

THEORETICAL FOUNDATIONS FOR A RIGHT TO EDUCATION UNDER THE U.S. CONSTITUTION: A BEGINNING TO THE END OF THE NATIONAL EDUCATION CRISIS

*Susan H. Bitensky**

INTRODUCTION

Education may justly be called the lifeblood of a free people. The underlying logic of this observation stems from freedom's inevitable dependence upon knowledge. Justice Cardozo once wrote in this regard: "We are free only if we know, and so in proportion to our knowledge. There is no freedom without choice, and there is no choice without knowledge—or none that is not illusory. Implicit, therefore, in the very notion of liberty is the liberty of the mind to absorb and to beget."¹ This freedom of mind, made possible by education, has long been extolled by the nation's intelligentsia as an integral and quintessential component of American national identity.²

Beyond its role in potentiating the inner life of the individual, however, the educated mind is a prerequisite to another American value and *modus operandi*, democratic government. At the inception of the nation, Thomas Jefferson hailed an enlightened citizenry as an indispensable

* Associate Professor of Law, Detroit College of Law. B.A., Case Western Reserve University, 1971; J.D., University of Chicago Law School, 1974. I am especially grateful to my colleagues Charles Clarke, Martin Kotch, Robert McCormick, and Matthew McKinnon for their valuable comments and advice on earlier drafts. I also would like to thank law students William Asimakis, Michael Behan, and Lawrence Oliver, II for their outstanding research assistance.

¹ BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 104 (photo. reprint 1982) (1928).

² See, e.g., RALPH W. EMERSON, *Self-Reliance*, in RALPH WALDO EMERSON: *SELECTED ESSAYS* 175, 178-81, 203 (Larzer J. Ziff ed., 1982) (1841); THOMAS PAINE, *The Rights of Man*, in *THE THOMAS PAINE READER* 201, 218-20, 260 (M. Foot & I. Kramnick eds., 1987) (1791-92); HENRY D. THOREAU, *Civil Disobedience*, in *THE PORTABLE THOREAU* 109, 127, 133, 136-37 (C. Bode ed., 1977) (1849); Walt Whitman, *One's-Self I Sing*, in *LEAVES OF GRASS* 31 (Signet Classics 1958) (1855); Letter from Thomas Jefferson to Roger C. Weightman (June 24, 1826), in *THOMAS JEFFERSON: WRITINGS* 1516, 1517 (Merrill D. Peterson ed., 1984). For a less sanguine view of the American preoccupation with individualism and freedom, see ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* 85-88 (1987).

safeguard of democracy.³ It is an idea that has endured, receiving continuing homage from the United States Supreme Court and other governmental bodies.⁴ Thus, whether the general population has been cognizant of it or not, education has come to undergird that individual freedom which, both on a personal and political level, Americans consider their birthright.

Not wont to leave aspirations for public edification in the realm of rhetoric, education's proponents began to put in place an infrastructure and legal regime for universal schooling of the nation's children even before the turn of the century.⁵ Today, every state has enacted laws mandating the education or school attendance of children within certain age ranges.⁶ Every state also provides free public elementary and secondary schools, presumably to enable the education of these children.⁷

Yet, in spite of these real achievements and the strong sentiments that inspired them, something has gone terribly wrong. Unacceptable numbers of children have been emerging from the public schools undereducated and frequently unprepared to join the work force even in low-level jobs.⁸ An unmistakable phenomenon has surfaced: the public schools are ailing and ailing profoundly—not just in this or that hamlet, but across the country.⁹ There is a crisis in public education of such

³ THOMAS JEFFERSON, *A Bill for the More General Diffusion of Knowledge*, in THOMAS JEFFERSON: WRITINGS, *supra* note 2, at 365.

⁴ *E.g.*, Plyler v. Doe, 457 U.S. 202, 221 (1982); *Ambach v. Norwick*, 441 U.S. 68, 76-78 (1979); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29-30 (1973); *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972); *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954); WILLIAM BENNETT, *OUR CHILDREN AND OUR COUNTRY: IMPROVING AMERICA'S SCHOOLS AND AFFIRMING THE COMMON CULTURE* 212-15 (1988) [hereinafter BENNETT, *OUR CHILDREN*]; NATIONAL COMMISSION ON EXCELLENCE IN EDUCATION, *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* 7 (1983) [hereinafter NAT'L COMM'N, *NATION AT RISK*]; TASK FORCE ON EDUCATION, NATIONAL GOVERNORS ASSOCIATION, *EDUCATING AMERICA: STATE STRATEGIES FOR ACHIEVING THE NATIONAL EDUCATION GOALS* 7 (1990) [hereinafter GOVERNORS' ASS'N, *EDUCATING AMERICA*]; *see also* President's Address Before a Joint Session of the Congress on the State of the Union, 26 WEEKLY COMP. PRES. DOC. 146, 147, 149, 150 (Jan. 31, 1990).

⁵ IRA KATZNELSON & MARGARET WEIR, *SCHOOLING FOR ALL: CLASS, RACE, AND THE DECLINE OF THE DEMOCRATIC IDEAL* 28 (1985); *see also* LAWRENCE A. CREMIN, *AMERICAN EDUCATION: THE METROPOLITAN EXPERIENCE, 1876-1980*, at 544, 546-47 (1988).

⁶ E. GORDON GEE & STEPHEN R. GOLDSTEIN, *LAW AND PUBLIC EDUCATION* 11 (2d ed. 1980). By 1918, all forty-eight states then in the Union had enacted compulsory education or school attendance laws. CREMIN, *supra* note 5, at 297. Following the school desegregation decision in *Brown v. Board of Educ.*, 347 U.S. 483 (1954), some states repealed their compulsory schooling laws in order to thwart racially integrated public education. However, all of these states, except Mississippi, re-enacted such laws during the ensuing decade. LAWRENCE KOTIN & WILLIAM E. AIKMAN, *LEGAL FOUNDATIONS OF COMPULSORY SCHOOL ATTENDANCE* 34 (1980). In 1987, Mississippi, too, finally returned to the fold with a new compulsory school attendance statute. MISS. CODE ANN. § 37-13-91 (1990).

⁷ KOTIN & AIKMAN, *supra* note 6, at 90-91; E. EDMUND REUTTER JR., *SCHOOLS AND THE LAW* at v-vi (4th ed. 1980).

⁸ *See infra* notes 32-34, 41-43, 51-54 and accompanying text.

⁹ *See infra* notes 31-37, 40-44, 50-66, 288-93, 317 and accompanying text.

menacing proportions that not only is the national self-concept of a free and independent people imperiled, but the very economic and political pre-eminence of the nation has been jeopardized.¹⁰

Alarmed by these developments, state governments have experimented with an array of education reform measures.¹¹ Their efforts have been complemented by exhortations and proposals from national political leaders¹² and by a wealth of studies and reports issued by education experts.¹³ In spite of these efforts, the crisis has persisted with an unnerving intractability.¹⁴

With such vital interests at stake, intractability is simply not an option and, of necessity, must provoke inquiry into whether all viable education reforms have been considered. A natural question for the legal community is whether the crisis' invincibility represents, at least in part, some failing or distortion of the legal system. It is the thesis of this Article that certain ingrained and automatic assumptions about the United States Constitution in its relation to education have unnecessarily limited the search for meaningful reform. I refer, in particular, to the assumption that there can be no affirmative right to education under the Constitution and that, as a consequence, the provision of education is a matter reserved primarily to state and local governments by the Tenth Amendment, with the federal government relegated to a supplemental role.¹⁵

This supposition has denied reformers at least two important advantages in their struggle to reverse the crisis. Were education to be recognized as an affirmative right under the Constitution, those doing battle against the crisis would be armed with a potent pedagogical message—that education is a national priority of the first magnitude and that, as such, children, parents, teachers, administrators, and policymakers must treat their respective responsibilities vis-a-vis education with commensurate dedication and activity.¹⁶ Besides acting as an agent of moral suasion, the right would also have the singular effect of making the federal government the ultimate guarantor of education for school-age children holding the right.¹⁷ Such a restructuring of the constitutional architecture would institutionalize greater flexibility in allocating education responsibilities between the state and federal governments, thereby creating the potential for a national approach more immediately responsive to the crisis' exigencies.¹⁸ Reform efforts could be freed from the hobbling strictures of state and local governments' piecemeal and often resource-

¹⁰ See *infra* notes 50-58, 293 and accompanying text.

¹¹ See *infra* notes 40-41, 44-47, 468 and accompanying text.

¹² See *infra* notes 31-41, 44-47, 75-76 and accompanying text.

¹³ See *infra* note 29.

¹⁴ See *infra* notes 41, 44-47, 50 and accompanying text.

¹⁵ See *infra* notes 90-144, 429-31 and accompanying text.

¹⁶ See *infra* notes 478-85 and accompanying text.

¹⁷ See *infra* notes 471-76 and accompanying text.

¹⁸ See *infra* notes 471-76 and accompanying text.

poor responses,¹⁹ as the federal government would bring its uniquely national perspective, powers, and resources to bear upon what has become, in scope and consequence, a truly national problem.²⁰ Recognition of the right would work the kind of systemic change without which progress in ameliorating the crisis may be needlessly retarded or altogether frustrated.²¹

Of course, policy reasons for desiring a right to education under the Constitution are not, by themselves, a basis for recognizing the right. The Constitution itself is silent on the issue of education. Nevertheless, this is an instance where policy can be well served by law. Doctrines interpreting the Constitution are rich with possible theoretical bases for asserting an unenumerated affirmative right to education. Specifically, the right may be found implicitly to arise from the Fourteenth Amendment's Due Process Clause²² and Privileges or Immunities Clause,²³ the First Amendment's Free Speech Clause,²⁴ and from another implied constitutional right, the right to vote.²⁵ These theoretical bases, each sufficient on their own, are further supported by principles of constitutional construction derived from the Ninth Amendment,²⁶ the role of international human rights law as a source of constitutional values,²⁷ and from

¹⁹ See *infra* note 469 and accompanying text.

²⁰ See *infra* notes 50-62, 288-92, 316-17 and accompanying text.

²¹ Of course, the blame for the education crisis cannot be laid exclusively at the schoolhouse door. Nor is the legal architecture of the relationship between children and education the only impediment to overcoming the crisis. The fact of the matter is that the public schools are confronted with the daunting task of educating children who are all too often the victims of poverty, family instability, crime-ridden environments, and other societal ills. L. Stanley Chauvin, Jr., *Startling Statistics About Children*, 76 A.B.A. J., Feb. 1990, at 8; *Schools Are Not Families*, N.Y. TIMES, Mar. 4, 1991, at A16; T. Berry Brazelton, *Why is America Failing Its Children?*, N.Y. TIMES, Sept. 9, 1990, § 6 (Magazine), at 40; *U.S. Panel Warns on Child Poverty: 'Staggering National Tragedy' Seen as Threatening the Future for the Young*, N.Y. TIMES, Apr. 27, 1990, at A22; Julie Johnson, *Childhood is Not Safe, Congress Study Warns*, N.Y. TIMES, Oct. 2, 1989, at A12.

It is a tall order to expect schools to successfully educate children whose stomachs are empty or whose psyches are traumatized. Susan Chira, *Schools New Role: Steering People to Services*, N.Y. TIMES, May 15, 1991, at A1; Suzanne Daley, *School Chiefs Are Dropping Out, Plagued by Urban Problems*, N.Y. TIMES, Dec. 26, 1990, at A1; Joseph Berger, *Social Ills Pull Educators' Concern to New Issues*, N.Y. TIMES, Sept. 6, 1989, at B10. But, dare we relinquish this expectation? "Students, even from the most difficult backgrounds, can academically and socially succeed." CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, AN IMPERILED GENERATION: SAVING URBAN SCHOOLS, at xv (1988) [hereinafter *CARNEGIE STUDY*]. That deleterious social conditions need remedying cannot justify giving up on the schools' mission and further aggravating the plight of these children. It is reform on multiple fronts, rather than a general abdication, which the education crisis would seem to warrant.

²² See *infra* notes 194-277 and accompanying text.

²³ See *infra* notes 325-77 and accompanying text.

²⁴ See *infra* notes 278-302 and accompanying text.

²⁵ See *infra* notes 303-24 and accompanying text.

²⁶ See *infra* notes 407-28 and accompanying text.

²⁷ See *infra* notes 379-406 and accompanying text.

the historical evidences of original intent.²⁸

This Article is divided into four parts elaborating and developing the points made above. Part I surveys the nature and scope of the education crisis. Part II analyzes the current status of the right to education under the Constitution. Part III examines each of the federal constitutional bases for recognizing an affirmative right to education. Finally, Part IV considers the ways in which the right to education may have a palliative effect upon the crisis.

I. THE NATURE AND SCOPE OF THE EDUCATION CRISIS

It would be impossible within the confines of this article, nor is it my purpose, to give a comprehensive description of the education crisis. It is a multifaceted and complex problem that has engendered voluminous documentation and commentary during the past decade.²⁹ However, in order to grasp fully the legal and policy arguments set forth, respectively, in Parts III and IV of this Article, it is necessary that the reader have at least a nodding acquaintance with the parameters and symptomology of the crisis as well as with the attitudinal context in which the crisis arose.³⁰

²⁸ See *infra* notes 429-59 and accompanying text.

²⁹ E.g., WILLIAM J. BENNETT, *AMERICAN EDUCATION: MAKING IT WORK* (1988) [hereinafter BENNETT, *MAKING IT WORK*]; BENNETT, *OUR CHILDREN*, *supra* note 4, *passim*; ERNEST L. BOYER, *HIGH SCHOOL: A REPORT ON SECONDARY EDUCATION IN AMERICA* (1983); CARNEGIE STUDY, *supra* note 21, *passim*; GOVERNORS' ASS'N, *EDUCATING AMERICA*, *supra* note 4, *passim*; DAVID T. KEARNS & DENNIS P. DOYLE, *WINNING THE BRAIN RACE: A BOLD PLAN TO MAKE OUR SCHOOLS COMPETITIVE* (1989); NAT'L COMM'N, *NATION AT RISK*, *supra* note 4, *passim*; OFFICE OF EDUCATIONAL RESEARCH AND IMPROVEMENT URBAN SUPERINTENDENTS NETWORK, U.S. DEP'T OF EDUC., *DEALING WITH DROPOUTS: THE URBAN SUPERINTENDENTS' CALL TO ACTION* (1987); DIANE RAVITCH & CHESTER E. FINN, JR., *WHAT DO OUR 17-YEAR-OLDS KNOW?: A REPORT ON THE FIRST NATIONAL ASSESSMENT OF HISTORY AND LITERATURE* (1987); DIANE RAVITCH, *THE SCHOOLS WE DESERVE: REFLECTIONS ON THE EDUCATIONAL CRISES OF OUR TIMES* (1985); STEVEN SCHLOSSTEIN, *THE END OF THE AMERICAN CENTURY 217-300* (1989); *THE GREAT SCHOOL DEBATE: WHICH WAY FOR AMERICAN EDUCATION?* (Beatrice Gross & Ronald Gross eds., 1985) [hereinafter *GREAT SCHOOL DEBATE*]; THOMAS TOCH, *IN THE NAME OF EXCELLENCE: THE STRUGGLE TO REFORM THE NATION'S SCHOOLS, WHY IT'S FAILING, AND WHAT SHOULD BE DONE* (1991).

³⁰ The discussion is confined to an examination of the crisis as it is manifested at the elementary and secondary school levels. This is not meant to imply that all is well with preschool or postsecondary education. Indeed, there is evidence to indicate quite the contrary. With respect to preschool education, see, for example, Edward B. Fiske, *Governors Panel Asks Broader U.S. Role in Preschool for the Poor*, N.Y. TIMES, Feb. 25, 1990, at A22; Fred M. Hechinger, *About Education: Early Childhood Education: Helping Determine the National Fate*, N.Y. TIMES, Oct. 10, 1990, at B6; Fred M. Hechinger, *About Education: Why France Outstrips the United States in Nurturing Its Children*, N.Y. TIMES, Aug. 1, 1990, at B8. With respect to postsecondary education, see, for example, BLOOM, *supra* note 2, *passim*; JOHN BRADEMAS, *THE POLITICS OF EDUCATION: CONFLICT AND CONSENSUS ON CAPITOL HILL 65-73* (1987); *THE ALMANAC OF HIGHER EDUCATION 1989-90*, at 1-3 (Editors, The Chronicle of Higher Education eds., 1989); Anthony DePalma, *Study Urges Colleges to Return to Original Mission*, N.Y. TIMES, Dec. 5, 1990, at B15; Anthony DePalma, *Graduate Schools Fill with Foreigners*, N.Y. TIMES, Nov. 29, 1990, at A1. Nor is the exclusion meant to imply

In April 1983, the National Commission on Excellence in Education, appointed by then U.S. Secretary of Education, Terrel H. Bell, jolted the nation with a report that disclosed shocking inadequacies in American public education.³¹ The Commission found that a substantial percentage of the public school student population was not acquiring even basic knowledge and skills, let alone scholarship of a higher order.³² Vast numbers of American children were actually growing up functionally illiterate.³³ Testing revealed that there also had been a steady and significant decline in their knowledge of mathematics, science, English, and other subject areas over the course of the preceding two decades.³⁴

The Commission cited as a major cause of the crisis the fact that the public schools had set academic standards too low. Instead of striving to provide students with an excellent education in a challenging environment, the public school systems operated upon the premise that no more than the minimum need be taught. Students consequently internalized this standard, thereby losing any inclination to learn beyond the minimum.³⁵ The Commission observed that this should occasion no surprise "because we tend to express our educational standards and expectations largely in terms of 'minimum requirements.'" ³⁶ The Commission's diagnosis was dire: the minimal requirements ethos had eroded the educational foundations of the country. The prescribed cure implied rigorous measures: only pursuit of excellence in education could put schooling back on a solid footing.³⁷ And, while excellence as a panacea has had its critics,³⁸ there is no gainsaying that the Commission's focus on it became

that there can be no federal constitutional right to preschool or postsecondary education. This article does not address that issue.

³¹ NAT'L COMM'N, *NATION AT RISK*, *supra* note 4, at 5-15, 18-23.

³² Indeed, besides finding that large numbers of students lacked rudimentary reading, writing, and computation skills, the Commission concluded that many 17-year-olds did not possess the "higher order" intellectual skills normally associated with that age group. *Id.* at 9. Nearly 40% of these children could not draw inferences from written materials; only 20% of them could write a persuasive essay; and only one-third of them were capable of solving a mathematics problem entailing several steps. *Id.* at 8-9.

³³ In its 1983 report, the Commission related that in the United States some 23 million adults, 13% of all seventeen-year-olds, and up to 40% of all minority youth were functionally illiterate. *Id.* at 8. The Commission's figures on illiteracy may be conservative. Two years later, Jonathan Kozol estimated that there were some 60 million Americans who were functionally illiterate and that the United States ranked forty-ninth out of the 158 member nations of the United Nations with respect to national literacy rates. JONATHAN KOZOL, *ILLITERATE AMERICA* 5, 10-11 (1985).

³⁴ NAT'L COMM'N, *NATION AT RISK*, *supra* note 4, at 8-9.

³⁵ *Id.* at 13-15; see also KEARNS & DOYLE, *supra* note 29, at 7, 67.

³⁶ NAT'L COMM'N *NATION AT RISK*, *supra* note 4, at 14.

³⁷ *Id.* at 12-15.

³⁸ E.g., Irving Howe, *A Plea for Pluralism*, in *GREAT SCHOOL DEBATE*, *supra* note 29, at 361-62; Fred L. Pincus, *From Equity to Excellence: The Rebirth of Educational Conservatism*, in *GREAT SCHOOL DEBATE*, *supra* note 29, at 329-44; Lawrence C. Stedman & Marshall S. Smith, *Weak Arguments, Poor Data, Simplistic Recommendations: Putting the Reports Under the Microscope*, in *GREAT SCHOOL DEBATE*, *supra* note 29, at 83-105.

highly influential in shaping the education reform movement throughout the 1980s.³⁹

In 1988, the succeeding Secretary of Education, William J. Bennett, again evaluated the condition of American education, this time after five years of state education reform efforts that had been inspired by the 1983 report.⁴⁰ Overall, his assessment was not encouraging. While noting that the free-fall of educational quality had been arrested, he opined that, "Our students know too little, and their command of essential skills is too slight."⁴¹

It is the hard facts underlying Secretary Bennett's conclusions, though, which convey the real extremity in which the public schools have left the nation's children. A representative sampling of the data upon which he relied include such findings as that, by 1988, fewer than forty percent of young adults between the ages of twenty-one and twenty-five could read well enough to interpret a newspaper article; fewer than five percent of all in-school seventeen-year-olds possessed the level of reading skills necessary to understand primary-source historical documents; fewer than twenty-five percent of all seventeen-year-olds tested were able to complete adequately writing tasks considered indicative of the ability to engage in academic study, business, or professional work; American students consistently rated at or near the bottom in most international comparisons of mathematics performance; fifty percent of a national sample of seventeen-year-olds did not know that F. Scott Fitzgerald authored *The Great Gatsby* and fifty percent of them were unaware that George Byron, John Keats, and William Wordsworth were poets; one in three seventeen-year-olds did not know that it was Abraham Lincoln who issued the Emancipation Proclamation; and one-third of seventeen-year-olds tested did not know that the Declaration of Independence signaled the American colonists' revolt against English domi-

³⁹ TOCH, *supra* note 29, at 3-4, 55-71; see also ROSEMARY C. SALOMONE, EQUAL EDUCATION UNDER LAW: LEGAL RIGHTS AND FEDERAL POLICY IN THE POST-BROWN Era 12, 198 (1986) (also stressing that a commitment to equality in educational opportunities accompanies America's drive for excellence in its schools); Chester E. Finn, Jr., *The Drive for Excellence: Moving Towards a Public Consensus*, in GREAT SCHOOL DEBATE, *supra* note 29, at 74-82. Indeed, the educational goals adopted by the governors in 1990, pursuant to the directives of the Jeffersonian Compact, reflect continued acceptance of the need to attain excellence in education. The governors include among their goals that, by the year 2000, the following will be accomplished: the high school graduation rate will increase to at least 90%; American students will be *first* in the world in mathematics and science achievement; every adult American will be literate and possess the knowledge necessary to compete in a global economy and to exercise the rights and responsibilities of citizenship; and students will leave grades four, eight, and twelve having demonstrated competency over *challenging* subject matter such as English, mathematics, science, history, and geography. GOVERNORS' ASS'N, EDUCATING AMERICA, *supra* note 4, at 37; see also *American Education Gets a C*, N.Y. TIMES, Oct. 4, 1991, at A30 (opining that academic standards must be raised in order to bring American education up to par).

⁴⁰ W. BENNETT, MAKING IT WORK, *supra* note 29.

⁴¹ *Id.* at 2.

nation.⁴² The fact is that even if children escaped functional illiteracy, they still stood a good chance of growing up “culturally illiterate”—unfamiliar with that basic core of factual knowledge comprising society’s shared heritage.⁴³ This, then, is the sort of educational deprivation which had become a fixed feature of public schooling by the late 1980s.

Evidently concerned that progress in turning back the crisis was not proceeding rapidly enough, President George Bush took the unusual step of convening an education “summit meeting” with the fifty state governors in 1989.⁴⁴ At the end of this conference, the President and the governors issued what they called a “Jeffersonian compact to enlighten our children and the children of generations to come.”⁴⁵ The enumerated purposes of the compact included establishing a process for setting national education goals; seeking greater flexibility and enhanced accountability in the use of federal resources to meet these goals; and restructuring the public education system.⁴⁶ The ultimate objective of the compact was, again, that of educational excellence, of enabling “all children [to] reach their highest educational potential.”⁴⁷ The parties to the compact still have much to achieve, for in 1991 the National Education Goals Panel concluded that students had still failed to make adequate academic gains.⁴⁸ A similar assessment was also made by the U.S. Department of Education which found that students had just reached in 1991 the achievement levels that their predecessors attained in 1970, leaving upcoming generations unprepared for the demands of the twenty-first century.⁴⁹ In short, despite substantial efforts by the states through-

⁴² *Id.* at 8-14 (setting forth the data upon which Secretary Bennett relied, some of which is highlighted in the text above).

⁴³ E. D. Hirsch defines “cultural literacy” as follows:

To be culturally literate is to possess the basic information needed to thrive in the modern world. The breadth of that information is great, extending over the major domains of human activity from sports to science. It is by no means confined to “culture” narrowly understood as an acquaintance with the arts.

E.D. HIRSCH, JR., *CULTURAL LITERACY: WHAT EVERY AMERICAN NEEDS TO KNOW* at xiii (1988). The findings of Mr. Hirsch and other education experts confirm that during the 1980s cultural illiteracy became commonplace among public school students in the United States. *Id.* at 18-19; RAVITCH, *supra* note 29, at 79; RAVITCH & FINN, JR., *supra* note 29, at 43-120.

⁴⁴ Joint Statement Following the Education Summit with Governors in Charlottesville, Virginia, 25 WEEKLY COMP. PRES. DOC. 1487 (Sept. 28, 1989) [hereinafter Jeffersonian Compact]. The education “summit meeting” is only the third time that a United States President has summoned all of the country’s governors to address a single issue. Kenneth H. Bacon, *Education Summit Gets a Good Report Card Well in Advance of Next Week’s Opening Bell*, WALL ST. J., Sept. 20, 1989, at A26.

⁴⁵ Jeffersonian Compact, *supra* note 44, at 1489.

⁴⁶ *Id.* at 1487.

⁴⁷ *Id.* at 1488.

⁴⁸ Susan Chira, *Report Card on Educational Goals: At this Rate, the Nation is Flunking*, N.Y. TIMES, Oct. 2, 1991, at B8 [hereinafter Chira, *Nation Flunking*]; Karen DeWitt, *First Report Card Issued on U.S. Education Goals*, N.Y. TIMES, Oct. 1, 1991, at A18 [hereinafter DeWitt, *First Report Card*]. The National Education Goals Panel was comprised of six governors, four members of the Bush administration, and four members of Congress. DeWitt, *First Report Card*, *passim*.

⁴⁹ Karen DeWitt, *Pupils in America Reverse Declines, Analysis Shows*, N.Y. TIMES, Oct. 1, 1991,

out the preceding decade, "an enormous gap exists between current performance levels and those required to secure our future."⁵⁰

The effects of the crisis have, indeed, extended far beyond the schoolhouse door so as to jeopardize our prospects as a nation and a people. Some of the most unsettling symptoms of the crisis have come from the business community. Many corporate executives have expressed consternation upon finding themselves faced with an evolving work force that is so poorly educated as to be unqualified to perform entry level jobs.⁵¹ Employees' individual educational shortcomings have been collectively transmuted into a continuing and widespread syndrome impairing industry's vitality and capacity for development.⁵² David T. Kearns, chairman of the Xerox Corporation and Deputy Secretary of Education, lamented that "[p]ublic education has put this country at a terrible competitive disadvantage" in relation to the world economy.⁵³ So ominous is the threat to American competitiveness that many companies have become heavily involved in providing basic education to the incoming work force as well as bestowing assistance upon the public schools.⁵⁴

at A1, A18; see also Barbara Kantrowitz & Pat Wingert, *A Nation Running in Place: Tests Show No Progress in a Competitive World*, NEWSWEEK, Oct. 14, 1991, at 54 (reporting that while American students perform at 1970 levels, other countries have developed curricula designed to prepare their students to compete in an increasingly technological global economy). *But cf.* *American Education Gets a C*, N.Y. TIMES, Oct. 14, 1991, at A30 (opining that although the federal report reveals that current student performance is not good enough for the demands of the next century, the fact that students are presently performing at 1970 levels is "not as bad as some might think" because black and Hispanic children have made some gains).

⁵⁰ GOVERNORS' ASS'N, EDUCATING AMERICA, *supra* note 4, at 7.

⁵¹ JACK E. BOWSHER, EDUCATING AMERICA: LESSONS LEARNED IN THE NATION'S CORPORATIONS 229 (1989); KOZOL, *supra* note 33, at 14; Edward B. Fiske, *Impending U.S. Jobs "Disaster": Work Force Unqualified to Work*, N.Y. TIMES, Sept. 25, 1989, at A1 [hereinafter Fiske, *Work Force Unqualified*]; Ellen Graham, *Retooling the Schools: The System Needs a Complete Overhaul, and Not Just More Tinkering*, WALL ST. J. REP., Mar. 31, 1989, at R1; Julie A. Lopez, *System Failure: Businesses Say Schools Are Producing Graduates Unqualified to Hold Jobs*, WALL ST. J. REP., Mar. 31, 1989, at R12.

⁵² EDUCATION COMMITTEE OF THE HUMAN RESOURCES TASK FORCE, THE BUSINESS ROUNDTABLE, BUSINESS MEANS BUSINESS ABOUT EDUCATION 2 (1989) [hereinafter BUSINESS ROUNDTABLE]; KOZOL, *supra* note 33, at 14-15; Karen DeWitt, *Bush Pushes Education Goals at Math Educator's Meeting*, N.Y. TIMES, Apr. 25, 1991, at B8 [hereinafter DeWitt, *Bush Pushes Education Goals*]; *Work Force Failing to Meet Math Needs*, N.Y. TIMES, Apr. 11, 1990, at B8; Steven A. Holmes, *School Reform: Business Moves in*, N.Y. TIMES, Feb. 1, 1990, at D1; Joseph Berger, *Companies Step in Where the Schools Fail*, N.Y. TIMES, Sept. 26, 1989, at A1; Fiske, *Work Force Unqualified*, *supra* note 51, *passim*; Lopez, *supra* note 51, *passim*.

⁵³ KEARNS & DOYLE, *supra* note 29, at 1. Other analysts have reached the same conclusion. BOWSHER, *supra* note 51, at 18-19; BRADEMAS, *supra* note 30, at 104-06; SCHLOSSSTEIN, *supra* note 29, at 217-300; Kantrowitz & Wingert, *supra* note 49, at 54; Holmes, *supra* note 52, *passim*; Ann McLaughlin, *Education and Work: The Missing Link*, N.Y. TIMES, Sept. 25, 1989, at A19.

⁵⁴ See, e.g., BUSINESS ROUNDTABLE, *supra* note 52, at 2-41; Don J. DeBenedictis *Project Might*, 76 A.B.A. J., Feb. 1990 at 27; *Nabisco Awards \$9.7 Million in Grants to 15 Schools*, N.Y. TIMES, Apr. 17, 1991, at A19; Claudia H. Deutsch, *Businesses Profit by Job Illiteracy*, N.Y. TIMES, Jan. 6,

In addition, although the United States' armed forces performed admirably in the recent war with Iraq, military leaders also have complained that they must spend millions of dollars on remedial education in basic skills such as reading, writing, spelling, and computation.⁵⁵ Their complaints apparently are well-founded, since, in 1987, forty percent of *high school graduates* entering the armed forces read at or below the ninth grade level.⁵⁶ This is a sobering statistic in light of the fact that over one million pages of technical reading material are needed to support the operation and maintenance of the B-1 bomber.⁵⁷ Equally disquieting is the possibility that students' lack of exposure to foreign language and international studies may endanger national security by making it more difficult for Americans to comprehend other cultures and political systems and, therefore, to engage in effective diplomacy and avert military confrontations.⁵⁸

Even the safety and tranquility of America's streets have been adversely affected by the crisis, for there appears to be a strong correlation between educational deprivation and elevated crime rates. Up to seventy-five percent of imprisoned youths in the United States are functionally illiterate.⁵⁹ Only one in four prisoners has a high school diploma.⁶⁰ Statistics also show that states with the highest dropout rates have the highest per capita prison populations while states with the lowest dropout rates have the smallest prison populations.⁶¹ This relationship between the lack of adequate education and criminal activity is no small matter for a society where one out of every four households is affected by crime every year.⁶²

While the education crisis has been wreaking havoc on a societal scale,⁶³ it also has been a source of personal tragedy for those individuals

1991, § 4A (Education Life), at 42; Holmes, *supra* note 52, *passim*; Berger, *supra* note 52, *passim*; Lopez, *supra* note 51, *passim*.

⁵⁵ NAT'L COMM'N, *NATION AT RISK*, *supra* note 4, at 9.

⁵⁶ W. BENNETT, *MAKING IT WORK*, *supra* note 29, at 10.

⁵⁷ KOZOL, *supra* note 33, at 82 (quoting from THOMAS H. DUFFY, *LITERACY INSTRUCTION IN THE MILITARY* (1983)).

⁵⁸ BRADEMAS, *supra* note 30, at 103-14.

⁵⁹ Patricia Puritz, *Juvenile Justice: Teaching Literacy Through Law-Related Education*, 75 A.B.A. J., June 1989, at 124.

⁶⁰ Edward B. Fiske, *Lessons: Can Money Spent on Schools Save Money that Would Be Spent on Prisons?*, N.Y. TIMES, Sept. 27, 1989, at B8 (citing estimate of the Correctional Education Assoc., a group of educators who work in prisons) [hereinafter Fiske, *Money Spent on Schools*].

⁶¹ Fiske, *Money Spent on Schools*, *supra* note 60, *passim*.

⁶² BOWSHER, *supra* note 51, at 15-16; *cf.* *Violent Crime up 10% with Cities Hardest Hit*, N.Y. TIMES, Oct. 22, 1990, at A15 (F.B.I. reports violent crime up dramatically in first half of 1990).

⁶³ The societal ramifications of the crisis described in the text are by no means exhaustive. For example, child welfare and unemployment compensation costs rise when workers are unqualified to work. KOZOL, *supra* note 33, at 13; *see* BOWSHER, *supra* note 51, at 17-18. There are less obvious societal costs as well, such as medical expenditures necessitated by the inability of illiterate adults to properly use medication or preventive health care measures. KOZOL, *supra* note 33, at 14.

who either drop out of school,⁶⁴ or who graduate from high school with a substandard education. As the United States Supreme Court pointed out over three decades ago in *Brown v. Board of Education*, “[i]n these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”⁶⁵ What was written then is even more true now, for, as the twentieth century draws to a close, the “information age” has dawned, making expertise and informed intelligence the sine qua non of meaningful human endeavor.⁶⁶

In fact, the poorly educated are thwarted at every turn. They face the likely prospect of circumscribed earning power⁶⁷ and they may well be rendered politically ineffectual.⁶⁸ Just as egregious, they are bereft of their heritage, of mankind’s greatest intellectual and artistic achievements.⁶⁹ The insidiousness of this intellectual impoverishment is that it not only makes inaccessible the profound and the beautiful, but it also

⁶⁴ Over twenty years ago, the U.S. Supreme Court noted that inferior education induces children to drop out of school. *Gaston County, N.C. v. United States*, 395 U.S. 285, 295-96 (1969). If the Court is correct, dropout rates in the public schools are another indicator of the severity of the education crisis. In 1988, U.S. Secretary of Education Bennett characterized the national school dropout rate as “alarmingly high.” BENNETT, MAKING IT WORK, *supra* note 29, at 20. It has stayed high. Indeed, as of February 1990, public high schools nationwide were graduating only 71% of the students who entered as freshmen. Michael D. Hinds, *Cutting the Dropout Rate: High Goal but Low Hopes*, N.Y. TIMES, Feb. 17, 1990, at A1. Apparently, when they are older, some of these students do eventually obtain a high school diploma or its equivalent. Data from the National Center for Education Statistics show that between 1975 and 1990, the number of 19- and 20-year-olds who received a diploma or its equivalent rose to 83% from 81%. DeWitt, *First Report Card*, *supra* note 48, *passim*.

