CONSTITUTIONAL PERSONHOOD SUMMIT

MATERIALS

Mission Statement

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Agenda

State Constitutional Provisions

Background Papers on Textual Sources of a Right to Education

- The Equal Protection Clause
- The Substantive Dimension of the Due Process Clause
- The Citizenship Clause

Article Summaries

- Kristi Bowman, *Before School Districts Go Broke: A Proposal for Federal Reform*
- Michael A. Rebell, *The Right to Comprehensive Educational Opportunity*
- Kimberly Jenkins Robinson*, The Case for a Collaborative Enforcement Model for a Federal Right to Education*
- David G. Sciarra and Danielle Farrie*, From Rodriguez to Abbott: New Jersey's Standards-Linked School Funding Reform*

DOES CONSTITUTIONAL PERSONHOOD IN A FREE DEMOCRACY EMBODY A RIGHT TO EDUCATION?

Proposed Mission Statement for an Education Law Summit

Fifty years ago, when the Civil Rights Movement called national attention to the state of Mississippi, one of the things the nation learned – or should have learned – was the meaning of what Bob Moses refers to as a "sharecropper education." Black Mississippians facing deadly violence to demand the right to vote were denied because it was said that they could not read or properly interpret provisions of the Mississippi constitution. Under remarkable pressure from the Movement, the United States Department of Justice authorized John Doar to challenge Mississippi's denials of the right to vote on the ground (among others) that the State of Mississippi had deliberately and systematically failed to educate its Black children. In a brilliant legal strategy, Doar and his colleagues painstakingly documented their charge of deliberate denial and discrimination in the education of Black children in the attached Answers to Interrogatories. The question still looms whether any class of children – or any child – in a free democracy can be limited to a sharecropper's education.

We have been studying the evolution of civil rights in United States constitutional jurisprudence. We use the term civil rights to include both entitlements specified in the Bill of Rights (like the right of free speech or religious choice) and entitlements (like an individual's right of personal integrity, family autonomy, or public accommodation) that are implicit in our traditions and our commitment to republican democracy. Under Bob's influence, we have given special attention to the unenumerated rights 1) to be accommodated in public places, 2) to vote and engage in other forms of political participation and 3) to acquire literacy that is sufficient to enable political as well as economic participation. We are interested in how and when protection of these civic entitlements falls within the national government's jurisdiction. We are interested, in other words, in how claims of right made by "the People of the United States" are, or should be, answered by our legal systems.

We believe that basic civil rights – including the right to be accommodated in public places, the right to participate in the Nation's political life, and the right to education – are The

People's privileges as defined by the Reconstruction Amendments.[1] We understand them, in other words, to be entitlements that come with being counted among The People of the United States. We therefore understand the United States government to have the power -- and the duty -- to take a role in the enforcement of these basic rights.

Our claim that these and other basic civil rights are fundamental and federally enforceable is surprisingly controversial. Indeed, the right of accommodation in public spaces is grounded in statutory law rather than in constitutional principles;[2] and the Supreme Court has declined to acknowledge that the people of the United States have a federally protected right to vote,[3] or a federally protected right to acquire the literacy that makes political (and economic) participation possible.[4] The history of civil rights jurisprudence in the United States can be understood as a struggle to understand 1) what the fundamental rights of democratic citizenship are and 2) whether those rights are guaranteed by the federal government or may be left for the states to delineate and protect.

The extent to which a democratic society must sacrifice other interests to the protection of civil rights is contestable, but the fundamental character of certain rights seems clear. We argue that a right fundamental to democratic citizenship in a republican government must be, at its core, subject to federal protection. If this were not so, a nation that asserts a guarantee of

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1 "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV.

2 *See* United States v. Johnson, 390 U.S. 563, 566 (1968) (Recognizing the Civil Rights Act as establishing a "substantive right to public accommodation" as defined in the Act); *but see* Bell v. Maryland, 378 U.S. 226, 311 (1964) (Goldberg J., dissenting) ("The State of Maryland has failed to protect petitioners' constitutional right to public accommodations and is now prosecuting them for attempting to exercise that right.").

3 *See* Minor v. Happersett, 88 U.S. 162, 178 (1874) ("[T]he Constitution of the United States does not confer the right of suffrage upon any one."). *But see* Reynolds v. Sims, 377 U.S. 533, 555 (1964) (The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.").

4 *See* Plyer v. Doe, 457 U.S. 202, 221 (1982) ("Public education is not a 'right' granted to individuals by the Constitution."). *But see* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 35-37 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution…[But e]ven if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditures in Texas provide an education that falls short."); Papasan v. Allain, 478 U.S. 265, 285 (1986) ("[T]his Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right.").

democratic freedom would be forced to tolerate freedom's denial in any of its subdivisions within which a political majority disregards the right, denies that the right is fundamental to democratic citizenship or takes a narrow view of the right's scope. It follows that every person in every state of the United States is entitled to some minimum (and, yes, contestable) measures of civil rights and that the federation is empowered – we would say obligated – to protect these entitlements. The mission of this summit is to arrive at, and to disseminate, a consensus statement regarding the measure of educational opportunity owed by our state and federal governments to each child on United States soil.

CONSTITUTIONAL PERSONHOOD SUMMIT
PARTICIPANTS

Dr. Robert P. Moses, *President and Founder, The Algebra Project*

In his young adult life, Dr. Moses was a pivotal organizer for the civil rights movement as field secretary for the Student Non-Violent Coordinating Committee (SNCC), and was director of SNCC's Mississippi Project. He was a driving force behind the Mississippi Summer Project of 1964 in organizing the Mississippi Freedom Democratic Party (MFDP), which challenged the Mississippi regulars at the 1964 Democratic Convention. From 1969-1976, he worked for the Ministry of Education in Tanzania, East Africa, where he was chairperson of the math department at the Samé school. Dr. Moses returned to the USA in 1976 to continue to pursue doctoral studies in Philosophy at Harvard. A MacArthur Foundation Fellow from 1982-87, Dr. Moses used his fellowship to develop the concept for the Algebra Project, wherein mathematics literacy in today's information age is as important to educational access and citizenship for inner city and rural poor middle and high school students as the right to vote was to political access and citizenship for sharecroppers and day laborers in Mississippi in the 1960s. As founder and president of the Algebra Project Inc., Dr. Moses also serves as director of the project's materials development program. See more at www.algebra.org. Together with Algebra Project Inc. board member Danny Glover, Moses and others recently launched a national discussion calling for an amendment to the U.S. Constitution for Quality Public School Education as a Civil Right; see more at www.qecr.org. Dr. Moses has received several college and university honorary degrees and honors, including the Heinz Award for the Human Condition and the Nation/Puffin Prize for Creative Citizenship.

Aderson Francois, *Professor, Howard Law School*

Professor Francois, a well published scholar in the fields of civil rights and pedagogy, is the Supervising Attorney of the Civil Rights Clinic and also teaches Civil Procedure, Constitutional Law, Federal Civil Rights, Legal Methods, and Supreme Court Jurisprudence at Howard Law School. In 2008, the Transition

Team of President Barack Obama appointed Professor Francois Lead Agency Reviewer for the United States Commission on Civil Rights.

He has testified before Congress on civil rights issues and drafted numerous briefs to the United States Supreme Court, the Supreme Court of California, the Supreme Court of Iowa, and Maryland's highest court on such civil rights matters as equal protection in education, employment discrimination, voting rights, marriage equality for same-sex couples, and the right to a fair criminal trial.

He received his J.D. from New York University School, clerked for the late Honorable A. Leon Higginbotham, Jr., Chief Judge of the United States Court of Appeals for the Third Circuit, became an associate in the litigation department in the New York Offices of Paul Weiss Rifkind Wharton & Garrison, provided pro bono death penalty representation to inmates before the United States Court of Appeals for the Fifth Circuit, and served as a Special Assistant in with the United States Commission on Civil Rights in Washington, D.C. Before joining Howard's faculty, Professor François was an Acting Assistant Professor and the Assistant Director of the Lawyering Program at New York University School of Law.

Peggy Cooper Davis, *Professor, NYU School of Law*

Peggy Cooper Davis joined the NYU Law faculty in September 1983 after having served for three years as a judge of the Family Court of the State of New York and having engaged in the practice and administration of law during the preceding 10 years. Her scholarly work has been influential in the areas of child welfare, constitutional rights of family liberty, and interdisciplinary analysis of legal pedagogy and process. Davis's 1997 book, *Neglected Stories: The Constitution and Family Values*, illuminates the importance of anti-slavery traditions as guides to the meaning of the Fourteenth Amendment. Her recent book, *Enacting Pleasure*, is a collection of essays exploring the social, cultural, psychological, and political implications of Carol Gilligan's relational psychology. She has also published more than 50 articles and book chapters, most notably in the premier journals of Harvard, Yale, NYU, and Michigan law schools. For more than 10 years, Davis directed the Lawyering Program, a widely acclaimed course of experiential learning that distinguishes NYU Law School's first-year curriculum. She now directs the Experiential Learning Lab, through which she works to develop and test progressive learning strategies and to develop professional education courses that systematically address the interpretive, interactive, ethical, and social dimensions of practice. She earned her J.D. at Harvard Law School.

David G. Sciarra, *Executive Director, Education Law Center*

David Sciarra oversees and directs ELC programs and activities. A practicing civil rights lawyer since 1978, he has litigated a wide range of cases involving socioeconomic rights, including affordable housing, shelter for the homeless, and welfare rights. Read More

Since 1996, David has litigated to enforce access for low-income and minority children to an equal and adequate education under state and federal law and has served as counsel to the plaintiff students in New Jersey's landmark Abbott v. Burke case. He also conducts research, writes, and lectures on education law and policy in such areas as school finance, early education and school reform. He received his B.A. from the University of California, Berkeley, and graduated magna cum laude in 1978 from Temple University School of Law.

Michael A. Rebell, *Executive Director, Campaign for Educational Equity, Professor of Law and Educational Practice, Columbia University Teachers College*

Michael Rebell co-founded and served as Executive Director of The Campaign for Fiscal Equity (CFE), which won a major constitutional ruling on behalf of New York City public schools. Mr. Rebell is one of the nation's foremost authorities on the education adequacy movement in the United States and has pioneered the legal theory and strategy of educational adequacy. In the last 15 years, this legal strategy has proven successful in almost 75% of the cases challenging a state's failure to provide students with a sound, basic education. Mr. Rebell has also litigated numerous class-action lawsuits especially on behalf of students with disabilities, including the landmark New York State case, *Jose P. v. Mills*. He has written two books *(Equity and Education* and *Education Policymaking and the Courts*) and several dozen articles on a wide range of education issues, including educational equity, education finance, testing, rights of disabled students and dropout prevention. Mr. Rebell is a graduate of Harvard College and Yale Law School.

Kristi Bowman, *Professor, Michigan State College of Law*

Professor Bowman joined the Law College faculty in 2007, where she teaches Property, Torts Remedies, Education Law, and Street Law. With academic interests in Education Law and Policy and Constitutional Law, she has published numerous articles in scholarly journals examining public schools in fiscal crisis, students' free speech rights, racial/ethnic equality in education, and religion in public schools. Her publications have appeared in numerous journals, including the *North Carolina Law Review*, the *American University Law Review*, and the *University of Cincinnati Law Review*. She also is the co-author of the 5th edition of the leading textbook in her field, *Educational Policy and the Law*. In 2010, she received the Education Law Association's Steven S. Goldberg Award for Distinguished Scholarship in Education Law. She also is a faculty affiliate of the Education Policy Center at the Michigan State University College of Education.

The founder and editor of the SSRN Education Law Abstracting Journal, Professor Bowman is active in several professional organizations including the American Association of Law Schools, for which she was the Education Law Section Chair in 2010 and currently serves on the Committee for Sections and the Annual Meeting. She was the recipient of a Michigan State University Lilly Teaching Fellowship for the 2009-10 academic year.

Professor Bowman also has served as an assistant professor at Drake University Law School. Prior to teaching, she practiced at Franczek Sullivan, P.C. (now Franczek Radelet), in Chicago, where she represented school districts, and worked at the United States Department of Education, Office for Civil Rights. She also clerked on the United States Court of Appeals for the Eighth Circuit.

In 2001, Professor Bowman graduated *magna cum laude* from the Duke University Law School, having served as both the Articles Editor of the *Duke Law Journal* and the Associate Executive Editor of the *Duke Journal of Gender Law and Policy*. She simultaneously received her M.A. in Humanities from Duke University.

Derek Black, *Professor, University of South Carolina Law School*

Derek Black is a Professor at the University of South Carolina School of Law. His areas of expertise include education law and policy, constitutional law, civil rights, evidence, and torts. The focus of his current scholarship is the intersection of constitutional law and public education, particularly as it pertains to educational equality and fairness for disadvantaged students. His earlier work focused more heavily on intentional discrimination standards. His articles have been published in the *Vanderbilt Law Review*, *Minnesota Law Review*, *Boston University Law Review*, *William & Mary Law Review*, *Boston College Law Review*, and *North Carolina Law Review*, among various others. His work has also been cited in the U.S. Circuit Courts of Appeals and by several briefs before the U.S. Supreme Court.

