USING INTERNATIONAL HUMAN RIGHTS LAW IN SCHOOL FINANCE LITIGATION TO ESTABLISH EDUCATION AS A FUNDAMENTAL RIGHT

By Anna Williams Shavers[*]

The attempt to provide equality in education over the last four decades has largely been based upon litigation brought in state courts to challenge school finance systems. This approach has primarily developed because of the 1973 Supreme Court Case, San Antonio School District v. Rodriguez*, in which the court held that education "is not among the rights afforded explicit protection under our Federal Constitution." Instead of trying to pursue claims that school finance systems did not meet the burden imposed by the U.S. Constitution, litigants turned to state constitutions. This litigation has resulted in various levels of success. In this Article, the question of education as a fundamental right is revisited from the perspective of the U.S. Constitution, but also from the perspective of education as a fundamental human right under international law. The right to education contained in various international instruments is discussed along with the Constitution to demonstrate that the United States is required to assure equal access to quality education. The use of international human rights becomes another means for school finance advocates to achieve equal education opportunity.*

INTRODUCTION

While it is often touted that the United States is the leader in the free world, evidence indicates that this is not accurate with respect to public school education. U.S. students' academic achievement still lags that of their peers in many other countries. U.S. students continue to rank around the middle of the pack, and behind many other advanced industrial nations particularly in math, reading and science.[1] Looking internally, we find that there is a disparity in the education that students receive, often tied to the financial health of a particular school system. Former Education Secretary Arne Duncan called test scores a "brutal truth" that "must serve as a wake-up call" for the country.[2] The United States should also take several actions simultaneously, Duncan said. The country must "invest in early education, raise academic standards, make college affordable, and do more to recruit and retain top-notch educators."[3] The fact that the U.S. has the highest child poverty rate among industrialized countries[4] has been cited as a reason that the performance of U.S. student is so much lower than some other countries.[5] While students in well-funded schools have high performance, poverty negatively impacts school performance. As noted educational researcher, Stephen Krashen, has stated, "when we control for poverty, American students rank near the top of the world on international tests."[6] Prior to becoming Secretary of State, Rex

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1. Drew Desilver, *U.S. Students' Academic Achievement Still Lags That of Their Peers in Many Other Countries*, PEW RES. CTR. (Feb. 15, 2017), http://www.pewresearch.org/fact-tank/2017/02/15/u-s-students-internationally-math-science/ [https://perma.cc/FBY3-9YQ4] (referencing Programme for International Student Assessment, a triennial international survey which aims to evaluate education systems worldwide by testing the skills and knowledge of 15-year-old students); Lyndsey Layton, *U.S. Students Lag Around Average on International Science, Math, and Reading Tests*, WASH. POST (Dec. 3, 2013). https://www.washingtonpost.com/local/education/us-students-lag-around-average-on-international-science-math-and-reading-test/2013/12/02/2e510f26-5b92-11e3-a49b-90a0e156254b_story.html?utm_term=.c68a55df274c [https://perma.cc/BCZ9-93NL].

2. Christine Armario, *'Wake-up Call': U.S. Students Trail Global Leaders*, ASSOCIATED PRESS (Dec. 7, 2010), http://nbcnews.com/id/40544897/ns/us_news_life/t/wake-up-call-US-students-trail-global-leaders/#.WxxCSPZFxPY.

3. Layton, *supra* note 1; *see also* BRUCE D. BAKER ET AL., THE REAL SHAME OF THE NATION: THE CAUSES AND CONSEQUENCES OF INTERSTATE INEQUITY IN PUBLIC SCHOOL INVESTMENTS 41 (2018) (noting that education reform advocates rarely "acknowledge the egregiously uneven investment in public schooling across states and its relation to the divergent quality and performance of individual state education systems").

4. UNICEF OFFICE OF RESEARCH, CHILD WELL-BEING IN RICH COUNTRIES: A COMPARATIVE OVERVIEW 3 (2013).

5. STEPHEN KRASHEN, PROTECTING STUDENTS AGAINST THE EFFECTS OF POVERTY: LIBRARIES 1, http://www.sdkrashen.com/content/articles/protecting_students.pdf [https://perma.cc/7T74-LDWG]; Valerie Strauss, *How Poverty Affected U.S. PISA Scores*, WASH. POST (Dec. 9, 2010), http://voices.washingtonpost.com/answer-sheet/research/how-poverty-affected-us-pisa-s.html [https://perma.cc/LHG5-CB8N].

6. Stephen Krashen, *The Common Core: A Disaster for Libraries, A Disaster for Language*

Tillerson noted that the U.S. has educational shortfalls which must be addressed. Citing low performance by eighth graders in math as reported by the National Assessment of Educational Process (NAEP)[7] as evidence that the U.S. is falling behind our international competitors in producing students, Secretary Tillerson concluded that this deficiency in education must be addressed.[8] A 2008 GAO report concluded that "[i]nvestments in the education . . . of children are critical to the nation's future . . ."[9] and "[t]he nation's economic prosperity and global competitiveness depend in large part on the effective education of the 48 million students who attend public schools."[10] As Professor Kimberly Jenkins Robinson has concluded, "[a]n excellent education for all schoolchildren should be the nation's ultimate education goal because all families ultimately want a first-rate education for their children and the United States would benefit economically, socially, and politically from providing such an education."[11] Education scholars have documented the relationship between poverty, increased resources, and success in education.[12] Professors Ryan and Heise conclude that high poverty schools generally have lower academic achievement than low poverty schools.[13] As some scholars have concluded, with the proper resources and effective use, "schools [can] operate in ways that blunt the degradation of the schooling experience that is common to poor and racialized students."[14]

The recognition persists of the fact that education in the U.S. needs to be improved and often it is poor children in poor school districts who are being failed even though they could greatly benefit the country. In part this is because, despite acknowledgment that educational performance of students can be influenced by socio-economic status and students from financially disadvantaged backgrounds require more educational resources than other students,[15] many states and localities still spend less money per pupil in the

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Arts, a Disaster for American Education, SCHOOLS MATTER (Jan. 25, 2014), http://www.schoolsmatter.info/2014/01/the-common-core-disaster-for-libraries.html [https://perma.cc/V66L-A76A].

7. Rex Tillerson, *How to Stop the Drop in American Education*, WALL STREET J. (Sept. 5, 2013), https://www.wsj.com/articles/how-to-stop-the-drop-in-american-education-1378422168?tesla=y [https://perma.cc/JRP8-W8M2].

8. *Id.*

9. GOV'T ACCOUNTABILITY OFFICE, ENSURING OPPORTUNITIES FOR DISADVANTAGED CHILDREN AND FAMILIES 1 (2008).

10. *Id.* at 6.

11. Kimberly Jenkins Robinson, *Disrupting Education Federalism*, 92 WASH. U. L. REV. 959, 964 (2015).

12. *See, e.g.*, Charles Payne & Cristina Ortiz, *Doing the Impossible: The Limits of Schooling, the Power of Poverty*, 673 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 32, 54–55 (2017) (noting that in the "money doesn't matter debate" there is disagreement as to whether public schools can affect the disadvantages that poor children suffer and "an iron law correlation between socioeconomic status and educational achievement and attainment").

13. *See* James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2103 (2002).

14. Payne & Ortiz, *supra* note 12, at 55.

15. *See generally,* Charles T. Clotfelter et al., *High Poverty Schools and the Distribution of*

poorest school districts than in the more privileged districts.[16] The lack of resources devoted to education of disadvantaged children also has a disproportionate effect on children of color.[17]

The result is that the promise from *Brown v. Board of Education*[18] of equal education opportunity and the pursuit of that goal through 40 years of school finance litigation[19] have not been fully realized. In this Article, I propose that the federal government assume a greater responsibility for education. Some have suggested that this role is best served by supporting various choice plans for education.[20] Although a full discussion of this issue is beyond the scope of this paper, it must be noted that many scholars have suggested caution when considering the choice plans as a solution to education crises.[21] Consider, as Charles Payne and Cristina M. Ortiz have stated, "charter schools seem to make their living by focusing on the least disadvantaged of the disadvantaged."[22] In Part I, I explore the treatment of

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Teachers and Principals, 85 N.C. L. REV. 1345 (2007).

16. *See* James S. Liebman & Michael Mbikiwa, *Every Dollar Counts: In Defense of the Obama Department of Education's "Supplement Not Supplant" Proposal*, 117 COLUM. L. REV. ONLINE 36, 36 (2017); Robinson, *supra* 11, at 973–74 (noting that in a substantial majority of the states, funding inequities between wealthy and poor districts and schools persists); NATASHA USHOMIRSKY & DAVID WILLIAMS, FUNDING GAPS 2015: TOO MANY STATES STILL SPEND LESS ON EDUCATING STUDENTS WHO NEED THE MOST 1 (2015); Emma Brown, *In 23 States, Richer School Districts Get More Local Funding then Poorer Districts*, WASH. POST (Mar. 12, 2015) https://www.washingtonpost.com/news/local/wp/2015/03/12/in-23-states-richer-school-districts-get-more-local-funding-than-poorer-districts/?utm_term=.ef8db4091e48 [https://perma.cc/J8U6-XGJH] (citing National Center for Education Statistics).

17. THE ANNIE E. CASEY FOUND., RACE FOR RESULTS: 2017 POLICY REPORT 22 (2017); David G. Hinojosa, *"Race-Conscious" School Finance Litigation: Is A Fourth Wave Emerging?*, 50 U. RICH. L. REV. 869, 870 (2016) (acknowledging the strong link between inadequate and inequitable school finance systems and educational opportunity and race and ethnicity); NAT'L CTR. FOR EDUC. STATISTICS, *Indicator 4 Snapshot: Children Living in Poverty for Racial/Ethnic Subgroups*, https://nces.ed.gov/programs/raceindicators/indicator_rads.asp [https://perma.cc/98CZ-GUGT].

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

19. *See* note 60 *infra*.

20. These choice programs include privately managed public schools such as charter schools and access to school vouchers which allow children to attend private schools with the support of government funds. The National Conference of State Legislatures maintains a website with explanations of the various programs. NAT'L CONFERENCE OF STATE LEGISLATURE, *School Choice and Charters*, http://www.ncsl.org/research/education/school-choice-and-charters.aspx [https://perma.cc/YK2E-29UN]. President Donald Trump advocated the creation of a $20 billion voucher program. *See generally,* Alyson Klein, *Where Will Trump Go Next on Choice? Watch These Three Groups of Students*, EDUC. WEEK (Feb. 6, 2018), http://blogs.edweek.org/edweek/campaign-k-12/2018/02/trump_choice_military_native_american_washington.html [https://perma.cc/C29R-YPKY]; Andrew Vanacore, *What New Orleans Can Teach Betsy DeVos About Charter Schools*, POLITICO (Jan. 9, 2017), http://www.politico.com/magazine/story/2017/01/what-new-orleans-can-teach-betsy-devos-about-charter-schools-214610 [https://perma.cc/E92E-WTWW].

21. *See also* Michael A. Naclerio, Note, *Accountability Through Procedure? Rethinking Charter School Accountability and Special Education Rights*, 117 COLUM. L. REV. 1153, 1159–61 (2017) (discussing varied opinion on the effectiveness of charter schools).

22. Payne, *supra* note 12, at 56; *see also* Stephanie Simon, *Special Report: Class Struggle--*

education as a fundamental right under the U.S. Constitution and follow this up in Part II with a discussion of the State School Finance Litigation that resulted from the Supreme Court's seeming rejection of education as a federal fundamental right. In Part III, I consider the role of the federal government through Congress and the Courts in financing education by both statutory enactments and a reconsideration of education as a fundamental right. In this part, I consider the addition of substantive due process arguments along with equal protection. Finally, I propose in Part IV that international human rights law should be added to the arsenal of advocacy tools used in school finance litigation to help interpret an obligation of the U.S. to treat education as a fundamental right.

I. EDUCATION AS A FUNDAMENTAL RIGHT: ESTABLISHING THE RIGHT TO EQUAL EDUCATION OPPORTUNITY

Jurisprudence on the right to an education has largely developed along two distinct lines based upon Supreme Court cases. In what can be considered the Supreme Court's most important equal education opportunity decisions, *Brown v. Board of Educ*ation[23] and *San Antonio Independent School District v. Rodriguez,*[24] the Court made conclusions which are arguably inconsistent. While *Brown* focused on equality in the context of race and public school desegregation and separate but equal concepts, *Rodriguez* focused on equality concepts based upon methods used to finance public school education.

The *Brown* Court, in this often quoted statement, emphasized the importance of education as follows:

> [E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. [I]t 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. In 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. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[25]

In a unanimous decision, the Court concluded that the segregation of African-American students in public schools deprived them of the equal

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How Charter Schools Get Students They Want, REUTERS (Feb. 15, 2013), http://www.reuters.com/article/us-usa-charters-admissions-idUSBRE91E0HF20130216 [https://perma.cc/NRF2-ZCEB].

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

24. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1972).