⁶⁵ *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

⁶⁶ NAT’L COMM’N, NATION AT RISK, *supra* note 4, at 7; *see also* GOVERNORS’ ASS’N, EDUCATING AMERICA, *supra* note 4, at 7; HUDSON INSTITUTE, WORKFORCE 2000: WORK AND WORKERS FOR THE 21ST CENTURY 97-101 (1987).

⁶⁷ *Plyler v. Doe*, 457 U.S. 202, 221-22 (1982); BOWSHER, *supra* note 51, at 16-18; KOZOL, *supra* note 33, at 13; Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 45-46 (1987); Stephen W. Gard, San Antonio Independent School District v. Rodriguez: *On our Way to Where?*, 8 VAL. U. L. REV. 1, 19 (1973); Robert E. Godwin, Comment, *Equality and the Schools: Education as a Fundamental Interest*, 21 AM. U. L. REV. 716, 731 (1972) [hereinafter Comment, *Equality and the Schools*].

⁶⁸ HIRSCH, JR., *supra* note 43, at 12-13; KEARNS & DOYLE, *supra* note 29, at 85-88; KOZOL, *supra* note 33, at 32-34; NAT’L COMM’N, NATION AT RISK, *supra* note 4, at 7; Edelman, *supra* note 67, at 33-34; Penelope A. Prevolos, Rodriguez Revisited: *Federalism, Meaningful Access, and the Right to Adequate Education*, 20 SANTA CLARA L. REV. 75, 89, 95, 98-99 (1980); R. George Wright, *The Place of Public School Education in the Constitutional Scheme*, 13 S. ILL. U. L.J. 53, 54, 61-63 (1988); Comment, *Equality and Schools*, *supra* note 67, at 732. In fact, there is an apparent correlation between lack of education and a disinclination to vote. *See infra* note 317 and accompanying text. And, those who do vote may exercise the franchise with very little understanding of the American political system, thereby robbing the vote of its politically purposive content. *See infra* notes 323-24 and accompanying text.

⁶⁹ BLOOM, *supra* note 2, at 239-40; RAVITCH & FINN, *supra* note 29, at 203; RAVITCH, *supra* note 29, at 42-44.

hides from its victims the heights to which they might aspire,⁷⁰ and the freedom of mind which they might traverse.⁷¹ "Rage, rage against the dying of the light" could have justly been the poet's protestation against ignorance as well as against death.⁷²

Such is the nature of the education crisis. Its toll has been a high one. The states, as the governmental entities with primary responsibility for education, have tackled the problem for more than ten years with only marginal success. The governors of these states as well as education experts have begun to question whether fundamental alterations in the design and structure of the system for providing education must be made.⁷³ However, there is considerable controversy over what the nature of those alterations should be. Proposals have ranged from privatization to enhanced governmental involvement, with a host of variations in between.⁷⁴ In formulating its education policies, the Bush administration has mirrored this debate, assuming an unprecedented interventionist and leadership role in relation to education,⁷⁵ while simultaneously attempting to cede increased responsibility for schooling and school reform to the private sector.⁷⁶

⁷⁰ BLOOM, *supra* note 2, at 239-40; RAVITCH & FINN, *supra* note 29, at 203; RAVITCH, *supra* note 29, at 25.

⁷¹ See CARDOZO, *supra* note 1, at 104.

⁷² DYLAN THOMAS, *Do Not Go Gentle into that Good Night*, in *THE COLLECTED POEMS OF DYLAN THOMAS* 128 (New Directions Publishing Corp. 1957).

⁷³ *E.g.*, GOVERNORS' ASS'N, *EDUCATING AMERICA*, *supra* note 4, at 8, 33-35; JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* (1990); MYRON LIEBERMAN, *PRIVATIZATION AND EDUCATIONAL CHOICE* (1989); Educational Visions Team, *New World Found., Progressive Federalism: New Ideas for Distributing Money and Power in Education*, in *GREAT SCHOOL DEBATE*, *supra* note 29, at 419-35; Task Force on Educ. Excellence, *Nat'l Educ. Ass'n, The NEA's Plan for School Reform*, in *GREAT SCHOOL DEBATE*, *supra* note 29, at 405-18; Ernest L. Boyer, *For Education: National Strategy, Local Control*, *N.Y. TIMES*, Sept. 26, 1989, at A31.

⁷⁴ Compare GOVERNORS' ASS'N, *EDUCATING AMERICA*, *supra* note 4, at 8, 30-35 (calling for the cooperative participation of federal, state, and local governments, as well as the private sector and voluntary organizations, in ameliorating the crisis; and noting the need to strengthen and perhaps change the federal government's role) with CHUBB & MOE, *supra* note 73, at 215-25 (promoting the market mechanism of giving parents and children "choice" in selecting schools without privatization of public schooling) and with LIEBERMAN, *supra* note 73, at 4-5 (urging choice with privatization of public school systems) and with Educational Visions Team, *New World Found.*, *supra* note 73, at 419-35 (proposing expanded social and fiscal responsibilities for education at all governmental levels and a redefinition of governmental roles so as to increase the federal government's financial contribution to the schools).

⁷⁵ Education issues analyst Edward B. Fiske has highlighted the unprecedented national approach taken by the framers of the Jeffersonian Compact: "The goals they [the framers] set were ambitious, and political veterans could not recall any previous occasion on which the White House and the National Governors' Association had agreed on a set of goals for anything, much less an enterprise that is generally considered to be a local affair." Edward B. Fiske, *Lessons: With Bright National Goals for Schools Set, Governors Puzzle Over How to Attain Them*, *N.Y. TIMES*, Feb. 28, 1990, at B8 [hereinafter Fiske, *Bright Goals*].

⁷⁶ In April 1991, the White House issued a wide-ranging plan for reforming education. The plan includes proposals for setting national standards in order to define what students should know; for

The private sector has proven a valuable ally in the search for an improved educational system. However, while welcoming continued assistance from this quarter, it is also important to evaluate which sector of society is optimally positioned to pull the nation out of its educational crisis. The private sector understandably has its own institutional interests to protect and, like the states, may find it more difficult to attain the national perspective that comes from governance of a country in its entirety. Nor is the private sector organized or empowered to cajole individual businesses into implementing a sustained and synchronized national education strategy.⁷⁷

By the very act of instigating and entering into the Jeffersonian Compact, the White House gravitated, reflexively perhaps, toward recognition of the strategic value of further pervasive involvement by the federal government in education reform. For, what is the creation of this compact if not a tacit admission that there is a need for a national plan, spearheaded by the federal government and developed in a new collaboration with the states, to overcome the crisis and stabilize elementary and secondary schools at an acceptable level of educational quality?

national student testing; for research and development by the private sector to invent new kinds of schools; and for giving parents "choice" in selecting their children's schools. The latter proposal envisions diverting governmental monies from the public schools to "follow" individual students who wish to attend a private school. In addition to encouraging states to free school tax dollars in this way, the Bush administration would like to see the federal laws amended so that Chapter I funds, currently destined for public schools serving needy children, could be used to "follow" individual disadvantaged students to the private schools of their choice. Susan Chira, *Bush School Plan Would Encourage Choice by Parents*, N.Y. TIMES, Apr. 19, 1991, at A1 [hereinafter Chira, *Choice by Parents*]. Some criticize this portion of the plan for its tendency to undermine those public schools which are already weak and for its abandonment of those troubled students who may be unequipped to exercise the "choice" option or who will be rejected by their chosen school. *School Choice, Without Harm*, N.Y. TIMES, Apr. 28, 1991, § 4, at 16; see also Chira, *Choice by Parents*, *supra*, *passim* (setting forth Senator Edward M. Kennedy's negative reaction to the plan). Likewise, the President's charge to the business community to develop model schools has stirred considerable controversy and opposition. Susan Chira, *A Sea of Doubt Swells Around Bush's Education Plan*, N.Y. TIMES, July 22, 1991, at A12 [hereinafter Chira, *Sea of Doubt*]; Karen DeWitt, *Brought to You by Exxon—School Reform*, N.Y. TIMES, July 21, 1991, § 4, at 4 [hereinafter DeWitt, *Exxon School Reform*].

⁷⁷ Cf., e.g., Chira, *Sea of Doubt*, *supra* note 76, *passim* (reporting that some business leaders, asked by President Bush to raise funds for the establishment of model schools, have criticized the request due to the recession and because, the leaders predict, compliance will result in switching funds from ongoing projects); DeWitt, *Exxon School Reform*, *supra* note 76, *passim* (noting that many business leaders worry that the President's request for corporate involvement in the development of new model schools will cause existing philanthropic programs for education to suffer); William Celis 3d, *Business Tax Breaks are Hurting Schools, Educators Complain*, N.Y. TIMES, May 22, 1991, at A1 (reporting that many of the companies which have aided deteriorating public schools have also insisted on substantial tax breaks from their communities, thereby reducing funds available to finance public education).

Indeed, education experts and business executives have said that, with respect to that element of the President's plan favoring privatization of schooling, the "most fundamental problem . . . is that the President has not shown how his plan will lead to broad-based, systemic change." Chira, *Sea of Doubt*, *supra* note 76, *passim*.

If what is needed is a national approach entailing a more audacious and far-ranging role for the federal government beyond supplementing state education efforts, then the issue arises as to whether the legal system can be understood to countenance such further developments. The executive branch, with its various calls for national education goals, the elements of a national core curriculum, national education standards, and national student testing, among other proposals,⁷⁸ has begun to sound as if the day is not far off before the question may be raised whether a more national approach comports with constitutional doctrines.

As discussed in Part IV of this Article, a positive right to education under the Constitution would not only accommodate a new role for the federal government in implementing a national approach, but would mandate it by obligating the federal government ultimately to assure fulfillment of the right and, therefore, of a certain level of quality education. The Supreme Court has seriously considered whether such a right exists. And, while not yet recognizing the right, the Court has demonstrated a marked reluctance to foreclose the possibility of its future recognition.

II. ANALYSIS OF THE CURRENT STATUS OF THE RIGHT TO EDUCATION UNDER THE UNITED STATES CONSTITUTION

The Supreme Court has primarily encountered the argument that there is a federal constitutional right to education in the context of equal protection cases decided over the course of the past two decades.⁷⁹ However, well before the heyday of equal protection, in *Meyer v. Nebraska*,⁸⁰ the Court advanced the notion that seeking knowledge has a constitutional dimension under the Fourteenth Amendment's Due Process Clause.⁸¹ In *Meyer*, a parochial school teacher challenged the constitutionality of a Nebraska statute under which he had been convicted for violating its prohibition against teaching foreign languages to students who had not yet passed the eighth grade.⁸² Relying upon the substantive

⁷⁸ The National Commission on Excellence in Education described the elements of a core curriculum which, in its view, were necessary nationwide. NAT'L COMM'N, NATION AT RISK, *supra* note 4, at 24-27. The Jeffersonian Compact enunciated the need for national education goals. Jeffersonian Compact, *supra* note 44, at 1487. Six national education goals were adopted by the nation's governors in 1990. GOVERNORS' ASS'N, EDUCATING AMERICA, *supra* note 4, at 36-38. The Bush administration has also called for national education standards and national student testing. DeWitt, *Bush Pushes Education Goals*, *supra* note 52, *passim*; Karen DeWitt, *The Push to Consider a Once Taboo Subject: National School Tests*, N.Y. TIMES, Feb. 3, 1991, § 4, at E5; Felicity Barringer, *Education Panel Sets Guidelines on Achievement*, N.Y. TIMES, May 13, 1990, § 1, at 18.

⁷⁹ See *infra* notes 90-144 and accompanying text.

⁸⁰ 262 U.S. 390 (1923).

⁸¹ *Id.* at 399. The Due Process Clause of the Fourteenth Amendment provides, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

⁸² *Meyer*, 262 U.S. at 396-97.

due process theory which held sway at the time,⁸³ the Court found the statute unconstitutional as applied because it contravened certain liberties guaranteed by the clause.⁸⁴ The Court included among the pertinent liberties the right to acquire useful knowledge.⁸⁵

The *Meyer* "education right"⁸⁶ has survived to this day,⁸⁷ although the particular brand of substantive due process upon which it is premised has fallen by the wayside.⁸⁸ It was conceived and is presently comprehended as a negative right in the sense that, rather than imposing any affirmative obligation upon government to provide education, it simply forbids government from impeding individuals in their quest for information and enlightenment.⁸⁹

After a long hiatus following the *Meyer* decision, the positive education right also had its day in court, but as a function of equal protection rather than due process analysis. The seminal case is *San Antonio Independent School District v. Rodriguez*,⁹⁰ a class action brought on behalf of Mexican-American schoolchildren who challenged that component of Texas' system of financing public education based on local property taxes. The gravamen of the complaint was that Texas had violated the Fourteenth Amendment's Equal Protection Clause insofar as this aspect of the financing scheme caused school districts with low property tax bases to receive less funds than districts with higher property tax bases.⁹¹

⁸³ See *infra* notes 178-81 and accompanying text. Although the substantive due process theory which prevailed from 1897 to 1937 is discussed more fully in Part III of this Article, at this juncture it may be helpful to point out that the Court typically used the theory to protect economic liberty rights, such as the right to contract, which could not be curtailed by government unless pursuant to the exercise of the state's police power in the interests of the general welfare. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 8-2 to 8-4 (2d ed. 1988).

⁸⁴ *Meyer*, 262 U.S. at 401, 403.

⁸⁵ *Id.* at 399.

⁸⁶ In 1986, the Supreme Court described *Meyer* as having established childrearing and education rights. *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986); see *Gard*, *supra* note 67, at 13.

Some commentators have characterized the rights established in *Meyer* as privacy rights essentially comprised of the individual's freedom to make decisions concerning his or her personal life. CONGRESSIONAL RESEARCH SERV., LIBRARY OF CONGRESS, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION* 1589 (Johnny H. Killian ed., 1987) [hereinafter *CONGRESSIONAL RESEARCH, CONSTITUTIONAL ANALYSIS*]; TRIBE, *supra* note 83, § 15-20. This does not negate or run counter to conceptualizing *Meyer* as also recognizing a right to acquire knowledge. See TRIBE, *supra* note 83, § 12-19, at 944 n.4, and § 15-6, at 1320; David Favre & Matthew McKinnon, *The New Prometheus: Will Scientific Inquiry Be Bound by the Chains of Government Regulations?*, 19 DUQ. L. REV. 651, 707, 709-11 (1981).

⁸⁷ TRIBE, *supra* note 83, § 15-6; Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 988-89 (1979). For other cases decided in the 1920s and adopting the *Meyer* Court's reasoning, see *Farrington v. Tokushige*, 273 U.S. 284 (1927); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); and *Bartels v. Iowa*, 262 U.S. 404 (1923).

⁸⁸ TRIBE, *supra* note 83, §§ 8-5 to 8-7.

⁸⁹ Edelman, *supra* note 67, at 25 & n.99; see TRIBE, *supra* note 83, § 12-19, at 944 & n.4.

⁹⁰ 411 U.S. 1 (1973).

⁹¹ *Id.* at 4, 17-41, 47. The Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

Plaintiffs-appellees urged the Supreme Court to review the challenged legislation under the strict scrutiny standard, the most stringent measure of a statute's constitutionality, and, therefore, the most favorable standard of review available to them.⁹² However, in order to invoke successfully strict scrutiny, plaintiffs were required by the Court to meet one of two criteria: either the challenged law must infringe upon a fundamental right under the Constitution, or the law must adversely affect a suspect class.⁹³ It is in considering the first criterion that the Court confronted the question of whether a positive federal constitutional right to education exists.⁹⁴

While acknowledging the critical importance of education to the nation,⁹⁵ Justice Powell's majority opinion maintained that the importance of a service performed by government is not germane to ascertaining whether there is a fundamental constitutional right to that service.⁹⁶ Rather, the sole test for discerning a fundamental right is that the right must be "explicitly or implicitly guaranteed by the Constitution."⁹⁷

Plaintiffs attempted to meet this test by arguing that education constitutes an implicit right. Their theory was that education attains this status because it is a virtual prerequisite to the meaningful exercise of free speech under the First Amendment and of the right to vote.⁹⁸ The Court rejected this argument on two grounds. First, the Court recalled that "we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice."⁹⁹ Second, the Court expressed a floodgates concern that if education were a fundamental right under the Constitution, then food and shelter could not logically be denied that status.¹⁰⁰

These responses seem a most unsatisfying way of disposing of the issue, for they are very like non sequiturs. With respect to the first response, it should be noted that plaintiffs were not seeking the most effective speech or the most informed electoral choice.¹⁰¹ Nor would

⁹² 411 U.S. at 17, 28-29. Under the strict scrutiny standard of review, the Texas statutes would be upheld only if the state could show that the statutes furthered some compelling state interest. *Id.* at 16-17.

⁹³ *Id.* at 17.

⁹⁴ *Id.* at 29.

⁹⁵ *Id.* at 29-30.

⁹⁶ *Id.* at 30-33.

⁹⁷ *Id.* at 33-34.

⁹⁸ *Id.* at 35-36.

⁹⁹ *Id.* at 36.

¹⁰⁰ *Id.* at 37.

¹⁰¹ *Id.* at 115-16 (Marshall, J., dissenting); Brief for Appellees at 25, 31-34, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (No. 71-1332). During oral argument before the U.S. Supreme Court, counsel for plaintiffs-appellees fleetingly mentioned that there should be a "maximum" educational program in Texas public schools. However, he did not explain what such a program would entail and made no claim that it must endow the citizenry with the ability to articulate the most effective speech or the most informed electoral choice. *Oral Argument on Behalf of*

recognition of a right to education necessarily require that the right must yield the most effective speech or the most informed vote, a point which the majority conceded elsewhere in the same opinion.¹⁰²

The reasoning of the second response is similarly inapposite. If the sole test for determining the existence of fundamental rights under the Constitution is that they must be explicitly or implicitly guaranteed by that document, then the floodgates concern should not figure into the calculus. Moreover, even if a floodgates effect were a legitimate analytical consideration, the majority opinion did not explore whether there are grounds for distinguishing education from other basic needs. It is not as if the search would be patently futile, since Justice Marshall did explore precisely this question in his dissent and discovered a distinguishing characteristic: education bears an immediate relationship to constitutional concerns for free speech and democratic government while the relationship of food, housing, and other basic needs is more attenuated.¹⁰³

It is on the basis of such incongruous counter-arguments that the *Rodriguez* majority concluded that education is not among the rights afforded implicit protection under the Constitution.¹⁰⁴ However, what is perhaps most intriguing about *Rodriguez* is that the majority declined to leave the matter in these unequivocal terms of repudiation. In dicta that one commentator has dubbed the "unheld holding" of *Rodriguez*,¹⁰⁵ the Court indicated that, in an appropriate case, it might find that there is a right to "some identifiable quantum of education" sufficient to provide children with the "basic minimal skills" necessary for the enjoyment of the rights of speech and of full participation in the political process.¹⁰⁶

Appellees, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (No. 71-1332), in 76 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 572, 590 (P. Kurland & G. Casper eds., 1975).

¹⁰² The Court indirectly admits as much in hypothesizing a right to education which would be violated if children were not to receive the basic minimal skills essential for the enjoyment of free speech and voting rights. See *Rodriguez*, 411 U.S. at 36-37.

¹⁰³ *Id.* at 115 n.74 (Marshall, J., dissenting). A few commentators have observed that state constitutions often link education, but not housing or health, to the preservation of democratic values. John E. Coons et al., *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CAL. L. REV. 305, 387-89 (1969); Betsy Levin, *Commentary: Education as a Constitutional Entitlement: A Proposed Judicial Standard for Determining How Much Is Enough*, 1979 WASH. U. L.Q. 703, 712-13 [hereinafter Levin, *Judicial Standard*].

¹⁰⁴ 411 U.S. at 35. Because the Court determined that neither a fundamental right nor a suspect class were involved in the *Rodriguez* litigation, the Court reviewed the Texas legislation under the rational relationship standard of review which merely requires that state legislation be shown to bear some rational relationship to legitimate state purposes in order for the legislation to be upheld. *Id.* at 40.

¹⁰⁵ Prevolos, *supra* note 68, at 75, 78-83.

¹⁰⁶ It is worth setting forth the Court's "unheld holding" in full:

Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right [to free speech or to vote], we have no indication that the present levels of educational expenditures in Texas provide an education that falls short. Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument

The Court explained that it did not reach this issue in *Rodriguez* because no allegation could fairly be made that Texas failed to provide its schoolchildren with such skills.¹⁰⁷ The Court cited an absolute denial of education to school-age children as an example of a case where the Justices might someday reach the issue.¹⁰⁸

This portion of Justice Powell's opinion reflects an unwillingness to adopt a rigid and absolutist position against the right. Rather, the majority opinion implicitly acknowledges the possibility that the Constitution may be interpreted to support a positive right to education, i.e., a right to have government provide education (in contrast to the negative *Meyer* right to be free of governmental impediments to the acquisition of education).¹⁰⁹ The language signifies that the *Rodriguez* decision does not preclude the Court from finding a positive constitutional right to education on another occasion. Thus, the status of the right under the Federal Constitution remains an open question.¹¹⁰

The Supreme Court's next encounter with education as a positive

provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.

Rodriguez, 411 U.S. at 36-37.

¹⁰⁷ *Id.* Indeed, the Court ultimately held that Texas' legislation passed muster under the rational relationship standard of review. *Id.* at 44-55.

¹⁰⁸ *Id.* at 37. Because the Court described an appropriate case in which to recognize the right to education as one in which a state's financing system causes a complete denial of educational opportunities to its schoolchildren, some commentators have considered whether the Court only meant to leave open the possibility that there is a right to have the states refrain from a total denial of the opportunity to acquire minimal basic skills. See, e.g., Levin, *Judicial Standard*, *supra* note 103, at 708. I tend toward the view that this is too restricted a reading of the *Rodriguez* language since the Court also stated in the same paragraph that children might have a constitutional claim if the state denied them the opportunity to acquire the basic skills necessary for enjoyment of free speech and voting rights. Stuart Biegel, *Reassessing the Applicability of Fundamental Rights Analysis: The Fourteenth Amendment and the Shaping of Educational Policy After Kadrmas v. Dickinson Public Schools*, 74 CORNELL L. REV. 1078, 1084 (1989); Betsy Levin, *The Courts, Congress, and Educational Adequacy: The Equal Protection Predicament*, 39 MD. L. REV. 187, 260 (1979) [hereinafter Levin, *Educational Adequacy*]; Prevolos, *supra* note 68, at 75, 78-83; Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 831 & n.232, 850 (1985); Wright, *supra* note 68, at 56-57.

¹⁰⁹ E.g., Biegel, *supra* note 108, at 1084; Edelman, *supra* note 67, at 33; James S. Liebman, *Implementing Brown in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 VA. L. REV. 349, 420 (1990); Lupu, *supra* note 87, at 1045; Prevolos, *supra* note 68, at 75, 78-83; Ratner, *supra* note 108, at 850; Wright, *supra* note 68, at 56-57; see Laurence H. Tribe, *Commentary: The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 334 (1985) [hereinafter Tribe, *Inalienable Rights*].

¹¹⁰ Julius Chambers, *Adequate Education for All: A Right, an Achievable Goal*, 22 HARV. C.R.-C.L. L. REV. 55, 69-70 (1987); Paul R. Dimond, *The Constitutional Right to Education: The Quiet Revolution*, 24 HASTINGS L.J. 1087, 1102-03 (1973); Liebman, *supra* note 109, at 420; Prevolos, *supra* note 68, at 83; Ratner, *supra* note 108, at 850; Wright, *supra* note 68, at 56-57; see Biegel, *supra* note 108, at 1084; Edelman, *supra* note 67, at 33; Lupu, *supra* note 87, at 1045.

fundamental right came nine years later in *Plyler v. Doe*.¹¹¹ This case was brought on behalf of undocumented school-age children assailing the constitutionality, under the Fourteenth Amendment's Equal Protection Clause, of Texas statutes which authorized public school districts to deny tuition-free enrollment to such children and which withheld from the districts state funds for the education of illegal alien children. Plaintiffs-appellees contended that this legislation violated the Equal Protection Clause by denying undocumented children the free public education that other children residing within Texas continued to enjoy.¹¹²

Although, as in *Rodriguez*, the Court did not opt to review the legislation under a strict scrutiny standard, the Court also did not choose the least rigorous standard of review—the rational relationship test—which had been employed in *Rodriguez*. Instead, the *Plyler* Court invoked the intermediate or, as it is sometimes called, heightened scrutiny standard of review¹¹³ based, in part, on the status of education under the Constitution. The Court took the position that while “[p]ublic education is not a ‘right’ granted to individuals by the Constitution . . . neither is it merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation.”¹¹⁴ The Court explained that “[b]oth the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction.”¹¹⁵

But if education is not a constitutional right, and if it is also not just another governmental benefit, then what is it? In his dissent, Chief Justice Burger—with some justification—found such reasoning to be tantamount to a “quasi-fundamental-rights analysis.”¹¹⁶ Indeed, if the *Rodriguez* Court opened the door to a positive right to education, the *Plyler* majority may have momentarily straddled the threshold.¹¹⁷ Yet,

¹¹¹ 457 U.S. 202 (1982).

¹¹² *Id.* at 205.

¹¹³ As conceived in *Plyler*, under the intermediate or heightened scrutiny standard of review, state legislation will be sustained in the face of an equal protection challenge if the legislation furthers some substantial state goal. *Id.* at 217-18 & n.16, 223-24; see also TRIBE, *supra* note 83, § 16-32, at 1602-03 (discussing the various forms of intermediate scrutiny and referring to the variant of intermediate scrutiny in *Plyler* as “a new form of heightened scrutiny.”)

¹¹⁴ *Id.* at 221.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 244 (Burger, C.J., dissenting); see also TRIBE, *supra* note 83, § 16-23, at 1551 (referring to the *Plyler* majority's “not-quite-fundamental right”). *But see* Wright, *supra* note 68, at 57 (reading *Plyler* as temporarily discouraging fundamental right status for education).

¹¹⁷ See, e.g., TRIBE, *supra* note 83, § 16-23, at 1551; Ratner, *supra* note 108, at 840 n.287; Jim Clark, Note, *Plyler v. Doe: Broadening the Boundaries of Intermediate Scrutiny in Equal Protection Cases*, 36 ARK. L. REV. 383, 399 (1982); Ruth Jones, Note, *Plyler v. Doe—Education and Illegal Alien Children*, 8 BLACK L.J. 132, 132 (1983); cf. Biegel, *supra* note 108, at 1086 (noting that although Justice Brennan's majority opinion in *Plyler* stated that education is not a constitutional right, “his reasoning followed the usual pattern of fundamental rights analysis”). *But see* Deirdre Dexter, Note, *Constitutional Law: The Equal Protection Clause: The Effect of Plyler v. Doe on Intermediate Scrutiny*, 36 OKLA. L. REV. 321, 337 (1983) (observing that *Plyler* treats education as a “prized right of our society not deemed fundamental”). Interestingly, in a later case, the Court

in the final analysis, this step was probably more conservative than dynamic. The *Rodriguez* majority had expressed a willingness to recognize the right in the context of an absolute denial of public education—the circumstance, in effect, presented in *Plyler*.¹¹⁸ The *Plyler* Court, while not indicating any disagreement with that option in future cases, also cautiously forebore to take full advantage of it at the first opportunity.¹¹⁹

Given the ambivalence of *Plyler*, one might suppose that *Papasan v. Allain*,¹²⁰ the next case involving an asserted right to education, would bring some further clarification of the issue. However, the factual posture of the latter case did not provide an opportunity for movement on the question one way or the other. In *Papasan*, schoolchildren and local public school officials in Mississippi's Chickasaw Cession brought an action predicated, in part, on the Fourteenth Amendment's Equal Protection Clause. The complaint charged that the state's distribution of Sixteenth Section Land funds resulted in a funding disparity that favored schools outside of the Cession. This disparity, it was alleged, denied petitioners the minimally adequate education which children in other areas of the state were assured.¹²¹ Based on these allegations, petitioners argued that there was a federal constitutional right to minimally adequate education, that Mississippi had infringed upon that right, and that, consequently, the state's conduct should be reviewed under the strict scrutiny standard.¹²²

The Court declined this invitation, since the criteria for applying strict scrutiny had not been fulfilled.¹²³ The Court observed, in dicta, that under *Rodriguez* and *Plyler* the question of whether a fundamental constitutional right to education exists "has not yet [been] definitively

described the *Plyler* majority opinion as not settling the question of whether a right to education exists under the Constitution. *Papasan v. Allain*, 478 U.S. 265, 285 (1986); see also Patrick R. Hugg, *Federalism's Full Circle: Relief for Education Discrimination*, 35 LOY. L. REV. 13, 32 (1989) (emphasizing the *Papasan* Court's characterization of *Plyler*).

¹¹⁸ *Rodriguez*, 411 U.S. at 37.

¹¹⁹ Michael A. Olivas, *Plyler v. Doe, Toll v. Moreno, and Postsecondary Admissions: Undocumented Adults and "Enduring Disability"*, 15 J.L. & EDUC. 19, 26 (1986); Joanne C. Slotnik, *Plyler v. Doe: Paving the Way for Heightened Judicial Scrutiny in Constitutional Adjudication of Denials of Education*, 9 J. CONTEMP. L. 235, 243-44 (1983); Carl D. Rosenblum, Comment, *State Statute Denying Undocumented Aliens Access to Free Public Education Unconstitutional*, *Plyler v. Doe*, 6 SUFFOLK TRANSNAT'L L.J. 367, 380 & n.83 (1982).

However, the *Plyler* Court, applying heightened rather than strict scrutiny to Texas' denial of a free public education to illegal alien children, still found that the denial served no substantial state interest and, therefore, that the state statutes violated the Equal Protection Clause. *Plyler*, 457 U.S. at 230.

¹²⁰ 478 U.S. 265 (1986).

¹²¹ *Id.* at 274.

¹²² *Id.* at 285.

¹²³ The Court ruled that the rational relationship test was the proper standard of review and remanded for a determination of whether Mississippi had a rational reason for the funding disparity. *Id.* at 286, 289-92.

settled."¹²⁴ Nor did the Court see any reason to settle the question in *Papasan* since the petitioners alleged no facts in support of the claim that they were deprived of a minimally adequate education.¹²⁵ Thus, *Papasan* left matters where they were. Perhaps the main interest of the case, for purposes of this discussion, lies in the fact that Justice White's opinion for the Court confirmed what was not quite said outright before—it remains an open question whether there can be a positive right to education under the Constitution.¹²⁶

This is how things stood when the Supreme Court handed down *Kadrmas v. Dickinson Public Schools*,¹²⁷ the most recent and puzzling case in the quadrumvirate of equal protection decisions addressing education as a constitutional right. Plaintiffs-appellants were a schoolgirl, Sarita Kadrmas, and her mother. They sued the Dickinson Public School District because it charged the Kadrmas family, which lived on an income at or near the poverty level, \$97 per year to transport Sarita by school bus over the sixteen mile distance between her home and school.¹²⁸ The North Dakota statute which plaintiffs challenged permitted nonreorganized school districts, on the latter's own authority, to charge a fee for transporting students to and from school, but allowed reorganized school districts this option only upon the direct approval of voters. Plaintiffs, who resided in a nonreorganized school district, contended that the fee and this difference between nonreorganized and reorganized districts constituted a violation of the Fourteenth Amendment's Equal Protection Clause.¹²⁹ A factual oddity of the case was that because the Kadrmases arranged for the private transportation of Sarita between home and school, her parents' refusal to pay the bus fee never prevented Sarita from attending school.¹³⁰

Plaintiffs-appellants pressed the Court to apply a heightened scrutiny standard of review; they made no attempt to persuade the Court to use strict scrutiny.¹³¹ Justice O'Connor's opinion for the Court, however, characterized the Kadrmases as seeking strict scrutiny, or heightened scrutiny if strict scrutiny were refused.¹³² She also represented their brief as offering as a rationale for strict scrutiny that the bus fee unconsti-

¹²⁴ *Id.* at 285.

¹²⁵ *Id.* at 286.

¹²⁶ *Id.* at 285. The *Papasan* Court's reaffirmation of the uncertain status of the right to education has been highlighted by several commentators. *E.g.*, Hugg, *supra* note 117, at 32; Liebman, *supra* note 109, at 420; Wright, *supra* note 68, at 57.

¹²⁷ 487 U.S. 450 (1988).

¹²⁸ *Id.* at 454-55.

¹²⁹ *Id.* at 455.

¹³⁰ *Id.* at 455-56, 458.

¹³¹ Brief for Appellants at 15-18, *Kadrmas* (No. 86-7113).

¹³² Justice O'Connor's opinion for the Court stated that plaintiffs-appellants sought to have the Court "apply a form of strict or 'heightened' scrutiny to the North Dakota statute." *Kadrmas*, 487 U.S. at 458.

tutionally deprived those who could not afford it of minimum access to education.¹³³ The *Kadrmas* did, it is true, assert that they were unconstitutionally deprived of such minimum access to education. But, the right to education which they asserted was a state created right and did not independently arise from the provisions of the Constitution. In essence, plaintiffs-appellants' arguments revolved around the constitutionality of North Dakota's purported withdrawal of such an important state-created benefit and the need for the Court's heightened scrutiny of such state action.¹³⁴

Nevertheless, Justice O'Connor addressed the applicability of strict scrutiny and concluded that it was inappropriate on three grounds, two of which are pertinent here. First, she dismissed the possibility that Sarita had been denied a fundamental right of minimum access to education, reasoning that inasmuch as Sarita had continued to attend public school during the period of her exclusion from the bus, there could be no denial of minimum access.¹³⁵

Justice O'Connor then surmised that plaintiffs-appellants must have meant to argue that the Equal Protection Clause requires states to provide students like Sarita with free transportation to and from school, regardless of whether such transportation is essential in providing access to school, and that the fundamental right to such transportation would necessitate strict scrutiny.¹³⁶ The Court likewise struck down this alternative rationale for strict scrutiny by invoking the proposition that the Court had not yet accepted "that education is a 'fundamental right,' . . . which should trigger strict scrutiny" with citations to *Rodriguez*, *Plyler*, and *Papasan* in support thereof.¹³⁷

While it is true that these cases establish that the Court has not yet accepted a positive constitutional right to education, the appearance of this proposition in *Kadrmas* is baffling. The proposition is posed by Jus-

¹³³ *Id.* at 458.

¹³⁴ Brief for Appellants at 12, *Kadrmas* (No. 86-7113).

¹³⁵ *Kadrmas*, 487 U.S. at 458.

¹³⁶ *Id.* at 458. Counsel for plaintiffs-appellants did have the following exchange with the Court in which the right to transportation was mentioned:

QUESTION: That may be so, but if we rely on that, then we would have to be saying that North Dakota is constitutionally required to furnish bus transportation to poor people, who have no way for their children to get to school.

MR. HOUDEK: I think what it would—that's a fair characterization, Your Honor.

QUESTION: I think it is, too.

Record of Oral Argument on Behalf of Appellants at 15, *Kadrmas* (No. 86-7113).

However, the meaning of this cursory reference is unclear in view of the fact that appellants stated in their reply brief: "[I]t should be noted that we are not discussing a claim that all children in North Dakota have [a] constitutional right to be bused to school." Reply Brief of the Appellants at 5, *Kadrmas* (No. 86-7113).

¹³⁷ *Kadrmas*, 487 U.S. at 458. Without discussion, Justice O'Connor also reiterated the proposition at the close of her opinion to the effect that the challenged North Dakota statute "interferes with no fundamental right." *Id.* at 465.

tice O'Connor as apparently countering a claim that Sarita had a constitutional right to free transportation between home and school.¹³⁸ But, if that were the *Kadrmas*' claim, then plaintiffs-appellants were asserting a right to free transportation,¹³⁹ not a right to education, and the *Rodriguez-Plyler-Papasan* proposition would not address the right asserted.

Consider, then, whether the proposition is pure dictum, as it is used in Justice O'Connor's opinion, or whether it takes on some new significance as an integrated part of the holding in *Kadrmas*. Even assuming arguendo that the *Kadrmas*es sought strict scrutiny, and assuming further that the *Kadrmas*es were really asserting a right to free transportation, then why should the Court even reach the issue of whether there is a fundamental right to education under the Constitution? Indeed, the *Kadrmas*es made no other allegations before the Supreme Court regarding the quality or quantity of education provided to Sarita once inside the schoolhouse door.¹⁴⁰ Thus, the *Kadrmas* majority's reiteration of the proposition that the Court has not yet accepted the right to education seems totally gratuitous and quite out of place.¹⁴¹

More curious still is the *Kadrmas* Court's failure even to mention the "unheld holding" of *Rodriguez* and its continued vitality in *Plyler* and *Papasan*. Did the *Kadrmas* Court mean in this way to answer the open question as to whether there can be a positive right to education under the Constitution? It does not seem plausible that the Court undertook to resolve this issue, about which the Justices were in such a quandary, with a single cryptic and conclusory statement.¹⁴²

¹³⁸ I use the word "apparently" because Justice O'Connor did not clearly indicate that she meant the proposition to answer a claim that there is a right to free transportation. However, the proposition appears to have no other discernible purpose in her analysis. See *Kadrmas*, 487 U.S. at 458.

¹³⁹ Justice Marshall aptly noted in a dissent joined by Justice Brennan that the *Kadrmas* majority treated the case as turning on "the provision of transportation, rather than the provision of educational services." *Id.* at 466 (Marshall, J., dissenting). Hence, he concluded that the *Kadrmas* Court "does not address the question of whether a State constitutionally could deny a child access to a minimally adequate education." *Id.* at 466 n.1 (Marshall, J., dissenting); see Jeffrey Jenkins, Note, *No Free Ride to the Schoolhouse Gate: Equal Protection Analysis in Kadrmas v. Dickinson Public Schools*, 20 N.M. L. REV. 161, 175-77 (1990) [hereinafter Note, *No Free Ride*] (characterizing the *Kadrmas* majority opinion as addressing a right to transportation rather than a right to education); see also Michele Benson, Comment, *Kadrmas v. Dickinson Public Schools: A Search for a Consistent Equal Protection Standard in Education*, 16 HASTINGS CONST. L.Q. 581, 593-94 (1989) [hereinafter Comment, *Consistent Equal Protection*] (contending that the majority opinion treated the *Kadrmas*' claim as one to be free from a user fee rather than as a claim to a right to education); cf. *The Supreme Court 1987 Term—Leading Cases*, 102 HARV. L. REV. 143, 208 (1988) ("The Court failed to define 'fundamental right'" in *Kadrmas*).

¹⁴⁰ Brief for Appellants *passim*, *Kadrmas* (No. 86-7113); Reply Brief of the Appellants *passim*, *Kadrmas* (No. 86-7113).

¹⁴¹ See Note, *No Free Ride*, *supra* note 139, at 175 & n.147.

¹⁴² *Id.*; see Comment, *Consistent Equal Protection*, *supra* note 139, at 594, 601. Moreover, some commentators go so far as to suggest that Justice O'Connor's majority opinion, in dicta, expressly left open the question of whether a constitutional right to minimal educational access exists. Biegel, *supra* note 108, at 1085; Hugg, *supra* note 117, at 34.

No doubt, the *Kadrmas* "statement" reflects an unfriendly attitude on the part of at least five of the Justices toward a positive right to education under the Constitution. As such, it probably dims any expectations that the Court will soon recognize the right. On the other hand, the *Kadrmas* decision's one-line statement that there is no constitutional right to education can hardly be taken, as a matter of stare decisis, to preclude the Court from finding the right at some future date. As used in *Kadrmas*, the statement is dictum and without much logical relevance to the matters litigated. Thus, although it is the Court's last word on the subject, *Kadrmas* probably adds nothing and subtracts but little from the analysis of the right to education developed in *Rodriguez*, *Plyler*, and *Papasan*.¹⁴³

In sum, the right to education is obviously no stranger to American constitutional jurisprudence. The Supreme Court has long recognized the existence of a negative right to education as one of the liberties guaranteed by the Due Process Clause of the Fourteenth Amendment such that government is barred from obstructing the individual's acquisition of knowledge. Through an equal protection analysis, the Court has also considered whether the Constitution may embrace a positive right to education which would require government to provide public education to school-age children. These equal protection cases, taken together, have established two propositions: a positive right to education under the Constitution has not yet been accepted; and, it is still an open question whether children may someday have a positive constitutional right to demand that government provide them with "some identifiable quantum" of education so as to enable each child "to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process."¹⁴⁴

The open question has remained on the nation's agenda for close to twenty years. Must it forever elude resolution? Does the Constitution contain no answer to an issue of such import? As the analysis which follows demonstrates, the Constitution does indeed contain an answer and the question need not and should not, in good conscience, remain open any longer.

¹⁴³ Justice O'Connor also rejected the *Kadrmas*' plea for heightened scrutiny by distinguishing *Plyler* from *Kadrmas* on factual grounds, i.e., that unlike the illegal alien children in *Plyler*, Sarita had not been penalized for the illegal conduct of her parents; and that unlike the total denial of public education to the undocumented children in *Plyler*, the bus fee would not create a subclass of illiterates. *Kadrmas*, 487 U.S. at 450. In addition, Justice O'Connor construed the *Plyler* Court's use of a heightened scrutiny standard as unique and inapplicable to factual situations other than those presented by the *Plyler* litigation. *Id.* at 450.

Having rejected the heightened scrutiny standard of review, the Court then applied the rational relationship test and held that North Dakota's school transportation practices did not violate the Equal Protection Clause. *Id.* at 465.

¹⁴⁴ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36-37 (1973).

III. THEORETICAL FOUNDATIONS FOR A POSITIVE RIGHT TO EDUCATION UNDER THE UNITED STATES CONSTITUTION

A. *Some Preliminary Matters*

1. *The Normalcy of Implied Constitutional Rights.*—That the Constitution does not expressly posit a right to education by no means ends the controversy over whether the right exists. This, of course, is the teaching of *Rodriguez*: rights may arise by implication from the Constitution's provisions as well as by explicit reference.¹⁴⁵ Nor are implied constitutional rights aberrational. Over the years, the Supreme Court has recognized an extensive array of diverse implied rights which have become part of the lexicon of modern constitutional jurisprudence.¹⁴⁶

The Constitution contains a number of provisions any one of which arguably forms the analytical basis for an implied positive right to education. However, because not all of these bases are necessarily of equal interest, I have chosen to focus mainly on those constitutional provisions and doctrines which make the strongest and most influential case for the right.¹⁴⁷ Of these provisions, modern substantive due process theory

¹⁴⁵ *Id.* at 17, 33 & n.78; see *infra* notes 407-28 and accompanying text (setting forth a full discussion of the Ninth Amendment's role as authority for recognizing implied rights under the Constitution).

¹⁴⁶ See, e.g., *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) (right to an open criminal trial); *Jackson v. Virginia*, 443 U.S. 307 (1979) (rights to a presumption of innocence and to demand proof beyond a reasonable doubt before being convicted of a crime); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (the right to marry or not to marry); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (right to make one's own choice about having children); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to travel interstate); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (right to receive information); *Afroyim v. Rusk*, 387 U.S. 253 (1967) (right to retain American citizenship, in spite of commission of criminal activities, until expressly and voluntarily renouncing it); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to marital privacy); *Reynolds v. Sims*, 377 U.S. 533 (1964) (right to vote); *NAACP v. Button*, 371 U.S. 415 (1963) (right to use the federal courts and to advise others to use them); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (right to hold one's own beliefs); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (right of association); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (right to rear children in accordance with parental values and beliefs).

¹⁴⁷ No effort is made in this Article to locate a positive right to education in the Equal Protection Clause of the Fourteenth Amendment. The omission is, in a sense, ironic. *Rodriguez*, *Plyler*, *Papasan*, and *Kadrmas*, the cases which have thus far broached the question of whether there is a positive federal right to education, are, in fact, all equal protection decisions. Nonetheless, in *Rodriguez*, the case which sets forth the most substantive discussion of the matter, the Court considered the envisioned right as flowing, not from the language of the Equal Protection Clause, but, rather, from the First Amendment's Free Speech Clause and from constitutional provisions evincing solicitude for individual political participation. *Rodriguez*, 411 U.S. at 35-36; see *Gard*, *supra* note 67, at 26-29. *Plyler* is the only other of the four equal protection cases to give more than glancing attention to the viability of a positive right to education under the Constitution. *Plyler v. Doe*, 457 U.S. 202, 221-24 (1982). The *Plyler* Court, with its fear that Texas' education policies might create a "subclass of illiterates" and a "permanent caste . . . of cheap labor," may have brought the idea of a constitutionally protected interest in education somewhat nearer to the classic equal protection concerns of ameliorating invidious discrimination and majoritarian domination. *Id.* at 230, 218-19; *TRIBE*, *supra*

would presently seem to hold the most promise and is thus given particular attention.

2. *Overcoming the Prejudice Against Positive Constitutional Rights.*—Mainstream legal thought has it that the Constitution is a charter of negative rights protecting Americans against governmental intrusions.¹⁴⁸ The *Rodriguez* majority opinion, however, posed the possibility

note 83, § 16-12, at 1463-64, 1465 & n.11. Yet the Court seemed to rely for its quasi-fundamental rights analysis not upon equal protection language, but upon such factors as the needs of the nation and of the nation's children. *Plyler*, 457 U.S. at 221.

In any event, some commentators have proposed finding a positive right to education in the Equal Protection Clause. *E.g.* Levin, *Educational Adequacy*, *supra* note 108, at 254-63; Prevolos, *supra* note 68, at 120; *cf.* Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 57-58 (1969) (arguing that theoretically there is a need for an entitlement under the U.S. Constitution to a minimum level of education, but that the fulfillment of such need can only be achieved through equal protection claims). One writer suggests the Thirteenth Amendment as a foundation for the right as well. Rodic B. Schoen, *Nationalization of Public Education: The Constitutional Question*, 4 TEX. TECH L. REV. 63, 115, 119-25 (1972). Although their reasons for invoking the Equal Protection Clause differ on some points, a unifying concern is for the promotion of equal educational opportunity as well as for the guarantee of some quantum of adequate education. The linchpin of their analyses is that the rights to equal educational opportunity and to a quantum of adequate education both fit comfortably in the Equal Protection Clause because the pursuit of equality and the pursuit of adequacy ultimately converge.

I do not quarrel with the desirability of attaining equal educational opportunity or of continuing to use the Equal Protection Clause for that purpose. I also concur with the notion that educational equality and educational adequacy or quality are not mutually exclusive concepts. Indeed, these are values which complement each other and which can and should operate in tandem for the improvement of American education. SALOMONE, *supra* note 39, at 198-203.

Where I do part company with these writers is in relation to their underlying theorematic construct that because the two concepts are not mutually exclusive, the Equal Protection Clause suffices as the foundation for a positive right to education just as it suffices as the foundation for a right to equal educational opportunity. *See* Levin, *Educational Adequacy*, *supra* note 108, at 254-63; Prevolos, *supra* note 68, at 120; *cf.* Michelman, *supra*, at 57-58 (arguing that fulfilling a right to minimum protection of education will require that claims be predicated on notions of inequality or discrimination). The illogic of this progression becomes readily apparent when one considers that the Equal Protection Clause could theoretically be satisfied by denying education to all children or by allocating to each student equal shares of substandard schooling. *See* Philip B. Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last?"*, 1972 WASH. U. L.Q. 405, 419 (1972); *cf.* Edelman, *supra* note 67, at 34-35 (under the Equal Protection Clause, "[t]he obvious question is, if poor or vulnerable children cannot be absolutely deprived of education when it is provided to others, why can they be absolutely deprived when it is not?"); Michael J. Perry, *Equal Protection, Judicial Activism, and the Intellectual Agenda of Constitutional Theory: Reflections on, and Beyond, Plyler v. Doe*, 44 U. PITT. L. REV. 329, 336 (1983) ("Abridgement of a fundamental interest is not an equal protection problem."). *But see* Levin, *Educational Adequacy*, *supra* note 108, at 259-63 (arguing that since state governments already provide education, the Equal Protection Clause of the Federal Constitution requires that states must provide to all children that level of education which the state considers basic or adequate). Clearly, such a universal denial of education or severe denigration of its quality across the board would violate a positive right to a quantum of adequate or quality education even as it might pass muster under equal protection principles.

¹⁴⁸ Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2272-78 (1990); David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 864-67, 878, 889-90 (1986); Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of a*

that the Constitution is susceptible of giving rise to a positive right to education.¹⁴⁹ While this break with tradition might be discounted as dicta gone fanciful, it turns out that the concept of such a right has received the approbation of a number of legal scholars.¹⁵⁰ Moreover, the Supreme Court reiterated the heresy in *Papasan*.¹⁵¹

The *Rodriguez* dicta, although departing from mainstream thinking, may actually be quite in harmony with the original intent of the Constitution's framers and the spirit of the final document which they produced. Evidence of such original intent in relation to governmental responsibility for education is taken up in Part III.C.3 of this Article. However, it may assist the reader in considering the arguments which follow if I digress at this juncture to illustrate, albeit in abbreviated fashion, that the language and spirit of the Constitution accord quite naturally with the general proposition that there may be positive constitutional rights.

Most rights arising under the Constitution are phrased as prohibitions on government and, therefore, are considered negative rights.¹⁵² Yet a mere abundance of negative rights does not mean that the Constitution is thereby rendered devoid of positive rights. This may be readily ascertained from a perusal of Constitutional provisions which, in fact, expressly set forth positive rights.¹⁵³ The Sixth Amendment nicely illustrates the point,¹⁵⁴ as it grants "the accused" a veritable panoply of positive rights: the right to "enjoy . . . a speedy and public trial, by an impartial jury," the right "to be informed of the nature and cause of the accusation," the right to be confronted with the witnesses against him, the right to have compulsory process for obtaining witnesses in his favor, and the right to have assistance of counsel.¹⁵⁵ Similarly positive in content is the right described in Article IV of the Constitution that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of

Negative Rights View of the Constitution, 43 VAND. L. REV. 409, 410 (1990); see also Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1107 (1986) [hereinafter Black, Jr., *Further Reflections*] (noting that the "constitutional law of human rights is traditionally conceived as being a set of prohibitions only, rather than as containing . . . affirmative duties"); Tribe, *Inalienable Rights*, *supra* note 109, at 330 (remarking that under the Constitution, "rights tend to be individual, alienable, and negative").

¹⁴⁹ *Rodriguez*, 411 U.S. at 36-37; see *supra* notes 105-10 and accompanying text.

¹⁵⁰ See *supra* notes 109-10 and accompanying text.

¹⁵¹ See *Papasan v. Allain*, 478 U.S. 265, 284-85 (1986) (noting that whether a positive right to education may be recognized in the Constitution remains an unsettled question).

¹⁵² Currie, *supra* note 148, at 864-66; Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 888 (1987); Tribe, *Inalienable Rights*, *supra* note 109, at 330; see Gerhardt, *supra* note 148, at 410.

¹⁵³ Bandes, *supra* note 148, at 2276; Gerhardt, *supra* note 148, at 437 & n.117; Tribe, *Inalienable Rights*, *supra* note 109, at 331-32.

¹⁵⁴ Bandes, *supra* note 148, at 2276; Tribe, *Inalienable Rights*, *supra* note 109, at 331-32.

¹⁵⁵ U.S. CONST. amend. VI.

Citizens in the several States,"¹⁵⁶ and the right to American citizenship conferred by the Fourteenth Amendment upon "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof."¹⁵⁷

While there are only a few isolated instances of express positive rights in the Constitution, they signify much in a milieu indisposed to the recognition of such rights. Their presence demonstrates that ours is a Constitution compatible with the inclusion of positive rights. Or, to put the matter in tautological but unambiguous terms, the Constitution's express positive rights show that the Constitution can and does have positive rights.¹⁵⁸

This conclusion is further buttressed by the existence of implied positive constitutional rights as well as express ones. Some scholars have described implied positive rights in the many affirmative duties which the Constitution imposes on government.¹⁵⁹ The genesis of this theory lies in

¹⁵⁶ U.S. CONST. art. IV, § 2, cl. 1. The purpose of this provision is to assure that when the citizens of State *A* travel to State *B*, they will be entitled to partake of the same fundamental rights enjoyed by the citizens of State *B*. *TRIBE, supra* note 83, § 6-34.

¹⁵⁷ U.S. CONST. amend. XIV, § 1; see *Afroyim v. Rusk*, 387 U.S. 253, 262 (1967); *Schneider v. Rusk*, 377 U.S. 163, 165, 169 (1964); *TRIBE, supra* note 83, § 5-16, at 356 (construing this provision as conferring a right to citizenship on persons born or naturalized in the United States).

¹⁵⁸ *Tribe, Inalienable Rights, supra* note 109, at 331-32.

¹⁵⁹ For commentaries which enumerate some of the affirmative duties imposed by the Constitution on government, see Black, Jr., *Further Reflections, supra* note 148, at 1111-14; Currie, *supra* note 148, at 872-86; and Tribe, *Inalienable Rights, supra* note 109, at 332.

It is interesting to note that some of the federal government's greatest affirmative duties are set forth with sweeping eloquence in the Preamble to the Constitution. U.S. CONST. pmbl. Unlike other provisions of the Constitution, though, the Preamble is treated more as a statement of aspiration than as a source of law. Black, Jr., *Further Reflections, supra* note 148, at 1107-08. Yet, Professor Charles Black's query in relation to the Declaration of Independence pertains equally to the Preamble of the Constitution: "Can we . . . dare to treat *these* words as semantically blank?" *Id.* at 1105. The ramifications of such an inquiry are intriguing. Conceived of as a source of duties and correlative rights, the elements of the Preamble seem to presuppose an educated citizenry and, therefore, an implied positive right to education. For example, if a purpose of the Constitution is to "provide for the common defence," then the populace has a concomitant right to that defense. This conclusion is lent added support by the delegation of power to Congress in Article 1, Section 8, Clause 1 of the Constitution to lay and collect taxes to provide for the nation's defense. *Id.* at 1113-14. However, one might also argue that if the right to common defense is to be made capable of realization, it must include the positive right to education. This relationship between education and defense has lately come into sharper focus as the juxtaposition of increasingly sophisticated weaponry with undereducated troops has drawn national attention. See *supra* notes 55-58 and accompanying text; Robert J. Goodwin, *The Crisis in Public Education and a Constitutional Rationale for Federal Intervention*, 4 DET. C.L. REV. 937, 957 n.100 (1988). Similar reasoning supports recognition of an implied right to education in the Preamble's assurances that the Constitution was formed to "promote the general Welfare" and "insure domestic Tranquility." U.S. CONST. pmbl. The relationship between education and the nation's economic welfare is now all too evident, as is the relationship between education and the welfare of society's individual members. See *supra* notes 51-54, 59-69 and accompanying text. The correlation between education and domestic tranquility (manifested as an absence or reduction of crime) is well known, too. See *supra* notes 59-62 and accompanying text. Finally, liberty is secured to "ourselves and our Posterity" by the Preamble, and,

the insight that a duty simultaneously creates a right to have the duty performed, just as the converse holds true—a right implicates a duty to effectuate the fulfillment of the right. It may be deduced from this symbiotic relationship between rights and duties that, among the affirmative duties expressly imposed on government by the Constitution, there are some which contemporaneously create implied, correlative positive rights.¹⁶⁰ This symbiotic process is manifested in such constitutionally mandated affirmative duties as the requirements that “a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time” by Congress;¹⁶¹ that the members of the House of Representatives must be chosen by the people;¹⁶² and that the United States must guarantee to every state a republican form of government and protection against invasion.¹⁶³

Additionally, there are many rights generally thought to be phrased in the negative, but which may legitimately be read to entail positive rights and burdens.¹⁶⁴ An example is the language of the Fourteenth Amendment’s Equal Protection Clause that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”¹⁶⁵ The clause has been understood to confer upon its beneficiaries the authority to demand government’s affirmative exertions as well as governmental restraint in order that equal protection be given its full effect.¹⁶⁶ This reasoning applies with equal force to the First Amendment’s Free Speech Clause. While the clause states what Congress may not do—abridge free speech¹⁶⁷—the language has been interpreted to oblige government, under certain circumstances, to provide resources enabling public access to fora and information.¹⁶⁸ The Fourth Amendment is another provision

therefore, “[p]osterity has its claims under the Constitution.” Arthur S. Miller, *Nuclear Weapons and Constitutional Law*, in *NUCLEAR WEAPONS AND LAW* 235, 242 (Arthur S. Miller & Martin Feinrider eds., 1984). This is especially true of the claims of children to the education which will enable their ultimate liberty and independence. While an argument for a right to education based on the introductory words of the Constitution is not the most palatable argument available, perhaps with the continuing deterioration of education and the damage such deterioration is working on defense, general welfare, tranquility, and liberty, “[t]he time has come to think seriously about giving substantive content to the preamble.” Miller, *supra*, at 241.

¹⁶⁰ Tribe, *Inalienable Rights*, *supra* note 109, at 332; cf. Black, Jr., *Further Reflections*, *supra* note 148, at 1111-14 (generally inferring from the existence of express affirmative duties the existence of implied positive constitutional rights).

¹⁶¹ U.S. CONST. art. I, § 9, cl. 7; see Tribe, *Inalienable Rights*, *supra* note 109, at 332.

¹⁶² U.S. CONST. art. I, § 2, cl. 1; see Tribe, *Inalienable Rights*, *supra* note 109, at 332 & n.10.

¹⁶³ U.S. CONST. art. IV, § 4; see Tribe, *Inalienable Rights*, *supra* note 109, at 332.

¹⁶⁴ Bandes, *supra* note 148, at 2282; Currie, *supra* note 148, at 874-75; Edelman, *supra* note 67, at 25; Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1326 (1984); Sunstein, *supra* note 152, at 889.

¹⁶⁵ U.S. CONST. amend. XIV, § 1.

¹⁶⁶ Bandes, *supra* note 148, at 2276-77; Michelman, *supra* note 147, at 16-17; Tribe, *Inalienable Rights*, *supra* note 109, at 332.

¹⁶⁷ U.S. CONST. amend. I.

¹⁶⁸ Bandes, *supra* note 148, at 2282 & n.51 (citing *Schneider v. State*, 308 U.S. 147 (1939)).

articulated as a prohibition—protecting the sanctity of the home and individual personal affairs against governmental intrusions.¹⁶⁹ But, enforcement of this prohibition is also contingent upon government fulfilling the affirmative duty, owed to the citizenry, to obtain a warrant based on probable cause.¹⁷⁰ Thus, those constitutional provisions cast in negative terminology may exist in dialectic union with complementary positive rights and burdens.¹⁷¹

The orthodox view rejecting the possibility of positive constitutional rights is, by its very prevalence and longevity, due considerable deference. Yet, dogmatism and immovability on the subject are also clearly inappropriate. The plain words of the Constitution as well as the interpretation of those words by legal scholars seem to warrant the unorthodox but supportable conclusion that positive rights are neither alien nor antithetical to American constitutional law.

B. *The Substantive Theoretical Foundations for the Right to Education*

1. *The Due Process Clause.*—The Due Process Clause of the Fourteenth Amendment prohibits the states from depriving any person of “life, liberty, or property, without due process of law.”¹⁷² In attempting to give content to this sweeping injunction, the Supreme Court has understood due process as giving rise to conceptually distinct doctrines of procedural due process and substantive due process.¹⁷³ The latter has been further subdivided into two separate modes of analysis for finding substantive constitutional rights.¹⁷⁴ One mode is that of incorporation,

¹⁶⁹ U.S. CONST. amend. IV.

¹⁷⁰ Bandes, *supra* note 148, at 2282.

¹⁷¹ *See id.* at 2282-83.

¹⁷² U.S. CONST. amend. XIV, § 1. The Fifth Amendment places the same prohibition on the federal government. *Id.* at amend. V.

¹⁷³ 2 RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 14.6 (1986) [hereinafter 2 ROTUNDA, SUBSTANCE AND PROCEDURE]; *see* JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 14-21 (1980).

¹⁷⁴ Some commentators argue that a substantive property right to education arises by operation of procedural due process pursuant to the Fourteenth Amendment. *See, e.g.*, Allen W. Hubsch, *Education and Self-Government: The Right to Education Under State Constitutional Law*, 18 J.L. & EDUC. 93, 109-12 (1989); Liebman, *supra* note 109, at 406-13. Professor Liebman poses it this way:

Can it be argued, then, that students have a property interest, say, in receiving a diploma and that among the procedures that are due before the state may withdraw that benefit are instruction and remedial services sufficient to enable students applying reasonable effort to pass the tests on which diplomas are in part predicated?

Liebman, *supra* note 109, at 406; *see* Hubsch, *supra*, at 110.

Reduced to its underlying logic, Professor Liebman's premise is that a substantive state-provided right to education may give rise to federal procedural due process protections against the abrogation of the state-provided right; the purported result is that the state-provided right is thereby metamorphosed into a positive federal constitutional right to education. However, that procedural due process may be required before a state can curtail or terminate a state-created right does not

meaning that most of the Bill of Rights are applicable to the states through the Fourteenth Amendment's Due Process Clause.¹⁷⁵ My focus here is on the other mode of substantive due process analysis, which locates fundamental constitutional rights in the promise of "liberty" in the Due Process Clause taken by itself.¹⁷⁶ It is substantive due process in this latter sense which legal scholars repeatedly raise as a possible home for a positive right to public elementary and secondary education.¹⁷⁷

Substantive due process as an independent source of constitutional rights has a long and tumultuous history. In its first incarnation, during the so-called *Lochner* era spanning 1897 to 1937,¹⁷⁸ substantive due process theory focused primarily on protecting the liberty to contract. As such, the theory did duty as a justification for striking down state and federal legislation thought to intrude upon a laissez-faire paradigm of economic relations.¹⁷⁹

In keeping with this solicitude for the private sector, the Court also decided two cases during the *Lochner* era which articulated a substantive due process liberty right to be free of governmental impediments in the acquisition of education from private providers. In *Meyer v. Nebraska*, it will be recalled, the Court found unconstitutional, as applied in a private tutoring arrangement, a Nebraska statute that forbade the teaching of foreign languages to children who had not completed the eighth grade.¹⁸⁰ In *Pierce v. Society of Sisters*, the Court invalidated an Oregon statute that required school-age children to attend public rather than private schools.¹⁸¹ Although, in 1937, the Court disavowed substantive due process in relation to economic rights,¹⁸² *Meyer* and *Pierce* have survived

alter the fact that the right is state-created and state-defined. *Bishop v. Wood*, 426 U.S. 341 (1976); 2 ROTUNDA, SUBSTANCE AND PROCEDURE, *supra* note 173, § 17.5; Hubsch, *supra*, at 109. Were Professor Liebman's thesis accepted, a procedural due process right to education under the Constitution would seem to take on the character of a second-class right which, because of its state-defined content, would lose much of its ameliorative pedagogic effect. See *infra* notes 478-85 and accompanying text.

¹⁷⁵ 2 ROTUNDA, SUBSTANCE AND PROCEDURE, *supra* note 173, § 15.6.

¹⁷⁶ *Id.* § 15.7; Daniel D. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215, 218 n.22 (1987); Richard S. Myers, *The End of Substantive Due Process?*, 45 WASH. & LEE L. REV. 557, 557 n.1 (1988).

¹⁷⁷ Edelman, *supra* note 67, at 33-35; Gard, *supra* note 67, at 13-14, 21; Philip B. Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Defined*, 35 U. CHI. L. REV. 583, 591 (1968); Lupu, *supra* note 87, at 1000-01, 1045; see also Tribe, *Inalienable Rights*, *supra* note 109, at 334.

¹⁷⁸ TRIBE, *supra* note 83, § 8-2.

¹⁷⁹ *Id.* §§ 8-2 to 8-4. *Lochner v. New York*, 198 U.S. 45 (1904), for which the era was named, typifies the Court's substantive due process theory at the time. In *Lochner*, the Court struck down a state statute which prohibited bakers from working more than sixty hours per week. The Court's rationale was that the law interfered with the liberty of bakers and their employers to contract under the Fourteenth Amendment's Due Process Clause.

¹⁸⁰ 262 U.S. 390 (1923); see *supra* notes 80-89 and accompanying text (discussing the *Meyer* case).

¹⁸¹ 268 U.S. 510 (1925).

¹⁸² TRIBE, *supra* note 83, § 8-2.

intact as has idea of a negative liberty right to acquire knowledge, free of governmental obstruction.¹⁸³

The Court's moratorium on substantive due process continued for almost thirty years following the close of the *Lochner* era.¹⁸⁴ Then, in 1965, the Court decided *Griswold v. Connecticut*,¹⁸⁵ holding constitutionally impermissible a state prohibition on the use or abetment of the use of contraceptives by married couples.¹⁸⁶ Taking Justice Douglas' opinion for the Court at face value, the marital privacy right announced in *Griswold* was located in "penumbras" emanating from various constitutional amendments.¹⁸⁷ However, Justices White and Harlan, in concurring

¹⁸³ *Id.* § 15-6.

¹⁸⁴ Conkle, *supra* note 176, at 215.

¹⁸⁵ 381 U.S. 479 (1965).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 481-86.

A central thesis undergirding Part III of this article is that in order to give real meaning to certain express provisions of the Constitution (as well as to the unenumerated right to vote), these provisions must be understood as giving rise to an implied right to education. Another possible basis for this thesis is Justice Douglas' penumbras approach articulated in *Griswold*. In his opinion for the Court, Justice Douglas found a right to marital privacy in the zone of privacy located in penumbras created by emanations from the First, Third, Fourth, Fifth, and Ninth Amendments. *Id.* at 481-86. Likewise, it is also plausible to argue that a right to education may be drawn from a zone protective of an educated and knowledgeable citizenry, which zone is created by penumbras emanating from the constitutional sources described in Part III. See Stephen E. Gottlieb, *Compelling Government Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 972 (1988).

However, the penumbral approach is problematic for two reasons which, taken together, counsel against its use in support of a right to education. First, penumbras, as conceived in *Griswold*, have been in disfavor with the Supreme Court for some time now—the Justices preferring to locate personal privacy rights elsewhere in the Constitution. *Whalen v. Roe*, 429 U.S. 589, 598 n.23 (1977) (privacy rights arise more properly from the due process concept of liberty); see *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2936-37 (1990) (pregnant minor has a protected liberty interest under the Due Process Clause in deciding whether or not to bear a child); *Thornburgh v. American College of Obstetrics & Gynecology*, 476 U.S. 747, 772 (1986); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973). Second, the penumbral approach is commonly thought of in relation to privacy rights exclusively. See Elizabeth G. Patterson, *Property Rights in the Balance—The Burger Court and Constitutional Property*, 43 MD. L. REV. 518, 535-39 (1984); Wendy M. Watts, *The Parent-Child Privileges: Hardly a New or Revolutionary Concept*, 28 WM. & MARY L. REV. 583, 602 (1987); James B. Stoneking, Note, *Penumbras and Privacy: A Study of the Uses of Fictions in Constitutional Decision-Making*, 87 W. VA. L. REV. 859, 870-72 (1985). But see Gottlieb, *supra*, at 972 (invoking penumbras in support of a right to education). For the time being, then, these drawbacks curb the temptation to employ *Griswold*-type penumbras in support of a constitutional right to education.

It may be objected that insofar as Part III of this Article proposes a right to education because of a nexus between education and an express or already acknowledged constitutional right, the proposal comes perilously close to Justice Douglas' penumbral reasoning. However, it bears emphasizing that a nexus relationship has been used repeatedly by the Supreme Court to give rise to various unenumerated constitutional rights without invoking the *Griswold* jargon of penumbras, emanations, and zones. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (under the First Amendment there is a right to have criminal trials open to the public); *Taylor v. Kentucky*, 436 U.S. 478 (1978) (a criminal defendant has the right to a presumption of innocence under the Sixth Amendment); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (the Constitution generally supports the

opinions, lodged the right in the Due Process Clause,¹⁸⁸ and it is their analysis which, with the benefit of hindsight, has become the "prevailing doctrine of *Griswold*."¹⁸⁹ Subsequently, in *Eisenstadt v. Baird*,¹⁹⁰ the Court, this time ostensibly relying on equal protection principles, invalidated a statute prohibiting distribution of contraceptives to unmarried persons and freed the privacy right from notions of marriage and family.¹⁹¹ Finally, in 1973, the Court frankly reconstructed substantive due process in *Roe v. Wade*¹⁹² as the analytical basis for another privacy right, the right to an abortion.¹⁹³

Conservatively viewed, *Griswold* and its progeny go no further than to establish a constitutional right to privacy which, with *Roe*, became engrafted onto the Due Process Clause. However, Professor Laurence Tribe proposes that the very logic of privacy implicates the broader concept of personhood. Professor Tribe reasons that human existence necessarily has a social dimension as well as an inward-turning one. The right to privacy, considered in relation to this social aspect of the human experience, thus may be understood to be subsumed within the more comprehensive right of personhood "to project one identity rather than another upon the public world."¹⁹⁴ Building upon this premise, Professor Tribe advances the thesis that the freedom or privacy of the entire self, both inward- and outward-turning, cannot be ensured exclusively by negative constitutional rights. "Ultimately, the affirmative duties of government

right to travel interstate); *Reynolds v. Sims*, 377 U.S. 533 (1964) (the Equal Protection Clause of the Fourteenth Amendment requires that a "one person, one vote" rule must govern elections for state legislators); *NAACP v. Alabama*, 357 U.S. 449 (1958) (there is a First Amendment right of association); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (there is a First Amendment right of belief); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (the Fourteenth Amendment's Due Process Clause gives rise to parents' right to send their children to private school). As Chief Justice Burger approvingly described the approach, "fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined." *Richmond Newspapers*, 448 U.S. at 580.

¹⁸⁸ *Griswold*, 381 U.S. at 502 (White, J., concurring); *id.* at 499 (Harlan, J., concurring). Justice Goldberg's concurrence, which was joined by Chief Justice Warren and Justice Brennan, also conceived the marital privacy right as flowing from the liberty guaranteed by the Due Process Clause. *Id.* at 486.

¹⁸⁹ Lupu, *supra* note 87, at 994; see also TRIBE, *supra* note 83, § 11-3 (noting that by 1973, most of the Justices had accepted *Griswold* as a substantive due process decision); Conkle, *supra* note 176, at 220-21 (interpreting the *Griswold* decision as reaffirming the validity of the substantive due process rights announced in *Meyer* and *Pierce*).

¹⁹⁰ 405 U.S. 438 (1972).

¹⁹¹ *Id.*

¹⁹² 410 U.S. 113 (1973).

¹⁹³ *Id.* The right to an abortion elucidated in *Roe v. Wade* is not unqualified; restrictions on the exercise of the right increase with each succeeding trimester of pregnancy. *But cf.* *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (a majority of the Court upholding Missouri's ban on the use of public resources for the performance of an abortion not essential to save the mother's life, and upholding the requirement that before a physician conducts an abortion on a fetus believed to be at least twenty weeks old, he must determine whether the fetus is viable).

¹⁹⁴ TRIBE, *supra* note 83, § 15, at 1303.

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."¹⁹⁵

In contemplating Professor Tribe's exposition of the psychological and sociological attributes of self, it is impossible to avoid the conclusion that intellectual development is a major component of human identity. Indeed, the Supreme Court has alluded in more than one opinion to the value of education in forming the civilized individual.¹⁹⁶ But, if this is so, then cannot *Meyer* and *Pierce*, read in light of cases such as *Roe v. Wade*, be understood as only a partial and insufficient step with respect to the status of education as an element of the personhood right? Education, after all, does not drop from heaven and not everyone can afford the cost of private schooling. Thus, if *Meyer* and *Pierce* say that government cannot thwart the acquisition of knowledge and if public schools are the main avenue by which the populace acquires knowledge,¹⁹⁷ then does it not follow that a right to personhood should also require government to provide those schools? Otherwise, a good share of the populace will most certainly be thwarted in its pursuit of knowledge.¹⁹⁸

It is not necessary, however, to agree with the transmutation of the right to privacy into a right to personhood in order to find a positive right to education in the Due Process Clause. There are several analytical constructs for finding fundamental liberty rights in the clause which are not necessarily tied to the privacy right. Constitutional theorists cluster into several different camps, each espousing a different approach

¹⁹⁵ *Id.* § 15-2.

¹⁹⁶ The Court has observed that an essential purpose of the public schools is to educate youth to "the shared values of a civilized social order." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986). "By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation." *Plyler v. Doe*, 457 U.S. 202, 223 (1982). "[E]ducation prepares individuals to be self-reliant and self-sufficient participants in society." *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972). Education "is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

¹⁹⁷ Out of a total of 45,433,000 children enrolled in elementary and secondary schools in the fall of 1988, there were 5,241,000 students in private schools and 40,192,000 students in public schools. It is estimated that of the 45,963,000 children enrolled in elementary and secondary schools in the fall of 1989, there were 5,355,000 students in private schools and 40,608,000 in public schools. It is also estimated that of the 46,192,000 children enrolled in elementary and secondary schools in the fall of 1990, there were 5,391,000 students in private schools and 40,801,000 students in public schools. Telephone interview with Fred Beamer, Statistician with U.S. Dep't of Education, Office of Education, Research, and Improvement (July 11, 1991).

¹⁹⁸ See *supra* notes 164-71 and accompanying text (discussing more fully the dialectical relationship between negative and positive rights); see also Tribe, *Inalienable Rights*, *supra* note 109, at 333-34 (contending that government-provided education may be an entitlement under the Constitution because without that education many people will be rendered unable to exercise other constitutional rights).

to such fundamental rights determinations.¹⁹⁹ The Justices of the Supreme Court are no less badly divided, as evidenced by the divergent opinions in *Michael H. v. Gerald D.*²⁰⁰ and the obtuse sidestepping (except for Justice Scalia's concurring opinion) of the issue in *Cruzan v. Director, Missouri Department of Health*.²⁰¹ While an exegesis of the views of constitutional theorists might well yield analytical constructs conducive to finding an affirmative right to education in the Due Process Clause,²⁰² it would perhaps be more useful to look to the theories put forward by the Justices in *Michael H.*, because the opinions by Justices Scalia, O'Connor, and Brennan contain the most recent and self-consciously comprehensive judicial exposition of the criteria for finding due process liberty rights in general. Although the Justices' methodological models of substantive due process rights selection are at variance with each other, each model can be legitimately construed to support recognition of an affirmative due process right to public elementary and secondary education.²⁰³ From a practical standpoint, this means that if a majority of the Court does ultimately settle upon one of the *Michael H.*

¹⁹⁹ The interpretivist school of thought refuses to acknowledge the discovery of any rights not literally set forth in the text of the Constitution or the Bill of Rights. *E.g.*, ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 143-60, 251-59 (1990). Value-oriented theorists support judicial recognition of unenumerated constitutional rights insofar as necessary to further social good that comports with the history and principles of the Constitution and with a broader social consensus. *E.g.*, MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY* 91-145 (1982); Paul Brest, *The Misconceived Quest for the Original Understanding, in INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT* 227-62 (Jack N. Rakove ed., 1990). A third group of scholars, those using "process oriented" interpretation, focus on the Constitution as a device for protecting the openness of the political processes. *E.g.*, Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 6-12 (1976); Owen M. Fiss, *Groups and the Equal Protection Clause, in EQUALITY AND PREFERENTIAL TREATMENT* 85, 130 (Marshall Cohen et al. eds., 1977).

²⁰⁰ 109 S. Ct. 2333 (1989).

²⁰¹ 110 S. Ct. 2841 (1990). *Cruzan* considered whether a person in an irreversible vegetative state has a fundamental right under the Due Process Clause to obtain termination of life-sustaining, artificial hydration and nutrition. The majority assumed, without deciding, that a competent person would have this right based on prior case law involving the right to refuse unwanted medical treatment. *Id.* at 2852. Without any meaningful exploration of the fundamental rights analysis upon which it was relying, the majority then concluded that the incompetent's liberty interest in dying could not attain the same status and was properly subject to the state's countervailing interest in preserving life, as manifested in the state's requirement that the incompetent's desire to die must be proven by clear and convincing evidence before life-sustaining treatment will be terminated. *Id.* Only Justice Scalia offered a forthright analysis, drawing upon his plurality opinion in *Michael H.*, as to why he would find the incompetent without a right to die under the Due Process Clause. *Id.* at 2859-63.

²⁰² For example, Professor Tribe suggests that an affirmative right to basic education should be found in the Constitution because it is one of those systematic relational rights concerned with capacities that persons are unable to exercise without governmental assistance. Tribe, *Inalienable Rights*, *supra* note 109, at 333-34.

²⁰³ The concurring opinion of Justice Stevens and the dissenting opinion of Justice White will not be examined since neither focused on the methodology to be used in determining substantive due

constructs, there will be in place an analytical basis for also finding a positive liberty right to education.

The plurality opinion in *Michael H.* was written by Justice Scalia and joined by Chief Justice Rehnquist and, in all but footnote six, by Justices O'Connor and Kennedy as well. As framed by Justice Scalia, the issue was whether the unwed father, Michael H., had a constitutionally protected fundamental liberty interest in parental rights with respect to Victoria, where blood tests showed a 98.07 percent probability that she was his natural daughter; where the mother was married to another man and was cohabiting with the latter at the time of Victoria's conception and birth; and where the married couple wished to embrace the child as their own.²⁰⁴ Justice Scalia refused to find such a fundamental due process right in the apparent biological father. Justice Scalia relied upon an analysis, set forth in the now famous footnote six, which makes decisive whether the liberty interest at stake is "rooted in history and tradition" of this society,²⁰⁵ 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."²⁰⁶

Justice Scalia stressed that in order for an interest to be recognized as a substantive due process right, the traditional protection accorded it "need not take the form of an explicit constitutional provision or statutory guarantee,"²⁰⁷ i.e., the interest need not previously have existed as a formal right. Rather, there must be some evidence that the interest has been an "important traditional value."²⁰⁸ It is instructive to attend to those repositories of law and legal thought that Justice Scalia selected as appropriate sources for locating the most specific level of tradition protecting or denying protection to Michael H.'s asserted right: longstanding American common law developed by state courts and early English common law, as well as the writings of prominent figures in the history of legal scholarship, such as Blackstone, were thought to be dispositive.²⁰⁹ However, in an evident effort to fortify his analysis, Justice Scalia also canvassed more modern state statutes and state and federal judicial decisions directly addressing the most specific level of tradition protecting or repudiating the particular right in question.²¹⁰ These, then, are exemplary of the evidences to which, in Justice Scalia's view, the judiciary should turn in the search for traditional values.

Justice Scalia's reasoning, particularly insofar as it requires reliance

process rights generally. *Michael H.*, 109 S. Ct. at 2347-49 (Stevens, J., concurring); *Id.* at 2360-63 (White, J., dissenting).

²⁰⁴ *Id.* at 2342 & n.4, 2343-44.

²⁰⁵ *Id.* at 2342, 2344 n.6.

²⁰⁶ *Id.* at 2344 n.6.

²⁰⁷ *Id.* at 2341 n.2.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 2342-43.

²¹⁰ *Id.* at 2343.

on "the most specific level" of relevant tradition, has been subject to scathing criticism. How, the critics ask, can the most specific levels of relevant tradition be defined?²¹¹ And, isn't this formulation really an invitation to judges to use their own subjective value systems, cloaked in a seeming mantle of objectivity, in determining substantive due process rights?²¹² The difficulties in defining the most specific levels of relevant tradition are formidable. Nevertheless, this author will resist the temptation to join in the assault on footnote six and assume, for purposes of argument, that the footnote six approach is a workable and defensible one.

Justice Scalia's methodology can be usefully employed here because there is overwhelming evidence of American history and traditions which are specifically protective of children's interest in education. Michael H., according to Justice Scalia, was unable to point to history and traditions specifically protecting the interest of an unwed father so circumstanced as Michael H. in a paternal relationship with a natural daughter like Victoria.²¹³ In contrast, school-age children in the United States can point to an enduring and pervasive historical tradition of receiving state-provided elementary and secondary education.²¹⁴ Indeed, those children for whom private schooling is not an option are *compelled* to attend public school.²¹⁵ These historical traditions "specifically relate to the right"²¹⁶ to education of persons in the particular circumstance of being school-age children.

The historical tradition of children receiving, and of government providing, public elementary and secondary education has roots in the roles played by both the state and federal governments. State governments began to provide free public education long before other major Western societies.²¹⁷ Public primary schools run by the states were in place before the turn of the century.²¹⁸ Public high schools came into their own in the last quarter of the nineteenth century, and from 1890 to 1930, enrollments in public high schools doubled each decade.²¹⁹ All states currently provide free public elementary and secondary schools.²²⁰ By 1918, every state had enacted compulsory schooling laws, and most

²¹¹ *E.g.*, Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1090-98 (1990); *The Supreme Court—Leading Cases*, 103 HARV. L. REV. 137, 183-87 (1989) [hereinafter *Leading Cases*].

²¹² Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 44, 94-95 (1989); Tribe & Dorf, *supra* note 211, at 1059, 1086-87, 1089; *Leading Cases*, *supra* note 211, at 183, 185.

²¹³ *Michael H.*, 109 S. Ct. at 2344 n.6.

²¹⁴ See *supra* note 5 and accompanying text; see *infra* notes 217-39 and accompanying text.

²¹⁵ See *supra* note 6 and accompanying text; see *infra* note 221 and accompanying text.

²¹⁶ *Michael H.*, 109 S. Ct. at 2344 n.6.

²¹⁷ KATZNELSON & WEIR, *supra* note 5, at 28.

²¹⁸ *Id.*; see also CREMIN, *supra* note 5, at 544.

²¹⁹ CREMIN, *supra* note 5, at 546; see also KATZNELSON & WEIR, *supra* note 5, at 225 n.1.

²²⁰ See *supra* notes 6-7 and accompanying text.

states began to seriously enforce such laws during the 1920s and 1930s.²²¹ The constitutions of all states contain provisions supportive of state-provided education.²²² At least thirty-eight states had constitutions containing such provisions during the nineteenth century.²²³ Most of the current state constitutions go much further and affirmatively obligate state governments to provide public education, while no less than twenty-nine state constitutions boasted such affirmative obligations before 1900.²²⁴ The history and tradition resulting from the practices and laws

²²¹ CREMIN, *supra* note 5, at 644. However, during the early twentieth century "universal" public education frequently excluded children from minority groups. KATZNELSON & WEIR, *supra* note 5, at 28, 73-74; KOTIN & AIKMAN, *supra* note 6, at 34. Moreover, in reaction to *Brown v. Board of Educ.*, 347 U.S. 483 (1954), several southern states repealed their compulsory attendance or compulsory education statutes in order to avoid the effect of the *Brown* Court's ruling requiring racially integrated public schools. Within the ensuing decade after *Brown*, every southern state except Mississippi re-enacted compulsory attendance statutes, albeit some in a watered down form. KOTIN & AIKMAN, *supra* note 6, at 34. Mississippi reenacted a compulsory school attendance law in 1987. MISS. CODE ANN. § 37-13-91 (1990).

²²² ALA. CONST. art. XIV, § 256, amended by ALA. CONST. amend. no. 111; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 5; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. IX, § 3; KAN. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, pt. 1, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. pt. 2, ch. 5, § 2; MICH. CONST. art. VIII, § 2; MINN. CONST. art. XIII, § 1; MISS. CONST. art. VIII, § 201; MO. CONST. art. 9, § 1(a); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, §§ 1-2; N.H. CONST. pt. 2, art. 83; N.J. CONST. art. VIII, § 4; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, §§ 1-2; N.D. CONST. art. VIII, § 1; OHIO CONST. art. I, § 7, art. VI, §§ 2-3; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. ch. II, § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 2; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1.

²²³ DAVID TYACK ET AL., *LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785-1954*, at 55-59 (1987) [hereinafter TYACK, *SHAPING EDUCATION*].

²²⁴ For state constitutions affirmatively obligating state governments to provide public education at present, see, for example: ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 5; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; KAN. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, pt. 1, § 1; MD. CONST. art. VIII, § 1; MICH. CONST. art. VIII, § 2; MINN. CONST. art. XIII, § 1; MISS. CONST. art. VIII, § 201; MO. CONST. art. 9, § 1(a); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, §§ 1-2; N.J. CONST. art. VIII, § 4; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, §§ 1-2; N.D. CONST. art. VIII, § 1; OHIO CONST. art. I, § 7, art. VI, §§ 2-3; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 2; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1.

For state constitutions affirmatively obligating state governments to provide public education before 1900, see, for example: ARK. CONST. art. XIV, § 1 (1874); CAL. CONST. art. IX, § 5 (1879); CAL. CONST. art. IX, § 3 (1849); COLO. CONST. art. IX, § 2 (1876); DEL. CONST. art. X, § 1 (1897); FLA. CONST. art. XII, § 1 (1885); FLA. CONST. art. IX, § 2 (1868); GA. CONST. art. VIII, § 1

of the states for over a century have established that the "principle of free, mass public schooling . . . [has been] accepted as a given by virtually all of the social classes and groups in the United States."²²⁵

But the states' role is only half the story. The federal government and its founders have contributed significantly to the tradition of public education from the beginning of the nation until the present. As discussed in Part III.C.3 of this Article, George Washington, Thomas Jefferson, and other political leaders of the early republic highly valued mass education. Jefferson, in particular, favored a central role for the federal government in ensuring that free education would be made available to the nation's children.²²⁶ Indeed, the federal government has, since its earliest years, followed a policy of allocating to the states land grants for the express purpose of establishing public schooling.²²⁷ After the Civil War, Congress also conditioned re-entry of the Confederate states into the Union upon their willingness to guarantee public education to all of the children within their respective borders.²²⁸

In more modern times, the federal government's continued involvement is manifested in an extensive matrix of legislation governing and aiding various aspects of public elementary and secondary education.²²⁹ The Supreme Court, too, has often extolled the virtues of public education,²³⁰ recognizing "the public schools as a most vital civic institution

(1877); IDAHO CONST. art. IX, § 1 (1889); ILL. CONST. art. VIII, § 1 (1870); IND. CONST. art. VIII, § 1 (1851); KAN. CONST. art. VI, § 2 (1859); KY. CONST. § 183 (1891); LA. CONST. art. 248 (1898); LA. CONST. art. 224 (1879); LA. CONST. art. 135 (1868); LA. CONST. tit. XI, art. 141 (1864); LA. CONST. tit. VIII, art. 136 (1852); LA. CONST. tit. VII, art. 134 (1845); ME. CONST. art. VIII, § 1 (1819); MD. CONST. art. VIII, § 1 (1867); MO. CONST. art. XI, § 1 (1875); MO. CONST. art. 9, § 1 (1865); MONT. CONST. art. X, § 1 (1889); N.J. CONST. of 1844, art. IV, § 7, para. 6 (amended 1875); N.Y. CONST. art. 9, § 1 (1897); N.C. CONST. art. IX, § 2 (1868); N.D. CONST. art. VIII, § 147 (1889); OHIO CONST. art. VI, § 2 (1851); OR. CONST. art. VIII, § 3 (1857); PA. CONST. art. X, § 1 (1873); S.D. CONST. art. VIII, § 1 (1889); TEX. CONST. art. VII, § 1 (1876); WASH. CONST. art. IX, § 2 (1889); W. VA. CONST. art. XII, § 1 (1872); WIS. CONST. art. X, § 3 (1848); WYO. CONST. art. VII, § 1 (1889).

²²⁵ KATZNELSON & WEIR, *supra* note 5, at 29. "Access to a common school system, . . . became part of what Americans expected as a minimum right of citizenship." *Id.* at 75; *see also* Preovolos, *supra* note 68, at 111 (arguing that there is a common understanding that education is a national entitlement).

²²⁶ *See infra* notes 443-50 and accompanying text.

²²⁷ *See infra* notes 448-50 and accompanying text.

²²⁸ *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 220 & n.9 (1948) (Frankfurter, J., concurring).

²²⁹ *See, e.g.*, Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1485 (1990); Elementary and Secondary School Improvement Hawkins-Stafford Amendments of 1988, 20 U.S.C. §§ 2701-2731 (1990); Women's Educational Equity Act, 20 U.S.C. §§ 3041-3047 (1990); School Dropout Demonstration Assistance Act of 1988, 20 U.S.C. §§ 3241-3247 (1990); Bilingual Education Act, 20 U.S.C. §§ 3281-3341 (1990).

²³⁰ *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 222 n.20 (1982) ("Moreover, the significance of education to our society is not limited to its political and cultural fruits. The public schools are an important socializing institution, imparting those shared values through which social order and stability are maintained."); *Ambach v. Norwick*, 441 U.S. 68, 76 (1979) (Education is the primary vehicle for

for the preservation of a democratic system of government²³¹ that is intrinsic to American national identity and culture. Nor has the Court limited itself to the role of a sidelines cheerleader. It has frequently and profoundly intervened to implement such far-reaching reforms as racial desegregation of the public schools,²³² the delineation of the extent of students' free speech rights²³³ and freedom of belief while in the school-house,²³⁴ protection of public schools' discretion to include evolution in the science curriculum,²³⁵ and protection of the right of school-age illegal alien children to free public schooling.²³⁶

Finally, the executive branch of the federal government has periodically exerted itself on behalf of the nation's schoolchildren as well. Presidents Lyndon Johnson and Dwight Eisenhower took the initiative in prompting Congress to provide extensive financial assistance to education.²³⁷ President Ronald Reagan's Secretary of Education appointed a

transmitting "the values on which our society rests."); *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) ("Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship."); *Illinois ex rel. McCollum*, 333 U.S. at 231 (public schools are "the most powerful agency for promoting cohesion among a heterogeneous democratic people . . . [They are] at once the symbol of our democracy and the most persuasive means for promoting our common destiny.").

231 *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring).

232 *See, e.g.*, *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979) (Dayton II); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977) (Dayton I); *Milliken v. Bradley*, 433 U.S. 267 (1977) (Milliken II); *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973); *Wright v. Council of Emporia*, 407 U.S. 451 (1972); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Green v. County Sch. Bd.*, 391 U.S. 430 (1968); *Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964); *Goss v. Board of Educ.*, 373 U.S. 683 (1963); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Brown v. Board of Educ.*, 349 U.S. 294 (1955) (Brown II); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (Brown I); *but see, e.g.*, *Board of Educ. v. Dowell*, 111 S. Ct. 630 (1991) (holding that desegregation decrees are not intended to operate in perpetuity and that determinative factors in deciding the legality of dissolving such a decree are whether there has been good faith compliance and whether vestiges of past de jure segregation have been eliminated to the extent practicable); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976) (holding that the school board need not continue to reassign students on the basis of race to compensate for demographic changes); *Milliken v. Bradley*, 418 U.S. 717 (1974) (Milliken I) (holding that a federal court may not impose a multidistrict, area-wide remedy for single-district de jure segregation violations where there is no evidence that the other included school districts have failed to operate unitary school systems or effected segregation within other districts, and where there is no evidence that school district boundaries were created to foster racial segregation).

233 *See, e.g.*, *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969).

234 *E.g.*, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

235 *Edwards v. Aguillard*, 482 U.S. 578 (1987).

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

237 As John Brademas notes, Congress, at the behest of the President, also has pushed education aid to center stage to meet periods of national urgency. Thus, President Lyndon Johnson made federal assistance to elementary and secondary schools a weapon in his War on Poverty, just as

National Commission on Excellence in Education and charged it with studying and reporting on the condition of the public schools. The resulting report catapulted the education crisis into popular consciousness and inspired reform efforts in several states.²³⁸ President Bush also has assumed a leadership role by convening an education "summit" meeting with the nation's governors to set national goals for improving the public schools.²³⁹

It is improbable that in expounding the footnote six methodology for finding substantive due process liberty rights, Justice Scalia or Chief Justice Rehnquist ever contemplated it as a basis for finding an affirmative right to public elementary and secondary education.²⁴⁰ Yet, unlike the hapless unwed father in *Michael H.*, school-age children are blessed with a rich legacy of historical tradition, continued to this day, specifically protective of an entitlement to government-provided public elementary and secondary education. This is true whether the source of such historical tradition is sought in state laws and practices of a bygone era, such as were thought decisive in the *Michael H.* plurality opinion, or in modern state law and practice, in the views of the Founding Fathers, or in federal law and practice.

Justice O'Connor's concurring opinion in *Michael H.*, with which Justice Kennedy joined, did not dispute the proposition that relevant historical traditions protecting or denying protection to a claimed right are valid criteria for determining whether to recognize a right as fundamental under substantive due process doctrine.²⁴¹ Rather, Justice O'Connor took issue with the footnote six methodology insofar as it makes determinative the most specific level at which a relevant tradition protecting or repudiating the asserted right can be identified. She reasoned that neither precedent nor the "unanticipated" future warrants the unyielding narrowness of the footnote six approach.²⁴² Although Justice O'Connor's opinion is vague as to the manner in which relevant histori-

President Dwight Eisenhower had before him made federal assistance to education a key component of the American response to the Soviet Union's launching of Sputnik in 1957. BRADEMAS, *supra* note 30, at 27, 61, 76.

²³⁸ See *supra* text accompanying notes 31-39.

²³⁹ See *supra* text accompanying notes 44-47.

²⁴⁰ In *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998 (1989), Chief Justice Rehnquist's majority opinion held that under the Fourteenth Amendment's Due Process Clause a state has no affirmative duty to protect an individual against violence at the hands of another private actor. According to the Court, the Due Process Clause protects the individual only from abusive or oppressive conduct by government. Of course, the right asserted in *DeShaney* is distinguishable from a positive right to have government provide education; the latter does not require state protection against the aggression of a private actor. In dicta, however, the Court more broadly observed that "our cases have recognized that the 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." *Id.* at 1003.

²⁴¹ *Michael H. v. Gerald D.*, 109 S. Ct. 2333, 2346-47 (1989) (O'Connor, J., concurring in part).

²⁴² *Id.* at 2346-47.

cal traditions are to be utilized, plainly she intended a more flexible standard than is set forth in footnote six.²⁴³ But, surely, if the claimed right of school-age children to public elementary and secondary education can meet Justice Scalia's more exacting "specific level" test, then the right can also meet Justice O'Connor's more liberal conception.

The dissenting opinion of Justice Brennan, joined by Justices Marshall and Blackmun, also spurned footnote six.²⁴⁴ Like Justices Scalia and O'Connor, Justice Brennan did not dispute that history and tradition should play a role in the ascertainment of fundamental substantive due process rights.²⁴⁵ He parted company with footnote six, however, in relation to Justice Scalia's definition of tradition and in relation to the latter's insistence that only *historical* tradition is pertinent to the inquiry.

In essence, Justice Brennan's conception of tradition differed from that of Justice Scalia in four ways. First, Justice Brennan posited that the tradition which matters for substantive due process purposes is not the tradition *protecting* a claimed right, but, instead, the tradition manifesting the *importance* which society attaches to the claimed right.²⁴⁶ Second, Justice Brennan asserted that the relevant tradition need not be the most specific level of tradition protecting the claimed right. Rather, liberty rights may consist of "more generalized interests" that have received protection, such as parenthood or marriage.²⁴⁷ Third, Justice Brennan would restrict the use of tradition in locating substantive due process rights to those situations where the rationale for a traditional rule has not changed so as to make the rule "out of place."²⁴⁸ Fourth, insofar as the Supreme Court has already considered related liberty interests, Justice Brennan would also look for relevant tradition in the Court's precedents.²⁴⁹ Beyond these four modifications in the definition and ap-

²⁴³ Justice O'Connor stated that no "single mode of historical analysis" is proper. *Id.* at 2347. She reasoned that a "single mode of historical analysis"—and especially that set forth in footnote six—would be so constraining as to preclude future recognition of "unanticipated" rights which are as worthy of fundamental status as those constitutional rights which came into being before *Michael H.* and which might well not pass muster under footnote six. *Id.* at 2346-47.

²⁴⁴ *Id.* at 2349-55 (Brennan, J., dissenting).

²⁴⁵ Justice Brennan stated that with respect to the recognition of substantive due process rights, "[i]t is not that tradition has been irrelevant to our prior decisions." Indeed, such recognition has been "partly the result of the historical and traditional importance of these interests in our society." *Id.* at 2350 (Brennan, J., dissenting).

²⁴⁶ Justice Brennan wrote:

Moreover, by describing the decisive question as whether Michael and Victoria's interest is one that has been "traditionally *protected* by our society," *ante.* at 2341, (emphasis added), rather than one that society traditionally has thought important (with or without protecting it), and by suggesting that our sole function is to "*discern* the society's views," *ante.* at 2345, n.6, (emphasis added), the plurality acts as if the only purpose of the Due Process Clause is to confirm the importance of interests already protected by a majority of the States.

Id. at 2351 (Brennan, J., dissenting).

²⁴⁷ *Id.* at 2350 (Brennan, J., dissenting).

²⁴⁸ *Id.* at 2351 (Brennan, J., dissenting).

²⁴⁹ *Id.* at 2350-52 (Brennan, J., dissenting).

plication of tradition as an analytical tool in finding substantive due process rights, Justice Brennan would have the Court take into account the nature of the Constitution as a "living charter"²⁵⁰; in particular, the "broad and majestic terms" of the due process guaranty should be imbued with meaning garnered from experience so that it is not rendered "an empty promise."²⁵¹

The whole thrust of Justice Brennan's analysis is to avoid the perceived straightjacket into which Justice Scalia's footnote six would fit the Due Process Clause. His more fluid and general conception of historical tradition, as well as his exalted expectations for the promises of the Due Process Clause, bespeak a deeply held concern that substantive due process remain responsive, in a principled way, to the evolving conditions and values of American society. It is thus in the context of Justice Brennan's overall purpose in finding an alternative to footnote six, as well as in the analytical elements of that alternative, that the possibility of a substantive due process right to public education must be considered.

Justice Brennan's four-part definition of tradition lends itself to recognition of a positive due process right to public education, although not without some complications. As discussed earlier, there is a long and pervasive tradition in the United States of protecting children's access to public elementary and secondary education, a tradition which, therefore, necessarily manifests the exceptional importance which this society attaches to children's education.²⁵² Whether this tradition is understood as operating at the most specific level of protection afforded the claimed right to education or as serving a generalized interest in protecting children's education, the claimed right to education must meet Justice Brennan's more general standard because, as has been shown, it satisfies Justice Scalia's more specific one. Nor has the rationale for the historical tradition of providing school-age children with public education changed so as to make the tradition obsolete and "out of place." To the contrary, the unrelenting national crisis in public education has generated urgent calls for greater governmental commitment to improving elementary and secondary school systems.²⁵³ Indeed, government has attempted to respond, within the limitations imposed by the current legal structure.²⁵⁴

It is the fourth part of Justice Brennan's definition of historical tradition, suggesting reliance on pertinent Supreme Court precedents, which may prove somewhat troublesome in relation to establishing an affirma-

²⁵⁰ *Id.* at 2351 (Brennan, J., dissenting).

²⁵¹ *Id.* at 2350 (Brennan, J., dissenting).

²⁵² See *supra* notes 5-7, 217-39 and accompanying text; see *infra* notes 436-55 and accompanying text.

²⁵³ E.g., GOVERNORS' ASS'N, EDUCATING AMERICA, *supra* note 4, *passim*; NAT'L COMM'N, NATION AT RISK, *supra* note 4, at 32-33; Jeffersonian Compact, *supra* note 44, at 1487-90.

²⁵⁴ See *supra* notes 31, 36-40, 44-47, 50, 75-76 and accompanying text. For a detailed description of state government efforts to respond to the crisis, see NAT'L GOVERNORS' ASS'N, THE GOVERNORS' 1991 REPORT ON EDUCATION: RESULTS IN EDUCATION: 1990, at 6-46 (1990).

tive right to education under substantive due process. Justice Brennan implied that reliance on Supreme Court precedent is appropriate where the claimed right is not “‘new,’” i.e., where the claimed right is “close enough” to interests already accorded constitutional protection by the Court.²⁵⁵ However, deciding whether a substantive due process right to government-provided education is “new” is not as easy as it may sound. On the one hand, cases such as *Meyer v. Nebraska*²⁵⁶ and *Pierce v. Society of Sisters*²⁵⁷ have posited a negative substantive due process right to acquire useful knowledge. On the other hand, in the equal protection context, the Court has essentially either skirted or confounded the issue of whether there can be an affirmative constitutional right to public elementary and secondary education.²⁵⁸

In *San Antonio Independent School District v. Rodriguez*,²⁵⁹ the Court left open the question of whether there might be a fundamental constitutional right to “some identifiable quantum of education” necessary for meaningful exercise of the rights of free speech and of political participation.²⁶⁰ The Court did not see any need to reach that question because no claim was made in the *Rodriguez* litigation that Texas’ school financing scheme fell short of providing this baseline quantum of education.²⁶¹ That the constitutional status of an affirmative right to education remained unresolved was highlighted a decade later by the ensuing cases of *Plyler v. Doe*²⁶² and *Papasan v. Allain*.²⁶³ In *Plyler*, the Court opined that public education is not a right under the Constitution. In the next breath, however, the Court remarked that “neither is it merely some governmental ‘benefit’ indistinguishable from other forms of social welfare

²⁵⁵ Justice Brennan explained the idea this way in the context of *Michael H.*:

This is not a case in which we face a “new” kind of interest, one that requires us to consider for the first time whether the Constitution protects it. On the contrary, we confront an interest—that of a parent and child in their relationship with each other—that was among the first that this Court acknowledged in its cases defining the “liberty” protected by the Constitution . . .

Thus, to describe the issue in this case as whether the relationship existing between Michael and Victoria “has been treated as a protected family unit under the historic practices of our society” . . . is to reinvent the wheel. The better approach—indeed, the one commanded by our prior cases and by common sense—is to ask whether the specific parent-child relationship under consideration is close enough to the interests that we already have protected to be deemed an aspect of “liberty” as well.

Michael H., 109 S. Ct. at 2351-52 (Brennan, J., dissenting) (citations omitted).

²⁵⁶ 262 U.S. 390 (1923).

²⁵⁷ 268 U.S. 510 (1925).

²⁵⁸ See *supra* notes 90-144 and accompanying text (discussing the case law on this point). Liberty rights under the Fourteenth Amendment’s Due Process Clause may also be fundamental constitutional rights for purposes of equal protection analysis. 2 ROTUNDA, SUBSTANCE AND PROCEDURE, *supra* note 173, § 18.39, at 695-96.

²⁵⁹ 411 U.S. 1 (1973).

²⁶⁰ *Id.* at 36-37.

²⁶¹ *Id.* at 36-38.

²⁶² 457 U.S. 202 (1982).

²⁶³ 478 U.S. 265 (1986).

legislation.”²⁶⁴ In *Papasan*, Justice White’s opinion expressly stated that the question of whether there is an affirmative right to public education under the Constitution had not been answered by *Rodriguez* or *Plyler* and would not be definitively settled in *Papasan* either since the latter case did not require resolution of the issue.²⁶⁵ Although Justice O’Connor joined in Justice White’s *Papasan* opinion without reservation,²⁶⁶ just two years later, in *Kadrmas v. Dickinson Public Schools*,²⁶⁷ she curtly stated, without discussion, “[n]or have we accepted the proposition that education is a ‘fundamental right.’”²⁶⁸ This was stated in a case which the Court treated as turning more on the right to transportation than on the right to education.²⁶⁹ Justice Marshall’s dissenting opinion in *Kadrmas* cautioned that the constitutional status of public education “remains open today.”²⁷⁰

With *Meyer* and *Pierce* and the four equal protection decisions in mind, it can be concluded that an affirmative substantive due process right to education is both not new and new. It is not new in the sense that the Court has definitively recognized a related due process right—the negative right to acquire knowledge free of governmental impediments. It is also not new in the sense that in the equal protection cases the Court considered but failed to decide whether there can be an affirmative fundamental right to public elementary and secondary education. But, the possibility of an affirmative fundamental right to public education is also, at the same time, still quite new and unexplored insofar as it has been left by the Court for another day.

The result is that Supreme Court precedent simply may not be helpful in ascertaining whether Justice Brennan’s methodology, as described in his *Michael H.* dissent, will give rise to an affirmative substantive due process liberty right to public education. The negative right established in *Meyer* and *Pierce* may be too attenuated and dissimilar from an affirmative right to education, and the precedent of *Rodriguez* and its progeny may be too unsettled to offer any guidance.

Professor Laurence Tribe and Michael Dorf have suggested that in using Supreme Court precedent as part of the tradition which defines substantive due process rights, what matters is not so much the precise holdings of those precedents, but rather their underlying rationales—“the essential reasons for those holdings.”²⁷¹ Professor Tribe and Mr. Dorf are of the opinion that with respect to the use of such precedent,

²⁶⁴ 457 U.S. at 221.

²⁶⁵ 478 U.S. at 285-86.

²⁶⁶ *Id.* at 267.

²⁶⁷ 487 U.S. 450 (1988).

²⁶⁸ *Id.* at 458.

²⁶⁹ See *supra* notes 131-39 and accompanying text.

²⁷⁰ 487 U.S. at 466 n.1 (Marshall, J., dissenting).

²⁷¹ Tribe & Dorf, *supra* note 211, at 1103.

“Justice Brennan’s dissent in *Michael H.* proceeds much along these lines.”²⁷²

Certainly, one of the rationales behind *Meyer* and *Pierce* is to ensure that Americans have the opportunity to acquire useful knowledge without hindrance from government. If this rationale is applied in American society of the late twentieth century—in the “information age” of increasingly sophisticated and novel moral, scientific, and political issues²⁷³—does not government impede the acquisition of useful knowledge if it fails to provide the means to acquire such knowledge?²⁷⁴ Indeed, the *Rodriguez* Court’s “unheld holding”—hypothesizing a positive right to some quantum of education—comes close to acknowledging that such means must be provided as a constitutional matter.²⁷⁵

Furthermore, what of the rationale behind the decision in *Plyler v. Doe*? If it is a violation of the Equal Protection Clause to deprive school-age undocumented children of a free public education, then can any one group of school-age children be so deprived? And, if no one group can be deprived, can it seriously be argued that all children may be deprived without violating the Due Process Clause?²⁷⁶ The rationale of *Plyler* surely militates against such a result. In short, relevant Supreme Court precedent, viewed through the lens of the Court’s underlying rationales, can be construed as yet another indication that Justice Brennan’s concept of tradition supports an affirmative liberty right to public elementary and secondary education.

However, even if the rationales behind these precedents are not generalized enough to support such a right, this does not, by itself, require rejection of an affirmative right to education under Justice Brennan’s theory. Nowhere in his dissent does Justice Brennan even hint that a paucity of dispositive Supreme Court precedent is fatal to an asserted substantive due process right. Indeed, such a result would run counter to the very notion of the living Constitution that Justice Brennan so warmly embraced. Under these circumstances, the other parts of Justice Bren-

²⁷² *Id.* at 1103 n.172.

²⁷³ The National Commission on Excellence in Education reported:

Knowledge, learning, information, and skilled intelligence are the new raw materials of international commerce Learning is the indispensable investment required for success in the “information age” we are entering. . . .

A high level of shared education is essential to a free, democratic society

For our country to function, citizens must be able to reach some common understandings on complex issues, often on short notice and on the basis of conflicting or incomplete evidence.

NAT’L COMM’N, NATION AT RISK, *supra* note 4, at 7. See *supra* text accompanying note 66.

²⁷⁴ See *supra* notes 164–71, 197–98 and accompanying text. It is not meant to suggest that *Meyer* and *Pierce* stand for the proposition that there is a positive right to education under the Due Process Clause. Rather, these cases are cited for the import of their underlying rationales.

²⁷⁵ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24, 36–37 (1973); *Gard, supra* note 67, at 27; *Prevolos, supra* note 68, at 75, 78–83.

²⁷⁶ *Edelman, supra* note 67, at 34–36.

nan's definition of applicable tradition would appear to take on greater weight and still make a persuasive case for the right.

The disagreement among the Justices in *Michael H.* over the correct analytical construct for determining substantive due process rights essentially turns upon the Justices' divergent understandings of the concept of tradition. It is a significant disagreement. By the same token, it should not be overlooked that the Justices have continued to agree that tradition is a crucial component of the rights discovery process under the Due Process Clause. No matter which of the three conceptions of tradition put forward in *Michael H.* may command a majority of the Court, the evidence of tradition supporting recognition of a positive substantive due process right to education is enormous.²⁷⁷

2. *The Free Speech Clause.*—The Free Speech Clause of the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."²⁷⁸ The obvious import of these words is, generally speaking, legislation that abridges freedom of speech is prohibited.²⁷⁹ The corollary is that legislation which enriches freedom of speech by making manifest the full extent of its meaning is permitted and, indeed, desirable.²⁸⁰

While the reach of the Free Speech Clause has been the subject of lively debate, much of the discussion has occurred within the parameters elucidated by Professor Thomas Emerson who has posited that free speech in a democratic society embodies four main purposes: to assure

²⁷⁷ Some commentators have made an additional argument in support of a positive right to public education which, although based on substantive due process, involves an analysis markedly different from that discussed in the text above. *E.g.*, Ratner, *supra* note 108, at 823-28; see Patricia W. Morrison, Note, *The Right to Education: A Constitutional Analysis*, 44 U. CIN. L. REV. 796, 807-09 (1975). The argument proceeds by analogy from the holding in *Jackson v. Indiana* that a criminal defendant involuntarily committed to a state mental institution for an indefinite period of time is entitled, by virtue of substantive due process, to have "the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." 406 U.S. 715, 738 (1972); see also *Youngberg v. Romeo*, 457 U.S. 307, 320 n.27 (1982) (reaching the same conclusion where the claimant is a mentally retarded person who is involuntarily institutionalized and seeks treatment and training). The commentators theorize that because every state compels children to attend school, under the reasoning of *Jackson* and *Romeo* "the nature of the education that students are provided must be rationally related to the purpose for which they are compelled to attend school," i.e., the purpose of acquiring academic knowledge. Ratner, *supra* note 108, at 827-28. Thus, substantive due process requires that the "incarcerated" child receive at least an adequate education in the basics of academic knowledge. *Id.*; cf. Gard, *supra* note 67, at 20-22 (developing a similar argument that failure to provide an adequate education to children forced into school attendance violates the Eighth Amendment's prohibition against cruel and unusual punishment).

²⁷⁸ U.S. CONST. amend. I.

²⁷⁹ Although the literal language of the Free Speech Clause prohibits abridgement of speech in seemingly absolute terms, the Supreme Court has allowed restrictions upon speech under certain limited circumstances where there are competing considerations. TRIBE, *supra* note 83, § 12-2.

²⁸⁰ ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 19-20 (1979).

individual self-fulfillment; to advance knowledge and discover truth; to provide for participation in decision making by all members of society; and to achieve an adaptable, more stable community.²⁸¹ At various times, the Justices of the Supreme Court have looked to one or another of these purposes to explain the meaning of the clause.²⁸²

It is the thesis of this Article that the full extent of the Free Speech Clause, understood under any one of Professor Emerson's premises, necessarily encompasses an implied positive right to elementary and secondary education. Otherwise, without an education, the American people will inevitably be alienated from free speech objectives and the clause will be enervated into mere words of aspiration.

One of the most durable free speech purposes advanced by Professor Emerson is the clause's "structural" role in promoting democratic government. Justice Brennan described the basic idea that "the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self government."²⁸³ If the United States is truly a government based on the demo-

²⁸¹ THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6-7 (1970). *But see* Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. REV. 1405 *passim* (1987) (arguing that the First Amendment should not be viewed as promoting a well-defined conception of positive values, but rather as a negative-reactive attempt to limit wrongful government interference with free speech).

²⁸² Justice Brennan, in his opinion for the Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), adopted the notion that the main function of the Free Speech Clause is to further the democratic processes inherent in self-government. Lee C. Bollinger, *Free Speech and Intellectual Values*, 92 YALE L.J. 438, 438-39 (1983); Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 208-10, 221. This notion also was favored by Justice Stewart in relation to the Free Press Clause of the First Amendment. Peter Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 633-34 (1975). In contrast, Justices Holmes and Brandeis suggested that a primary purpose of the Free Speech Clause is to promote individual self-realization or autonomy. *Whitney v. California*, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring) (Justice Holmes joined in Justice Brandeis's concurring opinion); *see also* *Cohen v. California*, 403 U.S. 15, 24 (1971) (Harlan, J., writing for the Court and expressing the same view). Justice Holmes also embraced the concept that the Free Speech Clause is designed to lead to the discovery of truth through robust intellectual exchange in the marketplace of ideas. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Later, the Court brought within the ambit of the marketplace-of-ideas concept the goal of furthering democratic participation in government. *New York Times*, 376 U.S. at 269-72; *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

²⁸³ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587 (1980) (Brennan, J., concurring). Justice Brennan's understanding of the structural role of the Free Speech Clause is supported by leading First Amendment scholars coming from a broad spectrum of philosophical and political orientations. *See, e.g.*, ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 62 (1975); ELY, *supra* note 173, at 93-94; EMERSON, *supra* note 281, at 7; MEIKLEJOHN, *supra* note 280, at 27; Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 23 (1971); Kalven, Jr., *supra* note 282, at 208-10, 221.

Some commentators also have critiqued this view without entirely rejecting it. *See, e.g.*, C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 1039-40 (1978) (the Free Speech Clause implicates more than mere "individual participation in public deci-

cratically elicited consent of the governed, then free expression is essential to the formulation and articulation of what that consent shall be.²⁸⁴

While many a truth may come from the mouths of babes, it is clear that participation in self-government requires considerably more. Indeed, why else would the Constitution set a minimum voting age of eighteen?²⁸⁵ But, age alone does not suffice either. Justice Brennan observed that “[i]mplicit in this structural role is . . . the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed.”²⁸⁶ In short, the participation of the populace in self-

sion making,” i.e., “it requires protecting self-chosen, nonverbal conduct from certain forms of government abridgement.”); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 523, 527-28 (the structural role of the First Amendment should be supplemented by a “checking value” which aims at curbing abuse of official power); Martin H. Redish, *Self-Realization, Democracy, and Freedom of Expression: A Reply to Professor Baker*, 130 U. PA. L. REV. 678, 680 (1982) (the reach of the First Amendment must go beyond the structural role model to serve the goal of self-realization as well).

²⁸⁴ MEIKLEJOHN, *supra* note 280, at 27.

²⁸⁵ U.S. CONST. amend. XXVI, § 1.

²⁸⁶ *Richmond Newspapers*, 448 U.S. at 587 (Brennan, J., concurring); *accord* *Saxbe v. Washington Post Co.*, 417 U.S. 843, 862-63 (1974) (Powell, J., dissenting).

In fact, the Supreme Court has recognized in the Free Speech Clause a right to receive information. *E.g.*, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (holding that the First and Fourteenth Amendments prohibited Georgia from making mere private possession of obscene material a crime); *Lamont v. Postmaster General*, 381 U.S. 301, 307-08 (1965) (Brennan, J., concurring) (holding that it is a violation of the First Amendment for Congress to enact a statute requiring the addressee to request in writing that his mail be delivered in order to receive mail classified by the statute as communist political propaganda). Some commentators have extrapolated from the right to receive information a positive right to education. Gard, *supra* note 67, at 18-19; Preovolos, *supra* note 68, at 91-94. This analogy between the right to receive information and the right to education is weakened, though, by the fact that the former is usually thought of as the proscription of governmental interference with access to information while the latter would require the government's fulfillment of an affirmative obligation. Preovolos, *supra* note 68, at 92-93. Ms. Preovolos overcomes this difficulty by relying on *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973), in which the Court held that the First Amendment does not compel broadcasters to sell time for editorial advertisements. Ms. Preovolos finds the case supportive because the holding is premised upon the Court's determination that FCC practices already provided adequate access to the information in issue. Preovolos, *supra* note 68, at 93. Her argument is an intriguing one, but, in relying so heavily on the *CBS* case, it seems to hang by a very slender thread.

However, the decision in *Richmond Newspapers* may give the argument added force. In a plurality opinion, the *Richmond Newspapers* Court ruled that there is a First Amendment right of access to criminal trials—even though in that case neither defense counsel, the prosecution, nor the trial judge wanted an open trial. TRIBE, *supra* note 83, § 12-20, at 959 & n.35. The decision raises the question of “why the public has a right to receive information in spite of its supplier's desire that it not be disclosed.” *Id.* § 12-20, at 959. Taking this logic one step further, if government can be compelled to provide access to a trial, why cannot it be compelled to provide access to education?

The theory admittedly becomes strained in light of the differences between the provision of an open criminal trial and the provision of education. The criminal trial must be conducted in any event and government's provision of access to it involves not much more than the opening of doors; the provision of education obviously entails a great deal more than opening doors. Moreover, the Sixth Amendment to the Constitution “implies that government cannot claim unfettered discretion

government requires the education of that populace.

Luminaries among the Founding Fathers such as Thomas Jefferson and George Washington had no hesitation in acknowledging the critical relationship between education and self-government.²⁸⁷ Over two hundred years later, this relationship has become still more profoundly synergistic in a society faced with making decisions about such complex and fateful issues as environmental conservation, the national budget deficit, disarmament, abortion, and the right to die.²⁸⁸ Yet, in this same society, massive numbers of Americans begin their adult lives unable to interpret a newspaper article,²⁸⁹ if they can read at all,²⁹⁰ and unable to write well enough to communicate persuasively.²⁹¹ Nor do they bring to the decision-making process that store of general foundational knowledge from which an informed and reasoned consent may be conceptualized.²⁹² No doubt, this is why government officials and education experts alike have expressed the fear that present deficiencies in American public elementary and secondary education will, somewhere along the line, jeopardize the functioning of democratic government.²⁹³

The link between public education and the preservation of democratic government has become almost proverbial in Supreme Court opinions. The Court's decisions repeatedly and reverentially refer to the nation's public schools as both the symbol and engine of American-style democracy.²⁹⁴ But, if there is this link—if democracy cannot survive

to treat criminal trials as though they involved wholly internal or confidential matters." *Id.* § 12-20, at 959. There is no such Sixth Amendment underpinning for a positive right to education. Nonetheless, the idea of using *Richmond Newspapers* to build upon Ms. Prevolos's theory for a First Amendment right to education is provocative. *Cf.* *TRIBE*, *supra* note 83, § 12-20, at 965 (opining that perhaps the most far-reaching aspect of *Richmond Newspapers* is that it reflects a "growing realization that the Constitution is no longer simply a source of fences around private spheres, but is increasingly drawn into question when the state is asked to take affirmative steps to make liberty or equality meaningful").

²⁸⁷ See *infra* notes 443-44 and accompanying text; see *supra* note 3 and accompanying text.

²⁸⁸ See *supra* notes 66, 273 and accompanying text; see also Edelman, *supra* note 67, at 33-34 ("How can anyone participate effectively in America's democratic processes . . . without some minimum amount of education? Whatever the situation was in 1787, in 1987 education is essential for everyone.").

²⁸⁹ DeWitt, *First Report Card*, *supra* note 48, *passim*. See *supra* note 42 and accompanying text.

²⁹⁰ See *supra* note 33 and accompanying text.

²⁹¹ See *NAT'L COMM'N, NATION AT RISK*, *supra* note 4, at 9 (four-fifths of the seventeen-year-olds tested could not write a persuasive essay); see *supra* note 42 and accompanying text.

²⁹² See *supra* notes 42-43 and accompanying text.

²⁹³ *NAT'L COMM'N, NATION AT RISK*, *supra* note 4, at 7; *KEARNS & DOYLE*, *supra* note 29, at 2, 85-86; see *RAVITCH & FINN, JR.*, *supra* note 29, at 252.

²⁹⁴ *E.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (accepting the proposition that "education is necessary to prepare citizens to participate effectively and intelligently in our open political system"); *Board of Educ. v. Allen*, 392 U.S. 236, 247 (1968) (stating that education is "an indispensable ingredient for achieving the kind of nation, and the kind of citizenry" essential to a free society); *Keyishian v. Board of Regents*, 385 U.S. 589, 628 (1967) (Clark, J., dissenting) (noting that the "public educational system is the genius of our democracy"); *School Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) ("Americans regard the public schools as a most vital civic

without education—then necessarily the structural role of the Free Speech Clause can only be realized if education is provided. In other words, the structural role of the Free Speech Clause ineluctably presupposes and entails an implied affirmative right to education.²⁹⁵ It should be noted that the idea of a nexus between education and free speech, such that the former enables the actualization of the latter, is not unfamiliar to the Justices. Plaintiffs-appellees in the *Rodriguez* case raised the nexus argument, and it was given some credence by the Court as a possible reason for recognizing a positive right to education sometime in the future.²⁹⁶

This causal relationship also exists between education and the other three purposes of the Free Speech Clause. If the purpose of the clause is individual self-fulfillment, as Professor Emerson and others hold it to be,²⁹⁷ then it requires no inferential leap to conclude that education is the necessary prerequisite to that maturation of character and intellect which is within contemplation of the clause. Those who receive substandard education tend to be alienated from their own potentiality. For many of them, self-fulfillment, whether in the form of earning power, political input, or intellectual accomplishment, becomes unknowable and unreachable.²⁹⁸

Likewise, if the purpose of the clause is the advancement of knowledge and the discovery of truth,²⁹⁹ then, once again, education is neces-

institution for the preservation of a democratic system of government.”); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 216, 231 (1948) (Frankfurter, J.) (maintaining that public schools are “the most powerful agency for promoting cohesion among a heterogeneous democratic people” and that public schools are “at once the symbol of our democracy and the most pervasive means for promoting our common destiny”).

²⁹⁵ Compare *Gard*, *supra* note 67, at 18 (making a nexus argument that there should be a right to education because education enables the meaningful exercise of free speech) with *Preovolos*, *supra* note 68, at 87-88, 91-96 (accepting the nexus argument, but also contending that there should be a right to education because it would be analogous to the right to free speech); cf. *Dimond*, *supra* note 110, at 1104 (noting that “[e]ducation always has been an aspect of, and in tension with, the First Amendment freedoms”).

²⁹⁶ See *supra* notes 98, 102, 106 and accompanying text.

²⁹⁷ EMERSON, *supra* note 281, at 6; TRIBE, *supra* note 83, § 12-1, at 787-89; Baker, *supra* note 283, at 991-92; Redish, *supra* note 283, at 679. But see Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CAL. L. REV. 761, 772-74 (1986).

²⁹⁸ See *supra* notes 64-72 and accompanying text (documenting the harm that substandard education works upon individual development).

²⁹⁹ The Supreme Court has repeatedly acknowledged the relationship between free speech and the discovery of truth. See *Board of Educ. v. Pico*, 457 U.S. 853, 866 (1982); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981); *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 538 (1980); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). This purpose of the Free Speech Clause also has been recognized by First Amendment theorists. EMERSON, *supra* note 281, at 6-7; Christopher T. Wonnell, *Truth and the Marketplace of Ideas*, 19 U.C. DAVIS L. REV. 669, 670 (1986); see also Benjamin S. DuVal, Jr., *Free Communication of Ideas and the Quest for Truth: Toward a Teleological Approach to First Amendment Adjudication*, 41 GEO. WASH. L. REV. 161, 203-08 (1972) (purpose of Free Speech Clause is to promote the correction of erroneous beliefs). But see Baker, *supra*

sarily implicated as a free speech right. The marketplace of ideas, which Justice Holmes saw as central to promoting the discovery of knowledge and truth, is utterly meaningless without an education. The formulation and the articulation of ideas which excite intellectual ferment and which foster enlightenment are obviously contingent upon the receipt of information and the development of sophisticated thought processes.³⁰⁰

The fourth purpose of the Free Speech Clause, the achievement of a more adaptable and stable community, is predicated on the assumption that open discussion, involving the opportunity for disagreement and conflict, enhances the individual's tolerance of government decisions which counter his beliefs.³⁰¹ Like the purposes of promoting democratic self-government and acquiring knowledge and truth, this purpose would seem wholly dependent on education. For how can a society conduct open and intelligent discussions in relation to controversial issues without informed conversationalists?

Some will no doubt object that the idea of an implied affirmative right to education in the Free Speech Clause runs counter to the entrenched view that this clause is the very archetype of the negative right and should primarily be construed to do no more than bar government from interfering with expression.³⁰² Nevertheless, the fact remains that none of the purposes of the clause can be effectuated without educating the populace. When traditional analysis clashes so seriously with the purposes of the Free Speech Clause, it is time to consider embracing alternative approaches that have a more realistic chance of effectuating the central goals of the clause. The alternative that seems naturally to un-

note 283, at 974-81; Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 1-48.

³⁰⁰ The relationship between education and the discovery of knowledge and truth is highlighted by the effects of the education crisis on the young adults emerging from the nation's schools during the 1980s. These young people have been rendered ignorant of history, literature, science, and other fields, necessarily causing a drastic contraction of their knowledge and ability to discern truth. See *supra* notes 32-34, 41-43 and accompanying text.

³⁰¹ EMERSON, *supra* note 281, at 7; Jeffrey M. Blum, *The Divisible First Amendment: A Critical Functionalist Approach to Freedom of Speech and Electoral Campaign Spending*, 58 N.Y.U. L. REV. 1273, 1324-25, 1349-50 (1983).

³⁰² "Traditionally, the first amendment, like other provisions of the Bill of Rights, has operated primarily as a negative force in maintaining the system of freedom of expression. It has served to prevent the government from prohibiting, harassing, or interfering with speech or other forms of communication." Thomas I. Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795, 795 (1981).

Nevertheless, Professor Emerson also suggests that the structural role of the Free Speech Clause does imply certain positive unenumerated rights. He bases this suggestion upon the assumption that government has become "a more pervasive participant in the system of freedom of expression." *Id.* As such, he argues that the First Amendment imposes the obligation on government to "expand the system of freedom of expression" while, at the same time, adhering to rules setting outer limits of that expansion. *Id.* at 796. Inasmuch as government may aptly be characterized as a pervasive participant in that marketplace of ideas called school, Professor Emerson's argument may have some application as support for a positive right to education arising from the First Amendment.

dergird the clause and that goes to the very essence of free speech is an implied positive right to education.

3. *The Right to Vote*.—Closely related to the Free Speech Clause's structural role is the right to vote, for both serve the end of enabling individual participation in democratic self-government.³⁰³ Although there is no one clause of the Constitution expressly announcing a right to vote per se, the Constitution is filled with references to voting³⁰⁴ and mandatory federal elections³⁰⁵ that appear to presuppose the existence of a right to vote in federal elections. In addition, Article IV, Section 4 provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."³⁰⁶

However, there is continuing disagreement over whether the Constitution does, in fact, guarantee the right to vote in either federal or state elections. The controversy persists in spite of the Supreme Court's explicit acknowledgment in *Reynolds v. Sims*³⁰⁷ that the Constitution embraces the right: "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections."³⁰⁸ Some commentators, taking a dismissive attitude

³⁰³ ELY, *supra* note 173, at 116; Prevolos, *supra* note 68, at 88.

³⁰⁴ The provisions of the Constitution which mention voting typically do so in the context of prohibiting restraints upon exercise of the franchise. *E.g.*, U.S. CONST. amend. XV, § 1 ("The right of citizens . . . to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."); *id.* at amend. XIX, § 1 ("The right of citizens . . . to vote shall not be denied or abridged by the United States or by any State on account of sex."). The Twenty-Fourth Amendment states:

The right of citizens . . . to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Id. at amend. XXIV, § 1; *id.* at amend. XXVI, § 1 ("The right of citizens . . . who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.").

³⁰⁵ The Constitution repeatedly refers to mandatory federal elections, sometimes with the qualifier that the elections are to be carried out by "the people," i.e., presumably through the vote. *E.g.*, U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . ."); *id.* at art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."); *id.* at art. I, § 3, cl. 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."); *id.* at art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America. He shall . . . be elected . . ."); *id.* at amend. XVII, § 1 ("The Senate . . . shall be composed of two Senators from each State, elected by the people thereof . . ."); *id.* at amend. XXII, § 1 ("No person shall be elected to the office of the President more than twice . . .").

³⁰⁶ *Id.* at art. IV, § 4.

³⁰⁷ 377 U.S. 533 (1964).

³⁰⁸ *Id.* at 554. The Court also stated, "[a] consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this [the right to vote] indelibly

toward this pronouncement, or ignoring it altogether, contend that because the Constitution does not expressly grant a right to vote, there must be none.³⁰⁹ Others are equally convinced that the Constitution embraces an implied right to vote.³¹⁰

Analysis would seem to dictate that the better argument rests with those who contend that there is a federal constitutional right to vote. In *Reynolds*, the Court's pronouncement that there is such a right is not dicta, but appears to be integral to the holding in that case. The *Reynolds* Court considered whether Alabama's legislative apportionment scheme violated the Equal Protection Clause of the Constitution. By the Court's own admission, the existence of an implied personal right to vote was a "predominant consideration" in determining the scheme's constitutionality.³¹¹

Allowing, then, that a constitutional right to vote is not without its respectable detractors, there is authority in the textual references of the Constitution, in the *Reynolds* decision, and in scholarly writings to support the proposition that such a right exists. This being so, the next logical question is whether this right is merely the mechanical act of pulling a lever or whether it entails something more.

A monkey probably can be trained to pull a lever in a voting booth. But it would be reducing voting to an absurdity to include within its

clear. It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote." *Id.* (citing *Ex parte Yarbrough*, 110 U.S. 651 (1884)); see also *United States v. Classic*, 313 U.S. 299, 314-15, 318 (1941) (voting in congressional elections is a constitutional right). *But see* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 n.78 (1973) (asserting in dictum that "the right to vote, *per se*, is not a constitutionally protected right"); *Plyler v. Doe*, 457 U.S. 202, 217 n.15 (1982) (reiterating the above quoted language from *Rodriguez*); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 171, 173-78 (1874) (there is no constitutional right to vote upon which women's assertion of a right of suffrage may be predicated). The ruling in *Minor* on women's right to vote was later reversed by the Nineteenth Amendment. U.S. CONST. amend. XIX.

³⁰⁹ Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 595-96 (1975); Gerald P. Goulder, *The Reconstructed Right to Vote: Neutral Principles and Minority Representation*, 9 CAP. U. L. REV. 31, 34 (1979); see also Emily M. Calhoun, *The First Amendment and Distributional Voting Rights Controversies*, 52 TENN. L. REV. 549, 550-51, 555 (1985) (noting that the Court's pronouncements on whether there is a right to vote have been inconsistent and that the status of the right under the Constitution is unclear).

³¹⁰ EDWARD S. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 474 (14th ed. 1978); ELY, *supra* note 173, at 117, 122-23, 234 n.30; Mary J. Morrison, *Constitutional Reasoning for Rights*, 54 MO. L. REV. 29, 50 & n.55 (1989); Sandra Guerra, Note, *Voting Rights and the Constitution: The Disenfranchisement of Non-English Speaking Citizens*, 97 YALE L.J. 1419, 1426 (1988); Nancy Manougian, Note, *Plyler v. Doe: Equal Protection for Illegal Aliens*, 12 CAP. U. L. REV. 143, 156 (1982); Robert F. Wall, Comment, *Equal Protection: Analyzing the Dimensions of a Fundamental Right—The Right to Vote*, 17 SANTA CLARA L. REV. 163, 175 (1977); see Prevolos, *supra* note 68, at 88-91; cf. Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1079 (1979) (there is a "quasi-constitutional right" to vote in state elections).

³¹¹ *Reynolds*, 377 U.S. at 561. The Court's statements in later cases to the effect that there is no constitutional right to vote are dicta. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 217 n.15 (1982); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 n.78 (1973); see CONGRESSIONAL RESEARCH, *CONSTITUTIONAL ANALYSIS*, *supra* note 86, at 1780 n.7.

compass a choice that has nothing to do with political issues or candidates for political office. Voting in American society is understood to be essential to the promotion of democratic self-government and a republican form of government.³¹² Hence, voting is preconditioned on the ability to engage in politically purposive conduct. Politically purposive conduct, in turn, is preconditioned on an educated citizenry. This does not mean that the voter must be guaranteed "the most *informed* electoral choice,"³¹³ but it does require that the voter at least be provided the wherewithal to make a "meaningful" electoral choice.³¹⁴ That is why the Supreme Court has acknowledged that "education is necessary to prepare citizens to participate effectively and intelligently in our open political system."³¹⁵

The relationship between education and voting is particularly compelling considering that American voters decide the external policies and internal stability of a superpower in a rapidly changing world. While the uneducated may still be able to meaningfully elect the local dogcatcher, they are simply unequipped to vote in a politically purposive way in relation to such monumental and intricate issues as structuring post-Cold War international relations, dealing with smoldering tensions in the Middle East, or reducing the runaway budget deficit. In relation to national security policy, one education expert points out that "issues of war and peace are vastly more complicated than ever before. To comprehend them, we must know more facts, take into account more variables, and, in developing national policy, far more skillfully balance means and goals."³¹⁶

Unless the right to vote is recognized to give rise to an implied right to education, the vote will inevitably be debased by its lack of political meaning. As the issues to which candidates must respond become thornier and as the education crisis continues, this degenerative process can only accelerate until the vote is completely undermined by its meaninglessness. Indeed, symptoms that this process has been underway for some time may be reflected in statistics showing that large percentages of Americans do not bother to vote and that there is a correlation between

³¹² *Reynolds*, 377 U.S. at 555 ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society . . ."); *id.* at 562 ("The right to elect legislators . . . is a bedrock of our political system."); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969) (voting is "the foundation of our representative society"); *ELY*, *supra* note 173, at 116 ("[T]he right to vote seems . . . central to a right of participation in the democratic process . . ."); *Perry*, *supra* note 310, at 1079 ("The franchise is a fundamental—perhaps *the* fundamental—characteristic of American government and politics.").

³¹³ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36 (1973).

³¹⁴ *Prevolos*, *supra* note 68, at 90.

³¹⁵ *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972); *see also Rodriguez*, 411 U.S. at 63 (Brennan, J., dissenting) (stating that "there can be no doubt that education is inextricably linked to the right to participate in the electoral process").

³¹⁶ *BRADEMAS*, *supra* note 30, at 113.

lack of education and the propensity to forego voting.³¹⁷

Yet, if anything, the development of constitutional law in relation to the right to vote manifests the Supreme Court's long-standing concern that the vote not be debased or distorted. This concern has been most prominently manifested in apportionment cases involving challenges under Article I, Section 2 or the Equal Protection Clause, to districting schemes that caused some individuals' votes to be given less weight than others. The Supreme Court responded by propounding the concept of "one man, one vote," with the avowed purpose of ensuring that, insofar as practicable, each person's vote must be given approximately equal weight.³¹⁸ While the holdings in these cases are clearly confined to the problem of unequal weighting of votes,³¹⁹ the Court's reasoning is instructive. The Court repeatedly and emphatically has referred to its underlying disquiet over any subversion of the vote. "The consistent theme of those [apportionment] decisions is that the right to vote in an election is protected by the United States Constitution against dilution or debasement."³²⁰ Or, restated, "each and every citizen has an inalienable right to full and effective participation in the political processes."³²¹

Of course, there is no precise measurement of what level of educational deprivation will effectively silence a would-be voter's political voice. However, as detailed earlier, education experts are finding that the education crisis is leaving people shockingly unaware of the most basic

³¹⁷ In 1988, 57.4% of the electorate voted in the presidential elections, while in the 1986 congressional elections, 46% of the voting-age population went to the polls. Of those persons voting for President, 36.7% had only completed eight years of school or less; 41.3% had completed one to three years of high school; 54.7% had completed four years of high school; 64.5% had completed one to three years of college; and 77.6% had completed four years or more of college. Of those persons voting in congressional elections, 32.7% had completed eight years of school or less; 33.8% had completed one to three years of high school; 44.1% had completed four years of high school; 49.9% had completed one to three years of college; and 62.5% had completed four years or more of college. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 262 (110th ed. 1990).

³¹⁸ With respect to congressional elections, the Court has looked to Article I, Section 2's edict that representatives shall be chosen "by the People" as the constitutional underpinning for the "one man, one vote" principle. *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964). With respect to state legislative elections, the Court has relied upon the Equal Protection Clause of the Fourteenth Amendment as support for applying the principle. *Reynolds v. Sims*, 377 U.S. 533, 560 (1964). The Court has also invoked the Equal Protection Clause to apply the "one man, one vote" principle to certain local governmental bodies as well. *Hadley v. Junior College Dist.*, 397 U.S. 50, 53-54 (1970). *But cf. Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 726-28 (1973) (principle is inapplicable to election of members of a water district where main purpose was to provide for retention and distribution of water for farming).

³¹⁹ See, e.g., *Wesberry*, 376 U.S. at 7-8, 18; *Reynolds*, 377 U.S. at 568. *But see White v. Register*, 412 U.S. 755, 767-69 (1973) (concluding that it was proper to assess the constitutionality of a Texas legislative reapportionment plan by factoring in cultural and language barriers that effectively alienated Mexican-Americans from political participation).

³²⁰ *Hadley*, 397 U.S. at 54.

³²¹ *Reynolds*, 377 U.S. at 565; accord *White*, 412 U.S. at 767-69.

information.³²² It should be recalled that many Americans have trouble even interpreting the newspaper and are ignorant of major events in American history.³²³ In the political sphere, a 1982 study revealed "grave shortcomings in 17-year-olds' understanding of our system of government," while a 1986 assessment showed "little improvement in knowledge of American political philosophy, the Constitution, and basic civil rights."³²⁴ To put it bluntly, the intellect of the poorly educated has been infantilized, both in terms of its store of information and its capacity for political acumen. As the wherewithal for reasoned political judgment has disappeared, so too has the possibility of a politically purposive vote necessarily become more remote for such people. The interrelationship between the vote and education has thus been brought into high relief by the ongoing education crisis.

Insofar as it may be assumed that a constitutional right to vote exists (and there is a solid basis for so assuming), then there must also be a correlative, implied positive right to education. The correlative right follows because it is education which makes the vote meaningful as politically purposive conduct and because it is the meaningful vote, not a nonsensical one, that is guaranteed by the Constitution. Otherwise, the Supreme Court's overriding concern in the apportionment cases that a person's vote must not be diluted or debased in relation to other votes will be betrayed, as will the nation's commitment to ensuring the populace's full and effective participation in the electoral processes.

4. *The Privileges or Immunities Clause.*—The Privileges or Immunities Clause of the Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."³²⁵ The Clause is considered something of an enigma. There is little in the way of dispositive legislative history to illuminate what rights might be subsumed under its aphoristic phraseology.³²⁶ Case law interpreting the Clause is also sparse.³²⁷

³²² See *supra* notes 31-36, 41-43, 50-53, 57-58, 60, 69-71 and accompanying text.

³²³ See *supra* notes 42, 289 and accompanying text.

³²⁴ BENNETT, MAKING IT WORK, *supra* note 29, at 13-14.

³²⁵ U.S. CONST. amend. XIV, § 1.

³²⁶ There are differing opinions as to what the debates of the 39th Congress reveal about the intent behind the privileges or immunities clause. See ELY, *supra* note 173, at 27; Aviam Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651, 655, 681-86 (1979). In this regard, it has been remarked:

[E]xactly what the framers of the Fourteenth Amendment intended in their Privileges or Immunities Clause has been a puzzling subject. And as Professor Gunther has noted, "[i]n no part of the congressional debates on the Amendment is there greater evidence of vagueness and inconsistencies than in the discussions of 'privileges and immunities'."

J. Harvie Wilkinson, III, *The Fourteenth Amendment Privileges or Immunities Clause*, 12 HARV. J.L. & PUB. POL'Y 43, 44 (1989) (quoting GERALD GUNTHER, CONSTITUTIONAL LAW 417 (11th ed. 1985)).

³²⁷ 2 ROTUNDA, SUBSTANCE AND PROCEDURE, *supra* note 173, § 14.3.

In fact, within five years after enactment of the Amendment, the Supreme Court essentially torpedoed the Privileges or Immunities Clause in the *Slaughter-House Cases*.³²⁸ In *Slaughter-House*, the Court upheld Louisiana legislation establishing a slaughterhouse monopoly against plaintiffs' claim that the monopoly interfered with, among other things, the right to carry on a lawful trade protected by the Clause.³²⁹ Because the Court believed that fundamental rights, for the most part, belong within "the class of rights which the State governments were created to establish and secure,"³³⁰ the majority opinion interpreted the Privileges or Immunities Clause narrowly so as to protect only those rights which are uniquely derivative of national citizenship, i.e., rights that "owe their existence to the Federal Government, its National character, its Constitution, or its laws."³³¹ The right to pursue a lawful trade, the Court said, belongs to the rights of state, not national, citizenship.³³²

In *Slaughter-House* and subsequent cases, the Court attempted to give this concept of the Clause more definition by enumerating some of the specific rights peculiar to national citizenship. Standing in stark contrast to the broad language of the Privileges or Immunities Clause, the list which emerged has turned out to be an eclectic mix of rights unified only by the fact that they are all already guaranteed by federal law other than the Clause.³³³ The *Slaughter-House* decision thus effectively rendered the privileges or immunities language a redundancy.³³⁴

Slaughter-House has cast a long shadow, for the Privileges or Immunities Clause is still "largely ignored" by the courts as a source of

³²⁸ 83 U.S. (16 Wall.) 36 (1873).

³²⁹ *Id.* at 60, 77, 80, 83.

³³⁰ *Id.* at 76.

³³¹ *Id.* at 79.

³³² *Id.* at 60, 78-79.

³³³ The list of rights set forth in the *Slaughter-House* decision include the rights to free access to the nation's seaports; to use the nation's navigable waters; to seek a writ of habeas corpus; to become a citizen of any state by bona fide residence in that state; to demand the federal government's protection over life, liberty, and property when on the high seas or in a foreign country; and to visit the seat of the national government to make claims against or do business with that government. *Id.* at 79-80. In *Twining v. New Jersey*, the Court added to this list the rights to pass freely from state to state; to petition Congress for redress of grievances; to vote for national officers; to enter public lands; to be protected against violence while in lawful custody of a U.S. Marshal; and to inform United States authorities regarding violations of federal law. 211 U.S. 78, 97 (1908). Later, in *Oyama v. California*, the Court recognized the statutory right to take and hold real property as falling within the Privileges or Immunities Clause as well. 332 U.S. 633, 640 (1948).

³³⁴ The received reading of Justice Miller's *Slaughter-House* majority opinion is that it turned the Privileges or Immunities Clause into surplusage by assigning to the clause rights already protected elsewhere in the Constitution. ELY, *supra* note 173, at 22-23; TRIBE, *supra* note 83, § 7-4, at 556, 558; Normand G. Benoit, *The Privileges or Immunities Clause of the Fourteenth Amendment: Can There Be Life After Death?*, XI SUFFOLK U. L. REV. 61, 63-64 (1976); Lino A. Graglia, *Do We Have an Unwritten Constitution?—The Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 83, 83 (1989).

rights.³³⁵ However, this very quiescence has periodically provoked speculation in the academic community on the true meaning and potential of the Clause. Indeed, it is troubling to live with the notion that any provision of the Constitution is pointless verbiage—especially where it is capable of defensible interpretation.³³⁶

From among those scholars who share this unease, a school of thought has evolved which contends that the Privileges or Immunities Clause should be understood to implicitly give rise to certain unenumerated substantive rights.³³⁷ A prominent representative of this viewpoint, Professor Philip Kurland, has suggested that one of the rights protected by the Privileges or Immunities Clause is a positive right to education:

With all due respect to those who have labored so hard in the vineyard, *equal* educational opportunity is not the essence of the claim. It is not equality but quality with which we are concerned. For equality can be secured on a low level no less than a high one. The claim that will have to be developed will be a claim to adequate and appropriate educational opportunity. And this, I submit, derives more cogently from concepts of privileges and immunities rather than equality of treatment.³³⁸

Professor Kurland's thesis is that the Privileges or Immunities Clause is best suited to making the Constitution responsive to the "existent and potential needs" of a modern society dominated by big govern-

³³⁵ Wilkinson III, *supra* note 326, at 43; Timothy S. Bishop, Comment, *The Privileges or Immunities Clause of the Fourteenth Amendment: The Original Intent*, 79 NW. U. L. REV. 142, 143 (1984); Ivery Foreman, Comment, *Reviving the Privileges or Immunities Clause*, 6 BLACK L.J. 211, 228-29 (1980).

³³⁶ "It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore, such a construction is inadmissible, unless the words require it." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). As Professor Charles Black has commented, it is presumptuous to disregard the meaning of even so nebulous a provision as the Preamble to the Constitution. Black, Jr., *Further Reflections*, *supra* note 148, at 1105, 1107. With respect to the Privileges or Immunities Clause in particular, the framers of the Fourteenth Amendment "certainly must have felt that the words that they labored over would convey more than the present nullity." Benoit, *supra* note 334, at 107-08; see Sanford Levinson, *Some Reflections on the Rehabilitation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 71, 82 (1989). *Contra* Wilkinson, III, *supra* note 326, at 52.

³³⁷ For a sampling of the literature espousing the thesis that the Privileges or Immunities Clause should be interpreted to support unenumerated or implied rights generally, see ELY, *supra* note 173, at 24, 28-30; TRIBE, *supra* note 83, § 7-4, at 558-59, and § 11-2, at 773-74; Michael K. Curtis, *Privileges or Immunities, Individual Rights, and Federalism*, 12 HARV. J.L. & PUB. POL'Y 53, 58-60 (1989); Kurland, *supra* note 147, at 419; Levinson, *supra* note 336, at 74-75; Lupu, *supra* note 87, at 1035; Laurence H. Tribe, *Contrasting Constitutional Visions: Of Real and Unreal Differences*, 22 HARV. C.R.-C.L. L. REV. 95, 102 (1987) [hereinafter Tribe, *Contrasting Visions*]; see also Benoit, *supra* note 334, at 101-02, 112. *Contra* Graglia, *supra* note 334, at 88-89.

Some of these commentators also make the point that the unenumerated rights protected by the Privileges or Immunities Clause include substantive ones. ELY, *supra* note 173, at 24; TRIBE, *supra* note 83, § 7-4, at 558-59, and § 11-2, at 773-74; Kurland, *supra* note 147, at 419; Lupu, *supra* note 87, at 1035; Tribe, *Contrasting Visions*, *supra*, at 102; see Benoit, *supra* note 334, at 101.

³³⁸ Kurland, *supra* note 147, at 419.

ment and by the massive inundation of new technologies.³³⁹ According to Professor Kurland, governmental power over the creation and distribution of goods and services in the United States has assumed such proportions that individual choice is substantially constricted;³⁴⁰ this threat to individual freedom is further compounded by the advent of new technologies that have the potential to invade and overwhelm Americans' personal lives.³⁴¹ Professor Kurland would ward off such oppression by finding certain implied substantive rights, and especially a positive right to education, in the Privileges or Immunities Clause.³⁴² Because its language "speaks to matters of substance," it is this Clause which most naturally lends itself to serve as the source of the right.³⁴³

Although Professor Kurland wrote his article on the Privileges or Immunities Clause in 1972, the omnipresence of government and the proliferation of new technologies has not appreciably abated. Dependence on government continues to erode the integrity of individual freedom. The very desire for personal self-preservation, for example, is contingent upon governmental decisions with respect to nuclear weapons plants,³⁴⁴ nuclear weapons policy,³⁴⁵ governmental allocations of medical and other essential benefits to the poor or elderly,³⁴⁶ governmental involvement in the decision to have an abortion,³⁴⁷ governmental involvement in combating illicit drug trafficking,³⁴⁸ etc. Likewise, there is the potential for abuse of evolving technologies, such as gene therapy,³⁴⁹ robotics,³⁵⁰ and the computer,³⁵¹ so as to intrude upon personal privacy

³³⁹ *Id.* at 418-19. For a similar perception of late twentieth century American society, see *TRIBE*, *supra* note 83, § 7-4, at 558-59; *Foreman*, *supra* note 335, at 229-31.

³⁴⁰ Kurland, *supra* note 147, at 418-19; *accord* Kreimer, *supra* note 164, at 1295-96.

³⁴¹ Kurland, *supra* note 147 at 419; *cf.* Emerson, *supra* note 302, at 795-96, 848 (commenting on the dangers to freedom of expression posed by new communications technology).

³⁴² Kurland, *supra* note 147, at 418-20; *see also* JOHN DEWEY, *DEMOCRACY AND EDUCATION* 9 (1944) (noting the need for formal education to prepare the individual to deal with complex, overbearing societies).

³⁴³ Kurland, *supra* note 147, at 406, 419.

³⁴⁴ Keith Schneider, *Nuclear Weapons Plants Face Law Suits Around the U.S.*, *N.Y. TIMES*, Aug. 8, 1990, at A15; Matthew Wald, *Secrecy Tied to Hanford Tanks' Trouble*, *N.Y. TIMES*, Aug. 1, 1990, at A12.

³⁴⁵ ELLIOTT MEYROWITZ, *PROHIBITION OF NUCLEAR WEAPONS: THE RELEVANCE OF INTERNATIONAL LAW* 29-39 (1990).

³⁴⁶ Food Stamp Act, 7 U.S.C.A. §§ 2011-2032 (West 1988 & Supp. 1991); Social Security Act, 42 U.S.C.A. §§ 301-1397e (West 1983 & Supp. 1991).

³⁴⁷ *See, e.g.*, *Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (upholding regulations prohibiting certain federally funded programs from providing abortion counseling, referral, and activities involving the recommendation of abortion as a family planning method).

³⁴⁸ David G. Evans, *In the Name of Policing the Drug War . . . How Many Liberties Are We Losing?*, 17 *HUM. RTS.* 14 (1990); Katherine Bishop, *Military Takes Part in Drug Sweep and Reaps Criticism and a Lawsuit*, *N.Y. TIMES*, Aug. 10, 1990, at A12.

³⁴⁹ Robert M. Henig, *Dr. Anderson's Gene Machine*, *N.Y. TIMES*, Mar. 31, 1991, § 6, at 31; *Gene Treatments for Human Illness May Be Tried Soon*, *N.Y. TIMES*, Aug. 1, 1990, at A1.

³⁵⁰ *See A Robot with the Brains, Build and Gait for Mars*, *N.Y. TIMES*, July 8, 1990, § 3, at 9.

³⁵¹ Edward Rothstein, *In the Mind of the High-Tech Child*, *N.Y. TIMES*, Aug. 2, 1990, at C1;

and individuality.

In view of the continuity and intensity of these political and scientific developments, Professor Kurland's argument for finding a positive right to education in the Privileges or Immunities Clause has become increasingly convincing with the passage of time. Indeed, his foresight has been confirmed by the symptomology of the education crisis. As previously discussed, poor education is jeopardizing democratic government³⁵² and disqualifying large numbers of people from either working in or coping with an increasingly "high-tech" environment.³⁵³ The result, just as Professor Kurland predicted, is an incremental encroachment on the capacity of the individual to meaningfully exercise constitutional freedoms, such as free speech and political participation, and a concomitant contraction of individual identity in the face of seemingly monolithic political and technological forces.³⁵⁴

As relevant as Professor Kurland's ideas are to the 1990s, it should be acknowledged that this theory is not without its weaknesses. First, on its face, the Privileges or Immunities Clause appears to limit cognizable claims to those made only against state governments. Anticipating this objection, Professor Kurland disposes of it by looking to Supreme Court decisions which demonstrate "how the national government may be called on to respond to claims which the fourteenth amendment in terms makes only against state action."³⁵⁵ Second, the Privileges or Immunities Clause, read literally, appears to bestow its protections only upon "citizens of the United States."³⁵⁶ Professor Kurland meets this difficulty with the observation that any difference in treatment as between aliens and citizens already must be "particularly justified" under the Equal Protection Clause.³⁵⁷ Thus, whatever rights may, in the future, be

Peter H. Lewis, *The Executive Computer: Modem Makers Are Picking up the Pace*, N.Y. TIMES, July 15, 1990, § 3, at 8.

³⁵² See *supra* notes 68, 288-95, 301, 312-17, 323-24 and accompanying text.

³⁵³ See *supra* notes 34, 42, 51-57, 67, 288-92, 297-300 and accompanying text. For a full analysis of the technological demands which will be made on the American work force and the latter's preparedness to meet those demands over the next decade, see HUDSON INSTITUTE, *supra* note 66, *passim*.

³⁵⁴ See Kreimer, *supra* note 164, at 1295-96, 1395-96; see also Emerson, *supra* note 302, at 795 (noting that government has become "a more pervasive participant in the system of freedom of expression" and has assumed a greatly enhanced affirmative role in the system).

³⁵⁵ Kurland, *supra* note 147, at 419 (citing *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); and *Bolling v. Sharpe*, 347 U.S. 497 (1954)). The dynamic of the Court calling upon the federal government to respond to claims which the language of the Fourteenth Amendment makes actionable only against state conduct is well illustrated in *Bolling*. There, the Court incorporated into the Fifth Amendment's Due Process Clause principles of equality that are virtually identical to those arising from the Fourteenth Amendment's Equal Protection Clause. The effect is to forbid the federal government from allowing racial segregation of public schools in the District of Columbia, just as *Brown v. Board of Educ.*, 347 U.S. 483 (1954), prohibits state governments from doing the same under the Equal Protection Clause.

³⁵⁶ U.S. CONST. amend. XIV, § 1.

³⁵⁷ Kurland, *supra* note 147, at 419; see also ELY, *supra* note 173, at 24-25 (contending that the

accorded citizens under the Privileges or Immunities Clause will also be accorded to resident noncitizens by operation of the equal protection principle.

The third and perhaps most troubling weakness in the Kurland proposal is that its practical application is still barred by the Court's 1873 *Slaughter-House* decision. Yet, as long as people change their minds and judges overrule their decisions, this obstacle is not insurmountable either. As one commentator stated, "[t]he overruling of *Slaughter-House's* reading of the Privileges or Immunities Clause is a consummation devoutly to be wished."³⁵⁸ In fact, whatever validity *Slaughter-House* had when it was decided, it is clear that the considerations underlying the decision no longer exist.

The seeds of the *Slaughter-House* case were sown in the uncertainty and confusion over the concept of citizenship which prevailed before the Civil War.³⁵⁹ The view which had particular currency in the Supreme Court during that period was that national citizenship was actually secondary to and derivative of state citizenship.³⁶⁰ Even though the Union victory subsequently marked the ascendancy and primacy of national government, the early post-Civil War era retained a pronounced anti-federal mood in many quarters.³⁶¹ Thus, although Section 1 of the Fourteenth Amendment was added to the Constitution shortly after the war in order to invest the national government with "a portion of each state's control over civil and political rights" and to make state citizenship derivative of federal citizenship,³⁶² a majority of the Supreme Court Justices remained mired in pre-war conceptualizations.³⁶³

"The nineteenth century legal mind grasped the concept of federalism by visualizing two coextensive spheres, one defining the power of the federal government, the other that of the states."³⁶⁴ To the *Slaughter-*

Privileges or Immunities Clause could mean that "there is a set of entitlements, 'the privileges and immunities of citizens of the United States,' which states are not to deny to anyone. In other words, the reference to citizens may define the class of rights rather than limit the class of beneficiaries.'")

³⁵⁸ Levinson, *supra* note 336, at 73-74. The Supreme Court is no stranger to such about-faces. Consider that in *Brown v. Board of Educ.*, 347 U.S. 483 (1954), the Court rejected its earlier legitimation, in *Plessy v. Ferguson*, 163 U.S. 537 (1896), of separate but equal facilities for blacks and whites under the Equal Protection Clause. Or consider another famous turn around when the Court invalidated the substantive due process doctrine which had predominated from 1897 to 1937. *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937); see *TRIBE, supra* note 83, § 4-4, at 219-20. Indeed, the overthrow of precedent has recently come into vogue among many Supreme Court Justices. *Supreme—But Also Court*, N.Y. TIMES, June 30, 1991, § 4, at 14.

³⁵⁹ *TRIBE, supra* note 83, § 7-3, at 549.

³⁶⁰ See, e.g., *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

³⁶¹ *TRIBE, supra* note 83, § 7-3, at 549-51.

³⁶² *Id.* at 549.

³⁶³ "The majority of the *Slaughter-House* Court thought Congress intended no sweeping reconstruction of the spheres of state and federal power." Wilkinson, III, *supra* note 326, at 46; see Levinson, *supra* note 336, at 73.

³⁶⁴ *TRIBE, supra* note 83, § 7-3, at 552.

House Justices, it was impossible for the federal government, under authority of the Privileges or Immunities Clause, to sit in judgment upon state legislation for the purpose of protecting the peoples' civil rights from infringement by state governments. Attributing such power to the federal government meant to these Justices nothing less than the destruction of state sovereignty and federalism.³⁶⁵ Thus, the *Slaughter-House* decision froze for posterity pre-Civil War thinking on federalism and civil rights; the casualty, of course, was the Privileges or Immunities Clause.

While the nation obviously still wrestles periodically with various facets of state-federal relations,³⁶⁶ it is equally true that the particular concerns of the *Slaughter-House* majority have long been put to rest. What *Slaughter-House* stanchd under the Privileges or Immunities Clause was merely rerouted through the Due Process and Equal Protection Clauses. Throughout the twentieth century, the Court has frequently relied on one or the other of these two clauses to strike down state laws as violative of federally enforceable rights under the Constitution.³⁶⁷ Certainly the evolution of the Equal Protection and Due Process Clauses are reassurance that the elicitation of fundamental rights from the federal Constitution does not signify the demise of the states or federalism. The reality is that the rationale for *Slaughter-House's* decimation of the Privileges or Immunities Clause is irrelevant to late twentieth century legal analysis and presents a totally unnecessary obstacle to judicial development of the clause.

The error of the *Slaughter-House* majority's ways is further exemplified by the fact that even in 1873, the year of the *Slaughter-House* decision, there already existed precedent warranting a different result. The 1823 case of *Corfield v. Coryell*³⁶⁸ indicates that *Slaughter-House* may not have been correctly decided in the first place and that Professor Kurland's reading of the Privileges or Immunities Clause comports more faithfully with the purpose and spirit of the clause. *Corfield* was decided under the Privileges and Immunities Clause of Article IV, Section 2 of the Constitution,³⁶⁹ a clause which, in spite of similarities in verbiage and cadence, has a meaning different from the Fourteenth Amendment's Privileges or Immunities Clause. While the latter seems to be worded so as to guaranty substantive rights, the former is cast in terms of equal access to state-created rights. That is, the Privileges and Immunities

³⁶⁵ *Id.* at 551-55; see Benoit, *supra* note 334, at 99.

³⁶⁶ See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976)). *Garcia* significantly diminished state immunity from federal regulation under the Commerce Clause of the Constitution.

³⁶⁷ TRIBE, *supra* note 83, § 7-3, at 553-55; Benoit, *supra* note 334, at 99-100.

³⁶⁸ 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

³⁶⁹ The clause provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2.

Clause is generally understood to require that each state must accord to visiting citizens of other states the same fundamental rights as the host state accords to its own citizens.³⁷⁰

However, in *Corfield*, Judge Bushrod Washington was not content to let each state be the arbiter of what rights it, as the host state, would grant to out-of-staters. Judge Washington took the tack that there are certain rights which are so fundamental that they belong to the citizens of all free governments:

The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental privileges are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: *Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety*; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.³⁷¹

Judge Washington followed this statement of principle with a list of specific rights intended to be illustrative rather than exhaustive.³⁷² The strong implication is that he understood Article IV, Section 2 to embrace unenumerated and, as of yet, unidentified federally protected rights under the Constitution.³⁷³

There has been much vacillation and controversy over the validity of the *Corfield* fundamental-rights analysis as it relates to Article IV, Section 2.³⁷⁴ But, doubts on this score do not change the fact that two

³⁷⁰ ELY, *supra* note 173, at 29; 2 ROTUNDA, SUBSTANCE AND PROCEDURE, *supra* note 173, § 14.3; TRIBE, *supra* note 83, § 6-34, at 528.

³⁷¹ 6 F. Cas. at 551-52 (emphasis added).

³⁷² Judge Washington wrote:

The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; *may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental*; to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. . . .

Id. at 552 (emphasis added).

³⁷³ Judge Washington's intention in this regard may be gleaned from his statement that in listing rights arising from Article IV, Section 2, he was only mentioning "some" of the particular privileges and immunities of citizens and that there are "many others, which might be mentioned." *Id.* at 552; see ELY, *supra* note 173, at 28-30.

³⁷⁴ Judge Washington's analysis has been viewed by some as an attempt to introduce natural-rights theory into the Privileges and Immunities Clause. TRIBE, *supra* note 83, § 6-34, at 529; David S. Bogen, *The Privileges and Immunities Clause of Article IV*, 37 CASE W. RES. L. REV. 794, 842

circumstances continue to make the *Corfield* analysis highly pertinent to determining what rights are protected by the Fourteenth Amendment's Privileges or Immunities Clause. First, during the thirty-ninth Congress, the framers of the Fourteenth Amendment repeatedly referred to *Corfield* as explanatory of the sorts of rights guaranteed by the Privileges or Immunities Clause.³⁷⁵ Second, Justice Field's dissenting opinion in the *Slaughter-House Cases*, in which he was joined by Chief Justice Chase and Justices Swayne and Bradley, borrowed from the *Corfield* analysis in order to define the dissenters' view of the federal rights protected by the Privileges or Immunities Clause.³⁷⁶

If the *Corfield* analysis does inform the Privileges or Immunities Clause of the Fourteenth Amendment, then the case becomes even more persuasive for adopting Professor Kurland's thesis regarding the right to education. Certainly there is a plausible argument that the general rights, listed in *Corfield*, to happiness, safety, liberty, life, and property are all contingent, to one degree or another, upon fulfillment of a more specific right to education. Indeed, this relationship has been underscored by contemporary data on the ramifications of the public education crisis, showing that substandard education endangers national security, aggravates crime, interferes with individual self-fulfillment, and depresses the economy's capacity for innovation and international competition.³⁷⁷

In sum, Professor Kurland's formulation of a substantive right to education in the Privileges or Immunities Clause has only become more compelling as the evidence mounts that, without successful school systems, individual rights and freedoms will be endangered by the invasive

(1987). Before the nineteenth century ended, the Supreme Court ostensibly rejected Judge Washington's injection of natural rights into the clause. See *Downham v. Alexandria*, 77 U.S. (10 Wall.) 173 (1870); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869) (The *Paul* case was later overturned in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), *reh'g denied*, 323 U.S. 811 (1944)). Nevertheless, natural-rights doctrine returned to haunt Article IV, Section 2. Whether among the Justices there numbered some closet natural-rights theorists or whether sheer inadvertence has been the cause, the parlance of natural-rights thinking found its way into some twentieth-century opinions interpreting the Privileges and Immunities Clause. See, e.g., *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371, 387 (1978) (Privileges and Immunities Clause protects only "basic and essential activities"); *Austin v. New Hampshire*, 420 U.S. 656, 661 (1975) (Privileges and Immunities Clause includes for nonresidents of a state a "fundamental" right to "exemption from higher taxes or impositions than are paid by" residents of the state). But, Professor Laurence Tribe calls these modern incantations of natural-rights ideology "echos, rather than true incarnations, of the 19th-century natural rights notions that animated Justice Washington's opinion in *Corfield*." TRIBE, *supra* note 83, § 6-35, at 534.

³⁷⁵ ELY, *supra* note 173, at 29. "Senator Jacob Howard of Michigan, a member of the Committee on Reconstruction, quoted extensively from the opinion of Circuit Judge Washington in *Corfield v. Coryell* while defining the intended scope of the fourteenth amendment in the Senate." Foreman, *supra* note 335, at 213; see also Russel W. Galloway, *Slaughtering Slaughter-House: The Privileges or Immunities Clause Should Be Restored to Its Original Meaning*, 7 CAL. LAW. 16, 16-18 (1987).

³⁷⁶ 83 U.S. (16 Wall.) 36, 83-111 (1873) (Field, J., dissenting); see Kurland, *supra* note 147, at 412-13.

³⁷⁷ See *supra* notes 51-71 and accompanying text.

attributes of modern society. *Corfield* lends added support to this formulation. When these factors are considered in conjunction with the anachronistic posture of the *Slaughter-House Cases*, the time seems long overdue for bringing the Privileges or Immunities Clause out of idle obscurity and into the fray as the legitimate source of a positive right to education.

C. Principles of Constitutional Construction Also Support Recognition of the Right

In the preceding sections, the case is made for finding an implied right to education in various express provisions of the Constitution as well as in another implied right, the right to vote. The analysis of each such constitutional basis for the right to education has been developed, it is trusted, to stand independently and on its own, without further elaboration or reference to additional doctrinal justifications. However, it would be a distortion to leave things at that. The case for finding a positive right to education is actually considerably stronger than the sum of its analytical bases. There are principles of constitutional construction which make recognition of the right even more compatible with the sense and purpose of the Constitution. These principles derive from international law's informing role, the Ninth Amendment, and evidence of original intent.³⁷⁸

³⁷⁸ The Supreme Court also has had occasion to rely upon a rule of construction for locating fundamental rights which consists of looking to the Constitution as a whole, rather than to any specific constitutional provision. This approach is perhaps most notably exemplified in *Shapiro v. Thompson*, 394 U.S. 618 (1968), where the Court held that there is a constitutional right to travel interstate. In describing its rationale, the Court stated that, "[w]e have no occasion to ascribe the source of this right . . . to a particular constitutional provision," although during the years preceding *Shapiro*, the Court had invoked several provisions as possible bases for the right. *Id.* at 630. According to the Court, the right is to be found, instead, in the "nature of our Federal Union" and "our constitutional concepts of personal liberty." *Id.* at 629. The Court could go this route, it was explained, because the right to travel interstate is a "right so elementary [that it] was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created." *Id.* at 631 (quoting Justice Stewart's majority opinion in *United States v. Guest*, 383 U.S. 745, 758 (1966)).

Former Chief Justice Warren E. Burger recently stated that he believes there is a right to education suffusing the Constitution as a whole. Interview with former Chief Justice Warren E. Burger, in Dearborn, Mich. (Nov. 15, 1991) (clarifying his remark, that there is a right to education, made in Address Marking the Bicentennial of the Bill of Rights in Honor of the Centennial of the Detroit College of Law, in 1991 DET. C. L. REV. (forthcoming Jan. 1992)). Certainly it is conceivable that the education crisis may become devastating enough to imperil "the stronger Union the Constitution created," as in *Shapiro*. *Id.* Indeed, it is arguable that things already have reached such a pass. Cf. Wright, *supra* note 68, at 53-54, 60, 69 (suggesting that because the Constitution is a charter of self-government by enfranchised citizens, the time is ripe for the Court to look for a right to education in the Constitution as a whole). While the theory has considerable appeal, its prospects for success at present do not appear especially bright. Aside from the difference between the political proclivities of the Warren Court, which decided *Shapiro*, and the Rehnquist Court, there is the fact that prior to *Shapiro*, the Court had already recognized a constitutional right to travel in specific provisions of the Constitution. See, e.g., *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (First

1. *International Law in the Role of Informing the Constitution.*—

There are at least six international instruments which posit a positive right to education. One, the Protocol of Buenos Aires, is a treaty to which the United States is a party.³⁷⁹ The others either are treaties to which the United States is not yet a party or are nontreaty instruments. The United Nations Convention on the Rights of the Child³⁸⁰ and the International Covenant on Economic, Social and Cultural Rights³⁸¹ are

and Fifth Amendments); *California v. Edwards*, 314 U.S. 160 (1941) (Commerce Clause); *Twining v. New Jersey*, 211 U.S. 78 (1908) (Fourteenth Amendment). The right to education can boast no such pedigree.

³⁷⁹ Protocol of Amendment to the Charter of the Organization of American States (Protocol of Buenos Aires), Feb. 27, 1967, 21 U.S.T. 607, OAS Treaty Series No. 1-A OASOR, OEA/Ser. A/Z, Add. 2 (1967) [hereinafter Buenos Aires Protocol]. The right to education is set forth as follows:

The Member States will exert the greatest efforts, in accordance with their constitutional processes, to ensure the effective exercise of the right to education, on the following bases:

- a. Elementary education, compulsory for children of school age, shall also be offered to all others who can benefit from it. When provided by the State it shall be without charge;
- b. Middle-level education shall be extended progressively to as much of the population as possible, with a view to social improvement. It shall be diversified in such a way that it meets the development needs of each country without prejudice to providing a general education; and
- c. Higher education shall be available to all, provided that, in order to maintain its high level, the corresponding regulatory or academic standards are met.

Id. at art. 47.

³⁸⁰ Convention on the Rights of the Child, Nov. 20, 1989, G.A. Res. 44/25, 44 U.N. GAOR. Supp. No. 49 at 165, U.N. Doc. A/44/736 (1989) [hereinafter Convention of the Child]. The right to education is set forth, in pertinent part, as follows:

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- (a) Make primary education compulsory and available free to all;
- (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
- (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
- (d) Make educational and vocational information and guidance available and accessible to all children;
- (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

Id. at art. 28.

³⁸¹ International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 [hereinafter Economic, Etc. Rights Covenant]. The right to education is set forth, in pertinent part, as follows:

1. The States Parties to the present Covenant recognize the right of everyone to education. . . .

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

- (a) Primary education shall be compulsory and available free to all;
- (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
- (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
- (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
- (e) The development of a system of schools at all levels shall be actively pursued, an

two such treaties; another, the Convention Against Discrimination in Education,³⁸² imposes a duty to educate upon those nations that become parties to that Convention. The category of nontreaty instruments includes the Declaration of the Rights of the Child,³⁸³ the American Declaration of the Rights and Duties of Man,³⁸⁴ and the Universal Declaration of Human Rights.³⁸⁵

Although the right to education is variously described in these documents, generally speaking, the standard formulation establishes a right to education which is then qualified with the acknowledgment that the right may be achieved progressively, in stages. Article 26 of the Universal

adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

Id. at art. 13, ¶¶ 1-2.

³⁸² Convention Against Discrimination in Education, Dec. 14, 1960, 429 U.N.T.S. 93 [hereinafter Anti-Discrimination Convention]. The duty to provide education is described as follows:

The States Parties to this Convention undertake furthermore to formulate, develop and apply a national policy which, by methods appropriate to the circumstances and to national usage, will tend to promote equality of opportunity and of treatment in the matter of education and in particular:

a. To make primary education free and compulsory; make secondary education in its different forms generally available and accessible to all; make higher education equally accessible to all on the basis of individual capacity; assure compliance by all with the obligation to attend school prescribed by law;

b. To ensure that the standards of education are equivalent in all public education institutions of the same level, and that the conditions relating to the quality of the education provided are also equivalent;

c. To encourage and intensify by appropriate methods the education of persons who have not received any primary education or who have not completed the entire primary education course and the continuation of their education on the basis of individual capacity;

d. To provide training for the teaching profession without discrimination.

Id. at art. 4. Although this provision does not literally enunciate a right to education, the imposition of the duty to provide education may be read to give rise to an accompanying right to demand fulfillment of the duty. *See supra* notes 159-63 and accompanying text.

³⁸³ United Nations Declaration of the Rights of the Child, G.A. Res. 1386, 14 U.N. GAOR Supp. No. 16 at 19, U.N. Doc. A/4354 (1959). The right to education is set forth, in pertinent part, as follows:

The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture, and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgment and his sense of moral and social responsibility, and to become a useful member of society.

Id. at principle 7.

³⁸⁴ American Declaration of the Rights and Duties of Man, May 2, 1948, O.A.S. Off. Rec. OEA/Ser. L/V/II. 23, Doc. 21, Rev. 6 [hereinafter American Declaration]. The right to education is stated as follows:

Every person has the right to an education, which should be based on the principles of liberty, morality and human solidarity.

Likewise, every person has the right to an education that will prepare him to attain a decent life, to raise his standard of living, and to be a useful member of society.

The right to an education includes the right to equality of opportunity in every case, in accordance with natural talents, merit and the desire to utilize the resources that the state or the community is in a position to provide.

Every person has the right to receive, free, at least a primary education.

Id. at art. 12.

³⁸⁵ Universal Declaration of Human Rights, G.A. Res. 217 A, 3(1) GAOR Res. 71, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

Declaration of Human Rights typifies the pattern: "Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit."³⁸⁶

It is tempting to become sidetracked into a discussion over the applicability of the instruments' education provisions as the law of decision, binding on domestic courts. In fact, some authorities have made precisely this argument, with respect to five of the instruments—the Protocol of Buenos Aires, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the American Declaration of the Rights and Duties of Man, and the Convention Against Discrimination in Education—in order to establish the right to education as a binding rule of customary international law.³⁸⁷ In addition, some have argued that the right to education provision of the Protocol of Buenos Aires is binding, self-executing treaty law.³⁸⁸ However, the limited scope of this Article's thesis obviates any need to consider the instruments as providing the rule of decision. For even if the instruments were binding on domestic courts, that would not give them constitutional stature. Rather, by virtue of the Constitution's Supremacy Clause,³⁸⁹

³⁸⁶ *Id.* at art. 26.

³⁸⁷ Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 406-08 (1985); Charles Christopher, Comment, *Plyler v. Doe and the Right of Undocumented Alien Children to a Free Public Education*, 2 B.U. INT'L L.J. 513, 523-32 (1984). *Contra In re Alien Children Educ. Litig.*, 501 F. Supp. 544 (S.D. Tex. 1980), *aff'd unreported mem.* (5th Cir. 1981), *aff'd sub nom. Plyler v. Doe*, 457 U.S. 202 (1982). The district court in *In re Alien Children Education Litigation* rejected plaintiffs' arguments that the right to education provisions of the Buenos Aires Protocol, the Universal Declaration, the Economic, Etc. Rights Covenant, the American Declaration, and the Anti-Discrimination Convention, are binding as customary international law. Neither the Fifth Circuit Court of Appeals nor the Supreme Court mentioned these international law arguments in their affirming opinions. Professor Lillich has criticized the district court's decision as improperly concluding that the education provisions are aspirational and as demonstrating a "misunderstanding of the role of domestic courts in the enforcement, much less the development, of customary international law." Lillich, *supra*, at 407 nn.189-90 & 192.

As a general matter, non treaty instruments and even treaties to which this country is not a party may, under certain circumstances, constitute customary international law. L. CHEN ET AL., *HUMAN RIGHTS AND WORLD PUBLIC ORDER* 266-71 (1980). Customary international law is considered part of the federal common law. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

³⁸⁸ See Brief of the International Human Rights Group as Amicus Curiae Urging Affirmance at 3-23, *Doe v. Plyler*, 628 F.2d 448 (5th Cir. 1980) (No. 78-3311); accord Robert F. Kane & Felix Velarde-Munoz, *Undocumented Aliens and the Constitution: Limitations on State Action Denying Children Access to Public Education*, 5 HASTINGS CONST. L.Q. 461, 504 & 505 n.367 (1978).

A treaty which is not self-executing requires a congressional enactment in order to have binding effect within the United States. A self-executing treaty does not require this additional step. For a discussion of the distinctions between self-executing and non self-executing treaties, see LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 156-61 (1972).

³⁸⁹ The Supremacy Clause provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof;

they would merely become federal law which could be superseded by subsequent contradictory federal legislation or treaty law.³⁹⁰

For purposes of this discussion, the real relevance of these international instruments lies in their value as a means of informing open-ended or cryptic clauses of the Constitution. The general-informing role of international human rights instruments vis-a-vis the Constitution has been embraced by a significant number of international law scholars³⁹¹ and at least one United States Court of Appeals.³⁹² It also received an approving nod from the four concurring Supreme Court Justices in *Oyama v. California*,³⁹³ when they looked to the United Nations Charter to define constitutional norms under the Fourteenth Amendment.³⁹⁴

While the use of international human rights instruments to inform constitutional language has gained a great deal of credence in recent years, there is lack of agreement as to whether such instruments must rise to the level either of binding customary international law or of self-

and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

³⁹⁰ The Chinese Exclusion Case, 130 U.S. 581 (1889); HENKIN, *supra* note 388, at 163-64; Lillich, *supra* note 387, at 369.

³⁹¹ Richard B. Bilder, *Integrating International Human Rights Law into Domestic Law—U.S. Experience*, 4 HOUS. J. INT'L. L. 1, 2, 7 (1981); Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3, 4, 15-18, 36 (1983) [hereinafter Christenson, *Inform Due Process and Equal Protection*]; Gordon A. Christenson, *The Uses of Human Rights Norms to Inform Constitutional Interpretation*, 4 HOUS. J. INT'L. L. 39, 52-55 (1981) [hereinafter Christenson, *Inform Constitutional Interpretation*]; Lillich, *supra* note 387, at 408-12; Hans A. Linde, *Comments*, 18 INT'L LAW. 77-78, 80-81 (1984); Bert B. Lockwood, Jr., *The United Nations Charter and United States Civil Rights Litigation: 1946-1955*, 69 IOWA L. REV. 901, 902, 916, 932, 936, 948-49 (1984); Robert J. Martineau, *Interpreting the Constitution: The Use of International Human Rights Norms*, 5 HUM. RTS. Q. 87, 103, 105-07 (1983); Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 HOW. L.J. 145, 210-11, 218-20 (1984).

Incidentally, this role of international law in relation to the Constitution has been given a number of interchangeable names. See, e.g., Christenson, *Inform Due Process and Equal Protection*, *supra*, at 3, 36 (informing or illuminating role); Lillich, *supra* note 387, at 408-12 (infusing role); Lockwood, *supra*, at 902, 916, 948 (finding or redefining role); Martineau, *supra*, at 103, 107 (defining or incorporating role). It is perhaps worth mentioning that there is some inconsistency among the commentators with respect to the meaning of the term "incorporating" as it is used in this context. At least one commentator uses the term in the same sense that others use the terms "informing," "infusing," etc. See Martineau, *supra*, at 103, 107. In contrast, some writers use the word "incorporating" to convey the process by which a non-self-executing treaty or customary international law may become part of the federal common law. See Christenson, *Inform Due Process and Equal Protection*, *supra*, at 20. As indicated in the text above, this latter sort of incorporation is not in issue here. In the interest of avoiding any unnecessary confusion, the term "incorporating" simply will not be used.

³⁹² *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981) (referring to international law as an aide in defining due process).

³⁹³ 332 U.S. 650 (1948).

³⁹⁴ *Id.* at 673 (1948) (Black, J., Douglas, J., Murphy, J., & Rutledge, J., concurring).

executing treaties in order to fulfill the informing function. Professor Richard Lillich takes the position that international human rights instruments may infuse the Constitution whether or not they also constitute binding customary international law or self-executing treaties.³⁹⁵ Professor Gordon Christenson, on the other hand, intimates that in order for international human rights norms to be of value in informing the Constitution, they should derive from customary international law.³⁹⁶

Professor Christenson is undoubtedly correct when he suggests that customary international law is more persuasive than international human rights norms which do not yet attain to that status. But, in this writer's judgment, Professor Lillich takes the sounder view. Unlike the situation where an international instrument is to serve as the rule of decision, use of the instrument as an interpretative device merely to inform the Constitution does not logically require treating the instrument as dispositive law.

As mentioned previously, some commentators have proposed that the education provisions of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the Protocol of Buenos Aires, the American Declaration of the Rights and Duties of Man, and the Convention Against Discrimination in Education, do, in fact, give rise to a positive right to education as binding customary international law.³⁹⁷ Arguably, then, these instruments meet even Professor Christenson's more demanding standard for informing the Constitution. In any event, surely these five instruments meet Professor Lillich's more liberal prerequisites, representing the reiteration of a world consensus on the right to education in major international documents over the course of several decades.³⁹⁸

³⁹⁵ Professor Lillich states that "international human rights law, at least until the United States ratifies more self-executing human rights treaties or more norms in the Universal Declaration ripen into customary international law, may serve an important function shaping the content and reach of constitutional . . . standards." Lillich, *supra* note 387, at 411-12; *see also* Martineau, *supra* note 391, at 105, 107 (maintaining that "[t]he [informing] approach is free from the concerns . . . of determining whether international norms are so widely accepted as to be deemed binding on the court"); *cf.* Bilder, *supra* note 391, at 7 (asserting that the judiciary will use international standards to inform the Constitution even though they are not regarded "as customary law to be considered as 'the law of the land'").

³⁹⁶ Professor Christenson remarks that "[t]hese [international human rights] norms supply a context, guide interpretation and fill gaps in the positive law, but their use requires convincing technical presentation of the *positive* sources of customary international law before they are contextually persuasive." Christenson, *Inform Due Process and Equal Protection*, *supra* note 391, at 17.

³⁹⁷ *See supra* note 387 and accompanying text; *see also* CHEN ET AL., *supra* note 387, at 273-74 (pronouncing the entire Universal Declaration to be customary international law).

³⁹⁸ Lillich, *supra* note 387, at 406-08; *cf.* Paust, *supra* note 391, at 191 (implying that "human rights to education," drawn from the Universal Declaration, should at least have informed the Supreme Court's analysis in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973)); Christenson, *Inform Due Process and Equal Protection*, *supra* note 391, at 18-20 (suggesting that the education rights provisions of the Universal Declaration, the Economic, Etc. Rights Covenant, and the Child Rights Declaration, may inform the Fourteenth Amendment's Equal Protection Clause

It still may be objected, though, that nothing much is accomplished by this informing role because, by the instruments' terms, the right may be achieved progressively and, typically, only elementary education is guaranteed. Yet the fact remains that these documents posit a right to education which is clearly meant to be mandatory, not precatory.³⁹⁹ That provision is made for the right to be achieved in stages probably reflects the drafters' recognition that not all nations have the resources or level of development necessary to achieve the full-blown right immediately.⁴⁰⁰ It is stating the obvious to add that the United States does not fall within the classification of poor or underdeveloped nations of likely concern to the drafters.⁴⁰¹

Granting that at least five of the seven international instruments discussed above are of a status qualifying them to inform the Constitution, the question still remains as to whether the pertinent provisions of the Constitution need informing. An affirmative answer seems in order when the substantive analytical bases for a constitutional right to education are considered, e.g., the Fourteenth Amendment's Due Process and Privileges or Immunities Clauses, the First Amendment's Free Speech Clause, and sundry references to the right to vote. These clauses and phrases are the very prototype of that comprehensive yet compressed constitutional language which lends itself to, and, indeed, begs for infusion by international human rights norms because so few words are used to say so much.⁴⁰² What, after all, could be at one and the same time both so terse and so expansive as the Constitution's directives that the states must not "abridge the privileges or immunities of citizens",⁴⁰³ that "Congress shall

primarily by justifying application of a stricter standard of scrutiny to discriminatory classifications burdening education).

³⁹⁹ Lillich, *supra* note 387, at 407; see also Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 418 (1979) (the right to education provision in the Economic, Etc. Rights Covenant is not merely aspirational).

⁴⁰⁰ Henkin, *supra* note 399, at 418-19; see Frank C. Newman, *Editorial: Interpreting the Human Rights Clauses of the U.N. Charter*, 1972 REVUE DES DROITS DE L'HOMME 283, 287-288.

⁴⁰¹ Even if the education provisions of these instruments were construed to make the secondary level of education aspirational rather than mandatory, the fact that the language posits a right to education at the elementary school level would still be supportive of a right to education under the Constitution. The infusing role would simply be somewhat less persuasive and encompassing.

⁴⁰² The Privileges or Immunities Clause has remained "an empty and unused vessel which affords the Court full opportunity to determine its contents . . ." Kurland, *supra* note 147, at 420. The vast number of decisions by the Supreme Court fleshing out the Free Speech and Due Process Clauses stand as a testament to the need for and propriety of normative infusion from international law. See, e.g., *Cruzan v. Director, Missouri Dep't of Health*, 110 S. Ct. 2841 (1990) (qualified right to die located in Due Process Clause); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (right to receive information guaranteed by Free Speech Clause); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (right to hold one's own beliefs recognized in Free Speech Clause); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (right of association guaranteed by Free Speech Clause); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (right to raise children in accordance with parental values and beliefs protected by Due Process Clause).

⁴⁰³ U.S. CONST. amend. XIV, § 1.

make no law . . . abridging the freedom of speech";⁴⁰⁴ that no state shall deprive any person "of life, liberty, or property, without due process of law";⁴⁰⁵ and passing references to the right to vote?⁴⁰⁶ The positive right to education as an international human rights norm has the potential to breathe a more complete and rational meaning into the language of these constitutional provisions.

2. *The Ninth Amendment.*—The Ninth Amendment to the Constitution states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."⁴⁰⁷ Like the Fourteenth Amendment's Privileges or Immunities Clause, the Ninth Amendment has been assiduously ignored for decades on end.⁴⁰⁸ However, the silence has been punctuated sporadically by intense and disputatious bursts of scholarly interest.⁴⁰⁹ The reason under-

⁴⁰⁴ *Id.* at amend. I.

⁴⁰⁵ *Id.* at amend. XIV, § 1.

⁴⁰⁶ See *supra* notes 304-06 and accompanying text.

⁴⁰⁷ U.S. CONST. amend. IX.

⁴⁰⁸ From its adoption in 1791 until the Supreme Court's decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Ninth Amendment was never used as the basis for a decision by the United States Supreme Court, even though parties periodically raised the issue. Eugene M. Van Loan, III, *Natural Rights and the Ninth Amendment*, 48 B.U. L. REV. 1, 1 (1968). For a discussion of the few pre-1965 Supreme Court opinions containing anything more than a fleeting reference to the Ninth Amendment, see Van Loan, III, *supra*, at 1 n.3. Likewise, little scholarly attention was devoted to the Ninth Amendment before the *Griswold* decision. Van Loan, III, *supra*, at 1 n.4; see also Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 2 n.9 (1988) [hereinafter Barnett, *Reconceiving the Ninth*]. Even after *Griswold*, the Supreme Court only predicated its decisions on the Ninth Amendment in two cases, *Roe v. Wade*, 410 U.S. 113 (1973), and *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). Naturally, *Griswold* engendered a great deal of commentary. See Van Loan, III, *supra*, at 2 n.11 (listing twenty-three articles and student comments and case notes on the Ninth Amendment).

⁴⁰⁹ A recent spurt of scholarly activity in relation to the Ninth Amendment commenced in the late 1980s. See generally Morriss Arnold, *Doing More Than Remembering the Ninth Amendment*, 64 CHI.-KENT L. REV. 265 (1988); Sotirios A. Barber, *The Ninth Amendment: Inkblot or Another Hard Nut to Crack?*, 64 CHI.-KENT L. REV. 67 (1988); Randy E. Barnett, *Two Conceptions of the Ninth Amendment*, 12 HARV. J.L. & PUB. POL'Y 29 (1989) [hereinafter Barnett, *Two Conceptions*]; Randy E. Barnett, *Foreword: The Ninth Amendment and Constitutional Legitimacy*, 64 CHI.-KENT L. REV. 37 (1988) [hereinafter Barnett, *Constitutional Legitimacy*]; Donald L. Beschle, *Uniformity in Constitutional Interpretation and the Background Right to Effective Democratic Governance*, 63 IND. L.J. 539, 560-61 (1988); Charles L. Black, Jr., *On Reading and Using the Ninth Amendment*, in THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 337 (Randy E. Barnett ed. 1989) [hereinafter Black, Jr., *Reading the Ninth*]; Chambers, *supra* note 110, at 69; Charles J. Cooper, *Limited Government and Individual Liberty: The Ninth Amendment's Forgotten Lessons*, IV J.L. & POLITICS 63 (1987); Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 CHI.-KENT L. REV. 131 (1988); Stephen Macedo, *Reasons, Rhetoric, and the Ninth Amendment: A Comment on Sanford Levinson*, 64 CHI.-KENT L. REV. 163 (1988); Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, in THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT, *supra*, at 291; Simeon C.R. McIntosh, *On Reading the Ninth Amendment: A Reply to Raoul Berger*, in THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT, *supra*, at 219; Lawrence E. Mitchell, *The Ninth Amendment and the "Jurisprudence of Original Intention,"* 74

lying both the long stretches of inattention and shorter bouts of charged controversy may well be the same: this is the "scary amendment,"⁴¹⁰ at least for those who harbor a strong resistance to unenumerated or implied constitutional rights.

The "scariness" of the Ninth Amendment is that, if read in a straightforward way, it means that the express enumeration of the rights of the people in the Constitution must not be taken to preclude future recognition of other unenumerated rights in the Constitution. While this view has considerable currency among constitutional theorists,⁴¹¹ it is by no means the only view. For instance, some see the Ninth Amendment merely as a constraint on the federal government's usurpation of power.⁴¹² Others theorize that the Ninth Amendment refers to common law or other rights that fall short of constitutional stature.⁴¹³ Yet, the straightforward reading of the Ninth Amendment continues to hold an inherent appeal for this author. This interpretation, unique among others, has the distinct virtue of taking the amendment's words for just what they seem to say. It is an interpretation buttressed by evidence that the framers meant what they wrote,⁴¹⁴ as well as by modern precedent

GEO. L.J. 1719 (1986); Andrzej Rapaczynski, *The Ninth Amendment and the Unwritten Constitution: The Problems of Constitutional Interpretation*, 64 CHI.-KENT L. REV. 177 (1988); Norman Redlich, *The Ninth Amendment as a Constitutional Prism*, 12 HARV. J.L. & PUB. POL'Y 23 (1989) [hereinafter Redlich, *Ninth Amendment Prism*]; Lawrence G. Sager, *You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What on Earth Can You Do with the Ninth Amendment?*, 64 CHI.-KENT L. REV. 239 (1988); Suzanna Sherry, *The Founder's Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

⁴¹⁰ ELY, *supra* note 173, at 34.

⁴¹¹ *Id.* at 34-41; 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 624-25 (4th ed. 1873); Barnett, *Two Conceptions*, *supra* note 409, at 37; Black, Jr., *Further Reflections*, *supra* note 148, at 1104; Chambers, *supra* note 110, at 69; Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 152-53 (1928) (pt. 1); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 709 (1975); Knowton H. Kelsey, *The Ninth Amendment of the Federal Constitution*, in THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT, *supra* note 409, at 93; Massey, *supra* note 409, at 325; McIntosh, *supra* note 409, at 233, 241; Mitchell, *supra* note 409, at 1731-33, 1742; Bennet B. Patterson, *The Forgotten Ninth Amendment*, in THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT, *supra* note 409, at 107; Jordan J. Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee*, 60 CORNELL L. REV. 231, 234, 237, 245-46 (1975); Redlich, *Ninth Amendment Prism*, *supra* note 409, at 26; Sherry, *supra* note 409, at 1164-66; Tribe, *Contrasting Visions*, *supra* note 337, at 107-08; Van Loan, III, *supra* note 408, at 35, 38, 41-45.

⁴¹² EDWARD DUMBAULD, THE BILL OF RIGHTS 63 (1957); Raoul Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1, 23-24 (1980); Cooper, *supra* note 409, at 64, 66.

⁴¹³ Russell L. Caplan, *History and Meaning of the Ninth Amendment*, in THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT, *supra* note 409, at 243, 247-48.

⁴¹⁴ ELY *supra* note 173, at 34-41; Barnett, *Two Conceptions*, *supra* note 409, at 34, 36, 37; Kelsey, *supra* note 411, at 102; Levinson, *supra* note 409, at 141; Massey, *supra* note 409, at 295-98; Paust, *supra* note 411, at 234-35; Norman Redlich, *Are There "Certain Rights . . . Retained by the People?"* in THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT, *supra* note 409, at 127, 138-39; Sherry, *supra* note 409, at 1164-66; *but see* Cooper,

issuing from the Supreme Court.

That modern precedent originated in 1965 with *Griswold v. Connecticut*.⁴¹⁵ The significance of the opinion, for purposes of this discussion, is that it recognized a marital privacy right as emanating from the penumbras of the Ninth Amendment, as well as from other amendments to the Constitution.⁴¹⁶ However, Justice Douglas' opinion is disappointing in that it contains no explanation of the role that the Ninth Amendment plays in giving rise to such a penumbral right. It was Justice Goldberg who leaped into the breach with a concurring opinion devoted to the significance of the Ninth Amendment as it relates to unenumerated rights generally and the marital privacy right in particular. According to Justice Goldberg, while the Ninth Amendment does not serve as an independent source of rights in and of itself, the amendment does mean that there are other unenumerated constitutional rights beyond those specifically listed in the Bill of Rights.⁴¹⁷

Since *Griswold*, the Supreme Court has expressly relied upon the Ninth Amendment in two additional cases: *Roe v. Wade*⁴¹⁸ and *Richmond Newspapers, Inc. v. Virginia*.⁴¹⁹ In *Roe*, the Court mentioned the Ninth Amendment as one of a number of constitutional bases for protecting, as a "liberty" under the Due Process Clause, a woman's unenumerated right to have an abortion under certain circumstances.⁴²⁰ In *Richmond Newspapers*, Chief Justice Burger's plurality opinion invoked the Ninth Amendment as support for finding, implicit in the guarantees of the First Amendment, an unenumerated right to attend criminal trials.⁴²¹ In keeping with Justice Goldberg's conception, the Court looked to the Ninth Amendment, not as creating Ninth Amendment rights, but, as a rule of construction authorizing the judiciary to find unenumerated rights elsewhere in the Constitution. This is an approach that also has attracted substantial support in the scholarly literature.⁴²²

supra note 409, at 64 (the framers intended the Ninth Amendment "to protect 'residual' rights that exist by virtue of the fact that the federal government has only limited powers"); Mitchell, *supra* note 409, at 1719-25 (it is impossible to know the framers' intent in relation to the Ninth Amendment).

⁴¹⁵ 381 U.S. 479 (1965). Justice Douglas' opinion for the Court is described more fully in part III.B.1 of this Article.

⁴¹⁶ *Id.* at 484-86.

⁴¹⁷ *Id.* at 486-93, 496 (Goldberg, J., concurring).

⁴¹⁸ 410 U.S. 113, 152-53 (1973).

⁴¹⁹ 448 U.S. 555, 579 & n.15 (1980) (plurality opinion).

⁴²⁰ *Roe*, 410 U.S. at 153.

⁴²¹ *Richmond Newspapers*, 448 U.S. at 579 & n.15.

⁴²² ELY, *supra* note 173, at 37-38; Arnold, *supra* note 409, at 268; Black, Jr., *Reading the Ninth*, *supra* note 409, at 346-47; Black, Jr., *Further Reflections*, *supra* note 148, at 1104; Rapaczynski, *supra* note 409, at 188-90; Tribe, *Contrasting Visions*, *supra* note 337, at 102; see Thomas C. Grey, *The Uses of an Unwritten Constitution*, 64 CHI.-KENT L. REV. 211, 221 (1988); Patterson, *supra* note 411, at 125; Redlich, *Ninth Amendment Prism*, *supra* note 409, at 26-28; Sherry, *supra* note 409, at 1166. Some commentators suggest that the Ninth Amendment is undersold as a pure rule of con-

Having settled upon the Ninth Amendment as a rule of construction, it should be pointed out that the critical question yet remains as to what sources may be used to find unenumerated constitutional rights. Some commentators claim that these rights must be ascertained by distilling a sense of the Constitution as a whole;⁴²³ others opine that such rights may be drawn from extra-constitutional sources;⁴²⁴ and still others, echoing the analysis in *Griswold*, *Roe*, and *Richmond Newspapers*, propose that such rights must be already implicit within specific provisions of the Constitution (other than the Ninth Amendment).⁴²⁵

It is the latter source of rights which is favored here upon the premise that it is the least unprecedented and, therefore, probably the most readily acceptable. The Supreme Court has long engaged in the practice of recognizing unenumerated rights as implicitly arising from constitutional provisions, resulting in numerous entitlements that are nowhere mentioned or even alluded to in the Constitution.⁴²⁶ This practice would seem to corroborate, de facto, that the unenumerated rights referred to in the Ninth Amendment may properly be sought in the implications of the express words of the Constitution.

This Article has urged that an unenumerated positive right to education arises from the Free Speech Clause of the First Amendment, the Due Process Clause and the Privileges or Immunities Clause of the Fourteenth Amendment, and, indirectly, from the Constitution's references to elections and voting. The Ninth Amendment, as a rule of construction, thus makes clear that finding the education right in these provisions is an exercise which, far from offending constitutional precepts, comports with an accepted paradigm of constitutional interpretation.⁴²⁷

struction and that the amendment should also serve as an independent source of unenumerated constitutional rights. Levin, *Judicial Standard*, *supra* note 103, at 707; Massey, *supra* note 409, at 311-320, 336; McIntosh, *supra* note 409, at 235, 240-41; Mitchell, *supra* note 409, at 1731-34; Paust, *supra* note 411, at 234-35, 253-59; Van Loan, III, *supra* note 408, at 42 & n.246, 45. Some commentators have even recognized a right to education as located within the Ninth Amendment itself. Levin, *Judicial Standard*, *supra* note 103, at 707; Terrence J. Moore, *The Ninth Amendment—Its Origins and Meaning*, 7 NEW ENG. L. REV. 215, 308-09 (1972).

⁴²³ ELY, *supra* note 173, at 12; McIntosh, *supra* note 409, at 235-36; Tribe, *Contrasting Visions*, *supra* note 337, at 107; see Barnett, *Constitutional Legitimacy*, *supra* note 409, at 56.

⁴²⁴ Barnett, *Two Conceptions*, *supra* note 409, at 38-39; Black, Jr., *Reading the Ninth*, *supra* note 409, at 344-49; Black, Jr., *Further Reflections*, *supra* note 148, at 1105; Grey, *supra* note 422, at 211, 214, 221-22, 233-34, 237; Sherry, *supra* note 409, at 1164-66, 1177.

⁴²⁵ Arnold, *supra* note 409, at 268; Black, Jr., *Further Reflections*, *supra* note 148, at 1104; Redlich, *Ninth Amendment Prism*, *supra* note 409, at 27; Tribe, *Contrasting Visions*, *supra* note 337, at 107; see Black, Jr., *Reading the Ninth*, *supra* note 409, at 347.

⁴²⁶ See *supra* notes 145-46 and accompanying text.

⁴²⁷ At least one commentator has advocated using the Ninth Amendment as a rule of construction so as to facilitate judicial recognition of an unenumerated right to education under the Constitution. Chambers, *supra* note 110, at 69 & n.63, 70-72. Such an argument, no doubt, will meet with objection from those who believe that the Ninth Amendment should be limited to supporting negative constitutional rights exclusively. Barnett, *Two Conceptions*, *supra* note 409, at 40. But see *supra* notes 148-71 and accompanying text.

The right to education, although nowhere specifically enumerated in the Constitution, is "retained by the people" by implication in that document's express provisions. Indeed, Justice Douglas foresaw just this possibility when he stated that "the right of the people to education . . . like the right to pure air and pure water, may well be rights 'retained by the people' under the Ninth Amendment."⁴²⁸

3. *Original Intent to Delegate Power over Education to the Federal Government.*—The Tenth Amendment to the Constitution states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."⁴²⁹ The conventional wisdom is that the power to provide education belongs primarily to the states because the Constitution does not delegate that power to the federal government nor forbid the states from exercising such power.⁴³⁰ Thus, conventional theory teaches that the federal government is restricted to supplementing state-provided educational systems insofar as the Constitution otherwise permits.⁴³¹ The axis upon which this construct turns is the presumption that the power over education is not delegated to the United States.

Yet, if the Supreme Court were to recognize an implied positive right to education under the Constitution, then an implied duty and the power to carry out that duty would thereby be delegated to the federal government to ensure fulfillment of the right.⁴³² Once the federal government's power was recognized, the Tenth Amendment would recede into inconsequence. It has become a "truism" that the Tenth Amendment imposes no affirmative limitation on any authority delegated to the federal government by the Constitution.⁴³³ In short order, the conven-

⁴²⁸ *Palmer v. Thompson*, 403 U.S. 217, 233-34 (1971) (Douglas, J., dissenting).

⁴²⁹ U.S. CONST. amend. X.

⁴³⁰ KERN ALEXANDER ET AL., *THE ECONOMICS AND FINANCING OF EDUCATION* 323 (4th ed. 1983); ARVAL A. MORRIS, *THE CONSTITUTION AND AMERICAN EDUCATION* 61 (2d ed. 1980); 1 JAMES A. RAPP, *EDUCATION LAW* § 3.02[2], at 3-11 (perm. ed. rev. vol. 1991); Project, *Education and the Law: State Interests and Individual Rights*, 74 MICH. L. REV. 1373, 1375 & n.4 (1976) [hereinafter Project, *Education and Law*].

⁴³¹ 1 RAPP, *supra* note 430, § 3.01[3], at 3-5. The federal government has considerable influence over education through provisions of the Constitution other than the Tenth Amendment. *See, e.g., id.* § 3.01[3] (discussing federal control over education pursuant to the spending power).

⁴³² The point is made earlier in this article that a constitutional right creates a correlative governmental duty to assure fulfillment of the right and vice versa. *See supra* notes 159-71 and accompanying text. Indeed, many of the articles sympathetic to recognition of a positive right to education under the Constitution are predicated on the underlying assumption that the right would empower the federal government to fulfill the duty of ensuring provision of at least an adequate quantum of education. *See, e.g.,* Edelman, *supra* note 67, at 33-34; Gard, *supra* note 67, at 29-34; Kurland, *supra* note 147, at 419; Levin, *Educational Adequacy*, *supra* note 108, at 261-63; Prevolos, *supra* note 68, at 76, 112-17; Tribe, *Inalienable Rights*, *supra* note 109, at 330-35; Wright, *supra* note 68, at 72-80.

⁴³³ The Supreme Court has stated:

The amendment states but a truism that all is retained which has not been surrendered. . . . From the beginning and for many years the amendment has been construed as not depriving the

tional wisdom would be delegitimated and overthrown by recognition of the right.

A likely objection to this debunking may be that the Constitution was never written with such a right and power in mind and, therefore, that the Tenth Amendment remains a bar to direct and expanded federal involvement in guaranteeing the provision of education. To meet this concern, and ease the inevitable discomfort that such a thorough deposal must occasion, it is informative to examine available evidence of original intent with respect to the national government's power over education.

Although there is a division of opinion as to what degree, if any, original intent should be used to construe the Constitution,⁴³⁴ surely it is appropriate to consult this source where the validity of longstanding assumptions about a constitutional provision are called into question. Indeed, should there be purblind acceptance of the conventional wisdom when original intent may disclose a different understanding? It is my contention that the evidences of original intent reveal that the Tenth Amendment has been materially misunderstood in relation to the provision of education. The framers' own words and conduct as well as the attitude of other eminent public figures of the day reveal that the Constitution was drafted upon the assumption that the national government would shoulder a direct and pivotal responsibility for providing education, well beyond supplementation.⁴³⁵

Even before the adoption of the Constitution, the Confederate Congress exercised the power to subsidize local public education, the effect of which was the proliferation of schools.⁴³⁶ For example, the Confederate Congress enacted the Land Ordinance of 1785 by virtue of which the sixteenth lot of every township was reserved for the establishment and maintenance of schools.⁴³⁷ Subsequently, in its Northwest Ordinance of

national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.

United States v. Darby, 312 U.S. 100, 124 (1941); accord Martha A. Field, Comment, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84, 90-91, 95-96 (1985); Kevin P. Holewinski, Comment, *Garcia: The Preservation of Federalism Values Is Best Left to the Political Process Rather than the Courts*, 15 CAP. U. L. REV. 515, 537 (1986). *Contra* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 568, 570-73 (1985) (Powell, J., dissenting); see also Stephen L. Smith, Comment, *State Autonomy After Garcia: Will the Political Process Protect States' Interests?*, 71 IOWA L. REV. 1527, 1541 (1986) (pointing out that some legal scholars have disagreed with the Supreme Court's characterization of the Tenth Amendment as a "truism").

⁴³⁴ Compare BORK, *supra* note 199, at 143-60 (asserting that the only legitimate method of interpreting the Constitution is reliance upon original intent) with TRIBE, *supra* note 83, § 1-7, at 10 & n.2 (observing that what the framers intended or assumed in drafting the Constitution is not necessarily determinative of what the Constitution means).

⁴³⁵ See FRANK BOURGIN, *THE GREAT CHALLENGE: THE MYTH OF LAISSEZ-FAIRE IN THE EARLY REPUBLIC* 45, 131-37 (1989); Gard, *supra* note 67, at 10-12; Prevolos, *supra* note 68, at 108-09.

⁴³⁶ TYACK ET AL., *supra* note 223, at 31-33.

⁴³⁷ An Ordinance for ascertaining the mode of disposing Lands in the Western Territory, May

1787, the Confederate Congress articulated the national government's policy of encouraging education in the affected territory: "Religion, morality and knowledge, being necessary to good government and happiness of mankind, schools and means of education shall forever be encouraged."⁴³⁸ In fact, in negotiating the sale of Northwest Territory lands to the Ohio Company in 1787, the Congress again reserved the sixteenth section of every township for schools.⁴³⁹

It is noteworthy that these ordinances were made under the Articles of Confederation, a document which was much more deferential toward states' rights and state sovereignty than the United States Constitution would be.⁴⁴⁰ At least two commentators have taken the position that the Northwest Ordinance, by itself, is strong evidence that the right to education was not mentioned in the Constitution because it was assumed to be contained within a more general constitutional guarantee.⁴⁴¹ They find further support for this conclusion in the fact that the Founding Fathers placed a high premium on the importance of education.⁴⁴²

Historical research does indeed reveal that such men among the founders as George Washington, James Madison, and Thomas Jefferson made the wide dissemination of education one of their foremost concerns, since they considered an educated populace essential to the survival and health of the fledgling republic.⁴⁴³ However, perhaps no American political figure is more renowned for his love of knowledge and dedication to its diffusion than Thomas Jefferson. Jefferson was adamant that democracy and good government could only be sustained if access to education became pervasive.⁴⁴⁴ To this end, he envisioned public education on a massive scale, supported by infusions of federal funding.⁴⁴⁵ He is also said to have entertained the idea of establishing a centralized national school system, as well as a national institute for teaching and research.⁴⁴⁶

While, for a variety of reasons, Jefferson was unable to bring most of these ideas to fruition,⁴⁴⁷ as President he reinstated the practice of endowing new states with lands for public education, for the first time

20, 1785, in 4 JOURNALS OF THE AMERICAN CONGRESS FROM 1774-1788, at 520-22 (Washington, D.C. 1823).

⁴³⁸ Northwest Ordinance of 1787, art. III, 1 Stat. 50, 52-53 (1789).

⁴³⁹ BOURGIN, *supra* note 435, at 134.

⁴⁴⁰ *Id.* at 33-34.

⁴⁴¹ Gard, *supra* note 67, at 11; Prevolos, *supra* note 68, at 109; *but see* TYACK ET AL., *supra* note 223, at 32 (arguing that the motivation for the 1785 and 1787 Ordinances was not Congress' desire to promote education, but, rather, the need to raise money to reimburse revolutionary soldiers).

⁴⁴² Gard, *supra* note 67, at 11-12; Prevolos, *supra* note 68, at 109.

⁴⁴³ BOURGIN, *supra* note 435, at 127-37; TYACK ET AL., *supra* note 223, at 21, 23-27; Gard, *supra* note 67, at 11-12.

⁴⁴⁴ BOURGIN, *supra* note 435, at 133-34; TYACK ET AL., *supra* note 223, at 23.

⁴⁴⁵ BOURGIN, *supra* note 435, at 132.

⁴⁴⁶ *Id.* at 135-36.

⁴⁴⁷ Jefferson was impeded in his plans for large scale educational improvement by developments

transforming the practice into “a fixed and binding policy of the federal government.”⁴⁴⁸ Except for Texas, Maine, and West Virginia, every state admitted into the Union since 1802 has received such an endowment from the federal government.⁴⁴⁹ One historian has evaluated Jefferson’s land reservation policy as a clear indication that “[e]ducation was . . . early taken under the protection of the federal government”⁴⁵⁰

It should be emphasized that in his assumption of a primary, albeit not exclusive, role for the federal government in providing education, Jefferson was hardly a renegade. Both George Washington and James Madison proposed the endowment of a national university.⁴⁵¹ Benjamin Rush favored a system of education spanning common schools through a federal university.⁴⁵² And, Noah Webster even devised a national curriculum of sorts—a “Federal Catechism” to teach children republican values.⁴⁵³ Moreover, such plans and hopes were nourished in a context where conflict between the states and the national government over education was unknown.⁴⁵⁴ It is probably safe to say that at that time “not a single member consciously visualized the powers reserved to the states as including the power to establish a public school system supported by state taxes.”⁴⁵⁵

Standing by themselves, the attitudes and policies of the nation’s early political leaders, including authors of the Constitution, would seem to indicate that the Constitution was drafted without any thought of relegating the federal government to only a secondary, supplementing role in the education arena. But this evidence does not stand by itself; there is also in the history of the Constitution’s drafting process a telling sign that the delegation of powers to the federal government, referred to in the Tenth Amendment, was meant to encompass implied or unenumerated powers as well as express ones.

That this was the drafters’ intention may be detected by comparing the language of the Tenth Amendment with that of its predecessor, Article II of the Articles of Confederation. Article II reposed in the states all powers not “expressly” delegated to the national government.⁴⁵⁶ However, the Constitution’s framers deliberately dispensed with the word “expressly” when they recast the rest of the language of Article II as the

in foreign relations which seriously depleted the national treasury. *Id.* at 132, 135-37. Congressional lassitude and apathy also proved a restraint. *Id.* at 136-37.

⁴⁴⁸ *Id.* at 134.

⁴⁴⁹ *Id.* at 135.

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.* at 135-36.

⁴⁵² TYACK ET AL., *supra* note 223, at 23.

⁴⁵³ *Id.* at 23-24.

⁴⁵⁴ BOURGIN, *supra* note 435, at 132-33.

⁴⁵⁵ *Id.* at 132.

⁴⁵⁶ ARTICLES OF CONFEDERATION art. II (1781).

Tenth Amendment.⁴⁵⁷ This deliberate deletion is inexplicable—unless the framers contrived by it to signal that under the Tenth Amendment the federal government would retain those powers delegated to it, whether enumerated or unenumerated.⁴⁵⁸

Original intent, as gleaned from the evidence described above, supports the interpretation that there is an implied power over education delegated by the Constitution to the federal government. As such, original intent elucidates in the Constitution a schematic that comfortably accommodates an implied positive right to education that would obligate the federal government to assure fulfillment of the right. The recognition of such a right and duty does not conflict with any provision of the Constitution. To the contrary, the nascent right would be more consonant with and expressive of the Constitution's meaning as it was originally conceived by the nation's forefathers.⁴⁵⁹

⁴⁵⁷ C. HERMAN PRITCHETT, *THE AMERICAN CONSTITUTIONAL SYSTEM* 16-17 (5th ed. 1981); *TRIBE*, *supra* note 83, § 5-3, at 302 n.7 ("Article IX [sic] of the Articles of Confederation *did* reserve to the states all powers not 'expressly' delegated to the national government, but the tenth amendment deliberately omitted any requirement of an *express* articulation of the national government's powers."); Phillip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239, 315 n.286 (1989); James Huffman, *Governing America's Resources: Federalism in the 1980's*, 12 ENVTL. L. 863, 868-69 (1982); *cf.* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819) (discussing the significance of the omission of the term "expressly" in the Tenth Amendment).

⁴⁵⁸ The Supreme Court reads the omission of the word "expressly" from the Tenth Amendment in a similar sense:

But there is no phrase in the instrument [the Constitution] which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only, that the powers "not delegated to the United States, nor prohibited to the states, are reserved to the states or to the people;" thus leaving the question, whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument It's [the Constitution's] nature, therefore, requires, that only its great outlines should be marked, its important objects designa:ed, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.

McCulloch, 17 U.S. at 406-07; *cf.* Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 855-58 (1987) (discussing Congress' unenumerated power to regulate immigration); William A. Isaacson, *Garcia v. San Antonio Metropolitan Transit Authority: Antifederalism Revisited*, 21 U. TOL. L. REV. 147, 188 (1989); PRITCHETT, *supra* note 457, at 16-17 (intimating that because the word "expressly" was omitted from the Tenth Amendment, the federal government should be understood to have implied powers). *But see* Field, *supra* note 433, at 95 n.63.

⁴⁵⁹ It is interesting that in *Rodriguez*, the Court considered the possibility of a future positive right to education without displaying any concern over a derogation of Tenth Amendment principles. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36-37 (1973); *see also* *Papasan v. Allain*, 478 U.S. 265, 285 (1986) (acknowledging that the status of a positive constitutional right to education remains unsettled while omitting any discussion of the possibility that such a right could run afoul of the Tenth Amendment). Long before *Rodriguez*, Thomas Jefferson indicated that he believed in a far-reaching federal empowerment over education, without expressing any recounted qualms over the fact that the empowerment was unenumerated. *BOURGIN*, *supra* note 435, at 135.

IV. PALLIATIVE EFFECTS OF A POSITIVE RIGHT TO EDUCATION UNDER THE UNITED STATES CONSTITUTION

A constitutional right remains a constitutional right even if it is politically or philosophically distasteful to some sectors of the population. If there is a positive right to education lying dormant in the Constitution, ideally it should be recognized as such as a matter of principle.

The legal case for the right has been reviewed in some depth in Part III of this Article and, if found persuasive, should suffice as reason enough for recognizing the right. However, it would be irresponsible to leave readers with the impression that this is simply a technical question of law which can just as well be decided now or later. The education debacle has persisted into the 1990s, and what is on the line is nothing less than the future of our children individually and of the nation as a whole.⁴⁶⁰ If a positive constitutional right to education could contribute to setting in motion the dynamics for reversing the crisis and undoing its pernicious damage, then there is some real urgency in recognizing the right at an early date. It is important, therefore, to explore, from a policy perspective, whether the right has the potential to engender or act as the catalyst for a revitalization of American education.

At first glance, the right might seem superfluous, embodying a fine sentiment, to be sure, but having little practical bearing on the education crisis. After all, every state has enacted statutes requiring that children of eligible age attend school,⁴⁶¹ almost every state has adopted constitutional provisions that require it to provide free public education.⁴⁶² Moreover, the federal government, even in its supplemental role, already has indirectly assumed a large share of responsibility for schooling⁴⁶³ through laws aiding and/or shaping education under the Spending Clause⁴⁶⁴ and other provisions of the Constitution.⁴⁶⁵ What could an affirmative right to education under the federal Constitution add to all this that would be of any significance?

A. *The Right Will Make the Federal Government into the Ultimate Guarantor of the Provision of Education*

Part I of this Article documents the depth and breadth of the education crisis, detailing its degenerative effects on business and the nation's

At one time, Jefferson also proposed to address such internal problems as education, roads, rivers, and canals under authority of a constitutional amendment which never materialized. *Id.* at 135.

⁴⁶⁰ See *supra* notes 32-35, 41-43, 51-71 and accompanying text.

⁴⁶¹ See *supra* note 6 and accompanying text.

⁴⁶² See *supra* notes 222-24 and accompanying text.

⁴⁶³ See *supra* notes 226-39 and accompanying text. *But see* Karen De Witt, *U.S. Says Schools Cost More but Achieve Less*, N.Y. TIMES, Aug. 29, 1991, at A30 (reporting that the federal role amounts to no more than six to eight percent of the total dollars spent by the federal government).

⁴⁶⁴ U.S. CONST. art. I, § 8, cl. 1; see 1 RAPP, *supra* note 430, § 3.02[2], at 3-11 n.8.

⁴⁶⁵ See *supra* notes 232-36 and accompanying text.

economic health; on the United States' military and diplomatic capabilities; on domestic peace and the maintenance of law and order; on the continued viability of democratic government; and on the opportunity for individual growth and fulfillment of the nation's children. From this kaleidoscope of fragmented effects what comes into focus is a picture of a crisis that is national both in its geographic indiscriminateness and in its social, political, and economic consequences.

Yet the federal government is disabled from responding as if it were faced with a national emergency requiring utilization of the most salutary measures. The fact remains that under the current legal regime, the national government is generally considered to be devoid of the power or duty to guarantee to each school-age child that he or she will receive a certain quantum of education.⁴⁶⁶ But it is precisely the lack of that certain quantum of education—the quantum that would constitute excellence in education—which federal officials, governors, and prominent education experts have pinpointed as one of the principal causes of the crisis.⁴⁶⁷ In the meantime, state governments, despite laudable efforts, have been unable to rehabilitate the schools sufficiently to defuse the crisis and turn the situation around.⁴⁶⁸ This should occasion no surprise, for many states are financially strapped⁴⁶⁹ and some state and local education reform plans have become bogged down in local political bickering.⁴⁷⁰

Were a positive right to education recognized under the Constitution, the federal government would be obligated to strive, in conjunction with the states, to assure a quality education for every child.⁴⁷¹ The

⁴⁶⁶ See *supra* note 104, 430-31 and accompanying text.

⁴⁶⁷ See *supra* notes 35-39, 47 and accompanying text.

⁴⁶⁸ See *supra* notes 40-41, 44-47, 50 and accompanying text. For a review of some of the state education reform efforts that have been tried, see NAT'L GOVERNORS ASS'N, THE GOVERNORS' 1991 REPORT ON EDUCATION: RESULTS IN EDUCATION: 1990, at 6-52 (1990); Karen DeWitt, *Vermont Gauges Learning by What's in Portfolio*, N.Y. TIMES, Apr. 24, 1991, at A23; Susan Chira, *Electronic Teacher: A Mississippi Experiment*, N.Y. TIMES, Jan. 24, 1990, at A1; Deirdre Carmody, *New York Moves to Help Poorly Rated Teachers*, N.Y. TIMES, Sept. 27, 1989, at B10.

⁴⁶⁹ See, e.g., Hugg, *supra* note 117, at 19, 22; Scott J. Paltrow, *Cries for Help Go Unheard: State and Local Governments Are on the Edge of a Fiscal Abyss. Much of the Country Is Becoming Meaner and Harsher for Those Most Desperate for Assistance*, L.A. TIMES, Feb. 4, 1991, § A, at 1; William Celis 3d, *Despite Economic Woes 2 Strapped States Seek More Money for Schools*, N.Y. TIMES, Jan. 7, 1991, at A12; Michael Hinds & Erik Eckholm, *80's Leave States and Cities in Need*, N.Y. TIMES, Dec. 30, 1990, at 1.

⁴⁷⁰ See, e.g., BENNETT, MAKING IT WORK, *supra* note 29, at 3; William Celis 3d, *Texas Lawmakers Confront School Financing Issue Anew*, N.Y. TIMES, July 19, 1991, at A10; Isabel Wilkerson, *Politics Trip up Chicago School Revolution*, N.Y. TIMES, June 30, 1991, § 1, at 1; Peter Kerr, *Trenton Officials Reach Pact to Alter Florio School Plan*, N.Y. TIMES, Mar. 5, 1991, at B2; Daley, *supra* note 21, *passim*.

⁴⁷¹ See *supra* notes 159-63 and accompanying text (discussing the symbiosis of rights and duties). Indeed, in 1987, 84% of Americans surveyed expressed the wish that the federal government would require schools to meet minimum education standards. Chester E. Finn, Jr., *A Seismic Shock for Education*, N.Y. TIMES, Sept. 3, 1989, § 4, at 13 [hereinafter Finn, *Seismic Shock*]. *But cf.* Board of

unique and untried element of this scenario would be that the federal government could bring to the task the financial resources, the visible leadership, the coordinating capacity, and the focus on national interest which the states, struggling separately and disjointedly, are ill equipped to provide.⁴⁷²

It is beyond the scope of this Article to attempt a blueprint for the realignment of education responsibilities between the state and federal governments which recognition of the right would inevitably entail. The preservation of federalism in this context, with the concomitant goal of making state-federal relations most conducive to fulfilling the right, is an undertaking which will undoubtedly take years to mediate into a structure that is optimally balanced for those purposes. And, although it will propel the federal judiciary into uncharted waters, the Supreme Court is not unfamiliar with the general task of demarcating powers and responsibilities between the state and federal governments. The Court has, after all, grappled for over a century with such issues under the Commerce Clause.⁴⁷³

However, while not presuming to advance any master-plan for the realignment of governmental authority in providing education, I must confess to a preference on one point: that in addition to endowing the judiciary with power to ensure fulfillment of the education right through adjudication, Congress should also be empowered to intervene in order to protect the right with legislated, mandatory education reform measures directly applicable to the schools.⁴⁷⁴ Such congressional empower-

Educ. v. Dowell, 111 S. Ct. 630, 637 (1991) (in dicta, describing education as a matter for local authorities).

⁴⁷² See *supra* notes 74-75 and accompanying text; see also CARNEGIE STUDY, *supra* note 21, at xiv-xv (characterizing the urban school crisis as a major failure of the present social policy which relies on "a piecemeal approach to a problem that requires a unified response"); Ernest L. Boyer et al., *Former Commissioners of Education Speak Out*, in GREAT SCHOOL DEBATE, *supra* note 29, at 448-49 (calling for new, far-reaching federal efforts in education); William Celis 3d, *A Plan Aimed at Improving Schools*, N.Y. TIMES, Aug. 1, 1990, at B8 (reporting that then Governor Michael Dukakis of Massachusetts complained about inadequate federal financing of education); Karen DeWitt, *Report Urges Science Funds Be Used for Education*, N.Y. TIMES, Sept. 16, 1991, at A17 (reporting that Carnegie Commission on Science, Technology, and Government recommended greater coordination of government efforts to improve science education; also reporting that chairman of Commission study group which prepared the report wishes the federal government would bring the best pedagogical ideas to America's classrooms); Fiske, *Bright Goals*, *supra* note 75, at B8 (reporting that Governor Roy Romer of Colorado urged the federal government to increase substantially its financial contribution to education).

Indeed, as things stand now, "our per pupil spending on kindergarten through grade 12 lags behind that of five other industrialized nations . . ." Robert B. Reich, *Who Champions the Working Class?*, N.Y. TIMES, May 26, 1991, § 4, at E11.

⁴⁷³ E.g., *New Energy Co. v. Limbach*, 486 U.S. 269 (1988); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981); *Wickard v. Filburn*, 317 U.S. 111 (1942); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

⁴⁷⁴ Although a fair number of commentators present analyses favorable to recognition of a positive right to education under the Constitution, the scholarly literature does not offer much in the

ment would expand the federal government's arsenal in combating the crisis by providing the option of legislated remedial measures imposed nationwide, such as a national minimum core curriculum, national education standards, and the like—a development which, polls have shown, most Americans wish *the federal government* in particular to institute.⁴⁷⁵ There are, in fact, Supreme Court precedents which arguably may be marshalled to authorize Congress' assumption of such a role.⁴⁷⁶ Their deployment for this end, though, I leave to the ingenuity of others, since

way of extended discussion about how the responsibilities for providing education might be assigned to the state and federal governments so as to maintain federalism while simultaneously giving the federal government a more responsive role, including and going beyond the adjudicatory function. The general assumption in many of the articles seems to be that the right will only give the federal courts authority to adjudicate whether the right is fulfilled and to fashion remedies where the right is violated. Compare Biegel, *supra* note 108, at 1099-16 (calling for litigation to enforce education rights under the Constitution, but also briefly referring with approval to the imposition of a national minimum core curriculum) with Gard, *supra* note 67, at 30-34 (assuming that litigation will be utilized to enforce a federal constitutional right to education, with compliance to be ascertained by reliance on outputs standards) and with Liebman, *supra* note 109, at 371-78, 380 (proposing that state-legislated minimum educational-performance standards should be utilized in litigation enforcing fulfillment of a right to education) and with Wright, *supra* note 68, at 54-55, 67-80 (seeking judicial disposition of suits brought by individuals on behalf of the public to enforce a federal constitutional right to education).

⁴⁷⁵ The call for such a nationwide curriculum was put in these eloquent terms by E.D. Hirsch, Jr.: "To suggest that it is undemocratic or intolerant to make nationwide decisions about the extensive school curriculum must not any longer be allowed to end the discussion. The 'pluralistic,' laissez-faire view itself implies a nationwide extensive curriculum—the curriculum of cultural fragmentation and illiteracy." HIRSCH, JR., *supra* note 43, at 144; see also KOZOL, *supra* note 33, at 103, 121 (calling for a national campaign and the need for a national imperative in relation to education).

Much to the experts' amazement, Gallup polls show that a large majority of Americans want federal interference in education on a much more pervasive scale. They desire national education standards, a national curriculum, and national tests. 84% of those surveyed in 1987 "agreed that one of the things the Federal Government should do is 'require states and local school districts to meet minimum educational standards.'" (emphasis added). Finn, *Seismic Shock*, *supra* note 471, § 4, at 13.

⁴⁷⁶ See, e.g., *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (approving Congress' legislative initiatives pursuant to section five of the Fourteenth Amendment); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (approving congressional enactments legislated under the Commerce Clause for the purpose of ameliorating racial discrimination in places of public accommodation).

One commentator has concluded that because the education crisis affects interstate commerce, Congress is thereby empowered to legislate a national core curriculum under the Commerce Clause. Goodwin, *supra* note 159, at 957-58; but see Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 416. Professor Laurence Tribe has taken a broad view of the powers with which the *Morgan* case endows Congress under section five of the Fourteenth Amendment:

Concern for individual rights, therefore, does not justify creating artificial internal limits on congressional power to enforce the fourteenth amendment. Indeed, in an era when Congress may in some cases exhibit a greater sensitivity to individual rights than the Court, it will be all the more important that Congress be permitted to exercise the full range of its constitutional prerogatives.

TRIBE, *supra* note 83, § 5-14, at 350; see also Daniel J. Leffell, Note, *Congressional Power to Enforce Due Process Rights*, 80 COLUM. L. REV. 1265, 1277-95 (1980) (concluding that under any interpretation of *Morgan*, Congress is empowered to enact "expansive due-process-based legislation").

the theoretical foundation for congressional empowerment over education is at some remove from the focus of this Article.

B. *The Right's Pedagogical Effect*

The effects of the right stemming from the federal government's role as the ultimate guarantor of education are palpable, involving, as they would, the commitment of material resources and the observable implementation of policies and legal measures. However, the right also would have another less obvious, but equally important, effect—that of pedagogy.

Generally speaking, there is a pedagogical purpose inherent in virtually all law. Laws are made to be known;⁴⁷⁷ otherwise, they would be ineffective as a means of governance or restraint. The educational impact of law is perhaps most effectually realized by the reciprocal interplay between law and social values. Law draws its content from the values and priorities of the people it governs, including norms which may exist on a subconscious or subliminal level. In so doing, law articulates those values and priorities and disseminates them back to the populace to become part of conscious conventional wisdom.⁴⁷⁸ In this process, law assimilates not only a society's values and priorities as they are, but also those values and priorities which comprise that society's goals and needs. It is in this latter, initiatory phase that law has its most dramatic educative effect because it crystallizes and makes visible the norms which constitute a society's aspirations and ideals.⁴⁷⁹

⁴⁷⁷ Robert H. Bork has observed that "[l]aw is a public act." BORK, *supra* note 199, at 144. Hegel even advanced the notion that law is not law unless it is known. GEORGE HEGEL, *PHILOSOPHY OF RIGHT* 135 (T.M. Knox trans., Oxford Univ. Press, 1967).

⁴⁷⁸ "The judge interprets the social conscience, and gives effect to it in law, but in so doing he helps to form and modify the conscience he interprets. Discovery and creation react upon each other." BENJAMIN CARDOZO, *THE GROWTH OF THE LAW* 96-97 (photo. reprint 1982) (1924); see also PAUL R. DIMOND, *THE SUPREME COURT AND JUDICIAL CHOICE* 1, 4-5 (1989) (arguing that there is a continuing dialogue between the populace and lawmakers over the meaning of the Constitution); Anne Norton, *Transubstantiation: The Dialectic of Constitutional Authority*, 55 U. CHI. L. REV. 458, 468 (1988).

⁴⁷⁹ Aristotle, *Nicomachean Ethics*, in *THE BASIC WORKS OF ARISTOTLE* 952, 1105 (Richard McKeon ed., 1941); Plato, *Laws VII*, in *THE COLLECTED DIALOGUES OF PLATO, INCLUDING THE LETTERS* 1418-19, 1502 (Edith Hamilton & Huntington Cairns eds., 5th prtg. 1969) (A.E. Taylor trans., 1934); David R. Barnhizer, *Prophets, Priests and Power Blockers: Three Fundamental Roles of Judges and Legal Scholars in America*, 50 U. PITT. L. REV. 127, 162-63 (1988); Paul Brest, *The Thirty-First Cleveland-Marshall Fund Lecture: Constitutional Citizenship*, 34 CLEV. ST. L. REV. 175, 179 (1986); Keith Burgess-Jackson, *Bad Samaritanism and the Pedagogical Function of Law*, 8 CRIM. JUST. J. 1, 3-4, 26 (1985); Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127, 180 (1967); Norton, *supra* note 478, at 459, 469; Philip Soper, *The Moral Value of Law*, 84 MICH. L. REV. 63, 85 (1985).

The classic case of government taking a pioneering role through the medium of the law is *Brown v. Board of Educ.*, 347 U.S. 483 (1954). It will be recalled that in *Brown*, the Supreme Court held that separate but equal public schools for black children violate the Equal Protection Clause of the Fourteenth Amendment. The civil rights movement which followed on the heels of this decision

While a society's ideals may be expressed in many different types of laws, perhaps none is so suited to this mission as a nation's constitution. The United States Constitution is, indeed, conceived of as a proclamation of the country's most cherished and fundamental beliefs. It is this almost sacred quality which may have led Professor Laurence Tribe to declare that the Constitution is the "only 'law' that it makes sense literally to find encased in glass on display in the National Archives in Washington, D.C.; the only law that we virtually *worship* as a nation; the only law that has attained almost the status of scripture."⁴⁸⁰ Because of this aura, the Constitution is the source to which Americans may naturally be expected to look for the manifestation of their ideals and, hence, their national identity.⁴⁸¹ It is this heightened credibility and accessibility that makes the Constitution such an exceptionally powerful educative device.

An affirmative right to education, enshrined in the Constitution, would have the potential to induce Americans to treat education as a paramount national priority. The right, in partaking of the Constitution's "majesty,"⁴⁸² would impart the idea that education, rather than being simply a necessary rite of passage, is a matter of supreme importance; this idea, when understood collectively, would give rise to a popular ethos of esteem for intellectual development that would finally accord with Jeffersonian notions of an enlightened society. Surrounded by such an environment, children would grow up in circumstances more nurturing of their desire and will to learn while their elders would be able to draw upon a new source of inspiration in endeavoring to halt the crisis and redeem the schools.⁴⁸³

This concept of the power of the idea in reforming the public schools has not been lost on education experts. Diane Ravitch, Assistant Secretary for Educational Research and Improvement, and Counselor to the U.S. Secretary of Education, has astutely observed that "[t]he effort

is a vivid testament to the leadership of the *Brown* Court in rejecting racial segregation as an acceptable part of American life. See MARTIN LUTHER KING, JR., *STRIDE TOWARD FREEDOM* 195, 198-99 (1958).

⁴⁸⁰ Laurence H. Tribe, *The Constitution in the Year 2011*, 18 PAC. L.J. 343, 344 (1987) [hereinafter Tribe, *Year 2011*]; see also BLOOM, *supra* note 2, at 55 (remarking upon "a national reverence for our Constitution"); PAINE, *supra* note 2, at 287 (referring to the Constitution as "the political bible of the state").

⁴⁸¹ ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 25-27, 375-76 (1987); LAURENCE TRIBE, *CONSTITUTIONAL CHOICES* 26 (1985); Barnhizer, *supra* note 479, at 163; Brest, *supra* note 479, at 179; Norton, *supra* note 478, at 459; Tribe, *Year 2011*, *supra* note 480, at 344. *But see* Herbert J. Storing, *The Constitution and the Bill of Rights*, in *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES* 32 (M. Judd Harmon ed., 1978).

⁴⁸² *Cf.* COX, *supra* note 481, at 27, 378 (referring to the "majesty" of the Constitution).

⁴⁸³ *Cf.* Susan H. Bitensky, *Educating the Child for a Productive Life: Articles 28 and 29*, in *CHILDREN'S RIGHTS IN AMERICA: U.N. CONVENTION ON THE RIGHTS OF THE CHILD COMPARED WITH UNITED STATES LAW* 167, 167-68, 183 (Cynthia Price Cohen & Howard A. Davidson eds., 1990) (noting that a similar effect could be achieved if the United States were to become a party to the Convention of the Child).

to improve schools depends on the quality of ideas, for ideas ultimately determine policies and actions," and that "[f]or everyone involved, the critical factor that must change is the attitude toward the importance of good education."⁴⁸⁴ In a similar vein, John Brademas has noted that the federal government's commitment to education will be crucial in shaping attitudes toward education and, ultimately, to education reform.⁴⁸⁵ Recognizing a positive right to education in the Constitution would, of course, be the most authoritative and inspiring expression of this commitment that it is within the law's capacity to provide.

C. *The Content of the Right*

It would seem common sense to assume that the more exacting the content of the right to education, the more powerful will be its pedagogical impact and the more thoroughgoing will be governmental efforts to fulfill the right. The issue, perforce, arises as to what quality of education the right should guarantee. Will American children be entitled "to receive an . . . education correspondent to their ability," as provided in the Japanese Constitution?⁴⁸⁶ Or, will they be entitled to something less or something more than their Japanese counterparts?

In fact, Americans do not start with a blank slate, the Supreme Court having already expressed some thoughts on the subject in *San Antonio Independent School District v. Rodriguez*.⁴⁸⁷ There, it will be recalled, the Court left open the possibility of a federal constitutional right to "some identifiable quantum of education . . . to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process."⁴⁸⁸ This conception of the right has considerable appeal. It evidently would require the schools to produce graduates capable of functioning politically in American society.⁴⁸⁹ A second advantage is that the *Rodriguez* formulation could make governmental compliance with the right capable of measurement in the sense that the focus would be on outputs, i.e., the level of knowledge acquired by students. Generally speaking, outputs can be assessed by standardized testing of student performance, a device familiar to American educators.⁴⁹⁰

⁴⁸⁴ RAVITCH, *supra* note 29, at 155, 310; see BOYER, *supra* note 29, at 281; BENJAMIN DUKE, *THE JAPANESE SCHOOL* 185 (1986); Chira, *Nation Flunking*, *supra* note 48, at B8 (quoting Chester E. Finn, Jr. as stating that the nation needs "a purposeful populist uprising" with respect to the acceptance of education as a priority).

⁴⁸⁵ BRADEMAS, *supra* note 30, at 62; accord Educational Visions Team, New World Found., in *GREAT SCHOOL DEBATE*, *supra* note 73, at 429-30.

⁴⁸⁶ KENPO (Constitution) art. 26, ¶ 1 (Japan).

⁴⁸⁷ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

⁴⁸⁸ *Id.* at 36-37.

⁴⁸⁹ See Levin, *Educational Adequacy*, *supra* note 108, at 259-60.

⁴⁹⁰ See Gard, *supra* note 67, at 29-34; Preovolos, *supra* note 68, at 115-16. *But cf.* Biegel, *supra* note 108, at 1110-13 (arguing that such testing is inaccurate and unfair); Liebman, *supra* note 109, at

In spite of these advantages, however, the *Rodriguez* formulation seems wanting. Why did the Court use the phrase "basic minimal skills" in describing the quantum of education required? Is it the Court's view that bare literacy is enough to ensure enjoyment of the rights of speech and full political participation?⁴⁹¹ And, should not the promised quantum be sufficient to enable graduates' full participation in the economic life of the country as well as in its political processes?⁴⁹² But, if the *Rodriguez* formulation is unsatisfactory, what should be the content of an affirmative right to education under the Constitution?

To a large extent, the positive right to education, like so many other constitutional rights, will have to be worked out over time and with the help of experience. Although it might be preferable were things otherwise, the fact is that constitutional rights do not often spring into existence full-blown like Athena from Zeus' forehead.⁴⁹³ It is only over the course of decades that the Supreme Court has defined the First Amendment's Free Speech Clause to include such implicit rights as the right of association,⁴⁹⁴ the right of belief,⁴⁹⁵ and the right to receive information.⁴⁹⁶ The Court has likewise spent almost the entire twentieth century struggling to coax a coherent theory of substantive liberty rights out of the Due Process Clause.⁴⁹⁷ Thus, that the content of the potential right to education may yet spark disagreement and require amplification

374-77 (contending that educational outputs standards and student competency testing have injured rather than helped poor and minority children).

⁴⁹¹ One commentator has suggested that the *Rodriguez* conception of a hypothetical right to education under the Constitution does not go much further than ensuring literacy:

The very least that an exercise of the Court's pronouncement in *Rodriguez* would seem to require is that every student acquire a reading level adequate for meaningful access to the political system. . . .

Therefore, one possible content for the right to education would prescribe demonstrated achievement levels in certain basic skills sufficient for access to the political system. The narrowest definition of such skills would simply require basic literacy. . . .

Prevolos, *supra* note 68, at 114-15.

⁴⁹² In *Plyler v. Doe*, one of the Supreme Court's major concerns in applying equal protection analysis to statutes denying illegal alien children free access to public schooling was that children should be assured the opportunity to contribute to and benefit from the American economy. 457 U.S. at 221-24. There is a similar sensitivity to this issue in some state courts. For example, in *Robinson v. Cahill*, 303 A.2d 273, 295 (N.J.), *cert. denied* 414 U.S. 976 (1973), the New Jersey Supreme Court construed the state's constitution "to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market." *Accord* *Seattle Sch. Dist. v. Washington*, 585 P.2d 71, 94 (1978). The wisdom of adopting a right to education which prepares the child for the labor market as well as for other responsibilities is noted by some of the commentators as well. Levin, *Judicial Standard*, *supra* note 103, at 709-13; Ratner, *supra* note 108, at 818-22; *cf.* Edelman, *supra* note 67, at 33-34 (noting that participation in "America's democratic processes or the economy" requires some minimum amount of education).

⁴⁹³ See Black, Jr., *Further Reflections*, *supra* note 148, at 1107; Edelman, *supra* note 67, at 32.

⁴⁹⁴ *E.g.*, *NAACP v. Button*, 371 U.S. 415 (1963).

⁴⁹⁵ *E.g.*, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

⁴⁹⁶ *E.g.*, *Stanley v. Georgia*, 394 U.S. 557 (1969).

⁴⁹⁷ See *supra* notes 172-92, 199-213, 241-51, 271-72 and accompanying text.

should not preclude recognition of the right.⁴⁹⁸

While there are a number of possible definitions of the right which are worthy of consideration,⁴⁹⁹ I would call attention to one proposal which may prove particularly useful in broadening and enriching future discussions of the subject. The proposal is this: to recognize a federal constitutional right to the minimum quantum of education necessary to enable the development of children's mental abilities to their fullest potential.

The gist of this right, in analogous phraseology, may already be found in several international human rights instruments. The Universal Declaration of Human Rights states that the right to education "shall be directed to the full development of the human personality."⁵⁰⁰ The International Covenant on Economic, Social and Cultural Rights provides that "education shall be directed to the full development of the human personality and the sense of its dignity" and "shall enable all persons to participate effectively in a free society."⁵⁰¹ This language was articulated again, most fully and forcefully, in the recently adopted United Nations Convention on the Rights of the Child. Article 29 of the Convention provides that, "States Parties agree that the education of the child shall be directed to . . . [t]he development of the child's personality, talents and mental and physical abilities to their fullest potential."⁵⁰²

The norm that children should be educated to enable them to reach their fullest potential, then, has a most respectable lineage, having been embraced by the international community for over forty years in some of its loftiest and most well-accepted statements of human rights. As discussed in Part III.C.1 of this Article, many scholars consider it appropriate to inform interpretation of the United States Constitution by reference to international human rights norms. Thus, finding a right with such content in the Constitution would accord with authoritative principles of constitutional construction.

⁴⁹⁸ As one commentator has stated:

Where was it written that single-celling is what the Constitution mandates in prisons? That a particular level or degree of training and service is what makes a school for the mentally retarded pass constitutional muster? There is no "right answer." Yet the courts have entered the field and issued decrees.

Edelman, *supra* note 67, at 32.

⁴⁹⁹ See, e.g., Kurland, *supra* note 147, at 419 (contending that "[t]he claim that will have to be developed will be a claim to adequate and appropriate educational opportunity"); Levin, *Educational Adequacy*, *supra* note 108, at 260 (proposing that a baseline for the right's content may be discovered in the *Rodriguez* formulation that children must be taught the "basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process" and in the requirement articulated in several state court cases that children must be provided with education that will enable them to compete in today's labor market); Wright, *supra* note 68, at 55, 60-67 (pegging the right to a guarantee of minimum civic competence).

⁵⁰⁰ Universal Declaration, *supra* note 385, at art. 26, ¶¶ 1-2.

⁵⁰¹ Economic, Etc. Rights Covenant, *supra* note 381, at art. 13, ¶ 1.

⁵⁰² Convention of the Child, *supra* note 380, at art. 29, ¶ 1(a).

The proposed formulation for the content of a positive right to education also has American antecedents. The proposal closely parallels, in substance, the standard of education which President Bush and the nation's governors pledged to achieve in their Jeffersonian Compact⁵⁰³ and which the National Commission on Excellence in Education had earlier recommended.⁵⁰⁴ The idea has also surfaced in American academic circles.⁵⁰⁵

A constitutional right to education imbued with this sort of exacting content could markedly enhance the ameliorative effects of the right. A right of this ilk would teach American children that much more is required of them than the acquisition of basic minimal skills and that society has faith in children's ability to reach their fullest intellectual potential. Indeed, the right, so construed, would compel government to provide children with the means for meeting the high expectation that they will achieve such academic excellence. If the federal government truly committed itself to providing the sort of resources and involvement necessary to enable each child to reach his or her fullest intellectual potential, it is conceivable that the education crisis would finally begin to relent even in the nation's most beleaguered school systems.

Lest this proposal seem impractical and unwieldy, it should be highlighted that there is precedent for such an individualized approach in the Education for the Handicapped Act, a statute which has proven workable for over fifteen years.⁵⁰⁶ Under authority of this legislation, Congress appropriates federal funds to assist state and local agencies to educate handicapped children. The appropriations, though, are conditional. To qualify for such federal assistance, a state must demonstrate that it is implementing programs assuring handicapped children a "free appropriate public education."⁵⁰⁷ A prerequisite to meeting this standard is that

⁵⁰³ The Jeffersonian Compact states as an objective that American society must enable "all children [to] reach their highest educational potential." Jeffersonian Compact, *supra* note 44, at 1488.

⁵⁰⁴ "Our goal must be to develop the talents of all to their fullest. Attaining that goal requires that we expect and assist all students to work to the limits of their capabilities." NAT'L COMM'N, NATION AT RISK, *supra* note 4, at 13.

⁵⁰⁵ Professor Rosemary Salomone writes:

Then how can we define the basic right underlying equal educational opportunity? . . . As the country moves toward the end of this decade, we should recognize that each child has a right to a minimally adequate education that is appropriate to its needs. Rather than merely asking "How much education?", we should ask, "What type of education?" is necessary to permit the individual to participate effectively in the democratic process and to enjoy the personal benefits that learning brings, within limits set by individual potential.

Salomone, *supra* note 39, at 201; *cf.* Biegel, *supra* note 108, at 1110-11 (envisioning a right to "a minimum level of equal access to basic skills and a clearly defined knowledge base," with opportunities for brighter students to advance far beyond the basics). *But see* Coons et al., *supra* note 103, at 373-74 (arguing that there can be no right to education because its content would be "radically unintelligible").

⁵⁰⁶ 20 U.S.C.A. §§ 1400-1485 (West 1990 & Supp. 1991).

⁵⁰⁷ *Id.* at § 1412(1). In *Board of Educ. v. Rowley*, 458 U.S. 176, 192 (1982), the Court interpreted the "free appropriate public education" language to require that instruction and support serv-

an "individualized education program" (IEP) must be devised to meet the unique needs of each handicapped child.⁵⁰⁸ Moreover, a participating state must provide specified administrative procedures by which the child's parents or guardians may challenge changes in the evaluation or education of the handicapped child.⁵⁰⁹

At the time that this federal legislation was under consideration by Congress, there were more than eight million handicapped children in the United States requiring special education and related services.⁵¹⁰ If it is possible to devise and implement an IEP for each one of the several millions of handicapped children qualifying for such services, it would also seem to be feasible to take an individualized approach—*sans* IEP or an equally singularized equivalent—to the education of other school-age children as well, who are more likely to tend toward an educability mean and, therefore, who would not generally require the same level of trait-specific treatment as handicapped children.

Moreover, the proposed right presents no more difficulties in measuring government compliance than the *Rodriguez* formulation. It should be clarified that the proposed right would not guarantee that each child must be educated so as to actually reach his or her fullest intellectual potential. Rather, the right would merely guarantee that government will provide the minimum amount of education necessary to *enable* children to reach the fullest potential of their mental abilities. The minimum education required could even be relatively uniform as long as it is pegged high enough.⁵¹¹ In the event that a child's abilities demand a more personalized accommodation, a flexible response should be feasible since school systems have previously accommodated differences in ability with such devices as tracking or ability grouping.⁵¹² In comparison, enforcement of the *Rodriguez* formulation, it should be remembered, would require government to make the equally difficult determination of when children are being taught enough so that they will someday be able to have "the enjoyment of the rights of speech and of full participation in the political process."⁵¹³

ices provided pursuant to the statute need only be educationally beneficial to handicapped children. Inasmuch as the *Rowley* standard of education arises from statutory construction, it has little bearing on discussion of the content of a right to education under the Constitution.

⁵⁰⁸ 20 U.S.C.A. § 1414(a)(5) (West 1990).

⁵⁰⁹ *Id.* § 1415.

⁵¹⁰ *Rowley*, 458 U.S. at 195 (quoting from S. REP. NO. 168, 94th Cong., 1st Sess. 8 (June 2, 1975), reprinted in 1975 U.S.C.C.A.N. 1425, 1432).

⁵¹¹ One commentator notes that procedures for ensuring that each child is educated can serve individual differences because of "the essential similarity of each child as a potentially functioning human and responsible citizen." Dimond, *supra* note 110, at 1127.

⁵¹² 2 JAMES A. RAPP, EDUCATION LAW § 8.05[3]-[7] (1990). I do not mean to suggest that tracking or ability grouping necessarily should be the means of fulfilling a right to education. I merely cite these devices to show that the concept of measuring and catering to students' differing potentialities is hardly new or impracticable.

⁵¹³ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973).

To reiterate, the content of a constitutional right to education will inevitably require extended and thoughtful study. The standard proposed here is not intended as the only or necessarily the best answer. But, in view of its respectable history as an international human rights norm and its consistency with American education policy and constitutional objectives, the "fullest potential" standard should receive serious consideration.

CONCLUSION

The Bible says that there is nothing new under the sun.⁵¹⁴ For all its apparent novelty, a positive constitutional right to education is not new either. Rather, it has lain quiescent in the Constitution all these years, occasionally glimpsed at through the musings of judges and legal scholars. That it is not new—that it has existed all along—should be warrant enough for its formal recognition. The Bible also says, however, that to every thing there is a season.⁵¹⁵ If one season be more propitious than another, it would seem that the education crisis has brought the season for recognition of the right full upon us.

⁵¹⁴ *Ecclesiastes* 1:9.

⁵¹⁵ *Id.* at 3:1.