Prior to teaching, he litigated issues relating to school desegregation, diversity, school finance equity, student discipline, and special education at the Lawyers' Committee for Civil Rights Under Law. He left the Lawyers' Committee to begin a career in teaching at Howard University School of Law, where he also founded and directed the Education Rights Center. The Center studies the causes and extent of educational inequalities in public schools, provides advocacy resources to parents, and attempts to shape national and local education policy.

Professor Black has also taught at the University of North Carolina School of Law and American University Washington College of Law. Beyond teaching, he is active in various outside endeavors, including serving as pro bono counsel in civil rights cases, a consultant to civil rights campaigns, and a member of the Obama-Biden Presidential Transition Team.

He attended law school at the University of North Carolina at Chapel Hill, where he was a member of the Law Review for two years, was awarded the Dan Pollitt ACLU fellowship in his third year, and graduated with High Honors.

Kimberly Robinson, *University of Richmond, School of Law*

Professor Kimberly Robinson teachers and writes in the area of education law and policy and is a national expert on the federal role in education and equal educational opportunity. She also teaches in the areas of pre-trial litigation and legislation and regulation. Professor Robinson is a Researcher at the Charles Hamilton Houston Institute for Race and Justice at Harvard Law School. Among her current projects, she is co-editing a book with Professor Charles Ogletree of Harvard Law School entitled *The Enduring Legacy of Rodriguez: Creating New Pathways to Equal Educational Opportunity*. Her scholarship has appeared in the *University of Chicago Law Review*, *Boston College Law Review*, *William and Mary Law Review*, and *UC Davis Law Review*, among other venues. Prior to joining the Richmond Law faculty in 2010, Professor Robinson was an Associate Professor at Emory University School of Law and a visiting fellow at George Washington University Law School. She also served in the General Counsel's Office of the United States Department of Education, where she helped draft federal policy on issues of race, sex, and disability discrimination. In addition, Professor Robinson represented school districts in school finance and constitutional law litigation as an associate with Hogan & Hartson, LLP (now Hogan Lovells). Professor Robinson is a frequent lecturer on education law and policy issues, including serving as the keynote speaker at the "Is Education a Civil Right?" conference at Harvard Law School in April 2013 and as the Dean's Distinguished Lecturer at the Harvard Graduate School of Education in March 2014.

Susan H. Bitensky, *Alan S. Zekelman Professor of International Human Rights Law Director, Lori E. Talsky Center for Human Rights of Women and Children*

Upon graduation from law school, Professor Bitensky served as assistant general counsel to the United Steelworkers of America for three years in Pittsburgh, followed by four years of private practice with a Manhattan labor law firm. Before joining the Law College faculty in 1988, she was associate counsel to the New York City Board of Education for six years during which time she dealt mainly with commercial law and education law matters. Professor Bitensky has published a book *Corporal Punishment of Children: A Human Rights Violation* (Transnational Publishers 2006); a chapter of an American Bar Association volume; a piece in an encyclopedia on childhood, issued by The University of Chicago Press;

as well as a host of law review articles in leading journals such as *Northwestern University Law Review* and *Notre Dame Law Review*. She has also presented papers at numerous international symposia. Her scholarship focuses on children's rights under the federal Constitution and international human rights law. She is a member of Phi Beta Kappa. Before college, Professor Bitensky was an apprentice to the Robert Joffrey Ballet Company. She teaches Evidence, Constitutional Law, Jurisprudence, and International Human Rights Law.

Andrew Jondahl, *J.D. Candidate, NYU School of Law*

Andy Jondahl is a third-year student at NYU School of Law, where he is on the Executive Board of the Suspension Representation Project and is a Senior Articles Editor on the *Review of Law & Social Change*. Last year he participated in the Civil Rights Clinic at the New York Civil Liberties Union. After his first year of law school, Andy interned with the Alliance for Justice's Bolder Advocacy Project, helping nonprofits remain compliant with IRS 501(c)(3) requirements while participating in the political process. Last summer, Andy worked at the DOJ Civil Rights Division in the Equal Educational Opportunities Section. Before law school, he received his undergraduate degree in Broadcast Journalism from Boston University in 2007, spent three and a half years volunteering with the Peace Corps in Senegal, and worked in New York City for two nonprofit organizations engaged in the global fight against malaria. When he graduates in the spring, Andy hopes to pursue a career in civil rights litigation.

Kaydene Grinnell, *J.D. Candidate, NYU School of Law*

Danielle Whiteman, *J.D. Candidate, NYU School of Law*

CONSTITUTIONAL PERSONHOOD WORKING GROUP
SESSION AGENDA

Friday, November 7, 2014
10:00 a.m. – 4:00 p.m.
Chauncey Conference Center
Princeton, New Jersey

10:00	Participant Introductions and Descriptions of Participants' Work
10:20	Introduction by Bob Moses
10:30	Discussion of Goals
11:00	Presentation of Equal Protection Arguments
	Response by Derek Black *Professor, University of South Carolina Law Schoo*l
	Open Discussion
11:50	Distribution Lunches - Break
12:00	Presentation of Substantive Due Process Arguments
	Response by Susan H. Bitensky, Alan S. Zekelman *Professor of International Human Rights Law and Director of the Lori E. Talsky Center for Human Rights of Women and Children*
	Open Discussion
12:50	Presentation of Citizenship Arguments
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	Response by Aderson Francois *Professor, Howard University School of Law*
	Open Discussion
1:30	Constitutional Personhood and School Funding David Sciarra *Executive Director, Education Law Center*

2:15	Constitutional Personhood and the Federal Role in Education Kimberly Robinson *Professor, University of Richmond School of Law* Michael Rebell *Professor, Columbia Teacher's College; adjunct Professor, Columbia Law School; Executive Director, Campaign for Educational Equity*
3:15	Discussion of Post-Conference Statement
4:00	Adjourn

RIGHTS TO EDUCATION UNDER STATE CONSTITUTIONS

State	Constitution
Alabama	"The legislature shall establish, organize, and maintain a liberal system of public schools throughout the state for the benefit of the children thereof between the ages of seven and twenty-one years….Separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race." Art. XIV, § 256
Alaska	[The Legislature must] "establish and maintain a system of public schools open to all children of the State," and permits them to "provide for other public educational institutions." Art. VII, § 1
Arizona	"The legislature shall enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system, which system shall include: 1. Kindergarten schools. 2. Common schools. 3. High schools. 4. Normal schools. 5. Industrial schools. 6. Universities, which shall include an agricultural college, a school of mines, and such other technical schools as may be essential, until such time as it may be deemed advisable to establish separate state institutions of such character." Art. XI, §1(A)
Arkansas	"The university and all other state educational institutions shall be open to students of both sexes, and the instruction furnished shall be as nearly free as possible. The legislature shall provide for a system of common schools by which a free school shall be established and maintained in every school district for at least six months in each year, which school shall be open to all pupils between the ages of six and twenty-one years." Art. 11, § 6.
California	"A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement." Art. IX, § 1. "The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established." Art. IX, § 5
Colorado	"The general assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously." Art. IX, § 2. "The general assembly shall, by law, provide for organization of school districts of convenient size, in each of which shall be established a board of education, to consist of three or more directors to be elected by the qualified electors of the district. Said directors shall have control of instruction in the public schools of their respective districts." Art. IX, §15.

Connecticut	"There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation." Art. VIII, § 1.
Delaware	"The General Assembly shall provide for the establishment and maintenance of a general and efficient system of free public schools, and may require by law that every child, not physically or mentally disabled, shall attend the public school, unless educated by other means." Art X, § 1.
Florida	"The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require." Art. IX, § 1(a). As a result of the 2002 amendments, Florida's constitution also requires the legislature to make adequate provision for reduced class sizes, and provides that every four-year-old child in the state have access to a "high quality pre-kindergarten learning opportunity." Art. IX, § 1(b). Note: Prior to 1998, the constitution simply required the state to make "[a]dequate provision…for a uniform system of free public schools." Art. IX, §1
Georgia	"The provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia. Public education for the citizens prior to the college or postsecondary level shall be free and shall be provided for by taxation, and the General Assembly may by general law provide for the establishment of education policies for such public education. The expense of other public education shall be provided for in such manner and in such amount as may be provided by law." Art. VIII, §1
Hawaii	"The State shall provide for the establishment, support and control of a statewide system of public schools free from sectarian control, a state university, public libraries and such other educational institutions as may be deemed desirable, including physical facilities…." Art. X, §1
Idaho	"The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools." Art. IX, §1
Illinois	"A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities. The State shall provide for an efficient system of high quality public educational institutions and services. Education in public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law. The State has the primary responsibility for financing the system of public education." Art. X, §1

Indiana	“Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it should be the duty of the General Assembly to encourage…moral, intellectual scientific, and agricultural improvement; and provide…for a…system of Common Schools… equally open to all.” Art. VIII, §1
Iowa	"The general assembly shall encourage by all suitable means, the promotion of intellectual, scientific, moral and agricultural improvement." Art. IX, 2nd, § 3.
Kansas	"The legislature shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools, educational institutions and related activities which may be organized and changed in such manner as may be provided by law." Art. 6, § 1.
Kentucky	“The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State." §183
Louisiana	“The legislature shall provide for the education of the people of the state and shall establish and maintain a public educational system.” Art. VIII §1. The legislature must “annually appropriate funds sufficient to fully fund the current cost to the state of such a program as determined by applying the approved formula in order to insure a minimum foundation of education in all public elementary and secondary schools.” Art. VIII, §13
Maine	“A general diffusion of the advantages of education being essential to the preservation of the rights and liberties of the people; to promote this important object, the Legislature are authorized, and it shall be their duty to require, the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools.” Art. VIII, pt. 1, §1
Maryland	"The General Assembly …shall by Law establish throughout the State a thorough and efficient System of Free Public Schools….”Art. VIII, §1
Massachusetts	“Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish …public schools and grammar schools in the towns….” Pt. 2, ch. V, §II
Michigan	“Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.” Art. VIII, § 1. “The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin.” Art. VIII, § 2.

Minnesota	“The stability of a republican form of government depending mainly upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public schools. The legislature shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state.” Art. XIII, §1
Mississippi	“The Legislature shall, by general law, provide for the establishment, maintenance and support of free public schools…. ” Art. VIII, §201
Missouri	“[a] general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of [21] years as prescribed by law.” Art. IX, §1(a)
Montana	“(1) It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state. (2) The state recognizes the distinct and unique cultural heritage of the American Indians and is committed in its educational goals to the preservation of their cultural integrity. (3) The legislature shall provide a basic system of free quality public elementary and secondary schools. The legislature may provide such other educational institutions, public libraries, and educational programs as it deems desirable. It shall fund and distribute in an equitable manner to the school districts the state's share of the cost of the basic elementary and secondary school system.” Art. X § 1.
Nebraska	“The Legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years.” Art. VII, § 1.
Nevada	“The legislature shall encourage by all suitable means the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements….” Art. 11, § 1.
New Hampshire	"Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools..." Pt. 2, art. 83
New Jersey	The education clause in New Jersey's State Constitution requires the legislature to "provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all children in the State between the ages of five and eighteen years." Art. 8, § IV, ¶ 1.
New Mexico	“A uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the state shall be established and maintained.” Art. XII, §1
New York	“The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.” Art. XI, §1

North Carolina	"The people have a right to the privilege of education, and it is the duty of the state to guard and maintain that right." Art. I, § 15. "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged." Art. IX, § 1. "The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students." Art. IX, § 2.
North Dakota	"A high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people being necessary in order to insure the continuance of that government and the prosperity and happiness of the people, the legislative assembly shall make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the state of North Dakota and free from sectarian control." Art. 8, § 1. "The legislative assembly shall provide for a uniform system of free public schools throughout the state, beginning with the primary and extending through all grades up to and including schools of higher education..." Art. 8, § 2. "In all schools instruction shall be given as far as practicable in those branches of knowledge that tend to impress upon the mind the vital importance of truthfulness, temperance, purity, public spirit, and respect for honest labor of every kind. ..." Art. 8, § 3. "The legislative assembly shall take such other steps as may be necessary to prevent illiteracy, secure a reasonable degree of uniformity in course of study, and to promote industrial, scientific, and agricultural improvements." Art. 8, § 4.
Ohio	"The General Assembly shall…secure a thorough and efficient system of common schools throughout the state….." Art. VI, §2
Oklahoma	"The Legislature shall establish and maintain a system of free public schools wherein all the children of the State may be educated." Art. XIII, §1
Oregon	"The Legislative Assembly shall provide by law for the establishment of a uniform, and general system of Common schools." Art. VIII, §3
Pennsylvania	"The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth." Art. III, §14
Rhode Island	"The diffusion of knowledge, as well as of virtue among the people, being essential to the preservation of their rights and liberties, it shall be the duty of the general assembly to promote public schools and public libraries, and to adopt all means which it may deem necessary and proper to secure to the people the advances and opportunities of education and public library services." Art. XII, §1-4

South Carolina	“The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the State and shall establish, organize and support such other public institutions of learning, as may be desirable.” Art. XI, §3
South Dakota	"The stability of a republican form of government depending on the morality and intelligence of the people, it shall be the duty of the Legislature to establish and maintain a general and uniform system of public schools wherein tuition shall be without charge, and equally open to all; and to adopt all suitable means to secure to the people the advantages and opportunities of education." Art. VIII, § 1
Tennessee	"The state of Tennessee recognizes the inherent value of education and encourages its support. The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools." Art. XI, § 12
Texas	Recognizing that a "general diffusion of knowledge" is “essential to the preservation of the liberties and rights of the people,” the education clause of Texas's state constitution requires the legislature to "establish and make suitable provision for the support and maintenance of an efficient system of public free schools." Art. VII, § 1
Utah	"The Legislature shall provide for the establishment and maintenance of the state's education systems including: (a) a public education system, which shall be open to all children of the state; and (b) a higher education system…." Art. X, § 1.
Vermont	"Laws for the encouragement of virtue and prevention of vice and immorality ought to be constantly kept in force, and duly executed; and a competent number of schools ought to be maintained in each town unless the general assembly permits other provisions for the convenient instruction of youth." Ch. II, § 68
Virginia	"That free government rests, as does all progress, upon the broadest possible diffusion of knowledge, and that the Commonwealth should avail itself of those talents which nature has sown so liberally among its people by assuring the opportunity for their fullest development by an effective system of education throughout the Commonwealth." Art. I, § 15. "The General Assembly shall provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth, and shall seek to ensure that an educational program of high quality is established and continually maintained." Art. VIII, § 1.
Washington	"It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex." Art. IX, § 1. "The legislature shall provide for a general and uniform system of public schools….”Art. IX, § 2Art.

