

BOOKED BUT CAN'T READ: "FUNCTIONAL LITERACY," NATIONAL CITIZENSHIP, AND THE NEW FACE OF *DRED SCOTT* IN THE AGE OF MASS INCARCERATION

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ABSTRACT

For Black men in the contemporary age of mass incarceration, the consequences of functional illiteracy are devastating. 70% of America's adult incarcerated population and 85% of juveniles who interface with the juvenile court system are functionally illiterate, which extends beyond the ability to read and includes the development of problem-solving and critical-thinking skills one needs to access knowledge, communicate, and participate effectively in political processes, the economy, higher education, and other 21st century exercises of democratic citizenship. Following decades of lawsuits seeking vindication of fundamental education rights through the Fourteenth Amendment's Equal Protection Clause, the nation's racialized illiteracy crisis persists and spurs little policy action. Mourning the dead horse but seeing no point in continuing to beat it, this Article argues that a different provision of the Fourteenth Amendment—the Citizenship Clause—authorizes and mandates Congress to guarantee a meaningful floor of adequate functional literacy instruction nationwide. Coupled with Section 5 of the Amendment, the Citizenship Clause obligates the federal government to ensure that all national citizens have equal, full membership and the ability to participate in the national society. Grounding this inquiry into accountability, the case study of Madison, Wisconsin, demonstrates how the racialized illiteracy crisis precludes those without access to adequate functional literacy instruction from their constitutionally guaranteed national citizenship, particularly because early illiteracy leads to cyclical and accumulating negative outcomes that skyrocket the risk of

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incarceration and subsequently of disenfranchisement from voting and political processes. This Article marries California State Supreme Court Justice Goodwin Liu's account of "the social citizenship tradition in our constitutional heritage" with the seminal contemporary case Gary B. v. Snyder, wherein plaintiffs file federally and pick up the Equal Protection mantle to advance a fundamental right of access to functional literacy, and ultimately suggests that the country's historic understanding of national citizenship and its substantive rights triggers a Congressional duty to ensure adequate access to functional literacy as a part of equal, national citizenship. For in cities like Madison, reputationally progressive jewel of the state that denied Dred Scott his citizenship and citizen rights nearly two centuries ago, so too does the racialized illiteracy crisis lawfully disparage young Black men to non-citizen subjects and deny their access to democratic society today. If this academic year mirrors the past 12 in Madison, at least 85% of Black fourth graders currently attending the city's public schools are four times more likely than their peers to drop out, and 2/3 will end up in prison or on welfare. If this academic year mirrors the past 12 in Madison, the vast majority of the 166 Black boys who began fourth grade in the city this past fall are now members of a discrete class that is more likely to spend time incarcerated than to become functionally literate in school. Coining this the age of the mass and disparate illiteracy-to-incarceration pipeline, this Article reinforces the reality that we have not ended the subjugation of Black men in America, we have merely found yet another way to disguise it.

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1. TROYATLMS, *The Relationship Between Incarceration and Low Literacy* (Mar. 16, 2016) [hereinafter *Literacy Mid-South*], <https://literacymidsouth.wordpress.com/2016/03/16/incarceration-and-low-literacy/> [<https://perma.cc/CP4V-R4WS>].

INTRODUCTION: AN ISTHMUS DIVIDED

Could a place as prosperous, resourceful, and progressive as Dane County also be home to some of the most profound, pervasive, and persistent racial disparities in the country?²

On a small, scenic isthmus between Lake Mendota and Lake Monona lies Madison, Wisconsin. Just over 255,000 people call the state capital home. The second-largest city in the state and the seat of Dane County, Madison has topped ‘best-of’ lists for nearly a decade: ranked the “most-liveable [sic] small- to mid-size city in the U.S.” in the fall of 2014,³ “the most secure U.S. community among large metropolitan areas” in 2010,⁴ and the “best city to raise a family in the country” just last year,⁵ the city enjoys a prestigious reputation. Madison and Dane County alike are “known for their support of ‘progressive’ social, economic, and political values.”⁶ Historically a predominantly White community, Madison “take[s] pride in being welcoming, supportive of inclusion and diversity, and firmly opposed to . . . discrimination.”⁷ And fewer than two years ago, a brief real estate study published in *The New York Times* added a lustrous jewel to Madison’s crown of accolades: “The Best Place[] . . . to Raise Children.”⁸ Citing factors like housing costs, median income, crime and unemployment rates, and percentage of population under forty-five, the report first appeared in print in the *Times* with a headline that implored readers: “Think of the Children.”⁹

But this litany of accolades hides the full truth. Grounded by the question “*which children?*,” this Article sets forth a different truth—a tale of two Madisons. A different body of evidence implicates a gulf between reputation and reality in

2. Race to Equity Project Team, Wis. Council on Children and Families, *Race to Equity: A Baseline Report on the State of Racial Disparities in Dane County* 3, 4 (Oct. 3, 2013) [hereinafter *Race to Equity Baseline Report*].

3. *2015 Top 100 Best Places to Live*, LIVABILITY, <https://livability.com/best-places/top-100-best-places-to-live/2015> [<https://perma.cc/VT5J-888U>] (last visited Sept. 7, 2019).

4. *Most Secure U.S. Places: Seventh Annual Farmers Insurance Study Ranks the Most Secure Places to Live in the U.S.*, BESTPLACES, <https://www.bestplaces.net/docs/studies/secure.aspx> (last visited Sept. 5, 2019).

5. Jackson Danbeck, *Madison Ranked Best City to Raise Family in Country*, WMTV NBC15 (Nov. 12, 2019, 3:56 PM), <https://www.nbc15.com/content/news/Madison-ranked-best-city-to-raise-family-in-country-564816041.html> [<https://perma.cc/P7S2-JS92>].

6. RACE TO EQUITY BASELINE REPORT, *supra* note 2.

7. *Id.*

8. Michael Kolomatsky, *The Best (and Worst) Places to Raise Children*, N.Y. TIMES (Sept. 13, 2018), <https://www.nytimes.com/2018/09/13/realestate/the-best-and-worst-places-to-raise-children.html> [<https://perma.cc/BH4F-SWQX>].

9. *Id.*

Madison, the political hub of “the worst state for Black Americans.”¹⁰ For Black Madisonians, this best-of-worst-of city boasts staggering disparity—generally more than elsewhere across the state and nation.¹¹ Black children face especially salient disparity in the city’s public schools.¹² The Madison Metropolitan School District (“MMSD”) is the second-largest public school district in Wisconsin, where Black/White academic achievement gaps are in fact so vast that they continually rank “dead last” in the nation.¹³ Compiling data from the Wisconsin Department of Public Instruction (“DPI”), an op-ed printed in Madison’s *Isthmus* mere weeks after the *Times* report deemed the city the ‘best place to raise children’ evidences just how vast these racialized academic achievement gaps are in MMSD specifically.¹⁴ Subsequent analysis of the data suggests, for example, that 69.6% of MMSD’s White students earned a “college ready” score on the ACT in Reading from 2013-2017, compared to just 12.7% of their Black peers.¹⁵ State DPI data also shows racial disparity in MMSD student achievement well before students reach ACT-age. For the 10 academic years spanning 2005 to 2016, while over 50% of MMSD’s White fourth graders tested advanced or proficient in literacy, the same held true for fewer than 15% of their Black peers.¹⁶ The 2017-2018 academic year brought an impressive jump in proficiency for the district’s White fourth graders to 66.1%.¹⁷ But the number of MMSD’s Black fourth graders

10. Dan Shafer, *Wisconsin Named Worst State for Black Americans*, MILWAUKEE BUS. JOURNAL (Aug. 5, 2016, 10:59 AM), <https://www.bizjournals.com/milwaukee/news/2016/08/05/wisconsin-named-worst-state-for-black-americans.html> [<https://perma.cc/VLV4-D859>].

11. RACE TO EQUITY BASELINE REPORT, *supra* note 2, at 12.

12. *See id.* at 3 (“The Project was [created to confront Dane County’s] . . . wide black/ white disparities . . . relating to . . . criminal justice . . . and to educational achievement.”); *see also* Chris Rickert, *Madison Schools Achievement Gap Driven by Higher-Than-Average White Test Performance*, WIS. STATE JOURNAL (Mar. 24, 2019), https://madison.com/wsj/news/local/education/local_schools/madison-schools-achievement-gap-driven-by-higher-than-average-white/article_4659fa71-11e0-5834-a2c3-b5f969219e3d.html [<https://perma.cc/23LC-W5HZ>] (substantiating 2016 Stanford University and *The New York Times* reports with new data to reach the same conclusion: that “Madison’s achievement gap...[is] one of the biggest in the nation”).

13. Steven Elbow, *Working on the Achievement Gap*, THE CAP TIMES (Oct. 31, 2018), https://madison.com/ct/news/local/education/working-on-the-achievement-gap/article_669f412d-d4fc-58b1-ae0c-1008b8979a2d.html [<https://perma.cc/Z48K-GTFA>]; *see also* Rich Kremer, *Wisconsin Has Widest Achievement Gap On Nation’s Report Card*, WPR (Oct. 30, 2019, 4:00 PM), <https://www.wpr.org/wisconsin-has-widest-achievement-gap-nations-report-card> [<https://perma.cc/3RRW-6KWY>].

14. Laurie Frost & Jeffrey Henriques, *Yes, They Graduated, but Can They Read?*, ISTHMUS (Oct. 4, 2018) [hereinafter *Yes, They Graduated*], <https://isthmus.com/opinion/opinion/madison-school-district-touts-graduation-rates-but-academic-proficiency-in-question/> [<https://perma.cc/ZLK9-2JAD>].

15. Elbow, *supra* note 13.

16. Laurie Frost & Jeffrey Henriques, *Laurie Frost and Jeff Henriques: Reading by Fourth Grade Vital to Success*, THE CAP TIMES (Dec. 5, 2018) [hereinafter *4th Grade Reading*] https://madison.com/ct/opinion/mailbag/laurie-frost-and-jeff-henriques-reading-by-fourth-grade-vital/article_88675834-d71a-5bc4-86bf-acd9fa779f06.html [<https://perma.cc/48V3-ZVCD>].

17. Elbow, *supra* note 13.

demonstrating literacy above or at grade level the same year dropped to a mere 8.4%.¹⁸

The severe, long-term implications of illiteracy in the fourth grade—ones that impact young Black boys¹⁹ in particular—transform the district’s decade-long, systemic failure to provide adequate literacy instruction to Black fourth graders into a racialized illiteracy crisis. Fourth grade is “the watershed year” because it predicts students’ potentials in critical ways.²⁰ Literacy strongly correlates with myriad positive social and economic outcomes, and children who are not proficient by the fourth grade are much more likely than their proficient peers to face a series of accumulating negative consequences including disengagement from learning, social and behavioral problems, school discipline, failing to graduate high school, and decreased earning potential.²¹ The most catastrophic consequence, however, is a skyrocketed lifetime likelihood of involvement in the criminal justice system.²² According to the National Assessment of Adult Literacy (“NAAL”), “85% of all juveniles who interface with the juvenile court system are functionally illiterate.”²³ So too is 70% of America’s adult incarcerated population.²⁴ Illiteracy in the fourth grade is so irreparably damaging, in fact, that any fourth grader who is not proficient has only a 22% chance of ever catching up.²⁵ The reality is especially damning for the Black boys among this group, who—at just nine- and ten-years-old—have a greater lifetime likelihood of spending time incarcerated than of ever becoming functionally literate in school.²⁶

18. *Id.*

19. I focus on Black boys in this Article but recognize the implications of early illiteracy and other “school-to-confinement pathways” are also catastrophic for Black girls, who receive far less attention in scholarship about racial disparity and the criminalization of students of color in schools. MONIQUE W. MORRIS, *PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOLS* 12 (2016). For groundbreaking, nuanced analysis of “the ways in which Black females and males experience [the school-to-prison pipeline] together *and* differently,” see Monique W. Morris’s 2016 *Pushout: The Criminalization of Black Girls in Schools*. *Id.* at 9.

20. Sara Shelton, *Fourth Grade a Watershed Year in Learning to Read*, *TIMES RECORD NEWS* (Nov. 14, 2018, 12:33 AM), <https://www.timesrecordnews.com/story/opinion/2018/11/14/fourth-grade-watershed-year-learning-read/1988699002/> [<https://perma.cc/TL8M-SJ9C>]; see also LEILA FIESTER & RALPH SMITH, ANNIE E. CASEY FOUND., *EARLY WARNING!: WHY READING BY THE END OF THIRD GRADE MATTERS* 9 (2010); *Literacy Statistics*, *BEGIN TO READ* [hereinafter *BEGIN TO READ*], <https://www.begintoread.com/research/literacystatistics.html> [<https://perma.cc/TL8M-SJ9C>] (last visited Sept. 5, 2019); *Literacy Mid-South*, *supra* note 1.

21. See *Literacy Mid-South*, *supra* note 1; see also *RACE TO EQUITY BASELINE REPORT*, *supra* note 2, at 10 (suggesting that Black/White economic and educational disparity including early reading proficiency “clearly contribute to a pipeline of accumulating risk factors that show up even more acutely in many of the measures of racial disproportionality in the county’s child welfare, juvenile justice and the adult correctional systems”).

22. *BEGIN TO READ*, *supra* note 20.

23. *Id.*

24. *Literacy Mid-South*, *supra* note 1.

25. *BEGIN TO READ*, *supra* note 20.

26. Compare *BEGIN TO READ*, *supra* note 20 (“If a child is not reading proficiently in the 4th grade, he or she will have approximately a 78 percent chance of not catching up”), with THOMAS P.

Where Dane County's largest public school district has largely failed to produce literate Black fourth graders for more than a decade, it follows that the same racial disparity exists in the county's correctional institutions. In 2011, a Black minor from Dane County was 25 times more likely than a White minor to be incarcerated.²⁷ This racial disparity "carr[ies] over" to the adult system: the next year, Black adults in Dane County were arrested at more than eight times the rate of White adults.²⁸ This Article coins the term *illiteracy-to-incarceration pipeline* to define the accumulation of negative consequences caused by early illiteracy, which too often form the "strong connection between early low literacy skills and our country's exploding incarceration rates."²⁹

This Article's use of Madison as a case study to demonstrate the illiteracy-to-incarceration pipeline is intentional. Traditional legal scholarship on racial disparity in public education tends to focus on poorly resourced urban districts attended almost exclusively by students of color;³⁰ this scholarship at times posits that the persistent deprivation of basic educational opportunity that occurs in these districts would be "unthinkable" in well-resourced ones that primarily serve White, affluent students.³¹ But MMSD tells us otherwise. In Madison, where the generally well-intentioned White status quo touts a commitment to public education and racial justice, where public schools are "high quality,"³² resourced "more than most,"³³ and list "racial equity" among their core values and "Black Excellence" among their goals,³⁴ and where all signs point to equal educational opportunity, Black boys are forced by law to attend schools that have failed systemically and for over a decade to provide them adequate access to *functional literacy*: the minimum level of literacy that is necessary to function, let alone participate

BONCZAR, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION 1974–2001, at 8 (2003) (Black men in America have a 32.2% lifetime likelihood of incarceration).