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

protection of the laws guaranteed by the Fourteenth Amendment.[26] Based upon this conclusion, the Court determined that it was not necessary to determine if the Due Process clause of the Fourteenth Amendment was also violated.[27]

While recognizing that education has traditionally been provided by state and local government, the Court emphasized the importance of education to the general society and the requirement to provide education equal protection. It did not decide that the federal government had no role to play in providing that equal protection. In part, because of *Brown,* education has been recognized as equipping citizens with the knowledge and skills necessary to achieve their full potential, as well as being the foundation of good citizenship and the key to economic opportunity.[28] Thus supporting the belief that the right to education is a fundamental right.

Although the Court in *Brown* decided that the attempts to establish separate but equal education failed in terms of facilities and instruction and denied children an equal education opportunity,[29] it did not address the issue of how to assess whether equal opportunity had been achieved once the *de jure* segregation was eliminated. These issues were addressed in subsequent challenges involving school finance and were primarily based on the systems established to fund schools and the resulting funding inequalities. Plaintiffs in early school finance cases framed their claims in terms of equity—i.e. the denial of equal education opportunity.[30]

Advocates trying to address some of these deficiencies in education have focused on the fact that not all K-12 students have an equal education opportunity. These advocates turned to the courts to address what was perceived as the states' failure to provide equal education opportunity. The two categories of cases, [s]chool desegregation and school finance cases, sprang from the similar goal of equalizing educational opportunities for poor and/or minority students. Efforts to achieve equal educational opportunities are now primarily focused on state school finance cases, in part because, as Professor James E. Ryan has stated, the Supreme Court has "strongly impl[ied] that it is time for federal courts to get out of the business of school desegregation."[31]

Serrano v. Priest (Serrano I)[32] involved a class action brought in

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26. *Id.* at 495.

27. *Id.*

28. *See, e.g.*, Karmas v. Dickinson Public Schools, 487 U.S 450, 469 (1988) (noting the "vital role of education in our society").

29. *Brown*, 347 U.S. at 492–93 (overturning the prevailing "separate but equal" doctrine established in Plessy v. Ferguson, 163 U.S. 537 (1896)).

30. *See infra* text accompanying notes 58–63.

31. James E. Ryan, *Schools, Race and Money*, 109 YALE L.J. 249, 252 (1999) (citing Missouri v. Jenkins, 515 U.S. 70 (1995); Freeman v. Pitts, 503 U.S. 467 (1992); Board of Educ. v. Dowell, 498 U.S. 237 (1991)).

32. Serrano v. Priest, 487 P. 2d 1241, 5 Cal.3d 584 (Cal. 1971) (*Serrano I*); Serrano v. Priest, 557 P.2d 929 (Cal. 1971) (*Serrano II*); Serrano v. Priest, 569 P.2d 1303 (Cal. 1977)

California state court in 1968 on behalf of California students. The basis of the challenge was the per-pupil expenditures which varied greatly and depended on a school district's tax base. It was claimed that these kinds of tax-base disparities resulted in inequalities in actual educational expenditures. The Supreme Court of California held that education was a fundamental interest and agreed with the plaintiffs that the school finance system "fails to meet the requirements of the equal protection clause of the Fourteenth Amendment of the United States Constitution and the California Constitution."[33] *Serrano I* was based on two dispositive points: First, education in the public schools is a "fundamental" interest or right; second, the "wealth" of a school district—meaning its real-property tax base—is a "suspect classification."[34] The court invoked strict-scrutiny review. Since the court found no compelling governmental interest in tying per-pupil education expenditures to the assessed value of a district's realty, it invalidated the system. Other states reached similar conclusions in school finance reform cases.[35]

Shortly after the 1971 *Serrano I* decision, the U.S. Supreme Court decided the *Rodriguez* case. The case was filed in federal court in 1968 by parents on behalf of Mexican-American school children in Texas who were poor or resided in school districts with low property-tax bases.[36] The plaintiffs claimed that the Texas school finance scheme was unconstitutional because it violated equal protection under the Constitution since (1) the Fourteenth Amendment to the Constitution made education a "fundamental right," and (2) poor and Mexican-American families were treated as a "suspect class."[37] They cited *Brown* for the proposition that education is a constitutionally fundamental interest and noted that the fundamentality is manifested in many ways, including:

> (1) Education is essential to the maintenance of the free enterprise system; for it enables the individual to compete in the economic marketplace, irrespective of his socio-economic background, on an equal basis. The public schools are the great hope of the poor and minority groups; they represent their greatest opportunity to achieve economic security and social status. (2) Education is vital to the development of the individual. The

(*Serrano III*).

33. *Id.* at 589–90.

34. *Id.* at 597–609.

35. *See, e.g.*, Hollins v. Shofstall, No. C-253652 (Super. Ct. Maricopa County, Ariz. Jan. 13, 1972); Robinson v. Cahill, 287 A.2d 187, 217 (N.J. Super. Ct. 1972); Sweetwater Cty. Planning Comm. for the Org. of Sch. Dists. v. Hinkle, 491 P.2d 1234, 1236–37 (Wyo. 1971).

36. Prior to the *Brown* decision, there had been challenges brought to school systems that established separate school systems for Mexican-American children. *See generally*, Alfredo Mirandé, *"Light but Not White": A Race/plus Model of Latina/o Subordination*, 12 SEATTLE J. FOR SOC. JUST. 947, 982 (2014) (discussing Westminster School Dist. v. Mendez, 161 F. 2d. 774 (9th Cir. 1947) and Alvarez v. Lemon Grove School District, Superior Court, San Diego County, No. 66625 (1931)); Roberto Álvarez, Jr., *The Lemon Grove Incident: The Nation's First Successful Desegregation Court Case*, 32 J. San Diego Hist., 116, 116–35 (1986).

37. Brief for Appellees at 3, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1972).

> educational system attempts 'to nurture and develop the human potential of . . . children . . . to expand their knowledge, broaden their responsibilities, kindle their imagination, foster a spirit of free inquiry, and increase their human understanding and tolerance.'[38] (3) Education is vital to the economic and political survival . . . an educated populace allows a nation to compete and protect itself in the world community.[39]

Thus, they claimed, the Equal Protection Clause established a right to substantially equal funding for all school districts within a given state. Therefore, it was asserted, the state's finance system was unfair and denied an equal education opportunity to students who were poor and resided in school districts with a low property tax base.[40]

A three-judge court held the Texas school-finance system unconstitutional under the equal protection clause of the Fourteenth Amendment.[41] The Court, in a 5-4 decision, disagreed. It held that even though Texas "virtually concede[d]"[42] that its system of finance failed judicial strict scrutiny, the finance system did not violate the Equal Protection Clause. Education was not a fundamental right under the United States Constitution requiring a strict scrutiny analysis and the system was not "so irrational as to be invidiously discriminatory."[43] The Court noted that education was not among the rights either explicitly or implicitly found in the text of the Constitution and,[44] reasoning that the level of scrutiny required was not strict scrutiny because the finance system discriminated on the basis of property wealth and did not work to disadvantage a suspect class or encroach upon a fundamental right.[45]

II. SCHOOL FINANCE LITIGATION

At the core . . . is education. If I can look at your ZIP code and I can tell whether you're going to get a good education, I really can't say it doesn't matter where you came from.

Condoleezza Rice[46]

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38. *Id.* at 29 (quoting Wisconsin v. Yoder, 406 U.S. 205, 239 (1972) (White, J., concurring)).

39. *Id.*

40. *Id.* at 28–29.

41. *Id.* at 2–4.

42. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16 (1972).

43. *Id.* at 55.

44. *Id.* at 35.

45. *Id.* at 28, 37–40.

46. Carolyn Phenicie, *74 Interview: Condoleezza Rice on Education, National Security and Donald Trump*, THE 74 (Jan. 4, 2017), https://www.the74million.org/article/74-interview-condoleezza-rice-on-education-national-security-and-donald-trump/ [https://perma.cc/5USU-HWT3]; *see also* Eva Hershaw, *Judge Urges Lawmakers to Fix School Finance*, THE TEX. TRIB. (Feb. 22, 2015), http://www.texastribune.org/2015/02/22/judge-dietz-legeget-busy-take-responsibility-educ/ [https://perma.cc/3D5T-AGLT] (Judge Dietz: "[i]t ought not to make a difference as to your zip code as to your right to receive an adequate education").

Education advocates and parents recognize that the method used to finance education is a major determinant of whether children have an equal education opportunity. Studies have shown that school districts serving students of color and students living in poverty often have less resources.[47] Low levels of education attainment are common in communities with low socioeconomic status.[48] The American Psychological Association recognizes that the relationship between ethnicity, race and socio-economic status is intertwined[49] and affects quality of life.[50]

The disparity in resources is most often attributed to the historical practice of financing school districts through local property taxes. State-created school finance systems vary with respect to the extent of their reliance on local property taxes.[51] These finance systems can also have an effect on the housing choices made by families under the belief that "access to education varies with zip code and that access to housing varies by race."[52] In some cases, school

47. *See generally* James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432, 450 (1999); NATASHA USHOMIRSKY & DAVID WILLIAMS, FUNDING GAPS 2015: TOO MANY STATES STILL SPEND LESS ON EDUCATING STUDENTS WHO NEED THE MOST 1 (2015) ("The highest poverty districts in our country receive about $1,200 less per student than the lowest poverty districts [and] "differences are even larger—roughly $2,000 per student—between districts serving the most students of color and those serving the fewest.").

48. *See generally Educational Attainment Differences by Students' Socioeconomic Status*, NAT'L CTR. FOR EDUC. STAT. (July 30, 2015), https://nces.ed.gov/blogs/nces/post/educational-attainment-differences-by-students-socioeconomic-status.

49. *Ethnic and Racial Minorities & Socioeconomic Status*, AM. PSYCHOLOGICAL ASS'N, http://www.apa.org/pi/ses/resources/publications/minorities.aspx (last visited Apr. 15, 2018); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 862 (2007) (Breyer, J., dissenting).

50. *See generally* M. Akram Faizer, *The Privileges or Immunities Clause: A Potential Cure for the Trump Phenomenon*, 121 PENN ST. L. REV. 61, 85 n.107 (2016); Preston Green, III, Bruce D. Baker & Joseph O. Oluwole, *Achieving Racial Equal Educational Opportunity Through School Finance Litigation*, 4 STAN. J. C.R. & C.L. 283 (2008); Maureen Carroll, *Racialized Assumptions and Constitutional Harm: Claims of Injury Based on Public School Assignment*, 83 TEMP. L. REV. 903, 935 (2011).

51. *See generally* Anna Williams Shavers, *Rethinking the Equity vs. Adequacy Debate: Implications for Rural School Finance Reform Litigation*, 82 NEB. L. REV. 133, 134–36 (2003); Michael Heise, *State Constitutions, School Finance Litigation, and the 'Third Wave': From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1151–52 (1995). For example, courts have described the finance system in the State of Kansas as "financed public schools through taxes and other mechanisms provided for by the legislature, not by local districts" principally through local taxes, with school districts operating "pursuant to the powers and limitations granted by the legislature," including "minimum ad valorem tax levies or floors as well as maximum levies or caps." Petrella v. Brownback, 787 F.3d 1242, 1249 (10th Cir. 2015) (quoting Unified Sch. Dist. No. 229 v. State, 256 Kan. 232, 885 P.2d 1170, 1175 (1994)). *See also* Preston C. Green et al., *Achieving Racial Equal Educational Opportunity Through School Finance Litigation*, 4 STAN. J. C.R. & C.L. 283, 303 (2008) ("[M]ost states no longer receive most of their funding from local property taxation.").

52. Maureen Carroll, *Racialized Assumptions and Constitutional Harm: Claims of Injury Based on Public School Assignment*, 83 TEMP. L. REV. 903, 935–36 (2011) (noting that "not all parents have equal access to the housing located in attendance zones connected to high-quality schools").

districts have been drawn in a way to further the separation of students based on race and socioeconomic status.[53] Dean Erwin Chemerinsky has observed and criticized the Supreme Court's refusal to find that disparities in school funding violate the Constitution.[54] Justice Douglas, in his dissent in *Milliken v. Bradley*, a case cited by Dean Chemerinsky, poignantly describes the effect of the majority's decision in the 5-4 opinion:

> When we rule against the metropolitan area remedy we take a step that will likely put the problems of the blacks and our society back to the period that antedated the "separate but equal" regime of *Plessy v. Fer*guson, 163 U.S. 537. The reason is simple.
>
> The inner core of Detroit is now rather solidly black; and the blacks, we know, in many instances are likely to be poorer, just as were the Chicanos in *San Antonio School District v. Rodriguez*, 411 U.S. 1. By that decision the poorer school districts must pay their own way. It is therefore a foregone conclusion that we have now given the States a formula whereby the poor must pay their own way.
>
> Today's decision, given Rodriguez, means that there is no violation of the Equal Protection Clause though the schools are segregated by race and though the black schools are not only "separate" but "inferior."
>
> So far as equal protection is concerned we are now in a dramatic retreat from the 7-to-1 decision in 1896 that blacks could be segregated in public facilities, provided they received equal treatment.[55]

In *Rodriguez*,[56] the Court concluded that unequal funding of public schools in a manner that reinforces socio-economic inequality is consistent with the Fourteenth Amendment's Equal Protection Clause.[57] This reasoning has continued.