West Virginia	"The Legislature shall provide, by general law, for a thorough and efficient system of free schools." Art. XII, § 1. "The Legislature shall foster and encourage, moral, intellectual, scientific and agricultural improvement." Art. XII, § 12.
Wisconsin	"The legislature shall provide…for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years…." Art. X, §3
Wyoming	"The right of the citizens to opportunities for education should have practical recognition. The legislature shall suitably encourage means and agencies calculated to advance the sciences and liberal arts." Art. 1, § 23. "The legislature shall provide for the establishment and maintenance of a complete and uniform system of public instruction, embracing free elementary schools of every needed kind and grade, a university with such technical and professional departments as the public good may require and the means of the state allow, and such other institutions as may be necessary." Art. 7, § 1.

Sources: Symposium, Daniel S. Greenspahn, *A Constitutional Right to Learn: The Uncertain Allure of Making a Federal Case Out Education*, 59 S.C. L. REV. 755, 784 (Summer 2008); *Education Justice*, EDUCATION LAW CENTER, http://www.educationjustice.org/index.html (last visited Nov. 1, 2014).

CONSTITUTIONAL PERSONHOOD – RECOGNITION OF THE CONSTITUTIONAL RIGHT TO EDUCATION

Danielle Whiteman

The Equal Protection Clause

In *Brown v. Board of Education*, the landmark case in education, the Supreme Court struck down the *Plessy* doctrine of "separate but equal," saying: "Today, education is perhaps the most important function of state and local governments."[1] The Court recognized that the adoption of compulsory school attendance laws and the expenditures afforded to education clearly demonstrated the nation's recognition of the importance of education in our democratic society.[2] Education, the Court stated, was "the very foundation of good citizenship:"

> "Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity to an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be afforded on equal terms."[3]

The Court's words are as pertinent today as they were over sixty years ago when *Brown* was decided; the lower an individual's educational attainment, the more likely the student is to become unemployed.[4] Though "separate but equal" segregated children by racial background, children are also segregated by socioeconomic background, which, due to wealth distribution amongst racial groups in the United States, often leads to children in poor and disproportionately minority communities receiving vastly unequal educational opportunities.[5] Today, poor, minority, and urban students are likely to attend markedly inferior schools.[6] Though the greatest inequalities across the nation are not inequality within states but between states,[7] a June 2006 report by the Thomas B. Fordham Institute showed that within states, disparities in funding between schools and districts can amount to thousands of dollars

[1] Brown v. Board of Education, 347 U.S. 483 (1954).
[2] Id.
[3] Id.
[4] Kimberly Jenkins Robinson, The Case for a Collaborative Enforcement Model for a Federal Right to Education, 40 U.C. Davis L. Review 1653 (2007), at 1657-58 (explaining the effect of disparities of educational opportunities on children in low-income and minority neighborhoods).
[5] Id.
[6] Id. at 1655.
[7] Goodwin Liu, Education, Equality, and National Citizenship, 116 Yale L.J. 330 (2006).

per student per year.[8] Large gulfs separate the best-funded and worst funded school districts within states in ways that generally favor schools with savvier leaders and wealthier parents.[9] When attempting to address disparities in educational opportunities, lawyers and scholars have often turned to the Equal Protection Clause's injunction against officially sanctioned discrimination. Though there has been some success in addressing disparities in education by relying on state statutory language and constitutions, inequalities that have been inherent in the public education system since its inception go unmitigated. This is due in important part to the failure of state and federal courts to give denials of education the scrutiny that is required when addressing denials or compromises of fundamental rights.

I. Equal Protection Analysis

The Court's current Equal Protection jurisprudence was conceived in the 1940s and later took shape under the direction of the Warren Court.[10] To protect groups who consistently lost in the democratic process, the Court developed the "suspect classification" doctrine, which presumes a law unconstitutional if it uses certain "suspect" classifying traits.[11] As "the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States," said the Court in *McLaughlin v. State of Fla*., racial classifications are 'constitutionally suspect' and subject to the most rigid scrutiny. [12] This evolved into the "strict scrutiny" standard, which applies in cases involving classification based on race or national origin and alienage, [13] and requires the classification to be narrowly tailored to a compelling state interest. This is a high bar and most statutes classifying on the basis of these factors cannot clear it. Almost immediately after developing the "strict scrutiny" standard, the Court decided *Skinner v. Oklahoma* and held that marriage and procreation are fundamental rights that could not be lightly abridged by state legislation. Thus the court made "fundamental rights" doctrine a part of its equal protection classification schemes.[14] The doctrine was further developed in *Shapiro v. Thompson* when the Court stated that any classification that served to

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[8] The Thomas B. Fordham Inst., Fund the Child: Tackling Inequity & Antiquity in School Finance, 2 (2006), http://www.schoolfunding.info/resource_center/media/Fordham_FundtheChild.pdf.

[9] *See* Supra text accompany note 8.

[10] Gayle Lynn Pettinga, Rational Basis with Bite: Intermediate Scrutiny by Any Other Name, 62 Ind. L.J. 779, 781 (1987) (Explaining the evolution of the Equal Protection Analysis).

[11] Id.

[12] McLaughlin v. State of Fla., 379 U.S. 184, 192 (1964).

[13] Id. at 782 (internal citations omitted).

[14] Jeffrey H. Blattner, The Supreme Court's "Intermediate" Equal Protection Decisions: Five Imperfect Models of Constitutional Equality, 8 Hastings Const. L.Q. 777, 780 (1981). *See*, e.g., Skinner v. State of Okla. ex rel. Williamson, 316 U.S. 535 (1942).

penalize the exercise of a constitutional right was unconstitutional and could not survive strict scrutiny "unless shown to be necessary to promote a *compelling* government interest."[15] Outside of the areas of suspect classifications or fundamental rights, the Supreme Court continued to apply the traditional "rational basis" test, which presumes that legislation is constitutional, meaning that the Court will uphold the law if the classification drawn by the statute is rationally related to a legitimate state interest.[16] Under this standard of review, the Court defers to legislative judgment if at all possible, requiring only that some plausible set of facts exists that allows the Court to justify the challenged statute.[17] As Equal Protection analysis under the Warren Court consisted primarily of choosing between strict scrutiny or rational basis review, the level of scrutiny applied tended to determine the outcome of the challenge.[18] Increased dissatisfaction with the two-tiered equal protection system of strict scrutiny and rational basis prompted the Court to add a third standard of review that would allow for an intermediate level of scrutiny and protect other groups that, like racial minorities, lacked power in the political process.[19] The Court primarily uses this intermediate level of scrutiny to review statutes involving the quasi-suspect classifications of gender and illegitimacy, reasoning that groups within these classifications, like racial minorities, are disadvantaged by legislation classifying them on the basis of an "immutable characteristic."[20] Under this standard of review, these quasi-suspect classifications must "serve important governmental objective and must be substantially related to the achievement of those objectives."[21] This intermediate level of scrutiny permits the Court to look more closely at the ends and means of the challenged statute, instead of merely pronouncing it valid or invalid under the traditional two-tiered analysis.[22]

II. Equal Protection and Education

In *San Antonio Independent School District v. Rodriguez*, though the Court acknowledged that "the grave significance of education both to the individual and to our society cannot be doubted," it said that the importance of a service performed by the State does not determine whether it must be

[15] Shapiro v. Thompson, 394 U.S. 618, 634 (1969).
[16] Pettinga, supra note 10, at 783 (internal citations omitted).
[17] Id.
[18] Id.
[19] Id. at 784 (internal citations omitted).
[20] Id.
[21] Id. at 784. See, e.g., Craig v. Boren, 429 U.S. 190, 197 (1976) (ruling that gender-based classifications must serve important governmental objectives and must be substantially related to the achievement of those objectives).
[22] Pettinga, supra note 10, at 784 (internal citations omitted).

regarded as fundamental for the purposes of examination under the Equal Protection Clause.[23] The Court quoted Justice Stewart's majority opinion in *Shapiro v. Thompson* regarding the limits of the fundamental rights rationale employed in the Court's equal protection decisions. "The Court today does not pick out particular human activities, characterize them as 'fundamental', and give them added protection…to the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands."[24] The Court also struck down the suspect classification argument, finding that the appellees failed to demonstrate that the Texas school-financing system operated to the "particular disadvantage of any class fairly definable as indigent, or as composed of persons whose incomes are beneath any designated poverty level."[25] Finally, the Court noted that neither the appellees nor the lower court addressed the fact that the lack of personal resources had not occasioned an absolute deprivation of the desired benefit, and said: "where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages."[26]

A few years later, however, the Court seemed to reconsider its stance when it extended intermediate scrutiny protection beyond the traditional quasi-suspect classes in striking down a state law denying undocumented children access to free education.[27] In *Plyler*, the Court seemed to see that there was more involved in the cases than abstract parsing of whether the statutes discriminated against a suspect class or whether education was a fundamental right; the important fact was that the statute "imposes a lifetime of hardship on a discrete class of children not accountable for their disabling status."[28] Three important considerations justified the Court's invocation of the intermediate, "heightened rational basis" review.[29]

First, because children were politically powerless and unable to alter the classifying characteristics of their undocumented status, the Court reasoned that they deserved protection similar to those afforded quasi-suspect classification.[30] "In determining the rationality of [the statute] we may take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in [the statute] can hardly be considered

[23] 411 U.S. 1, 30 (1973).
[24] Id. at 31 (internal citation omitted).
[25] Id. at 22.
[26] Id. at 24.
[27] Pettinga, supra note 10, at 785 (internal citations omitted). *See*, e.g., Plyler v. Doe, 457 U.S. 202 (1982).
[28] *See* Plyler, 457 U.S. at 223.
[29] Pettinga, supra note 10, at 785.
[30] Id.

rational unless it furthers some substantial goal of the State."[31] Second, because the right to education, though not fundamental, is extremely important, the Court believed that it deserved some protection as a quasi-fundamental right.[32] The Court stated that although "public education is not a right granted to individuals by the Constitution," it was not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation."[33] The distinction, the Court explained, was marked by "the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child."[34]

> "The 'American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance.' We have recognized 'the public schools as a most vital civic institution for the preservation of a democratic system of government,' and as the primary vehicle for transmitting 'the values on which our society rests,' [A]s ... pointed out early in our history, ... some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence,' and these historic 'perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists.' In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.

The Court went on to say that in addition to diluting our political and cultural heritage, the denial of education to an isolated group of children posed an affront to one of the goals of the Equal Protection Clause, which is "the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit."[35]

> [B]y depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority. But more

[31] *See* Plyler, 457 U.S. at 223.
[32] Pettinga, supra note 10, at 785.
[33] *See* Plyler, 457 U.S. at 223.
[34] Id.
[35] Id. at 222.

> directly, 'education prepares individuals to be self-reliant and self-sufficient participants in society.' Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause."[36]

The third factor considered was that the statute completely denied children access to free education.[37] Invoking heightened scrutiny in this way enabled the Supreme Court to tailor justice to the situation without deciding whether this expansion should be limited to the unique circumstances in *Plyler*, or whether other quasi-fundamental rights or groups could be afforded quasi-suspect classification and thus deserving of the added protection of heightened scrutiny.[38]

III. Equal Protection Litigation in State Courts Towards Establishing Equity

In *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally Protected Right*, Professor Derek Black posits that inequality amongst state education systems can be addressed without sweeping legislation or an explicit reversal of *Rodriguez*. Because state constitutions and state supreme courts have recognized education as a constitutional and/or fundamental right with substantive dimensions, he says, federal courts are already in the position to intervene without any change in constitutional law or enactment of new legislation.[39]

> In the years following Rodriguez, and the last two decades in particular, state constitutions and supreme courts have recognized education as a constitutional and/or fundamental right with substantive dimensions. Moreover, states have expanded their statutory structures beyond simply compelling students to attend school. They now also guarantee students a particular curriculum and a level of quality therein. When Rodriguez was decided, none of this had occurred. The Court was evaluating what appeared to be a mere gratuitous state benefit.[40]

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[36] Id.
[37] Pettinga, supra note 10, at 785.
[38] Id.
[39] Derek Black, Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education As A Federally Protected Right, 51 Wm. & Mary L. Rev. 1343, 1349 (2010).
[40] Id.