27. RACE TO EQUITY BASELINE REPORT, *supra* note 2, at 11.

28. *Id.*

29. Literacy Mid-South, *supra* note 1.

30. See, e.g., Complaint, Gary B. v. Snyder, 329 F. Supp. 3d 334 (E.D. Mich. 2018) (No. 16-CV-13292). See generally, e.g., Robert Balfanz, Vaughan Byrnes & Joanna Hornig Fox, *Sent Home and Put Off Track: The Antecedents, Disproportionalities, and Consequences of Being Suspended in the 9th Grade*, in CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION 17 (Daniel J. Losen ed., 2015); Ivory A. Toldson, Tyne McGee & Brianna P. Lemmons, *Reducing Suspensions By Improving Academic Engagement Among School-Age Black Males*, in CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION 107 (Daniel J. Losen ed., 2015).

31. Complaint at 1–2, *Gary B.*, 329 F. Supp. 3d 334 (No. 16-CV-13292).

32. RACE TO EQUITY BASELINE REPORT, *supra* note 2, at 3.

33. Jim Zellmer, *Commentary on Madison's Ongoing Tax and Spending Growth*, SCHOOLINFOSYSTEM.ORG (June 27, 2017), <http://www.schoolinfosystem.org/2017/06/27/commentary-on-madisons-ongoing-tax-and-spending-growth-494652025-budget-spends-nearly-20k-per-student/> [https://perma.cc/DP37-XW3D] (stating that MMSD spends "nearly \$20k per student").

34. MADISON METROPOLITAN SCHOOL DISTRICT, STRATEGIC FRAMEWORK 3, <https://www.madison.k12.wi.us/files/www/uploads/sf2018.pdf> [https://perma.cc/KR3W-H67K] (last visited Oct. 15, 2019).

meaningfully in, today's democratic society. Yet, reputation and talk of equity disguise the de facto exclusion of the city's Black boys from basic educational opportunity. The lack of meaningful response to Madison's racialized illiteracy crisis forms the basis of this Article's inquiry into accountability. Where the American government has long recognized "the importance of education to our democra[cy]" because "it is required" for and "the very foundation of good citizenship,"³⁵ how have we come to allow the widespread preclusion of Black boys from "the most fundamental educational building block: literacy?"³⁶ Who can and should be accountable for implementing practical steps to end the mass funneling of this class into the illiteracy-to-incarceration pipeline?

In a society that has decided "schools are the mechanism by which [we are going to] fix racism,"³⁷ I propose a strategy not to relieve schools of this burden but to have other institutions help carry it. Proceeding in four Parts, this Article suggests federal accountability. Part I lays definitional groundwork for the illiteracy-to-incarceration pipeline and demonstrates its concrete consequences for and disparate impact on young Black boys in particular. A discussion of jurisprudence showing the federal government's selective recognition of this pipeline implicates federal accountability for and ability to advance adequate access to functional literacy nation-wide. Part II offers a legal etiology of America's racialized illiteracy crisis. Detailing the pivotal judicial battles in the war to shape the American mind, this Part analyzes the waves of the traditional approach to establish a fundamental right to education through the Fourteenth Amendment's Equal Protection Clause. Elucidating how the federal-state push-pull for control over public education enables a cyclical lack of accountability for the systemic exclusion of young Black boys from functional literacy, I substantiate the need for a meaningful, transparent system of accountability. Part III then examines *Gary B. v. Snyder*,³⁸ a contemporary spin on the Equal Protection Clause approach. Here, plaintiffs in 'slum-like' Detroit schools file federally for recognition not of a general fundamental right to education but of the fundamental right of access to literacy.³⁹

Inspired by *Gary B.*'s federal approach and the district court's finding that whether this specific right exists is an open question,⁴⁰ yet unconvinced by plaintiffs' odds of success through the Equal Protection Clause when the case is heard upon appeal, Part IV suggests the need for a new approach: to advance a national goal of equal educational opportunity via a meaningful floor of adequate literacy

35. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

36. *The Lawsuit: Key Documents*, RIGHT TO LITERACY DETROIT [hereinafter *The Lawsuit*], <https://www.detroit-accessstoliteracy.org/key-documents/> [https://perma.cc/SK2V-S7BE] (last visited Sept. 7, 2019).

37. *Code Switch: Reflections on a Year at Ron Brown High*, NPR (Nov. 8, 2017, 4:23 AM) <https://www.npr.org/templates/transcript/transcript.php?storyId=562566811> [https://perma.cc/278N-269K].

38. *Gary B. v. Snyder*, 329 F. Supp. 3d 344 (E.D. Mich. 2018).

39. *Id.*

40. *Id.* at 363.

instruction through the Fourteenth Amendment's Citizenship Clause. Drawing on California State Supreme Court Justice Goodwin Liu's work,⁴¹ this Part provides a conceptual framework for the term "national citizenship" and its substantive rights, which then grounds the arguments that: access to functional literacy is a substantive right of national citizenship; access to adequate literacy instruction is a part of equal, national citizenship; and Congress is therefore obligated to ensure this right. Then, concluding where it began, this Article returns to Madison, where the systematic, persistent deprivation of young Black boys' access to the level of literacy one needs to participate meaningfully in democratic society precludes this class en masse from equal national citizenship and lawfully disparages them to non-citizen subjects today. In this age of the mass and disparate illiteracy-to-incarceration pipeline, Michelle Alexander's words echo louder than ever before: "We have not ended racial caste in America; we have merely redesignated it."⁴²

I.

A "MOSTLY URBAN MYTH"⁴³ THAT MIGHT AS WELL BE TRUE

Before turning to constitutional text, history and education case law, this Part conceptualizes "functional literacy" and "functional illiteracy" as these terms operate in the 21st century. This definitional groundwork frames the connection between illiteracy and incarceration and shows how this connection is especially consequential for Black men. Emphasizing the validity of the pipeline and the federal government's history of recognizing it, this Part highlights (a) federal law that creates and at times mandates functional literacy instruction in federal correctional institutions and (b) federal case law that grants the same power to states. Ultimately, I assert that the federal government cannot have its "sufficient interest in eliminating illiteracy"⁴⁴ and be unaccountable for it, too.

A. Defining Functional Illiteracy and the Illiteracy-to-Incarceration Pipeline

"Prison planners use third-grade reading scores to predict the number of future beds needed."⁴⁵ Influential persons have repeated some version of this talking point for years. Some suggest the claim is "mostly urban myth" and "a low level of literacy is not a direct determinant for a person's probability to be convicted on criminal charges."⁴⁶ However, this Article joins the growing body of research, the "correctional and judicial professionals," and the "compelling statistics"⁴⁷ that

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

42. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 2* (rev. ed. 2012).

43. Literacy Mid-South, *supra* note 1.

44. *Rutherford v. Hutto*, 377 F. Supp 268, 272 (E.D. Ark. 1974).

45. Literacy Mid-South, *supra* note 1.

46. *Id.*

47. *Id.*

conclude it “should be true”—planners could use literacy scores to predict future prison populations.⁴⁸ The U.S. Department of Justice (“DOJ”) has itself stated: “[t]he link between academic failure and delinquency, violence, and crime is *welded* to reading failure.”⁴⁹ But what accounts for the illiteracy-to-incarceration pipeline? And why do different nuances of it share a focus on the third grade?

This focus is not random. Between the third and fourth grades, a standard shift occurs in curricula and instruction⁵⁰ that renders a child’s ability to read proficiently by the end of the third grade “a make-or-break benchmark in [their] educational development”⁵¹ and “one of the most critical milestones in [their] education.”⁵²

Up until the end of third grade, most children are *learning to read*. Beginning in fourth grade, however, they are *reading to learn*, using their skills to gain more information in subjects such as math and science, to solve problems, to think critically about what they are learning, and to act upon and share that knowledge in the world around them.⁵³

That is, most schools teach *elementary literacy*, or how to decode letters and words and other phonetic skills, from kindergarten through the third grade; afterwards, children are taught *adolescent literacy*, “the ability to read and write to access knowledge and communicate with the world” and the “essential “knowledge capabilities” like “compos[ing], comprehend[ing], synthesiz[ing], reflect[ing] upon, and critiqu[ing].”⁵⁴

Adolescent literacy builds on elementary literacy: developing the skills of the former requires the foundations of the latter.⁵⁵ Thus, “[b]y the time students enter fourth grade, it is . . . imperative that their ability to read be sufficiently well developed that it not impede their capacity to comprehend” and, further, “that their ability to comprehend—to analyze, critique, abstract, and reflect on text—be adequate to profit from the learning opportunities ahead.”⁵⁶ In fact, “[u]p to half of the printed fourth-grade curriculum is incomprehensible to students who read below

48. John Hudson, *An Urban Myth That Should Be True*, THE ATLANTIC (July 2, 2012), <https://www.theatlantic.com/business/archive/2012/07/an-urban-myth-that-should-be-true/259329/> [<https://perma.cc/S47G-FZUQ>]; see also Literacy Mid-South, *supra* note 1.

49. Literacy Mid-South, *supra* note 1 (emphasis added).

50. FIESTER & SMITH, *supra* note 20.

51. *Id.*

52. Literacy Mid-South, *supra* note 1.

53. FIESTER & SMITH, *supra* note 20 (emphasis added).

54. *What is Literacy?*, RIGHT TO LITERACY DETROIT [hereinafter *What is Literacy?*], <https://www.detroit-accessstoliteracy.org/literacy/> [<https://perma.cc/QG4F-KVUE>] (last visited Sept. 7, 2019) (citing CATHERINE SNOW, M. SUSAN BURNS & PEG GRIFFIN, PREVENTING READING DIFFICULTIES IN YOUNG CHILDREN (1998)).

55. *Id.*

56. SNOW, BURNS & GRIFFIN, *supra* note 54, at 210.

that grade level.”⁵⁷ Literacy is, therefore, the “most fundamental educational building block.”⁵⁸ Moreover, once children begin to develop adolescent literacy, it requires sustained, conscious development of evidence-based instruction through secondary school.⁵⁹ Only this “progressive” and “cumulative” process can ingrain adolescent literacy skills into the skill sets one needs “to succeed in the twenty-first century.”⁶⁰ Experts deem these ingrained skill sets *functional literacy*: “the level of . . . literacy necessary to function as an adult in society including participation in the economy, political process, and other activities of citizenship.”⁶¹

Consequently, a child’s ability to read proficiently during fourth grade is their ability to comprehend grade-appropriate curriculum, to begin developing adolescent literacy, and to begin sustaining functional literacy.⁶² This proficiency, or lack thereof, predicts their potential in critical ways.⁶³ A child who is functionally illiterate in the fourth grade has approximately only a 22% chance of catching up before the end of high school.⁶⁴ Each academic year, students who did not attain grade-level literacy during the fourth grade fall further behind.⁶⁵ “Few[er] books written at a third-grade reading level . . . are cognitively appropriate.”⁶⁶ When the functionally illiterate reach the ninth grade, they cannot access the materials intended to engage and instruct them at the high school level.⁶⁷ Failing to engage students with developmentally appropriate, relevant, and interesting content deters some from “investing” in developing their literacy.⁶⁸

This short-term consequence of functional illiteracy—disengagement from learning—directly leads to social and behavioral problems at school, increased truancy, and various forms of in-school discipline including in-school suspensions.⁶⁹ Hence, “[u]nderstanding punitive school discipline from the lens of

57. FIESTER & SMITH, *supra* note 20.

58. *The Lawsuit*, *supra* note 36.

59. *See What is Literacy?*, *supra* note 54.

60. *Id.*

61. *Id.*

62. FIESTER & SMITH, *supra* note 20; *see also* Literacy Mid-South, *supra* note 1.

63. Literacy Mid-South, *supra* note 1; *see also* BEGIN TO READ, *supra* note 20; FIESTER & SMITH, *supra* note 20.

64. BEGIN TO READ, *supra* note 20; *see also* FIESTER & SMITH, *supra* note 20 (“[T]hree quarters of students who are poor readers in third grade will remain poor readers in high school . . .”).

65. *What is Literacy?*, *supra* note 54.

66. *Id.*

67. *Id.*

68. *Id.* However, not all students who fall behind become disinvested in school. AMANDA E. LEWIS & JOHN B. DIAMOND, *DESPITE THE BEST INTENTIONS: HOW RACIAL INEQUALITY THRIVES IN GOOD SCHOOLS* 14 (2015). While some do, additional factors preclude students from catching up, like routine school practices that create intellectual and emotional obstacles to learning. *Id.* “[O]stensive” aspects of these practices often appear race-neutral, yet disproportionately impact students of color. *Id.*

69. Toldson, McGee & Lemmons, *supra* note 30.

academic engagement has shown that there is not only a discipline problem but an underlying education problem that leads to later behavior issues with students,”⁷⁰ or to perceived behavior issues with students.⁷¹ As such, the short-term consequences of early functional illiteracy regularly snowball into extended, more severe ones, like exclusion from school through out-of-school suspensions, which “a preponderance of research” shows “do little to change behavior and can push students out of school altogether.”⁷² In fact, the majority of suspensions students receive are for non-violent ‘offenses,’ including “chronic absence” (missing at least 15 days in one school year⁷³), disrupting the classroom, and insubordination.⁷⁴ In Wisconsin, for example, state law permits public school districts to suspend students for up to five days for reasons including “disruptive or unruly behavior,” which means “[n]oncompliance with rules” that a district’s school board adopts in their student code of conduct, like ones “pertaining to . . . dress of pupils.”⁷⁵ Like in many states, school boards in Wisconsin may expel a student for “repeated refusal or neglect to obey the rules,” or when a student’s repeated “disrupt[ion of] the ability of school authorities to maintain order” either in school or at a school activity does not itself constitute grounds for expulsion, but “the interest of the school demands the pupil’s expulsion.”⁷⁶ In some districts, such expellable behavior can include a student’s refusal to remove a hat, or their possession of a cell phone in class.⁷⁷

Though not all suspensions lead to expulsion, just one suspension increases a student’s likelihood of dropping out before the end of high school from 16% to 32%; moreover, this singular experience of exclusion has cumulative effects, as each additional suspension a student receives further increases their risk of dropping out by 10%.⁷⁸ Together, these exclusionary consequences culminate in a profound reality: students who cannot read proficiently by the end of third grade are “unlikely to graduate from high school.”⁷⁹ Thus, because academic disengagement impacts the level of disciplinary referrals and thus of suspensions more for young Black boys than for any other class,⁸⁰ the short-term consequences of functional illiteracy in the fourth grade are especially devastating for this class of

70. *Id.*

71. *See id.* at 111. *See also* LEWIS & DIAMOND, *supra* note 68, at 5–6.