Since the 1973 Rodriguez decision, under the belief that challenges to school finance systems based upon the United States Constitution were foreclosed, challengers to education systems began to focus on education clauses in state constitutions as the basis for relief. This is a move from what scholars have referred to as the "first wave" of school finance litigation that relied upon federal rights.[58] The Missouri State Supreme Court described the

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53. *See generally*, Milliken v. Bradley, 418 U.S. 717, 799–800 (1974) (Marshall, J., dissenting) (describing Detroit metropolitan area school districts with more than 70% of Detroit schools as having proportions of white or black students exceeding 90%).

54. Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 AM. U. L. REV. 1461, 1462 (2003) (citing Milliken v. Bradley, 418 U.S. 717 (1974)).

55. Milliken v. Bradley, 418 U.S. 717, 759–61 (1974).

56. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 54–55 (1973).

57. *Id.* at 54–55 (concluding that unequal funding of public schools in a manner that reinforces socio-economic inequality is consistent with the Fourteenth Amendment's Equal Protection Clause); *Id.* at 11–17 (suggesting that the discriminatory socio-economic funding paradigms corresponded with racial polarization in public schooling).

58. *See generally* Julie K. Underwood, *School Finance Adequacy as Vertical Equity*, 28 U. MICH. J.L. REFORM 493 (1994); William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597 (1994)

litigation that followed:

> The local nature of public schools has been at the heart of three waves of litigation that have occurred in the past 60 years. The first was racial desegregation, which included claims that education resources were distributed discriminatorily; the second wave was school-finance lawsuits aimed at achieving equity in financing between and among local districts; and the third, and current, wave expresses a "right" to an "adequate" education.[59]

Second wave equity lawsuits focused on seeking substantial equalization of education revenue. Third wave adequacy suits are characterized as seeking sufficient resources to provide an adequate education.[60] As some advocates and scholars have noted, "[a]dequacy litigation is seen as a means of ensuring that all public school children (regardless of race or zip code) receive a minimum, adequate level of education. . . ."[61]

Lawsuits have been filed in almost every state based on one or both of these theories.[62] A review of these cases reveals that equal education

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[hereinafter *Judicial Analysis*].

59. Comm. for Educ. Equal. v. State, 294 S.W.3d 477, 501 (Mo. 2009).

60. *See generally*, Anna Williams Shavers, *Rethinking the Equity vs. Adequacy Debate: Implications for Rural School Finance Reform Litigation*, 82 NEB. L. REV. 133 (2003); Nina L. Pickering, *Local Control vs. Poor Patrol: Can Discriminatory Police Protection Be Remedied Through the Education Finance Litigation Model?*, 86 B.U. L. REV. 741, 791, n. 76 (2006) ("In an equity suit, plaintiffs rely on state equality guarantees, and assert that education is a fundamental right and that disparities in funding violate that right.... In a quality [or "adequacy"] suit, the plaintiffs assert that the state constitution establishes a particular quality and that the schools do not measure up to that standard").

61. David Hinojosa & Karolina Walters, *How Adequacy Litigation Fails to Fulfill the Promise of Brown [But How It Can Get Us Closer]*, 2014 MICH. ST. L. REV. 575, 602 (2014).

62. Plaintiffs in the following twenty-seven states are generally considered to have had successful education finance challenges based upon their state constitutions: Alabama, Alaska, Arkansas, Arizona, California, Connecticut, Idaho, Kansas, Kentucky, Massachusetts, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, South Carolina, Tennessee, Texas, Vermont, Washington, West Virginia, and Wyoming. The decisions in California, Arizona, Texas, Louisiana, and Connecticut are "mixed results" because the courts have issued multiple decisions regarding these constitutional rights. For example, an "equity" decision favoring the plaintiffs and an "adequacy decision" favoring the defendants. *See* SCHOOLFUNDING.INFO: A PROJECT OF THE CENTER FOR EDUCATIONAL EQUITY AT TEACHERS COLLEGE, http://schoolfunding.info/ [https://perma.cc/EY4X-9WR4]. Opinion of the Justices, 624 So. 2d 107, 107 (Ala. 1993); Matanuska-Susitna Borough Sch. Dist. v. State, 931 P.2d 391, 399 (Alaska 1997); Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 816 (Ariz. 1994); DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90, 93 (Ariz. 1983); Serrano v. Priest (Serrano II), 557 P.2d 929, 949–52 (Cal. 1976); Horton v. Meskill (Horton II), 376 A.2d 359 (Conn. 1977); Idaho Sch. for Equal Educ. Opportunity v. Evans, 850 P.2d 724, 728 (Idaho 1993); Montoy v. State, No. 99-C-1738, 2003 WL 22902963 (Shawnee County Ct., Div. 6, Kan. Dec. 3, 2003); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 216 (Ky. 1989); McDuffy v. Sec. of the Executive Office of Educ., 615 N.E.2d 516, 554 (Mass. 1993); Comm. for Educ. Equality v. State, No. CV190-1371CC (Cir. Ct. Cole County, Mo. Jan. 1993); Helena Elementary Sch. Dist. v. State, 769 P.2d 684, 690 (Mont. 1989); Claremont Sch. Dist. v. Governor (Claremont II), 703 A.2d 1353, 1354 (N.H. 1997); Robinson v. Cahill (Robinson I), 303 A.2d 273, 295 (N.J. 1973); Campaign for Fiscal Equity v. State, 655 N.E.2d 661, 666 (N.Y.

opportunity is recognized and enforced in some states while not in others. Even where plaintiffs have favorable court decisions, they may not have received the remedy they sought[63] and litigation continues. As one commentator has stated, "[o]nce a court determines that a state's school finance system is unconstitutional, it faces the perplexing challenge of engaging state legislators and executives to implement a comprehensive remedy."[64] In some instances, a constitutional crisis has emerged. A judicial order is issued and the legislature and governor must decide how to finance the ordered remedy. If there is resistance the court must decide how or if it will react.[65] In *DeRolph v. State* (*DeRolph I*),[66] the Ohio Supreme Court issued an opinion in the case which had been started by a complaint filed in 1991 challenging the constitutionality of Ohio's elementary and secondary public

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1995); Leandro v. State, 488 S.E.2d 249, 254 (N.C. 1997); DeRolph v. State, 677 N.E.2d 733, 737 (Ohio 1997); Abbeville County Sch. Dist. v. State, 515 S.E.2d 535, 540 (S.C. 1999); Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 144 (Tenn. 1993); Edgewood Indep. Sch. Dist. v. Kirby (Edgewood II), 804 S.W.2d 491, 493 (Tex. 1991); Brigham v. State, 692 A.2d 384, 397 (Vt. 1997); Seattle Sch. Dist. No. 1 v. Washington, 585 P.2d 71 (Wash. 1978); Pauley v. Kelly, 255 S.E.2d 859, 865 (W. Va. 1979); Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310, 315 (Wyo. 1980).

Defendants have been successful in resisting these challenges in sixteen states: Colorado, Florida, Georgia, Illinois, Louisiana, Maine, Maryland, Michigan, Minnesota, Nebraska, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Virginia, and Wisconsin. Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1025 (Colo. 1982); Coal. for Adequacy and Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 406 (Fla. 1996); McDaniel v. Thomas, 285 S.E.2d 156, 165 (Ga. 1981); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1195–96 (Ill. 1996); Charlet v. Legislature, 713 So. 2d 1199, 1207 (La. 1998); Sch. Admin. Dist. No. 1 v. Commissioner, 659 A.2d 854, 858 (Me. 1995); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 790 (Md. 1983); Governor v. State Treasurer, 390 Mich. 389, 409 (1973); Skeen v. State, 505 N.W.2d 299, 320 (Minn. 1993); Gould v. Orr, 506 N.W.2d 349, 353 (Neb. 1993); Bismarck Pub. Sch. Dist. No. 1 v. State, 511 N.W.2d 247, 250 (N.D. 1995); Fair Sch. Fin. Council v. State, 746 P.2d 1135, 1137 (Okla. 1987); Olsen v. State, 554 P.2d 139, 149 (Or. 1976); Danson v. Casey, 399 A.2d 360, 367 (Pa. 1979); City of Pawtucket v. Sundlun, 662 A.2d 40, 42 (R.I. 1995); Scott v. Commonwealth, 443 S.E.2d 138, 142–43 (Va. 1994); Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989).

Decisions in state constitutional challenges to school financing schemes have not occurred in Hawaii, Mississippi, Nevada, or Utah; while cases were filed in Indiana and Iowa, a court decision was never reached. In January 2018, Community Legal Aid Society filed a lawsuit, Delawareans for Educational Opportunity v. Carney, for the failure of state officials to fairly and adequately fund education in schools across the state. *See Overview of Litigation History*, SCH. FUNDING, http://schoolfunding.info/litigation-map/ [https://perma.cc/Y949-X53T].

63. *See* Michael Rebell, *Financing Our Future Education Improvements for the 21st Century, Panel Three Commentary--Rodriguez Revisited: An Optimist's View*, 1998 ANN. SURV. AM. L. 289, 296 (1998) (discussing equity-based claims not receiving the judicially ordered remedies).

64. Gregory C. Malhoit, *Fulfilling the Promise of Brown: The Experiences of Lawyers Challenging State School-Funding Systems*, 83 NEB. L. REV. 830, 833 (2005).

65. *See, e.g.*, Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1696 (2014) ("Within the United States, not all state courts have been equally assertive, but many courts have nonetheless interpreted governmental failures to comply with explicit constitutional directions as violative of state constitutions.").

66. DeRolph v. State, 677 N.E.2d 733 (Ohio 1997).

school funding system.[67] The court held that the school financing system failed to meet the requirements of the state's constitution.[68] The court revisited the claims of noncompliance from 1997 through 2002.[69] Although the court repeatedly held that the state was not in compliance, it finally dismissed the case in 2002[70] with the court being described as retreating,[71] never achieving compliance,[72] and after being "rebuffed by the legislature (and potentially facing a constitutional crisis) . . . ultimately relinquished jurisdiction over the matter."[73]

In 2012, the Supreme Court of Washington in *McCleary v. State*[74] held the state legislature in contempt for not adequately funding schools, as previously required by the court.[75] Subsequently in 2015, the court found the legislature out of compliance and assessed a remedial penalty of $100,000 per day until it adopts a complete plan for complying with the constitution.[76] The litigation began in 2007 and continues as the court has retained jurisdiction until September 2018 and in its November 2017 decision ordered that the $100,000 per day penalty be continued until an appropriate plan is in place and that a report and brief is filed detailing the state's compliance by April 9, 2018.[77]

Similarly, in Kansas the plaintiffs prevailed in the 2003 case *Montoy v. State*,[78] resulting in a funding plan adopted by the legislature in 2006 to cure the "blatant violation" of the Kansas Constitution.[79] Before the plan could be

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67. *Revisiting DeRolph*, COLUMBIA DISPATCH (Apr. 20, 2014), http://www.dispatch.com/content/stories/editorials/2014/04/20/revisiting-derolph.html.

68. *DeRolph*, 677 N.E.2d at 747.

69. *See* State v. Lewis (DeRolph V), 789 N.E.2d 195, 197–99 (Ohio 2003).

70. DeRolph v. State, 780 N.E.2d 529 (Ohio 2002).

71. Patricia F. First & Barbara M. De Luca, *The Meaning of Educational Adequacy: The Confusion of Derolph*, 32 J.L. & EDUC. 185 (2003).

72. Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701, 727–28 (2010).

73. William S. Koski, *Beyond Dollars? The Promises and Pitfalls of the Next Generation of Educational Rights Litigation*, 117 COLUM. L. REV. 1897, 1909 n.44 (2017).

74. McCleary v. State, 269 P.3d 227, 244 (2012) (challenging the adequacy of state funding for K–12 education under article IX, section 1 of the Washington State Constitution).

75. *See McCleary*, 269 P.3d at 245.

76. *See* Order of Aug. 13, 2015 at 9 McCleary v. State, 269 P.3d 227 (Wash. 2012) (No. 84362-7).

77. *See* Order of Nov. 15, 2017 at XX, McCleary v. State, 269 P.3d 227 (Wash. 2012) (No. 84362-7).

78. Montoy v. State, 62 P.3d 228 (Kan. 2003) (*Montoy I*); Montoy v. State, 120 P.3d 306 (Kan. 2005) (*Montoy II*); Montoy v. State, 112 P.3d 923 (Kan. 2005) (*Montoy III*); Montoy v. State, 138 P.3d 755 (Kan. 2006) (*Montoy IV*); *see also* Anna Williams Shavers, *Closing the School Doors in the Pursuit of Equal Education Opportunity: A Comment on Montoy v. State, 2003 WL 22902963 (Kan. Dist. Ct. 2003)*, 83 NEB. L. REV. 901–14 (2005).

