Expanding the Scholastic Circle of Belonging

To Realize the Citizenship Promise of the Nation

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This paper argues that the “privileges and immunities” clause of the Fourteenth Amendment of the United States Constitution creates an affirmative obligation to improve our nation’s public schools in order to realize the citizenship rights of those most vulnerable to racism and bias: Black youth. It posits that citizens are those that are both included and empowered, and that Black youth, excluded and disempowered due to widespread perceptions that they are incapable and dangerous, are deprived of that citizenship. Finally, it suggests legal pathways for improving our schools to expand citizenship, and provide Black youth with the opportunities they deserve to belong within and contribute to our society.

INTRODUCTION—BIAS AT BOTH ENDS

On a sunny afternoon in Cambridge, Massachusetts, on a tree-lined, residential street with million dollar houses, a well-groomed Harvard Professor arrives home from a business trip to China. He unlocks the door, but its wooden contours stubbornly adhere to the enclosing frame. With the help of his cab driver, he shoves it out of its obdurate state and enters his foyer to find everything, save the darn door, just as it ought to be.

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Mere minutes pass before multiple police officers descend upon his home. One bangs on the door demanding he open up. He opens the door, baffled. The officer is unconvinced the professor lives there, and questions his presence in his own home. The professor, recognizing the need to deescalate the situation, shows forms of identification that include his address and credentials him as a Harvard University Professor.

This should be the end of the story.

But this professor is Black. He is cuffed, paraded out of his own home, driven in a squad car, booked, searched, and jailed.

The individual I am referring to is Henry Louise Gates, Jr.: renowned scholar and historian, recipient of over fifty honorary degrees, a MacArthur Genius award winner, producer of many PBS documentaries, and not simply a Harvard professor, but the Director of Harvard’s W. E. B. Du Bois Institute for African and African American Research.¹

How does an individual of his stature find himself jailed when he has not broken the law?²

In an interview about the incident, Gates himself explained: “we all . . . ‘are

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rerecovering racists. In America there is institutional racism that we all inherit and participate in, like breathing the air in this room.

Gates’ allusion to “breathing the air” hits the mark, as an impressive array of cognitive science and implicit bias research demonstrates that we internalize racist attitudes simply by living in today’s society. And anecdotes like that of Gates remind that Blacks, regardless of social standing, are vulnerable to the perils of prejudice.

But one has to wonder, if those African Americans at the top—like a tenured professor at an elite institution—are not immune, what lays in wait for those Blacks with far fewer privileges and protections? As Mari Matsuda, a critical race scholar, reminds, we have a duty to understand and tell the stories of those who are voiceless—to “look to the bottom” rather than feeling satisfied to understand the phenomena that are most apparent. This is an article about what is happening to, and what we owe, those most vulnerable to chaos of bias—young, poor African American boys in failing public schools. And as argued below, despite the promise of our nation’s schools, meaning both their pledge to provide an education to all and their potential to do so, Black boys...
remain second class citizens. This second class citizenship carries them from school to prison, and persuades peers of all races to accept the first myth of American social hierarchy—that Blacks are worth less, if not worthless.

In our hearts, we know there is something terribly wrong with this picture—that it is not American for there to be two classes of citizenship—and that something must be done. But by who? Gates provides a powerful answer: “America is the greatest nation ever founded. The ideals are the greatest ever espoused in human history, and we just need the country to live up to them.”

This paper argues that our very Constitution, and specifically the “privileges and immunities” clause of the Fourteenth Amendment, created an affirmative obligation to, as Gates put it, live up to our nation’s ideals, and ensure that Americans of all races celebrate meaningful citizenship. The first section of the paper defines meaningful citizenship as the nexus between belonging and freedom that empowers citizens to contribute to society. The second shows how Black youth are robbed of their citizenship rights by stigmas, biases, and prejudices. Section three posits that no institution is more central to the preclusion or expansion of citizenship than public schools. Section four highlights the unfortunate historical backsliding of citizenship rights in society and schools. Section five suggests a new social and legal strategy for reversing the trend and expanding citizenship by improving schools. Finally, the paper concludes by describing school policies plaintiffs might highlight in suits to compel governments to make our schools places where all children feel the sense of belonging and freedom implied by their citizenship.

II. CITIZENSHIP AND THE CIRCLE OF BELONGING

When Henry Louis Gates was taken, without committing a crime, from his own home to a local jail, he might have balked, “I’m an American citizen—I have rights.” In many contexts, Americans who have been treated with disrespect or as outsiders have invoked their citizenship. When Marc Anthony, a Puerto Rican born singer, responded to criticism that he was not an appropriate choice to sing God Bless America at the 2013 Major League Baseball All Star Game, he rebuked “I’m an American!” When Abeer Abdalla, an up and coming DC leader, responded to a lifetime of being treated as an outsider due to her Arab heritage, she titled her piece “I’m an American,

productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.” Plyler v. Doe 457 U.S. 202, 221 (1981).


too.”

And when the AdCouncil launched a campaign to unite the country after 9/11, and discourage acts of violence, disrespect, and exclusion aimed at fellow citizens, the ad portrayed individuals seemingly representing all manner of geographies, races, and walks of life saying one simple phrase: “I am an American.”

These individuals were not simply alleging that they had government identification—they were describing their belongingness to a community, their right to inclusive treatment, and, in the case of Marc Anthony and Abeer Abdalla, their desire and even right to contribute to that community. A conception of citizenship centered solely around government benefits misses this element of what it means to claim one’s identity as “an American.” The foregoing section attempts to develop a definition of citizenship that captures the true meaning of that powerful phrase.

As a legal matter, citizenship creates an essential relationship between individuals and the arguably the most powerful force for change on earth: societies. It confers protection from the coercive power of governments (at home and abroad) and opportunities to build ourselves up and create change—to nurture and be nurtured. And it is the only identity we have that creates the powerful bond to societies. As Paul Barry Clarke explained, “One may partially be a man, a woman . . . a mother, a father, a child, a brother, a sister, a member of an ethnic group, a religious group or a national group . . . [or] a citizen. Of all the categories available to humans it is only the latter that is exclusively, solely and fully political.”

Still, even as we know it means a great deal, most domestically born individuals rarely stop to consider what it means to be an American. We all recognize that our citizenship confers certain rights to be free from government intervention and obligations to contribute to society. We understand that it even compels our government to provide us with certain benefits that non-citizens cannot hope for. But we also know that citizenship means something more than taxes and social security checks—that underlying the series of benefits and burdens is a social contract carefully wrought and repeatedly emulated.

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Building off of a range of scholarship, this article argues that the form of democratic citizenship that we, in America, created long ago and have long celebrated exists at the nexus between membership and freedom.

**Figure 1: Citizenship at the Nexus of Membership and Freedom**

Membership is a precondition of citizenship. As Michael Walzer explains, membership is the primary good that we distribute to one another in the human community.\(^{15}\) In tribal and modern societies, non-belonging has historically been associated with social death. In contrast, “the state owes something to its [members] simply, without reference to their collective or national identity.”\(^{16}\) Walzer’s description of membership as inverse to non-belonging highlights the essential characteristic of membership—membership is a state of belonging, of being one of the whole. John Powell further explains that because of its essential role in engendering social meaning, “membership is a critical

14. John Greenwald, *The World: A Gift to All Nations*, TIME (July 06, 1987), http://content.time.com/time/magazine/article/0,9171,964901,00.html (writing that at that time of the articles publication, “of the 170 countries that exist today, more than 160 have written charters modeled directly or indirectly on the U.S. version.”); but see Adam Liptak, ‘We the People’ Loses Appeal With People Around the World, NEW YORK TIMES, February 6, 2012 at A1 (noting that charters around the world are increasingly less likely to emulate the US constitution perhaps due to the its guarantee of relatively few rights and our Court’s adherence to an originalist frame that may not be relevant to the modern concerns of new countries) (quoting David Law and Mila Versteeg, *The Declining Influence of the United States Constitution*, 87(3) N.Y.U. L. REV., 762 (June 2012)).


16. *Id.* at 43.
component to citizenship.” In other words, one’s status as a “member” is essential to positioning an individual as being worthy of garnering the benefits of citizenship. Echoing this sentiment, British social theorist T.H. Marshall explained that “Citizenship is a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed.” Thus, to Marshall, one must become a member before they can become a citizen, and when they are members in the deepest sense of the word, they are citizens like any other. Taking these theorists together, the status of membership is a necessary to the acquisition of citizenship. It provides a sense of belonging—that an individual is incorporated into and may receive benefits from the social whole.

But citizenship represents a two way relationship between the governing and the governed and must involve more than simple belonging and resource acquisition. Amartya Sen describes one definition of this other facet by arguing that one element of citizenship is “freedom,” which he defines as a people’s ability to “develop their potential and lead productive, creative lives in accord with their needs and interests. The focus is on human choice: “expanding the choices that people have to lead lives they value” by “building human capabilities—the range of things that people can do or be in their lives.”

Echoing the notion that empowerment cannot be realized with membership, and further noting how the two interrelate, Sen argues that one cannot build their future unless they possess the “functionings and capabilities” essential to being regarded by themselves and by others as a full member of society.

John Rawls adds that “[s]ince ancient Greece, both in philosophy and in law,” citizenship has indicated that “a person [may] take part in, or play a role in, social life, and hence . . . can exercise and respect its various rights and duties” and “can be a free and equal participant over a complete life.” Akhil Reed Amar concurs that “independent” citizenship entails a minimum entitlement to property that provides a foundation for productive labor. Thus, central to the notion of the citizen is one who can not only leverage membership to build their capacities, but can, and does, build their capacities in the service of contributing to the social life and economic health of their community.

19. Id. at 976 (describing the wisdom of AMARTYA SEN, DEVELOPMENT AS FREEDOM 3, 87 (1999)).
Thus, joining the two concepts, a citizen is one who is integrated into the community and empowered, encouraged, and expected to contribute to the social whole. In the context of today’s society, all citizens enjoy a basic modicum of freedoms represented by our rights to be free from certain Government intrusion on our lives that would impinge on our ability to choose our own destiny. Most notably, we are entitled to due process before we can be imprisoned or have our property taken, allowing us to continue to chart our pathway without unjust governmental intervention. Moreover, those who are fuller members of the social whole are able to benefit from vast educational and housing benefits, to name a few, that are intended to help them realize their full potential in the service of building the economy and taking on valuable social roles and responsibilities.

On the opposite end of the spectrum, those who are not citizens are those who are not empowered with the potential to contribute because their contributions are so thoroughly undervalued that society chooses not to invest in them. As William Forbath explains, “the most salient border between minimum respect and degradation in today’s class structure falls along the line between those who are recognized by organized society as working and providing a decent living for themselves and their families . . . and those men and women at the bottom of the class hierarchy who are not.” In today’s social context, those who are incarcerated lose their basic freedom to move freely, and eventually lose freedoms to hold jobs, vote, and live in certain

23. “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V. While these protections only apply to the federal government, the identical text of the Fourteenth Amendment applies these provides identical protections against encroachments by state governments. U.S. CONST. amend. XIV § 1.

24. While this is by no means meant to suggest that national educational funding has hit its maximum, the United States spent $638 billion, or $12,743 per pupil, during the 2009-2011 school year. National Center for Education Statistics, FAST FACTS (available at http://nces.ed.gov/fastfacts/display.asp?id=66). In the wealthiest school districts in New York, average per-pupil expenditures were almost three times as high the national average expenditure level, reaching $35,690 in the 2012-2013 school year. Study: Rich N.Y. schools spend 80% more than poor, USA TODAY (Dec. 2, 2013) http://www.usatoday.com/story/news/politics/2013/12/02/new-york-education-spending/3806093/. These are impressive resources available to many members of our society.


For example, according to the American Bar Associations interactive map of collateral consequences of convictions in various states, in California, being convicted of a felony leads to reductions in available rights and freedoms as delineated by one thousand seven hundred and thirty nine separate statutes. Individuals who have been convicted and incarcerated subsequently lose an incredible amount of agency to self-actualize and contribute. The social calculus to rob them of this freedom and membership represents a view that their potential contributions are not worthy of investment when compared against the risks of providing freedom.

II. DISSECTING THE BIAS THAT BISECTS THE CIRCLE OF BELONGING

Unfortunately, as this Article will argue, full citizenship is not equally distributed across social groups, and lesser forms of citizenship are disproportionately experienced by members of certain social groups. This lesser citizenship can and has been conveyed by previous scholars in terms of the rights afforded to and robbed from Blacks. However, the conception of citizenship offered above is broader than rights, and entails belongingness, respect, and empowerment to contribute. Bearing this definition in mind, citizenship is constrained when one is seen as an outsider or as incapable. As described below, a wealth of cognitive and social science research shows that, when it comes to Black youth, such perceptions are rampant.

As John Powell explains, many individuals within our society are considered outside of the “Circle of Human Concern,” and thus both undeserving of psychological “warmth” and belonging, and unfit for the membership and investments conferred on the capable. Based on data from a study by Lasana Harris and Susan Fiske, Powell notes that some groups within our society elicit amygdala and insula reactions in our brains that demonstrate deep disgust and loathing. Harris and Fiske’s research was conducted by utilizing prior research that shows that certain parts of the brain utilize oxygen when we feel various emotions and “light up” in functional Magnetic Resonance Imaging (fMRI) displays. The experiments assessed whether parts of the brain associated with positive and negative feelings “lit up” when individuals looked at images of members of various social groups. From these

tests, Lasana and Fiske concluded that some social groups elicit feelings of warmth, but are not considered competent (such as elderly individuals); some are perceived as competent, but do not elicit warmth (such as wealthy and Jewish individuals); some, like Whites, get both; but that poor Blacks, Muslims, and undocumented immigrants, among others, elicit a “disgust” response that shows that they are perceived as being both incompetent and undeserving of warmth. The same disgust response was also elicited by images of overflowing toilets and vomit.

Figure 2: Despised Groups Outside of the Circle of Human Belonging

As noted, Harris and Fiske recorded disgust at a neurological level, finding that our brains literally react with repulsion to members of certain groups. One might think that we would have some conscious awareness of such a powerful cognitive response. However, research suggests that our neurological reactions and subconscious thoughts escape conscious recognition. Thus, even as we dehumanize whole groups of people we are often consciously unaware of our biases. Moreover, a wave of mind-science research has demonstrated that the warmth/competence reaction is not the only reaction evading conscious awareness, and that other subconscious biases influence both our beliefs about and reactions to Black individuals.

Regarding our beliefs, at a basic level, research has demonstrated that individuals are more likely to associate positive traits and words with White
faces, and negative words and traits with Black faces. In a series of studies in which researchers tested the ease and accuracy with which participants paired Black versus White faces with positive or negative words, multiple researchers found that people of all races have consistent and substantial implicit negative associations of African Americans and that 75% of individuals reveal automatic preferences for White individuals over Black individuals. This research, which utilizes a measure called the Implicit Association Test (IAT), suggests that most of us, at a subconscious level, perceive Blacks as worse than White individuals—where “worse” means more likely to be associated with such intensely negative concepts as “disaster,” “agony,” “hatred,” and “rotten.”

Moreover, bias against African Americans seems to lead to beliefs about Black dangerousness, criminality, and even non-humanity. Regarding dangerousness, an additional IAT study found that Black faces were more easily cognitively paired with weapons than White faces. A similar study found that individuals primed with Black faces were able to more quickly identify a grainy image of a weapon than individuals primed with White faces. In the first of these studies, participants with higher levels of education did demonstrate lower levels of explicit bias. But their higher levels of education and outward conviction to egalitarianism did not impact their implicit association between weapons and Blacks. Similarly, in the race-face/weapon identification study, when individuals had more time to decide whether a grainy image was a weapon, they did not demonstrate bias, but when they were forced to make the decision quickly, bias abounded. The researchers argued that individuals knowingly primed with Black or White faces did not want to seem racist, and thus waited to be sure an item was a weapon before saying it was, but “[s]nap judgments allowed . . . stereotypes to spill out into overt behavioral errors.” The weapon IAT and weapon identification studies together suggest that individuals harbor subconscious associations between Blacks and dangerousness, as represented by dangerous objects. Moreover, these implicit attitudes are both beyond our conscious gaze and beyond our immediate control as simple commitments to fairness or efforts to seem unbiased are inadequate to stem them.

34. BLINDSPOT, supra note 5, at 73.
35. BLINDSPOT, supra note 5, at 43.
36. BLINDSPOT, supra note 5, at 105.
38. BLINDSPOT, supra note 5, at 105.
39. Id.
40. Payne, supra note 37, at 289.
41. Id.
Regarding perceptions of criminality, an experiment by Justin Levinson found that participants subconsciously perceived Blacks to be more violent and crime prone. In this experiment, participants read identical stories about a confrontation that varied only in the name of the protagonist. Participants were more able to recall the protagonist’s aggressive actions, and more apt to misattribute additional aggression to the protagonist, when the protagonist’s name was a stereotypically Black one (Tyrone) than when the name was stereotypically White (William). Surprisingly, participants with lower levels of explicit bias were more likely to showcase biases against Black individuals, suggesting that even individuals committed to racial egalitarianism might be susceptible to biased thinking.

Finally, regarding dehumanization, and perhaps partially explaining why Blacks are more easily associated with danger and aggression, Phillip Goff and associates have found that participants are quicker to identify apes when primed with Black faces than they are when primed with White faces. This suggests that Blacks are so deeply dehumanized at a subconscious level that they are more likely to be connected to animals. Their article also suggests that this dehumanization is no historical coincidence and that in hundreds of news stories published between 1979 and 1999 in the Philadelphia Inquirer, African Americans convicted of capital crimes were about four times more likely than whites convicted of capital crimes to be described with ape-words like “barbaric,” “beast,” “brute,” “savage” and “wild.” In an interview regarding the speed of the ape-Black association, Goff explained his dismay: “The difference between when the black face was primed and when the white face was primed was about six frames, which was about three full seconds. In cognitive terms, where you’re staring at a screen you’re just a few inches from and trying to tell what an object is, three seconds is a profound difference!”

Biases against African Americans also seem to lead to shocking reactions, including feelings of aggression, a willingness to engage in violence, a commitment to harsher punishment, and even prejudiced actions. Regarding aggression, individuals primed with Black faces are more likely to react aggressively than individuals primed with White faces when faced with
frustrating situations (such as being required to repeat a tedious experimental task due to a sudden loss of data). 48

More troublingly, regarding violence, in a number of studies, participants played a video game in which they had to discern the object in an individual’s hand, shooting them if they held a gun, and sparing them if they held a cell phone or other object. Shockingly, participants were faster to shoot Black individuals regardless of what they were holding, and more likely to misidentify the object in the individual’s hand as a gun, and shoot them, if they were Black. 49 This bias was exacerbated as individuals were forced to make their decisions more quickly. 50

Moreover, psychological research and real world experience suggests that subconscious processes can encourage individuals to give harsher sentences to Blacks. In one study, police and probation officers who were subliminally primed with “Black” words, such as “Harlem” or “dreadlocks,” recommended harsher sentences for a race neutral individual than officers in a control. 51 Similarly, two reviews of Florida defendant data found that, even controlling for offense severity and criminal record, defendants with more Afrocentric features received longer prison sentences, 52 and that Black defendants who had more stereotypically Afrocentric features than average were sentenced to death 2.4 times more often than Blacks who had less Afrocentric features. 53 It seems likely, given limited social consciousness about Afrocentric features and the presence of controls, that these differences reflect social biases related to Afrocentric features, and that at least some of that bias was operating below conscious awareness.

Goff, who conducted the previously mentioned ape association studies, also found that when individuals are told an ambiguous story about excessive police brutality, they are more likely to indicate that the police brutality is justified if they are first subconsciously primed with “ape” images and then told the victims of the brutality were Black. 54 This seems to suggest that even in the

50. Id.
54. Id.
face of undue violence, subconscious processes, like the latent African/animal association, can sap empathy for Blacks.

Finally, implicit negative attitudes towards Blacks not only lead to negative mental reactions, but prejudiced behaviors. A meta-analysis reviewing thirty-two studies found that implicit racial bias predicted racially discriminatory behavior—that preferences for Whites led to, for example, voting for John McCain, laughing at racist jokes, and providing less satisfactory medical care to Black patients.55

Taken together, these studies suggest that some Blacks elicit neurological disgust in their fellow citizens; that three in four people more easily associate Blacks with negative concepts like hatred and agony; that many associate Blacks with dangerousness, criminality, and non-humanity; that being primed with images of Blacks leads to aggression, violence, a commitment to harsher punishments; and that negative biases against Blacks leads to actual prejudiced conduct.

Recall that under the definition of citizenship presented above, full citizenship requires both membership and freedom to empower contributions to the social whole.

Given the subconscious attitudes individuals harbor about Blacks—that they are crime prone and even non-human—it is hard to imagine how Blacks could be considered equal members of the social whole. Instead, it appears that, at an automatic, cognitive level, we have already ruled out the notion that many Blacks are deserving of membership based on fears we have that they will commit criminal acts against us. Moreover, at a sub-conscious level, it appears the desire to associate with Blacks as peers is virtually eviscerated by deeply seated conceptions of Blacks as non-human. Finally, it seems that our minds have equated some Blacks, mainly poor Blacks, with objects that make us feel disgust. How can one expect to be treated as an equal, as a peer, as a member, when they elicit the same reaction as vomit or an overflowing toilet? Thus, membership, the precondition for citizenship, seems a pipe dream for many poor Black youth.

Moreover, given the willingness individuals demonstrate to support brutality against, give harsher prison and death sentences to, and even to shoot Black individuals, it is hard to imagine that members of our society, at a subconscious level, views Black as worthy of investments that empower them to contribute. There appears to be an almost intuitive, subconscious, utilitarian calculus related to Blacks—that since they cannot contribute as much to our society, we should not fret as deeply when they are emotionally scarred by police abuse; that since they cannot contribute as fully (and perhaps because they, given their criminal nature, are likely to take from the social whole), we should be more willing to incarcerate them; and that since they cannot

55. BLINDSPOT, supra note 5, at 49-50.
contribute as meaningfully, we should not feel as concerned about avoiding their deaths, even at the hands of the state, or at our own hands.

These are bold and troubling claims, and caring, compassionate people may disagree about the state of our subconscious bias. However, it is hard to disagree with the notion that a wealth of cognitive psychology suggests that Blacks, and Black youth, are not seen as members, and are not seen as being as worthy of investment. How can we overcome these psychological obstacles and ensure Black citizenship?

III. SCHOOLS AND CITIZENSHIP

[T]he public schools [is] a most vital civic institution for the preservation of a democratic system of government . . . [E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests. – Justice Brennan

To separate [Black school children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . . Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racially integrated school system. Chief Justice Earl Warren

As the quotes above demonstrate, the Court has clarified that public schools play a critical role both in ensuring that all individuals acquire the sense of belonging and empowerment necessary to become citizens able to “lead economically productive lives to the benefit of us all,” and in overcoming feelings “of inferiority to their status in the community” and other powerful psychological barriers to contributing.

58. Plyler, 457 U.S. at 221.
A. Zones of Civic and General Empowerment

The conception of public schools as institutions focused on ensuring productive citizenship has persevered since the inception of the public school system. As historians Crenson and Ginsberg explain, “[o]ne of the central purposes behind the creation of public schooling in the United States was to foster good citizenship.”60 This thread between citizenship and education has been drawn repeatedly, with increasing frequency since Brown v. Board of Education, in which Chief Justice Earl Warren explained that public education is “the most important function of state and local governments,” and “the very foundation of good citizenship,” enhancing “the performance of our most basic public responsibilities.”61 Even justices O’Conner and Thomas have echoed these sentiments, describing education as essential to “preparing students for work and citizenship”62 and vital to securing the “civic, political, and personal freedoms conferred by the Fourteenth Amendment.”63

B. Essential Remedies to Social Bias

As mentioned previously, and as demonstrated by the introductory quote from Brown, schools are also essential to overcoming psychological barriers to contributing to society. John Dewey, widely considered the father of modern public education, believed that education could break down “those barriers of class, race, and national territory which [keep] men from perceiving the full import of their activity.”64 Recent research has demonstrated Dewey was right. Integration helps combat implicit negative associations at even the physiological level. White individuals who have experienced previous “out-group” contact are less likely to maintain a state of high stress and anxiety when around individuals of other races.65 Moreover, having just three meetings with an individual of another race can reduce cortisol secretion (i.e. stress reaction) during the fourth meeting.66 This reduction in stress may account for the fact that social interactions with out-group members reduce the process of mental otherization, suggesting that “promoting racially and culturally diverse environments whenever possible, as early as possible, may be the best

60. Matthew A. Crenson and Benjamin Ginsberg, From Popular to Personal Democracy, 92 NAT’L CIV. REV. 173, 177 (2003).
64. JOHN DEWEY, DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION, MACMILLON CO. 101 (1938)
prescription for the development of positive interracial contact experience” for both majority and minority groups.” 67

This applies with great force to schools. American public schools are the pathway to determining the meaning of “citizenship” and “belonging” for the next generation. Obviously other institutions can play a role in determining and expanding citizenship and belonging. However, unlike family units, churches, sports teams, social groups, and all other social institutions, only schools are intended to serve a universal socializing function. American public schools touch a much larger number of children more frequently than any other American institution, reaching over 2/3 of all American children (including non-school aged children) for dozens of hours for dozens of weeks each year. 68 And, unlike other institutions, they are available to help all children, regardless of nation of origin, race, religion, or interests, become members of society.

As a universally socialization institution, public schools can encourage a broadening of the next generation’s “human family” or “in-group” that may encourage empathy to cross stubborn color lines. As John Powell explains, one powerful means of expanding the circle of belonging is to leverage “the concept of interbeing, or Tiep Hien, a concept developed by Thich Nhat Hanh, founder of the Buddhist order of the same name in Vietnam. Built on the notion of non-duality, the claim of interbeing is “I am; therefore you are. You are; therefore I am. We inter-are.” There is no such thing as a disconnected individual, or a non-member, under this inclusive system. Archbishop Desmond Tutu embraced a similar African concept, ubuntu, which emphasizes the relatedness of the human family: “My humanity is caught up, is inextricably bound up, in yours.” 69 Schools provide an opportunity for children to expand the scope of their circle of human belonging and feel that their humanity is bound up in the humanity of other children who may be of different backgrounds. And, as discussed later, psychological research echoes the importance of encouraging children, early and often, to expand the size of their cognitive in-group, as failing to do so may discourage them from empathizing with members of other races at a neurological level. 70

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68. In 2011, there were over 50 million children in K-12 public schools. Back to School Statistics, NATIONAL CENTER FOR EDUCATION STATISTICS, http://nces.ed.gov/fastfacts/display.asp?id=372. In 2011, there were just over 70 million children aged 0-17 in the United States. Childstats.gov, Child Population: Number Of Children (in Millions) Ages 0–17 In The United States By Age, 1950–2012 And Projected 2013–2050 (available at http://childstats.gov/americaschildren/tables/pop1.asp). The rate of students in schools compares to only 40% of families who “regularly go to religious services,” and it is doubtful, given the length of the class day, that any more than a small minority of service-going students spend more time in places of religion than they do in school.


70. BLINDSPOT, supra note 5, at 139.
If schools can help students overcome otherization and broaden their sense of self to incorporate the “other,” it may help the next generation overcome the policy reality identified by Alesian, Glaeser, and Gilens—that, today, negative attitudes about Blacks have created an unwillingness to address poverty or support poverty fighting programs. Views about a racial group should never predict (let alone be exploited to poison) feelings about a social program. An expansion of citizenship in schools may hold the key to ensuring that the next generation views Blacks as possessing the kind of belongingness and capacity to be worthy of social investment.

Obviously other institutions can play a role in determining and expanding citizenship and belonging. However, unlike family units, churches, sports teams, social groups, and all other social institutions, only schools are intended to serve a universal socializing function. American public schools touch a much larger number of children more frequently than any other American institution, reaching over 2/3 of all American children (including non-school aged children) for dozens of hours for dozens of weeks each year. And, unlike other institutions, they are available to help all children, regardless of nation of origin, race, religion, or interests, become members of society.

IV. THE LEGAL CREATION OF THE SECOND CLASS CITIZEN

While this Article has argued that Blacks are still relegated to a form of second class citizenship demanding critical action by schools, one might wonder why more progress has not already been made. In other words, where have the courts been over the past 150 years since emancipation?

A. The Legal Dismantling of the 14th Amendment Right to Integrated Education

Constitutional scholars will note that the 14th amendment was particularly designed to confer citizenship rights to the freed Blacks, promising in section one that “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,” and assuring in section five that “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”

One can imagine that if the Court were to have then adopted the definition of citizenship described above, it would require federal action to ensure that Black citizens could become contributing members of society. It would require education systems that prepared Blacks to become integrated members of

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72. See Back to School Statistics, supra note 68.
73. U.S. Const. amend. XIV §§ 1, 5.
society free enough to pursue their own economic destinies. Perhaps explaining the lack of action, some historians have argued that Southern Whites who had already fallen victim to the fantasies of White disempowerment epitomized by the Ku Klux Klan saw empowered Blacks as too much of a threat.\textsuperscript{74}

The Supreme Court, arguably responding to these fears, committed infanticide against this new and fragile promise of citizenship. In the \textit{Slaughter-House Case}, the Court ruled that “the [Fourteenth Amendment’s] sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.”\textsuperscript{75}

Gone was any meaningful federal right to citizenship. And the Southern states, with their penchant for abrogating the citizenship rights of Blacks (demonstrated with incredible violence during antebellum slavery\textsuperscript{76}), were again allowed to wreak havoc on the rights of the freed slaves. The Jim Crow era that followed has been described by historians as returning many freed Blacks to conditions nearly identical to those experienced during slavery.\textsuperscript{77}

But the Court was not done. The 14\textsuperscript{th} amendment would sustain many more blows, and much of that injury would wear away at the duty of schools to actualize widespread citizenship.

During the Jim Crow era, southern states rapidly developed all white schools which benefited from tax revenue functionally unavailable to Blacks. Directly preceding the end of the nineteenth century, the Supreme Court ruled in \textit{Cumming v. Richmond} that segregated schools were constitutionally permissible.\textsuperscript{78} As the Court wrote, “we cannot say that this action of the state court [of sanctioning the provision of tax-dollars to a segregated school] was, within the meaning of the Fourteenth Amendment, a denial by the state to the plaintiffs and to those associated with them of the equal protection of the laws or of any privileges belonging to them as citizens of the United States.”\textsuperscript{79}

Just as \textit{Slaughter-House} had invalidated the meaningfulness of citizenship, \textit{Cumming} severed the link between citizenship and schools,

\begin{itemize}
\item \textsuperscript{74} \textit{Rise of the Ku Klux Klan}, PBS, http://www.pbs.org/wgbh/amex/tableofcontents/features/general-article/grant-kkk/ (noting that the Klan was founded in 1865, three years before the passage of the 14\textsuperscript{th} amendment).
\item \textsuperscript{75} The Slaughter-House Cases, 83 U.S. 36, 77 (1872).
\item \textsuperscript{76} See, e.g., \textit{When I Was a Slave: Memoirs from the Slave Narrative Collection} (Norman R. Yetman ed. 2002).
\item \textsuperscript{78} \textit{Cumming v. Richmond County Board of Educ.}, 175 U.S. 528 (1899).
\item \textsuperscript{79} \textit{Id.} at 545.
\end{itemize}
creating a form of scholastic second class citizenship by denying Blacks access to the institution most central to full social, political and economic inclusion.

While Brown v. Board of Education and a short-lived family of progeny cases would temporarily expand access to scholastic citizenship, the Supreme Court would again enter the picture to declare that schools were not intended to ensure that all individuals acquired the skills necessary to citizenship—just some. Without a meaningful citizenship guaranty, plaintiffs were forced to turn to an increasingly marginalized equal protection clause which easily succumbed to a form of legal formalism known as “anti-classification.”

First, in Milliken v. Bradley, the court ruled that even as residential and school segregation remained rampant, and were accelerating due to White Flight, inter-district remedies (like busing) were unavailable absent evidence that all districts involved in the remedy had intentionally contributed to the harm. This conception meant that a rural Michigan district charged with receiving Black students into their schools could block busses full of Black children by claiming that although Detroit had willfully discriminated, the rural district had not, and should not be implicated in any judicial remedy. Under the conception of citizenship previously outlined, the court in Milliken empowered white rural districts to tell Black students “you are not members. You are not welcome. Stay out of our schools.”

By the 21st century, segregation had accelerated to the point that in many regions, Blacks were relegated to specific neighborhoods within urban cities. Although this level of micro-segregation was itself a reflection of a sad state of affairs, it also presented advocates for integration with a means of overcoming the command of Milliken. In Seattle, both White and Black parents, fueled by new learning regarding the benefits of integration, sought to broaden citizenship by integrating schools. They utilized a “school assignment” protocol that took race into consideration in determining which schools within Seattle (a single “district”) students would be assigned to. The program successfully created vibrant, integrated schools for years. And surely, this intra-district attempt to expand citizenship would remain safe from the Court.

It did not. In Parents Involved, the court held that the use of race, even in the context of an intra-district solution, triggered strict scrutiny, and was unconstitutional absent a “compelling interest” on par with national war time security. Thus, the court indicated that Blacks were not only barred membership (and therefore citizenship) from rural suburbs, but from

neighborhoods that bordered their own within the same city. As one might expect given the multi-racial makeup of supporters of the integration plan, this stripping of Black citizenship was not without negative consequences for Whites. As John Powell and Stephen Menendian explain, “The racial isolation of Whites in separate schools, reinforced by the lived experience of segregated neighborhoods, creates a sense of separateness and difference from people of a different color, who do not seem to be a part of the same community or share the same values.”

Given the critical importance of integration, the authors convey their shock at Parents Involved: “It is an amazing thing that we now tell school districts in Seattle and Louisville, not only are you not required to integrate schools, you are not allowed to integrate schools.”

What is remarkable about this decree is that both the founder of the American education system, and the Supreme Court itself in Brown and Grutter, “understood, education is fundamentally about citizenship and democracy.” Such constraints of citizenship, vis-à-vis a judgment that Blacks cannot be members of neighborhoods within the cities they reside (let alone suburbs within the states they pay taxes to) cannot square with a meaningful conception of citizenship.

As Powell explains in a separate presentation, the result of this segregation was more segregation. Segregated schools experience lowered education outcomes encouraging more white families to leave urban districts. This exacerbates residential segregation, which in turn fuels further school segregation.

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Figure 3: The Cycle of Segregation

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85. Id.
86. Id. Grutter has not been included in this analysis, which focuses on K-12 education.
This cycle has had vicious impacts, and in 2003, more American students attended segregated schools than in 1988. As of 2008, almost 2.4 million students, or about one in six Black and Latino students, attended a school in which the student body was 99-100% non-White. Even as non-White students make up more than 40% of the school aged population, the typical White student attends a school in which only one in five students are non-White.

From the lens of citizenship, a sense of belonging is becoming more and more scarce for non-White students. And from the perspective of cultivating a broader definition of the self through the sense of communal oneness advocated by Thich Nhat Hanh and Desmond Tutu, our segregated schools are failing to provide our students with an opportunity to become a generation that rises above the implicit bias that leads to subconscious disgust with poor Blacks and negative subconscious attitudes about Blacks. As membership continues along status quo lines, the opportunity to expand citizenship among the next generation is fading.

B. Why “Separate” Is “Inherently Unequal”

Segregated schools create second-class citizenship by providing an inadequate education that constrains the freedom needed to prepare Black students to contribute. As 550 scholars attested in an amicus brief in Parents Involved:

“More often than not, segregated minority schools offer profoundly unequal educational opportunities. This inequality is manifested in many ways, including fewer qualified, experienced teachers, greater instability cause by rapid turnover of faculty, fewer educational resources, and limited exposure to peers who can positively influence academic learning. No doubt, as a result of these disparities, measures of educational outcomes, such as scores on standardized achievement tests and high school graduation rates, are lower in schools with high percentage nonwhite students.”

Furthermore, African American students are increasingly concentrated in schools in low-income, urban neighborhoods, and among urban schools, wealthy schools provide budgets that are between 10% and 23% larger than those at poorer schools, and annual teacher salaries that are, on average, $2,576 larger. Another way of seeing this effect is that in schools where 90% of the

89. Id. at 11.
90. Id.
91. Brown, 347 U.S. at 495.
93. Id. at 38.
94. Id. at 39.
school population is non-white, 26% of the teachers do not have a teaching credential. This compares to only 5% of the teachers in schools that are less than 30% non-white. Thus, the individuals teaching any given class in the kind of schools that serve most Black students are five times less likely be credentialed than teachers in Whiter schools. Thus, it may not be terribly surprising that Black students in segregated public schools are receiving a lower quality education than their White peers.

C. Scholastic Outsourcing: Charter Schools and Intern Teacher Programs

One might hope that federal and state governments would invest wholeheartedly in integration efforts and funding for schools in urban, low-income neighborhoods to reverse this troubling trend. Instead, federal and state courts have only deepened the scholastic second-class citizenship dilemma by deregulating and privatizing the responsibility of imparting citizenship on many of our nation’s poor and Black youth (and subsequently reducing the quality of the education received by our nation’s most vulnerable children). In Zelman v. Simmons-Harris, the court held that charter schools, privately run entities that, arguably, undermine the state and federal responsibility to provide citizenship to our nation’s youth, were entitled to public resources. As the Court explained, “[the Charter movement] is part of a general and multifaceted undertaking by the State of Ohio to provide educational opportunities to the children of a failed school district.” It should be noted that the Court was not entirely incorrect—there are outstanding Charter schools that provide meaningful educational opportunities to students of all races. But as discussed below, far too many charter schools are struggling to provide a meaningful education to Black children, and far too few safeguards are in place to ensure that charter schools that are failing Black youth are not entrusted with inculcating Black citizenship.

There are three striking features to the Zelman Court’s holding that charter schools could receive state funding and supplant struggling public schools: 1) the holding itself relegates minority students to charter schools, 2) data show that charter schools underperform relative to public schools, and 3) minorities are substantially more likely to be served by charter schools.