72. Elizabeth Pufall Jones, *The Link Between Suspensions, Expulsions, and Dropout Rates*, AMERICA’S PROMISE ALLIANCE (Sept. 5, 2018), <https://www.americaspromise.org/opinion/link-between-suspensions-expulsions-and-dropout-rates> [<https://perma.cc/S7AK-8Z29>].

73. Beah Jacobson, *Get Involved in the Fight Against Chronic Absence*, AMERICA’S PROMISE ALLIANCE (Aug. 21, 2018), <https://www.americaspromise.org/news/get-involved-fight-against-chronic-absence> [<https://perma.cc/T7JK-AG9Y>].

74. Pufall Jones, *supra* note 72.

75. WIS. STAT. ANN. § 120.13(1)(a)–(b) (West 2019).

76. § 120.13(1)(c).

77. Pufall Jones, *supra* note 72.

78. *Id.*

79. FIESTER & SMITH, *supra* note 20.

80. Toldson, McGee & Lemmons, *supra* note 30, at 111.

students. More specifically, academic disengagement directly leads to disciplinary referrals for young Black boys in two uniquely punitive ways: first, though academic disengagement has “the strongest direct effect on disciplinary referrals” for all students, for Black boys it also has “a significant direct impact on truancy”⁸¹—again, where truancy is one of the predominant reasons students receive suspensions; and second, the academic disengagement of Black boys is often perceived differently than that of other students in ways that impact disciplinary referrals significantly.⁸² Namely, the perception of Black male bodies and the behavior of Black boys as threatening and “aggressive.”⁸³

[W]here race has been a fundamental organizing principle [in America] since before the country’s founding, racialization led not only to the formation of entrenched cultural belief systems that suggested some people were essentially different (and better) than others, but also led to the development of complex hierarchies in which those racialized bodies were treated differently in social, legal, political, and economic realms. . . .⁸⁴ For example, the long history of degrading black and brown bodies and black and brown minds, of characterizing black and brown people as “less than,” as dangerous, or “just” deviant is in the room when a teacher perceives a black student’s questions as combative or threatening and a white student’s as inquisitive.⁸⁵

The “strong . . . effects” of what schools perceive as “aggressive behaviors” on disciplinary referrals—tacit and explicit interpretations alike of which behaviors necessitate discipline, when, and for whom—help explain the historically disparate rates at which young Black students are suspended and expelled.⁸⁶ Nationally, Black students are almost four times more likely than their White peers to be suspended and nearly twice as likely to be expelled.⁸⁷ These disparities are even more profound in Madison; just last semester, Black students in MMSD received 57% of all out-of-school suspensions given by the district, despite comprising only 18% of the district’s student body.⁸⁸ Indeed, while a district’s disciplinary system

81. *Id.*

82. See LEWIS & DIAMOND, *supra* note 68, at 5.

83. Toldson, McGee & Lemmon, *supra* note 30, at 111.

84. LEWIS & DIAMOND, *supra* note 68, at 5.

85. *Id.* at 6.

86. *Id.*; see also LEWIS & DIAMOND, *supra* note 68, at 5, 48, 84.

87. Mimi Kirk, *When Teachers Punish Black Kids More Severely Than White Kids*, CITYLAB (Dec. 11, 2017), <https://www.citylab.com/solutions/2017/12/when-teachers-punish-black-kids-more-severely-than-white-kids/547982/> [<https://perma.cc/RQ7L-B6FT>].

88. Logan Wroge, *As Suspensions Rise, Madison School Board Unhappy With Racial Disparities*, THE CAP TIMES (Feb. 4, 2020), https://madison.com/wsj/news/local/education/local_schools/as-suspensions-rise-madison-school-board-unhappy-with-racial-disparities/article_cd24654c-a29c-5e1e-bb71-27db9114487a.html [<https://perma.cc/RF8Z-6B79>].

might be ostensibly “race neutral”⁸⁹ as written and the school teachers and administrators who apply it well-intentioned, “race and gender influence whether a student’s action is seen as silly or transgressive, a minor annoyance or in need of intervention,” and these “variant readings of behavior are consequential, as they result in quite different responses/sanctions.”⁹⁰ In this way, school discipline is racialized two ways: (1) in patterns of perceiving students of color as aggressive, threatening, and “inherently suspect” and in turn over-surveilling and over-disciplining them, and (2) in patterns of perceiving White students as “inherently innocent” and in turn granting them lenience for bad behavior.⁹¹

For young Black boys and Black boys with disabilities in particular, “academic disengagement and receiving disciplinary referrals have a cyclical relationship.”⁹² Exclusionary school disciplinary practices have the immediate effect of literal barriers to education by removing students from the classroom; thus, for students who are not grade-level proficient in literacy by the fourth grade, suspensions and expulsions further decrease their already-slim odds of catching up by interrupting the “progressive” and “cumulative” process that is necessary to develop functional literacy.⁹³ Moreover, suspensions and expulsions create emotional barriers to education by “communicating key messages to students about who is and is not a full citizen within the school context.”⁹⁴ Of the largely unacknowledged emotional consequences of school discipline, education experts suggest:

[A] sense of belonging can be vital to academic achievement. Disciplinary patterns serve as a barrier to creating such a sense of belonging among students when they contribute to producing what some social psychologists refer to as a “threatening environment”—“settings where people come to suspect that they could be devalued, stigmatized, or discriminated against because of a

89. LEWIS & DIAMOND, *supra* note 68, at xix.

90. *Id.* at 48. Attributing racialized disparities in school discipline largely to the implicit bias of teachers, research shows that both White and Black educators demonstrate implicit bias in sanctioning Black students more punitively than White students. Kirk, *supra* note 87.

91. See LEWIS & DIAMOND, *supra* note 68, at 48–49. Though Black students received 57% of all out-of-school suspensions given in MMSD in Fall 2019 while comprising only 18% of the district’s student body, White students received just 11% of the district’s out-of-school suspensions given in the same semester yet constituted 42% of its student body. Wroge, *supra* note 88.

92. Toldson, McGee & Lemmons, *supra* note 30; see also, Daniel J. Losen, Jongyeon Ee, Cheri Hodson & Tia E. Martinez, *Disturbing Inequalities: Exploring the Relationship Between Racial Disparities in Special Education Identification and Discipline*, in CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION 89 (Daniel J. Losen ed., 2015). Nearly 75% of students with disabilities have been suspended at least once during high school. Puffall Jones, *supra* note 72. In MMSD, “[s]tudents with disabilities—many of whom are also African American received more than half of the 1,542 out-of-school suspensions this fall [2019], despite making up 15% of the student population.” Wroge, *supra* note 88.

93. *What is Literacy?*, *supra* note 54; see also LEWIS & DIAMOND, *supra* note 68, at 48, 84.

94. LEWIS & DIAMOND, *supra* note 68, at 48.

particular social identity. . . .”⁹⁵ [W]hether you feel respected, welcomed, and/or treated well not only shapes social relations but also influences motivation, performance, and learning. Intelligence is less stable and more fragile than we typically acknowledge, and a host of contextual factors influence whether any of us are able to realize our potential.⁹⁶

Where Black boys may already feel barred from learning and devalued in schools because they lack literacy skills, these feelings can become compounded easily by everyday school culture and practices that, as described above, tend to have noticeable racialized consequences even when ostensibly “race neutral.”⁹⁷ For example, consider the mass-implementation of police officers as ‘school resource officers’ in public schools across America following the 1999 Columbine shooting, when the DOJ’s Community Oriented Policing Services (“COPS”) initiative awarded 275 jurisdictions over \$30 million to partner schools with local law enforcement agencies.⁹⁸ Police officers became staples in public schools, where they—“neither trained nor certified in counseling or social work”—executed “traditional policing models, addressing perceived rowdiness and disorder through arrests and surveillance of schoolchildren.”⁹⁹ This initiative coincided with the super-predator myth.¹⁰⁰ Propagating the narrative of rising, “thickening ranks of juvenile ‘super-predators,’”¹⁰¹ the myth implied that this “vicious, unrepentant,”¹⁰² and “new generation of street criminals”¹⁰³—who were afflicted by “moral poverty”¹⁰⁴ and “insufficiently socialized to the norms and values of a civilized, noncriminal way of life”¹⁰⁵—would primarily take the form of young Black and Brown boys.¹⁰⁶ The myth was later credited for “the worst public policy

95. *Id.*

96. *Id.* at 84.

97. *Id.* at xix.

98. AM. CIVIL LIBERTIES UNION, BULLIES IN BLUE: THE ORIGINS AND CONSEQUENCES OF SCHOOL POLICING 8 (Apr. 2017), https://www.aclu.org/sites/default/files/field_document/aclu_bullies_in_blue_4_11_17_final.pdf [<https://perma.cc/37LY-R35M>].

99. *Id.* at 9.

100. See WIS. COUNCIL ON CHILDREN AND FAMILIES, THE STATE OF JUVENILE JUSTICE IN WISCONSIN: WHAT DO WE REALLY KNOW? 3 (2011) (castigating the myth for its unfounded predictions that had disparate racial impact via “driv[ing] policy.” The Council stated: “We are often easily swayed by sensational stories in the media. After all, serious offenses and the tragedies they bring to those affected make for compelling headlines.” *Id.* at 15.).

101. William J. Bennett, John J. Dilulio, Jr. & John P. Walters, *Body Count: Moral Poverty . . . and How to Win America’s War Against Crime and Drugs* 27 (1996).

102. *Id.* at 14.

103. *Id.* at 26.

104. *Id.* at 13.

105. *Id.* at 28.

106. *Id.* at 26 tbl.2-1 (pairing fear-mongering, animalistic rhetoric with a graph of projections for juvenile offender populations disaggregated by race: an 8% growth for White boys; 26% for Black boys; and 71% for Latino boys). “In the end, the task we face is not an intellectually complicated one. We know what it takes to become a more civilized and decent nation. Previous

decision in the last twenty years—lowering the age of [Wisconsin’s] adult court jurisdiction to 17.”¹⁰⁷ Juvenile judges were among the first to voice concern over the increase of students appearing in court for non-violent, misdemeanor offenses and connected this to “the proliferation of school police officers.”¹⁰⁸

The widespread practice of employing police officers in school largely explains how the “cyclical relationship” between “academic disengagement and receiving disciplinary referrals” ultimately “leads” to “the disparate involvement of Black males in the juvenile and, eventually, adult justice systems.”¹⁰⁹ Madison and Dane County exemplify this process precisely: how functional illiteracy in the fourth grade puts Black boys on the fast track into the juvenile and adult correctional systems and “clearly contribute[s]” to racial disparity in them.¹¹⁰ In 2011, following at least six years during which over 85% of the Black fourth graders in MMSD—Dane County’s largest school district—were functionally illiterate,¹¹¹ the county’s public schools suspended Black students at a rate 15 times more than White students.¹¹² The same year, while Black adolescents comprised less than 9% of the county’s total youth population, they constituted nearly 80% of local kids sentenced to Wisconsin’s juvenile correctional facility.¹¹³ Fewer than five percent of these adolescents had committed violent or serious offenses.¹¹⁴ The typical “carry over from the juvenile justice to the adult systems”¹¹⁵ occurred the following year: in 2012, while only 4.8% of Dane County’s adult male population identified as Black, this group accounted for over 43% of the county’s newly incarcerated adult population.¹¹⁶

Now, as Madison’s public schools have produced functionally illiterate fourth graders on a mass-scale for over a decade, and graduation rates for Black high school seniors trail those for their White peers significantly,¹¹⁷ it follows that the current talk of the town is Dane County[’s] “juvenile crime problem.”¹¹⁸ It also

civilizations have been overthrown from without; our present dissolution is from within—which means it is entirely within our capacity to save ourselves. But the hour is growing late. Very late. Many among us have heard the chimes at midnight. It is time we set to work.” *Id.* at 17.

107. WIS. COUNCIL ON CHILDREN AND FAMILIES, *supra* note 100, at 3.

108. Lizette Alvarez, *Seeing the Toll, Schools Revise Zero Tolerance*, N. Y. TIMES, Dec. 3, 2013, at A18.

109. Toldson, McGee & Lemmons, *supra* note 30.

110. RACE TO EQUITY BASELINE REPORT, *supra* note 2, at 10.

111. *4th Grade Reading*, *supra* note 16.

112. RACE TO EQUITY BASELINE REPORT, *supra* note 2, at 9.

113. *Id.* at 11.

114. WIS. COUNCIL ON CHILDREN AND FAMILIES, *supra* note 100.

115. RACE TO EQUITY BASELINE REPORT, *supra* note 2, at 11.

116. *Id.*

117. In MMSD, while 90.7% of White students graduated at the end of the 2017, only 72.6% of their Black peers earned diplomas. *Yes, They Graduated*, *supra* note 14. Pointing to new district credit-recovery policies, some advocates have even questioned the validity of this figure, which demonstrates a 14.1% jump in Black students’ graduation rates from the previous year. *Id.*

118. Abigail Becker, *Out of Options: Dane County Has a Juvenile Crime Problem and Few Tools to Solve It*, THE CAP TIMES (Nov. 28, 2018), <https://madison.com/ct/news/local/govt-and->

follows that City of Madison Police Department recently started a community reading program to “help curb crime.”¹¹⁹ The city is picking up on what an abundant host of research has concluded for years: there is a “strong connection between” illiteracy and the county’s “exploding incarceration rates.”¹²⁰ It is neither coincidence, nor mere correlation, that the city has parallel racial disparity in its rates of early literacy and incarceration and that in both realms, this disparity is among the worst in the nation. Accordingly, this Article’s use of ‘illiteracy-to-incarceration pipeline’ purposefully nuances what contemporary scholarship deems the “school-to-prison pipeline” in order to push slightly against popular understanding that this pipeline begins with school discipline practices. The ‘illiteracy-to-incarceration pipeline’ more explicitly captures the critical role of functional literacy in this pipeline, where early illiteracy is so frequently the cause of the devastating, cyclical, and accumulating negative outcomes like academic disengagement, social and behavioral problems, truancy, dropping out of school, and school discipline that, together, too often predict whose future likely includes incarceration.

B. There Is Neither a Constitutional Right to Be Ignorant nor to Remain Uneducated

While on one hand the federal government asserts what this Article terms a *deficit-model of functional illiteracy* (a lack of literacy is a link to “delinquency, violence, and crime”),¹²¹ on the other it posits what this Article calls an *adequacy-model of functional literacy* (gaining literacy is a means of “facilitat[ing] re-entry” of incarcerated persons “into the community”¹²²). The latter model stems from the value of functional literacy to the rehabilitation of incarcerated persons, who have a 16% chance of re-incarceration if they receive literacy instruction but a 70% chance if they do not.¹²³ In 1996, Congress enacted the Prison Litigation Reform Act (PLRA),¹²⁴ establishing the “mandatory functional literacy program” requirement for “all mentally capable inmates who are not functionally literate” in federal

politics/out-of-options-dane-county-has-a-juvenile-crime-problem/article_57123a72-5f14-5049-b856-a3aa5d861d59.html [https://perma.cc/XN78-R5DE]; see also *Madison Police Chief Says Juvenile Justice System is Failing; DA Disagrees*, CHANNEL3000 (Oct. 17, 2018, 11:31 AM), https://www.channel3000.com/news/madison-police-chief-says-juvenile-justice-system-is-failing-ag-disagrees/808327125 [https://perma.cc/3CMZ-58QD].