79. Gannon v. State, 402 P.3d. 513, 520 (Kan. 2017) (*Gannon* V); Montoy v. State, 2003 WL 22902963 (Kan. Dist. Ct. 2003) (challenges based on Article 6, §§ 1, 5 and 6(b) of the Kansas Constitution).

fully implemented, the State cut school funding.[80] This led to the filing in *Gannon v. State of Kansas*[81] in 2010 alleging that the State has violated the Kansas Constitution by not adequately funding Kansas public schools.[82] Initially after the plaintiffs' victory, the legislature responded by increasing funding to address the finding of unconstitutional equity provisions.[83] After the 2014 elections, the legislature reduced funding again.[84] Subsequent to successful challenges the legislature adopted a new school finance system in 2016.[85] In *Gannon v. State* (*Gannon V*),[86] decided in October 2017, the Kansas Supreme Court held the legislative school financing plan constitutionally inadequate.[87] As the Kansas legislature began its new session in January 2018, it was again faced with the challenge to adopt a court approved school finance system or risk a court ordered closing of public schools.[88]

The mixed results in state school finance litigation along with the existing disparities support the need for a consideration of a larger role by the federal government.

III. FEDERALISM AND SCHOOL FINANCE: FINANCING EDUCATION AS A FEDERAL RESPONSIBILITY

The greatest obstacle to having appropriate levels of school finance to

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80. CALEB STEGALL, KAN. POL'Y INST., A KANSAS PRIMER ON EDUCATION FUNDING VOLUME II: ANALYSIS OF MONTOY VS. STATE OF KANSAS 4 (2009), https://kansaspolicy.org/wp-content/uploads/2015/12/KPI-VolII-Montoy.pdf (noting that after the state legislature approved additional school funding, funding was cut in 2009 when the state was faced with a budget deficit).

81. Gannon v. State, 319 P.3d 1196 (Kan. 2014) (affirming that, in violation of its duty to provide equity in public education, the State established wealth-based disparities by withholding funding from certain school districts).

82. *See generally*, Preston C. Green, III et al., *How the Kansas Courts Have Permitted and May Remedy Racial Funding Disparities in the Aftermath of Brown*, 53 WASHBURN L.J. 439 (2014).

83. Gannon v. State, 402 P.3d. 513, 517, 520–21 (Kan. 2017) (*Gannon V*).

84. Gannon v. State, 390 P.3d 461, 468 (Kan. 2017) (*Gannon IV*).

85. *Id.*; Hunter Woodall & Miranda Davis, *Finance Legislation Passes, Keeping Kansas Schools Open*, KAN. CITY STAR (June 24, 2016), http://www.kansascity.com/news/state/kansas/article85773397.html.

86. Gannon v. State, 402 P.3d. 513 (Kan. 2017) (*Gannon V*). For a history of this litigation, *see* Gordon L. Self et al., *Comprehensive Summary of the Kansas Supreme Court Opinion in Gannon v. State*, http://www.ksrevisor.org/schoolfinance.html [https://perma.cc/D4EE-P8M8]; Kansas Revisor of Statutes, *School Finance*, http://www.ksrevisor.org/rpts/Gannon%20V%20Comprehensive%20Analysis_FINAL_10-12-17.pdf [https://perma.cc/CGE6-FLEQ]; *see* Somers, Robb, and Robb, *School Finance Litigation-Gannon*, http://www.robblaw.com/html/school_finance.html [https://perma.cc/TR4W-FFP8] (website maintained by plaintiff's law firm).

87. *Gannon*, 402 P.3d. at 525.

88. *See* Peter Hancock, *School Finance Lawsuit Looms Large As Kansas' 2018 Legislative Session Begins Monday*, LAWRENCE J. WORLD (Jan. 7, 2018), http://www2.ljworld.com/news/2018/jan/07/school-finance-lawsuit-looms-large-2018-session-be/.

achieve equal education opportunity for all children in America appears to be the possibility of tax increases. As one commentator has noted:

> The human rights rationale for elevating the financial responsibility for compulsory schooling from the local to the national (and, optimally, global) level is to ensure that all children have access to good quality public school. However, the ability and willingness of individual governments to finance education is associated with taxation because education is funded out of the general tax. Distaste for taxation in the United States is palpable as evidenced in constant references to 'the tax burden.' Diminishing taxation decreases public funding for education and removes additional financial burden to parents. Lowering financial responsibility for education to the local and family level jeopardizes the human rights approach: people see funding destined for their own rather than other people's children. The rationale underlying this financial construct jeopardizes the right to education for all children.[89]

I start here by repeating arguments that I have made in the past.[90] On a basic level, I advocate for an increased role in school finance by the federal government. Traditionally, it has been accepted that the federal government must recognize and support the need for education but that education was left to state and local control.[91] Former Secretary of Education Richard W. Riley expertly described this relationship: "education is treated and viewed by Americans as a local function, a state responsibility, and a national priority."[92] Because of the continuing disparities in education between and within states,[93] a greater federal presence is required. These disparities have been attributed

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89. Katarina Tomasevski, *From the Outside Looking In: Changing New York City's Education Through the Human Rights Approach* 13 (Apr. 15, 2002), https://www.nesri.org/sites/default/files/Special_Rapporteur_Education_NYC.pdf [https://perma.cc/GA3V-3CY5] (Special Rapporteur on the Right to Education of the United Nations Commission on Human Rights).

90. *See* Anna Williams Shavers, *Providing an Adequate and Equitable Education for the Children of Katrina and Other Victims of Disaster*, *in* CHILDREN, LAW, AND DISASTERS: WHAT HAVE WE LEARNED FROM THE HURRICANES OF 2005 199–233 (Howard Davidson, Ellen Marrus, & Laura Oren, eds., 2008); Anna Williams Shavers, *Katrina's Children: Revealing the Broken Promise of Education*, 31 T. MARSHALL L. REV. 499 (2006); Anna Williams Shavers, *Rethinking the Equity vs. Adequacy Debate: Implications for Rural School Finance Reform Litigation*, 82 NEB. L. REV. 133, 181–89 (2003).

91. *See generally*, U.S. DEP'T OF EDUC., THE FED. ROLE IN EDUC., https://www2.ed.gov/about/overview/fed/role.html [https://perma.cc/867S-X9BJ]; Kimberly Jenkins Robinson, *Disrupting Education Federalism*, 92 WASH. U.L. REV. 959, 977 (2015) (noting the Court's reliance upon education federalism as one of several justifications for rejecting a federal right to education in *Rodriguez*).

92. Richard W. Riley, *The Role of the Federal Government in Education—Supporting a National Desire for Support for State and Local Education*, 17 ST. LOUIS U. PUB. L. REV. 29, 30 (1997).

93. *See generally Quality Counts Marks 20 Years: Report Explores New Directions in Accountability*, EDUC. WEEK (Jan. 26, 2016), http://www.edweek.org/media/qualitycounts2016_release.pdf [https://perma.cc/VF7V-ETCG]; Lindsey Cook, *U.S. Education: Still Separate and Unequal*, U.S. NEWS & WORLD REPORT (Jan. 28, 2015).

both to the failure in some states to adequately fund their schools[94] and the failure to find that education is a fundamental right.[95]

Other scholars have recognized the need for an increased federal presence.[96] This can take the form of legislative action by Congress to increase federal financing of public school education or by the Supreme Court in construing the Constitution to provide strict scrutiny of state and local education financing schemes by finding an implicit right to education as a fundamental right.

A. Federal Statutory Claims

Although education finance in America is thought of as primarily a State and local responsibility, the federal government has had a role in education since the original Department of Education was created in 1867.[97] The federal

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94. *See generally*, EQUITY AND EXCELLENCE COMM'N, FOR EACH AND EVERY CHILD: A STRATEGY FOR EDUCATION EQUITY AND EXCELLENCE 18 (2013), http://www2.ed.gov/about/bdscomm/list/eec/equity-excellence-commission-report.pdf (("Wide disparities in funding levels among the states ranged from a low of $6,454 per pupil in Utah to $18,167 in New York in 2010 . . . . In most states, the highest-spending districts pay about twice as much per pupil as the lowest-spending districts.") *citing* NAT'L CTR. FOR EDUC. STATISTICS, *Revenues and Expenditures for Public Elementary and Secondary Education: School Year 2009-10 (Fiscal Year 2010)* 11–12 (2012)); Ovetta Wiggins, *Report Finds Wide Disparities in Local Per-Pupil Spending; D.C. Charters Spend Most*, THE WASH. POST (Oct. 15, 2014), https://www.washingtonpost.com/local/education/report-finds-wide-disparities-in-local-per-pupil-spending-dc-charters-spend-most/2014/10/14/f8b94b8c-53cd-11e4-ba4b-f6333e2c0453_story.html?utm_term=.4f99ec219b82 [https://perma.cc/BWX4-8PDZ] (citing Thomas B. Fordham, *Institute Study on Metro D.C.*).

95. *See generally* Kristi L. Bowman, *The Failure of Education Federalism*, 51 U. MICH. J.L. REFORM 1, 16–17, 24–25 n. 102 (2017) (discussing "judicial abdication" and Michigan's decision that education is not a fundamental right); Christopher Edley, Jr. & Mariano-Florentino Cuellar, *Foreword to For Each and Every Child: A Strategy for Education Equity and Excellence* 18 (2013), http://www2.ed.gov/about/bdscomm/list/eec/equity-excellence-commission-report.pdf [https://perma.cc/3FB6-HCE4].

96. *See, e.g.*, Kimberly Jenkins Robinson, *Disrupting Education Federalism*, 92 WASH. U. L. REV. 959, 963, 978–88 (2015) (arguing that education federalism should be reexamined to ensure equal access to an excellent education and that a greater federal role in education is necessary to increase educational quality; a larger but not exclusive role of the federal government); Mildred Wigfall Robinson, *It Takes a Federalist Village: A Revitalized Property Tax as the Linchpin for Stable, Effective K-12 Public Education Funding*, 17 RICH. J.L. & PUB. INT. 549, 588 (2014) (Neither school districts nor state governments acting alone possess the necessary fiscal capacity to meet even the minimal challenge of adequacy); Kimberly Jenkins Robinson, *The High Cost of Education Federalism*, 48 WAKE FOREST L. REV. 287 (2013) (making a similar argument); Joshua Arocho, *Inhibiting Intrastate Inequalities: A Congressional Approach to Ensuring Equal Opportunity to Finance Public Education*, 112 MICH. L. REV. 1479, 1504 (2014) ("By tying federal funds under the next reauthorization of NCLB to states' use of a Guaranteed Tax Base system, Congress can incentivize states to provide true equality of educational opportunity to all schools while avoiding the federalism issues associated with a national system of school finance"); *but see*, John C. Pittenger, *Equity in School Finance: The Federal Government's Role?*, 24 CONN. L. REV. 757 (1992).

97. *See generally*, U.S. DEP'T OF EDUC., *The Federal Role in Education*, https://www2.ed.gov/about/overview/fed/role.html [https://perma.cc/W3M2-79CK] (providing a

government's role in education initially was to collect information and provide limited assistance to the states.[98] Efforts to increase the role of the federal government in education met with resistance.[99] As Professor Landis notes, the Blair Education Bill which sought to provide federal funding for public schools was introduced and defeated in Congress several times from 1880 to 1892.[100] In part, the bill's purpose was to provide education for free blacks who had been denied education as slaves.[101] Even though there was widespread support for the bill around the country, some congressmen opposed the bill on the grounds of unconstitutionality.[102] Supporters of the bill argued, in part, that it addressed the "temporary emergency of illiteracy."[103]

There are, however, several federal laws that address equal education opportunity.[104] These laws include Title VI of the Civil Rights Act of 1964,[105] 1965 Elementary and Secondary Education Act (ESEA),[106] Title IX of the Education Amendments of 1972,[107] section 504 of the Rehabilitation Act of

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history of the role of the federal government in education).

98. *See* Department of Education Act, 1867, (14 Stat. 434); *see generally* Riley, *supra* note 92, at 34.

99. *See generally* Michele L. Landis, *The Sympathetic State*, 23 LAW & HIST. REV. 387, 420 (2005) (identifying failed attempts at early education legislation).

100. *See id.*

101. *See id.*; Allen Going, *The South and the Blair Education Bill*, 44 MISS. VALLEY HIST. REV. 267 (1957).

102. Landis, *supra* note 99, at 420–21.

103. *Id.* at 421.

104. *See* Shavers, *supra* note 90, at 199 (discussing various agencies that have administered education statutes, such as the Department of Education that was established under the 1979 Organization Act. 20 U.S.C. § 3402 (1979)).

105. Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d (2000) (prohibiting discrimination on the basis of race, color and national origin); *see generally* Shavers, *supra* note 90, at 187; Maurice R. Dyson, *Leave No Child Behind: Normative Proposals to Link Educational Adequacy Claims and High Stakes Assessment Due Process Challenges*, 7 TEX. F. ON C.L. & C.R. 1, 18–19; Sarah S. Erving, Note, *New York's Education Finance Litigation and The Title Vi Wave: An Analysis of Campaign for Fiscal Equity V. State*, 10 J.L. & POL'Y 271, 284 (2001); Denise C. Morgan, *The New School Finance Litigation: Acknowledging That Race Discrimination in Public Education Is More Than Just A Tort*, 96 NW. U.L. REV. 99, 173 (2001); Kevin Randall McMillan, Note, *The Turning Tide: The Emerging Fourth Wave of School Finance Reform Litigation and The Courts' Lingering Institutional Concerns*, 58 OHIO ST. L.J. 1867 (1998).

106. 20 U.S.C. § 6301 (1965). Including the Title I program, ESEA offered new grants to districts serving low-income students, federal grants for textbooks and library books, funding for special education centers, and scholarships for low-income college students. Additionally, the law provided federal grants to state educational agencies to improve the quality of elementary and secondary education. *Every Student Succeeds Act (ESSA)*, U.S. DEP'T OF EDUC. (last visited June 24, 2018), https://www.ed.gov/ESSA.

107. Education Amendments of 1972, Pub. L. No. 92–318, 86 Stat. 373-75 (1972) (codified as amended at 20 U.S.C. §§ 1681–88 (1982)). Title IX prohibits discrimination of the basis of sex in schools that receive federal financial assistance. *See generally* Suzanne Eckes, *The Thirteenth Anniversary of Title IX: Women Have Not Reached the Finish Line*, 13 S. CAL. REV. L. & WOMEN'S STUD. 3, 19–22 (2003) (outlining the role of the Office for Civil Rights).

1973,[108] and the Education for All Handicapped Children Act (EAHCA), now the Individuals with Disabilities Education Act (IDEA).[109]

The No Child Left Behind Act (NCLBA)[110] was a version of the Elementary and Secondary Education Act (ESEA) and increased the federal government's role in K-12 education by attempting to reach universal proficiency on state academics and to close achievement gaps between high- and low-performing students, especially those in designated groups: students who are economically disadvantaged, are members of major racial or ethnic groups, have learning disabilities, or have limited English proficiency.[111] It has been described as "most expansive education reform law in the history of the United States."[112] The No Child Left Behind Act (NCLBA)[113] was in effect from 2002–2015. Included in its stated purpose is the recognition that the federal government has a responsibility "to ensure that all children have a *fair, equal, and significant opportunity* to obtain a high-quality education . . . ."[114]

While education is not enumerated in the Constitution as a federal power, and it has been argued that education is a power reserved to the states[115] under the Tenth Amendment,[116] federal action can be based upon the General Welfare Clause, commonly referred to as the "Spending Clause."[117]

The General Welfare clause of the Constitution, Article 1, Section 8 states:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common

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108. IDEA Improvement Act of 1997, Pub. L. 105–17, 111 Stat. 37 (1997) (as amended 2004).

109. 20 U.S.C. §§ 1400 et seq. (2014). In 1975, Congress passed the Act to provide federal funds to states to ensure uniformity in the procedures for the identification of students with disabilities and the provision of substantive resources through the states.

110. No Child Left Behind Act of 2001, Pub. L. 107–110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.).

111. ENSURING OPPORTUNITIES FOR DISADVANTAGED CHILDREN AND FAMILIES, *supra* note 9, at 11; Joshua E. Weishart, *Reconstituting the Right to Education*, 67 ALA. L. REV. 915, 966 (2016) (discussing of legislative efforts to provide equal education opportunity to disadvantaged children, such as Title I, the Individuals with Disabilities Education Act, and the No Child Left Behind Act) [hereinafter *Reconstituting the Right to Education*]; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-661, NO CHILD LEFT BEHIND ACT: STATES FACE CHALLENGES MEASURING ACADEMIC GROWTH THAT EDUCATION'S INITIATIVES MAY HELP ADDRESS, 5–6. (July 2006).

112. *Disrupting Education Federalism*, *supra* note 11, at 966.

113. No Child Left Behind Act of 2001, Pub. L. 107–110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.).

114. 20 U.S.C. § 6301 (2012).

115. *See, e.g.*, Virginia Department of Education v. Riley, 106 F.3d 559, 566 (4th Cir. 1997) (en banc), superseded by statute, as recognized by Amos v. Maryland Dep't of Public Safety & Correctional Servs., 126 F.3d 589 (4th Cir. 1997); Regina R. Umpstead, *The No Child Left Behind Act: Is It an Unfunded Mandate or a Promotion of Federal Educational Ideals?*, 37 J.L. & EDUC. 193, 200 (2008).

116. *See* U.S. CONST. amend. X.

117. Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1, 4 (2013).

> Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.[118]

Congress relied on this clause as the basis for its most significant legislation in education, including the (NCLBA),[119] the American Recovery and Reinvestment Act of 2009 ("Stimulus Bill")[120] which included provisions designed to expand educational opportunities,[121] and the Every Student Succeeds Act (ESSA) in December 2015 which reauthorized the NCLBA.[122] The ESSA was enacted in response to the fact that the NCLBA was widely maligned because of the standards set by the DOE.[123]

The federal government has often stepped in to provide more funding in times of emergency or crisis.[124] It is estimated, however, that the federal government now only provides about eight percent of the funds for K-12 education.[125] For the reasons stated above, the education finance system in America is now in a state of crisis. In a 2008 forum, it was concluded it is necessary to do more "to ensure all children have opportunities to become productive citizens—through revised . . . education policies [and] will require new thinking about federal investments."[126] It was recommended that, with respect to federal funding decisions, there be "a shift away from budgetary and policy discussions focused solely on current spending to those more focused on prevention and longer term investments."[127]

Professor Bowman has suggested that in responding to this crisis, a legislative solution to an increased role in school finance may be preferred

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118. U.S. CONST. art. I, § 8.

119. School Dist. of City of Pontiac v. Secretary of U.S. Dept. of Educ., 512 F.3d 252, 261 (6th Cir. 2008); Phillip Daniel, *No Child Left Behind: The Balm of Gilead has Arrived in American Education*, 206 EDUC. L. REP. 791, 800 (discussing the relationship of the spending clause to legislative action).

120. American Recovery and Reinvestment Act of 2009 (Stimulus Bill), Pub. L. No. 111-5, Feb. 17, 2009, 123 Stat. 115 (codified as amended in scattered sections of 6, 19, 26, 42, and 47 U.S.C.).

121. *See generally Disrupting Education Federalism*, *supra* note 1, at 966.

122. Every Student Succeeds Act, Pub. L. No. 114–95, 129 Stat. 1802 (2015) (codified as amended in 20 U.S.C. §§ 6301–6311). *See* Andrew B. Coan, *Judicial Capacity and the Conditional Spending Paradox*, 2013 WIS. L. REV. 339, 341 (discussing statutes relying on the spending power).

123. *See generally* Derek W. Black, *Abandoning the Federal Role in Education: The Every Student Succeeds Act*, 105 CAL. L. REV. 1309 (2017) (discussing the move to more state discretion in setting standards); Bowman, *supra* note 95, at 43–45.

124. The American Recovery and Reinvestment Act of 2009 (Recovery Act), Pub. L. No. 111-5, Feb. 17, 2009, 123 Stat. 115 (codified as amended in scattered sections of 6, 19, 26, 42, and 47 U.S.C.), was signed into law by President Obama on February 17th, 2009. *See generally* Louis Fischer, *When Courts Play School Board: Judicial Activism in Education*, 51 W. ED. L. REP. 693, 703–04 (1989) (providing instances of federal intervention in education).

125. *The Federal Role in Education*, DEPT. OF EDUC. (May 25, 2017), https://www2.ed.gov/about/overview/fed/role.html [https://perma.cc/88XE-HZ5W].

126. ENSURING OPPORTUNITIES FOR DISADVANTAGED CHILDREN AND FAMILIES, *supra* note 9, at 19.

127. *Id.*

because "Congress retains substantial authority to legislate about education—and the legislative and executive branch are in some ways better suited to education reform than the judiciary."[128] She suggests that a model of cooperative federalism is appropriate for education[129] because "[t]he model of dual federalism . . . is sorely outdated in the context of public education."[130] Cooperative federalism involves the establishment of a federal statutory framework of federal-state partnership where enforcement or administration is split between a federal agency and the states.[131] Cooperative federalism exists in both regulatory and entitlement programs.[132] Cooperative federalism has existed to a limited degree in education finance since the late nineteenth century.[133] Professor Kimberly Jenkins Robinson has similarly stated that she "do[es] not recommend that the courts should serve as the primary focus for reform. . . ."[134] She suggests that by taking this action, "the federal government would reestablish itself as the final guarantor of equal access to an excellent education."[135]

A program of cooperative school finance would be "in the nature of a contract: in return for federal funds, the [s]tates agree to comply with federally

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128. Bowman, *supra* note 95, at 41 (citing *Disrupting Education Federalism*, supra note 11, at 1006–13).

129. *Id.* at 53.

130. *Id.*; *see also id.* at 40 ("[L]egislative and agency-driven reforms are theoretically easier to enact and also have the long-term potential to be more effective, at least in some ways, than judicial reforms," but recognizing that under the current political climate these reforms are unlikely to be supported, but "may be more viable in the long-term than in the short-term.").

131. *See generally* New York v. United States, 505 U.S. 144, 167–68 (1992) (discussing the Occupational Safety and Health Act of 1970 as a program of cooperative federalism); John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1197–99 (1995) (discussing cooperative federalism under the Clean Air Act); Hannah J. Wiseman, *Delegation and Dysfunction*, 35 YALE J. ON REG. 233 (2018) (discussing the relationship between cooperative federalism and the non-delegation doctrine and how dysfunctions can occur in situations such as the Flint, Michigan water crisis under the Safe Drinking Water Act (SDWA)); David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796 (2008) (discussing the extensive use of cooperative federalism in environmental regulation); Spencer E. Amdur, *The Right of Refusal: Immigration Enforcement and the New Cooperative Federalism*, 35 YALE L. & POL'Y REV. 87 (2016) (discussing cooperative federalism and immigration enforcement); Eric M. Fish, *The Uniform Interstate Family Support Act (UIFSA) 2008: Enforcing International Obligations Through Cooperative Federalism*, 24 J. AM. ACAD. MATRIM. LAW. 33 (2011). *But see generally* Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L.J. 557 (2000) (presenting social scientific arguments against cooperative federalism).

132. Maine v. Thiboutot, 448 U.S. 1, 22–23 (1980); *see also* The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Reform Act), Pub. L. No. 104–193, § 110 Stat. 2105 (1996), which established conditional spending.

133. *See supra* Part III. A.

134. *Disrupting Education Federalism*, *supra* note 10, at 1012.

135. *Id.* at 1002. The Supreme Court's reluctance to recognize positive rights in cases like DeShaney v. Winnebago Cty. Dep't. of Soc. Sec., 489 U.S. 189 (1989) and Washington v. Glucksberg, 521 U.S. 702 (1997) may be a reason to rely upon statutory enactments rather than court analysis, *but see* discussion at Part III. B. infra.

imposed conditions."[136] The federal statute would establish and define the right to education by legislation and establish a system of administrative enforcement which includes the states. This approach would recognize "that some states have robust school finance systems and related policies that produce education of an acceptable level of quality (or higher), and do so more or less uniformly."[137] This would likely be in the states that have construed their constitutional clauses to require strict scrutiny.[138]

In response to an argument that education is not included as one of Article I's "enumerated fields," Congress can rely on its spending power.[139] Congress is permitted to exercise its spending power in connection with the conditional grant of federal funds if in doing so it complies with four factors.[140] First, the exercise of the spending power must be in pursuit of the general welfare. Second, Congress must exercise the spending power unambiguously. Third, the conditions must be related "to the federal interest in particular national projects and programs." Fourth, the terms of conditional spending must not be inconsistent with other constitutional provisions.[141] Professor Robinson has concluded that these parameters "would provide Congress and the executive branch ample room to take action that would strengthen federal authority over education in ways that would not run afoul of the Constitution."[142]

Some scholars have also advocated for the position that Congress can create legislation that interprets the Constitution and defines rights that the Constitution does not enumerate.[143] In his discussion of the passage of the Patient Protection and Affordable Care Act (PPACA), Professor Rubin states that "a feature of constitutional law that has been under emphasized in the scholarly literature [is] that statutes as well as judicial decisions interpret the Constitution"[144] and can "advance the constitution's purposes" with liberty and

136. *See* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

137. Bowman, *supra* note 95, at 40; *see also* BAKER ET AL., *supra* note 3, at 19–38 (noting from a state-by-state or district-by-district lens, there is wide variation in spending and student achievement outcomes, with strong performance in a few high-investment states and in low-poverty districts–even those in under-performing states–that rivals that of other high-performing nations).

138. *See, e.g.*, Serrano v. Priest, 557 P.2d 929 (Cal. 1976), *cert. denied*, 432 U.S. 907 (1977).

139. South Dakota v. Dole, 483 U.S. 203, 207 (1987) (arguing the constitutionality of a federal statute conditioning receipt of portion of federal highway funds on adoption of minimum drinking age of 21).