According to Black, scholars have attempted to sort state Equal Protection cases into three consecutive waves.[41] The first wave occurred in both state and federal courts up to *Rodriguez*; the primary theory was that school funding inequities, caused by variations in local property wealth, violated the Equal Protection Clause of the Federal Constitution.[42] The premise of the argument was that all students should be treated equally and should be entitled to absolute equity in resources.[43] The second wave of litigation came after the Supreme Court rejected the federal Equal Protection claims in *Rodriguez*.[44] While premised on the same notions of equal treatment of all students, advocates based their claims on untested state constitution equal protection and education clauses, rather than federal equal protection.[45] This second wave of litigation broadened the concept of equity to include a substantive component requiring states to offer all students a meaningful education that would prepare all students to participate actively in society.[46] The evolving concept of equity recognized that some students have greater needs than others and require greater educational resources, which raised issues of how educational resources should be distributed.[47] However, equalization of funding did not necessarily broaden educational opportunity; some states drove down overall spending across the state rather than providing more funding to the worst performing schools, meaning that educational opportunities just became equally bad across the state.[48] Thus the third wave of litigation, generally characterized as a pursuit of "educational adequacy," arose in the 1980s in concurrence with the "standards-based reform" movement in education.[49] During the third wave of litigation, advocates seized on language in state constitutions that they contended entitled students to some basic level of education and integrated elements of standards-based reform into their legal claims to argue that state constitutional phrases such as "efficient," "thorough," or "sound basic" education obligated the states to provide children with an education that prepared them for later challenges in life whether they be college, trade school, work, or the obligations of citizenship.[50]

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[41] Id. at 1360.
[42] Id.
[43] Id.
[44] Id. at 1361.
[45] Id.
[46] Id.
[47] Id.
[48] Id. at 1362-63.
[49] Id. at 1363.
[50] Id.

In 1989, the Kentucky Supreme Court decided *Rose v. Council for Better Educ.*, holding that a child's right to an adequate education was fundamental under the Kentucky constitution and concurring with the lower court's assertion that an efficient system of education must provide each child with at least seven skills, a number of which are relevant to notions of citizenship.[51] Since then, several other states have looked to *Rose* as an example and have prescriptively established what is meant by similar language in their own constitutions.[52] The third wave of litigation focused on standards and quality, ensuring that the states could not drive down education across the state in order to create basic equality.[53] Though courts use differing language, and may not define "adequate education" in terms that can be concretely understood, the use of the term "adequate education" is, at a minimum, an indication that students are entitled to some particular qualitative level of education[54] and that states have an obligation to ensure that schools have the resources necessary to meet this standard.[55]

IV. Examining Fundamentality and Reimagining Rodriguez

It is hard to reconcile the Court's repeated litanies of education's integral role in American society with its refusal to recognize a constitutionally protected, fundamental right to education. It is important to note, however, that a range of rights not explicitly enumerated in the Constitution have been found to be fundamental[56], and when the Court says that it "simply recognizes, as it must, an

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[51] *See* Rose v. Council for Better Educ., 790 S.W.2d 186, 212 (Ky. 1989) ("We concur with the trial court that an efficient system of education must have as its goal to provide each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.")

[52] Black, supra note 42, at 1364.

[53] See supra text accompanying note 19.

[54] Black, supra note 42, at 1366.

[55] *See* Michael Rebell, "The Right to Comprehensive Educational Opportunity." 47 HARVARD CIVIL RTS-CIVIL LIB. L. REV. 49 (2012).

[56] Compare Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that the Fourteenth Amendment's protection against infringement of certain liberties extended the right to "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men", including the right to engage in any of the common occupations in life, acquire useful knowledge, marry, establish a home and bring up children), and Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 535 (1925) (holding that the Fourteenth Amendment guaranteed parents and guardians the right to direct the upbringing and education of their children) ,

established constitutional right"[57], the reality is this: it is never clear whether or not a right is fundamental and constitutionally protected until the court declares it to be so. In addition, though the generally held assumption is that the courts fix the meaning of the Constitution, a number of scholars believe it is a mistake to equate the adjudicated Constitution with the full meaning of the Constitution itself.[58] As constitutional adjudication is constrained by the obligation to dispense legal justice in narrowly framed disputes, the adjudicated Constitution falls short of exhausting the substantive meaning of the Constitution's full guarantees.[59] In light of these facts, perhaps, as Justice Brennan notes in his dissent to the *Rodriguez* majority opinion, fundamentality should be seen as a function of the right's importance, and the closer the nexus between the specific constitutional guarantee and the non-constitutional interest, the more fundamental the non-constitutional interest, or right, becomes. [60] Currently, 14 states have declared that education is a fundamental right, and another 17 have declined to do so. Nineteen states have avoided explicitly addressing the question. Professor Black would argue that if the court were to decide *Rodriguez* today, the most difficult question would not be identifying or defining the right to education, but determining what degree of scrutiny to apply.[61] In the past, the Court determined its level of scrutiny based on whether the underlying right was fundamental or non-fundamental, applying strict scrutiny to deprivations of fundamental rights, rational basis analysis to deprivations of non-fundamental rights, and intermediate scrutiny to important but non-fundamental rights.[62] In the post- *Rodriguez* era, however, the Court would have to face the unique question of whether strict scrutiny also applies to rights that have been deemed fundamental or constitutional under state law, but not under federal law.[63] In states that have explicitly declared a right to education in their state constitutions, Professor Black believes that strict scrutiny should apply for two reasons. First, the Court's own analysis of whether a right is fundamental is largely based on the extent to which states have protected the right or given special importance to it, so a state's own recognition of a right as fundamental is incontrovertible evidence of its high importance.[64] Second, those states that have

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with Roe v. Wade, 410 U.S. 113,114 (1973), (holding that Texas statutes prohibiting abortions except to save the life of the mother were unconstitutional as they violated the Due Process Clause of the Fourteenth Amendment, which protects the right of privacy, including a woman's right to terminate her pregnancy).

[57] Rodriguez, 411 U.S. at 31.

[58] Liu, Education, Equality, and National Citizenship, 116 Yale L.J. 330, 338 (2006).

[59] Id.

[60] Rodriguez, 411 U.S. at 62-63.

[61] Black, supra note 42, at 1409.

[62] Id.

[63] Id. at 1410.

[64] Id.

recognized education as a fundamental right apply strict scrutiny themselves, so it would be illogical for the federal courts to apply a lower level of scrutiny when evaluating the same right.[65]

In the states that have avoided the question of whether there is a fundamental right to education, and instead addressed education as a constitutional right that imposes affirmative obligations on the state, predicting the appropriate level of scrutiny in federal court would be more difficult. As these states have not broached the issue of scrutiny, but mandated that the state meet its obligation, one might argue that strict scrutiny should still apply because there is no meaningful difference between a fundamental right and a constitutional right. However, if the Court didn't find that discrimination in the provision of a state constitutional right warranted strict scrutiny, the argument could be made for an intermediate level of scrutiny rather than a rational basis review due to the fact that, as Plyler seemed to recognize, education is worthy of heightened scrutiny. A state would therefore have to make a reasoned defense of its educational system.[66] Professor Black argues that inasmuch as many inequities are a result of historical practices or modern politics rather than legitimate or reasoned goals, heightened scrutiny would be sufficient to protect most educational interests.[67] While Professor Black recognizes that his strategy would not immediately render education a constitutionally recognized fundamental right, it could provide the practical and theoretical basis necessary to do so eventually. Black's article also explores the current strategies established by a number of other prominent scholars, and establishes one thing for certain: in the end, it may be the culmination of a number of approaches that finally tips the scales and forces the Court to recognize a federal right to education.

[65] Id.
[66] Id. at 1412.
[67] Id.

CONSTITUTIONAL PERSONHOOD – RECOGNITION OF THE CONSTITUTIONAL RIGHT TO EDUCATION

Andrew Jondahl

The Due Process Clause

I. Overview of Substantive Due Process

Beginning in the early part of the twentieth century, a body of law began to develop based on the concept of "substantive due process."[1] This concept gives fuller meaning to the text of the Due Process Clauses of the Fifth and Fourteenth Amendments.[2] Rather than ask merely if the court has followed proper procedures when depriving a person's life, liberty, or property—as in procedural due process—substantive due process inquires into whether the government has a sufficiently strong *reason* for depriving an individual of life, liberty, or property (no matter how fair the procedures used),[3] and it recognizes that certain un-enumerated rights are implicit within the term "liberty."[4] The Court has explained that "liberty" "includes more than the absence of physical restraint,"[5] and has recognized that it includes the right to marry,[6] the right to procreate,[7] the right to interstate travel,[8] the right to privacy,[9] the right to have an abortion,[10] the right to bodily integrity,[11] the right to refuse medical treatment,[12] and others.

Although courts have been somewhat inconsistent in their analysis of substantive due process claims, most engage in some form of three central inquiries: (i) whether the right asserted is "fundamental;" (ii) how narrowly the infringement upon that right is tailored to serve a state interest; and (iii) whether the state's interest is compelling. If a court determines that a right is fundamental, it will more carefully scrutinize how narrowly tailored the government's infringement is to serving the

[1] *See*, e.g., Lochner v. New York, 198 U.S. 45 (1905).
[2] U.S. CONST. amend. XIV ("nor shall any state deprive any person of life, liberty, or property, without due process of law"); U.S. CONST. amend. V ("nor [shall any person] be deprived of life, liberty, or property, without due process of law").
[3] Erwin Chermerinsky, *Substantive Due Process*, 15 TOURA L. REV 1501, 1501 (1999).
[4] Washington v. Glucksberg, 521 U.S. 702, 755–756 (1997) (Souter, J., concurring).
[5] Glucksberg, 521 U.S. at 719 (Rehnquist, C.J., writing for the majority).
[6] Loving v. Virginia, 388 U.S. 1 (1967).
[7] Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942).
[8] United States v. Guest, 383 U.S. 745 (1966).
[9] Griswold v. Connecticut 381 U.S. 479 (1965).
[10] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).
[11] Rochin v. California, 342 U.S. 165 (1952).
[12] Vacco v. Quill, 521 U.S. 793 (1997).

state interest, and how compelling the state interest is.[13] In summary, the government cannot infringe upon a fundamental right unless, in rare cases, the infringement is narrowly tailored to serve a compelling state interest.[14]

The argument that the Due Process Clause constitutionally guarantees education relies on the successful establishment of education as a "fundamental right," which is a difficult task because courts typically "exercise the utmost care whenever [they] are asked to break new ground in this field."[15] To determine if a right is fundamental, a court generally asks if the right is "deeply rooted" in the history and traditions of the United States[16] or if it is "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed."[17]

II. Historic Analysis of Education as a Fundamental Right

The Supreme Court acknowledged an education right in one of its earliest enumerations of fundamental "liberty" rights.[18] In *Meyer v. Nebraska*, which interpreted the Due Process Clause in 1923, the Court stated:

> Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, *to acquire useful knowledge*, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[19]

In *Meyer*, the Court invalidated a state law that prohibited teachers from instructing students in any language but English on the grounds that it conflicted with the right of a student to "acquire useful knowledge."[20] Two years later, in *Pierce v. Society of Sisters*, the Court invalidated an Oregon law on the

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[13] *Id.*
[14] Reno v. Flores, 507 U.S. 292, 302 (1993).
[15] Collins v. Harker Heights, 503 U.S. 115, 125 (1992).
[16] Moore v. East Cleveland, 431 U.S. 494, 503 (1977); Snyder v. Massachusetts, 291 U.S. 97 105 (1937). *See also*, Michael H. v. Gerald D., 491 U.S. 110 (1989).
[17] Palko v. Connecticut, 302 U.S. 319, 325 (1937).
[18] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
[19] *Id.* (emphasis added); *see also id.* at 401 ("the individual has certain fundamental rights that must be respected.").
[20] *Id.*

grounds that it violated a parent's constitutional right to direct the education of her child.[21] Although neither of these cases established that American students have a constitutional right to be provided education, they demonstrate that even when the doctrine of substantive due process was nascent, the Supreme Court had already considered certain education rights to be fundamental.