119. Christina Lorey, *Madison Police Say Educational Programs Will Help Curb Crime*, CHANNEL3000 (Nov. 30, 2018, 7:59 AM), https://www.channel3000.com/news/giving-tutors-over-toys-madison-police-say-donating-to-educational-programs-will-help-curb-crime/898304711 [https://perma.cc/Q4KZ-5PC6].

120. Literacy Mid-South, *supra* note 1.

121. *Id.* (emphasis added).

122. Second Chance Act of 2007, Pub. L. No. 110-199, § 231(3)(a)(6) (2008).

123. BEGIN TO READ, *supra* note 20.

124. *Know Your Rights: The Prison Litigation Reform Act (PLRA)*, ACLU, https://www.aclu.org/sites/default/files/images/asset_upload_file79_25805.pdf [https://perma.cc/26LB-VMWT] (last visited Oct. 9, 2019).

correctional institutions.¹²⁵ Accordingly, federal correctional institutions must provide capable-but-functionally-illiterate inmates with programming for a “period sufficient to provide the inmate with an adequate opportunity to achieve functional literacy.”¹²⁶ This period is either a minimum of 240 hours of instruction or until the inmate achieves a GED—“whichever occurs first.”¹²⁷ Setting forth this requirement, Congress defines “functional literacy” three ways: (A) “an eighth grade equivalence in reading and mathematics on a nationally recognized standardized test”; (B) “functional competency or literacy on a nationally recognized criterion-referenced test”; and (C) “a combination of subparagraphs (A) and (B).”¹²⁸ Congress’s express purpose for the program is consistent with the definition of 21st century functional literacy: the program “is designed to help inmates develop foundational knowledge and skill in reading, math, and written expression, and to prepare inmates to get a General Educational Development (GED) credential.”¹²⁹ The BOP states that those who function below these skill levels, who thus cannot earn a high school diploma, will find it “very difficult to get a job and carry out daily activities,” including fulfilling responsibilities to their communities.¹³⁰

In 1974 in *Rutherford v. Hutto*, an inmate at an Arkansas state correctional institution filed a civil suit against the state’s Commissioner of Corrections on the basis that being forced to attend classes in the state-law-created prison school district violated his federal constitutional rights.¹³¹ The plaintiff asserted his “constitutional right to remain ignorant and, indeed, illiterate.”¹³² Emphasizing the “well known contribution to crime of ignorance and lack of skills,” the federal district court affirmed its “unwilling[ness]” in prior cases “to hold that the Constitution positively requires a State to make an effort to rehabilitate its convicts” but also re-emphasized that “a State clearly has a right to undertake to rehabilitate its convicts. . . .”¹³³ This two-sided coin of rehabilitation induced fascinating insight into the federal government’s ability to define states’ power on the question of literacy—and to ensure access to it:

The question, then, is whether in the interest of rehabilitation of convicts a State may constitutionally require adult inmates of a prison to attend classes where they are given an opportunity to learn something which they may or may not be willing or able to

125. 18 U.S.C. § 3624(f)(1) (2012).

126. § 3624(f)(2).

127. 28 C.F.R. § 544.70 (2017).

128. 18 U.S.C. § 3624(f)(3)(A)–(C).

129. FEDERAL BUREAU OF PRISONS, PROGRAM STATEMENT: LITERACY PROGRAM (GED STANDARD) 5350.28, at 1 (Dec. 1, 2003) [hereinafter LITERACY PROGRAM].

130. *Id.*

131. *Rutherford v. Hutto*, 377 F. Supp. 268, 268 (E.D. Ark. 1974).

132. *Id.* at 270.

133. *Id.* at 271.

turn to their profit. To put it this way, may the State constitutionally lead the horse to water even though it knows that the horse cannot be made to drink?¹³⁴

The court held that a state “has the constitutional power to require a convict to participate in a rehabilitation program designed to benefit [him]” because it already possesses the constitutional power to require him to “perform uncompensated labor” for the state’s benefit.¹³⁵ The court thus dismissed the complaint for lack of valid constitutional basis:

The ‘constitutional right to be ignorant’ or ‘the constitutional right to remain uneducated,’ which [the inmate] postulates, simply does not exist. On the other hand, the Court holds that a State has a sufficient interest in eliminating illiteracy among its convicts to justify it in requiring illiterate convicts, including adults, to attend classes designed to bring them up to at least the fourth grade educational level where their exposure to instruction does not affect them adversely in any significant way and where they are not punished simply because they cannot or will not learn. If an illiterate convict can learn to read and write while in prison, that achievement may motivate him to improve himself further, or the achievement itself may give him a degree of self confidence that he needs to live in the outside world as a law abiding, productive citizen.¹³⁶

Beseeking the plaintiff to recognize that the mandated functional literacy programming is “designed to benefit him,”¹³⁷ the court sentenced him to literacy instruction for his potential improvement as a citizen. Preserving the interests of the state in rehabilitating its inmates, the court simultaneously limited this interest, at least in this case, to providing inmates adequate opportunity to reach “at least the fourth grade educational level.”¹³⁸ The court stated: “it will not hurt him to have at least some more education than he has.”¹³⁹

Because the mandatory functional literacy requirement is “the first step towards adequate preparation for successful post-release reintegration into society,”¹⁴⁰ federal prisons may discipline inmates who fail to enroll in or complete the mandatory hours.¹⁴¹ Federal prisons must also incentivize inmates to complete

134. *Id.*

135. *Id.*

136. *Id.* at 272–273 (emphasis added).

137. *Id.* at 273.

138. *Id.* at 272.

139. *Id.* at 273.

140. Federal Bureau of Prisons, Directory of National Programs: A Practical Guide Highlighting Reentry Programs Available in the Federal Bureau of Prisons 3 (May 18, 2017) [hereinafter Directory of National Programs].

141. 28 C.F.R. § 544.75 (2017).

the program¹⁴² and provide inmates with individual counselling to encourage their continued education beyond the requirement.¹⁴³ Further, whether an inmate “has earned, or is making satisfactory progress toward earning, a high school diploma or an equivalent degree” impacts their ability to earn ‘good time’ credit that reduces their confinement period.¹⁴⁴ Inmates may earn good time for “good behavior,”¹⁴⁵ defined by federal law as “exemplary compliance with institutional disciplinary regulations.”¹⁴⁶ Failing to make satisfactory progress toward a GED (not obtaining the literacy credit within the 240 hours of instruction¹⁴⁷) and withdrawing from the literacy program before obtaining a GED both evidence poor compliance—poor conduct—and thus preclude inmates from earning the maximum amount of good time.¹⁴⁸ In sum, if federal inmates either refuse or fail the “adequate opportunity to achieve functional literacy,”¹⁴⁹ they may remain incarcerated longer than they otherwise could have.

In the 2012 case *Livengood v. BOP*, the United States Court of Appeals for the Third Circuit found that the BOP’s “satisfactory progress” requirement for inmates to earn maximum good time is not punitive.¹⁵⁰ The court held that the requirement did not violate appellant’s substantive due process because “the BOP’s literacy program is plainly crucial to an inmate’s successful reintegration into society.”¹⁵¹ Four years later, a federal inmate challenged the same requirement for good time in *Lopez v. Benov*.¹⁵² Here, the United States Court of Appeals for the Ninth Circuit may have revealed the government’s intent behind the requirement when addressing the exemption for “sentenced deportable aliens” from participating in the programming.¹⁵³ While these inmates are not required to participate but may,¹⁵⁴ only those subject to “a final order of removal, deportation, or exclusion” can receive maximum good time without making “satisfactory progress.”¹⁵⁵

142. 18 U.S.C. § 3624(f)(2) (2012).

143. LITERACY PROGRAM, *supra* note 129, at 34, 37 (“Program Monitoring Requirements” for federal prisons mandate: “interview and counsel inmates with a GED need at least once (more if resources permit) about reenrollment.”).

144. 28 C.F.R. § 523.20(c)(1); *see also* 18 U.S.C. § 3624(b).

145. *Frequently Asked Questions: Federal Good Time Credit*, FAMILIES AGAINST MANDATORY MINIMUMS, <https://famm.org/wp-content/uploads/faq-federal-good-time-credit.pdf> [<https://perma.cc/65HE-6UAX>] (last visited Jan. 22, 2020).

146. 18 U.S.C. § 3624(b)(1).

147. LITERACY PROGRAM, *supra* note 129, at 6.

148. *See* 28 C.F.R. § 523.20(c)(2); *see also* DIRECTORY OF NATIONAL PROGRAMS, *supra* note 140 (“Inmates withdrawing from literacy programs prior to obtaining a GED will be restricted to the lowest pay and have an inability to vest or earn the maximum amount of Good Conduct Time.”).

149. 18 U.S.C. § 3624(f)(2).

150. *Livengood v. Bureau of Prisons*, 503 F. App’x. 104, 106–07 (3rd Cir. 2012).

151. *Id.* at 107.

152. *Lopez v. Benov*, 670 F. App’x. 947, 947–48 (9th Cir. 2016).

153. *Id.* at 948; *see also* 28 C.F.R. § 544.71(a)(3).

154. *Lopez*, 670 F. App’x at 948.

155. *Id.*; *see also* 28 C.F.R. § 523.20(d).

Though not binding, the Ninth Circuit's exposure of Congress's "not arbitrary"¹⁵⁶ intent behind the good time requirement is telling. When the federal government has an interest in providing the "adequate opportunity to achieve functional literacy"¹⁵⁷—namely, decreasing recidivism in society and producing "productive citizen[s]"¹⁵⁸—it is willing to create, implement, manage, and incentivize a system to ensure not just that that opportunity exists but that it exists adequately. But when the federal government's interest in ensuring that opportunity and its adequacy disappears—as with inmates who will not be released in American society—so too does its willingness to incentivize the opportunity and to ensure its adequacy.

As this Part begins to explore, critical to this Article's federal strategy for advancing a national goal of functional literacy is understanding the federal government's history of conceptualizing citizenship and how this bears on its contemporary approach toward education. Where 21st century functional literacy programming in federal prisons was "designed to benefit"¹⁵⁹ all competent, non-deportable inmates in order to rehabilitate them into law-abiding citizens, twenty-first-century public schools were not designed to benefit all competent students in order to develop them into good citizens; rather, America's public education system was built with the intent to produce good citizens, but at a time in this country¹⁶⁰ when 'citizen' and 'White' were synonymous, when "the education of people of African descent was illegal and considered a punishable offense,"¹⁶¹ and decades before the Constitution deemed Black Americans citizens.¹⁶² Public schools across the nation today remain plagued by the historically separate, mutually exclusive understandings of what it means to be a citizen in America and what it means to be Black in America—by the foundational understandings that children are intended to attend public school to become good citizens, and the only persons eligible to become good citizens are White.

156. *Livengood*, 503 F. App'x. at 107.

157. 18 U.S.C. § 3624(f)(2) (2012).

158. *Rutherford v. Hutto*, 377 F. Supp. 268, 272–273 (E.D. Ark. 1974).

159. *Id.* at 272.

160. Ted Brackemyre, *Education to the Masses: The Rise of Public Education in Early America*, U.S. HISTORY SCENE, <https://ushistoryscene.com/article/rise-of-public-education/> [https://perma.cc/8FF3-X39E] (last visited Jan. 25, 2020).

161. MORRIS, *supra* note 19, at 5.

162. *See* U.S. CONST. amend. XIV, § 1.

II.

LEGAL ETIOLOGIES OF THE RACIALIZED ILLITERACY CRISIS

*Education is not a “right” granted to individuals by the Constitution.*¹⁶³

Though the *Rutherford* finding that “the ‘constitutional right to be ignorant’ or ‘the constitutional right to remain uneducated[]’ . . . simply does not exist” re-emphasizes the long-standing tenet of American democracy that the principal purpose of education is the formation of “productive citizen[s],”¹⁶⁴ the federal government does not recognize a constitutional right to education.¹⁶⁵ This Part examines the two waves of the traditional approach under the Equal Protection Clause of the Fourteenth Amendment to secure recognition of fundamental education rights; the first seeking equal educational opportunity through a racial equality and civil rights lens,¹⁶⁶ and the second seeking equal educational adequacy in a school-operations context.¹⁶⁷ The Supreme Court’s treatment of the right to education in the cases that define these waves “can meaningfully be understood as fleshing out” America’s “constitutional commitment to school equality”¹⁶⁸—at least in terms of the Fourteenth Amendment’s Equal Protection Clause. Further, this Part demonstrates how the federal judiciary’s capacity to sculpt the country’s public education system both empowers states to control the system and creates ineffective boundaries of control over the system. I suggest that this “new federalism”¹⁶⁹ foundation perpetuates a systemic lack of accountability for America’s contemporary racialized illiteracy crisis, legitimizes the federal and states’ lack of commitment to equal and adequate educational opportunity, and thus reveals a need for a meaningful and transparent system of accountability at the federal level.

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

164. *Rutherford v. Hutto*, 377 F. Supp. 268 (E.D. Ark. 1974).

165. Julie Underwood, *Education as an American Right?*, *Under the Law*, PHI DELTA KAPPAN, (Jan. 22, 2018) [hereinafter *Education as an American Right?*], <https://www.kappanonline.org/underwood-education-american-right/> [https://perma.cc/PNG9-5AV7] (suggesting this challenges popular belief per the U.S.’s membership in the U.N., whose Universal Declaration of Human Rights guarantees “the right to education.”).

166. See Justin Driver, *The School-House Gate: Public Education, The Supreme Court, and the Battle for the American Mind* 242 (2018).

167. *Id.* at 315 (“Beginning in the early 1970s . . . the Supreme Court explored whether the Fourteenth Amendment’s Equal Protection Clause constrained schools’ operations—beyond the racial context . . .”).