First, the Court in Zelman admitted that the students in the Ohio school district at issue had been provided a sub-standard education. And the Supreme Court has repeatedly indicated that education is the bedrock of good citizenship. Yet the Court, faced with a factual record that evidenced a school district unable to provide citizenship training to the next generation, quickly

95. Id. at 41.
and unceremoniously dumped the State of Ohio’s academic obligation to prepare citizens onto privately run institutions. If the segregation cases indicated that Black students were not members of neighboring White urban and faraway White rural communities, this relegation of public functions to the private actors represents one of the clearest, and most troubling, indications that the Court feels the state has no obligation to ensure Black students develop the freedom necessary to contribute to the community. The Court essentially said “let’s outsource that obligation.”

This would not lead to second-class scholastic citizenship if charter schools performed as well as or better than public schools. However, the second striking feature of Zelman is that charter schools actually underperform relative to public schools. As Linda Darling-Hammond notes, “[a] study of 16 states, covering 70% of all charter schools, found that only 17% of charters produced academic gains that were significantly better than traditional public schools serving demographically similar students, while 37 percent performed worse than their traditional public school counterparts.”98 Thus, a charter school is more than twice as likely to underperform relative to a public school serving the same student community, as it is to outperform it. As is often the case with government outsourcing, and perhaps explaining the difference in quality between charter and public schools, unlike public schools, charter schools are often profit-oriented entities with minimal accountability.99 Moreover, perhaps explaining the difference between high and poorly performing charter schools, charters in districts that have taken the additional step of implementing robust regulations and safeguards and more equitable funding structures, seem to perform well.100 Rather than bolstering these safeguards, or protecting youth from schools that are under-regulated or underfunded, the federal government and Court have largely given charter schools free reign to profit while providing the level of education they desire. Thus, students who are relegated to a charter education seem less likely to achieve the kind of freedom required for meaningful citizenship.

Finally, the third striking feature of Zelman, and similar cases, is what they have wrought. Charter schools, which underperform relative to public schools, disproportionately serve Black and low-income students. As the Center for Education Reform recently reported, “[t]he CER Annual Survey of America’s Charter Schools reveals again that a majority of charter school students, 54 percent, qualify for the federal free and reduced lunch program.”101 An analysis of over 1.5 million students at thousands of charter schools in 27 states found that “[c]ompared to their feeders, charter schools enroll . . .

98. DARLING-HAMMOND, supra note 92, at 268.
99. Id.
100. Id.
higher percentage of black students,” and that in the last few years, “charter school enrollment has expanded among students in poverty, black students, and Hispanic students.” Specifically, while Black students make up 16% of the Public School population in the United States, they make up 29% of the Charter population. And as a recent report by the California Charter Schools Association noted, “African American students are enrolled in charter public schools at higher rates than traditional public schools in most of California’s large urban school districts, including Los Angeles and Sacramento, where Black students are twice as likely to attend charter as opposed to tradition public schools.” Given that charters underperform relative to similarly situated public schools, this suggests that minority and low income students are more likely to be provided with an education that does not fully prepare them to fulfill their citizenship obligations. They are not as free to self-actualize or contribute.

Taking all of the above contents together, under the re-segregation movement, a second tier of underfunded public schools has been created, and Black students have been relegated to forgotten corners of struggling inner-cities. And under the charter movement, the state has increasingly outsourced its responsibility to provide an education for Black students, often ceding that obligation to underperforming charter schools without compunction. This underscores two critical messages our schools are sending: Black students are not members—and are thus unwelcome in wealthier schools; and Black students are not worthy of empowerment to contribute—and thus the Court and state complacently outsource their educational obligations to underperforming charter schools.

Moreover, sadly, there is another chapter in the outsourcing of Black education. Overreliance on good-willed, but under-prepared, recruits from organizations like Teach for America (TFA) has exacerbated the privatization trend. By its own admission, Teach For America recruits are deployed more often to poor and minority schools. Moreover, TFA teachers are demonstrably less effective than certified teachers, and yet the Department of Education and Congress together have ceded the citizenship training of many of our most vulnerable youth to underprepared TFA teachers.

103. Id. at 18.
104. Id. at 16.
107. Renee v. Duncan, 686 F.3d 1002, 1012 (9th Cir. 2012) (holding that a Department of Education regulation did not violate the No Child Left Behind Law, even when it removed incentives for low income and minority schools to employ qualified teachers by allowing them to
Studies have confirmed that uncertified teachers are substantially less able to improve student outcomes. One groundbreaking study noted that “[i]n a series of regression analyses looking at 4th and 5th grade student achievement gains on six different reading and mathematics tests over a six-year period,” from 1995-2002, “certified teachers consistently produce[d] stronger student achievement gains than [did] uncertified teachers,” and that the findings held “for TFA recruits as well as others.” Most importantly, the study found that even after “[c]ontrolling for teacher experience, degrees, and student characteristics, uncertified TFA recruits [were still] less effective than certified teachers, and perform[ed] about as well as other uncertified teachers.”

The study also quantified the impact of providing students with an uncertified versus an uncertified teacher, and determined that “relative to teachers with standard certification, teachers lacking full certification slowed student progress over the course of a year by about [one-half] to 1 month in grade equivalent terms on most tests.” It seems, therefore, that schools with uncertified teachers are places where the citizenship guarantee slowly slips away year after year.

Additional research suggests that in the context of majority minority schools, having a credentialed teacher is even more important. A North Carolina study found that the positive “effect of [having teachers with] teacher credentials” is substantially larger, in both general and absolute terms, than the effects of any other variable considered in their regression models (student gender, student race, student age, student disability status, parental education level, and class size). Most strikingly, the researchers found that “having a teacher with strong rather than weak credentials would, on average, more than offset the adverse effect of racial and socio-economic differences.” Based on their regression analysis, the authors “conclude[d] that teacher credentials matter in a systematic way for student achievement at the high school level and that the magnitudes are large enough to be policy relevant.”

These findings were underscored by a national, longitudinal study that used Department of Education data to evaluate the effect of having a certified teacher on 22,000 children who were followed from kindergarten all the way

meet their obligation to hire only “Highly Qualified Teachers” by redefining the term “Highly Qualified Teacher” to incorporate individuals who have been enrolled, even for one day, in internship training programs like Teach For America).

109. Id.
110. Id. at 18.
111. Charles T. Clotfelter et al., Teacher Credentials and Student Achievement in High School: A Cross-Subject Analysis with Student Fixed Effects 45 J. HUM. RESOURCES 655-981 (2010).
112. Id.
113. Id.
through fifth grade.114 As students moved from kindergarten up through the grades, a perceivable achievement gap developed between Black and White students.115 Regression analyses suggest “that teacher qualifications are meaningful . . . as a policy tool for reducing the achievement gap” because “the presence of a certified teacher [was] associated with higher growth in reading for both African American and European American students,” but was “marginally more important for African American students.”116 In other words, having a certified teacher helped all students achieve large year-on-year gains, and it also helped Black students keep up with their White peers. In contrast, having a non-certified teacher robs Black students of these gains, and allows them to fall behind in their quest to attain empowerment and citizenship.

Exacerbating, and perhaps partially explaining, the backsliding experienced by students with uncertified teachers, most TFA teachers do not remain in schools long enough to develop skills and the rapport needed to help at risk youth overcome many obstacles to citizenship. In fact, “nearly all of [the TFA teachers]” in one study “[left the schools they were assigned] within three years.”117 Non-TFA teachers were substantially less likely to leave within that time period, with around twice as many sticking around after the three-year mark.118

Figure 4: Percentage of TFA and Non-TFA Teachers Who Leave Schools Within Three Years of Starting Teaching

114. Donald Easton-Brooks and Alan Davis, Teacher Qualification and the Achievement Gap in Early Primary Grades, 17 EDUC. POL’Y ANALYSIS ARCHIVES 5 (2009).
115. Id. at 8.
116. Id. at 10. The authors also note that, while important, simply having certified teachers in the classroom is not sufficient to offset the wide range of disadvantages that create the education gap. Id.
117. Id. at 2, 14
118. Id.
Sticking around makes a difference. As educational researcher Diane Ravitch has noted, “Most studies find that new teachers are less effective than experienced teachers and that the first two years of teaching are the least successful . . . Thus, many TFA teachers leave the field just at the point when teachers become most effective.”119 On the other hand, as noted previously, credentialed teachers are more likely to persevere and grow. That means more teachers mastering the complex art of teaching so they can provide the best instruction possible; more teachers developing their cultural capacity to meet the unique needs of a given school community; more teachers developing long-term relationships and working closely with parents and other community members to help students make major breakthroughs in increasing their sense of belonging and their general capacity to contribute to society; and more students who are given an education that provides an opportunity to realize full citizenship.

But instead of ensuring Black students can experience year on year gains from teachers who stick around, low income and minority school districts are increasingly turning to uncredentialed teachers to save money. As one report notes, “In the current era of massive budget shortfalls and cuts, TFA has begun placing teachers in jobs previously held by veteran teachers, who were laid off to ease school districts’ financial problems. The practice of laying off experienced teachers and replacing them with inexperienced TFA teachers, referred to as ‘laying off people to accommodate Teach For America,’ has been reported in various cities including Boston, Charlotte-Mecklenburg, Chicago, Dallas, and Washington, D.C.”120 And, as discussed previously, the federal government has largely supported the replacement of credentialed teachers with cheaper TFA recruits, allowing school districts to qualify for federal funding traditionally reserved for schools that hire “highly qualified teachers” even if they instead hire much cheaper (and less qualified) TFA members or other intern teachers. 121

From the lens of citizenship, this outsourcing of the obligation to provide effective teaching, and willingness to allow states to save a quick buck by providing lower quality teachers to poor and minority students, represents a clear signal that the potential social contributions of these students are less worthy of investment.