Although the Supreme Court has never directly considered whether a constitutional guarantee to education is located within the Due Process Clause,[22] it has often considered the fundamentality of the right to education in the context of the Equal Protection Clause. The seminal case concerning the right to education is *San Antonio Independent School District v. Rodriguez*.[23] The majority opinion in *Rodriguez* acknowledged "the vital role of education in a free society,"[24] and pointed to numerous Supreme Court opinions supporting the theme (most importantly, *Brown v. Board of Education*[25]). However, in considering the fundamentality of the right, the Court did not ask whether it was "deeply rooted" in our traditions or "implicit in the concept of ordered liberty." In fact, the Court asserted that the "social significance" or importance of a right does not bear on its fundamentality; rather, the Court said that the only substantive rights in the Constitution that are entitled to the highest protection are those explicitly or implicitly guaranteed by the Constitution.[26] In his famous dissent, Justice Marshall disputed that only rights found within the text of the Constitution are afforded protection, and argued that if the nexus between an asserted right and an explicitly protected Constitutional right is sufficiently strong, the asserted right should be given the same protection as the more explicitly protected right.[27] Justice Marshall explained that education was a prerequisite both to the exercise of First Amendment

[21] 268 U.S. 510; *see also* Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) (holding that "the First and Fourteenth Amendments prevent the state from compelling respondents to cause their children to attend formal high school to age 16").

[22] In *San Antonio Independent School District v. Rodriguez*, the Court considered whether children have a fundamental right to education. 411 U.S. 1 (1973); *see also* infra notes 24–32 and accompanying text. Some scholars have interpreted this analysis to be grounded in the Due Process Clause, *see, e.g.*, Kara Millonzi, 81 N.C. L. REV. 1286, 1293 (2003); however, neither Justice Powell's majority opinion nor Justice Marshall's famous dissent mentions either the Due Process Clause or the concept of substantive due process. *See* Rodriguez, 411 U.S. at 4–59 (Powell, J., writing for the majority); *id*. at 70–133 (Marshall, J., dissenting). Justice Stewart does briefly acknowledge that the liberty clause confers certain substantive rights, but not in the context of education. *Id.* at 61, note 8.

[23] 411 U.S. 1 (1973).

[24] *Id.* at 30.

[25] 347 U.S. 483 (1954) ("[Education] is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.").

[26] Rodriguez, 411 U.S. at 17.

[27] *Id.* at 98 (Marshall, J., dissenting) (comparing fundamentality of procreation because of its interaction with the Constitutional right to privacy, of the state franchise because of its ties to basic First Amendment rights, and of access to the appellate process because of its importance to Fourteenth Amendment rights).

rights and to the constitutional right to political participation, and therefore should receive the same protection as those rights.[28]

The majority rejected Justice Marshall's argument on the grounds that the Court had "never presumed to possess either the ability or the authority to guarantee the citizenry the most effective speech or the most informed electoral choice."[29] Importantly though, the majority left open the possibility that the Constitution might contain a right to education:

> Even if it were conceded that *some identifiable quantum of education is a constitutionally protected* prerequisite to the meaningful exercise of either right, we have no indication that the [Texas system] fails to provide each child with an opportunity to acquire *basic minimal skills* necessary for the enjoyment of the rights of speech and of full participation in the political process."[30]

Although this may seem to set a low bar to what level of education may be constitutionally required, it has not since been directly tested or defined by the Court. There have been two subsequent cases in which plaintiffs alleged the denial of a minimally adequate education, but the Court avoided the question in each. In *Papasan v. Allain,* petitioners alleged that the state distribution of funds denied them a minimally adequate education under the Equal Protection Clause, but the Court held that petitioners alleged insufficient facts in support of the claim.[31] In *Kadrmas v. Dickinson Public Schools*, plaintiffs alleged that the school district's requirement that a mother living in poverty pay for her daughter's transportation to school denied her a minimally adequate education, but the Court held that since the school continued to provide transportation despite the mother's nonpayment, the daughter had not been denied an education.[32]

In *Plyler v. Doe*, a group of undocumented school-age children brought an Equal Protection claim after having been denied an education by the state of Texas.[33] The Court stated unequivocally that

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[28] *Id.* at 70–133.
[29] *Id.* at 36.
[30] *Id.* at 36–37 (emphasis added).
[31] 478 U.S. 265 (1986).
[32] 487 U.S. 450 (1988); *see also* Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) (acknowledging that a certain degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence[,]" but holding that an eighth-grade education sufficiently served this this purpose).
[33] Plyler v. Doe, 457 U.S. 202 (1982).

"illegal aliens" are not a "suspect class,"[34] and that "public education is not a 'right' granted to individuals by the Constitution."[35] Oddly, the Court still applied thorough scrutiny to the state's asserted purposes, emphasized the importance of education ("it is [not] merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation"), and held that Texas must offer undocumented children an education.[36] The Court's opinion could be interpreted to implicitly hold that the undocumented immigrants *were* a suspect class or that the right to education *was* fundamental without saying so, but the matter remains unsettled.

III. Strategies for Locating the Right to Education within the Due Process Clause

In *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, Professor Susan H. Bitensky explains theories under which the concept of substantive due process could be used to locate a right to education in the Due Process Clause.[37]

First, she builds upon Professor Laurence Tribe's proposition that the line of substantive due process cases establishing a constitutional right to privacy[38] implicates a broader concept of personhood.[39] Under this theory, a person has both an inward- and outward-turning self,[40] and so the "affirmative duties of government cannot be severed from its obligations to refrain from certain forms of control; both must respond to a substantive vision of the needs of human personality."[41] Professor Bitensky expands upon this idea by arguing that given the Supreme Court's historic acknowledgment of the "value of education in forming the civilized individual," *Meyer* and *Pierce* should be read along with the *Roe v. Wade* privacy cases to have taken a step toward recognizing education as a personhood right: "If Meyer and Pierce say that government cannot thwart the acquisition of knowledge and if public

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[34] *Id.* at 219.
[35] *Id.* at 221.
[36] *Id.* at 230.
[37] Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 579–596 (1992).
[38] Professor Bitensky analyzes the Court's consideration of the right in three cases: Griswold v. Connecticut, 381 U.S. 479 (1965) (invalidating a state law that prohibited the use of contraceptives by married couples on the grounds that it was an unconstitutional intrusion on the right to privacy); Eisenstadt v. Baird, 405 U.S. 438 (1972) (extending the privacy right to unmarried couples); Roe v. Wade, 410 U.S. 113 (1973) (finding a qualified right to have an abortion within the constitutional right to privacy).
[39] Bitensky supra note 36, at 582; *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 8-2 TO 8-4.
[40] Bitensky supra note 36, at 582.
[41] TRIBE, supra note 38, § 15-2, at 1303.

schools are the main avenue by which the populace acquires knowledge, then does it not follow that a right to personhood should also require government to provide those schools?"[42]

Second, Professor Bitensky meets the Supreme Court on its own terms to establish a right to education, analyzing three of the opinions in the then recent case of *Michael H. v. Gerald D.*, each of which offered a different framework for ascertaining the fundamentality of a liberty interest.[43] Justice Scalia's framework, supported by a plurality, considers "whether the liberty interest at stake is rooted in history and tradition of this society, with tradition to be determined by the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[44] Professor Bitensky proceeds to evaluate each type of historical source Justice Scalia found relevant, and she identifies an analogous source (or sources) demonstrating the specific historical importance of education.[45] Justice O'Connor's opinion was vague, but not as rigid as Justice Scalia's in terms of historical analysis, so Bitensky posits that education would also be fundamental under her test.[46] Justice Brennan's dissent conceded that history and tradition are relevant to fundamentality, but defined tradition less rigidly, emphasizing the importance of the right to society.

The primary challenge litigants face in establishing education as a fundamental right under the Due Process Clause is the prevailing notion that ours is a constitution of negative rights.[47] That is, our constitution *prohibits* the government from infringing upon our individual rights, but it does not impose any affirmative duty upon the government to provide us with any services.[48] For example, while the First Amendment may prevent the government from curtailing our free speech, it does not impose a duty upon the government to provide us with a forum for expression. Although many state constitutions contain a positive guarantee to education, the only fundamental rights recognized by the Supreme Court with regard to education are those to acquire knowledge[49] and to direct the education of your

[42] Bitensky, supra note 36, at 583.
[43] *Id.* at 583–596; *see also* Michael H. v. Gerald D., 491 U.S. 110, 113–132 (1989) (Scalia, J., writing for a plurality); *id.* at 132 (O'Connor, J., concurring); *id.* at 136–157 (Brennan, J., dissenting).
[44] Bitensky, supra note 37, at 585 (quoting Michael H., supra note 42) (internal quotation marks omitted).
[45] *Id.* at 585–590.
[46] *Id.* at 590–591.
[47] *See* Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990).
[48] *Id.*
[49] Meyer, 262 U.S. at 400.

children.[50] While the Supreme Court has never acknowledged a positive right to education, the majority in *Rodriguez* did (as mentioned) leave open the possibility.[51]

Unfortunately, the assumption that the Constitution is a "charter of negative liberties…pervades the judicial way of talking about constitutional rights" and is treated as "virtually sacrosanct."[52] While the Constitution certainly contains positive rights,[53] the Supreme Court has rejected arguments that the Due Process Clause imposes any affirmative duty on the government.[54] The Court has recognized a few narrow exceptions to this rule, contingent upon a "special relationship" between the government and individuals whose liberty had been involuntarily deprived.[55] However, in *DeShaney v. Winnebago County Dept. of Social Services*, the Court squarely rejected the argument that this type of "special relationship" could be extended to a government's relationship with a child, even after the government had undertaken to protect a particular child.[56]

The second challenge litigants face in locating a fundamental right to education in the Due Process Clause is the low bar set by the Court in *Rodriguez*. Although, the Court did leave the door open to *some* minimal level of education guaranteed by the Constitution, we know that the bar is set lower than the education offered to the plaintiffs in the case, which most people in the education rights community would find insufficient.

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[50] Pierce, 268 U.S. at 534.
[51] Rodriguez, 411 U.S. at 36–37; *see also* Papasan, 478 U.S. at 285 ("this Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right")
[52] Bandes, supra note 48, at 2308.
[53] *See, e.g.*, U.S. CONST. amend. VI (requiring the government to provide speedy trials, the assistance of counsel, etc.); U.S. CONST. art. IV, § 4 (guaranteeing a republican form of government).
[54] *See, e.g.*, DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 196 (1989) ("[T]he Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty or property interests of which the government itself may not deprive the individual.")
[55] *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 103–104 (1976) (requiring the State to provide medical care to prisoners); Youngberg v. Romeo, 457 U.S. 307, 315–316 (1982) (requiring the State to provide services to people institutionalized with mental disabilities).
[56] DeShaney, 489 U.S. at 197–198.

CONSTITUTIONAL PERSONHOOD – RECOGNITION OF THE CONSTITUTIONAL RIGHT TO EDUCATION

Kaydene Grinnell

The Citizenship Clause

*Some constitutional scholars find support for recognition of a right to education in the Citizenship Clause of the Fourteenth Amendment. We believe that the scholarship of Justice Goodwin Liu provides an exemplary articulation of the merits of this argument. As such, this section is comprised of excerpts from the introduction of Justice Liu's milestone 2006 article.** Although Justice Liu focuses, for strategic reasons, on the constitutional obligations of Congress rather than the courts, he documents a history that can be used to establish rights that all branches of government should recognize.*

[T]he Fourteenth Amendment authorizes and obligates Congress to ensure a meaningful floor of educational opportunity throughout the nation. But instead of parsing the Equal Protection Clause, [one can focus] on the Fourteenth Amendment's opening words, the Citizenship Clause.[1] Before the Fourteenth Amendment mandates equal protection of the laws, it guarantees national citizenship. This guarantee is affirmatively declared; it is not merely protected against state abridgment. Moreover, the guarantee does more than designate a legal status.[2] Together with Section 5,[3] it obligates the national government to secure the full membership, effective participation, and equal dignity of all citizens in the national community. This obligation...encompasses a legislative duty to ensure that all children have adequate educational opportunity for equal citizenship.

For familiar reasons, the constitutional guarantee of national citizenship has never realized its potential to be a generative source of substantive rights. It was neutered by a reactionary Supreme Court that perverted the essential meaning of the Civil War Amendments and helped undermine Reconstruction.[4] Nevertheless, contemporaneous interpreters beyond the five-justice majority in the *Slaughter-House Cases* recognized national citizenship as a font of substantive guarantees that Congress had the power and duty to enforce. Justice John Marshall Harlan elaborated this view in his lone dissent in the *Civil Rights Cases*, describing the fundamental transformation of nationhood wrought by the

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** Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 332-41 (2006).

[1] U.S. CONST. AMEND. XIV, §1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States ....").

[2] *See id.* (referring to "the privileges or immunities of citizens of the United States").

[3] *Id.* §5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

[4] *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

Citizenship Clause.[5] Moreover, this understanding of national citizenship undergirded a series of proposals in Congress between 1870 and 1890 seeking to establish a strong federal role in public education that would, among other things, narrow educational disparities among the reunified states. These early proposals, which Congress vigorously debated and nearly passed, illuminate what many leaders of the Framing generation believed to be the scope of federal authority and responsibility to secure full and equal national citizenship. Their perspective bears directly on the maldistribution of educational opportunity across the nation today.

By recovering this strand of constitutional thought, this article aims to instantiate what William Forbath has called the "social citizenship tradition" in our constitutional heritage.[6] At its core, the tradition holds that there is a "basic human equality associated with the concept of full membership of a community" and that it is the duty of government to ensure the civil and political as well as social and economic prerequisites for the realization of this equality.[7] In pursuit of these commitments, the tradition challenges two aspects of how we typically understand constitutional law.

First, contrary to the conventional wisdom that "the Constitution is a charter of negative rather than positive liberties,"[8] the social citizenship tradition assigns equal constitutional status to negative rights against government oppression and positive rights to government assistance on the ground that both are essential to liberty. The concept of positive rights, while disfavored in Supreme Court doctrine,[9] has never been far from the core ideals of the nation's transformative moments. It was part of the ideology of emancipation and Reconstruction.[10] It animated the New Deal constitutional vision and

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[5] *See* The Civil Rights Cases, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting).

[6] William E. Forbath, *Caste, Class, and Equal Citizenship, 98 Mich. L. Rev. 1, 1 (1999)*; *see* Kenneth L. Karst, *The Supreme Court, 1976 Term-- Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 Harv. L. Rev. 1, 59-64 (1977)*.

[7] T.H. Marshall, *Citizenship and Social Class, in* T.H. MARSHALL & TOM BOTTOMORE, CITIZENSHIP AND SOCIAL CLASS 2, 6 (Pluto Press 1992) (1950); *see* Cass R. Sunstein, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER (2004).

[8] Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) (Posner, J.).

[9] *See* Town of Castle Rock v. Gonzales, 125 S. Ct. 2796 (2005) (finding no right to police enforcement of a domestic abuse restraining order); DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989) (finding no right to state protection against private violence); Harris v. McRae, 448 U.S. 297 (1980) (finding no right to government assistance for a medically necessary abortion); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (finding no fundamental right to education).

[10] *See* Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL'Y 37 (1990); James W. Fox, Jr., *CITIZENSHIP, POVERTY, AND FEDERALISM: 1787-1882, 60 U. PITT. L. REV. 421, 479-577 (1999)*. Professor Charles Black has located the nation's commitment to positive rights even earlier, in the Declaration of Independence. *See* CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 6 (1997); *id*. at 133 (reading the Constitution in light of the Declaration to infer an "*affirmative constitutional duty* of

President Franklin Roosevelt's call for a "Second Bill of Rights."[11] And it found brief expression in the fundamental rights strand of equal protection doctrine during the Great Society.[12] Moreover, as Cass Sunstein and David Currie have observed, positive rights to government assistance inhere in a variety of traditionally "negative" constitutional protections, although this reality is obscured by baseline "assumptions about . . . the natural or desirable functions of government."[13] Neither the text nor the history of the Constitution forecloses a reading of its broad guarantees to encompass positive rights, and the experiences of other nations suggest that the existence of such rights is compatible with constitutionalism….[14]

The general assumption of lawyers and lay people alike is that the meaning of the Constitution is fixed by the courts… Because the Supreme Court has refused to squarely recognize fundamental rights to education, welfare, and other government aid, we are taught to believe that no substantive obligations exist in these areas.

…[I]t is a mistake to equate the adjudicated Constitution with the full meaning of the

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Congress diligently to devise and prudently to apply the means necessary to ensure, humanly speaking, a decent livelihood for all").

[11] *See* SUNSTEIN, *supra* note 18; Forbath, *supra* note 17, at 68-75.

[12] *See supra* note 9. For discussion of this doctrine, see Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor, 39 Hastings L.J. 1, 37-38 (1987)*; and Michelman, *supra* note 10, at 25-33, 40-47.

[13] Cass R. Sunstein, Lochner's Legacy, 87 Colum. L. Rev. 873, 889 (1987); *see* David P. Currie, *Positive and Negative Constitutional Rights, 53 U. Chi. L. Rev. 864 (1986)*. The right to property, for example, cannot be reduced to a set of limitations on government regulation or interference. The right is meaningful because government has affirmatively created an elaborate system of laws, agencies, police, and courts on which property owners rely to enforce claims against private and public actors. *See, e.g.*, Truax v. Corrigan, 257 U.S. 312, 328 (1921) (holding that a state law barring injunctions against striking workers deprived an employer of property without due process). The same is true of contract: like property, it "entails a right against third parties that is worthless without government help." Currie, *supra*, at 876; *see also* Sunstein, *supra*, at 889 ("The contracts clause amounts to a right to state enforcement of contractual agreements; if the state fails to protect by refusing to enforce a contract, it is violating the clause."). Even the right of free speech, a quintessential negative right, often requires positive action by government. *See, e.g.*, Schneider v. New Jersey, 308 U.S. 147, 162 (1939) (holding that city officials must keep streets open for leafleting despite the burden of "cleaning and caring for the streets"); Glasson v. City of Louisville, 518 F.2d 899, 906 (6th Cir. 1975) (holding that the police "must take reasonable action to protect from violence persons exercising their constitutional rights" to speech and assembly).

[14] *See, e.g.*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 18, 1972, 33 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 303 (330-31) (F.R.G.), *translated in* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 282-88 (2d ed. 1997) (interpreting a constitutional right to freely choose one's place of training to imply positive rights to education); *Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.) (requiring reasonable government action to ensure the constitutional right of access to adequate housing); Trybunal Konstytucyjny [Pol. Constitutional Trib.], Determining Income Constituting the Basis for the Right to Family Allowance, http:// www.trybunal.gov.pl/eng/summaries/documents/P_3_05_GB.pdf (last visited Oct. 13, 2006) (summarizing Judgment of Nov. 15, 2005, P 3/05 (Constitutional Trib.) (Pol.), which identified a constitutional right to a family allowance and invalidated a statutory formula governing income eligibility).

Constitution itself.[15] Whatever answer a court might give to whether the Constitution guarantees minimum entitlements to social and economic welfare, it will be encumbered by considerations of judicial restraint arising from the countermajoritarian difficulty and limitations on institutional competence. The decision in *San Antonio Independent School District v. Rodriguez*, for example, exhibited many of these prudential concerns in holding that locally driven inequalities in public school funding do not violate the Constitution.[16] Moreover, as Robin West has explained, constitutional adjudication is constrained by the conservative methodology inherent to dispensing "legal justice" in narrowly framed disputes.[17] For these reasons, the adjudicated Constitution often falls short of exhausting the substantive meaning of the Constitution's open-textured guarantees. Lawrence Sager captured the point when he wrote that judicial doctrine in many areas, including the Fourteenth Amendment, "mark[s] only the boundaries of the federal courts' role of enforcement," leaving the full scope of constitutional norms "underenforced."[18]

… I do not address whether the Supreme Court or any court should hold that the Fourteenth Amendment guarantees an adequate education. Although that question remains open in the case law,[19] my thesis is chiefly directed at Congress, reflecting the historic character of the social citizenship tradition as "a majoritarian tradition, addressing its arguments to lawmakers and citizens, not to courts."[20] Whatever the scope of judicial enforcement, the Constitution--in particular, the Fourteenth Amendment--speaks directly to Congress and independently binds Congress to its commands. Thus the

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[15] *See* Larry D. Kramer, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); West, *supra* note 10, at 290-318; Forbath, *supra* note 17; Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act, 112 Yale L.J. 1943 (2003)*; Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212 (1978)*.

[16] 411 U.S. 1, 41 (1973) ("[T]he Justices of this Court lack both the expertise and the familiarity with local problems ... [involving] the raising and disposition of public revenues."); *id. at 42* (noting "this Court's lack of specialized knowledge and experience" on "difficult questions of educational policy"); *id. at 56* (questioning "the desirability of completely uprooting the existing system").

[17] WEST, *supra* note 10, at 311-14. Legal justice seeks "to guarantee some continuity between the past and the present"--"to treat like cases alike"--by conserving legal traditions through application of precedent and analogical reasoning. *Id.* at 311, 312; *see also* Post & Siegel, *supra* note 27, at 1966-71 (describing the different institutional perspectives of Congress and the Court in constitutional interpretation).

[18] Sager, *supra* note 27, at 1213.

[19] *See* Papasan v. Allain, 478 U.S. 265, 285 (1986) ("[T]his Court has not yet definitively settled ... whether a minimally adequate education is a fundamental right ...."); *Rodriguez, 411 U.S. at 36-37*.

[20] Forbath, *supra* note 17, at 1.

approach to constitutional meaning I take here is that of a "conscientious legislator"[21] who seeks in good faith to effectuate the core values of the Fourteenth Amendment, including the guarantee of national citizenship.

From this perspective, the language of rights, with its deep undertone of judicial enforceability, seems inapt to probe the full scope of a legislator's constitutional obligations. As Professor Sager has observed, "[T]he notion that to be legally obligated means to be vulnerable to external enforcement can have only a superficial appeal."[22] It is more illuminating to ask what positive duties, apart from corresponding rights, the Fourteenth Amendment entails for legislators charged with enforcing its substantive guarantees.[23] Framed this way, the inquiry proceeds from the standpoint that Congress, unlike a court, is neither tasked with doing legal justice in individual cases nor constrained by institutional concerns about political accountability. Instead, "Congress can draw on its distinctive capacity democratically to elicit and articulate the nation's evolving constitutional aspirations when it enforces the Fourteenth Amendment."[24] By mediating conflict and marshaling consensus on national priorities, including the imperatives of distributive justice, Congress can give effect to the Constitution in ways the judicial process cannot.

Thus the legislated Constitution, in contrast to the adjudicated Constitution, is not "narrowly legal" but rather dynamic, aspirational, and infused with "national values and commitments."[25] As we shall see, the Reconstruction-era proposals for federal aid to public education exemplify this sort of legislative constitutionalism, featuring Congress in the role of apprehending and discharging its duty to enforce the guarantee of national citizenship.

...Part II [of the Article] places the concept of citizenship in constitutional context, beginning

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[21] Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation, 27 Stan. L. Rev. 585 (1975)*. The classic statement of Congress's independent responsibility to interpret and follow the Constitution is James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 134-44 (1893)*.

[22] Sager, *supra* note 27, at 1221. Citing the example of state high court judges deciding matters of state law or Justices of the Supreme Court deciding federal law, Professor Sager noted that "[w]e are quite comfortable ... in the belief that these judges are legally obligated to observe the norms of their legal system." *Id.* at 1222. Although judges are subject to impeachment, "surely the presence of such rarely invoked enforcement devices is not essential to our perception that these judges are routinely and consistently bound to legal standards." *Id.*

[23] For a thoughtful discussion of the need to examine constitutional duties apart from judicially enforceable rights, see West, *supra* note 26.

[24] Post & Siegel, *supra* note 27, at 2031; *cf.* Laurence H. Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 Yale L.J. 1063, 1079 (1980) (arguing that representation-reinforcement theories of constitutional interpretation, while having some appeal to judges, have no relevance "to an elected representative--especially one who regards the Constitution as addressed to all who govern").

[25] Post & Siegel, *supra* note 27, at 2022, 2027; *see* West, *supra* note 10, at 312 (noting that the legislated Constitution embodies moral and political aspirations, including aspirations for distributive justice).

with a brief historical account of the Citizenship Clause and its transformative significance. I then argue that a proper reading of the Clause together with Section 5 yields three important insights. First, in addition to securing a legal status, the grant of national citizenship is rightly understood as a font of substantive guarantees. Second, the affirmative character of the Citizenship Clause means that Congress's enforcement power is not limited to protecting national citizenship against state abridgment. Congress has broad authority to legislate directly to make the guarantee of national citizenship meaningful and effective. Third, the Section 5 grant of congressional power to enact appropriate legislation to enforce the citizenship guarantee implies a constitutional duty of enforcement.

Part III shows how, soon after ratification, this approach to the Fourteenth Amendment was implemented by legislators seeking to establish a robust federal role in support of public education. In a series of federal aid bills introduced between 1870 and 1890, members of Congress invoked the grant of national citizenship as a basis of federal power and duty to ensure that children, white and black, in all states achieved basic literacy. The most well-developed proposals were national, not sectional, in scope, even as they were designed to disproportionately benefit poor states with high rates of illiteracy. The lengthy and learned congressional debates on these measures left a rich legacy informing both constitutional principle and education policy. That legacy identifies the guarantee of national citizenship as a source of federal responsibility to ensure a national floor of educational adequacy.

Part IV discusses policy implications of the constitutional perspective advanced here. The legislative duty I posit contemplates wide policymaking discretion for Congress. But the essential requirement is that Congress pursue a deliberate inquiry into the meaning of national citizenship and its educational prerequisites and that it take steps reasonably calculated to remedy conditions that deny children adequate opportunity to achieve those prerequisites. Current policies, including NCLB, fail to satisfy this basic account of legislative duty, highlighting the need for a stronger federal role within a continuing framework of cooperative federalism. I conclude with a few thoughts on the implications of my thesis for areas beyond education and on the questions of inclusion and exclusion raised by treating constitutional citizenship as a boundary of national membership.

BEFORE SCHOOL DISTRICTS GO BROKE: A PROPOSAL FOR FEDERAL REFORM

Kristi Bowman

79 Univ. of Cincinnati Law Review 895(2011)

The recession caused school districts across the country to face falling revenues, forcing them to cut their budgets and adjust to leaner times—and some of them reached or approached a point of fiscal crisis. This article argues that a nationwide solution is needed to ensure fiscal stability in education funding. It proposes that "when Congress reauthorizes No Child Left Behind, …it should include fiscal accountability provisions that require states to: (1) help districts create immediate, additional cost savings; (2) publicly monitor districts' fiscal health and create a plan for escalating involvement when a district nears and reaches fiscal crisis; and (3) assist in stabilizing districts' revenues long-term."

The article briefly explains how school districts operate financially, and then discusses the many variables that can contribute to school districts' fiscal crises. The article identifies two types of "systemic" factors that contribute to districts' financial crises: management and politics. Management problems, the article states, "could come in the form of outdated accounting methods, a lack of 'specialized knowledge in analytical tools developed to help local governments assess their fiscal health,' a general lack of sophisticated fiscal expertise among school districts' financial officers, dated and inflexible budgetary procedures, and a sense of planning year-to-year rather than having a long-term fiscal plan that includes having sufficient money in reserves." As examples of political factors, the article notes that "[m]any school district budgets are besieged by interest groups wielding political power, complicated by power dynamics between and among government officials, and obscured by many stakeholders' interests in making the financial situation seem better than it is because of the general unpopularity of options for dealing with fiscal crisis." The article also identifies "situational" factors, which are more time-, region-, or district-specific, that "also will exert increasingly substantial financial pressure on various states and school districts, if they have not done so already." These include pension obligations, recession-related litigation, and demographic changes that are increasing the percentage of at-risk students in many districts.

The article then analyzes the three legal mechanisms available to school districts in fiscal crisis—federal municipal bankruptcy, receivership, and state fiscal takeover of school districts. The article concludes that none of them provides an ideal solution to school districts' problems:

> First, although municipal bankruptcy has the advantages of restructuring a district's debt and unilaterally renegotiating its [collective bargaining agreements], ultimately bankruptcy proceedings cannot reach far enough to fundamentally restructure a school district in ways necessary to interrupt problems driven by politics or mismanagement. As a result, in the twenty-four states where bankruptcy is an option for school districts, it is a bad option. Second, state receivership has more flexibility and the potential to create greater systemic change than the bankruptcy process, but is only available to school districts in two states, is almost entirely untested in the case of school districts' fiscal crises, and even when available likely triggers more court involvement than necessary. Third, fiscal takeover mechanisms, like receivership, can address root causes

> of fiscal crisis better than bankruptcy. Available in varied forms in seventeen states, takeover mechanisms are much more common than receivership and have had respectable success in stabilizing districts financially. However, when employed, takeover mechanisms can face high levels of local resistance. Finally, in nineteen states school districts do not have access to even one of these three imperfect options. Taken together, states as a whole do not provide anywhere near sufficient support for the increasing number of school districts nearing or facing fiscal crisis across the country.

The article then argues that there is a strong federal interest in fiscally stable school districts for both economic and civic reasons. The article contends that the legislation proposed below is an appropriate mechanism for addressing the federal interest because it ensures that this interest will be satisfied in all states, rather than only some states; is consistent with federal education policy that focuses on achieving accountability through spending legislation; "involves significant deference to states and thus allows states to satisfy the purpose of the conditions in a way that makes sense given their unique demographics and dynamics;" and "gives states political cover to enact controversial policies during difficult economic times."

The article then lays out proposed legislation which would add a subsection to the text of Title I, Part A, Subpart 1 of the No Child Left Behind Act, which contains the basic requirements for compliance plans each state must submit to the U.S. Department of Education as a condition of receiving its share of the $15 billion in annual Title I funding. The proposed text states:

(e) FISCAL ACCOUNTABILITY.—Each State plan shall demonstrate that the State is a responsible steward of the funding allocated pursuant to this Act. Such a demonstration shall—

(1) Through legislation or regulation, enable school districts to create additional cost savings during FY 2012. Such cost savings shall be created by—

(A) Expanding the fiscal expertise available to school districts by—

i. Entering into a long-term contract with an outside consulting agency with expertise in education policy and municipal finance, and partially subsidizing such consultants' interactions with school districts; or

ii. Approving partnerships between school districts and universities with education and municipal finance expertise for the purpose of studying the effect of cost-saving measures on student learning;

(B) Requiring the administrative or comprehensive consolidation of school districts with 1,000 students or fewer;

(C) Permitting school districts to more easily outsource contracts for non-instructional services;

(D) Providing incentives for the reduction of school districts' salary expenses. Such reductions shall occur through the layoff of low-performing teachers regardless of seniority; or

(E) Satisfying the purposes of this part, (e)(1), as determined by the Secretary of Education and in accordance with such criteria as the Secretary establishes.

(2) Through legislation or regulation, provide technical assistance to anticipate and assist school districts in fiscal crisis. Such assistance shall—

(A) Assess school districts' fiscal health on an annual basis. This assessment shall—

i. Be based on pre-determined criteria; and,

ii. Make public the names of the districts approaching and in fiscal crisis; and

(B) Determine a plan of escalating state intervention to assist a school district approaching and in fiscal crisis.

(3) Through legislation or regulation, seek to stabilize education funding over the long term. Such stabilization shall—

(A) Set in place guaranteed state funding allocations, tied to the previous fiscal year;

(B) Create an adequately-funded state reserve fund for education which may not be used for other purposes;

(C) Create a system which allows school districts to insure against idiosyncratic risk of fiscal crisis;

(D) Authorize school districts to engage in private contracts to stabilize funding and regulate such financing arrangements; or

(E) Satisfy the purposes of this part, (e)(3), as determined by the Secretary of Education and in accordance with such criteria as the Secretary establishes.

The article lays out the reasons why this proposed legislation is a legitimate exercise of congressional spending power. It then explains the rationale for each component of the proposed legislation and provides examples or discussion of how each of the options could work in practice.

THE RIGHT TO COMPREHENSIVE EDUCATIONAL OPPORTUNITY

Michael A. Rebell

47 Harvard Civil Rts-Civil Lib.L.Rev. 49 (2012)

This article seeks to establish a statutory and constitutional basis for a right to comprehensive educational opportunity. It argues that comprehensive services are needed to overcome the impact of poverty on educational opportunity, and that, in order to achieve this goal, "disadvantaged students' access to the necessary comprehensive services needs to be seen as a basic right, rather than as a benefit that policymakers may bestow or deny at their discretion." The right envisioned in this article

> would require states to adopt a comprehensive approach to educational opportunity that ensures disadvantaged students the services and supports most critical for school success. These resources include traditional educational resources like high quality teaching, a rich and rigorous curriculum, adequate facilities, and sufficient, up-to-date learning materials. In addition, they must include supplemental resources needed to overcome the impediments to educational achievement imposed by the conditions of poverty. Extensive research in this area has emphasized four fundamental areas of requisite preventive and supportive services: (1) early childhood education beginning from birth; (2) routine and preventive physical and mental health care; (3) after-school, summer school and other expanded learning time programs; and (4) family engagement and support. To be effective in overcoming achievement gaps and promoting educational attainment at high proficiency levels, these services must be provided consistently, comprehensively, and at high quality levels.

After establishing the necessary components of the right to educational opportunity, the article turns to legal mechanisms for establishing and enforcing this right. It first contends that the federal No Child Left Behind Act (NCLB), the current reauthorization of the Elementary and Secondary Education Act (ESEA), "implicitly establishes a statutory right to comprehensive educational opportunity through its stated goal of providing "fair, equal and substantial" educational opportunities to all children and its mandate that all children be proficient in meeting challenging state standards by 2014." The article argues that this right should be made explicit in re-authorization of the ESEA. The article recommends removing the mandate that states achieve full proficiency by 2014 and shifting the focus to "greater emphasis on federal monitoring to ensure that the states are devoting sufficient resources to provide all students meaningful educational opportunities that can result in a substantial reduction in the achievement gaps." Specifically, the article proposes

> revising ESEA to require the states to ensure meaningful educational opportunity for all of their students by: (1) describing in the plans they develop for ESEA compliance purposes the educational programs and services that they will implement to overcome achievement gaps and substantially improve the levels of student proficiency by 2020; (2) undertaking cost analyses of the resource levels that would be needed to implement these programs and services; and (3) including assurances on how the necessary resources will be provided and how they will be distributed in an equitable manner.

The article further clarifies that the programs and services provided to low-income students to ensure meaningful educational opportunity "must include not only adequate school-based resources, but also the full range of comprehensive services they need in the areas of early education, extended learning time, health services and family supports." This approach, the article contends, appropriately addresses federalism concerns and states' funding obligations. The article then looks at data from cost studies to conclude that while the additional necessary investments under this approach would not be inconsequential, they are nevertheless realistic, particularly in light of the long-term economic and social benefits that would "far surpass the amount of the necessary investment."

The article then argues that this right should also be protected under the federal constitution. Despite the fact that the U.S. Supreme Court's 1973 decision in *San Antonio Independent School District v. Rodriguez* held that education is not a fundamental interest entitled to strict scrutiny under the federal Constitution, the article concludes that developments since that time have established sufficient precedents under each of the Supreme Court's three equal protection categories to support a right to comprehensive educational opportunity:

> First, probing an issue the Court left open in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), evidence and precedents from the state sound basic education cases demonstrate that an adequate education is a necessary prerequisite for students to exercise their free speech and voting rights; a sound basic education—and one that incorporates necessary comprehensive services—therefore, does constitute a fundamental interest under the federal Constitution. Next, based on the precedent of *Plyler v. Doe*, 457 U.S. 202 (1982), failing to provide children from impoverished backgrounds a meaningful educational opportunity will "perpetuate a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare and crime," and their plight is, therefore, entitled at least to intermediate level scrutiny. Finally, even under the less demanding rational relationship standard, recent "second order" precedents indicate that the present practice of providing some, but far from all, low income students with vitally needed comprehensive services creates "two tiers" of citizens, a pattern that strongly offends the concept of equal protection.

Finally, the article contends that, while "[a] strong legal basis exists for seeking acknowledgement of a right to comprehensive educational opportunity in the federal and state courts,… recognition and implementation of the right should not be the exclusive responsibility of the courts." The article cites scholarship arguing "that the Constitution imposes affirmative obligations upon both the legislative and executive branches of government" and that "the legislative and executive branches can and should act to enforce constitutional mandates in areas where the courts have not ruled or will not rule."

The article then relies on the history of the development of the right to a free appropriate education for students with disabilities to find that the legislative and executive branches have a similar obligation, equal to that of the courts, to recognize and implement the right to comprehensive educational opportunity. As explained in the article, in the early 1970s, plaintiffs filed two prominent lawsuits

contending that students with disabilities had an affirmative right to attend public schools and receive educational services appropriate to their individual needs. The district courts in those cases held that handicapped children had a right to "an adequate, publicly supported education" and set forth extensive procedures to be followed in formulating personalized educational programs for handicapped children. Both cases were resolved through consent decrees and were never considered by higher courts. Congress nevertheless responded to the cases and the concerns of advocates for the disabled by enacting the Education of all Handicapped Children's Act and the Rehabilitation Act of 1974, even though no court had ordered them to do so. Both of these pieces of legislation incorporated many of the major principles from the litigation, and the drafters turned to the cases for significant guidance.

This, the article concludes, has two major implications for present purposes:

> First, the fact that Congress and many state legislatures were willing to recognize a new constitutional right for a large cohort of students with disabilities, without any binding judicial mandate to do so, creates a significant precedent for Congress and state legislatures to recognize and implement a similar right to comprehensive educational opportunity for economically disadvantaged students.
>
> Second, the fact that Congress and the state legislatures have recognized that these students have a right not merely to access public education, but to receive "a free appropriate public education that emphasizes special education and related services designed to meet their unique needs" has major implications for considering the highly analogous individual needs of economically disadvantaged children. Like children with disabilities, children from backgrounds of poverty… need special supports and services to overcome the impediments that inhibit their learning potential.

The article concludes that recognizing this right will not create a slippery slope, as education has always occupied a unique place in the United States' effort to maintain and improve the lives of the disadvantaged. Finally, the article emphasizes the urgency of this fight, noting that demographic trends suggest that "[i]n the absence of massive educational upgrading for [low income] students, the overall educational attainment of the labor force will decline in the years ahead rather than remain constant or grow like those of our many economic competitors."

THE CASE FOR A COLLABORATIVE ENFORCEMENT MODEL FOR A FEDERAL RIGHT TO EDUCATION

Kimberly Jenkins Robinson

40 U.C. Davis L. Rev. 1653

This article begins by discussing the limitations of current mechanisms for addressing educational inequities in the United States including desegregation, school finance litigation and federal legislation, most notably the Elementary and Secondary Education Act (ESEA) currently known as No Child Left Behind (NCLB). The author provides background information about international human rights models that define and enforce a right to education, and then proposes a collaborative enforcement model based in part on these international human rights models. Specifically, the article proposes a collaborative enforcement model consisting of: (1) a reporting obligation to a panel of education experts, (2) technical assistance, (3) financial assistance and withholding funds, and (4) a complaint mechanism. The article contends that this collaborative approach to a federal right to education should be adopted through Spending Clause legislation.

Congressionally-Established Federal Right to Education

The article calls on Congress to recognize a federal right to education that guarantees equal educational opportunity within each state. In order to discourage states from pursuing equity through leveling down revenues, the article further recommends that Congress establish in the preamble of the statute that it aims to develop each child's mental and physical abilities, personality, and talents to her or his fullest potential. The article also suggests including reduction of interstate inequalities as an explicit goal of the statute. However, the article concludes that Congress should not prescribe how states should meet these goals, but rather should require states to assess how best to achieve them while allowing states to retain the flexibility to adopt different approaches.

Reporting Obligation

Once Congress recognizes the right, the article contends, states should be required to submit to a panel of education experts convened by the federal government an initial report analyzing how the state will guarantee the federal right to education, followed by periodic updates discussing progress the state has made toward guaranteeing the right. The article proposes that Congress develop reporting guidelines that specify the information required in these reports, which could include qualitative and quantitative measures of educational resources, disaggregated data for the state, district, and school level on disparities in educational opportunity, and identification of obstacles to achieving the right to education, including financial, political, and policy obstacles.

In reviewing reports, the article states, “the panel should assess whether the state provides the right to education on the basis of equal opportunity, identify any successful efforts to provide a right to education as well as impediments to guaranteeing this right, and recommend how a state could improve its provision of the right to education.” In making these determinations, the panel should consider information submitted by independent organizations and should also be able to conduct independent fact-finding and receive testimony. While the panel would make recommendations, these

recommendations would not be binding, and states would be able to develop their own solutions and approaches to identified concerns.

Technical Assistance

The article also calls on the federal government to support states in their efforts to ensure equal educational opportunity. The panel's role would include referring states to organizations that could provide technical assistance, and the "federal government could build on its role as a repository of data and information on educational best practices by developing expertise on the most common obstacles to the provision of the federal right to education and potential avenues to overcome those obstacles."

Financial Assistance and Withholding Funds

The article also argues that the federal government should provide states with substantial financial assistance, rewarding states that make good-faith efforts to provide the right to education, including those that encounter obstacles but make progress toward their goals. The article recommends withholding federal funds as a last resort, only after warnings and technical assistance are unsuccessful.

Complaint Mechanism

The article also calls on Congress to "establish a complaint mechanism where groups or individuals could report a violation of the right to education. This mechanism would ensure that the panel does not miss violations of the right to education because a state fails to disclose the violation." The panel of experts would review the complaint, receive a response from the state, investigate facts and receive necessary testimony, and then issue findings and recommendations.

Establishing a Federal Right to Education Through Spending Legislation

The article argues that Congress should adopt the above proposal through spending legislation that establishes reasonable conditions on federal financial assistance for the general welfare. The article establishes that this would satisfy the current standards for legislation enacted pursuant to Congress' power to spend for the general welfare.

The Case for a Collaborative Approach to a Federal Right to Education

Finally, the article discusses "why adopting a collaborative approach that builds upon cooperative federalism represents an effective way to develop and implement a right to education and why this collaborative approach possesses advantages over a litigation-centered approach. It then analyzes how the approach would build and improve upon the approach adopted in NCLB."

"Cooperative federalism envisions the federal and state governments negotiating shared authority and responsibility for a policy reform," the article explains, "provid[ing] a mechanism for national attention and reform without federal dominance of the shape of those reforms while also allowing the federal government to establish a framework for state action without transforming the states into mere extensions of the federal government."

With respect to this cooperation, the article further states that "the proposed approach encourages the federal government and states to work together to develop effective solutions to the barriers that states encounter in providing the federal right to education. Congress then supports states as they implement approaches tailored to their unique circumstances." The article argues that this approach has several advantages over litigation. For example:

- A collaborative approach might avoid some of the backlash that court-defined approaches sometimes engender, more effectively build political will, and therefore experience greater success in bringing about lasting change.

- "When a democratic process defines the right to education, the citizenry through the legislature may revisit and refine the adopted approach to address shortcomings and incorporate insights from experience and new research."

- A collaborative approach to a federal right to education would also preserve more state and local control over education than a litigation-centered approach. States would have the option of rejecting the federal money and the accompanying obligations. Additionally, the panel's recommendations would be non-binding, and participating states would retain the authority to determine how to respond to the panel's concerns.

- While courts typically do not have in-depth knowledge about education, the panel will be made up of experts who can more effectively assess and propose modifications for education systems.

- The collaborative approach seeks to bring policymakers together to develop effective solutions rather than spark and galvanize resistance as court decisions that mandate significant social change often do.

- The collaborative framework proposed here avoids the piecemeal nature of litigation and places the burden on states to show that they are providing the right to education, rather than forcing schoolchildren and their families to sue and prove that they are being denied this right.

- Relying on a single panel rather than a lot of individual courts to perform these assessments will ensure consistency throughout the nation.

The article also argues that this model builds on NCLB's cooperative federalism approach while addressing some of its shortcomings. Notably, NCLB "fails to acknowledge that inferior educational opportunities for some disadvantaged students represent a key contributor to the achievement gap. This Article's proposal addresses that shortcoming by supplementing existing reporting obligations with a requirement that states must identify, reduce and ultimately eliminate unjustified disparities in educational opportunities along lines of race, poverty, and other measures in light of the typically greater needs of most disadvantaged students." This approach would further establish the federal government as a partner in achieving NCLB's objectives, and would address criticism of NCLB as an unfunded mandate. Furthermore, the article contends, "when Congress couples financial assistance

with technical assistance, states would be better equipped to use the financial assistance in an effective and efficient manner."

Finally, the article looks at "Congress' historical willingness to promote equal educational opportunity," "the substantial changes and increased federal involvement in NCLB," and support among some in Congress for related legislation to argue that this approach may be politically viable.

FROM RODRIGUEZ TO ABBOTT: NEW JERSEY'S STANDARDS-LINKED SCHOOL FUNDING REFORM
David G. Sciarra and Danielle Farrie

This article begins by looking at the history of education finance litigation in Texas to establish that the state has historically provided and continues to provide "substantially less funding to educate children in poor school districts than it does for children in affluent, advantaged districts." However, the article comments, the "persistent inequity in Texas school funding is not an anomaly. It represents both the enduring pattern of school finance in the states over the last half century and… reflects the current condition in all but a handful of states." Based on the findings *of Is School Funding Fair? A National Report Card*, the article notes that "only a few states have finance systems that provide both a sufficient level of base funding and also systemically deliver greater resources as poverty increases, i.e., a fair system. This means that most states do not ensure that districts have the resources needed to provide an equal educational opportunity for all students, regardless of socio-economic background."

The article then "describes how one state—New Jersey—broke through this pattern and achieved fair school funding, spurred by the State Supreme Court's rulings in the *Abbott v. Burke* litigation." The article identifies several factors that were instrumental in propelling the transformation of New Jersey's school finance system "from regressive to progressive," and making it "one of the few states that provide sufficient base funding for all students and higher funding to districts with greater student need." These included the state's adoption and implementation of statewide standards-based education in 1996, the State Supreme Court's 1997 *Abbott IV* ruling, the Court's ongoing oversight and its review of the new school finance formula adopted by the Legislature ten years later, and the concerted and sustained efforts of parents, education stakeholders and citizens who advocated for fair funding in the statehouse and in communities across the state.

In *Abbott IV*, the article explains, the Court made several important rulings that dramatically shaped subsequent school finance reform in New Jersey. The Court held that the State's curriculum content standards and assessments were "a reasonable legislative definition of a constitutional thorough and efficient education" for all New Jersey students, that content standards and assessments "themselves do not ensure any substantive level of achievement" and alone "cannot answer the fundamental inquiry" of whether a financing formula "assures the level of resources needed to provide a [constitutional] education to children in the special needs districts," and that the state's school funding formula must, in a "concrete way," attempt to "link the content standards to the actual funding needed to deliver that content." This set the stage for New Jersey to use state curriculum standards as the basis for funding a statewide public education system, which the state accomplished by establishing a new funding formula in the School Funding Reform Act of 2008 (SFRA).

The process of developing the new formula began with a "costing-out" study in which the state determined the resources necessary to meet the curriculum content and performance standards in districts of different sizes and with different demographics, and then calculated the costs of those resources. Based on the cost study, a team of experts developed a statewide "weighed student formula" designed to provide the resources for all students to achieve the state's academic and performance standards. The formula established base costs for general education elementary school students, small

weights increasing the per-pupil costs for middle and high school students, and larger weights that reflected the additional services needed for at-risk students (with even larger weights in schools with concentrated poverty), English language learners, and students with disabilities. The formula also established preschool per-pupil amounts. Based on these cost amounts, the SFRA formula calculates each district's funding target level, or "Adequacy Budget." To support the Adequacy Budget, districts receive state "Equalization Aid," which provides the difference between the district's "local fair share," or the amount districts are expected to raise from local property taxes, and the Adequacy Budget level. The SFRA is relatively straightforward when compared with the complexity of typical finance formulas, and "aside from a portion of special education and preschool, it combines most state aid to districts in a single aid stream, affording significant flexibility over how districts can allocate resources among its schools and students." The SFRA also requires the state to review the formula every three years and recommend appropriate adjustments to the legislature.

Implementation of the formula has been mixed, the article reports—though the state provided almost all of the funding necessary to meet its obligation during the first two years of implementation, the state, under Governor Chris Christie, backed away from its commitment in 2010 and has underfunded the formula since that time. The Court ordered the state to provide full funding to the high-needs districts covered by the *Abbott* litigation, but substantial shortfalls remain, especially in funding for non-*Abbott* districts. "The formula's carefully developed determinations of education costs and funding remain intact," the article notes, but "[t]he underfunding of the SFRA, if a chronic condition, has the potential to jeopardize New Jersey's ability in the future to maintain both fair funding and its overall high standing on academic performance in comparison to other states."

Nevertheless, the article posits:

> The SFRA offers a new framework for fundamentally altering traditional approaches to state finance reform. The formula posits the necessity of finance reform by building upon a simple logic, wholly consistent with current education improvement efforts: because states are mandating curriculum content standards, and adopting test-based accountability regimes to measure district, school and student performance in meeting those standards, the states must also put in place a finance system driven by the actual cost of giving all students an equal opportunity to achieve those standards…This "standards-linked" frame for school finance reform upends the longstanding, business-as-usual way in which school funding is determined in state capitols, where the debate starts and, by and large, ends with how much money is presently available and how to allocate that money among districts and schools to satisfy powerful political constituencies.

The article notes some of the motivations for resistance to this type of approach, including the ways in which race, class, and segregation impact political power; a realistic fear that the actual cost of standards-based education will significantly exceed the current level of investment in the public schools; and states' tendency to, "under the guise of local autonomy," delegate their constitutional responsibility to operate the nation's public education systems to local districts and schools.

However, the article looks to *For Each and Every Child: A Strategy for Education Equity and Excellence*, a 2013 report by the Equity and Excellence Commission (Equity Commission), which it finds "offers a glimmer of hope for building a new wave of state school funding reform, one grounded in SFRA-style standards-linked education finance." The report reaches many of the same conclusions laid out in this article:

> With few exceptions, states continue to finance public education through methods that have no demonstrable link to the cost of delivering rigorous academic standards and that can produce high achievement in all students, including but not limited to low income students, English-language learners, students with disabilities, students in high poverty and students who live in remote schools and districts. Few states have rationally determined the cost of enabling all students to achieve established content and performance standards, including the cost of achieving those standards across diverse student populations and geographic locations. Most states do not properly ensure the efficient use of resources to attain high achievement for all students. A meaningful educational opportunity requires that states make sure all students receive the resources to achieve rigorous academic standards and obtain the skills to compete in the economy and participate capably as citizens in a democratic society.

As the article explains, the Commission recommends that:

1. States begin by identifying the teaching staff, programs and services necessary to provide all students the opportunity to achieve rigorous academic standards and to determine and report the actual cost of those essential resources.

2. States adopt and implement a school finance system designed to provide equitable and sufficient funding for all students to achieve state content and performance standards, including additional resources to address the academic and other needs of at-risk students and those in concentrated poverty, ELL students, students with disabilities, and those in remote areas.

3. States must ensure these new finance systems are supported by stable and predictable sources of revenue.

4. States periodically review and update their finance systems in order to maintain the opportunity for student achievement of rigorous academic standards.

5. States' standards-linked finance systems must also include companion mechanisms to ensure the effective and efficient use of all education funding at the local level to enable students to achieve state academic standards, "regardless of the governance structure."

The Equity Commission report also calls for a greater federal role in addressing educational funding inequities. The article explains:

> First, through utilizing federal funds to provide appropriate incentives, the federal government should direct the states to adopt standards-linked finance systems and to

> demonstrate progress in the implementation of these systems. Second, the Commission wrestles with a major barrier facing states in moving towards a standards-linked finance system: securing the resources to fund the additional costs of educating poor children and growing numbers of children in high poverty district and school settings, a challenge exacerbated in those states with low overall fiscal capacity to raise sufficient state and local revenue to make the requisite equity investments in their public schools. To address this challenge, the Commission calls on Congress to enact new "Equity and Excellence" legislation to provide significant new federal funding targeted to high poverty schools with achievement gaps and to offer incentives to states to enhance their own funding of such schools. The legislation should also include mechanisms to enable the federal government to "monitor and enforce the ongoing performance of its new equity and excellence investments to make sure those investments are, in fact, enhancing student achievement.

Though the article concludes that this is not likely to be achieved in the short-term, it finds that "the Commission has set the stage for what could be the beginnings of a long-term effort to secure passage of federal legislation to provide increased funding in return for standards-linked finance reform, legislation that represents a fundamental reordering of the federal role in education."