168. *Id.*

169. See Diane S. Sykes, *The “New Federalism”: Confessions of a Former State Supreme Court Justice*, 38 OKLA. CITY U. L. REV. 367, 369 (2013) (asserting that state constitutions have “a fundamental significance” as “an independent source of law” and are thus “an important feature in the structure of our federalism.”) Justice Sykes posits: “We are witnessing a revitalized public conversation about the structure of government, the prerogatives of the states, and the rights of the people. It’s entirely fitting that we keep the state constitutions in the mix.” *Id.*

A. Equal Protection Wave One: Educational Opportunity and Racial Disparity

Essential to understanding the first wave of cases alleging violations of the Equal Protection Clause in seeking to advance equal educational opportunity is their racial context. In the 1883 *Civil Rights Cases*, the Supreme Court struck down the Civil Rights Act of 1875.¹⁷⁰ Enforced by Section 5 of the Fourteenth Amendment, the Act's public accommodations provision barred racial discrimination in public places.¹⁷¹ The Court held that the Fourteenth Amendment does not grant Congress affirmative powers to justify a constitutional ban on racial prejudice under the Thirteenth Amendment, which the Court concluded does not explicitly confer the rights of free citizens on former slaves: that though the Thirteenth Amendment abolished slavery, discrimination on the basis of race does not always constitute a "renewal of slavery."¹⁷² Thus, the Court determined that because Congress had no affirmative powers to preclude private discrimination under the Fourteenth Amendment, it could only legislate corrective, remedial law if a state were to restrict by law the rights of citizens of a particular race.¹⁷³ Justice Harlan voiced the sole dissent to this "inaugurat[ion of] the Jim Crow era"—an inauguration that empowered the states to tolerate private discrimination:¹⁷⁴

The statute of 1875, now adjudged to be unconstitutional, is for the benefit of citizens of every race and color. What the nation, through Congress, has sought to accomplish in reference to that race is—what had already been done in every State of the Union for the white race—to secure and protect rights belonging to them as freemen and citizens; nothing more. It was not deemed enough "to help the feeble up, but to support him after." The one underlying purpose of congressional legislation has been to enable the black race to take the rank of mere citizens. The difficulty has been to compel a recognition of the legal right of the [B]lack race to take that rank of citizens, and to secure the enjoyment of privileges belonging, under the law, to them as a component part of the people for whose welfare and happiness government is ordained.¹⁷⁵

Just over a decade later, the Court upheld the constitutionality of the implicit doctrine guiding the *Civil Rights Cases*—so deemed "separate but equal" by

170. *See* *Civil Rights Cases*, 109 U.S. 3, 26 (1883).

171. Richard Wormser, *Jim Crow Stories: Civil Rights Act of 1875 Declared Unconstitutional*, THIRTEEN: MEDIA WITH IMPACT, https://www.thirteen.org/wnet/jimcrow/stories_events_un-civil.html [<https://perma.cc/S8MU-6EL4>] (last visited Sept. 6, 2019).

172. Melvin I. Urofsky, *Civil Rights Cases*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Civil-Rights-Cases> [<https://perma.cc/GQ2E-2DPP>] (last visited Sept. 6, 2019).

173. *Id.*

174. *Id.*

175. *Civil Rights Cases*, 109 U.S. at 61 (Harlan, J., dissenting).

Justice Harlan—in the 1896 *Plessy v. Ferguson* decision.¹⁷⁶ The Court found that a state statute that “implies merely a legal distinction between” races, one that is “founded in the color of the two races,” indeed “has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude.”¹⁷⁷ On this basis, where the biracial (Black/White) plaintiff had refused to sit in a train car designated for Black individuals and separated from other cars designated for White individuals, the Court held that plaintiff’s complaint implicated no Constitutional law other than the Fourteenth Amendment’s Equal Protection Clause.¹⁷⁸ Therefore, “the case reduce[d] itself” to whether the state statute was reasonable:¹⁷⁹ because a question of constitutional law did “not properly arise,” the question in this case and others of the same nature “are to be determined under the laws of each state.”¹⁸⁰

This sanctioning of the separate-but-equal doctrine became the “constitutional justification for segregation” in public places, including public schools.¹⁸¹ Against this backdrop arose the first wave of the traditional approach to secure the equal, fundamental right to education through the Equal Protection Clause, beginning with *Brown v. Board of Education*,¹⁸² “the most revered judicial opinion of the twentieth century.”¹⁸³ In 1954, Black student-plaintiffs in *Brown* alleged “that segregated public schools are not ‘equal’ and cannot be made ‘equal,’” and thus that they were denied equal protection of the law under the Fourteenth Amendment.¹⁸⁴ Finding for plaintiffs, the Court held that “segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal,” does “deprive the children of the minority group of *equal educational opportunities*.”¹⁸⁵ Many celebrated the decision as “a new birth of freedom.”¹⁸⁶ But others, less impressed, found that the Court was merely following “inevitable” history, not making it.¹⁸⁷

Brown has been ubiquitous in American dialogue since the decision, but “the opinion and its legacy remain unfamiliar in important respects.”¹⁸⁸ Popular

176. *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting). This doctrine asserts that individuals of different races are afforded equality of treatment when they are given substantially equal facilities, even if said facilities are separate. *Id.* (majority opinion).

177. *Id.* at 543 (Harlan, J., dissenting).

178. *Id.* at 542–43.

179. *Id.* at 550.

180. *Id.* at 552.

181. Kahlil Chism, *A Documentary History of Brown: Using Primary Records to Understand Brown et al. v. Board of Education of Topeka et al.*, in *THE UNFINISHED AGENDA OF BROWN V. BOARD OF EDUCATION* 7, 13 (The Editors of Black Issues in Higher Educ. ed., 2004).

182. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

183. DRIVER, *supra* note 166.

184. *Brown*, 347 U.S. at 488.

185. *Id.* at 493 (emphasis added).

186. DRIVER, *supra* note 166, at 246.

187. *Id.*

188. *Id.* at 248.

perception that *Brown* recognizes or creates a constitutional, fundamental right to education is unfounded: the Court merely held that where states make available public education, it is unconstitutional to withhold that education on the basis of race.¹⁸⁹ The Court only intimated at a possible individual right to education as each state so construes it: “[the] *opportunity* of an education . . . where the state has undertaken to provide it, is a right which must be made available on all equal terms.”¹⁹⁰ Leaving this right to the states to decide at which equal level, if any, to provide it,¹⁹¹ the Court declared:

[E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities . . . it is the very foundation of good citizenship.¹⁹²

Thus, as “practices relegating minority children to inferior schools” continued following *Brown*, many “lawyers and scholars” have since attempted to establish a constitutional right to equal educational opportunity through the Equal Protection Clause.¹⁹³ But the Court has not adjusted its understanding of what equal educational opportunity looks like since it first articulated its understanding of this right in *Brown* as one for the states to determine and provide, rather than a constitutional concern.¹⁹⁴ Further, attempts to establish equal educational opportunity through complaints alleging disparate treatment of students of color under the Equal Protection Clause have “been less potent.”¹⁹⁵ Essentially, and as the case study of Madison illustrates, said disparate treatment often “cannot readily be traced to official design.”¹⁹⁶ Thus, proving the denial of equal *opportunity* is difficult.¹⁹⁷ Especially in relatively well-funded, affluent, diverse, and self-deemed progressive communities, where racial disparities remain vast and persistent, “all of the circumstances [can] seem right” for equal educational opportunity, which appears—for all intents and purposes—to exist.¹⁹⁸ Thus, “the “substantive” dimension of disadvantage—the practical importance of an absolute or relative deprivation, apart from its causal origin—has had only a shadowy presence

189. *Education as an American Right?*, *supra* note 165.

190. *Brown*, 347 U.S. at 493 (emphasis added); *see also Education as an American Right?*, *supra* note 165.

191. Liu, *supra* note 41, at 334.

192. *Brown*, 347 U.S. at 493.

193. Liu, *supra* note 41, at 334.

194. *See id.*

195. *Id.*

196. *Id.*

197. DRIVER, *supra* note 166, at 313–14 (referencing an unnamed case arising out of Preston Hollow Elementary School in North Dallas).

198. LEWIS & DIAMOND, *supra* note 68, at left-side bk. jacket flap.

in Equal Protection doctrine.”¹⁹⁹ In large part, this explains why the first wave of the Equal Protection approach failed to succeed in establishing equal educational rights nationwide.

B. Equal Protection Wave Two: Educational Adequacy and Disparate School Operations

The second wave of the approach to establish fundamental education rights under the Fourteenth Amendment’s Equal Protection Clause moved beyond the context of racial inequity and contesting equal educational *opportunity* to a cause of educational deprivation that is perhaps less ‘shadowy’: disparate school operations, particularly in school funding.²⁰⁰ Beginning with the “equal protection trilogy”²⁰¹ in the 1970s and 1980s—*San Antonio Independent School District v. Rodriguez*,²⁰² *Vorchheimer v. School District of Philadelphia*,²⁰³ and *Plyler v. Doe*²⁰⁴—this wave asked the Supreme Court to find, under the Equal Protection Clause, whether restraints on school operations deprive students of *equal educational adequacy*.²⁰⁵ School finance litigation, also termed “adequacy cases,”²⁰⁶ more clearly illuminate the government’s commitment to school equality under the Equal Protection Clause that the Court principally articulated in *Brown*.²⁰⁷ This Part focuses on *Rodriguez* and *Plyler*; the former is a formative adequacy case, and the latter bears on the argument for federal accountability that this Article develops in later Parts.

In *Rodriguez*, a 1973 class action suit for educational adequacy under the Equal Protection Clause, student-plaintiffs from Texas claimed that the state’s system of funding public education produced school districts with unequal access to revenue.²⁰⁸ The Court found that Texas allowed disparate treatment of individuals based on where they lived—property-rich or property-poor districts.²⁰⁹ Though recognizing that education is critical to society, the Court held that this alone does not substantiate a factual basis for finding a fundamental federal right to education

199. Liu, *supra* note 41, at 334 (citing *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956)).

200. Julie Underwood, *Litigating for Resources for High-Need Students*, PHI DELTA KAPPAN (Sept. 24, 2018) [hereinafter *Litigating for Resources*], <https://www.kappanonline.org/underwood-law-resources-funding-high-need-children-schools/> [https://perma.cc/A8R5-Z7GW].

201. DRIVER, *supra* note 166, at 316.

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

203. *Vorchheimer v. Sch. Dist. of Phila.*, 430 U.S. 703 (1977) (per curiam).

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

205. See DRIVER, *supra* note 166.

206. *Litigating for Resources*, *supra* note 200.

207. See DRIVER, *supra* note 166.

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

209. See *id.* at 130–33 (Marshall, J., dissenting) (“It is essential to recognize that an end to the wide variations in taxable district property wealth inherent in the Texas financing scheme would entail none of the untoward consequences suggested by the Court or by the appellants.”).

in the Constitution.²¹⁰ “Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditures in Texas provide an education that falls short.”²¹¹ On the basis that the Constitution does not “prohibit[] states from funding public schools in a manner that yield[s] massive disparities in per pupil expenditures between areas with high property values and areas with low property values,” the Court upheld the disparate school finance system.²¹²

California State Supreme Court Justice Liu points to *Rodriguez* to assert that “it is a mistake to equate the adjudicated Constitution with the full meaning of the Constitution itself,” which he posits is the position of “a growing body of scholarship.”²¹³ He states: “the adjudicated Constitution often falls short of exhausting the substantive meaning of the Constitution’s open-textured guarantees” due to its valuing of “prudential concerns” over securing meaningful floors for economic and social welfare; these concerns naturally couple a political-judicial system that enables and encourages judicial restraint through “countermajoritarian difficulty and limitations on institutional competence.”²¹⁴ In other words, where the *Rodriguez* Court was confronted with locally driven inequality in public schools but did not find this inequality a Constitutional violation, it effectively chose to designate its boundaries of enforcement on one hand while it simultaneously left the “full scope of constitutional norms”—here a potential a minimum right to education—“underenforced.”²¹⁵

This underenforcement echoed loudly in the second case of the Equal Protection trilogy just four years later. Reviewing a matter of school operations in terms of separation of students by sex, the Court in *Vorchheimer v. School District of Philadelphia*²¹⁶ declined to preclude localities from having some same-sex public high schools that based admissions on students’ sex.²¹⁷ The Court again skirted its potential to identify and enforce a fundamental constitutional right to education—but just barely²¹⁸—in *Plyler*, the trilogy’s final case.²¹⁹ This 1982

210. *Id.* 36–37 (majority opinion).

211. *Id.*

212. DRIVER, *supra* note 166.

213. Liu, *supra* note 41, at 338.

214. *Id.*

215. *Id.* (“Lawrence Sager captured the point when he wrote that judicial doctrine in many areas, including the Fourteenth Amendment, ‘mark[s] only the boundaries of the federal courts’ role of enforcement,’ leaving the full scope of constitutional norms ‘underenforced.’”).

216. *Vorchheimer v. Sch. Dist. of Phila.*, 430 U.S. 703 (1977) (per curiam).

217. *Id.*; see also *Vorchheimer v. Sch. Dist. of Phila.*, 532 F.2d 880, 881 (3d Cir. 1976) (vacating the district court’s judgment that held that a public school board’s policy of maintaining a “limited number of single-sex high schools in which enrollment is voluntary and the educational opportunities offered to girls and boys are essentially equal,” in a “system otherwise coeducational,” was impermissible pursuant to the Constitution and other federal law).

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

219. DRIVER, *supra* note 166, at 316.

immigration-related school operations case arose after Texas granted localities authority to foreclose public education for undocumented students.²²⁰ Discussing the total deprivation of education that undocumented children face as a class, because of their class, the Court deemed illiteracy “an ensuring disability.”²²¹ Illiteracy, the Court found, falls under the floor of education that enables individuals “to be self-reliant and self-sufficient participants in society”²²² and held:

The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.²²³

Drawing on these “well-settled principles”²²⁴ and the *Brown* Court’s conception of education as “the very foundation of good citizenship,”²²⁵ the Court did not find a fundamental right to education, but it held that “more is involved” in this inquiry than whether or not education is a fundamental right:

[The state measure] imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of [the measure], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in [the measure] can hardly be considered rational unless it furthers some substantial goal of the State.²²⁶

The state argued the sufficiency of its argument’s rational basis on the “undocumented status of these children”—a status that Congress “apparent[ly] disapprov[ed].”²²⁷ Striking down the measure, the Court cited its inability “to find in the congressional immigration scheme any statement of policy that might weigh

220. *Plyler*, 457 U.S. at 205.

221. *Id.* at 222.

222. *Id.* (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)).

223. *Id.*

224. *Id.* at 223.

225. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

226. *Plyler*, 475 U.S. at 223–24.

227. *Id.* at 224.

significantly in arriving at an equal protection balance concerning the State's authority to deprive these children of an education."²²⁸ Rather than harnessing an opportunity to enforce the "full scope of constitutional norms," the Court again chose instead to redesignate its boundaries of enforcement.²²⁹ However, while *Plyler* does not set a floor for adequate education nationwide, it remains the only Supreme Court decision that guarantees an education at all; further, it does so for non-citizens.

The approach for equal educational rights set forth by the Equal Protection trilogy gained momentum following the 1970s and 1980s, especially in the form of adequacy cases; but where the national educational crisis of underserved students was "once an absorbing concern of federal constitutional law," in more recent decades it has "sustained attention mainly in the state courts."²³⁰ Professor and legal scholar Justin Driver attributes this shift to the burden *Rodriguez* placed on states to create and provide a public system of education.²³¹ Advocates have taken up this cause in at least forty-five states.²³² Leveraging the education clauses in state constitutions to argue for increased educational adequacy, many "have lately found a receptive audience" in state supreme courts that are willing to acknowledge individual rights to education.²³³ These cases have thus spurred slight increases in equal education for school districts within their respective states.²³⁴ Seeking to ensure *equal opportunity for equal outcomes of education* rather than just *equal opportunity for education*, the adequacy cases give voice to what clearly fell on deaf ears in the first wave of the Equal Protection approach: "inclusion" and "integration" are not synonymous, and each represents a very different experience for students in America's public schools. In fact, the gulf between them is educational deprivation—in many ways, the very same deprivation legalized and promulgated so many decades ago by the separate-but-equal doctrine.

C. The Need for Federal Accountability

The federal judiciary's treatment of public education as a protected state right empowers the states to take some control over the educational opportunity and

228. *Id.* at 224–25.

229. Liu, *supra* note 41, at 338 (citing Sager, see *supra* note 215).

230. *Id.* at 331.

231. DRIVER, *supra* note 166, at 316; see also Emily Parker, *50 State Review: Constitutional Obligations for Public Education*, EDUC. COMM'N OF THE STATES 2 (Mar. 2016), <https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf> [<https://perma.cc/D3HB-QVS2>].

232. Liu, *supra* note 41, at 331; see also *Litigating for Resources*, *supra* note 200.

233. Liu, *supra* note 41, at 331.

234. *Id.*

adequacy of that opportunity that they must provide.²³⁵ Each of the state's constitutions includes language requiring the creation of a public education system.²³⁶ States' constitutional education provisions vary in their language or lack thereof around length of the academic year, establishment of higher education systems, religious restrictions, school funding, education of students with disabilities, and age of students.²³⁷ They also set forth significantly different standards, opportunities, requirements, and student performance assessment systems.²³⁸ For example, the education provision of Wisconsin's Constitution is Article X, which was last amended in April of 1972 and mandates the creation of Wisconsin's public schools:²³⁹

The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years; and no sectarian instruction shall be allowed therein; but the legislature by law may, for the purpose of religious instruction outside the district schools, authorize the release of students during regular school hours.²⁴⁰

While Article X addresses some aspects of a public education system, like the establishment of higher education,²⁴¹ it does not establish other aspects some states include in their constitutions, like the education of students with disabilities.²⁴²

The vast differences in states' education provisions—especially the way each state constitution mandates how and to what ends its public schools are funded—

235. *Education as an American Right?*, *supra* note 165; *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.”).

236. *Education as an American Right?*, *supra* note 165; Parker, *supra* note 231. Interestingly, because Washington D.C. is not a state, there exists no constitutional foundation for public education here. *Id.*

237. *Id.*

238. *Education as an American Right?*, *supra* note 165.

239. WIS. CONST. art. X.

240. *Id.* § 3.

241. *Id.* § 6. (“Provision shall be made by law for the establishment of a state university at or near the seat of state government, and for connecting with the same, from time to time, such colleges in different parts of the state as the interests of education may require. The proceeds of all lands that have been or may hereafter be granted by the United States to the state for the support of a university shall be and remain a perpetual fund to be called ‘the university fund,’ the interest of which shall be appropriated to the support of the state university, and no sectarian instruction shall be allowed in such university.”) *Id.* Twenty-nine other state constitutions address the establishment of higher education. Parker, *supra* note 231, at 1.

242. *Compare id.* art. X., with MICH. CONST. art VIII, § 8 (“Institutions, programs, and services for the care, treatment, education, or rehabilitation of those inhabitants who are physically, mentally, or otherwise seriously disabled shall always be fostered and supported.”). Only nine state constitutions require public education for students with disabilities. Parker, *supra* note 231, at 1.

“have sweeping consequences for the policy and laws that policymakers create”²⁴³ for state public education systems and in turn spur deep funding dissimilarities in districts both between and within states.²⁴⁴ That a significant number of state supreme courts have been willing to hear adequacy cases from their school districts—to address funding disparities among the districts in their respective states—is welcome momentum.²⁴⁵ But state courts do not have the jurisdiction to address school finance disparities between states, which are often much more stark²⁴⁶ to the extent that “even if we were to eliminate disparities between school districts within each state, large disparities across states would remain.”²⁴⁷ Ultimately, the between-state school finance differences culminate in inequality that “fall[s] most heavily on disadvantaged children with the greatest educational needs.”²⁴⁸

To be sure, the treatment of public education as a “protected state right”²⁴⁹ has fostered a system of persistent inequality and disparate impact on students of color and students from low-income backgrounds nationwide.²⁵⁰ The federal judiciary refrains from enforcing the “full scope of constitutional norms” when presented with challenges to this national, organizational disparity under the Fourteenth Amendment, and this “underenforce[ment]”²⁵¹ certifies laws that fail to protect any national standards of educational adequacy and equality of educational opportunity.²⁵² The problem of school funding disparities and its disparate impact on students of color also draws little policy action on and accountability from the

243. Parker, *supra* note 231; *see, e.g.*, WIS. CONST. art. X, § 2 (“[T]he school fund . . . shall be exclusively applied to the following objects, to wit: (1) To the support and maintenance of common schools, in each school district, and the purchase of suitable libraries and apparatus therefor. (2) The residue shall be appropriated to the support and maintenance of academies and normal schools, and suitable libraries and apparatus therefor.”); *see also, e.g.*, Campbell Cty. Sch. Dist. v. State, 907 P.2d 1238, 1279 (Wyo. 1995) (finding that public school districts in Wyoming were not meeting the state constitution’s requirement of a “complete and uniform system of public instruction” because the state’s school funding system was unconstitutional on both adequacy and equity grounds, the Wyoming Supreme Court ordered state legislature to fund districts at the level they deemed explicitly to be the cost of a “quality” and “proper” education).

244. *Education as an American Right?*, *supra* note 165.

245. *See* Liu, *supra* note 41, at 332 (describing the increase in education adequacy claims made in state courts and the courts’ receptiveness to hearing those claims); *see also Education as an American Right?*, *supra* note 165 (“[S]tate courts have often been willing to address funding disparities among school districts . . .”).

246. *Education as an American Right?*, *supra* note 165.

247. Liu, *supra* note 41, at 333.

248. *Id.*

249. *Education as an American Right?*, *supra* note 165.

250. *See* Liu, *supra* note 41, at 332–33 (describing the need for a national approach to ensure equal access to education as the current state by state approach has still left disparities between states).

251. *Id.* at 338 (citing Sager, *see supra*, note 215).

252. *See id.* at 333.

Executive and Legislative levels.²⁵³ The Tenth Amendment does not authorize the federal government to regulate public education directly.²⁵⁴ However, Congress can exact indirect control over public education by asserting its Constitutional spending authority: in exchange for federal funding, local and state school boards must often comply with federal education laws.²⁵⁵ In this way, Congress has enacted statutory national education rights for particular groups of students.²⁵⁶

Beyond the Individuals with Disabilities Education Act (“IDEA”),²⁵⁷ perhaps the most known of these federal education laws is the No Child Left Behind Act (“NCLB”) of 2001.²⁵⁸ Championed by President George W. Bush to increase the academic achievement of underserved students, NCLB amended and reauthorized the Elementary and Secondary Education Act of 1965 (“ESEA”), which President Lyndon B. Johnson had passed in at-the-time unprecedented federal efforts to promote accountability in public education.²⁵⁹ Where ESEA encouraged educational accountability with a novel focus on “research-based assessment” of student achievement,²⁶⁰ NCLB expanded Executive control over public education and cast the federal government as something like an overseer of schools’ accountability for student outcomes.²⁶¹ President Obama signed the Every Student Succeeds Act (ESSA) in 2015 to reauthorize ESEA and scale back federal regulation over public education.²⁶² ESSA amended federal accountability systems and

253. *See id.* at 330 (“Despite the persistence of this inequality and its disparate impact on minority students, the problem draws little policy attention.”); *see also id.* at 334 (“The lack of policy attention to this problem mirrors the absence of legal theory that treats the national distribution of educational opportunity as a matter of constitutional concern.”).

254. 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.”).

255. *See Education as an American Right?*, *supra* note 165 (citing, for example, the Every Student Succeeds Act (“ESSA”), the Individuals with Disabilities Education Act (“IDEA”), and Title IX of the Civil Rights Act).

256. *Id.* (“For example, both the Individuals with Disabilities Education Act and the McKinney-Vento Homeless Assistance Act provide students within their protection (i.e. students with disabilities and homeless students) a federal right to an appropriate education.”).

257. Individuals with Disabilities Education Act, 20 U.S.C. § 1400 (2012).

258. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115, Stat. 1425.

259. *Federal Education Policy Over the Years*, ACT, <http://www.act.org/content/act/en/products-and-services/the-act-educator/states-and-districts/federal-education-policy-history.html> [<https://perma.cc/PWD5-MBPV>] (last visited Sept. 5, 2019). President Johnson believed that “full educational opportunity” should be the “first national goal.” *Every Student Succeeds Act (ESSA)*, U.S. DEP’T OF EDUC., <https://www.ed.gov/essa> [<https://perma.cc/Q5LZ-PDNW>] (last visited Sept. 5, 2019).

260. ACT, *supra* note 259.

261. *See* Alyson Klein, *No Child Left Behind: An Overview*, EDUCATION WEEK (Apr. 10, 2015), <https://www.edweek.org/ew/section/multimedia/no-child-left-behind-overview-definition-summary.html> [<https://perma.cc/R5ZY-ALYS>].

262. U.S. DEP’T OF EDUC., *supra* note 259 (“[O]ver time, NCLB’s prescriptive requirements became increasingly unworkable for schools and educators. Recognizing this fact, in 2010, the Obama administration joined a call from educators and families to create a better law that focused on the clear goal of fully preparing all students for success in college and careers.”).

granted states increased flexibility with regard to specific NCLB requirements “in exchange for rigorous and comprehensive state-developed plans designed to close achievement gaps, increase equity, improve the quality of instruction, and increase outcomes for all students.”²⁶³

What have such federal grabs for control over public education by exacting these national policies accomplished, when at the same time the federal government has advanced the growing “new federalism”²⁶⁴ model by incentivizing states individually, positioning them with power, and at times “expressly permit[ting them] to decide what its students should learn and how well they should learn it?”²⁶⁵ According to Justice Liu: “virtually nothing to ensure adequacy or equality of opportunity according to a national standard.”²⁶⁶ The federal government has defined the scope of the country’s commitment to educational equality as a system wherein states are at the helm of a problem they are, practically speaking, unable to control, because the largest aspect of the problem—inter-state disparity—is one over which they have no jurisdiction.²⁶⁷ As the racialized illiteracy crisis rages on in public schools across America, the need for a federal strategy to advance a national goal of functional literacy becomes clear.

III.

BEATING THE DEAD HORSE WITH A NEW SWITCH: GARY B. REIMAGINES THE EQUAL PROTECTION APPROACH

This Part sets the stage for the legal strategy this Article proposes: establish a fundamental right of access to functional literacy through the Citizenship Clause, as a means of advancing a national goal of equal educational adequacy and opportunity. I turn to *Gary B. v. Snyder*,²⁶⁸ wherein plaintiffs who attend or attended public schools in Detroit allege the deprivation of a fundamental right under the Fourteenth Amendment’s Due Process Clause—“access to the most basic building block of education: literacy,”²⁶⁹ and disparate treatment on the basis of their race under the Fourteenth Amendment’s Equal Protection Clause, against the State of Michigan.²⁷⁰ Because the federal judiciary has refrained from exercising the full scope of constitutional norms under the Fourteenth Amendment²⁷¹ throughout the first two waves of the Equal Protection Clause approach to establish fundamental

263. *Id.*

264. Sykes, *supra* note 169.

265. Liu, *supra* note 41, at 333.

266. *Id.*

267. *See id.*

268. *Gary B. v. Snyder*, 329 F. Supp. 3d 344 (E.D. Mich. 2018).

269. Complaint at 1, *Gary B.*, 329 F. Supp. 3d 334 (No. 16-CV-13292).

270. *See id.* at 119–20.

271. *See* Liu, *supra* note 41, at 405–06 (“The point is not that these specific limitations mark substantive constitutional boundaries. Rather, these limitations—plus the fact that state compliance with federal education policy is generally voluntary—indicate that respect for state prerogatives constrains the national policymaking process. . . .”).

education rights, I call attention to *Gary B.* not because of its Equal Protection strategy but because of its novel shift from prior case law in both venue and the specific right it sets out to establish. Namely, *Gary B.* is the first federal case in the nation to “seek to vindicate the right of all students to access to [sic] literacy, no matter their zip code.”²⁷² While the U.S. District Court for the Eastern District of Michigan Southern Division granted the State’s motion to dismiss the complaint in July 2018,²⁷³ the case could very well render new stakes for the Equal Protection Clause, public education in America, and the role of the federal government when the Sixth Circuit Court of Appeals hears the currently pending appeal.

In *Gary B.*, plaintiffs contend that “decades of State disinvestment in and deliberate indifference to Detroit schools have denied schoolchildren plaintiffs access to the most basic building block of education: literacy,” which is the “core component in the American tradition of education” and “fundamental to participation in public and private life.”²⁷⁴ Plaintiffs’ complaint defines 21st century *functional literacy* and its stakes for the first time in federal jurisprudence,²⁷⁵ just as Part I of this Article does. For the almost exclusively low-income, predominantly of-color student bodies in plaintiffs’ “slum-like” schools, “illiteracy is the norm.”²⁷⁶ The “abject failure” of Detroit public schools to deliver adequate access to literacy “makes it nearly impossible for [these] young people to attain the level of literacy necessary to function—much less thrive—in higher education, the workforce, and the activities of democratic citizenship.”²⁷⁷ Plaintiffs thus assert that their schools are “schools in name only.”²⁷⁸ Though plaintiffs’ proffer that these “appalling outcomes”²⁷⁹ are “unprecedented” and “unthinkable in schools serving predominantly White, affluent student populations,”²⁸⁰ the percentages of functionally illiterate students of color in plaintiffs’ schools actually closely parallel the level of functionally illiterate Black students in Madison’s public schools: just 4.2% and 9.5% of third graders demonstrate basic literacy skills at the two elementary-aged plaintiffs’ schools.²⁸¹

Arguing the need to establish and protect access to a basic level of literacy as a fundamental right, plaintiffs rely on *Obergefell v. Hodges*²⁸² to distinguish functional literacy from a mere good or a service and to suggest that illiteracy is a

272. RIGHT TO LITERACY DETROIT, <https://www.detroit-accessstoliteracy.org/> [https://perma.cc/C6RH-JXPV] (last visited Sept. 7, 2019).

273. See *Gary B.*, 329 F. Supp. 3d at 369.

274. Complaint at 1, *Gary B.*, 329 F. Supp. 3d 334 (No. 16-CV-13292).

275. *Id.* at 1–4.

276. *Id.* at 1.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* at 2.

281. *Id.* at 5.

282. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

social and economic ill of the ilk for which the Constitution should provide judicial remedy.²⁸³ Specifically, plaintiffs contend that illiteracy “demeans” and “stigmatizes” those from whom it deprives liberty, delivers the illiterate to social and economic instability, and “lock[s] them out of valuable social and political institutions, from State academies of higher learning, to the marketplace of ideas, to the very texts that undergird our constitutional democracy.”²⁸⁴

Finding that plaintiffs failed to state a claim for relief based on the Equal Protection Clause, the district court thus did not confront this claim directly and ultimately granted the State’s motion to dismiss the case in July 2018.²⁸⁵ However, because the court found that “a plaintiff who alleges a violation of his right to due process states a legally protected interest, and Plaintiffs have done so here,”²⁸⁶ the response to plaintiffs’ Due Process claim required more analysis. Finding no dispositive Supreme Court precedent for the present question of whether access to literacy is a fundamental right,²⁸⁷ the court rejected defendants’ argument that “the right to literacy—or the right of *access* to literacy is foreclosed by the Supreme Court’s pronouncements that education is not a fundamental right.”²⁸⁸ The court specifically named the novel aspects of *Gary B.* that critically distinguish its question: (a) the right alleged, “access to literacy,” is “a distinct concept from the bare right to education or the right to an equally funded education” and (b) plaintiffs do not challenge the State’s laws or educational funding scheme or structure—for the laws are valid, the authority of school officials is valid, and the school attendance is compulsory—yet they “are not given any meaningful education at all.”²⁸⁹ The court deemed this complete deprivation of meaningful education, as alleged, “nothing short of devastating,” for “[w]hen a child who could be taught to read goes untaught, the child suffers a lasting injury—and so does society,” yet did not find this enough to trigger relief for plaintiffs under the Due Process Clause.²⁹⁰ Ultimately, the court left open *Gary B.*’s discrete question of whether access to literacy is a fundamental right for the Supreme Court and in fact encouraged the Supreme Court to answer it by stating: “[t]he Court must therefore cautiously take up the task.”²⁹¹

283. *Gary B.*, 329 F. Supp. 3d at 365.

284. *Id.* (citing Plaintiff’s court filing, quoting *Obergefell*, 135 S. Ct. at 2601–02 (alterations adopted and quotation marks omitted)).

285. *Id.* at 368–69.

286. *Id.* at 355.

287. *Id.* at 361.

288. *Id.*

289. *Id.* at 361–62.

290. *Id.* at 366.

291. *Id.* at 363.

IV.

A FUNDAMENTAL RIGHT OF ACCESS TO FUNCTIONAL LITERACY UNDER THE
CITIZENSHIP CLAUSE

*[W]hy are we talking about beating the odds when it comes to these children? We should be talking about changing the odds for them. – Kavitha Cardoza*²⁹²

*That [public schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes. – Justice Robert Jackson*²⁹³

Harnessing the federal potential of the open Equal Protection question in *Gary B.*²⁹⁴ and innovating a new path for the Court to reach an answer should the Equal Protection approach continue to fail, this Part proposes establishing a fundamental right of access to functional literacy through the Citizenship Clause. First, I discuss how the drafters of the Fourteenth Amendment understood “national citizenship” and the implicit notions of access and equality within it. Evaluating the social-temporal evolution of this definition shows that the nation’s interpretation of *what* national citizenship entails has remained consistent since the ratification of the Fourteenth Amendment, but its understanding of *who* can access national citizenship and its substantive rights has changed. Based on this conceptual groundwork, this Part then asserts that access to functional literacy is a substantive right of national citizenship that, albeit non-enumerated, is consistent with the framers’ conceptions of effective national citizenship. Functional literacy enables one to unlock the substantive rights of national citizenship and thus to assert one’s national citizenship effectively. That is, functional literacy enables one to participate meaningfully in American democratic society. Thus, this Part ends by arguing that the federal government has a constitutional duty to do more than the “virtually nothing”²⁹⁵ it is currently doing to protect the right of all American citizens of adequate access to functional literacy. Specifically, coupled with Section 5 of the Fourteenth Amendment, the Citizenship Clause obliges Congress to exercise its “power to enforce, by appropriate legislation”²⁹⁶ this right for all American citizens, including Black men in states across the country whose national citizenship is currently and systematically abridged by the racialized illiteracy crisis and the illiteracy-to-incarceration pipeline.

292. NPR, *supra* note 37.

293. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

294. *Gary B.*, 329 F. Supp. 3d at 363.

295. Liu, *supra* note 41, at 333.

296. U.S. CONST. amend. XIV, § 5 (“The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.”).

A. National Citizenship: Origins and Substantive Rights

Before this Article advances its argument of adequate access to functional literacy for equal national citizenship, it is necessary to define “national citizenship.” The ratification of the Thirteenth Amendment in 1865 abolished slavery and involuntary servitude in America,²⁹⁷ thus rendering Black Americans a legally recognized population—“whole persons”—for the first time in national history.²⁹⁸ Though the Thirteenth Amendment granted Congress enforcement power to enact the abolition of slavery,²⁹⁹ it left two critical matters unresolved: first, the scope of Congress’s powers to do this enacting; and second, what it meant for Black Americans to be legally recognized.³⁰⁰ Thus, the condition of Black Americans was “without further protection of the Federal government . . . almost as bad as it was before.”³⁰¹ Former Confederate states enacted state laws imposing “onerous disabilities and burdens” on Black Americans and “curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value.”³⁰²

“[Q]uite sure that these new persons [in the postbellum South] would never be allowed to vote,” Republicans feared the passage of the Fourteenth Amendment would enhance the political power of the South—the former Confederate states—by increasing their representation in both the House of Representatives and the Electoral College.³⁰³ Thus, they executed what at least one legal historians considers “a fundamental change in the political order” akin to the First Constitutional Convention in Philadelphia: they proposed the Fourteenth Amendment and simultaneously refused to acknowledge the legitimacy of the former Confederate states, thereby precluding them from the amendment ratification process.³⁰⁴ Excluding the Southern states “was a necessary political condition for the Republicans to gain the two-thirds vote required by Article Five for the proposal of a constitutional amendment.”³⁰⁵

This political strategy enabled the Republicans to prevent the South from gaining political power, as the drafters intentionally created the Fourteenth Amendment to resolve the Thirteenth Amendment’s unanswered questions in a way favorable to them. Specifically, the Republicans drafted the Fourteenth Amendment as (1) a means of establishing Black Americans as people, which the

297. *Id.* amend. XIII, § 1.

298. PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR & REVA B. SIEGEL, *From Reconstruction to the New Deal: 1866–1934*, in PROCESSES OF CONSTITUTIONAL DECISIONMAKING 331, 349 (7th ed. 2018) [hereinafter BREST].

299. U.S. CONST. amend. XIII, § 2.

300. *See* BREST, *supra* note 298, at 350.

301. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 70 (1872).

302. *Id.*

303. BREST, *supra* note 298.

304. *Id.* at 350.

305. Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 503 (1989).

Dred Scott decision first made necessary; (2) an explicit grant of national citizenship to Black Americans as a birthright or natural right; and (3) a guarantee of equal civil rights to Black Americans who constituted national citizens.³⁰⁶ The Citizenship Clause thus states: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.”³⁰⁷ The Section continues with the Privileges and Immunities Clause: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States”³⁰⁸ and, as explored in Part II of this Article, also includes the language of Equal Protection.

The origins of this Amendment—and particularly of the Citizenship Clause within it—reveal four key insights about how the drafters conceptualized national citizenship. First, expressly extending national citizenship status to Black Americans whom the Thirteenth Amendment had already recognized as a legal, non-slave/non-involuntary servant class, the drafters delineated a difference between having a status as a person in a legally free class and having national citizenship: the latter means something more. While “[a] citizen of the United States is held by the courts to be a person who was born within the limits of the United States and subject to their laws,”³⁰⁹ national citizenship extends beyond this. Second, the drafters then named the ‘something more’ that national citizenship means—codified it, in fact—by marrying national citizenship with a guarantee of civil rights. Inherent in constitutionally protected national citizenship, then, are rights attendant to national citizenship: substantive citizenship rights—that which makes citizenship effective and having status as a legally free person mean something more. Third, also inherent in constitutionally protected national citizenship is the equality of these meaningful rights: that each American citizen has the same substantive citizenship rights, or the same scope of and access to meaningful liberty, to eliminate “all class legislation” and the “injustice of subjecting one caste of persons to a code not applicable to another”³¹⁰ still permissible under the Thirteenth Amendment and its grant of legal, non-slave status.

Fourth, these equal and substantive rights of national citizenship prevent such injustice—the separation of legally free persons into disparately treated classes—by serving as the mechanisms by which legally free individuals can participate and have representation in the “code...applicable to [them],” or American government and law.³¹¹ Consequently, the equal and substantive rights of national citizenship are those that uphold what many constitutional drafters and founding fathers of the American democracy considered the “vital principle of free

306. See U.S. CONST. amend. XIV, § 1; see also BREST, *supra* note 298, at 350.

307. *Id.*

308. *Id.*

309. Jacob Howard, Speech Introducing the Fourteenth Amendment (May 23, 1866), in BREST, *supra* note 298, at 339.

310. *Id.* at 341.

311. *Id.*

government, that those who are to be bound by the laws ought to have a voice in making them.”³¹² One such figure, Senator of Michigan and member of the Joint Committee on Reconstruction that drafted the Fourteenth Amendment Jacob Howard, introduced the Amendment to the Senate and spoke of its explicit purpose to codify national citizenship together with the equal and substantive rights that make national citizenship meaningful and effective: “the safety and prosperity of [the] States depend[s] upon . . . not retain[ing] in their midst a race of pariahs, so circumstanced as to be obliged to bear the burdens of Government and to obey its laws without any participation in the enactment of the laws.”³¹³ In sum, the very premise or foundation of national citizenship in America is the absence of circumstances that deprive classes of legally free persons from being able to participate in the democratic government by which they are bound.

As such, the creation and codification of national citizenship endowed value to the legal freedom in America and named this value: the guaranteed rights of national citizens—that to which legally free persons are entitled because they cannot otherwise participate in the American government. Though the drafters of the Fourteenth Amendment enumerated some of these rights, including those already protected as personal rights in other constitutional Amendments like governmental representation,³¹⁴ Senator Howard indicated that the substantive rights of national citizens, “whatever they may be . . . are not and cannot be fully defined in their entire extent and precise nature.”³¹⁵ These “great fundamental guarantees,”³¹⁶ are those that “[i]e] at the basis of all society and without which a people cannot exist except as slaves, subject to a despotism.”³¹⁷ Because of this marriage between personal freedom and national citizenship, the substantive rights of national citizenship require Congress to have the power to give these rights full effect by “carry[ing] out all the principles” underlying them.³¹⁸ In fact, the drafters enumerated this power of Congress as a duty in Section 5 of the Fourteenth Amendment, which “casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the [Fourteenth A]mendment are carried out in good faith.”³¹⁹

B. National Citizenship: Social-Temporal Dimension

Accordingly, this Article understands “national citizenship” as the state of being represented in and a participatory member of one’s society—as a status that necessarily endows a citizen the rights and duties equal to those endowed to all citizens. This understanding is consistent with the formative scholarship of

312. *Id.* at 345 (citing James Madison, Note to His Speech on the Right of Suffrage (1821)).

313. *Id.*

314. U.S. CONST. amend. XIV, § 2.

315. Howard, *supra* note 309, at 340.

316. *Id.* at 341.

317. *Id.* at 342.

318. *Id.* at 341.

319. *Id.* at 342.

English sociologist T.H. Marshall, who first introduced the kind of citizenship that emerged in North America in the eighteenth and nineteenth centuries as a *civil-socio-political status*³²⁰ “bestowed on those who are full members of a community.”³²¹ Crediting Marshall in his 2006 scholarship on national citizenship, Justice Liu asserts that national citizenship means “the condition of being a full member of one’s society, with membership implying an essential degree of equality.”³²² Marshall and Justice Liu extrapolate on the political, civil, and social dimensions of equality implicit to citizenship as intimated by the Fourteenth Amendment’s drafters.³²³ *Social citizenship* encompasses broader “rights of citizenship” that are characterized not only by “equality of legal status” but also by “equality of that other kind of status which is a social fact—namely, one’s rank on a scale defined by degrees of deference or regard.”³²⁴ According to Liu, Marshall deems social citizenship “the right to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society.”³²⁵

This Article understands citizenship like the Fourteenth Amendment’s drafters, Marshall, and Justice Liu: a socially rooted and “evolving concept” that, by virtue of it being an evolving concept, enables “future generations, and . . . Congress acting under Section 5, to develop further [its] privileges and immunities.”³²⁶ National citizenship thus implies not only rights and duties but also the “functionings and capabilities” essential to being regarded as a full member of society.³²⁷ These “functionings and capabilities” change and evolve as society and social standards of civility change. Simply put, national citizenship was created as and remains more than a legal status today: it “means something” because it has a living, social-temporal context.³²⁸ This Article therefore understands “substantive citizenship rights” as those rights encompassed by the national citizenship guarantee that enable the social dimension of national citizenship. These are the rights that give national citizenship meaning beyond free legal status (*liberty*) by permitting national citizens to act as civilized beings according to contemporary social standards (*to participate and be represented in democracy*) and to be seen and

320. Ulrike Davy, *How Human Rights Shape Social Citizenship: On Citizenship and the Understanding of Economic and Social Rights*, 13 WASH. U. GLOBAL STUD. L. REV. 201, 203 (2014); see also Ben Jackson, *T.H. Marshall*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/T-H-Marshall> [<https://perma.cc/RC47-RNPG>] (last visited Oct. 14, 2019).

321. T.H. Marshall, *Citizenship and Social Class* (1950), reprinted in T.H. Marshall & Tom Bottomore, *Citizenship and Social Class* 2, 18 (1992).

322. Liu, *supra* note 41, at 342.

323. *Id.* at 341–42.

324. *Id.* (quoting Kenneth L. Karst, *The Supreme Court 1976 Term Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 5–6 (1977)).

325. *Id.* (quoting MARSHALL, *supra* note 321, at 8).

326. *Id.* at 357.

327. *Id.* at 342.

328. *Id.* at 357–58.

treated as civilized beings in contemporary society (*to be allowed to participate and be represented in democracy*).³²⁹

C. Rendering Sense out of The Slaughterhouse Cases

Of course, the *Slaughter-House Cases* conflict with this understanding of national citizenship and its substantive rights. In the infamous 1872 decision, the Supreme Court ruled that the “privileges and immunities” protected for and guaranteed to national citizens were limited to “those rights” that are “fundamental” and thus enumerated in the Federal Constitution.³³⁰ The Court based this ruling on how the Circuit Court for the Eastern District of Pennsylvania defined “privileges and immunities” in the 1823 case *Corfield v. Coryell*:

The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, *fundamental*; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.³³¹

Yet the *Slaughter-House Cases* “proved to be more important as a historical snapshot than as a lasting court decision.”³³² The Court’s majority ultimately adopted Justice Field’s dissenting opinion “that the Fourteenth Amendment protects the fundamental rights and liberties of all citizens against state interference.”³³³ Further, I suggest there may be infinite interpretive possibility in the

329. See generally *id.* at 342.

330. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 76 (1872).

331. *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230) (emphasis added).

332. Alex McBride, *Slaughterhouse Cases (1873)*, THIRTEEN: MEDIA WITH IMPACT, https://www.thirteen.org/wnet/supremecourt/antebellum/landmark_slaughterhouse.html [<https://perma.cc/KB2N-B5SV>] (last visited Sept. 6, 2019).

333. *Id.* Justice Field’s dissent in the *Slaughter-House Cases* and the analogous broad interpretations of the Fourteenth Amendment he espoused in other early opinions took hold with the Court’s majority in *Barbier v. Connolly*, 113 U.S. 27 (1885) and *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Thomas H. Burrell, *Justice Stephen Field’s Expansion of the Fourteenth Amendment: From the Safeguards of Federalism to a State of Judicial Hegemony*, 43 GONZ. L. REV. 77, 82 (2007).

“general head[.] . . . to pursue and obtain happiness and safety.”³³⁴ This Article thus joins the host of legal scholars and subsequent case law that rejects the initial *Slaughter-House Cases* majority as precedential and binding.

D. Access to Functional Literacy as a Substantive Right of National Citizenship and Congress’s Enforcement Duty

This Article argues that access to functional literacy is a part of equal, national citizenship on the basis that America’s racialized illiteracy crisis precludes Black men from meaningful and effective national citizenship. The crux of this argument is that the racialized illiteracy crisis prevents Black men from participation and representation in American democratic society in myriad ways, particularly by funneling them into correctional facilities at mass and disparate rates.³³⁵ Access to functional literacy, the “most fundamental educational building block,”³³⁶ is the floor—the minimal level of education—that citizens need to be able to access their meaningful national citizenship through representation and participation in the democratic American government; where the Supreme Court in *Rodriguez* recognized that there may be “some identifiable quantum of education [that] is a constitutionally protected prerequisite to the meaningful exercise of [other rights],”³³⁷ this penultimate Part argues that access to functional literacy is, in fact, that ‘identifiable quantum.’ For, as previous legal scholarship argues:

[A] basic level of access to literacy is one such prerequisite to the meaningful exercise of constitutional rights, including but not limited to voting, freedom of the press, interstate travel, and notice of criminal conduct. The necessary level of literacy required as a prerequisite to exercise such rights is not an amorphous or unattainable concept. Over the past 40 years, academic research has developed effective, widely accepted literacy assessments, as well as measures of the literacy levels required to engage in certain activities.³³⁸

The intersection of the Court’s recognition in *Rodriguez*, together with its analysis in *Brown* and *Plyler*, grounds this Article’s argument that access to functional literacy is a substantive right of national citizenship, and can be measured as such—a measurement plaintiffs in *Rodriguez* and progeny never attempted to

334. *Corfield*, 6 F. Cas. at 551–52.

335. See generally Mary M. Prosser & Shannon Toole, *Wisconsin’s Mass & Disparate Incarceration*, WISCONSIN LAWYER, Apr. 2018, <https://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=91&Issue=4&ArticleID=26275> [<https://perma.cc/UC3N-VMWK>].

336. *The Lawsuit*, *supra* note 36.

337. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36 (1973).

338. Brief for Kappa Delta Pi, the International Literacy Association & the National Association for Multicultural Education as Amici Curiae at 10, *Gary B. v. Snyder*, 329 F. Supp. 3d 344 (E.D. Mich. 2018) (No. 16-CV-13292).

identify.³³⁹ But the Court's discussion of the rights that functional literacy permits and encompasses in *Brown* and *Plyler* compels the interpretation that this basic level of literacy should meet the Court's proffered "some identifiable quantum"³⁴⁰ standard. In *Brown*, the Court described education as "required in performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship"³⁴¹; in *Plyler*, the Court deemed illiteracy "an ensuring disability" and a lifelong "handicap" that bars individuals from "be[ing] self-reliant and self-sufficient participants in society."³⁴² The *Plyler* Court further distinguished literacy from education by defining illiteracy, in particular, as a "stigma" forever born by the illiterate.³⁴³ Moreover, where the *Plyler* Court did not recognize a fundamental right to education, it held that "more [was] involved"³⁴⁴ in its inquiry because plaintiffs faced "depriv[ation] of a basic education"³⁴⁵ specifically because of their membership in a "discrete class"—a class "of children not accountable for their disabling status" for whom "[t]he stigma of illiteracy will mark them for the rest of their lives."³⁴⁶ The Court said: "[b]y denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation."³⁴⁷

Do young Black students in America's public schools today, a "discrete class,"³⁴⁸ not also face near certain "depriv[ation] . . . of a basic education"—of the minimum level of literacy that permits "participa[tion] in society"—because they are members of this discrete class?³⁴⁹ Or are we willing to state that 91.6% of Black fourth graders in Madison's public schools and others around the country are "accountable for their disabling status"³⁵⁰ as illiterate—that unlike the *Plyler* students, young Black students are just largely and inherently incapable of functional literacy?³⁵¹ Is "more [not also] "involved,"³⁵² then, in establishing and ensuring adequate access to the minimum floor of basic education—functional literacy—the denial of which "foreclose[s] any realistic possibility that" this discrete

339. *Rodriguez*, 411 U.S. at 36; see also *Papasan v. Allain*, 478 U.S. 265, 284 (1986).

340. *Rodriguez*, 411 U.S. at 36.

341. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

342. *Plyler v. Doe*, 457 U.S. 202, 222 (1982) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)).

343. *Id.* at 223.

344. *Id.*

345. *Id.* at 222.

346. *Id.* at 223.

347. *Id.*

348. *Id.*

349. *Id.* at 222.

350. *Id.* at 223.

351. FOUND. FOR CHILD DEV., *AMERICA'S VANISHING POTENTIAL: THE CASE FOR PREK-3RD EDUCATION 4* (2008) ("Our children are not failing to learn. Our schools are failing to teach them effectively.").

352. *Plyler v. Doe*, 457 U.S. 202, 223 (1982).

class “will contribute in even the smallest way to the progress of our Nation?”³⁵³ Systemically depriving young Black students of adequate access to the most basic level of education, America’s racialized illiteracy crisis deprives, too, their “ability to live within the structure of our civic institutions”—most literally, and particularly for Black boys, through incarceration.³⁵⁴ Where substantive citizenship rights are the “functionings and capabilities” that allow citizenship to mean something, to have practical effects in the American democracy as society evolves,³⁵⁵ then these rights include access to 21st century functional literacy³⁵⁶—the level of education that allows one to unlock the skill-sets that alleviate the link to incarceration. For in prison, and when disenfranchised from voting and political processes, a person’s social dimension of national citizenship is void; their citizenship no longer means something because they are no longer represented in or able to participate in the American democracy. Rather, they are merely “subject to a despotism.”³⁵⁷

As such, the racialized illiteracy crisis and the mass and disparate impact of the illiteracy-to-incarceration pipeline on young Black boys nationwide trigger a Congressional duty to “secure the full membership, effective participation, and equal dignity of all citizens in the national community.”³⁵⁸ Congress must protect and uphold access to functional literacy as a substantive, fundamental federal right guaranteed to all American citizens. This Article’s legal strategy for federal accountability to ensure equal and adequate literacy instruction and opportunity for equal citizenship represents innovative potential to advance a national goal of functional literacy.³⁵⁹

V.

CONCLUSION: YOUR MOVE, MADISON

*We need to work toward keeping children behind books, not bars. – Kadjata Bah*³⁶⁰

353. *Id.*

354. *Id.*

355. Liu, *supra* note 41, at 342.

356. *Id.*

357. See Howard, *supra* note 309, at 342.

358. Liu, *supra* note 41.

359. See generally *Education as an American Right?*, *supra* note 165 (“In past decades, both [the First Amendment and Equal Protection Clause] arguments were raised to the U.S. Supreme Court and did not prevail. However, in addition to protecting due process and ensuring equal protection, the 14th Amendment also guarantees the rights of citizenship. It may be plausible, then, to argue that since individuals need a minimal level of education to be effective citizens, this level of educational opportunity should be recognized as a federal right.”).

360. Kadjata Bah, *Restorative Justice Alternatives Will Keep Kids in the Classroom*, SIMPSON STREET FREE PRESS, <http://www.simpsonstreetfreepress.org/editorial/restorative-justice-editorial> [https://perma.cc/9F82-T5BV] (last visited Sept. 19, 2019) (Kadjata is an eighth-grade student in a Madison public school and a youth reporter for *Simpson Street Free Press*).

While the Constitution afforded Dred Scott no national citizenship when the Court denied his freedom in 1857, the ratification of the Fourteenth Amendment eliminated Chief Justice Taney's justification for finding that "neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were . . . a part of the people, nor intended to be included in the [Declaration of Independence]" and thus, the Court's finding that Black Americans have "no rights which the White man [i]s bound to respect."³⁶¹ The Citizenship Clause's guarantee of equal, national citizenship renders the "reduc[tion of Black men] to slave[s]," to non-citizen subjects, no longer "lawful[.]"³⁶² Yet today, more than 150 years later, Black men in America continue to be denied meaningful national citizenship through deprivation of the substantive rights that make national citizenship effective. Public schools across America are failing to provide adequate access to functional literacy instruction at such staggering rates that we cannot build prisons big enough or quickly enough to accommodate our incarcerated populations.³⁶³

In cities like Madison, the status quo's rhetoric of equity and inclusion fosters popular perception that all students have adequate access to basic educational opportunity, while daily practices in the city's institutions continue reinforcing racial hierarchies.³⁶⁴ Why did the use of the n-word by a White teacher in Madison in 2018 cause public outcry, "a no-tolerance policy on the use of racial slurs," and the teacher's resignation,³⁶⁵ when the district's practice of failing to provide adequate functional literacy instruction to Black fourth graders en masse has continued for over a decade without inciting real change? Why does the teacher's use of the n-word spur "restorative circles" for students "to process thoughts and feelings," when the district's history of skyrocketing Black boys' lifetime likelihoods of incarceration incites only the former-Superintendent's statement that "it's important to recognize the progress we have made, which is substantial?"³⁶⁶

361. Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857).

362. *Id.*

363. See Prosser & Toole, *supra* note 335 ("After a modest decline in the prison population since its peak in 2007, at the end of 2017 Wisconsin was poised to incarcerate more people in its 37 prisons than at any time in its history. Despite having opened 15 prisons since 1990—eight in the 1990s and another seven in the 2000s—plans have been advanced to build again. Wisconsin prisons are well above their design capacity, and the state is increasingly contracting with county jails to hold hundreds of overflow prisoners. Although the Wisconsin Department of Corrections' (DOC) proportion of the general fund budget more than doubled from 1990 to 2016 and now exceeds \$1.2 billion annually, the DOC faces staffing challenges, ballooning costs arising from an increasingly older and sicker population, and calls for programming that it cannot meet with the resources it currently receives.").

364. Lewis & Diamond, *supra* note 68, at 19.

365. Negassi Tesfamichael, *Hamilton Middle School Teacher Who Used N-Word Resigns*, THE CAP TIMES (Nov. 16, 2018), https://madison.com/ct/news/local/education/hamilton-middle-school-teacher-who-used-n-word-resigns/article_7b40d8ef-a483-502f-a566-f8ab6362a680.html [<https://perma.cc/5TGL-766G>].

366. Elbow, *supra* note 13.

Today, in America's 'best city to raise a family,' in a public school district that names "racial equity" and "social justice" among its core values³⁶⁷ and "Black Excellence" among its goals,³⁶⁸ 91.6% of Black fourth graders are functionally illiterate.³⁶⁹ Acknowledging the racialized illiteracy crisis in Madison and the district's racial disparities in school discipline, MMSD School Board President Gloria Reyes contends "that the good work teachers are doing to support the district's anti-racism efforts also should be recognized."³⁷⁰ Consider Michelle Alexander's words:

Rather than rely on race, we use our criminal justice system to label people of color "criminals" and then engage in all the practices we supposedly left behind. Today it is perfectly legal to discriminate against criminals in nearly all the ways that it was once legal to discriminate against African Americans. Once you're labeled a felon, the old forms of discrimination—employment discrimination, housing discrimination, denial of the right to vote, denial of educational opportunity, denial of food stamps and other public benefits, and exclusion from jury service—are suddenly legal. As a criminal, you scarcely have more rights, and arguably less respect, than a black man living in Alabama at the height of Jim Crow. We have not ended racial caste in America; we have merely redesignated it.³⁷¹

But in cities like Madison, "good intentions do not mitigate results."³⁷² The district's position that the "reality" of closing racialized academic achievement gaps is that this "is probably some of the most complex work there is"³⁷³ does not justify not doing this work. In the words of Justice Liu: "Reasonable [actors] may disagree on how best to define and deliver educational adequacy for equal citizenship. But such disagreement, if pursued in good faith and with a determination to act, would be a welcome step forward from the present neglect of this constitutional imperative."³⁷⁴ This good faith process of ensuring adequate access to equal educational opportunity for equal national citizenship will indubitably "reflect socially situated judgments about the prerequisites of equal citizenship in the contemporary life of the nation."³⁷⁵ Thus, this Article concludes with a rewriting of Alexander's elegy and extends it instructively not just to Madison, but to best-of cities, worst-of cities, and all other cities in between:

367. MADISON METROPOLITAN SCHOOL DISTRICT, *supra* note 34.

368. *Id.* at 5.

369. *See* Elbow, *supra* note 13.

370. Wroge, *supra* note 88.

371. ALEXANDER, *supra* note 42.

372. LEWIS & DIAMOND, *supra* note 68, at xix.

373. Elbow, *supra* note 13.

374. Liu, *supra* note 41, at 338.

375. *Id.*

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Rather than rely on race, we use *our public education* system to label *young Black boys* “*subjects*” rather than “*citizens*” and then engage in all the practices we supposedly left behind. Today it is perfectly legal to discriminate against *functionally illiterate Black men* in nearly all the ways that it was once legal to discriminate against African Americans. Once you’re a *functionally illiterate Black man*, the old forms of discrimination—employment discrimination, housing discrimination, denial of educational opportunity, *and inclusion in a class far more likely than any other to be stripped of freedom, involuntarily shackled, and confined*—are suddenly legal. As a *functionally illiterate Black man in the age of the mass and disparate illiteracy-to-incarceration pipeline*, you scarcely have more rights, and arguably less respect, than a [B]lack man living in Alabama at the height of Jim Crow. We have not ended racial caste in America; we have merely redesignated it.