121. Renee v. Duncan, 686 F.3d 1002, 1012 (9th Cir. 2012).
D. The Impact of Second Class Schools: Second Class Citizenship

Previously, this Article argued that effective public schools could and should have positive effects on Black citizenship. But instead, segregated, outsourced, under-regulated, and poorly staffed schools are deeply impinging upon the citizenship of young Blacks. These schools close of pathways to Black citizenship for three reasons: they reduce opportunities for students of all races to overcome stereotype oriented thinking (therefore maintaining the status quo of Black exclusion from membership); they rob students of learning opportunities needed to self-actualize (depriving them of freedom); and they increase the likelihood that students will be swept into the school to prison pipeline, leading to massive abridgements of their citizenship rights (solidifying second class citizenship).

Schools represent a critical moment of identity development, and early scholastic experiences can shape the contours of a child’s “in-group” and “out-group.” In one study, a team of researchers at Harvard found that five-to-eight year olds could be enticed to develop out-group bias towards delineated and constrained social groups quite easily. But there was a wrinkle: when these children were simply shown images of the two groups (which had different color skin, one red, one purple), and told stories about the groups in which one group was clearly cruel and one group was clearly kind, they did not develop a clear sense of group identity. However, once these children were told that one group was called the Nifs, and the other was called the Lups, suddenly they were able to make group based determinations, for example, that all the purple ones are bad. This research might support the notion that where children can more easily see individuals as inhabiting a social group outside of themselves, not simply based on how they look, but how they are described without being present, they are more able to draw negative assumptions about members of those groups as a whole. This is precisely the situation in segregated schools, where, as discussed above, White children have minimal exposure to Black children, and thus may be encouraged to form out-group generalizations about them.

Research suggests that out-group generalizations gain instant cerebral salience, and determine not only how we perceive people, but which parts of our brains we use to judge them. Research by Jason Mitchell at Harvard found that when we consider individuals who we consider to be similar to us, we activate the ventral medial-Pre-Frontal Cortex – the part of the brain we use to

122. BLINDSPOT, supra note 5, at 131 (describing experimental results reported in the Psychology Dissertation of Andrew Baron (Harvard University 2009) (available at http://media.proquest.com/media/pq/classic/doc/1974363321/fmt/ai/rep/SPDF?_s=jWS0a9mB4D Cq9T55AX%2FPTBRVrdA%3D)).
123. Id.
124. Id.
think about ourselves.\textsuperscript{125} When we think about out-group members, the ventral medial-Pre-Frontal Cortex lies dormant.\textsuperscript{126} As noted previously, schools provide an important opportunity for in-group and out-group identity formation. When fewer and fewer children are able to receive an integrated education that encourages them to see Black children as part of their in-group, fewer and fewer members of the next generation are able to recruit a potentially more empathetic part of their brain when they think about Black people, and fewer and fewer Black people can benefit from the experience of being full members in our society.

Moreover, Black students glean an unfortunate message about how society views their belongingness and value when they observe the differences between their under-resourced, segregated schools, and the beautiful campuses on the other (Whiter) side of town. As one New York student in a high school with holes in the ceiling and exposed rusty pipes lamented, “You can understand things better when you go among the wealthy. You look around you at their school, although it’s impolite to do that, and you take a deep breath at the sight of all those beautiful surroundings. Then you come back and see that these are things you do not have. You think of the difference.”\textsuperscript{127} Mazarin Banaji warns “African Americans who internalize stereotypes of their own group are at risk of not living up to their academic potential.”\textsuperscript{128} And indeed, the combination of structural and psychological barriers experienced by Black students appears to be taking a toll.

Lower quality public schools also rob students of opportunities needed to develop the freedom required for human flourishing. To express this risk, this Article will borrow from the Department of Education’s stated goal for all citizen students: a high school education that prepares students for and allows them to pursue college and a career.\textsuperscript{129} To be either college or career ready, it is helpful (and many would argue necessary) to graduate from high school. However, in 2002, Black students were about 40% less likely to graduate from high school than their white peers (with 78% of White vs. 56% of Black students graduating).\textsuperscript{130} In some states, like Rhode Island, Black students were about twice as likely to drop out of High School (with 81% of White students and 42% of Black students graduating).\textsuperscript{131} High school graduation has huge

\begin{flushright}
125. \textit{BLINDSPOT}, supra note 5, at 139.
126. \textit{id.}
128. \textit{BLINDSPOT}, supra note 5, at 93.
130. \textit{ROD PAIGE & ELAINE WITTY, THE BLACK-WHITE ACHIEVEMENT GAP 37 (2010)}
131. \textit{id.}
\end{flushright}
implications for both college readiness and careers, as well as access to rights later on.

In terms of college readiness, far too few of our nation’s Black children ever get the opportunity to further develop themselves at four-year institutions. As the chart below shows, even as the percentage of individuals earning a college degree has increased, Black college attainment has languished behind White enrollment for well over three decades, and the gap has not decreased appreciably. Instead, in 2007, 84% more White 25-29 year olds had earned a college degree than Blacks (with 35% of Whites and 19% of Blacks earning a degree).

**Figure 5: Percentage of adults (age 25-29) earning a college degree, by race, 1971-2007**

![Graph showing the percentage of adults earning a college degree by race from 1971 to 2007.](Image)

In terms of career readiness, even as too few Black students graduate high school, high school graduation has never been more important to the economic prospects of Blacks. As Linda Darling-Hammond notes, “in the years from 2001 to 2006, a 21-year old high school dropout who was Black had less than a one-in-four chance of being employed full-time.” A White 21 year-old drop-out was about twice as likely to have full time employment. Even among High School graduated Blacks, job prospects were dim if they were not enrolled in college, and in fact, African American high school graduates not enrolled in college at 21 were only 46% likely to be employed full time. Whites in the same category were 59% likely.

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134. *Id.*

135. *Id.*

136. *Id.*
Black students in slapped together schools become disengaged, and, far too often, they drop out. This is the death-knell of citizenship, ringing in a highly probable future of incarceration and constrained civic and civil rights. As Western and Pettit explain, “serving time in prison has become a normal life event” for young black men who drop out of high school. In fact, the cumulative risk of incarceration by age 30–34 for black high school dropouts born between 1975 and 1979 was 68 percent. And as school resegregation and privatization have accelerated, so too has the school to prison pipeline. Whereas about 10% of Black high school dropouts between the ages of 20-34 were incarcerated in 1988, in 2008, a terrifying 38% of Black high school dropouts in that age group were in prison. It is worth pointing out that in the same time period, the United States saw an unprecedented wave of segregation, with segregation rates peaking higher in 2003 than they were in 1988.

The resulting impact of resegregation and subsequent incarceration on Black citizenship can be expressed most shockingly in terms of voting rights. Today, one in seven Black men cannot vote due to their current or former status as incarcerated felons. In terms of legal rights, Federal legislation such as the Prisoner’s Litigation Reform Act limits the claims that can be brought and relief obtained from prisoners who suffer infringements of their statutory and constitutional rights. For those young Black children doomed to become prisoners and former felons, second class scholastic citizenship is the harbinger of a state of practical national non-citizenship.

137. Bruce Western and Becky Pettit, Incarceration & Social Inequality, DAEDALUS 8 (Summer 2010).
138. Id. at 11.
139. Id. at 10.
140. Bhargava, Frankenburg, & Le, supra note 88, at 12.
141. ALEXANDER, supra note 29, at 187-188.
142. 42 U.S.C. § 1997
Reviewing the segregation, charter, and TFA cases, and the outcomes of the current schooling paradigm on Black youth, it becomes clear that scholastic second-class citizenship exists along both “membership” and “freedom” lines. Higher quality schools are not available to Blacks, who are not welcome there. And Black schools have become a outsourced zone where private organizations and institutions provide sub-standard citizenship instruction that too often culminates in the most sweeping expression of social disdain: incarceration.

As Powell explains in Racing to Justice, “Some space becomes white space that requires protection and regulation, and some becomes non-white space that requires containment and regulation.” The school integration cases demonstrate that primarily White schools represent one such protected space—and Black students become the contagion to be contained. Thus, if Blacks in post Slaughter-House America have only a formulistic claims to “citizenship,” Black students experience something more akin to a Dred Scott or Plessy v. Ferguson form of scholastic secondary citizenship wherein the state offers two tiers of publicly available education: one that is fully funded, and sends children to colleges and universities that are the envy of the world, and another.

that provides a publicly underfunded, privately mismanaged education that is a pathway to prison.

V. A LEGAL PATH FORWARD: THE CITIZENSHIP GUARANTEE OF THE FOURTEENTH AMENDMENT

Without a legal pathway to true citizenship for all members, our country heads to ruin; the school to prison pipeline will flow more and more aggressively; the souls of would be contributors (and their White peers) will be further twisted; and the nation will continue to distort.

There is hope. A number of legal scholars have begun to argue that the privileges and immunities clause of the fourteenth amendment could confer a positive obligation on the nation to provide meaningful citizenship. Of course, the most prominent obstacle to this doctrinal shift is the case that committed infanticide on the citizenship clause: Slaughter-House. Fortunately, the Slaughter-House court’s reading of the privileges and immunities clause loses legitimacy when historically contextualized. As mentioned previously, writing for the majority, Justice Miller balked at the notion that the privileges and immunities clause was meant to confer national citizenship rights, writing that such an interpretation would render “serious [consequences], so far-reaching and pervading, [and create] so great a departure from the structure and spirit of our institutions” that it would “fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character” and “radically change[] the whole theory of the relations of the State and Federal Governments to each other and of both these governments to the people.”144

Yet, dramatic flair aside, one need look no further than the end of the opinion to spot the loose earth beneath Justice Miller’s feet. As Justice Field explained in his dissent, “The terms, privileges and immunities, are not new in the amendment; they were in the Constitution before the amendment was adopted. They are found in the second section of the fourth article, which declares that ‘the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States,’ and they have been the subject of frequent consideration in judicial decisions. In Corfield v. Coryell, Mr. Justice Washington said he had “no hesitation in confining these expressions to those privileges and immunities which were, in their nature, fundamental; which belong of right to citizens of all free governments, and which have at all times been enjoyed by the citizens of the several States which compose the Union, from the time of their becoming free, independent, and sovereign.”145 Field

144. Slaughter-House, 83 U.S. at 78.
145. Slaughter-House, 83 U.S. at 97 (Fields, J, Dissenting) (citing Corfield v. Coryell, 6 Fed. Cas. 546, no. 3 (1823)).
explained that in *Corfield*, the court had established that the privileges and immunities included “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. . . . [T]hey can be enjoyed under that clause by the citizens of each State in the several States upon the same terms and conditions as they are enjoyed by the citizens of the latter States.”  

While Field’s dissent provides insights into what the framers hoped to create through the 14th amendment, a reading of *Dred Scott* helps remind what the framers hoped to undo. As Professors John Powell and Stephen Menendian explain, “The Reconstruction Amendments were deeply contextual” and “sought to bring those who had been slaves into the political community.”  

The context, as Professor Akhil Amar explains, was that “Taney’s backdrop *Dred Scott* opinion had located citizenship in a broad context of social meaning and practice above and beyond state action . . . Thus, when the Fourteenth Amendment overturned Taney, it did so with words suggesting that Congress could use its sweeping McCulloch-like enforcement power [necessary and appropriate] to enact statutes affirming that blacks were in fact and in law equal citizens worthy of respect and dignity.”  

But what exactly is Taney’s backdrop? What did *Dred Scott* portend?  

Reasoning historically, the *Dred Scott* court had commanded that Blacks “were not [to be] regarded in any of the States as members of the community which constituted the State, and were not [to be] numbered among its ‘people or citizens.’ Consequently, the special rights and immunities guaranteed to citizens do not apply to them. And not being ‘citizens’ within the meaning of the Constitution, they are not entitled to sue in that character in a court of the United States.”  

Thus, if the infamous *Dred Scott* Court intended to communicate that Blacks were not members of the political community, and had no right to enforce citizenship guarantees against states in federal courts, then the 14th amendment’s “citizenship” clause and section 5 enforcement powers must have been intended to give Congress the power it needed to dispatch Dred Scott and overturn the second-class citizenship status that was conferred on Blacks by *Southern States*. It created federal rights applicable to the states, specifically named in the clause. Finally, in reply to Justice Miller’s argument that the Framers could not have meant to upend the relationship between the states and the Federal Government, that relationship had long since been upended when

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147. Powell & Menendian, supra note 84, at 1178.  
the Federal Government took the lives of hundreds of thousands of southern soldiers to maintain union, and was further upended when the same Federal Government maintained troops in southern states for years following the war.

This reading of the 14th amendment is further supported by Justice Harlan’s loan dissent in The Civil Rights Cases. There, Harlan makes an impassioned argument that the Fourteenth Amendment confers an affirmative right. As he writes, “The first clause of the first section - ‘all persons born or naturalized in the United States . . . are citizens of the United States, and of the state wherein they reside . . . is of a distinctly affirmative character.’”\(^{150}\) It denotes membership in a “political community known as the ‘People of the United States.’”\(^{151}\) And as to the enforcement power conferred by the amendment, the Congressional Record clarifies the intention of the Framers that section five would confer an obligation on Congress to effectuate the citizenship guarantees of section one. In a May 1866 speech by Senator Jacob Howard introducing the Fourteenth Amendment as it emerged from the Joint Committee, Howard described section five saying, “It gives to Congress power to enforce by appropriate legislation all the provisions of this article of amendment . . . It casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith. . . . I look upon this clause as indispensable for the reason that it thus imposes upon Congress this power and this duty.\(^{152}\)

This analysis provides reason to be enthusiastic about the future of a more expansive 14th amendment citizenship guarantee, actionable against states by federal legislation and by judicial action from the federal courts.

\textit{A. A Local Solution: Citizenship and Education Rights in California}

Although there is support to suggest the 14th amendment creates a positive obligation in the Federal Government to ensure the citizenship of Americans, it is also important to note that, to date, the Federal Government has been complacent about or even complicit in the creation of scholastic second class citizenship. First, the expansion of charter schools and infiltration of intern teachers into the public citizenship instruction of at risk students has been greatly supported by Congressional legislation such as Section 163.\(^{153}\)

Moreover, as Judge Goodwin Liu explains, Title I of the Elementary and

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\item \textbf{150.} The Civil Rights Cases, 109 U.S. 3, 46 (1883) (Harlan, J., dissenting).
\item \textbf{151.} \textit{Id.}
\item \textbf{153.} Continuing Appropriations Act, Section 163, §1, 124 Stat. at 3521 (expanding the definition of “highly qualified” in the No Child Left Behind law to include teachers working towards “alternative certification,” such as TFA teachers \textit{in training}. This definition change allowed states to secure funds reserved for districts with sufficient levels of “highly qualified” teachers in struggling schools while simply flooding poor and minority schools with inexpensive, less well trained, less effective intern teachers).
\end{enumerate}
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Secondary Education Act, the “single largest program of federal education aid” predictably provides more funding to wealthy districts than it does to poorer ones. Specifically, the act “awards funding to each state in proportion to its share of poor children and to its existing level of per-pupil spending. Thus, wealthy, high-spending states receive more Title I aid per eligible child than poor, low-spending states. In 2001, for example, Massachusetts had 33% fewer poor children than Alabama but received 36% more Title I aid.” But poverty also tracks to race. For example, Alabama, which received substantially less per-pupil funding under Title I than Massachusetts, had four times as many Black individuals per capita as Massachusetts in 2010.

Taken together, then, Title I reinforces, rather than reduces, interstate and interracial disparities in educational opportunity. Judge Liu argues that this funding scheme “treat[s] the nation’s schoolchildren not as ‘citizens of the United States,’ but foremost as ‘citizens of the state wherein they reside’” which he calls “an improper inversion of the Fourteenth Amendment guarantee.”

Spending more money on states with more wealthy and White students does not simply treat each individual as a citizen of the state in which they reside. It also functions to bolster a sense of scholastic second-class citizenship for at risk students who live in resource poor states that currently underfund education. It underscores the generalized sense that, from a citizenship lens, “your contributions to this nation are not as important as those of students in other states (who tend to be Whiter and wealthier), and are already receiving more money than you. That’s why we’re giving them even more.”

With such troubling federal trends, it is important for plaintiffs to look as well to their states. California presents a strong opportunity for the realization of meaningful scholastic citizenship, and could serve as a model for other states and the nation. First, the California Supreme Court has suggested that there is a privilege to education, enforceable in California, which stems from the 14th amendment. In Piper v. Big Pine School Districts, the court announced that school segregation infringed upon this privilege, writing, “the common schools are doorways opening into chambers of science, art, and the learned professions, as well as into fields of industrial and commercial activities. Opportunities for securing employment are often more or less dependent upon the rating, which a youth, as a pupil of our public institutions, has received in his schoolwork. These are rights and privileges that cannot be denied.” Moreover, in the landmark case Serrano v. Priest, the same court outlawed a

155. Id. (emphasis added).
156. U.S. CENSUS BUREAU, 2010 CENSUS.
157. Id. at 402-403 (2006).
school financing system that privileged wealthy school districts, on the grounds “that the right to an education in our public schools is a fundamental interest which cannot be conditioned on wealth” and can only be abridged in the service of a “compelling state purpose.”\textsuperscript{159} Explaining their holding, the court reminded that education has an “indispensable role . . . in the modern industrial state” as “a determinant of an individual’s chances for economic and social success in our competitive society” and as “a unique influence on a child’s development as a citizen and his participation in political and community life.”\textsuperscript{160} The court concluded that, in California, “education is the lifeline of both the individual and society.”\textsuperscript{161} By both requiring that California schools remain open to all and fighting for a minimum quality of adequacy, California seems to effectuate both elements of citizenship: belonging and freedom to cultivate one’s abilities.

What’s more, based on the affirmative citizenship and education rights language of \textit{Serrano}, plaintiffs have successfully moved the state to settle on education adequacy lawsuits. Most recently, in 2004, plaintiffs in \textit{Williams v. California} settled a lawsuit to improve “deplorable conditions” in certain California schools.\textsuperscript{162} There, “the state agreed to provide $800 million for school repairs and $139 million for instructional materials, ensure teacher qualification and equitable assignment, institute ongoing complaint procedures, and review school conditions annually.”\textsuperscript{163} At the heart of the plaintiffs case in \textit{Williams} was the contention that education is essential to citizenship, and that the California and federal constitutions, together with California case law, confer a positive obligation upon the states to maintain a specific quality of education for \textit{all} students. Overall, California has seen marked progress in expanding scholastic citizenship, and serves as a model to other states seeking to ensure that state schools are designed to expand meaningful citizenship. The Golden State provides Golden opportunities for plaintiffs to persuade a state court to affirm scholastic citizenship rights that stem from generalized educational and citizenship guarantees.

\textbf{VI. DEVELOPING SCHOLASTIC CITIZENSHIP}

Whether plaintiffs choose to take a Federal or State route to expanding scholastic citizenship, it is critical that litigants focus on defining and securing commitments to honor a scholastic citizenship guaranty. This is in large measure because the definition of scholastic citizenship remains fairly nebulous. Federally, despite the vast enlargement of the federal role in education occasioned by No Child Left Behind, “nothing in the Act establishes

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\footnote{159. Serrano v. Priest, 5 Cal.3d 584, 589 (Cal. 1971) (emphasis added).}
\footnote{160. Id. at 605 (emphasis added).}
\footnote{161. Id.}
\footnote{162. EDUC. JUSTICE, http://www.educationjustice.org/states/california.}
\footnote{163. Id.}
\end{footnotes}
a common set of educational expectations for meaningful national citizenship.\textsuperscript{164} At the state level, even as the federal Race to the Top program has encouraged states to set scholastic standards, many state governments and courts have yet to explicitly articulate an adequacy baseline for their schools, let alone a citizenship guaranty.

Encouragingly, a number of state courts have articulated an adequacy baseline. Most notably, in \textit{Rose v. Council for Better Education, Inc.}, the Kentucky Supreme Court established that a quality education, as guaranteed by the Kentucky state constitution, must include: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.\textsuperscript{165}

Recalling the working definition of citizenship described above as the nexus between membership and freedom, we see that the State Court in Oklahoma here requires that the education afforded each student meet a “freedom” baseline—it must meaningfully prepare students to be able to self-actualize. Specifically, the standard calls for sufficient knowledge and skills to “enable students to function in a complex and rapidly changing civilization,” “compete” in the “job market,” “make informed choices,” and “affect his or her community, state, and nation.”\textsuperscript{166} The latter of these three requirements begins to tap into the larger concept of citizenship: preparing individuals to contribute to their community.

However, totally lacking from the conception of a quality baseline articulated in \textit{Rose} is any sense of “membership” or “belonging.” As noted above, many Americans (almost certainly including many teachers and fellow students) subconsciously associate Blacks with gorillas and gun-toting criminals, and Black students, like others, are sensitive to self-fulfilling prophecies and other negative impacts of implicit bias. Regarding self-fulfilling prophecies, studies have demonstrated that when teachers are randomly told

\textsuperscript{164} Liu, \textit{supra} note 154, at 401.
\textsuperscript{165} \textit{Rose v. Council for Better Educ., Inc.}, 790 S.W.2d 186, 212 (Ky. 1989)
\textsuperscript{166} \textit{Id.}
that certain students will excel (regardless of their actual academic ability), they subconsciously (through body language, verbal cues, and the amount of attention and feedback given) reinforce beliefs in the student that they are gifted and unwittingly create the future they were told would come to fruition. One can imagine that a teacher who subconsciously feels disgust for all of his Black students and sees them as lacking competence to achieve academically is likely to both mistreat them and expect and demand less of these students, leading to a lower quality education. And one can also imagine that these Black students would find it difficult to maintain their enthusiasm to learn when so little is expected of them.

Conveyed from the positivist lens, a sense of belonging is essential to encouraging students to stay engaged and connected to the content and community. As the National Center for Education Evaluation wrote in its 2008 recommendation for stemming school dropouts, “increasing student engagement [is] critical to preventing dropping out. Engagement involves active participation in learning and schoolwork as well as in the social life of school . . . While dropping out typically occurs during high school, the disengagement process may begin much earlier and include academic, social, and behavioral components.” To put these findings in human terms, at present, many Black students enter deeply biased school communities that create a sense of second-class scholastic citizenship (a feeling of “this school isn’t for you”). This leads to social and academic disengagement, which often leads to dropping out, funneling students into the most aggressive track within the school to prison pipeline. And even in Oklahoma, and the four other states with the same conception of a baseline for adequate education, a sense of academic belonging is not guaranteed.

What’s worse, many state supreme courts have actually determined that there is no educational adequacy baseline (and thus neither a freedom orientated standard nor a membership oriented one). Over-reliance on the education clause in many state constitutions has led courts to stymie efforts to secure scholastic citizenship rights. In Nebraska, for example, the state supreme court held that “the framers of the 1875 [Nebraska] constitution intentionally omitted any language from the free instruction clause that would have placed restrictions or qualitative standards on the Legislature’s duties regarding

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167. ROBERT ROSENTHAL & LENORE JACOBSON, PYGMALION IN THE CLASSROOM: TEACHER EXPECTATION AND PUPILS’ INTELLECTUAL DEVELOPMENT 61, 68, 74-75 (1968).
education.” A similar conclusion emerged in Indiana, where the state supreme court held that, “Guided as we are by the text of the constitutional provision in the context of its history, we conclude that the Education Clause of the Indiana Constitution does not impose upon government an affirmative duty to achieve any particular standard of resulting educational quality.”

Returning to the overall point, there is a patchwork of scholastic citizenship rights throughout the country. Students in Kentucky, Alabama, Arkansas, Massachusetts and North Carolina are guaranteed a scholastic citizenship that at least touches on their “freedom” rights—preparing them to compete economically and contribute civically. Students in Nebraska, Indiana, and Pennsylvania have no judicially enforceable educational citizenship rights. And at the federal level, despite large scale spending and financial incentives, Congress has as of yet failed to define what “citizenship” means in the context of schools. Finally, despite the pervasiveness of implicit bias and other threats to student engagement and “belonging,” throughout the country, a conception of “membership” seems lacking in the scholastic citizenship guaranty.

A. Nurturing a Burgeoning Sense of Belonging

What would it mean for students to “belong” within their school communities? At a minimum, a sense of belonging would alter the relationship between students and those school districts that have increasingly told Black students, “we don’t want you.” This would mean an overturning of the holdings in both Milliken and Parents Involved that tell students of color that they neither belong in Whiter rural school communities nor in wealthier, Whiter scholastic neighborhoods just on the other side of town. The legal claim, under the 14th amendment, would be that the privileges and immunities clause confers the power and obligation on the Federal government to actualize citizenship, which means overturning case law or legislation that stems students’ ability to belong to the broader social and political community. I mention case law to remind that although the concepts of inter-district harm/inter-district remedy and the intent doctrine seem deeply rooted in the American consciousness, they are creations of case law. They are not products of federal legislation, and Congress could, at a moment’s notice, unhinge these shaky legal practices to let the sun shine into our schools. With a powerful citizenship claim, plaintiffs might stand a chance to compel the Federal Government to do just that.

Litigants should also address the second dimension of belonging: empathy. Today, Black students receive harsher punishments for the same


171. Bonner ex rel. Bonner v. Daniels, 907 N.E.2d 516, 522 (Ind. 2009). See also Marrero v. Commonwealth, 709 A.2d 956, 965-966 (Pa. 1998) (in which the state supreme court similarly decided it was “unable to judicially define what constitutes an “adequate” education or what funds are “adequate” to support such a program”).
school offenses; likely because they are subconsciously perceived by their teachers as being more aggressive than they are (recall the gun experiment). In fact, at present, Blacks students are three times more likely to be suspended than White students for the same transgressions. California seems especially primed to take the discipline challenge on, as just last year, Governor Jerry Brown signed state legislation that relaxes zero tolerance laws and gives principals and superintendents increased discretion to use alternatives to suspension. A Federal claim could request the same relief, premised on the notion that until schools are allowed to institute policies that allow teachers and staff to acknowledge the humanity and innocence of children, Black students will continue to receive isolating, punitive treatment that functions to decrease empathy between school administrators and students who break school rules.

More effective approaches, such as School-Wide Positive Behavioral Intervention and Supports, Social and Emotional Learning, and Restorative Justice have incredible promise to address the empathy component of belonging. As teachers and school staff are encouraged to challenge their own assumptions, they may find that the “bad kid” was truly a misunderstood human being, complex, struggling, and beautiful. They may achieve inter-being and ubuntu with students.

These practices also have the capacity to bolster the “freedom” component of citizenship. All three programs are effective at teaching students critical emotional skills (such as anger management, conflict resolution, active listening, inter-group cooperation, and self-reflection), which will help students, become effective contributors in their communities.

B. Scholastic Freedom to Achieve One’s Full Potential

At the heart of the citizenship guaranty to freedom is the inculcation of skills and capabilities that allow a person to self-actualize. One of the largest obstacles to the ability of poor and minority students to succeed is the self-fulfilling prophecy. Studies have demonstrated that when teachers are randomly told that certain students will excel (regardless of their actual academic ability), they subconsciously (through body language, verbal cues, and the amount of attention and feedback given) reinforce beliefs in the student that they are

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gifted and unwittingly create the future they were told would come to fruition. To the extent possible, teachers should be encouraged to engage in perspective taking or other activities that help them see the humanity of each student, understand their struggles, engage with them more empathetically and warmly, and do their best to advocate for them.

Finally, the willful provision of a second tier education system with public/private charter schools and privately and inadequately trained teachers must end. This process is an affront to the “freedom” component of citizenship, and impinges on poor and minority students’ abilities to meaningfully contribute to our society. Moreover, it leads these students to gush through the school-to-prison pipeline. Perhaps the most powerful claim that would become available after an expansion of the 14th amendment privileges and immunities clause would be one against districts, states, and federal agencies that utilize taxpayer dollars to fund second-rate schools and the provision of intern teachers.

VII. CONCLUSION—THE CITIZENSHIP CHILDREN DESERVE

Students deserve and our nation requires a meaningful pathway to citizenship that ensures students of all backgrounds develop the sense of belonging and freedom necessary to become contributing members of society. A review of recent constitutional interpretations of the privileges and immunities clause suggests a real opportunity to apply an expanded concept of “citizenship” to the context of schools, demanding that courts and Congresses play an active role in the development of scholastic citizenship. Caught in the headwinds of a culture that has created huge legal and pervasive psychological obstacles to their success, our children deserve nothing less than a sweeping expansion their citizenship rights.

As Skip Gates intoned after his unfortunate experience with the chaos of bias, “America is the greatest nation ever founded. The ideals are the greatest ever espoused in human history, and we just need the country to live up to them.” And as President Obama has argued, “A world-class education is also a moral imperative – the key to securing a more equal, fair, and just society. We will not remain true to our highest ideals unless we do a far better job of educating each one of our sons and daughters.” It is long since time that we expand scholastic citizenship, and allow our nation, long crippled by our
inability to empower all individuals to contribute, to benefit from the brilliance, commitment, and promise of all of its children.