
ARTICLES

BITTER ROOTS: DISCRIMINATORY TAINT AND GIFTED PROGRAMMING IN UNITED STATES EDUCATION LAW

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ABSTRACT	2
INTRODUCTION	2
I. THE HISTORY OF GIFTED PROGRAMMING IN PUBLIC SCHOOLS	6
A. <i>School Funding</i>	6
B. <i>Compulsory Attendance</i>	9
C. <i>Gifted Programming</i>	11
1. History of Gifted Education	11
2. Controversies in Gifted Education	17
II. PAST AND PRESENT IN POLICYMAKING	24
A. <i>Collings and the Memory of Evil</i>	24
B. <i>Murray and Discriminatory Taint</i>	26
C. <i>Gifted Programming, Memory, and Discriminatory Taint</i>	28
III. UNIVERSAL SCREENING AND RESPONDING TO HISTORY	32
A. <i>The Pooling Problem</i>	33
B. <i>Universal Screening and Selection Bias</i>	36
CONCLUSION.....	41

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ABSTRACT

Gifted programming in United States K–12 public education has been the subject of substantial recent controversy, including calls for its abolishment. This is due in large part to a troubling history of discrimination. We position this history in a broad legal, historical, and economic context and then apply contemporary developments in jurisprudential historiography to offer a framework for considering its policy effects. Applying a structure developed for analyzing the memory of evil in Supreme Court jurisprudence illustrates how selective treatment of historical education practices limits policymaking in the present. Then, considering gifted programming through a lens of discriminatory taint offers an analytical structure for evaluating past discrimination based on well-established principles of constitutional scrutiny analysis. Finally, we consider the potential for universal screening practices to mitigate underrepresentation in gifted programming.

INTRODUCTION

*“We must expand gifted programs and create them where they do not exist to ensure students receive the tools they need to lead. . . . This way, we will ensure stories of brilliant students of color breaking through unjust systems are no longer exceptions to the rule.”*¹

*“This is a modern-day-eugenics project—one manufactured based on spurious science and reinforced by institutional consent. . . . Latinx and [B]lack children will pay for the rest of their lives.”*²

Depending on the advocate, gifted programming in United States education either offers crucial educational services with potential to revolutionize the lives of children—particularly minority children—or represents the continuation and triumph of a broadly discriminatory past that substantially harms those students.³

¹ Colin Seale, *Stop Eliminating Gifted Programs and Calling it “Equity”: The Case for Expanding Opportunities for Brilliant Black and Brown Children*, TEACH FOR AM. (Sept. 9, 2021), <https://www.teachforamerica.org/one-day/opinion/stop-eliminating-gifted-programs-and-calling-it-equity>. The term “gifted” itself is controversial. See text accompanying *infra* notes 95–97, 109. This term is used in legal and policy discussions and so we retain it in this Article.

² David Kirkland, *What the Gifted Education Fight is Really About*, N.Y. DAILY NEWS (Sept. 20, 2019), <https://www.nydailynews.com/opinion/ny-oped-what-the-gifted-education-fight-is-really-about-20190920-vry2cqqpyvhw7or4jft3qa2eqm-story.html>.

³ Compare, e.g., Seale, *supra* note 1, with Kirkland, *supra* note 2, and Jon Howard, *The White Kid Can Do Whatever He Wants: The Racial Socialization of a Gifted Education Program*, 54 EDUC. STUD. 553, 553 (2018) (arguing that gifted programs “reproduced . . . power and privilege to move freely and to exclude racialized others within the educational landscape of the school”). These views are representative of two broadly contrasting views regarding the provision of gifted services. See SALLY R. BEISSER, UNINTENDED CONSEQUENCES OF NO CHILD LEFT BEHIND MANDATES ON GIFTED STUDENTS 6 (2008) (“Americans face a love-hate relationship battle between equity and excellence. While we applaud those with extraordinary skills and abilities or those who rise to greatness, we are

While the literature on gifted services is extensive, including scholarship that addresses equitable provision of gifted programming, this literature offers policymakers little practical guidance on how to account for this problematic past in a systematic manner.⁴ This Article contributes to the literature on gifted programming and education law by applying recent developments in the historiography of jurisprudence to the provision of gifted services.

committed to equity at the same time. The term giftedness has a tone of elitism seemingly eliciting hostility or threat regarding those who are not identified.”); Bobby Caina Calvan, *Schools Debate: Gifted and Talented, or Racist and Elitist?*, ASSOC. PRESS (Oct. 28, 2021), <https://apnews.com/article/new-york-education-new-york-city-united-states-race-and-ethnicity-f8cbdb50edba9802fe9ad503cfe7d467>. See generally MARCIA GENTRY ET AL., SYSTEM FAILURE: ACCESS DENIED: GIFTED EDUCATION IN THE UNITED STATES: LAWS, ACCESS, EQUITY, AND MISSINGNESS ACROSS THE COUNTRY BY LOCALE, TITLE I SCHOOL STATUS, AND RACE 1–5 (2019) (examining “missingness” of under-represented children in gifted education nationally and proposing policy solutions to aid with inclusion).

These views may help explain the potential for wildly oscillating policy for gifted programming. For instance, former New York City Mayor Bill De Blasio announced plans to end programming in the city for Gifted and Talented students in late 2021, months before his successor, Eric Adams, took office. *NYC Outlines Next Steps to Replace Gifted & Talented Program in Schools*, NBC N.Y. NEWS (Oct. 12, 2021), <https://www.nbcnewyork.com/news/local/brilliant-nyc-to-replace-gt-program-in-nyc-schools-with-accelerated-learning-for-more-students> [hereinafter *NYC Outlines Next Steps*]. The decision was celebrated by those who charge gifted programming with perpetuating racist stereotypes and entrenching segregation. E.g., Calvan, *supra*. Still others lamented the decision, claiming that gifted programming is necessary for bright students at risk of losing interest in school and falling short of their potential. *Id.* Six months later, Mayor Eric Adams announced plans to expand gifted programming, but to eliminate a controversial test used to screen extremely young children. See Lola Fadulu, *New York City to Expand Gifted and Talented Program but Scrap Test*, N.Y. TIMES (Apr. 14, 2022), <https://www.nytimes.com/2022/04/14/nyregion/nyc-gifted-talented.html>.

⁴ The general trend in scholarship on gifted programming is to brush past problematic history or to note past issues with discrimination and propose various policy adjustments to help in the present. See, e.g., Sarah Gosner, *A Strategy for Overcoming Equity Issues in Gifted Programs*, EDUTOPIA (Jan. 30, 2020), <https://www.edutopia.org/article/strategy-overcoming-equity-issues-gifted-programs> (analyzing effect of universal screening on students of color); GENTRY ET AL., *supra* note 3, at 11–13 (noting that “[g]ifted education in the United States has a long, persistent, and pervasive history of inequity in identification and services” and criticizing many testing policies for access to gifted programming as yielding racially disparate results); Joyce VanTassel-Baska, *American Policy in Gifted Education*, 41 GIFTED CHILD TODAY 98 (2018) (analyzing state policy variance in gifted programming and history of gifted education without mention of potential discrimination); Perry A. Zirkel, *The Case Law on Gifted Education: A New Look*, 48 GIFTED CHILD Q. 309, 310–13 (2004) (examining the history of litigation over discrimination in provision of gifted services); Charles J. Russo et al., *Gifted Education and the Law: A Right, Privilege, or Superfluous?*, 18 ROEPER REV. 179, 180–81 (1996) (examining contrasting viewpoints of gifted programming in light of *Broadley v. Bd. of Educ.*, 229 Conn. 1 (1994)).

The challenges of providing gifted programming lie at the intersection of three fundamental and related problems in education law and policy: (1) how to educate a differentiated student body,⁵ (2) how to differentiate—such as through student grouping—while not discriminating,⁶ and (3) in particular, how to treat a past that often *did* discriminate in the name of differentiation.⁷ Gifted programming is fraught with each of these concerns: it is an area of education policy built specifically on the desire to differentiate, one that has a challenging history of discrimination while attempting to do so, and one that has struggled to deal with its past while providing services in the present.⁸

How one should treat the past when deciding a case or creating policy is a complex question, heavy with the weight of precedent, politics, and history.⁹ This is particularly true when examining policies with problematic pasts. Recent advances in legal historiography have created frameworks for analyzing problematic historical policy as it applies to modern policymaking.¹⁰ These

⁵ See generally Maureen T. Hallinan, *Ability Grouping and Student Learning*, 6 BROOKINGS PAPERS ON EDUC. POL'Y 95, 95–96 (2003) (discussing ability grouping as a response to differentiated abilities among students).

⁶ See generally SUSAN WINEBRENNER & DINA BRULLES, *THE CLUSTER GROUPING HANDBOOK: HOW TO CHALLENGE GIFTED STUDENTS AND IMPROVE ACHIEVEMENT FOR ALL: A SCHOOLWIDE MODEL 1–6* (2008) (proposing cluster-based methods as a response to decline in differentiated learning methods to help, e.g., English language learners).

⁷ See generally ANGELA SAINI, *SUPERIOR: THE RETURN OF RACE SCIENCE* 85 (2019) (examining racial pseudoscience, including eugenics-based theories of racial supremacy, and noting their influence on racial segregation in schools: “[r]ace science had always sat at the intersection of science and politics, of science and economics. Race wasn’t just a tool for classifying physical differences but was also a way of measuring human progress, of placing judgement on the capacities and rights of others.”).

⁸ See Brian L. Wright et al., *Ignorance or Indifference? Seeking Excellence and Equity for Under-Represented Students of Color in Gifted Education*, 4 GLOB. EDUC. REV. 45, 51 (2017) (illustrating efforts to deal with past discrimination, and calling for increased awareness and action towards equity within education). Wright notes, “two historically ignored or trivialized notions specific to culturally and linguistically diverse students [are]: (1) gifted students must be compared with others . . . [by] experience and environment and (2) outstanding talents are present in students from all cultural groups, across all economic strata, and in all areas of human endeavor.” *Id.*

⁹ For a recent example, see *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2240–350 (2022) (noting the effect of “history” sixty-four times between the majority opinion, concurrences, and dissent when overruling *Roe v. Wade*, 410 U.S. 113 (1973)). The question of how the past should affect the present is obviously not limited to court decisions or legal scholarship. See generally CAROLINE ELKINS, *LEGACY OF VIOLENCE: A HISTORY OF THE BRITISH EMPIRE 1–6* (2022) (discussing, e.g., the defacement of a statue of Winston Churchill, examining interpretations of the history of the British empire, and noting that “[r]ecent crises . . . spotlight persistent injustices and demand reassessments of how Britain became what it is today.”).

¹⁰ We use the term “historiography” loosely, in the sense of legal scholarship focused on how courts have examined, or should examine, the past in their reasoning. See MAX PLANCK

frameworks, such as treatment of the “memory of evil”¹¹ and “discriminatory taint,”¹² have been fruitful in application to constitutional scrutiny analysis and examination of the long arc of Supreme Court precedent around race.¹³ They have yet to be applied to challenges in education policy. This Article draws on these frameworks to fill this gap in the legal literature by exploring the existence of gifted programming, how one is screened for entry into it, and the narratives crafted around these issues considering gifted programming’s history.

Part I outlines elements of this history, beginning with relevant portions of the creation of public schools through school finance practices and compulsory attendance.¹⁴ These areas predate gifted programming but have struggled to resolve issues like those which face policymakers for gifted programming today. Part II then introduces two legal frameworks for analyzing how the effects of history might be considered in modern policy. The first is Justin Collings’s conceptualization of the “memory of evil” in Supreme Court jurisprudence.¹⁵ This provides an initial lens through which to view the narratives surrounding gifted programming, which address history tinged by eugenics and other theories and practices of race-based discrimination.¹⁶ The second legal framework is W. Kerrel Murray’s writing on “discriminatory taint,” which provides specific policy guidelines based on constitutional scrutiny analysis, an area of legal thought which has a long history of addressing potential discriminatory

INST. FOR LEGAL HIST. & LEGAL THEORY, *Legal Historiography*, <https://www.lhlt.mpg.de/research-field/legal-historiography> (last visited Jan. 8, 2023) (“Every academic discipline profits from reflection on its own doings. This entails keeping up with the development of the academic system and, in the case of jurisprudence, of the legal system of which it is a part. Jurists must reflect on the history of their discipline and on the history of their research objects . . .”).

¹¹ Justin Collings, *The Supreme Court and the Memory of Evil*, 71 STAN. L. REV. 265, 269 (2019) (published in special commemoration of the 150th anniversary of the passage of the Fourteenth Amendment).

¹² W. Kerrel Murray, *Discriminatory Taint*, 135 HARV. L. REV. 1190, 1193 (2022). See generally Joseph Landau, *Process Scrutiny: Motivational Inquiry and Constitutional Rights*, 119 COLUM. L. REV. 2147, 2164–71 (2019) (discussing treatment of processes that bear on discriminatory intent).

¹³ See Collings, *supra* note 11; Murray, *supra* note 12.

¹⁴ We do not attempt to write a history of public education, gifted programming, or all its influences. Rather, we focus on the legal and policy effects that flow from aspects of that history as reflected in current legal and policy challenges to gifted programming.

¹⁵ Collings, *supra* note 11. The term “evil” in Collings’s framework—which primarily considers the memory of slavery and its after-effects—is appropriate. While modern education policy faces challenges, we do not characterize any particular current education policy as “evil” per se. Others who study education might make a stronger case. See also Matthew Clarke et al., *The Banality of Education Policy: Discipline as Extensive Evil in the Neoliberal Era*, 13 POWER & EDUC. 187, 187 (2021) (examining the practice of isolation policies in the United Kingdom education system).

¹⁶ See *infra* Section I.C.

government actions.¹⁷ Part II then applies Collings's and Murray's frameworks to gifted programming, emphasizing the continued relevance of the history of gifted programming, the contrasting benefits of the service, and how modern practice may reconcile gifted programming's past and present.

Part III then examines a specific area of active policy in gifted programming: the practice of universal screening for giftedness through statistical techniques. With some reservations, we suggest that universal screening may satisfy many of the concerns raised in a discriminatory taint analysis. Finally, this Article concludes by contrasting the bitter roots of gifted programming's past with the possibility for a redemptive future.¹⁸

I. THE HISTORY OF GIFTED PROGRAMMING IN PUBLIC SCHOOLS

This Part addresses the history of gifted programming and its precursors in education law through the development of school funding policies and compulsory attendance. It then identifies problematic issues in the history of gifted programming to contextualize its current policy debates.

A. School Funding

Schooling in the early years of the United States was haphazard. Instruction was available primarily to those who could afford it.¹⁹ Education across the nation was a collage of arrangements, with many schools dependent on tuition payments from parents while others received support in the form of charitable donations, property taxes, or church resources.²⁰ Some towns or groups of parents hired transient teachers to educate children.²¹ Access was often denied to children based on race, gender, geographic location, income, or a variety of other factors.²² Despite the belief that democracy depended on competent citizens capable of critical thinking and wise voting,²³ there was little meaningful government involvement in education.²⁴ One exception was the creation of land

¹⁷ See David Zimmerman, *Five Supreme Court Constitutions: Race-Based Scrutiny Past, Present, and Future*, 10 BYU J. PUB. L. 161, 162 (1996) (examining the history of scrutiny analysis in the context of race-based discrimination).