140. *See id.* at 207–08.

141. *See id.* at 208.

142. *Disrupting Education Federalism*, *supra* note 10, at 964.

143. *See generally* Megan S. Wright & Joseph J. Fins, *Rehabilitation, Education, and the Integration of Individuals with Severe Brain Injury into Civil Society: Towards an Expanded Rights Agenda in Response to New Insights from Translational Neuroethics and Neuroscience*, 16 YALE J. HEALTH POL'Y, L. & ETHICS 233, 259 (2016); Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 410, 437–49 (1990) (critiquing the negative view of rights under the Privileges and Immunities Clause and advocating congressional legislation to provide for positive rights).

144. Edward Rubin, *The Affordable Care Act, the Constitutional Meaning of Statutes, and*

equality being two of the most important.[145] He submits that the passage of some statutes "suggest[] that the U.S. Constitution guarantees so-called positive rights, such as rights to sustenance, decent housing, an adequate education, and, of course, basic health care."[146] This legislation is designed to define liberty and equality rights and establish positive rights[147] which require the state to take an affirmative action such as the appropriate funds. The IDEA, for example, has been held to set forth a positive right to a "free appropriate public education."[148] President Franklin D. Roosevelt listed several positive rights that should be secured through new federal legislation including the right to an education.[149] Positive rights are linked to our political participation: "people are unlikely to participate if they lack the basic necessities of life, and they cannot participate effectively if they are uneducated."[150]

Professor Mark Tushnet has noted that "[t]o the extent that our society recognizes positive rights, it does so through statutory entitlement programs,

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the Emerging Doctrine of Positive Constitutional Rights, 53 WM. & MARY L. REV. 1639, 1643 (2012) (citing Edward L. Rubin, *How Statutes Interpret the Constitution*, 120 YALE L.J. ONLINE 297, 301–02 (2011)).

145. *Id.* at 1665; *see also id.* at 1667 (discussing how the constitution's purposes can be determined and finding as the "three most notable purposes . . . (1) strong national government, (2) liberty, and (3) equality").

146. *Id.* at 1643 (citing Edward L. Rubin, *How Statutes Interpret the Constitution*, 120 YALE L.J. ONLINE 297, 301–02 (2011)).

147. Negative rights require the government to refrain from certain conduct and positive rights impose affirmative duties on the government to take actions or expend resources. *See* ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY 118–34 (1969); *see also* Civil Rights Cases, 109 U.S. 3, 11–12 (1883) (citing U.S. v. Cruikshank, 92 U.S. 542 (1875); Virginia v. Rives, 100 U.S. 313 (1880); Ex parte Virginia, 100 U.S. 339 (1879)) ("Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect: and such legislation must necessarily be predicated upon such supposed State laws or State proceedings, and be directed to the correction of their operation and effect."); Rubin, *supra* note 145, at 1685–88; *see generally* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986) (providing an insightful analysis of the controversy regarding positive and negative rights and arguments for the position that the Constitution imposes certain positive duties).

148. *See, e.g.*, W.B. v. Matula, 67 F.3d 484, 491–92 (3d Cir. 1995) (citing Bd. of Educ. V. Rowley, 458 U.S. 176, 188–89 (1982)).

149. *See* FRANKLIN D. ROOSEVELT, MESSAGE ON THE STATE OF THE UNION: "UNLESS THERE IS SECURITY HERE AT HOME, THERE CANNOT BE LASTING PEACE IN THE WORLD"—MESSAGE TO THE CONGRESS ON THE STATE OF THE UNION. JANUARY 11, 1944 (1944), *reprinted in* THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 32–44 (Samuel I. Rosenman ed., 1950); *see generally* CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER (2004) (providing an analysis of the "second bill of rights" and the idea of expanding affirmative rights such as socioeconomic rights as legal rights). *But see* Richard A. Epstein, *The Classical Liberal Alternative to Progressive and Conservative Constitutionalism*, 77 U. CHI. L. REV. 887, 896–99 (2010) (characterizing this as a minimalist approach to constitutional interpretation and criticizing its sustainability).

150. Rubin, *supra* note 145, at 1691.

which are subject to substantial political pressure and which receive almost no constitutional protection."[151] The statutes creating these entitlement programs "can be regarded as interpretations of the Constitution."[152] This demonstrates a sharing of the power to interpret the Constitution along with the Courts.

B. Constitutional Claims

1. Using Substantive Due Process and Equal Protection Analysis to Establish a Positive Right to Education

Absent a Congressional action, it may be necessary to return to the federal courts. When interpreting the Constitution, a fundamental right can be a negative right which requires that a government not take any action that interferes with that right. Negative rights limit the power of the government. A deprivation of life, liberty or property by the government triggers substantive due process analysis requiring a legitimate justification.[153] Whether the government deprivation is of a property or liberty interest it is presumptively unconstitutional.[154] A fundamental right can also be a positive right which requires the government to take certain action such as provide resources or protection to an individual. The right to an education in state constitutions is viewed as a positive right rather than a negative right.[155] The prevailing view has been that the U.S. Constitution "is one of negative rather than positive rights."[156] This view is based in part on the Supreme Court's

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151. Mark Tushnet, *An Essay on Rights*, 62 TEX L. REV. 1363, 1393 (1984) [hereinafter *An Essay on Rights*].

152. Rubin, *supra* note 145, at 1644; *see also id.* at 1695 (discussing examples of comprehensive legislation that establish positive rights including the Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended in scattered sections of 42 U.S.C.); The Supplemental Nutrition Assistance Program (previously commonly known as the Food Stamp Program) Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, § 4002, 122 Stat. 923, 1092 (codified in scattered sections of 7 U.S.C.), and various housing programs).

153. *See generally Russell W. Galloway, Basic Substantive Due Process Analysis,* 26 U.S.F. L. REV. 625 (1992) [hereinafter Galloway, *Substantive Due Process*]; Russell W. Galloway, Jr., *Basic Constitutional Analysis*, 28 SANTA CLARA L. REV. 775, 790–792 (1988). When a fundamental right is substantially affected, absent a demonstrated compelling interest, the action is invalid. If no fundamental right is affected the government action is subjected to rational review.

154. Galloway, *Substantive Due Process supra* note 153, at 632.

155. Bauries observes that some scholars recognize state constitutional rights to education as positive rights that "compel affirmative action." Bauries, *supra* note 72, at 731–32. *See* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1135 (1999) (explaining that the question is not "How does this policy burden a constitutional right?" That question would be apt if the right to education were merely a negative right. The question for positive rights enforcement is rather "How does this policy further a constitutional right?" More precisely, the question is whether the statute "achieves, or is at least likely to achieve, the constitutionally prescribed end"); Joshua E. Weishart, *Equal Liberty in Proportion*, 59 WM. & MARY L. REV. 215, 272 (2017).

156. Mark Tushnet, *Abolishing Judicial Review*, 27 CONST. COMMENT. 581, 589 n.17 (2011).

decision *in DeShaney v. Winnebago County Dep't. of Soc. Servs.*,[157] and earlier decisions that shared the view that the Fourteenth Amendment provided for negative, but not positive rights. According to Judge Richard Posner:

> The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services. Of course, even in the laissez-faire era only anarchists thought the state should not provide the type of protective services at issue in this case. But no one thought federal constitutional guarantees or federal tort remedies necessary to prod the states to provide the services that everyone wanted provided. The concern was that some states might provide those services to all but blacks, and the equal protection clause prevents that kind of discrimination.
>
> The modern expansion of government has led to proposals for reinterpreting the Fourteenth Amendment to guarantee the provision of basic services such as education, poor relief, and, presumably, police protection, even if they are not being withheld discriminatorily. To adopt these proposals, however, would be more than an extension of traditional conceptions of the due process clause. It would turn the clause on its head. It would change it from a protection against coercion by state government to a command that the state use its taxing power to coerce some of its citizens to provide services to others. The Supreme Court has refused to go so far [citing *Rodriguez*].
>
> Whether the Court has refused because a guarantee of basic service cannot easily be squared with the text or intellectual ambience of the Fourteenth Amendment or because judges lack objective criteria for specifying minimum levels of public services or are reluctant to interfere with the public finance of the states need not trouble us. It is enough to note that, as currently understood, the concept of liberty in the Fourteenth Amendment does not include a right to basic services, whether competently provided or otherwise.[158]

This view may be difficult to overcome, however, there is evidence that this view is changing[159] and this change is necessary to achieve equal

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157. DeShaney v. Winnebago Cty. Dep't. of Soc. Sec., 489 U.S. 189 (1989) (establishing that there is no substantive due process entitlement to receive protective services from the state).

158. Jackson v. City of Joliet, 715 F.2d 1200, 1203–04 (7th Cir. 1983) (citations omitted).

159. *See infra* text accompanying notes 166–169; *see also* Bowman, *supra* note 95, at 46–47 (discussing the possibility of recognizing education as a positive fundamental right and subjecting it to strict scrutiny); *Reconstituting the Right to Education*, *supra* note 111, at 918–19 nn. 4–10 (discussing relevant cases); Tushnet, *supra* note 141, at 1392 (noting that in a broader context some have argued that "we should strengthen or create positive rights while preserving most of our negative rights"). Professor Bowman has also suggested a "related approach would

education opportunity.

A challenge to a government action may trigger the liberty interest of substantive due process as well as the equality interest of equal protection. With respect to establishing a liberty interest the Supreme Court stated in *Meyer v. Nebraska*:[160]

> Without doubt, [the word "liberty" in the fourteenth amendment Due Process Clause] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. [161]

In *Brown*, the Court concluded that because it had found an equal protection violation, it was not necessary to decide whether the Due Process Clause of the Fourteenth Amendment was also violated.[162] This led many to conclude that equal education opportunity was a fundamental right protected by the equal protection clause and therefore, it was not necessary to base challenges to education systems as a violation of due process. As Stuart Biegel describes it "several commentators soon began to argue that education would be a logical addition to the growing list of fourteenth amendment 'fundamental rights' . . . . State action impinging on a student's education would thus be subject to the strictest possible standard of review."[163]

When the Court held in its 5-4 majority in *Rodriguez* that the plaintiffs did not establish that education was not a fundamental right, and found no equal protection violation, it seemed to be breaking a promise made to children in *Brown* that they had a right to equal education opportunity. As Justice Marshall stated in his dissent, "the majority's holding can only be seen as a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens."[164]

A fundamental right is protected by both substantive due process and equal protection. A reconsideration by the courts of education as a fundamental right can involve a rethinking of education as a fundamental right based upon the equal protection clause alone, substantive due process alone, or

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be to work within the confines of the Equal Protection Clause and apply 'rational basis with bite' based on the unique importance of education." Bowman, *supra* note 95, at 49.

160. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

161. *Id.* at 399.

162. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

163. 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, 1079 (1989) (citing Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305, 372–98 (1969)).

164. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 70–71 (1973).

a combination of the two doctrines. Once a court determines that a fundamental right exists, it can choose to review the constitutionality of the law at issue on either due process or equal protection grounds. "Analysis under the equal protection clause of the Fourteenth Amendment is identical to that used under the due process clauses."[165] Professor Laurence Tribe has warned against resting a decision on equal protection grounds rather than substantive due process when both claims are available.[166] As Professor Weishart states it, "[t]ogether, liberty [based upon the due process clause] and equality [flowing from the equal protection clause] represent the values, norms, and interests that the right to education is meant to protect."[167] Perhaps the *Brown* promise can be revived by including a substantive due process argument in school finance litigation. Some scholars have suggested that fundamental rights challenges based on substantive due process are superior to challenges based upon the equal protection clause.[168] A substantive due process claim could prevail in school finance litigation cases "if the burden on the individual is sufficiently great compared to the minimal benefit that is achieved" even if a challenged statute or its application is determined not to constitute an equal protection violation as in *Rodriguez*.[169]

The right to an education takes form as a claim-right held by children and becomes a positive liberty right.[170] After making a convincing case that neither the due process clause nor the equal protection clause are sufficient on their own to support the required constitutional analysis, Professor Weishart concludes that "[c]oalesced within the right to education's immunity-claim-right structure, substantive due process and equal protection together could offset their respective limitations and ameliorate the right's enforcement standards to synchronize the protection of children's liberty and equality interests."[171]

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165. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §10.7, at 457 (8th ed. 2010).

166. *See* Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1907–16 (2004) (discussing the inadequacy of Equal Protection as evidenced by Justice O'Connor's opinion in *Lawrence*); *see also* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 970 (1987) (noting that fundamental interests cases are "at the intersection of equal protection and substantive due process"). *But see*, Darren Lenard Hutchinson, *Preventing Balkanization or Facilitating Racial Domination: A Critique of the New Equal Protection*, 22 VA. J. SOC. POL'Y & L. 1 (2015) (discussing the dignity-based due process liberty claims rather than equal protection anti-subordination based claims).

167. *Reconstituting the Right to Education*, *supra* note 111, at 961.

168. *See, e.g.*, Aaron J. Shuler, *From Immutable to Existential: Protecting Who We Are and Who We Want to Be with the "Equalerty" of the Substantive Due Process Clause*, 12 J. L. & SOC. CHALLENGES 220, 221, 227 (2010) (discussing the reliance on a "revitalized substantive due process clause" instead of a "weakened equal protection clause.")

169. R. Randall Kelso, *Considerations of Legislative Fit Under Equal Protection, Substantive Due Process, and Free Speech Doctrine: Separating Questions of Advancement, Relationship and Burden*, 28 U. RICH. L. REV. 1279, 1293 n. 52 (1994).

170. *Reconstituting the Right to Education*, *supra* note 111, at 962.

171. *Id.* at 975.

"[D]ue process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix."[172] The due process and equal protection rights should converge and, as one commentator has phrased it, "equal protection ultimately should inform the type of due process analysis that is used."[173] In support of this conclusion, it is noted that "Justice Kennedy explains how, in due process cases that implicate equal protection principles, each clause 'may be instructive as to the meaning and reach of the other'[174] . . . . This intersection between due process and equal protection 'furthers our understanding of what freedom is and must become.'"[175] Recent Supreme Court decisions have confirmed the availability of substantive due process claims and emphasized the relationship to equal protection.[176] These cases lay the foundation for successful fundamental rights cases related to equality rights and liberty interests. In *Lawrence v. Texas*, Justice Kennedy's majority opinion concluded that equal protection and due process are "linked in important respects, and a decision on [due process] advances both interests."[177]

2. Education is a Fundamental Right

In *Rodriguez*, the Court stated: "[T]he key to discovering whether education is 'fundamental' . . . lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution."[178]

It went on to conclude that education "is not among the rights afforded explicit protection under [the] Constitution [and we do not] find any basis for saying it is implicitly so protected."[179]

Reaching the conclusion that education is a fundamental right subject to strict scrutiny is essential in order to base a school finance challenge on the Fourteenth Amendment. A number of scholars have advocated for such a result.[180] If it is established that an equal education opportunity is a fundamental right, then as Justice Brennan stated in his dissent in *Rodriguez*, "any classification affecting education must be subjected to strict judicial

172. Tribe, *supra* note 167, at 1898.

173. Katherine Watson, *When Substantive Due Process Meets Equal Protection: Reconciling* Obergefell *and* Glucksberg, 21 LEWIS & CLARK L. REV. 245, 275 (2017).

174. *Id.* (quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2603 (2015).

175. *Id.* at 253.

176. *See Obergefell*, 135 S. Ct. at 2584; Lawrence v. Texas, 539 U.S. 558, 564 (2003); Troxel v. Granville, 530 U.S. 57, 65 (2000); Romer v. Evans, 517 U.S. 620 (1996).

177. *Lawrence*, 539 U.S. at 575.

178. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33–34 (1973).

179. *Id.* at 35.

180. *See generally Reconstituting the Right to Education*, *supra* note 111, at 922 (citations omitted) (noting that some scholars have suggested petitioning the Court to overrule Rodriguez and recognize a fundamental right to "equal educational opportunity," while others suggest that the Court should consider alternative bases for the right such as the First Amendment's Free Speech Clause, the implied right to vote, and the Fourteenth Amendment's Due Process and Privileges and Immunities Clauses; the Citizenship Clause; or the Ninth Amendment).

scrutiny."[181] Based on the case made above regarding the inequities in education,[182] it is time to embrace and acknowledge the importance of education in our society and the role of the federal constitution. As Laurence Tribe has noted, "[e]ven Brown v. Board of Education, 347 U.S. 483 (1954), justified its departure from Plessy v. Ferguson, 163 U.S. 537 (1896), which it did not explicitly overrule, by pointing to the changed role of public education in the nation's life since 1896."[183] Since there is no explicit provision regarding education in the Constitution, the Court must accept that the right to education is inherent in the Constitution. To reach this conclusion, the Court has said that it must determine under the Due Process Clause that the claimed right must be "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[184] Perhaps the response to this is provided by Professor Weishart's statement that "if there is a federal constitutional right to education, its principal function is to protect children and, thereby, society at large."[185] As the Court stated in *Meyer v. Nebraska*, the "American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance."[186] In any event, the Supreme Court seems to have rejected this traditional test. As Tribe describes it, the Court's *Obergefell v. Hodges*[187] decision "has definitively replaced *Washington v. Glucksberg's* wooden three-prong test focused on tradition, specificity, and negativity with the more holistic inquiry of Justice Harlan's justly famous 1961 dissent in *Poe v. Ullman*, a mode of inquiry that was embodied in key opinions from the mid-1960s to the early 1970s."[188] In addition, the *Obergefell* jurisprudence[189] that "even unintended effects can render a traditional practice or definition

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181. *Rodriguez*, 411 U.S. at 63.

182. *See* text accompanying notes 1–17 *supra*.

183. Tribe, *supra* note 167, at 1914 n.74.

184. Michael H. v. Gerald D., 491 U.S. 110, 122–23 (1989) (citing Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)). This view is consistent with the argument made by some that the appropriate test for finding a fundamental right was articulated by the Supreme Court in Washington v. Glucksberg, 521 U.S. 702 (1997) where the Court rejected a substantive due process challenge to a right to die statute and stated that the Court is reluctant to expand scope of heightened scrutiny under substantive due process analysis.

185. *Reconstituting the Right to Education*, *supra* note 111, at 956.

186. Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

187. *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (holding that the right to marry is a fundamental right inherent in the liberty of the person under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and couples of the same-sex may not be deprived of that right and that liberty).

188. Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 16 (2015), (internal citations omitted) (noting that Professor Kenji Yoshino's "splendid Comment", Kenji Yoshino, *The Supreme Court, 2014 Term -- Comment: A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147 (2015), demonstrates this at pp. 149–50.) [hereinafter *Equal Dignity*]; *see also supra* text accompanying notes 146–151 discussing Rubin's arguments for the establishment of positive rights; Brooke Wilkins, *Should Public Education be a Federal Fundamental Right?*, 2005 B.Y.U. EDUC. L. J. 261, 266 (2005).

189. *Id.* (noting that Justice Kennedy's decisions in *Lawrence v. Texas*, 539 U.S. 558 (2003) and *United States v. Windsor*, 133 S. Ct. 2675 (2013) had begun the erosion of the *Glucksberg* tests).

inconsistent with the Fourteenth Amendment . . . may well have laid the foundation for reexamining a longstanding but always controversial doctrinal obstacle, requiring proof of intentional discrimination as an element of an asserted Fourteenth Amendment violation."[190]

The Supreme Court has been confronted with numerous opportunities to revisit the question as to whether there is a fundamental right to education, but has not made a definitive conclusion. As Professor Bowman has noted, however, "the Court's jurisprudence has left a door cracked open in Substantive Due Process."[191]

In *Plyler v. Doe*,[192] the Court for the first time extended the scope of the equal protection clause of the Fourteenth Amendment to school children who were not "legally admitted" into the United States. Even though the Court noted that education is not a right specifically granted by the Constitution, nor a right which in the past has been found by the Supreme Court to be a fundamental constitutional right, it held that Texas violated the equal protection clause by denying free public education to the children of "illegal aliens."[193] In his concurring opinion, Justice Marshall indicated his displeasure with the Court's failure to find a fundamental right to education:

> While I join the Court's opinion, I do so without in any way retreating from my opinion in . . . Rodriguez. I continue to believe that an individual's interest in education is fundamental, and that this view is amply supported "by the unique status accorded public education by our society, and by the close relationship between education and some of our most basic constitutional values."[194]

In addition to *Plyler*, *in Papasan v. Attain*[195] and *Kadrmas v.*

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190. *Id.; see, e.g.*, I.L. v. Alabama, 739 F. 3d 1273 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 53 (finding plaintiffs unable to prove intentional discrimination in Alabama's school finance system that had a negative impact on black children); *see also* Brian Lawson, *U.S. Supreme Court Won't Take Up Lawsuit Claiming Alabama Tax Law Discriminates Against Poor Schoolchildren*, AL.com (Oct. 6, 2014), http://www.al.com/news/huntsville/index.ssf/2014/10/us_supreme_court_wont_hear_law.html [https://perma.cc/UJ3E-M94S].

191. Bowman, *supra* note 95, at 46–47 (citing Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 457–58, (1988), Papasan v. Allain, 478 U.S. 265, 283 (1986), Plyler v. Doe, 457 U.S. 202, 221–23 (1982), and San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 36–37 (1973)); *see also Reconstituting the Right to Education*, *supra* note 111, at 956 (noting that Rodriguez's successors—Plyler, Papasan, and Kadrmas—failed to settle the matter); James E. Ryan, The Supreme Court and Public Schools, 86 VA. L. REV. 1335, 1392–94 (2000); *Disrupting Education Federalism*, *supra* note 11, at 1003; Susan H. Bitensky, T*heoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Educational Crisis*, 86 NW. L. REV. 550, 551–54 (1992).

192. Plyler v. Doe, 457 U.S. 202, 229 (1982), *reh'ing denied*, 458 U.S. 1131 (1982).

193. *Id.* at 220–29.

194. *Id.* at 230 (citations omitted).

195. Papasan v. Attain, 478 U.S. 265, 288 (1986) (holding that a state's intentional unequal distribution of school land funds violated equal protection to the extent that such differential treatment was not rationally related to any legitimate state interest).

Dickinson,[196] the Court also considered whether a fundamental interest existed in the right to education. In *Petrella vs. Brownback*,[197] a case in which the Supreme Court denied cert.,[198] the Tenth Circuit rejected the plaintiff children and parents' claim against state officials that the Kansas State school financing system violated their constitutional rights by infringing upon their fundamental liberty and property interests.[199] The Court noted that the plaintiffs relied heavily on *Papasan v. Allain,*[200] which built upon the recognition in *Rodriguez* that heightened scrutiny might be appropriate for a school finance scheme that funded some schools so poorly that it constituted a "radical denial of educational opportunity."[201] The *Papasan* court concluded that no such claim was presented.[202] The Tenth Circuit concluded the *Petrella* plaintiffs also had not demonstrated that such a claim existed and therefore, they had not demonstrated that they are likely to succeed on the merits of a rational basis argument.[203]

Moving the courts to accept a right to education as a fundamental right requiring a strict scrutiny analysis necessitates additional arguments to demonstrate that fundamental interest. This may be based upon an acceptance of the due process and equal protection analysis as a doctrine of equal dignity as described by Laurence Tribe based on the jurisprudence of *Obergefell* and related cases.[204] The failure to provide equal education opportunity is a denial of human dignity to the affected children. As Professor Weishart has stated, "whereas failing to demand equitable educational opportunities only serves to perpetuate political, economic, and social inequalities that erode human dignity."[205] The international law concept of human dignity has been relied

196. Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 465 (1988) (rejecting the family's contention that the imposition of a fee for the school district's optional door-to-door bus service violated the Equal Protection Clause).

197. Petrella v. Brownback, 787 F.3d 1242, 1263–64 (10th Cir. 2015).

198. Petrella v. Brownback, 136 S.Ct. 588 (2015).

199. *Id.*

200. *Papasan*, 478 U.S. at 265.

201. *Id.* at 284; *see also* Petrella v. Brownback, 980 F. Supp. 2d 1293, 1303 (D. Kan. 2014) ("Plaintiff[s] cite *Papasan* . . . in which the Supreme Court noted that *Rodriguez* had not completely foreclosed the possibility of applying strict scrutiny, based on an argument that some minimal amount of education is necessary to the meaningful exercise of the right to exercise free speech or to vote").

202. *See id.* at 286 (detailing the courts findings on what claims the petitioner presented for review).

203. *See* Petrella v. Brownback, 787 F.3d 1242, 1267 (10th Cir. 2015) ("Plaintiffs have failed to show that capping the amount of revenue a district may raise is an illegitimate means of achieving the goal of equity.").

204. *See Equal Dignity*, *supra* note 185, at 17 ("Equal dignity, a concept with a robust doctrinal pedigree, does not simply look back to purposeful past subordination, but rather lays the groundwork for an ongoing constitutional dialogue about fundamental rights and the meaning of equality. Obergefell is an important landmark, but it will not be—and should not be—the last word.").

205. *Reconstituting the Right to Education*, *supra* note 111, at 967.

upon to establish fundamental rights[206] and is available through this doctrine of equal dignity to help establish education as a fundamental right.[207]

IV. INTERNATIONAL HUMAN RIGHTS AND SCHOOL FINANCE

Using international law obligations to define education as a fundamental right first requires a determination that U.S. courts are willing to entertain international law and second, a conclusion that education is a fundamental right under international law. In this section I first discuss the use by the Supreme Court of references to the concept of human dignity and international law documents and concepts to help define a constitutional right.[208] Then, I specifically discuss how in the context of school finance challenges education can be recognized as a fundamental right by considering it as a human right as recognized by foreign and international entities.[209] In addition to providing a method to rethink the right to education as a fundamental right, *Obergefell* and related cases provide us with the basis for using international law in that journey.[210]

International Law legal principles dictate that the U.S. can and should consider international law in resolving domestic disputes either when the U.S. has ratified a relevant treaty or convention[211] or there are International "norms" and "customary international law" that apply.[212] The Restatement (Third) of Foreign Relations Law provides:

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206. *See Equal Dignity*, *supra* note 185, at 20 (noting the use of the word "dignity" in human rights instruments and constitutions).

207. *Id.* (noting that the concept of dignity is central to contemporary human rights discourse) (citing MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING (2012)).

208. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (relying upon the concept of human dignity to define constitutional rights).

209. Although international and foreign are sometimes used interchangeably, here I am using international to refer to customary law and conventional law that may or may not be binding on the U.S. and foreign to refer to domestic laws and regional agreements of countries other than the U.S. It should be noted that some scholars have urged states to use international law to construe their state constitutions. *See e.g.*, Martha Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359,359, 368–375 (2006) (suggesting that state courts should consider international sources when interpreting their constitutions).

210. See discussion *infra* Part IV. A.

211. A treaty or convention is an international agreement. *See* Berkeley Law Library, *Treaties and International Agreements*, https://www.law.berkeley.edu/library/dynamic/guide.php?id=65 ("Treaties can be referred to by a number of different names: international conventions, international agreements, covenants, final acts, charters, protocols, pacts, accords, and constitutions for international organizations"). Treaties create binding law for signatories only. *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 26, 1155 U.N.T.S. 331, 339; Restatement (Third) of the Foreign Relations Law of the United States, § 102(3) cmt. f (AM. LAW. INST. 1987). Treaty law may evolve into customary international law if the requirements for customary international law are satisfied. *Id.* at cmt. i.

212. *See* Restatement (Third) of the Foreign Relations Law of the United States, § 102(2) cmt. b–c (AM. LAW. INST. 1987).

> A state is obligated to respect the human rights of persons subject to its jurisdiction (a) that it has undertaken to respect by international agreement;
> (b) that states generally are bound to respect as a matter of customary international law (§ 702); and
> (c) that it is required to respect under general principles of law common to the major legal systems of the world.[213]

While a thorough discussion of these concepts is beyond the scope of this article, a brief explanation of some concepts is helpful. A treaty is a traditional source of international law that creates specific legal duties and obligations. A customary international law norm arises when the elements of customary international law, nation/state practice and *opinio juris* combine to establish an authoritative legal principle or rule prescribing, permitting, or prohibiting certain conduct.[214] *Opinio juris* exists when a norm has been generally accepted by nations as legally binding.[215] Although many scholars have argued, and courts have recognized, that particular norms protecting human rights are now a part of customary international law, there is continuing debate about which rights so qualify and whether all human rights have attained the status of customary law.[216] In addition to listing specific human rights, the Restatement includes a general provision:

> A state violates international law if, as a matter of state policy, it practices, encourages, or condones * * * (g) a consistent pattern of gross violations of internationally recognized human rights.[217]

A. International Law in the U.S. Supreme Court

When the Supreme Court extended the fundamental right to marry to same-sex couples in *Obergefell*, it did not explicitly rely on international law principles.[218] Justice Kennedy's articulation of the reasoning for extending fundamental right inherent in the liberty of the person under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, however, referred

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213. Restatement (Third) of Foreign Relations Law § 701 (AM. LAW. INST. 1987).

214. *Id.*; *see also* BRIAN D. LEPARD, CUSTOMARY LNTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS 8 (2010) (arguing that customary international law can be established in some circumstances even if the existence of consistent state practice is absent).

215. *See* Restatement (Third) of the Foreign Relations Law of the United States, § 102(2) cmt. c (AM. LAW. INST. 1987).

216. *See id.* at § 702 cmt. a; *see, e.g.*, Tom Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability*, 51 HARV. INT'L L.J. 113, 135–36 (2010); Anthony D'Amato, *Human Rights as Part of Customary International Law: A Plea for Change of Paradigms*, 25 GA. J. INT'L COMP. L. 47 (1995–96); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 12–13 (1982).

217. Restatement (Third) of Foreign Relations Law § 702 (AM. LAW. INST. 1987).

218. *See generally* Johanna Kalb, *Human Rights Proxy Wars*, 13 STAN. J. CIV. RTS. & CIV. LIBERTIES 53, 86 (2017) ("Despite international and comparative briefing on both sides of . . . *Obergefell*, no member of the Court mentioned these arguments.").

to the concept of dignity on several occasions.[219] In this regard, Laurence Tribe has stated, "[t]he language of dignity is not accidental. . . . As numerous scholars have recognized in recent years, the concept of dignity is central to contemporary human rights discourse. . . . 'Dignity' has become 'a crucial watchword, going global in various constitutions and international treaties, and offering judicial guidance.'"[220] Primarily because of three cases decided by the Supreme Court in the early twenty-first century, many assumed that this meant the majority of the Justices were willing to cite international and foreign law when resolving Constitutional questions. These cases, *Lawrence v. Texas*,[221] *Roper v. Simmons*,[222] and *Graham v. Florida*[223] all involved human rights and references were made to foreign[224] and international law.[225] In *Lawrence*, for example, Justice Kennedy noted the views of the European Court of Justice and other nations with respect to the protected rights of homosexual adults.[226] He stated in *Roper* that "Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18."[227] He used this as persuasive authority even though the U.S. has not ratified Convention on the Rights of the Child.[228] Although Justice O'Connor dissented from the majority opinion, she did not find fault with Justice Kennedy's references to foreign and international law:

> Nevertheless, I disagree with Justice Scalia's contention . . . that foreign and international law have no place in our Eighth Amendment jurisprudence. Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency. This inquiry reflects the special character of the Eighth Amendment,

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219. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015) (noting petitioners "ask for equal dignity in the eyes of the law").

220. Tribe, *supra* note 188, at 20 (citing MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING (2012) and quoting Samuel Moyn, *The Secret History of Constitutional Dignity*, 17 YALE HUM. RTS. & DEV. L.J. 39, 40 (2014)); *see also* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011) (discussing the dignity doctrine).

221. Lawrence v. Texas, 539 U.S. 558 (2003) (holding unconstitutional a Texas law criminalizing consensual sodomy between adults of the same sex).

222. Roper v. Simmons, 543 U.S. 551 (2005) (holding Eighth and Fourteenth Amendments forbid the imposition of the death penalty on offenders who were under eighteen when they committed their crimes as the Eighth Amendment bars capital punishment for children).

223. Graham v. Florida, 560 U.S. 48 (2010) (holding that the Eighth Amendment Cruel and Unusual Punishments Clause prohibits the imposition of a sentence of life in prison without parole on a defendant who was under eighteen at the time of the non-homicide crime as the Eighth Amendment prohibits a sentence of life without the possibility of parole for a juvenile convicted of a non-homicide offense).

224. *Lawrence*, 539 U.S. at 573, 576–77.

225. *Roper*, 543 U.S. at 576.

226. *Lawrence*, 539 U.S. at 573, 576–77.

227. *Roper*, 543 U.S. at 576.

228. See discussion *infra* accompanying note 275.

> which, as the Court has long held, draws its meaning directly from the maturing values of civilized society.[229]

Some argue that this approach of considering international and foreign standards is and should be irrelevant to any interpretation of the Constitution.[230] In a multi-essay book on the relationship between international law and the U.S. constitutional order[231], several scholars explore this issue. The authors point out that international law has been used to help the Supreme Court resolve cases since the late 18th century.[232] For example, in *Murray v. Schooner Charming Betsy*,[233] the Court established the presumption: "[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[234] This is commonly referred to as the *Charming Betsy* canon.[235]

With respect to human rights, Professor Alford notes that "the first notable use of foreign material in individual rights cases"[236] was in *Mueller v. Oregon*.[237] Although it is acknowledged that "t]he role of international law as

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229. *Roper*, 543 U.S. at 604–05.

230. *See generally* Mark Tushnet, *International Law and Constitutional Interpretation in the Twenty-First Century: Change and Continuity*, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 507–17 (David L. Sloss et al. eds., 2011). *See also* Ryan H. Boyer, *"Unveiling" Kansas's Ban on Application of Foreign Law*, 61 U. KAN. L. REV. 1061 (2013) (discussing Oklahoma's Save Our State Amendment and similar laws attempting to ban courts from relying on international law). For earlier articles advocating for more reliance on human rights norms, see, for example, Gordon A. Christenson, *The Uses of Human Rights Norms to Inform Constitutional Interpretation*, 4 HOUS. J. INT'L L. 39 (1981); Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367 (1985); Richard B. Lillich, *The United States Constitution and International Human Rights Law*, 3 HARV. HUM. RTS. J. 53, 79–81 (1990).

231. INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE (David L. Sloss et al. eds., 2011).

232. David L. Sloss, Michael D. Ramsey, and William S. Dodge, *Introduction*, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 1 (David L. Sloss et al. eds., 2011); *see also* Stephen C. McCaffrey, *There's A Whole World Out There: Justice Kennedy's Use of International Sources*, 44 MCGEORGE L. REV. 201 (2013) (beginning with its earliest opinions in the 1790s, the Court has often referred to international law and non-American materials.).

233. Murray v. Schooner Charming Betsy, 6 U.S. 64 (1804).

234. *Id.* at 118.

235. *See* David L. Sloss, Michael D. Ramsey & William S. Dodge, *Introduction*, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 49 (David L. Sloss et al. eds., 2011) ("[T]he Court consistently deployed both treaties and customary international law as an interpretive tool to construe statutes.").

236. Roger P. Alford, *International Law as an Interpretive Tool in the Supreme Court, 1901–1945*, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 272 (David L. Sloss et al. eds., 2011) (referring to the "Brandeis Brief" containing evidence of domestic and foreign practices); *see also* Mark Tushnet, *International Law and Constitutional Interpretation in the Twenty-First Century: Change and Continuity*, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 512 (David L. Sloss et al. eds., 2011) (noting that the Brandeis Brief became "a model for modern advocacy.")

237. Muller v. Oregon, 208 U.S. 412 (1908).

an interpretive tool enjoyed prominence after 2000,"[238] fears of international or foreign law controlling the U.S. are exaggerated. The Court has been careful to point out that "laws and practices of other nations and international agreements [are] relevant [but not] binding or controlling"[239] and "[i]t does not lessen fidelity to the Constitution or pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples."[240] The Court's consideration of international and foreign law now and for centuries has extended to customary international law. For example, in *Sosa v. Alvarez-Machain*, the Court noted that "For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations."[241] Professor Tushnet points out that as demonstrated by essays in International Law, "the U.S. Supreme Court has routinely referred to international law in cases interpreting the Constitution throughout the nation's history."[242] He suggests that some of the controversy is based upon a change in the types of cases considering international and foreign law. These new cases are not "about relations among states, [but] law applicable to relations between states and their citizens."[243] This competition with domestic law comes at a time of expanding human rights.[244] Justice Kennedy also referenced international agreements which the U.S. has not signed or ratified.[245]

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238. *International Law in Constitutional Interpretation after 2000, Introductory Note, in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 445 (David L. Sloss et al. eds., 2011).

239. Graham v. Florida, 560 U.S. 48, 82 (2010).

240. Roper v. Simmons, 543 U.S. 551, 578 (2005).

241. Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004).

242. Mark Tushnet, *Main Essay International Law and Constitutional Interpretation in the Twenty-First Century: Change and Continuity, in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 507 (David L. Sloss et al. eds., 2011).

243. *Id.* at 516.

244. *Id.*; *see also* Roger P. Alford, *Why Constitutional Comparativism is Different: A Response to Professor Tushnet, in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 518, 522 (David L. Sloss et al. eds., 2011) (arguing the Court's reliance on foreign and international practices by nations that do not share our common British heritage may present situations where these sources "will easily be misused and manipulated").

245. *See supra* text accompanying notes 229–230 (discussing Convention on the Rights of the Child). Ratification defines the international act whereby a state indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act. For example, in the U.S. human rights treaties require action taken by the legislature to make binding a treaty negotiated and signed by the executive. *See generally* Ratification, Black's Law Dictionary (10th ed. 2014); Melissa A. Waters, *Response Essay Judicial Dialogue in Roper: Signaling the Court's Emergence as a Transnational Legal Actor?, in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT 523, 527–528 (David L. Sloss et al. eds., 2011) (discussing the necessity of implementing legislation).

B. International Human Rights Law Recognizes a Fundamental Right to Education

Although some scholars[246] and advocates[247] have previously asserted that international instruments should be relied upon to establish a fundamental right to education, these efforts have been largely unsuccessful. It has been acknowledged that in the United States, "there is little knowledge of the human right to education, human rights in education or enhancing human rights through education."[248] The climate seems right to have the courts revisit the use of international law in the establishment of education as a fundamental right. Here I provide a guide to the many instruments and arguments that might now have a chance at success given the recognition by the Supreme Court of the value that may be derived from consulting international and foreign materials when determining human rights. First, I discuss the basic human rights documents. