App. LEXIS 38125 (5th Cir. Dec. 7, 2020).

<sup>13</sup> *Id.* at 733.

<sup>14</sup> *Williams v. Reeves*, Civil Action No. 3:17-cv-404-WHB-LRA (S.D. Miss.), Compl. (Dkt. No. 1) ¶ 5.53 (filed May 23, 2017).

conditions with “A”-rated schools where the students were predominantly white and received abundant resources like enrichment classes and extracurricular activities.<sup>15</sup>

The disparity in educational opportunity exists in no small part because the U.S. Supreme Court has repeatedly declined to recognize education as a fundamental right under the Constitution.<sup>16</sup> The Court therefore refused to scrutinize, and instead let stand, legislative decisions that further entrenched deep-seated inequities.<sup>17</sup> In the 2020 Michigan case discussed above, *Gary B. v. Whitmer*, a split panel of the U.S. Court of Appeals for the Sixth Circuit held that there is a fundamental right to a “basic minimum education” under the Constitution.<sup>18</sup> In light of Supreme Court precedent, the Sixth Circuit stressed that “the right defined in this opinion is narrow in scope.”<sup>19</sup> In particular:

It does not guarantee an education at the quality that most have come to expect in today’s America (but that many are nevertheless denied). Rather, the right only guarantees the education needed to provide access to skills that are essential for the basic exercise of other fundamental rights and liberties, most importantly participation in our political system. As described by Plaintiffs, this amounts to an education sufficient to provide access to a foundational level of literacy—the degree of comprehension needed for participation in our democracy.<sup>20</sup>

Even this narrow right proved short-lived. On its own accord, the Sixth Circuit vacated the decision and put the case on for rehearing by the entire court.<sup>21</sup> Fearing that the decision would be undone, the plaintiffs reached a settlement with the State of Michigan that includes a commitment to propose legislation to provide \$95 million for Detroit literacy.

In Mississippi, meanwhile, the plaintiffs did not even try to assert any rights under the federal Constitution, let alone a fundamental right to education.<sup>22</sup> Instead, they alleged that the current state constitution violates the Mississippi Readmission Act of 1870, which set the criteria for reentry to the Union. The statute required that Mississippi’s constitution never be amended as to deprive any citizen “of the school rights and privileges” secured by the state constitution. The original post-war clause required the legislature to establish a “uniform system of free public schools.” But the current version requires only “free public schools.” The court summarized: “According to plaintiffs, Mississippi’s removal of the word ‘uniform’ from its Constitution resulted in a violation of the Readmission Act that has caused them to suffer a number of injuries, including illiteracy, a diminished likelihood of high school graduation, low rates of college

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<sup>15</sup> *Williams*, 954 F.3d at 733.

<sup>16</sup> *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 458 (1988); *Papasan v. Allain*, 478 U.S. 265, 284–86 (1986); *Plyler v. Doe*, 457 U.S. 202, 223 (1982); *Rodriguez*, 411 U.S. at 35, 37.

<sup>17</sup> *E.g.*, *Kadrmas*, 487 U.S. at 458–65 (upholding state laws that allowed some local school boards, but not others, to assess a fee for school bus services); *Rodriguez*, 411 U.S. at 40–59 (upholding state’s reliance on widely varying local taxes to fund schools).

<sup>18</sup> *Gary B.*, 957 F.3d at 659–60.

<sup>19</sup> *Id.* at 659.

<sup>20</sup> *Id.*

<sup>21</sup> *Gary B. v. Whitmer*, 958 F.3d 1216 (6th Cir. 2020).

<sup>22</sup> *Williams v. Reeves*, 954 F.3d 729 (5th Cir. 2020).

attendance and college completion, and an increased likelihood of future poverty.”<sup>23</sup> The court allowed the plaintiffs to seek only a portion of the relief they sought—a declaration that the current constitution conflicts with the readmission act. But the court did not allow the plaintiffs to enforce the original constitutional mandate requiring “*uniform* free public schools.”<sup>24</sup>

## II.

What can we accomplish by declaring education a “fundamental right” and paramount duty of the state? By making a quality public education an individual right that belongs to every child, we build a system that is focused on the individual child and maximizes the unique potential of every student. And by making it a paramount duty of the state to fulfill this fundamental right, we ensure that each state has no greater funding priority than supporting public education. The goal is a system that enables every school in every district to fulfill the individual needs of every pupil. Embedding education as a civil right is a catalyst for all of us to put each child first.

First and foremost, enshrining quality education as a “fundamental right” under the state constitution empowers voters and elected officials to take concrete steps to bring this mandate to life. All state officials, in all branches of government, are sworn to support the constitution of their state. Governors and state legislators are bound to enact and enforce laws that carry out what their constitution requires. By making the right to a quality public education a constitutional civil right, we empower our elected officials to make policies that ensure quality public schools for all of a state’s children. And by empowering our elected officials, we empower the people who vote for them—everyday families, educators, and employers—to bring about the necessary change.

This is not a new idea. We saw it happen in Florida over twenty years ago. In 1996, the Florida Supreme Court upheld the dismissal of a case that “asked the trial court to declare that an adequate education is a fundamental right . . . and that the State has failed to provide its students that fundamental right by failing to allocate adequate resources for a uniform system of free public schools.”<sup>25</sup> After this decision, in 1998 the people of Florida voted to amend their constitution to state that “the education of children is a fundamental value of the people of the State of Florida,” and to make it “a paramount duty of the state to make adequate provision for the education of all children residing within its borders.”<sup>26</sup>

Over the next two years, Florida’s legislature and governor enacted a series of laws consistent with their new constitutional obligations. Among other things, these laws created programs to prepare low-income children for school, to establish standards for teacher certification and advance educators’ professional development, to monitor and promote school attendance, and to provide options for students from underperforming schools.<sup>27</sup> The constitutional amendments were the product of a political process that culminated in concrete legislative and executive policies that effected real change for children statewide.

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<sup>23</sup> *Id.* at 733.

<sup>24</sup> *See id.* at 737–41 (emphasis added).

<sup>25</sup> *Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles*, 680 So. 2d 400, 402 (Fla. 1996).

<sup>26</sup> Art. IX, § 1(a), Fla. Const.

<sup>27</sup> *See* Fla. Stat. §§ 229.0537, 231.09, 231.145, 231.15, 231.29(3), 231.6135, 232.17, 236.08106(2), 240.529.

Critically, creating a constitutional “fundamental right” also helps ensure that the third branch of government—the judiciary—can do its job to protect every child’s right to public education. The U.S. Supreme Court’s decision in *Brown v. Board of Education* is the best-known example of landmark change through the courts—but it is only one example of many in which individual poor families have been able to access the courts to improve education for all. Where courts embrace their role in interpreting and applying constitutional requirements as to education, we have seen an ongoing dialogue among all the branches. This back-and-forth results in continual assessment of the state’s educational policies—particularly as to funding—to help build consensus and realize the constitutional mandate.

Massachusetts provides the most recent example. The Massachusetts constitution declares that education is “necessary for the preservation of [the people’s] rights and liberties,” so it is the state’s duty “to cherish the interests of literature and the sciences, and all seminaries of them; especially . . . the public schools.”<sup>28</sup> In 1993, the state supreme court found that the constitution requires the state to provide adequate funding to educate all Massachusetts children.<sup>29</sup> Within days, the state enacted a law to revamp its public education system to ensure sufficient funding for every district and impose new accountability standards.<sup>30</sup> Over a decade later, the court found that the system was on a “steady trajectory of progress” consistent with the constitutional mandate.<sup>31</sup>

In 2019, however, a group of parents and the local NAACP sued alleging statewide funding disparities that disadvantaged low-income urban and rural schools.<sup>32</sup> The plaintiffs proclaimed that “Education Rights Are Civil Rights,” and the allegations mirrored those in Michigan and Mississippi. One parent asked: “How can children concentrate on learning when they are in a class with more than thirty students, when their books are outdated, when their school buildings are crumbling, when there aren’t enough guidance counselors, librarians, or after-school programs?”<sup>33</sup> The suit became part of the public dialogue with the governor and state legislature. Within months, the state passed the Student Opportunity Act, which commits \$1.5 billion in new public education funding over seven years and requires districts to develop evidence-based programs to close the opportunity and achievement gaps for underserved students.<sup>34</sup>

In Massachusetts, the presence of a vibrant constitutional education mandate, coupled with a judiciary prepared to embrace its role, was the catalyst for systemic change. It was change brought about by a steady back-and-forth and building of consensus that allowed many voices to be heard. As is typical, there were no lawsuits against individual schools, teachers, or administrators. The focus was on the state itself, at the highest executive and legislative levels. An enforceable constitutional education mandate reduces the burden on frontline teachers and

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<sup>28</sup> Part II, c. 5, § 2, Mass. Const.

<sup>29</sup> *McDuffy v. Sec’y of Exec. Office of Educ.*, 415 Mass. 545 (1993).

<sup>30</sup> Education Reform Act of 1993, Mass. G. L. cc. 69–71.

<sup>31</sup> *Hancock v. Comm’r of Educ.*, 443 Mass. 428 (2005).

<sup>32</sup> *Mussothe v. Sec’y of Educ.*, Civil Action No. SJ-2019-0244, Supreme Judicial Court for Suffolk County (Mass.).

<sup>33</sup> “Officials are served in funding lawsuit that alleges violation of education, civil rights,” Sept. 9, 2019, at <https://massteacher.org/news/2019/09/officials-served-in-funding-lawsuit>.

<sup>34</sup> “Groups Dropping Lawsuit Over Mass. Education Funding Disparities,” Jan. 27, 2020, at <https://www.wbur.org/edify/2020/01/27/education-lawsuit-dropped>; Student Opportunity Act (SOA) Plans, at <https://www.doe.mass.edu/commissioner/spec-advisories/soa.html>.

administrators and puts the focus on elected officials who must provide schools with the resources they need to educate all children.

### III.

While Massachusetts and other states have lessons we can build on, we should not stop there. Based on a provision enacted in 1780, the Massachusetts Supreme Court found a duty to provide an “adequate” education for all children. Minnesota’s provision, enacted in 1857, similarly requires an “adequate public education system.” In the Mississippi case discussed above, parents are trying to enforce a constitutional provision from 1870 that promised at most “uniformity.” The education clause language in most state constitutions dates back over 150 years, to a time period grounded in slavery that is so different from where we are today.<sup>35</sup>

What parent wants their child to have only an “adequate” education? None—we all aspire for excellence for our children. As I wrote almost thirty years ago, “the state’s duty toward its children is not satisfied unless it provides equal educational opportunities for all children. This duty is not satisfied when some children receive an ‘adequate’ education while others receive a more-than-adequate education.”<sup>36</sup> It is time for education justice. By creating a civil right to a quality public education for every child, we can, as Dr. King suggested, “bend the arc of the moral universe” toward justice in all of its forms: health justice, housing justice, economic justice, social justice, and racial justice. Our nation’s children deserve nothing less.

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<sup>35</sup> For a discussion of state constitutional education clauses over time, see Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education*, 2014 Mich. St. L. Rev. 429, 450–63 (2014); Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 Geo. Wash. L. Rev. 92, 112–17, 121–32 (2013); Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 Tex. L. Rev. 7, 108–11 (2008).

<sup>36</sup> *Skeen v. State*, 505 N.W.2d 299, 320 (Minn. 1993) (Page, J., dissenting).