¹⁸ The term "redemptive" in this policy context flows from Collings's contrast of "parenthetical" versus "redemptive" modes of narrative when considering the past. See *infra* Section II.A. Aristotle is credited with the statement: "The roots of education are bitter, but the fruit is sweet." DIOGENES LAERTIUS, LIVES OF EMINENT PHILOSOPHERS 444 (R.D. Hicks trans., Harvard Univ. Press 1972) (c. 200–300 C.E.).

¹⁹ See CTR. ON EDUC. POL'Y, HISTORY AND EVOLUTION OF PUBLIC EDUCATION IN THE US 1–2 (2020), <https://files.eric.ed.gov/fulltext/ED606970.pdf>.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 5.

²³ *Id.* at 2.

²⁴ See generally Lisa A. Hazlett, *American Education's Beginnings*, F. ON PUB. POL'Y ONLINE (2011), <https://files.eric.ed.gov/fulltext/EJ944210.pdf>.

grants, which gave significant areas of federal land to new states which agreed to use part of those lands to support public schools.²⁵ With this aid, many communities began creating public schools, yet wide support for free public education did not spread to the rest of the nation until the 1830s when Massachusetts board of education secretary and state legislator Horace Mann began advocating for the creation of schools available to all children, funded by the state.²⁶ In 1830, around 55% of children in the United States ages five to fourteen were enrolled in school.²⁷

Adoption of the free public school model was gradual and inconsistent as the common school movement spread across the nation in the 1800s.²⁸ States gradually began to accept responsibility for providing free education for children, with some embedding this responsibility into state constitutions.²⁹ Throughout the nineteenth century in the United States, free primary public education continued to spread, and by the middle of the century, most states had some form of public education available to at least some demographic groups within the state.³⁰ Some schools were operated by the state, but funded by parents, and some used a combination of state and parent funding.³¹ In the

²⁵ CTR. ON EDUC. POL’Y, *supra* note 19, at 2.

²⁶ *Id.* at 3. Mann and other proponents of the common school movement argued that state investment in free public school was necessary to create moral, literate, and productive citizens. *Id.* They also argued that educating the middle and lower class children would prevent crime and other social problems by enabling children to rise from poverty. *Id.* The cost of providing education was heralded as much lower than the societal costs stemming from poverty. *Id.*

²⁷ *Id.*

²⁸ See generally Bernard Leibson, *Public Funds and Public Schools*, 19 AM. SCHOLAR 217, 220–21 (1950).

²⁹ See PAUL L. TRACTENBERG, EDUCATIONAL PROVISIONS IN STATE CONSTITUTIONS: A SUMMARY OF A CHAPTER FOR THE STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY PROJECT 2, <https://statecon.camden.rutgers.edu/sites/statecon/files/subpapers/tractenberg.pdf> (last visited Jan. 8, 2023) (noting that early constitutions tended to “recognize the importance to society of an educated citizenry” and either exhorted learning or tasked legislatures to create schools; between 1835 and 1912 most new states had education clauses in their constitutions, and older states added them). See generally Trish Brennan-Gac, *Educational Rights in the States*, 40 HUM. RTS. 12, 12 (2014) (“A limited number of state constitutions explicitly recognize education to be a fundamental right Other state constitutions require the provision of education services . . . by the state without conveying a right to students. Others barely address education at all.”).

³⁰ JOHANN NEEM, DEMOCRACY’S SCHOOLS: THE RISE OF PUBLIC EDUCATION IN AMERICA 1–2 (2017) (“By the Civil War . . . most young free Americans attended free elementary schools, and a growing number attended public high schools. . . . Americans had come to see education as a public good worthy of public investment.”).

³¹ See Sun Go & Peter H. Lindert, *The Curious Dawn of American Public Schools* 7 (Nat’l Bureau of Econ. Rsch. Working Paper No. 13335, 2007) (“Parents and other private sources paid more than half of the cost of their children’s schooling up to 1838–1840, when the common schools got a fresh infusion of public money.”).

decades following the Civil War, nearly every state began to adopt publicly funded education.³²

With public funds came public controversy. Two challenges emerged, which remain the center of controversy in the present. The first, long-standing argument is whether funding for schools was ever *sufficient*.³³ The adequacy of school funding has long been debated and litigated, with mixed results, despite a wide range of modern education reforms and programs.³⁴ The second evergreen issue is whether that funding was *equitable*.³⁵ For instance, as public education spread in southern states, whether and how to provide funds for educating Black children was a matter of substantial controversy.³⁶ Even if Reconstruction-era constitutional provisions required that schools be provided to all children in the state, districts could go to great lengths to ensure that property taxes from white households did not fund schools for Black children.³⁷

³² See, e.g., ELLWOOD PATTERSON CUBBERLEY, PUBLIC EDUCATION IN THE UNITED STATES: A STUDY AND INTERPRETATION OF AMERICAN EDUCATIONAL HISTORY; AN INTRODUCTORY TEXTBOOK DEALING WITH THE LARGER PROBLEMS OF PRESENT-DAY EDUCATION IN THE LIGHT OF THEIR HISTORICAL DEVELOPMENT 19 (1st ed. 1919) (describing the general national attitudes towards public education in 1919 and noting that members of the public “have conceived the education of all as essential to the well-being of the state, and have established state systems of public education to enforce the idea.”).

³³ Compare James W. Guthrie & Arthur Peng, *The Phony Funding Crisis: Even in The Worst of Times, Schools Have Money to Spend*, 10 EDUC. NEXT 12, 13–14 (2010) (“For a variety of reasons, from one year to the next, schools almost always have more real revenue for each of their enrolled students.”), with C. Kirabo Jackson et al., *The Costs of Cutting School Spending: Lessons from the Great Recession*, 20 EDUC. NEXT 64, 66 (2020) (describing the effects of the school funding decreases of the Great Recession as leading “to a historic decline in per-pupil spending, which coincided with the first nationwide declines in test scores in more than 50 years as well as a smaller number of first-time college entrants”).

³⁴ See Jennifer Imazeki & Andrew Reschovsky, *Is No Child Left Behind an Un (or Under) Funded Federal Mandate? Evidence from Texas*, 57 NAT’L TAX J. 571, 572 (2004) (arguing that funding in the era of No Child Left Behind was insufficient to meet the demands of the law and noting that “[i]n recent months, several state legislatures have concluded that increased federal funding is not sufficient to cover the costs imposed by NCLB. State legislatures in a number of states have recently passed resolutions urging Congress to change the law”).

³⁵ See Leland Ware, *Black Lawyers and Civil Rights: The NAACP’s Legal Campaign Against Segregation*, 67 WASH. U. J.L. & POL’Y 393, 394–96 (2022).

³⁶ *Id.*

³⁷ See Jeff Lingwall, *Educational Gerrymanders: Creating Unequal School Districts in North Carolina*, 40 N.C. CENT. L. REV. 1 (2017) (discussing the practice of gerrymandering districts to avoid a state constitutional provision that prohibited segregation of school funding); see also Robert A. Margo, *Accounting for Racial Differences in School Attendance in the American South, 1900: The Role of Separate-but-Equal*, 69 REV. ECON. & STAT. 661, 661 (1987) (“School officials in the South allocated fewer resources to black schools than to white schools which, in turn, reduced the frequency of school attendance among black children compared with white children.”).

These issues continue in the modern era, with substantial litigation and policy debate surrounding what constitutes equitable provision of resources for education within states.³⁸

B. *Compulsory Attendance*

The development of funding for public schools was paired with legal requirements for children to attend those schools. Forms of compulsory instruction for children stretch back to before the existence of the United States.³⁹ Colonial entities required that parents instruct children, though the law targeted private family behavior rather than creating requirements to attend schools.⁴⁰ During the nineteenth century, pressure from school reformers led some states to enact compulsory attendance laws, which required children of certain ages—with many exceptions—to attend school for a certain number of weeks during the year.⁴¹ These laws originated in a handful of states, beginning with Massachusetts in 1852.⁴² Following the Civil War, a push for public schooling by Republican legislatures concerned with educating “ignorant” voters aided the movement towards compulsory education.⁴³ States in the South notably lagged, with many Southern states not adopting compulsory attendance laws until the 1910s or later.⁴⁴

³⁸ See R.C. Knoeppel & Matthew R. Della Sala, *Efficiency vs. Sufficiency: Investigating the Implications of Competing Concepts in School Finance Litigation and Policymaking*, 43 J. EDUC. FIN. 381, 394 (2018) (“Does equitable funding reflect an efficient finance system or [does] the deployment of funds that yield efficient student achievement outcomes reflect an efficient finance system?”).

³⁹ See generally MICHAEL S. KATZ, A HISTORY OF COMPULSORY EDUCATION LAWS (Donald Robinson ed., 1976).

⁴⁰ See *id.* (discussing colonial laws). Early corporations could also be charged to provide schools for their child workers. Jeff Lingwall, *Education Clauses in Corporate Charters: How Child Welfare Confronted the Industrial Revolution*, 43 J.L. & EDUC. 189, 189–90 (2014).

⁴¹ Karen Clay et al., *Laws, Educational Outcomes, and Returns to Schooling: Evidence from the First Wave of U.S. State Compulsory Attendance Laws*, 68 LAB. ECON. 101935 § 2.1 (2021) (discussing dates and requirements of initial compulsory attendance laws).

⁴² *Id.*

⁴³ Stephen Provasnik, *Judicial Activism and the Origins of Parental Choice: The Court’s Role in the Institutionalization of Compulsory Education in the United States, 1891–1925*, 46 HIST. EDUC. Q. 311, 318 (2006).

⁴⁴ Clay et al., *supra* note 41, § 2.1. Compulsory attendance laws were typically paired with restrictions on child labor as part of a dual-regulatory scheme to move children out of the workforce and into schools. *Id.* The pairing with compulsory attendance laws were often very specific: many states required attendance until perhaps age sixteen, unless someone over the age of fourteen was employed. See *id.* If employed, the child could leave full-time school attendance but would need to attend a “continuation” school until age sixteen. *Id.* §§ 2.1–2.2.

These laws struggled to address education equally across the spectrum of children. Some states differentiated labor restrictions between boys and girls,⁴⁵ many states differentiated school attendance between rural and urban children,⁴⁶ between the poor and well-off,⁴⁷ between Black and white children,⁴⁸ between those who worked and did not work,⁴⁹ between those who labored on farms versus those in factories,⁵⁰ between those who spoke English and those who did not,⁵¹ between the vaccinated and unvaccinated,⁵² between the religious and non-religious,⁵³ between natives and immigrants,⁵⁴ and between those areas of a state with funding to provide schooling or not.⁵⁵ The result was great facial similarity in compulsory attendance requirements among similarly aged children, but incredible variety in the details. These resulted in litigation as courts and legislatures probed the boundaries of what was legally permissible as schooling (now compulsory) became a vehicle to enforce broader policy goals.⁵⁶ The Supreme Court was drawn into the fray, deciding issues on language instruction in schools⁵⁷ and public versus private instruction.⁵⁸ Perhaps the most substantial intersection between the development of public schools and the compulsory attendance of children was how education intersected with legalized racism. After *Brown v. Board of Education*,⁵⁹ states wishing to stop

⁴⁵ 1909 Wash. Sess. Laws 948 (setting different age limits for boys (fourteen) and girls (sixteen) for employment in a variety of industries); 1883 N.J. Laws 59 (setting different age limits for boys (twelve) and girls (fourteen) for employment in a variety of industries).

⁴⁶ *E.g.*, 1877 Wash. Sess. Laws 278 (distinguishing between urban areas with more than 400 inhabitants and the remainder of the state for compulsory attendance).

⁴⁷ *E.g., id.*; 1918 Miss. Laws 312.

⁴⁸ *E.g.*, 1919 Ala. Laws 537 (differentiating consequences for Black and white children in case of truancy); *see also* Margo, *supra* note 37 (noting differences in funding between schools for Black and white children).

⁴⁹ *E.g.*, 1905 Cal. Stat. 389.

⁵⁰ *E.g.*, 1905 Cal. Stat. 11 (prohibiting employment in, *e.g.*, manufacturing, but not agriculture).

⁵¹ *E.g.*, 1905 Cal. Stat. 12 (conditioning work permits during school hours based on English language proficiency).

⁵² *E.g.*, *Commonwealth v. Butler*, 76 Pa. Super. 113, 116 (1921) (considering vaccination status and compliance with compulsory attendance provisions).

⁵³ *See Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925).

⁵⁴ *See Meyer v. Nebraska*, 262 U.S. 390, 390–98 (1923).

⁵⁵ *E.g.*, 1890 Idaho Sess. Laws 146 (excusing attendance when no schools were provided for at least twelve weeks within two miles of the student).

⁵⁶ *E.g.*, *Meyer*, 262 U.S. at 401; *Pierce*, 268 U.S. at 535–36; *Butler*, 76 Pa. Super. at 116–18.

⁵⁷ *Meyer*, 262 U.S. at 398.

⁵⁸ *Pierce*, 268 U.S. at 532–34.

⁵⁹ 347 U.S. 483, 487 (1954).

desegregated schools simply made schooling non-compulsory.⁶⁰ If they could not resist federal efforts to implement the Supreme Court's integration order, they could stop white children from being forced to attend or simply shut down the public school system entirely.⁶¹

In sum, the long history of compulsory attendance shows states grappling with two core issues: (1) how public education paired with broader social issues such as anti-immigrant sentiment and racism, and (2) how to educate children across a wide swath of economic, racial, ethnic, gender, and nativity divides. The next Section shows how attempts to offer *differentiated* education within the framework of compulsory attendance faced identical challenges.

C. Gifted Programming

1. History of Gifted Education

Public interest in and support for gifted education over the years has been a pattern of ebb and flow.⁶² There was great initial interest in the early twentieth century, followed by stagnation around World War II. The Cold War instigated what is known as the “golden age of gifted education,”⁶³ followed by another period of stagnation in the 1980s and on. Presently, gifted education is entangled in controversy, and it is uncertain where that conversation will lead.⁶⁴ This Section examines the history of intellectual thought leading to the creation of

⁶⁰ David Allen Peterson, Note, *Home Education v. Compulsory Attendance Laws: Whose Kids Are They Anyway?*, 24 WASHBURN L.J. 274, 277 (1985); Gerald B. Lotzer, *Texas Homeschooling: An Unresolved Conflict Between Parents and Educators*, 39 BAYLOR L. REV. 469, 471 (1987).

⁶¹ Kara Miles Turner, *Both Victors and Victims: Prince Edward County, Virginia, the NAACP, and Brown*, 90 VA. L. REV. 1667, 1668 (2004). In the modern era, the massive trend towards homeschooling again raised controversies with compulsory attendance laws. If children were required to be educated, to what extent could parents simply do so in their own homes, reflecting the colonial practice of legally requiring parents to be responsible for the education of children? See Peterson, *supra* note 60, at 275. If parents could educate their children at home, to what extent could the state supervise that education, and to what extent would the activities available in public schools be made available to home-schooled children? See *id.*

⁶² Elissa F. Brown & Leigh R. Wishney, *Equity and Excellence: Political Forces in the Education of Gifted Students in the United States and Abroad*, 41 GLOB. EDUC. REV. 22, 22 (2017) (“The ebbs and flows of public perceptions of equity and excellence and political and historical events have significantly impacted the evolution of the field of gifted education in the United States and abroad.”).

⁶³ Jennifer H. Robins, *An Explanatory History of Gifted Education: 1940–1960*, at 255 (2010) (Ph.D. dissertation, Baylor University), https://baylor-ir.tdl.org/bitstream/handle/2104/7946/Jennifer_Robins_phd.pdf (“As the field grew during the 1960s, it led to what Renzulli . . . has referred to as a ‘Golden Age of Gifted Education’ in the 1970s, during which every state provided for gifted students and there was ‘a lot of excitement.’”).

⁶⁴ See Bruce M. Shore, *Context Matters in Gifted Education*, 11 EDUC. SCI., art. 424, Aug. 11, 2021, at 7.

gifted programming, the geopolitical forces that influenced the creation of gifted programming in the United States, and the controversies that followed.

As compulsory attendance brought increasing numbers of children into schools, some schools developed accelerated programs for exceptionally bright students.⁶⁵ This paralleled increased interest in quantifying and explaining human mental ability, evident in the work of such scientists as Francis Galton and James McKeen Cattell. In 1892, Francis Galton published *Hereditary Genius*, considered the first study in human ability.⁶⁶ It summarized research that Galton conducted at the Anthropometric Laboratory in London, where he studied English families.⁶⁷ Galton concluded that inherited traits (or genetics) determined intelligence.⁶⁸ The belief that intelligence was hereditary prompted a rush to identify individuals with superior mental ability.⁶⁹ Theoretically, this would allow the human race as a whole to increase its intelligence.⁷⁰ This theory was the central claim of the discredited eugenics pseudoscience that formed the basis for forced sterilization laws in the United States and Nazi racial ideology in Europe.⁷¹

Galton corresponded with an American Ph.D. candidate named James McKeen Cattell.⁷² They collaborated to develop “mental tests” to demonstrate that mental ability could be studied scientifically.⁷³ Building on Cattell’s testing concepts, in 1905, French psychologists Alfred Binet and Theodore Simon developed the Binet-Simon scale of intelligence.⁷⁴ Lewis Terman revised the test at Stanford, where it became known as the Stanford-Binet test in 1916.⁷⁵ At least in education, the test was used to identify “feeble-minded” school children by dividing a person’s “mental age” by their actual age to calculate a “mental quotient,” later renamed intelligence quotient (IQ).⁷⁶

⁶⁵ See JAMES J. GALLAGHER, CURRENT AND HISTORICAL THINKING ON EDUCATION FOR GIFTED AND TALENTED STUDENTS 83, 100 (1994).

⁶⁶ See Robins, *supra* note 63, at 3 (citing FRANCIS GALTON, *HEREDITARY GENIUS* (1892)).

⁶⁷ See *id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 3–5.

⁷⁰ See generally Jennifer M. Klein, *Compensating Victims of Forced Sterilization: Lessons from North Carolina*, 40 J.L. MED. & ETHICS 422, 423 (2012).

⁷¹ See *id.*; Jonathan Marks, *Historiography of Eugenics*, 52 AM. J. HUM. GENETICS 650, 651 (1993).

⁷² Robins, *supra* note 63, at 3–4.

⁷³ *Id.*

⁷⁴ *Id.* at 4.

⁷⁵ Michael M. Sokal, *James McKeen Cattell and Mental Anthropometry: Nineteenth-Century Science and Reform and the Origins of Psychological Testing*, in PSYCHOLOGICAL TESTING AND AMERICAN SOCIETY 1890–1930, at 21 (Michael M. Sokal ed., 1987); Robins, *supra* note 63, at 4; Robert M. Thorndike, *Origins of Intelligence and Its Measurement*, 8 J. PSYCHOEDUC. ASSESSMENT 223, 226 (1990).

⁷⁶ Robins, *supra* note 63, at 4; Kendra Cherry, *Alfred Binet and the Simon-Binet Intelligence Scale*, VERYWELL MIND (Apr. 9, 2020), <https://www.verywellmind.com/alfred->

The test was eventually standardized and normed so that a person's score could be compared to the average score of the general population.⁷⁷ In theory, this method allowed classification of a person's intelligence along a spectrum of the general population.⁷⁸ As school enrollment surged in the early twentieth century, school administrators began to search for solutions to differentiate instruction for the varying academic abilities of their students.⁷⁹ Educational assessments filled this need.⁸⁰ By the early 1920s, "testing was a well-established means by which educational psychologists could help shape school practice and education policy."⁸¹ By this time, large cities had programs to educate "bright" students and administering standardized intelligence tests was "accepted practice" in schools during the 1940s.⁸²

The 1950s brought a great resurgence of focus on gifted education and programming.⁸³ The end of World War II, and the subsequent Cold War with the Soviet Union, focused attention in the United States on the need for competitiveness in scientific fields.⁸⁴ The National Science Foundation Act was passed in 1950, which pushed "gifted students . . . to the forefront of the nation's mind."⁸⁵ Then on October 4, 1957, the USSR launched Sputnik and American leaders began to show fears that America would fail to replicate Russia's technological advancement.⁸⁶ At the very least, if America could not keep up with Russia, it could not expect to effectively forestall nuclear attacks. Locating and educating America's brightest minds became a matter of national importance in order to contend with the communist threat.⁸⁷

binet-biography-2795503 (Cherry notes that Binet himself "believed that intelligence was complex and could not be fully captured by a single quantitative measure. He also believed that intelligence was not fixed.").

⁷⁷ Robins, *supra* note 63, at 4.

⁷⁸ *Id.* Terman joined a committee of psychologists to develop tests for the purpose of screening and classifying military recruits according to intelligence. *Id.* The Committee on the Psychological Examination of Recruits developed two intelligence tests: the Army Alpha and the Army Beta. *Id.* Army Alpha was administered to literate recruits and illiterate recruits were given Army Beta. *Id.*

⁷⁹ *Id.* at 4.

⁸⁰ *Id.*

⁸¹ See ELLEN CONDLIFFE LAGEMANN, AN ELUSIVE SCIENCE: THE TROUBLING HISTORY OF EDUCATION RESEARCH 93 (2002).

⁸² Robins, *supra* note 63, at 5–7.

⁸³ *Id.* at 8.

⁸⁴ *Id.*

⁸⁵ *Id.* at 48–49.

⁸⁶ See *This Day in History: Sputnik Launched*, HISTORY (Nov. 24, 2009), <https://www.history.com/this-day-in-history/sputnik-launched>; Dave Roos, *How the Cold War Space Race Led to US Students Doing Tons of Homework*, HISTORY (Aug. 13, 2019) <https://www.history.com/news/homework-cold-war-sputnik>.

⁸⁷ Robins, *supra* note 63, at 49–52.

Congress immediately responded to this “technological Pearl Harbor” with a flurry of policy action.⁸⁸ In their view, the preservation of democracy required that Americans reach for levels of innovation and creativity only attainable by the most academically gifted.⁸⁹ To locate and nurture gifted students, Congress passed the National Defense Education Act (NDEA) in 1958.⁹⁰ The act authorized one billion dollars over the course of four years for educational purposes, providing financial support for academically gifted students who otherwise might not be able to afford continuing education.⁹¹ Title V of the NDEA specifically set aside funds to identify and nurture gifted and talented students.⁹² In reference to the urgency of America’s predicament, the House report recommending passage of the bill noted that “[i]t is no exaggeration to say that America’s progress in many fields of endeavor in the years ahead—in fact, the very survival of our free country—may depend in large part upon the education we provide for our young people now.”⁹³ This funding brought renewed interest in defining giftedness. Before the NDEA, giftedness was defined almost exclusively as an ability to score well on intelligence tests. Afterwards, scholars redefined giftedness by including other factors such as creativity, leadership ability, and aptitude in visual and performing arts.⁹⁴

In 1972, the first federal definition of intelligence was given in the *Education of the Gifted and Talented: Report to Congress*, commonly known as the

⁸⁸ DAVID HALBERSTAM, *THE FIFTIES* 625–26 (2012). Both the Senate Special Committee on Space and Astronautics and the House Select Committee on Science and Astronautics were established in 1958. See DEBORAH D. STINE, *U.S. CIVILIAN SPACE POLICY PRIORITIES: REFLECTIONS 50 YEARS AFTER SPUTNIK 2* (2009). This was the first formation of standing committees in both the House and the Senate for a new subject since 1892. *Id.*

⁸⁹ See *National Defense Education Act*, HIST., ART & ARCHIVES, https://history.house.gov/Records-and-Research/Listing/lfp_006/ (last visited Jan. 8, 2023) [hereinafter *National Defense Education Act*, HIST., ART & ARCHIVES].

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580, 1592 (1958).

⁹³ See *National Defense Education Act*, HIST., ART & ARCHIVES, *supra* note 89.

⁹⁴ For example, J.P. Guilford proposed in 1967 that true brilliance required creativity. J.P. Guilford, *Creativity: Yesterday, Today and Tomorrow*, 1 J. CREATIVE BEHAV. 3 (1967) (“The social consequences of releasing creative abilities are potentially enormous.”). Soon after, in 1968, President Lyndon B. Johnson created the White House Task Force on the Gifted and Talented. GALLAGHER, *supra* note 65, at 100. The Civil Rights Movement then continued to shift the national conversation about giftedness. While the focus of the early sixties was on frantically finding and encouraging the best and brightest minds, the Civil Rights Movement called attention to all the minds that had been previously ignored. See, e.g., JAMES BORLAND, *ISSUES AND PRACTICES IN THE IDENTIFICATION AND EDUCATION OF GIFTED STUDENTS FROM UNDER-REPRESENTED GROUPS* 4 (2004) (“Despite . . . the coinciding of the post-Sputnik wave of gifted education programs with a crucial period in the struggle for civil rights by African Americans, little cognizance was taken of issues of race and class in this period.”).

Marland Report.⁹⁵ It defined giftedness as “those identified by professionally qualified persons who, by virtue of outstanding abilities, are capable of high performance. These are children who require differentiated educational programs and/or services beyond those normally provided by the regular school program to realize their contribution to self and society.”⁹⁶ Marland identified five areas in which a student could exhibit giftedness: general intellectual ability, specific academic aptitude, creative or productive thinking, leadership, and aptitude in visual and performing arts.⁹⁷

While the 1980s brought continued attention to giftedness with publication of *A Nation at Risk*, public support of gifted education stagnated in the latter end of the twentieth century.⁹⁸ The end of the Cold War and the dissolution of the Soviet Union in 1991 meant that the United States no longer had the specter of

⁹⁵ EDUCATION OF THE GIFTED AND TALENTED: REPORT TO THE CONGRESS OF THE UNITED STATES BY THE U.S. COMMISSIONER OF EDUCATION AND BACKGROUND PAPERS SUBMITTED TO THE U.S. OFFICE OF EDUCATION (1972) [hereinafter MARLAND REPORT]. The Marland Report was the culmination of three years of research and intended to relay to Congress all that was then known about gifted and talented education. Jennifer L. Jolly & Jennifer H. Robins, *The Marland Report: A Defining Moment in Gifted Education*, 45 J. EDUC. GIFTED 3 (2022).

⁹⁶ MARLAND REPORT, *supra* note 95, at 3–4.

⁹⁷ *Id.* at 2. For a general study on the definition of giftedness, see Robert J. Sternberg, *Introductions to Definitions and Conceptions of Giftedness*, in DEFINITIONS AND CONCEPTIONS OF GIFTEDNESS (Robert J. Sternberg & Sally M. Reis eds., 2004).

⁹⁸ NATIONAL COMMISSION ON EXCELLENCE IN EDUCATION, *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM: A REPORT TO THE NATION AND THE SECRETARY OF EDUCATION* (1983). *A Nation at Risk* (ANAR) was an evaluation of the American public education system by the National Commission on Education under the Reagan administration. *Id.* Its assessment found the public school system to be seriously failing. Gifted students were failing to meet their potential. *Id.* It gave a blunt summary of the state of affairs, saying the current generation’s academic performance “will not surpass, will not equal, will not even approach, those of their parents.” *Id.* at 6. ANAR specifically called out gifted students, saying, “[O]ver half the population of gifted students do not match the tested ability with comparable achievement in school.” *Id.* at 5.

Congress reacted to the report, and the subsequent change in public opinion, by passing the Jacob Javits Gifted and Talented Act in 1988. Daniel L. Winkler & Jennifer L. Jolly, *Historical Perspectives: The Javits Act: 1988-2011*, 34 GIFTED CHILD TODAY 61, 61 (2011) (“The Jacob K. Javits Gifted and Talented Student Education Program sought to advance the education of gifted children through scientifically based research projects and school-based strategies for students K–12. Particular emphasis was given to underserved students.”). In a follow-up to ANAR, the Department of Education published *National Excellence: A Case for Developing America’s Talent* in 1993. PAT O’CONNELL ROSS, NATIONAL EXCELLENCE: A CASE FOR DEVELOPING AMERICA’S TALENT 1, 1 (1993) (“The message society often sends to students is to aim for academic *adequacy*, not academic *excellence*.”). It detailed the improvements made in education since ANAR, but reported that America’s youth were still underperforming relative to their peers in other developed countries. *Id.* at 11. It also claimed that gifted education was seriously underfunded, reporting that “only 2 cents out of every \$100 spent on K–12 education in 1990” went to programming for gifted students. *Id.* at 10.

scientific geopolitical competition to motivate further investment in gifted and talented education.⁹⁹ Additionally, the increased focus on equity in schools made gifted education, with its perennial underrepresentation of students of color, even less popular.¹⁰⁰ The No Child Left Behind Act of 2002 (NCLB) further changed the environment.¹⁰¹ Where emphasis on high-achieving students had previously been the norm, advocates for gifted education now had to work to convince lawmakers that gifted students needed attention.¹⁰² NCLB required states to demonstrate that all students perform at or above grade level.¹⁰³ As a result, schools further shifted resources and attention away from high-achieving students to focus on underperforming students.¹⁰⁴ Finally, in 2015, the Every Student Succeeds Act reinvigorated public interest in gifted education after decades of stagnation by “enhanc[ing] the ability of elementary schools and secondary schools nationwide to identify gifted and talented students and meet their special educational needs.”¹⁰⁵

While the national conversation around gifted education has picked up in the last decade, many of the talking points have not changed.¹⁰⁶ Many scholars call

⁹⁹ See generally Roos, *supra* note 86.

¹⁰⁰ See, e.g., Stephen I. Pfeiffer, *Challenges and Opportunities for Students Who Are Gifted: What the Experts Say*, 47 GIFTED CHILD Q. 161, 168 (2003).

¹⁰¹ See BEISSER, *supra* note 3, at 1 (“[T]hose who are considered gifted have been increasingly underserved When the No Child Left Behind law was enacted in 2001, it forced schools to deeply subsidize the education of students performing below grade level. As result, gifted programs have suffered.”).

¹⁰² E.g., Tempus Fugit Glass, *What Gift? The Reality of the Student Who Is Gifted and Talented in Public School Classrooms*, 27 GIFTED CHILD TODAY 25, 28 (2004) (arguing for increased attention for gifted students in the era of NCLB, that “No Child Left Behind cannot, at its core, be interpreted to mean that the brightest students must wait on the slowest. All students should have the right to exercise their talents to the fullest potential.”).

¹⁰³ No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 101, Stat. 1425 (2002).

¹⁰⁴ See Patrick Haney, *The Gifted Commitment: Gifted Education’s Unrecognized Relevance in ‘Thorough and Efficient’ Public Schools*, 64 CASE W. RES. L. REV. 279, 284 (2013) (“Congress further hamstrung gifted education through [NCLB] . . . coercing states into diverting limited educational resources toward achieving basic academic proficiency. In particular, NCLB’s pursuit of grade-level performance frustrates gifted students’ pursuit of a meaningful education by restricting teachers’ focus to standardized-test concepts with borderline passing students.”). Similarly, funding for Javits decreased steadily throughout the first decade of the twenty-first century, and by 2010, Javits was completely defunded. See Rachana Bhatt, *A Review of Gifted and Talented Education in the United States*, 6 EDUC. FIN. & POL’Y 557, 561 (2011).

¹⁰⁵ Every Student Succeeds Act, 20 U.S.C. § 7293 (2015). Additionally, the Department “shall establish a National Research Center for the Education of Gifted and Talented Children and Youth.” *Id.*

¹⁰⁶ See Scott J. Peters et al., *Rethinking How We Identify “Gifted” Students*, PHI DELTA KAPPAN 8, 8–13 (Nov. 23, 2020) (outlining “several best practices in identifying gifted and talented students that, if implemented, would better align with the goal of gifted education, while also improving equity.”); Angie L. Miller, *Ways We Can Do Better: Bridging the Gap*

for increased funding and attention for gifted students.¹⁰⁷ Others call for its abolition based on the potential for discrimination.¹⁰⁸ The future of gifted education in the United States is uncertain, and what it becomes is dependent on the evolution of current controversies in the field.

2. Controversies in Gifted Education

The most significant current controversy in gifted programming is the underrepresentation of demographically, culturally, and linguistically diverse students.¹⁰⁹ Black, Hispanic, Native American, and English language learning

Between Gifted Education and Honors Colleges, 9 J. NAT'L COLLEGIATE HONORS COUNCIL 39, 42 (2018) ("Gifted children need to be prepared for what lies ahead of them as adults, not only in their academic and career pursuits but also in their social and personal experiences.").

¹⁰⁷ See Brown & Wishney, *supra* note 62, at 22 (referring to the ebb of public interest in gifted programming in the early twenty-first century, noting that the "ebbs and flows of public perceptions of equity and excellence and political and historical events have significantly impacted the evolution of the field of gifted education in the United States and abroad" and calling for a flow in the future: "Americans all lose by focusing on who is gifted rather than on what we can do to nurture intellectual potential.").

¹⁰⁸ See Kirkland, *supra* note 2.

¹⁰⁹ Donna Y. Ford et al., *Culturally and Linguistically Diverse Students in Gifted Education: Recruitment and Retention Issues*, 74 COUNCIL EXCEPTIONAL CHILD. 289, 293 (2008). This underrepresentation mirrors the roots of gifted programming in eugenics-based intelligence research, and so the founding of gifted programming is frequently raised in policy discussions about giftedness.

Controversies in gifted education also include the definition of giftedness itself, with no uniform agreement among scholars, educators, or policymakers on how to define giftedness. Sharon Dole & Lisa Bloom, *The Challenge of Providing Gifted Education*, 4 GLOB. EDUC. REV. 1, 1 (2017) ("[T]here is a lack of universal consensus on a definition of giftedness."). The terms "gifted" and "talented" have fallen in and out of favor over time, and the federal definition of giftedness has changed over time as well. One of the first federal definitions of giftedness appeared in amendments to the Elementary and Secondary Education Act of 1969: "The term 'gifted and talented children' means in accordance with objective criteria prescribed by the Commissioner, children who have outstanding intellectual ability or creative talent, the development of which requires special activities or services not ordinarily provided by local education agencies." Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 20 U.S.C. § 6301 (1965) (amended 1969). The most current federal definition of giftedness was published in 1994 in the U.S. Department of Education report, *National Excellence: A Case for Developing America's Talent*. ROSS, *supra* note 98. It eliminates the term "gifted" entirely, preferring "talent":

Children . . . with outstanding talent perform or show the potential for performing at remarkably high levels . . . when compared with others of their age, experience, or environment. These children and youth exhibit high performance capability in intellectual, creative, and/or artistic areas, possess an unusual leadership capacity, or excel in specific academic fields.

Id. at 11.

A related issue is that the various state definitions reflect attitudes toward giftedness and the related policy approaches to gifted programming. All states, with the exceptions of South

students have been persistently underrepresented in gifted education.¹¹⁰ Consider the most recent data reported by the U.S. Department of Education for the 2017–2018 school year. Although only 47% of students enrolled in public schools were white,¹¹¹ over 58% of students receiving gifted services were white.¹¹² In contrast, although Black students made up 15% of all students enrolled in public schools,¹¹³ they comprised only 8% of students enrolled in gifted programs.¹¹⁴ Similarly, although 27% of students enrolled in public schools identified as Hispanic,¹¹⁵ only 18% of students enrolled in gifted programs identified as Hispanic.¹¹⁶ The contrast for English language learners

Dakota and Massachusetts, currently have some definition of giftedness or talent, with no consensus on what term is most appropriate to describe gifted students. See Mary-Catherine McClain & Steven Pfeiffer, *Identification of Gifted Students in the United States Today: A Look at State Definitions, Policies, and Practices*, 28 J. APPLIED SCH. PSYCH. 59, 65 (2012). Terms used by various states include high ability, exceptional, gifted and talented, gifted, and talented. *Id.* at 65–66. Definitions are often somewhat amorphous. See *id.* at 61, 65–66. Differences in policy and programming between states often correlate with differences in definition. If giftedness is simply defined as a student with unusually high intellectual ability, it is unreasonable to dedicate extra resources to assist gifted students. On the other hand, if gifted students are defined as a group of students so exceptional that their needs cannot be met with ordinary education, extra resources are justifiable. See generally Jane Clarenbach & Rebecca D. Eckert, *Policy-Related Definitions of Giftedness: A Call for Change*, in FUNDAMENTALS OF GIFTED EDUCATION: CONSIDERING MULTIPLE PERSPECTIVES 32–33 (Carolyn M. Callahan & Holly L. Hertberg-Davis eds., 2017) (noting that “[d]efinitions of terms and concepts in any field of study provide the basis for common understanding and shared meaning The field of gifted education is no exception” and discussing how definitions flow through to policy decisions such as testing).

¹¹⁰ See Ford et al., *supra* note 109, at 289; Wright et al., *supra* note 8, at 50.

¹¹¹ U.S. DEP’T OF EDUC., PUBLIC SCHOOL STUDENTS OVERALL AND BY RACE/ETHNICITY, STUDENTS WITH DISABILITIES SERVED UNDER IDEA AND THOSE SERVED SOLELY UNDER SECTION 504, AND STUDENTS WHO ARE ENGLISH LANGUAGE LEARNERS, BY STATE: SCHOOL YEAR 2017–18, <https://ocrdata.ed.gov/assets/downloads/2017-2018/Student-Enrollment/All-Enrollment/Enrollment-Overall.xlsx> (last visited Jan. 8, 2023) [hereinafter U.S. DEP’T OF EDUC., PUBLIC SCHOOL STUDENTS] (showing national enrollment levels of all students).

¹¹² U.S. DEP’T OF EDUC., NUMBER AND PERCENTAGE OF PUBLIC SCHOOL STUDENTS ENROLLED IN GIFTED/TALENTED PROGRAMS, BY RACE/ETHNICITY, DISABILITY STATUS, AND ENGLISH PROFICIENCY, BY STATE: SCHOOL YEAR 2017–18, <https://ocrdata.ed.gov/assets/downloads/2017-2018/School-Programs/Gifted-and-Talented/Gifted-Talented-Enrollment.xlsx> (last visited Jan. 8, 2023), [hereinafter U.S. DEP’T OF EDUC., GIFTED/TALENTED PROGRAMS] (showing national enrollment levels of students in gifted programming).

¹¹³ U.S. DEP’T OF EDUC., PUBLIC SCHOOL STUDENTS, *supra* note 111.

¹¹⁴ U.S. DEP’T OF EDUC., GIFTED/TALENTED PROGRAMS, *supra* note 112.

¹¹⁵ U.S. DEP’T OF EDUC., PUBLIC SCHOOL STUDENTS, *supra* note 111.

¹¹⁶ U.S. DEP’T OF EDUC., GIFTED/TALENTED PROGRAMS, *supra* note 112.

is even more stark. Although 10% of all students identified as English language learners,¹¹⁷ they comprised only 3% of students in gifted programming.¹¹⁸

Because some variation between total enrollment percentages and gifted enrollment percentages would be expected due to statistical variability, one method for determining whether such variation should be concerning is the “Equity Allowance Goal.”¹¹⁹ Similar to the EEOC’s four-fifths rule of thumb in disparate impact cases in employment law,¹²⁰ the Equity Allowance Goal assumes the representation of each demographic group in gifted programming should be at least 80% of its overall enrollment percentages.¹²¹ Under this reasoning, a discrepancy of more than 20% implies a discrepancy greater than what could be explained by random chance.¹²² Table 1 presents these calculations for five of the largest reported demographics, plus English language learners.¹²³ For Hispanic, Black, and English language learning students, the national gifted enrollment rates are well below the equity allowance target, which means they are even farther below parity with white children.¹²⁴

Table 1. National Representation, Equity Allowance Goal, and Gifted Enrollment Percentage Among Large Demographic Groups, 2017–2018¹²⁵

	American Indian or Alaska Native	Asian	Hispanic	Black	White	English Language Learners
Enrollment Percentage, Total	1.0%	5.2%	27.2%	15.1%	47.3%	10.4%
Equity Allowance Goal (80%)	0.8%	4.1%	21.8%	12.1%	37.9%	8.3%
Gifted Enrollment Percentage	0.8%	9.6%	18.0%	8.2%	58.2%	2.8%

These numbers reflect a common challenge: studies of common testing and screening methodology indicate that current methods fail to recognize a

¹¹⁷ U.S. DEP’T OF EDUC., PUBLIC SCHOOL STUDENTS, *supra* note 111.

¹¹⁸ U.S. DEP’T OF EDUC., GIFTED/TALENTED PROGRAMS, *supra* note 112.

¹¹⁹ See Wright et al., *supra* note 8, at 52–53.

¹²⁰ See, e.g., THOMAS A. STETZ, TEST BIAS IN EMPLOYMENT SELECTION TRAINING: A VISUAL INTRODUCTION 67, 68 (2022).

¹²¹ Wright et al., *supra* note 8, at 56.

¹²² *Id.* at 53.

¹²³ See *infra* note 125.

¹²⁴ See *infra* note 125.

¹²⁵ Author’s calculations are based on information from the U.S. Department of Education website, on file with the author. See U.S. DEP’T OF EDUC., PUBLIC SCHOOL STUDENTS, *supra* note 111; U.S. DEP’T OF EDUC., GIFTED/TALENTED PROGRAMS, *supra* note 112.

substantial number of gifted students.¹²⁶ Universal screening for giftedness, when implemented by states or districts, finds giftedness in roughly equal numbers in every racial and socioeconomic group.¹²⁷ Unfortunately, universal screening is expensive, and budget constraints may eliminate efforts to universally assess students for gifted programming.¹²⁸ Empirically, the problem is not a matter of groups of students who are not gifted, but rather, the failure to include all gifted students in gifted programming.¹²⁹

This failure can be separated into two categories: recruitment barriers and retention barriers.¹³⁰ First, consider the barriers to recruitment. For a child to receive gifted services, gifted services must first be offered at the student's school. The chance of this dramatically decreases if the student is poor.¹³¹ Since school funding depends largely on local property taxes, children in poorer areas are less likely to have well-funded schools.¹³² Since gifted programming is often viewed with lower priority than other educational services, the provision of gifted programming is less likely to occur in these communities.¹³³ Then, since

¹²⁶ See David Card & Laura Giuliano, *Universal Screening Increases the Representation of Low-Income and Minority Students in Gifted Education*, 113 PROC. NAT'L ACAD. OF SCI. 13678, 13680 (2016); Jason A. Grissom & Christopher Redding, *Discretion and Disproportionality: Explaining the Underrepresentation of High-Achieving Students of Color in Gifted Programs*, 2 AERA OPEN 1, 14 (2016) ("In particular, we uncover evidence that Black students in classrooms with non-Black teachers are systematically less likely to receive gifted services in subsequent years, particularly in reading. . . . One explanation is that teachers exercise discretion in student referral, diagnosis, or selection along racial/ethnic lines in ways that contribute to patterns of disproportionality in assignment."). Historically, the disparity was explained by the debunked belief in the genetic superiority of white children. See generally LAGEMANN, *supra* note 81, at 93 (discussing early longitudinal study of gifted children).

¹²⁷ See Card & Giuliano, *supra* note 126, at 13679 (discussing distribution of test scores among newly identified students through universal screening).

¹²⁸ Adam Galvan, *Why Aren't More Black Students Identified as Gifted?*, DIST. ADMIN. (Mar. 28, 2016), <https://districtadministration.com/why-arent-more-black-students-identified-as-gifted/> ("Broward County Public Schools screened all students from 2005–07, and identified as gifted a large number of students who were poor, black, Hispanic, or whose parents did not speak English. When the universal evaluations ended due to budget constraints, the racial gaps reappeared.").

¹²⁹ See Card & Giuliano, *supra* note 126 *passim*.

¹³⁰ See Ford et al., *supra* note 109, at 290.

¹³¹ See Gary Stager, *Enrichment Programs: The Winners Win More at the Expense of their Classmates*, 44 DIST. ADMIN. 64 (2008). Unequal education funding is a consistent problem in the United States. See Dennis J. Condrón, *The Waning Impact of School Finance Litigation on Inequality in Per Student Revenue during the Adequacy Era*, 43 J. EDUC. FIN. 1 (2017).

¹³² See John G. Augenblick et al., *Equity and Adequacy in School Funding*, 7 FUTURE CHILD. 63, 64–66 (1997).

¹³³ See Adam Hobdy Weiss, *School Funding Inequalities in the Texas Panhandle Related to the Racial, Socio-economic, and Linguistic Composition of School Districts*, 46 J. EDUC. FIN. 20, 34 (2020).

property values in the United States tend to be lower in communities with high concentrations of people of color, students of color also tend to live in areas with less provision of gifted services.¹³⁴

Next, if gifted services exist, the student must be identified and classified as gifted. While the identification process varies significantly between states, identification takes place in two stages.¹³⁵ The first stage is screening, or determining who ought to be evaluated for giftedness.¹³⁶ The second is an evaluation, which usually consists of a combination of IQ, ability, or performance-based tests.¹³⁷

Gifted programming generally has a screening process to determine which students are evaluated for giftedness. Teacher or parent referral is the most commonly used tool.¹³⁸ This method relies on these adults to recognize behavior and performance as indicative of giftedness.¹³⁹ One problem with this method is that teachers may be more likely to recognize giftedness in students with whom they share cultural and social class values.¹⁴⁰ For example, Black children are more likely to be referred for screening by Black teachers.¹⁴¹ Because historically, following *Brown v. Board of Education*, many Black educators were forced out of education due to concerns over allowing the teaching of white children by Black teachers, and white teachers reporting to Black principals,

¹³⁴ See *id.* at 37; Hani Morgan, *The Gap in Gifted Education: Can Gifted Screening Narrow It?*, 140 EDUC. 207, 209 (2020).

¹³⁵ See Ford et al., *supra* note 109, at 293–95.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ See Wright et al., *supra* note 8, at 47–48.

¹³⁹ See *id.* at 52; Margarita Bianco et al., *Gifted Girls: Gender Bias in Gifted Referrals*, 33 ROEPER REV. 170, 170 (2011) (“[O]ne of the most common methods for screening students for gifted identification includes teachers’ observations and nominations . . .”).

¹⁴⁰ See Donna Y. Ford, *No Child Left Behind . . . Unless a Student is Gifted and of Color: Reflections on the Need to Meet the Educational Needs of the Gifted*, 15 J.L. SOC’Y 213, 235 (2013) (“[I]f not used carefully, teacher referrals can often negatively and disproportionately affects [sic] Black and Hispanic students. Sadly, this reality has been borne out in a comprehensive review of the literature which demonstrated that every study on teacher referral for gifted education screening and placement revealed that teachers under-refer African American students more than any other group.”).

¹⁴¹ See Wright et al., *supra* note 126 at 52; Sean Nicholson-Crotty et al., *Disentangling the Causal Mechanisms of Representative Bureaucracy: Evidence From Assignment of Students to Gifted Programs*, 26 J. PUB. ADMIN. RES. THEORY 745, 746 (2016) (“Our results show that, even conditioning on current test scores, [B]lack students are assigned to gifted services at higher rates when their classroom teacher is [B]lack.”). See generally Hala Elhoweris et al., *Effect of Children’s Ethnicity on Teachers’ Referral and Recommendation Decisions in Gifted and Talented Programs*, 26 REMEDIAL & SPECIAL EDUC. 25, 28 (2005) (studying empirical referrals for gifted programming and finding significant impacts of student race on referral).

Black students have been at a disadvantage at the screening stage.¹⁴² In general, culturally and linguistically diverse students are disproportionately less likely to be recommended for gifted screening by teachers.¹⁴³

Many of the same issues influencing the under-referral of Black and Hispanic students for gifted screening contribute to their poor retention in gifted programming. Insufficient cultural fluency can lead predominantly white teachers to misunderstand the behavior of these students, creating a hostile environment within gifted services and pressure for them to assimilate in order to stay in gifted programs.¹⁴⁴ Rather than risk experiencing “social class change anxiety” or risk being accused of betraying their culture, many Black and Hispanic students choose to leave gifted programs.¹⁴⁵ Even if students feel no pressure to assimilate, they likely find themselves in an environment where few people look like them.¹⁴⁶ They perceive that they do not belong.¹⁴⁷ Thus, the underrepresentation of Black students in gifted programming can, in turn, discourage Black students identified as gifted from staying in the program.¹⁴⁸

¹⁴² See generally LESLIE T. FENWICK, JIM CROW’S PINK SLIP: THE UNTOLD STORY OF BLACK PRINCIPAL AND TEACHER LEADERSHIP (2022).

¹⁴³ *Id.* One possible explanation for the disparate levels of teacher referrals is that white teachers may have lower expectations for cultural and linguistically diverse students. Morgan, *supra* note 134, at 210. Low teacher expectations are strongly correlated with the underrepresentation of minority students in gifted programs. *Id.*

¹⁴⁴ Paula Olszewski-Kubilius, *Do We Change Gifted Children to Fit Gifted Programs, or Do We Change Gifted Programs to Fit Gifted Children?*, 26 J. EDUC. GIFTED 304, 309 (2003).

¹⁴⁵ *Id.* (“[G]ifted minority students experience ‘social class change anxiety’ or guilt, anxiety, and depression when their grades or test performances or achievement surpass those of other minority students and family members and sets them apart from those with whom they most identify and love.”); Donna Y. Ford & Gilman W. Whiting, *Beyond Testing: Social and Psychological Considerations in Recruiting and Retaining Gifted Black Students*, 34 J. EDUC. GIFTED 131, 141 (2010) (“To stop being accused of acting White, he or she may stop displaying the characteristic(s) associated with the accusation [e.g., dress or talk differently, disengage from academics, downplay intelligence].”).

¹⁴⁶ E.g., Barbara J. Frye & Helen A. Vogt, *The Causes of Underrepresentation of African American Children in Gifted Programs and the Need to Address this Problem Through More Culturally Responsive Teaching Practices in Teacher Education Programs*, 73 BLACK HIST. BULL. 11, 11–12 (2010). (“In many instances, when African American children enter a gifted program, they do not see anyone who looks like them or to whom they can relate. . . . They often choose to underachieve rather than risk being accused by their peers of ‘acting white.’”).

¹⁴⁷ See, e.g., Melissa J. DuPont-Reyes & Alice P. Villatoro, *The Role of School Race/Ethnic Composition on Mental Health Outcomes: A Systematic Literature Review*, 74 J. ADOLESCENCE 71, 72 (2019) (“[H]aving sufficient same-race/ethnicity peers may prevent feeling like an outsider and minimize the frequency of experiencing racism.”).

¹⁴⁸ See Ford & Whiting, *supra* note 145, at 144 (explaining the experience of minority students in gifted education, and noting “[f]eelings of loneliness, isolation, and rejection increase, and the need for affiliation begins to outweigh the need for achievement. . . . When caught in this psychological and social-emotional conflict, some Black students attempt to sabotage their achievement . . . [by] refusing to be in gifted education”).

Another area of controversy is the bias of intelligence tests commonly used in identifying gifted students. Many tests used to measure intelligence have been framed in white, middle-class values, and therefore have difficulty accurately measuring intelligence in subjects outside that group.¹⁴⁹ Although modern intelligence tests attempt to avoid overt racism, most have roots in Terman's work with the Stanford-Binet test, which was itself rooted in Terman's view of the "dullness" of non-white children.¹⁵⁰ Those roots indicate that "the father of gifted education" was also a prominent eugenicist, convinced that intelligence was primarily inherited.¹⁵¹ His efforts to quantify human intelligence and promote gifted education built off his assumptions regarding white supremacy.¹⁵² Terman's white supremacy had company among the other founders of gifted programming,¹⁵³ and this ancestral connection has paired with the common question of the objectivity of modern assessments.¹⁵⁴ For example, even today, the most commonly used methods to identify gifted students rely on verbal assessments that "do not take into consideration the colloquial language used by many culturally different children."¹⁵⁵ As such, verbal-based

¹⁴⁹ See James M. Patton, *Assessment and Identification of African-American Learners with Gifts and Talents*, 59 EXCEPTIONAL CHILD. 150, 151 (1992) ("IQ tests measure distinct, Eurocentric cognitive skills, specific to Western culture. Because these tests are grounded on . . . cognition and behavior valued by . . . the middle class in Western societies, they . . . cannot adequately measure intelligence of African Americans.").

¹⁵⁰ See LEWIS TERMAN, *THE MEASUREMENT OF INTELLIGENCE* 91 (1916).

¹⁵¹ Robins, *supra* note 63, at 114; see also Jennifer L. Jolly, *Historical Perspectives: A Paradoxical Point of View: Lewis M. Terman*, 31 GIFTED CHILD TODAY 36, 36 (2008).

¹⁵² For example, in the 1920s Terman wrote, "the racial stock most prolific of gifted children are those from northern and western Europe, and the Jewish." L.M. Terman, *The Conservation of Talent*, 19 J. SCH. & SOC'Y 363 (1924). In line with these views, Terman's intelligence test was used as justification for sterilization in the name of eugenics. See Joanne Woiak, *Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck*, 37 J. AM. ETHNIC HIST. 92 (2018). Terman's genetic-based claims of intellectual superiority have modern echoes. See Kenneth Aizawa, *The Gap Between Science and Policy in The Bell Curve*, 39 AM. BEHAV. SCIENTIST 84, 86 (1995).

¹⁵³ See Katherine Cumings Mansfield, *Giftedness as Property: Troubling Whiteness, Wealth, and Gifted Education in the United States*, 17 INT'L J. MULTICULTURAL EDUC. 1, 6 (2015).

¹⁵⁴ See *id.* at 8–9; see also Eric Hoover, *At Admissions Conference, Talk of Standardized Tests Dominates*, CHRON. HIGHER EDUC. (Oct. 10, 2008), <https://www.chronicle.com/article/at-admissions-conference-talk-of-standardized-tests-dominates/>. Others extract Terman's contributions to gifted education with no mention of his background in eugenics. See Robins, *supra* note 63, at 59.

¹⁵⁵ J.D. Lewis et al., *Selecting for Ethnically Diverse Children Who May Be Gifted Using Raven's Standard Progressive Matrices and Naglieri Nonverbal Abilities Test*, 15 MULTICULTURAL EDUC. 38 (2007); see also Adrienne Hopkins & Kendra Garrett, *Separate and Unequal: The Underrepresentation of African American Students in Gifted and Talented Programs*, 73 BLACK HIST. BULL. 24, 25 (2010) (noting how giftedness has been "interconnected" with "highly developed verbal skills") (internal quotations omitted).

assessments are unlikely to identify giftedness in English language learners,¹⁵⁶ and the efficacy of intelligence tests can be hindered by expectation bias.¹⁵⁷

In sum, gifted programming has a history tied to discrimination and race-based pseudoscience. Gifted programming, as practiced in much of the United States, appears to exacerbate these same discriminatory concerns through substantial inequities in enrollment of some student groups in gifted services. The import these two facts should have on modern policy-making is a subject of significant debate. The next Part introduces two frameworks that may suggest a path forward.

II. PAST AND PRESENT IN POLICYMAKING

The prior Part highlighted aspects of the troubling history of gifted programming, a history that has led some to call for abandoning the practice altogether. These appeals to the past beg the question of how policymakers *should* view the past. Like gifted programming, jurisprudence often comes with a troubling past that current policymakers may struggle to address. This Part offers two contrasting perspectives on troubling legal histories which may shed light on gifted programming today.¹⁵⁸ We first outline these theories and then apply them to gifted programming. Then, we apply these principles to a significant modern policy development: the possibility of universal screening for giftedness.

A. *Collings and the Memory of Evil*

Courts are often confronted with the implications of past policies.¹⁵⁹ How they conceptualize the past affects their decisions in the present. While there is significant nuance in how various courts have dealt with these sometimes intricate problems, a recent categorization is instructive. Justin Collings classifies the approach to problematic history at the Supreme Court as either

¹⁵⁶ For instance, Terman's original test included example verbal questions such as "Artichoke is a kind of hay corn vegetable fodder" and "Cornell University is at Ithaca Cambridge Annapolis New Haven." RALPH M. BROWN, LEGAL PSYCHOLOGY 162 (1926).

¹⁵⁷ Haley C. Biddanda, *Reducing Racism-Based Stress in Black Youth During the Assessment Process*, 50 COMMUNIQUE 14, 14 (2022) (describing a stereotype threat in psychological testing settings, and noting that "Black students performed significantly worse when reminded of racial stereotypes about intelligence prior to testing or even when they were simply told that the test measured intelligence. This discrepancy disappeared when the test was framed as a problem-solving activity.").

¹⁵⁸ Perspectives on how the past should affect the present are, of course, not limited to jurisprudence. See ELKINS, *supra* note 9, at 1–6. Yet the jurisprudential literature offers a unique perspective specifically focused on the narrative justifications for policy creation, through court decisions. *Id.* Thus, it offers a strong perspective on how one might consider the role of past in present.

¹⁵⁹ See Collings, *supra* note 11, at 269 (discussing how courts are concerned with how the past should affect the present).

“parenthetical” or “redemptive.”¹⁶⁰ A parenthetical approach to history views a historical problem, like slavery, as a closed parenthesis, an event that interrupted the noble past of the republic and was then closed with the Civil War.¹⁶¹ For example, for the majority in the *Slaughter-House Cases*, the Civil War “was not fought to reshape the Union, but to restore it,” and the end of the war “did not solemnize a fundamental reordering; it marked a closed parenthesis.”¹⁶² A parenthetical approach “underestimate[s] the scope of past evil, and [does] too little to redress it.”¹⁶³ It “deem[s] the past irrelevant,”¹⁶⁴ and notes an example like slavery as a “baleful aberration from an otherwise noble tradition.”¹⁶⁵ A righteous constitutional history may have been corrupted by slavery, but with slavery’s abolishment that just tradition is restored as part of one continuous noble past.¹⁶⁶ Like the *Slaughter-House Cases*, *Plessy v. Ferguson* was parenthetical history, a “conciliatory forgetting” that allowed “resumption of evil.”¹⁶⁷

In contrast, a “redemptive” approach uses history to “repudiat[e] and redress” past harms by “work[ing] to root out any lingering vestige” of those harms.¹⁶⁸ Justice Marshall’s opinion in *Regents of the University of California v. Bakke* is illustrative.¹⁶⁹ Under the holding of *Bakke*, diversity could be considered in admissions, but consideration of the “past” was relegated to a relatively minor and amorphous role.¹⁷⁰ Instead, Justice Marshall rooted his opinion in slavery, *Dred Scott*, the later Black Codes, and Jim Crow,¹⁷¹ arguing the “impact of the past [was] reflected” in current social conditions.¹⁷² For Marshall, a stronger

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 269–71.

¹⁶² *Id.* at 274. Collings “take[s] the term ‘parenthesis’ from Benedetto Croce who allegedly dismissed fascism as ‘*una parentesi*’ (a parenthesis) in Italian history.” *Id.* at 269 (citing 1 BENEDETTO CROCE, *La Libertà Italiana Nella Libertà Del Mondo*, in 1 SCRITTI E DISCORSI POLITICI (1943–1947), at 54, 61 (1963)) (footnote omitted); see also Charles L. Leavitt IV, ‘*An Entirely New Land?*’ *Italy’s Post-War Culture and Its Fascist Past*, 21 J. MOD. IT. STUD. 1, 3–4 (2016), <https://core.ac.uk/download/pdf/42152933.pdf>.

¹⁶³ Collings, *supra* note 11, at 270.

¹⁶⁴ *Id.* at 286–87.

¹⁶⁵ *Id.* at 269.

¹⁶⁶ See *id.* at 269–70.

¹⁶⁷ *Id.* at 271.

¹⁶⁸ *Id.* at 270.

¹⁶⁹ 438 U.S. 265 (1978); see also Collings, *supra* note 11, at 310–11.

¹⁷⁰ Collings, *supra* note 11, at 310–11. At the very least, the role of history would play a minimal role. The Court allowed nebulous consideration of “past racial discrimination”: “These decisions compel the conclusion that States also may adopt race-conscious programs designed to overcome substantial, chronic minority underrepresentation where there is reason to believe that the evil addressed is a product of past racial discrimination.” *Bakke*, 438 U.S. at 366 (footnote omitted).

¹⁷¹ *Bakke*, 438 U.S. at 387–96.

¹⁷² *Id.* at 396.

state interest existed for redemptive “atonement and reconciliation” than the classroom diversity interest which undergirded the more parenthetical majority opinion.¹⁷³

B. *Murray and Discriminatory Taint*

The contrast between parenthetical and redemptive approaches to adjudicative history illustrate how courts in the United States have been inconsistent in their narratives of past discrimination.¹⁷⁴ This inconsistency flows through to the policy decisions of those courts. W. Kerry Murray offers a framework for this fraught decision-making process, which begins, like Collings, with two contrasting approaches to historical thought.¹⁷⁵ On one hand, when confronted with grandfather voting clauses passed to disenfranchise Black voters in the South, the Supreme Court refused to accept the facial neutrality of the provisions, noting that the Constitution “nullifies sophisticated as well as simple-minded modes of discrimination.”¹⁷⁶ In Murray’s categorization, this is a *temporally maximalist* approach, one that “offer[s] . . . maximalist attention to the realities of how a particular practice came to be . . .”¹⁷⁷ On the other hand, when considering whether racial bias played a role in capital punishment in Georgia, the Supreme Court considered past evidence of the state’s “dual system” of capital punishment, but noted that “unless historical evidence is reasonably contemporaneous with the challenged decision, it has little probative value.”¹⁷⁸ This is a *temporally minimalist* approach, one that “minimizes the relevance of similar past policies.”¹⁷⁹

Trying to navigate between temporal maximalism and minimalism presents two foundational questions: first, *when* is a past policy related closely enough to the present to warrant consideration in policymaking?¹⁸⁰ Second, if closely related, *what* is one to do about it?¹⁸¹ For the first question of *when*, several issues are relevant: examining whether the current policy performs the same function as the problematic past policy,¹⁸² whether the institutional actor is continuous with the past,¹⁸³ and whether related events connect the past to the

¹⁷³ Collings, *supra* note 11, at 310.

¹⁷⁴ See Murray, *supra* note 12, at 1193–94 (noting the lack of consistency among federal courts considering the impact of past discrimination on present policies under review).

¹⁷⁵ *Id. passim*.

¹⁷⁶ Lane v. Wilson, 307 U.S. 268, 275 (1939) (discussed in Murray, *supra* note 12, at 1199).

¹⁷⁷ Murray, *supra* note 12, at 1207.

¹⁷⁸ McCleskey v. Kemp, 481 U.S. 279, 298 n.20, 329–30 (1987) (discussed in Murray, *supra* note 12, at 1201–02).

¹⁷⁹ Murray, *supra* note 12, at 1204.

¹⁸⁰ *Id.* at 1202.

¹⁸¹ *Id.*

¹⁸² *Id.* at 1220.

¹⁸³ *Id.* at 1221.

present.¹⁸⁴ For the second question of *what*, Murray proposes a multi-part process based on traditional constitutional scrutiny standards.¹⁸⁵ If taint is present, courts should first look to disparate impact in the present.¹⁸⁶ If disparate impact is present, courts should apply a form of heightened scrutiny which looks to: (1) whether discrimination was a but-for cause of the policy,¹⁸⁷ and, if so, (2) whether: (i) the policy is supported by a legitimate government motivation, (ii) the policy accounts for the past, and (iii) whatever disparate impact remains is “unavoidable and outweighed by the benefits”¹⁸⁸ In sum, “[t]aint means that, at least sometimes, present good faith is insufficient. Sometimes, the unpurged taint of past discrimination may be a fact about contemporary government action that indicates its unlawfulness, irrespective of its good faith enactment.”¹⁸⁹

There is not a one-to-one match between Murray’s framework of taint and Collings’ framework of memory, but they share similarities. Both examine the role past plays in present, and both classify how others have treated the past in the context of policymaking.¹⁹⁰ The parenthesis-makers from Collings are similar to the temporal minimalists in Murray—both fail to fully regard the implications of the past for the present.¹⁹¹ The redeemers in Collings who consider history in an attempt to improve it are likewise similar to the temporal maximalists in Murray, who read past concerns strongly into the present.¹⁹² Unlike Murray, who offers rather specific policy proposals for handling issues marked by discriminatory taint in a scrutiny framework, Collings instead ends on a more ambiguous note, reflecting that both parenthetical and redemptive approaches to history have challenges: parenthetical reflection allows evil to

¹⁸⁴ *Id.* at 1224. For example, considering whether the new policy resulted from litigation over how the past policy discriminated would be a related event. *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ If discrimination is a but-for cause, Murray suggests applying strict scrutiny. *Id.*

¹⁸⁸ *Id.* Murray also notes how burdens of proof and production weigh into this evaluative process, but those arguments are more related to judicial decision-making rather than a policy framework like education. *Id.* at 1244–45.

¹⁸⁹ *Id.* at 1245.

¹⁹⁰ See Collings, *supra* note 11; Murray, *supra* note 12.

¹⁹¹ See Collings, *supra* note 11; Murray, *supra* note 12.

¹⁹² That said, the policy implications flowing from these stances may differ: a redemptive approach to a policy problem might, e.g., favor reform while a temporal maximalist might tend towards cancellation. Compare Mansfield, *supra* note 153, at 152–54 (acknowledging racist and classist history of gifted education, as well as present eugenicist discourse, and describing research-based methods to improve learning and growth for all students, not just those labeled as “gifted”), and Seale, *supra* note 1 (proposing expansion of gifted programming as a solution to the persistent racial inequities in gifted education), with Kirkland, *supra* note 2 (recognizing racist history of gifted education and supporting elimination of gifted programs in New York).

grow, while redemptive memory can be destabilizing.¹⁹³ Timing is crucial, as a closing parenthesis to history should only be made once redemptive memory exists, otherwise “premature proclamation of a close parenthesis” helps delay or actively hinders redemption.¹⁹⁴ Put otherwise, parentheses to history are helpful, but not when they serve to mask or exacerbate the problems they are declaring finished.

C. *Gifted Programming, Memory, and Discriminatory Taint*

This Section ties the historical narratives from Part I together with the analytical frameworks above to examine gifted programming. It first uses Collings’s framework for the memory of evil to analyze recent narratives surrounding gifted programming. This analysis examines discussion of gifted programming based on parenthetical or redemptive modes of reasoning. It then applies Murray’s framework for discriminatory taint to suggest a policy framework for analyzing the challenges surrounding gifted education.

Despite its virtues—and our view *is* that there are virtues—gifted programming has a long and well-documented history tying it to problematic issues such as eugenics and racial discrimination.¹⁹⁵ In Collings’s terminology, the narratives surrounding modern gifted programming face a “memory of evil” problem.¹⁹⁶ In line with Collings’s redemptive view of history, authors such as Satasha Green and Adrienne Hopkins might view this past as signifying fundamental problems with gifted programming that require radical change or abolishment.¹⁹⁷ Taken to an extreme, these may represent the “destabilizing” concerns in the memory of evil framework.¹⁹⁸ On the other hand, authors such as Pratik Chougule might ignore this history completely in favor of continuing gifted programming as is, akin to Collings’s parenthetical approach which

¹⁹³ Collings, *supra* note 11, at 338–39.

¹⁹⁴ *Id.* at 339 (“The trouble arises when that day’s arrival is declared prematurely; when the close parenthesis is announced before redemption has taken place; . . . when one blithely proclaims that evil is ended and paradise restored, though legions of serpents still slither through the grass.”).

¹⁹⁵ See discussion *supra* Section I.C.

¹⁹⁶ See Collings, *supra* note 11.

¹⁹⁷ See Satasha Green, *Afterthought: Gifted Education: The Civil Rights Issue of Our Generation?*, 73 BLACK HIST. BULL. 31, 31–32 (2010) (noting the “historical legacy” of Black education and that “we as educators . . . must continue to transform the educational system”); Hopkins & Garrett, *supra* note 155, at 26 (“It is well documented that . . . teacher perceptions and beliefs [about students of color] . . . plague the appropriate identification of students who are gifted and lead to their underrepresentation in gifted programs. . . . [A]ll involved have to change their approaches, expectations, and mindsets.”). As one policy tool to aid this change, Hopkins & Garrett suggest teaching educators and parents about the *history* of gifted education. Hopkins & Garrett, *supra* note 155, at 26; Kirkland, *supra* note 2.

¹⁹⁸ Collings, *supra* note 11, at 338.

ignores the continuance of the past to the present.¹⁹⁹ Doing so may hinder the redemptive power of change to gifted programming.²⁰⁰

Murray's framework offers a pragmatic alternative to these narratives: the existence of taint triggers a series of cascading decision rules, each with specific application to historical fact or present-day policy condition.²⁰¹ First, Murray's question of *when* a past policy warrants consideration in policymaking is likely satisfied: current gifted programming performs the same function as its historical antecedents, is implemented by the same institutional actors, and connects to the present through the continued provision of gifted services over time.²⁰² Given this, one resolves the question of *what* to do by first looking for the existence of disparate impact in the present.²⁰³ An ample literature examines this question, finding that, e.g., "[l]ow-income and minority students are substantially underrepresented in gifted and talented education programs in the United States,"²⁰⁴ and that more comprehensive screening may raise gifted participation rates among these groups.²⁰⁵ This literature is supported by case law, such as *McFadden v. Board of Education*, in which plaintiffs challenged a student assignment plan which allegedly discriminated against minority students.²⁰⁶ After eight years of complex litigation, the court found evidence of "obvious" disparate impact in gifted programming for the district in question, noting that:

The District chose instead to separate gifted Hispanic students from their white peers, thus perpetuating the cultural distinctions and barriers to assimilation that our nation's civil rights laws are dedicated to prevent. That this segregation occurs at the stage of a child's education and life

¹⁹⁹ Pratik Chougule served as policy coordinator during the 2016 presidential campaigns of Donald Trump and Arkansas governor Mike Huckabee. See Patrik Chougule, *Hillary Clinton's 'Alt-Right' Smear Will Backfire*, CNBC (Aug. 30, 2016, 10:42 AM), <https://www.cnbc.com/2016/08/30/hillary-clintons-alt-right-smear-will-backfire-commentary.html>. His 2017 article, *How America Turned Against Smart Kids* outlines only the positive contributions of early researchers such as Terman, with no mention of their work in eugenics. See Pratik Chougule, *How America Turned Against Smart Kids*, AM. CONSERVATIVE (Apr. 22, 2017), <https://www.theamericanconservative.com/articles/how-america-turned-against-smart-kids/>. He frames the current American attitudes toward gifted education as a resentful neglect of the gifted student in favor of a focus on bringing the underperforming student up to standard. *Id.* He posits that "[e]stablishment resistance to gifted and talented education stems from a broader apathy in American culture toward intellectual enrichment." *Id.*

²⁰⁰ See Collings, *supra* note 11, at 339.

²⁰¹ See discussion *supra* Section II.B.; Murray, *supra* note 12, at 1244.

²⁰² Murray, *supra* note 12, at 1220–21.

²⁰³ Murray, *supra* note 12, at 1244 ("To sum up, taint triggers a decision rule that first looks to disparate impact.").

²⁰⁴ See, e.g., Card & Giuliano, *supra* note 126, at 13678.

²⁰⁵ *Id.* at 13679.

²⁰⁶ *McFadden v. Bd. of Educ. for Ill. Sch. Dist. U-46*, 984 F. Supp. 2d 882 (N.D. Ill. 2013).

when he is most vulnerable to identifying his opportunities by cultural differences only aggravates an otherwise obvious disparate impact on these children.²⁰⁷

Together, the educational literature and case law suggest that at least *some* of the discriminatory historical roots of gifted programming have continued relevance in the modern era.²⁰⁸

Assuming this is true, Murray's follow-up is to then evaluate the policy under a heightened scrutiny analysis, one in which the government must show: (1) legitimate justifications for the policy, (2) an accounting for the troubling history, and (3) that any remaining disparate impact is outweighed by the benefits of the policy.²⁰⁹

Consider each of these. Just as an ample literature documents the troubling historical roots of gifted programming, another large literature exists to justify or promote its benefits.²¹⁰ These include textbooks such as *Education of the Gifted and Talented*,²¹¹ countless articles,²¹² the 1972 Marland Report,²¹³ and legislation, such as The Jacob K. Javits Gifted and Talented Children's Education Act of 1978.²¹⁴ Although many of these benefits may deserve caveats

²⁰⁷ *Id.* at 901; *see also* Johnson *ex rel.* Johnson v. Bd. of Educ. of Champaign Unit Sch. Dist. No. 4, 188 F. Supp. 2d 944, 979 (C.D. Ill. 2002). The court noted, in its decision regarding the district's compliance with a consent decree, that:

[i]n regard to the racial composition of the north side gifted programs, it is true that only 41 of the 258 students enrolled are African-American, which works out to roughly 16%. . . . While the numbers are still low in relation to the overall percentage of African-American students district-wide, the Court notes that the District has made substantial strides in improving minority enrollment in gifted programs. Indeed, the percentage of elementary level African-American students enrolled in the gifted programs during the 1996–1997 school year stood at a mere 2.7%.

Id.

²⁰⁸ *See generally* Wright et al., *supra* note 8, at 54.

²⁰⁹ Murray, *supra* note 12, at 1244. Murray notes:

If necessary, courts then apply heightened scrutiny. . . . [W]here taint supports a prima facie case, the government need not show narrow tailoring that satisfies a compelling interest. It need only show that legitimate reasons support the policy, that it has accounted for the problematic history, and that any persisting disparate impact is unavoidable and outweighed by the benefits of the legitimate justifications.

Id.

²¹⁰ *See infra* notes 211–214.

²¹¹ SYLVIA B. RIMM ET AL., EDUCATION OF THE GIFTED AND TALENTED (7th ed. 2017).

²¹² *E.g.*, Seale, *supra* note 1; Patrick Haney, *supra* note 104, at 279 (“Our nation is home to millions of gifted students—past, present, and future—who will meaningfully impact our nation’s economic competitiveness in these globalizing times only if provided the resources to realize their potential.”) (footnote omitted); Pfeiffer, *supra* note 100.

²¹³ MARLAND REPORT, *supra* note 95.

²¹⁴ Gifted and Talented Children’s Education Act of 1978, Pub. L. No. 95-561, § 901, 92 Stat. 2143, 2292 (1978).

or further research, they easily clear the bar employed under traditional scrutiny standards examining whether government action has a “legitimate” purpose.²¹⁵

Next, we look for an accounting of historical factors. We do so in two ways: first, by examining the practice of gifted programming as reflected in the education literature, and second, by examining legal developments since the onset of gifted programming. The literature suggests that despite problems with unequal application or identification for gifted programming, administrators are generally deeply aware of potential discrimination. For example, the National Association for Gifted Children announced a plan in 2020 to “confront systemic racism and advance equity for Black students in gifted education.”²¹⁶ It acknowledges that culturally and linguistically diverse students are underrepresented in gifted education, and that common methods of identification for gifted students are tainted with discrimination.²¹⁷ Numerous other education scholars raise similar points.²¹⁸

Next, the legal frameworks surrounding equality and discrimination in gifted programming are vastly different from those in place during the development of the concept of gifted programming and its expansion across the country. As discussed in Part I, the intellectual roots of gifted programming developed in the latter half of the nineteenth century, an era in which education law and the doctrine of equal protection were in relative infancy or were being actively attacked by courts.²¹⁹ In the *Plessy* or even pre-*Plessy* era, prevailing legal standards sanctioned intentional discrimination and segregation.²²⁰ While modern education reformers can point to widespread evidence that many challenges at the heart of *Plessy* still remain, the legal regime governing

²¹⁵ The traditional rational-basis standard examining legitimacy casts a broad net, drawing in justifications. See *Romer v. Evans*, 517 U.S. 620, 632 (1996) (“In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous.”); *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993) (“[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.”).

²¹⁶ *Championing Equity and Supporting Social Justice for Black Students in Gifted Education: An Expanded Vision for NAGC*, NAT’L ASS’N FOR GIFTED CHILD. (July 14, 2022), <https://www.nagc.org/championing-equity-and-supporting-social-justice-black-students-gifted-education-expanded-vision> (“NAGC [has] long advocated for educators, policymakers, and other stakeholders to understand that giftedness is universal and present in students from all racial, cultural, and socioeconomic backgrounds. . . . [R]ecent events reinforce that biased and discriminatory views are still widely held in American society.”).

²¹⁷ *Id.*

²¹⁸ See Green, *supra* note 197, at 32; Hopkins & Garrett, *supra* note 155, at 26.

²¹⁹ See Collings, *supra* note 11, at 271 (describing the evisceration of the Equal Protection Clause by the Supreme Court in the late nineteenth century).

²²⁰ *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

schools—and hence gifted programming—is far different than in the time of *Plessy*.²²¹

Compared to the late nineteenth or early twentieth centuries, and even to the mid-twentieth century when adoption of gifted programming began to accelerate, modern-day legal mechanisms that exist to combat both intentional and disparate impact discrimination are relatively robust.²²² These mechanisms may be imperfectly applied, and challenges such as those discussed in this Article remain, but that they *exist* marks a very different legal background than that at the time gifted programming was introduced. Together, the practice of gifted programming and prevailing legal norms suggest that public education and gifted programming administration have taken effort to account for the taint of the past.²²³

Finally, assuming the first two steps are satisfied, the last step in Murray's process for analyzing taint is a utilitarian weighing of whether what disparate impact remains is both "*unavoidable* and *outweighed* by the benefits."²²⁴ The following Part addresses these points through discussion of how sorting problems for identifying gifted students are likely *unavoidable* in their entirety, but that universal screening can help the benefits of gifted programming *outweigh* the remaining disparate impact.²²⁵

III. UNIVERSAL SCREENING AND RESPONDING TO HISTORY

This Part examines a specific policy regime as a potential remedy for the historical ailments of gifted education considered in the prior Part: the use of universal screening techniques.²²⁶ We discuss both the promise of and the

²²¹ See JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* 423 (2018) (examining the role of the Supreme Court in education law and asking readers to "[c]ontemplate only a sampling of the Court's numerous interventions in this domain that have vindicated core constitutional protections by rejecting illegitimate exercises of governmental authority and how those decisions have transformed public education").

²²² See *McFadden v. Bd. Of Educ. for Ill. Sch. Dist.* U-46, 984 F. Supp. 2d at 882 (N.D. Ill. 2013).

²²³ It bears emphasis that challenges remain, and more accounting could take place, which we will revisit in the following Part.

²²⁴ Murray, *supra* note 12, at 1244 (emphasis added).

²²⁵ There is voluminous research literature on the policy aspects of gifted programming. See generally Card & Giuliano, *supra* note 126; Morgan, *supra* note 134; Olszewski-Kubilius, *supra* note 144. A full policy analysis of the complete costs and benefits of all varieties of provision of gifted services is beyond the scope of this Article, but the following Part addresses a particular, helpful instance with specific anti-discrimination benefits.

²²⁶ A related principle with the potential to increase under-representation in gifted programming is the practice of using local norms for identification rather than national or state norms. See Scott Peters et al., *Local Norms Improve Equity in Gifted Identification*, THOMAS B. FORDHAM INST. (May 14, 2019), <https://fordhaminstitute.org/national/commentary/local-norms-improve-equity-gifted-identification>.

challenges to widespread screening for giftedness through the lens of discriminatory taint.

A. *The Pooling Problem*

To begin, it is helpful to consider a theoretical construct of ability grouping generally, and then its implications for gifted programming specifically. In an ideal world, each student would receive educational services specifically tailored to that child's individual needs on a deep level.²²⁷ Due to the lack of information on specific individual needs and the costs involved in meeting those needs, this approach to education is challenging to implement on a widespread basis. In general, it does not exist in modern public education. The closest approach to this ideal in the United States are those who qualify for Individualized Education Programs (IEPs).²²⁸ The development of an IEP is a labor-intensive process for both educators and families.²²⁹ Providing programming to meet those needs then relies on targeted funding and infrastructure.²³⁰ As such, it is limited to those with specific, qualifying conditions.²³¹ Outside of those with an IEP, individualized programming is typically limited. An educator may devote specific time to individual children's needs, but in a typical classroom this is often severely limited by the lack of available resources, including time, and the need to simultaneously supervise multiple students.²³²

²²⁷ E.g., Jennifer H. Waldeck, *For Higher Education, What Does "Personalized Education" Mean for Faculty, and How Should It Serve Our Students?*, 55 COMM'N EDUC. 345, 346 (2007) ("Others see personalized education, in its many forms, as the best way to capitalize on student strengths and result in 'true' learning.") (citing PRACTICAL APPROACHES TO USING LEARNING STYLES IN HIGHER EDUCATION (R. Dunn & S.A. Griggs eds., 2000)).

²²⁸ See Barbara C. Gartin & Nicki L. Murdick, *Idea 2004: The IEP*, 26 REMEDIAL & SPECIAL EDUC. 327, 330 (2005).

²²⁹ See Aleada Lee-Tarver, *Are Individualized Education Plans A Good Thing? A Survey of Teachers' Perceptions of the Utility of IEPs in Regular Education Settings*, 33 J. INSTRUCTIONAL PSYCH. 263, 265 (2006) ("Additional requirements and responsibilities for all education personnel makes the development and use of the IEP an even more time consuming and precise exercise for regular education and special education teachers.").

²³⁰ See, e.g., MICHELLE DOYLE, INDIVIDUALS WITH DISABILITIES EDUCATION ACT: GUIDE AND TOOLKIT (2014).

²³¹ E.g., Sneha Barve, *Special Education Advocacy: A Guide for Attorneys*, 36 CHILD L. PRAC. NEWSL. 147, 147 (2017) ("Individuals with Disabilities Education Act (IDEA) requires that children with qualifying disabilities receive a free and appropriate public education Very young children . . . are entitled to early intervention services under . . . IDEA. Children with qualifying disabilities between ages three and 22 . . . will receive special education services and related services under . . . IDEA.").

²³² Cf. Phil Smith et al., *Class Size Reduction: A Fresh Look at the Data*, 61 EDUC. LEADERSHIP 72, 74 (2003) ("Smaller classes allow for changes in teachers' classroom practices that may help account for students' achievement. . . . Teachers in smaller classes

As in education, many social or economic systems with individual-level differences but an inability to tailor services to those differences result in *tranching* or *pooling*: taking groups of somewhat similar individuals and tailoring services to the group, rather than the individual level. Pooling or tranching abounds in public policy: rather than provide each piece of extraordinary land in the United States with individualized legal protections, some, but not all, land is moved into a special category of protections known as national parks.²³³ Rather than protect each person at work from age discrimination with specific standards for each age, federal protections recognize a general division at age forty and pool individuals into a single protected class.²³⁴ Legal causes of action are themselves examples of pooling: one may touch another person with varying levels of offensiveness, and we call some, but not all, of those contacts “battery.”²³⁵

The law resorts to pooling for the same reasons completely individualized educational services are impossible to provide in United States: it is too costly to individualize each type of legal claim. This occurs because information in each of these areas is costly to obtain *and* costly to act on: knowing and acting on a *single* student’s unique educational needs is difficult, and discovering and acting on those needs *for each* student is prohibitively costly.²³⁶ Similarly, categorizing the infinite varieties of human contact that could be legally actionable, or the variety of ways someone can discriminate at differing age ranges, or each rock and leaf of public land is likewise impossibly costly, as would be administering a system of justice or land management with such variation. Thus, the need for pooling in law and policy is, in part, driven by simple problems of information and cost: it is far easier to sort and act on a

spend more time teaching, provide students with more individual attention, and know more about the needs and interests of their students than do teachers in larger classrooms.”).

²³³ E.g., Harmony A. Mappes, *National Parks: For Use and ‘Enjoyment’ or for ‘Preservation’? And the Role of the National Park Service Management Policies in that Determination*, 92 IOWA L. REV. 601, 604–05 (2007) (“The Antiquities Act gave the President the sole power to set aside objects and structures of historic and scientific interest as national monuments . . . with Congress creating fourteen national parks and twenty-one national monuments by the time it passed The National Park Service Act of 1916.”).

²³⁴ See generally David Neumark, *Age Discrimination Legislation in the United States*, 21 CONTEMP. ECON. POL’Y 297, 298 (2003) (“The 1967 ADEA prohibited discrimination based on age, covering those aged 40–65, and including discrimination based on age within this protected age range.”).

²³⁵ Of course, individual-level differences in the level of offense may result in different amounts of damages. Still, the initial classification as offensive or not is a dichotomous simplification of the wide range of possible human contact with varying levels of offensiveness. See e.g., *England v. S & M Foods, Inc.*, 511 So. 2d 1313, 1315 (La. Ct. App. 1987) (discussing whether the splattering of a hamburger constitutes battery).

²³⁶ See *Lee-Tarver*, *supra* note 229, at 265.

limited number of categories (gifted or not, battery or not, and so on), then it is to categorize and act on infinite variations of these themes.²³⁷

This leads to a crucial point—the costliness of obtaining and acting on information that necessitates pooling will render pooling itself *inherently imperfect*. Some land, worthy of designation as a national park, may not be so designated, while other land granted that status may not deserve it.²³⁸ Someone who is thirty-nine years old may experience substantial discrimination based on their age but not be given the same presumption of class membership and protected status. Someone may experience an offensive physical contact, but a court may decline to find it battery and award damages.

This holds true for gifted programming. If one assumes that specific children would benefit from gifted programming, such as due to specific aptitudes or development abilities, then issues as in the examples above immediately arise.²³⁹ Like these examples, gifted programming represents an attempt to pool some, but not all, children into alternative educational arrangements that may give them some, but not all, of the benefits they might receive from specifically individualized instruction tailored to their needs. Again like these examples, the result is inherently imperfect due to imperfect information: educators will not know exactly which students will, or will not, benefit from gifted programming.²⁴⁰ Then, some children who would benefit from gifted programming do not receive it, and some who may not benefit receive programming.²⁴¹ Just as with national park selection, screening for age

²³⁷ The law does recognize sub-categories in this area, such as how criminal law separates offensive physical contact into misdemeanors or felonies, for instance, but the central point holds. For parks, for instance, see NAT'L PARK SERV., CRITERIA FOR NEW PARKS, <http://npshistory.com/brochures/criteria-parklands-2005.pdf> (last visited Jan. 8, 2023) (“Besides running the National Park System, the National Park Service also manages or participates in several programs that offer recognition or assistance for areas that do not become units of the System. Resources that are nationally significant may be eligible for special titles or designations while they continue to be managed by states, local governments, other federal agencies, or private owners.”).

²³⁸ *See id.* (“To be feasible as a new unit of the National Park System . . . [i]t must have potential for efficient administration at a reasonable cost. Important feasibility factors include landownership, acquisition costs, life cycle maintenance costs, access, threats to the resource, and staff or development requirements.”).

²³⁹ For an overview of these complexities, see COLO. DEP'T OF EDUC., GIFTED IDENTIFICATION: GUIDANCE HANDBOOK (2020), <https://www.cde.state.co.us/gt/idguidebook>.

²⁴⁰ *See* Hallinan, *supra* note 5, at 95–96 (discussing limitations on ability grouping generally).

²⁴¹ *See* COLO. DEP'T OF EDUC., *supra* note 239, at 18. Attempting to compensate for the possible exclusion of children deserving of gifted programming who nevertheless fail to qualify, Colorado created a pool in between gifted and general education called a talent pool. *Id.* “A talent pool is defined as a group of students who demonstrate an advanced or even exceptional ability in a particular area, but at this time do not meet the criteria for gifted identification. Often students in a talent pool are provided advanced or gifted programming services.” *Id.*

discrimination, or finding a battery or not, the use of pooling as a partial solution to the need for individualized policy provision will be imperfect due to imperfect information. The efficiencies of pooling come at a cost, which is misclassification.²⁴²

With this said, not all pooling misclassifications are created equal. Rather than being random, some misclassification errors may be correlated with factors that are themselves areas of legal concern. For example, in the age discrimination example considered above, suppose that women aged thirty-nine are more likely than men aged thirty-nine to experience unactionable age-based discrimination. The classification errors built around the age forty threshold have now compounded with an additional problem: sex-based discrimination.²⁴³ Or, suppose that juries are less likely to find a battery when the victim is a member of a certain protected class.²⁴⁴ This misclassification (failing to find a battery when one should exist) is compounded with equal protection concerns (the justice system failing members of a protected class).

Similar to these examples, pooling efforts in education in the United States have historically suffered from substantial correlations with attributes currently protected under United States law, such as race or ethnicity.²⁴⁵ Thus, mis-selection into gifted programming (meaning selection of one who would not benefit, or failure to select one who would benefit), has not traditionally been based on the type of random misallocation which we accept as a necessary cost to gain the efficiencies from pooling. Rather, policy studies suggest that failure to select-in to gifted programming has focused on minorities.²⁴⁶ The result has been substantial controversy over the both the scope of gifted programming and the appropriateness of its existence at all.²⁴⁷ In the terms of our Article, this is the problem of discriminatory taint or the memory of evil.

B. *Universal Screening and Selection Bias*

In light of discriminatory taint, educators wishing to provide some level of individualized instruction for gifted children have considered many options that lie between two broadly contrasting approaches. On the one hand, school

²⁴² See COLO. DEP'T OF EDUC., *supra* note 239 at 18.

²⁴³ Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h).

²⁴⁴ See Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 L. & HUM. BEHAV. 621, 633 (2005) ("Based upon the current meta-analysis, it appears that the effect of racial bias in juror decision-making is small, yet reliable.").

²⁴⁵ Segregated schools are an egregious example of pooling specifically based on discrimination. See *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

²⁴⁶ See Grissom & Redding, *supra* note 126, at 14.

²⁴⁷ See Kirkland, *supra* note 2.

districts may eliminate gifted programming, as considered in New York.²⁴⁸ The rationale is simple: if a program has historically inequitable roots and continues to cause inequities, it should be stopped.²⁴⁹ What to replace it with remains challenging, because educators immediately run into the problems of offering the differentiated education that motivated gifted programming to begin with.²⁵⁰ In New York, the plan presented by Mayor Bill DeBlasio to end gifted programming entirely, and instead enrich education for all students, was quickly reversed by the subsequent administration in response to wealthy families leaving public schools for private and parochial schools.²⁵¹ Lacking evidence that the “enrichment for all” plan would succeed, some parents were unwilling to stay in the public schools long enough to see if it would bear fruit.²⁵² The resulting loss in funding made the decision to end gifted programming untenable.²⁵³

In contrast, rather than eliminating gifted programming, other districts have attempted to eliminate biases in the identification process.²⁵⁴ Colorado implemented universal screening for giftedness in 2020 to expand services to

²⁴⁸ See *NYC Outlines Next Steps*, *supra* note 3 (“In 2019, the city’s School Diversity Advisory Group recommended phasing out the existed [sic] Gifted and Talented program, saying it was ‘unfair’ and ‘unjust’ and led to segregation.”).

²⁴⁹ *Id.*

²⁵⁰ Cf. MAYA BIALIK & CHARLES FADEL, *OVERCOMING SYSTEM INERTIA IN EDUCATION REFORM* 7 (2017) (“[W]hen there is a new idea that challenges the status quo . . . [t]he burden of proof lies by default with the challenging idea . . . despite the current paradigm never truly defending itself to the same standards as those it imposes on new ideas, and its lack of effectiveness at achieving the goals of education.”); Mansfield, *supra* note 153, at 13. Mansfield recounts a teacher’s experience implementing an “enrichment for all” type program with support from her principal, and reported tremendous success for all students in a heterogeneous classroom. Mansfield, *supra* note 153, at 13. However, when the supportive principal retired, the new principal was unsupportive of her innovation. *Id.* She noted, “My early and eager attempts at conversation with him were met with accusations of my naiveté, and the declaration that the color, class, and gender divides in educational access and achievement were ‘just the way things are.’” *Id.*

²⁵¹ See *NYC Outlines Next Steps*, *supra* note 3 (“[A] program that once required rigorous testing for entry and included just 2,500 kindergarten students a year will expand to encompass tens of thousands of students—no additional testing or funding from parents required.”).

²⁵² *Transcript: Mayor Eric Adams Announces the Expansion of Gifted and Talented Programs Citywide*, N.Y. CITY (Apr. 14, 2022), <https://www1.nyc.gov/office-of-the-mayor/news/206-22/transcript-mayor-eric-adams-the-expansion-gifted-talented-programs-citywide>.

²⁵³ *Id.* (announcing reversal of the plan to eliminate gifted and talented programming in the city and acknowledging that gifted programming is a scarce resource in the city, with the new plan attempting to address inequity by increasing availability of gifted programming).

²⁵⁴ In our terminology, they have attempted to eliminate the correlation between misclassifying students for gifted services and protected student attributes like race.

include students historically left underrepresented.²⁵⁵ Under Colorado's program, identification decisions are based on a body of evidence, rather than a single assessment score, and high-performing students who may not qualify for gifted services, but still demonstrate a need for advanced instruction, are placed into "talent pools" where they receive differentiated instruction and are later assessed again for giftedness.²⁵⁶

Whether an approach like Colorado's succeeds depends on the particulars of the screening process. Colorado's approach includes multiple tools to eliminate barriers for students historically underrepresented in gifted programming.²⁵⁷ Theoretically, such screening has the potential to preserve the efficiencies granted by pooling while severing the pooling process from problematic correlations with protected attributes. In other words, universal screening has the potential to decrease bias in the selection process for screening for gifted programming.²⁵⁸ Much in the same way that running a randomized controlled trial may eliminate selection bias in an experiment, universal screening may eliminate the selection bias that has plagued gifted programming throughout its history. The reason is simple: by screening *everyone*, there is less chance for bias in *selection* for screening.²⁵⁹

This is hopeful, yet, as illustrated in the history of the compulsory attendance laws that drew children into public schools to begin with, implementing a "universal" standard without discrimination may be challenging.²⁶⁰ Here, this approach to eliminate bias helps resolve two sources of potential discrimination. Borrowing from employment law, the first potential bias might be termed a

²⁵⁵ See COLO. DEP'T OF EDUC., *supra* note 239.

²⁵⁶ *Id.* at 18.

²⁵⁷ *Id.* at 12 ("In some cases, [administrative units] choose to develop local norms on nationally norm-referenced cognitive and achievement tests to ensure access and inclusion of students from underrepresented populations in gifted programs, or to show qualifications for specialized programming."). These techniques are costly to implement, but serve as an example of a state attempting to reconcile the values of excellence and equity.

²⁵⁸ "Selection bias" as is typically conceived occurs because people often self-select into programs based on need—the most sick are those most likely to seek a medication, and so studying the effect of the medication based only on those individuals will give biased results for the effect on a typical individual. By randomizing who is treated, rather than allowing individuals to self-select, the selection bias problem is solved. For this reason, statisticians often prefer to run randomized controlled trials to eliminate this problem of selection bias. See generally James Heckman, *Varieties of Selection Bias*, 80 AM. ECON. REV. 313, 313–18 (1990).

²⁵⁹ This is much as if a pharmaceutical company were allowed to run a controlled trial on every member of the population—randomization would not be needed because the entire population would be the subject of study. The possibility of educators willfully choosing certain individuals not to be tested is eliminated.

²⁶⁰ See text accompanying *supra* notes 45–55.

disparate treatment effect.²⁶¹ This would occur when an educator does not believe students with certain backgrounds will qualify for gifted programming, and so chooses not to have them screened.²⁶² The second source of potential bias might be termed a disparate impact effect: the discriminatory effect of an otherwise neutral policy.²⁶³ For instance, a district policy that limits testing to those who go through a self-application process risks that students of certain backgrounds will be less likely to apply. The neutral policy (self-application) may result in a discriminatory effect in practice (self-application is correlated with a protected attribute).

This second problem—of disparate impact bias for screening into gifted programming—is substantial because of the costs involved in providing gifted services. If state law requires that students who pass screening be provided services, a district with funding concerns might limit access to testing to avoid needing to provide costly services. Thus, disparate impact bias may not stem from any inherent animus towards students in a protected class, but from the perceived realities of limited resources.²⁶⁴

For example, in New Mexico, gifted education is under the umbrella of special education and gifted students require an IEP in order to receive services.²⁶⁵ Because of this, the path towards screening is similar for both identifying giftedness and identifying disability.²⁶⁶ In 2021, Albuquerque Public Schools (APS) implemented a corrective action plan in response to a New Mexico Public Education Department complaint investigation.²⁶⁷ Parents alleged that APS intentionally delayed the evaluation of students referred by parents for suspected learning disabilities, essentially denying the student a free and appropriate public education as required by the Individuals with Disabilities

²⁶¹ *E.g.*, *Villalta v. City & Cnty. of San Francisco*, 448 F. App'x 697, 699 (9th Cir. 2011) (“[The plaintiffs] each made out prima facie cases of disparate treatment by showing that each was passed over for a promotion for which he was qualified in favor of a Caucasian employee.”).

²⁶² *See* Ford, *supra* note 140, at 235.

²⁶³ *E.g.*, *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 239 (2005) (“[C]laims that stress ‘disparate impact’ [by contrast] involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another”) (citation omitted).

²⁶⁴ The limitation of resources to devote to gifted programming or identifying students for gifted services reflects the universal challenge of any educational endeavor.

²⁶⁵ N.M. PUB. EDUC. DEP’T, GIFTED EDUCATION IN NEW MEXICO TECHNICAL ASSISTANCE MANUAL 2019, at 8 (2019), <https://webnew.ped.state.nm.us/wp-content/uploads/2019/08/manual-08-22-19ver3-Gifted-TAM.pdf>. In New Mexico, K–12 students who are determined to be gifted are considered “exceptional” and are served through applicable state rules for special education. *See id.*

²⁶⁶ *Id.*

²⁶⁷ N.M. PUB. EDUC. DEP’T SPECIAL EDUC. DIV., COMPLAINT RESOLUTION REPORT CASE No. C2021-11-SYS (Aug. 11, 2021).

Education Act (IDEA).²⁶⁸ The investigation found that the district's practices resulted in a delay of months, even entire school years, before it sought to obtain parental consent for an evaluation.²⁶⁹ While the investigation has not shed light on the motivation behind the district's delaying identification of students with disabilities, one concern is that the district's seemingly perennial budget deficit provides incentives to delay screening into potentially costly services.²⁷⁰

While the potential benefits from universal screening are significant, one critique is that they provide an "illusion of objectivity" which results in "sorting that correlates heavily by race."²⁷¹ In other words, universal screening may help eliminate disparate treatment effects in selection (by teachers) but may create disparate impact effects (through testing) at the same time. Because of this concern, the discussion of discriminatory taint is particularly salient. Like gifted programming itself, universal screening has a legitimate justification: it exists as an attempt to overcome problems of the past.²⁷² Then, whether a particular screening method accounts for the troubled history of testing depends on the details of the test. In Colorado, for instance, a variety of methods are employed to counteract this problem.²⁷³

Finally, any remaining disparate impact would need to be evaluated against the benefits of the policy.²⁷⁴ Current evidence suggests that universal screening techniques have substantial benefits for mitigating underrepresentation,

²⁶⁸ See *id.*; U.S. DEP'T OF EDUC., PROVIDING STUDENTS WITH DISABILITIES FREE APPROPRIATE PUBLIC EDUCATION DURING THE COVID-19 PANDEMIC AND ADDRESSING THE NEED FOR COMPENSATORY SERVICES UNDER SECTION 504, at 3 (Apr. 27, 2022), <https://www2.ed.gov/about/offices/list/ocr/docs/fape-in-covid-19.pdf> ("Compensatory services are required to remedy any educational or other deficits that result from the student with a disability not receiving the evaluations or services to which they were entitled.") (footnote omitted).

²⁶⁹ N.M. PUB. EDUC. DEP'T SPECIAL EDUC. DIV., *supra* note 267, at 15–16 (Aug. 11, 2021) ("Therefore, it is concluded that the District does have in effect policies and procedures to ensure that all children with disabilities who may be in need of special education and related services are located, evaluated, and identified."). The complexities of the allegations led to the decision to bifurcate the investigation into two separate inquiries: investigation of violations of the IDEA with respect to the allegations of the individual student, and investigation of systemic violations of the IDEA. *Id.* The allegations of systemic violations were still under investigation at the time of this writing. *Id.*

²⁷⁰ See, e.g., Stella Sun, *Albuquerque Public Schools Estimating \$45M Budget Deficit for 2022*, KOAT NEWS (May 25, 2021), <https://www.koat.com/article/albuquerque-public-schools-estimating-dollar45m-budget-deficit-for-fy-2022/36523868> ("School districts get funding from student enrollment. Since fiscal year 2014, APS has seen a steady decrease in student enrollment. APS believes a drop in birth rate is adding to the decline.").

²⁷¹ Kirkland, *supra* note 2.

²⁷² See Murray, *supra* note 12, at 1244.

²⁷³ See text accompanying *supra* notes 255–256.

²⁷⁴ Murray, *supra* note 12, at 1244.

particularly with the development of new testing methods.²⁷⁵ For example, efforts to reduce bias in gifted assessment have led to the development of the Raven Standard Progressive Matrices and the Naglieri Nonverbal Ability Test.²⁷⁶ Both nonverbal assessments, while not perfect, have been shown to increase the identification of gifted minority students.²⁷⁷ Absent a perfect assessment, utilizing several methods of identification may reduce the influence of bias present in any individual method.²⁷⁸

While empirical evidence is limited, it suggests that applying universal screening principles can aid in decreasing selection biases for screening into gifted services. In one study of a district that implemented universal screening standards, the district experienced a notable increase in the number of students identified as gifted.²⁷⁹ These newly identified students were “disproportionately poor, Black, and Hispanic, and less likely to have parents whose primary language was English. They were also concentrated at schools with high shares of poor and minority students and low numbers of gifted students before the program.”²⁸⁰

CONCLUSION

Conflict over the provision of gifted programming divides the educational community. To some, gifted programming is a necessary step towards providing an adequate education for students—particularly students of color—with specific developmental and educational needs.²⁸¹ To others, gifted programming represents base racism offered under the veneer of equality.²⁸² Which of these views is sounder, or how to chart a path between them, depends to a large degree on how one interprets the history of gifted programming. The roots of gifted programming in discriminatory policies have been extensively documented and the subject of an extended literature.²⁸³ How policymakers should conceptualize those roots in light of *current* practice in gifted programming has been relatively unexplored.

Recent developments in the historiography of jurisprudence may be instructive. Law, like education, is fraught with problematic past.²⁸⁴ Much of

²⁷⁵ See Card & Guiliano, *supra* note 126.

²⁷⁶ Jaret Hodges et al., *A Meta-Analysis of Gifted and Talented Identification Practices*, 62 GIFTED CHILD Q. 147, 149 (2018).

²⁷⁷ Jack Naglieri & Donna Y. Ford, *Addressing Underrepresentation of Gifted Minority Children Using the Naglieri Nonverbal Ability Test (NNAT)*, 47 GIFTED CHILD Q. 155, 155 (2003).

²⁷⁸ Jaret Hodges et al., *supra* note 276, at 169.

²⁷⁹ Card & Guiliano, *supra* note 126, at 13679.

²⁸⁰ *Id.*

²⁸¹ See Seale, *supra* note 1.

²⁸² See Kirkland, *supra* note 2.

²⁸³ *Supra* Section I.C.

²⁸⁴ See Collings, *supra* note 11, at 274; Murray, *supra* note 12, at 1193.

law's problematic precedent is defined by struggles in schools, as education law was used to advance discriminatory social agendas.²⁸⁵ Similarly, much of schooling's challenging history stems from how law was implemented, interpreted, or ignored.²⁸⁶ Frameworks for analyzing legal history may therefore reveal informative patterns for educational policymakers, much in the same way they may help courts struggling to apply precedent rooted in practices and assumptions they find immoral.

Considering gifted programming from a perspective of discriminatory taint offers policymakers a tailored version of scrutiny analysis that systematically addresses potential discriminatory intent in the development of policy. This framework looks to but-for causation in the relationship between past and present. It then considers whether troubling history has been accounted for and whether remaining disparate impact is justified. In light of this framework, we argue that developments in universal screening for access to gifted programming may broadly satisfy the demands of a taint analysis.²⁸⁷ We show how such screening has potential to cut through the historical correlation between failure to be identified for gifted services and discrimination. The expanded implementation of these principles may help move gifted programming from a problematic continuation of its bitter roots in discrimination to redemptive policy that has met, and addressed, its past.²⁸⁸

²⁸⁵ See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

²⁸⁶ *Supra* text accompanying notes 59–61.

²⁸⁷ *Supra* Part III.

²⁸⁸ See Collings, *supra* note 11, at 269–70.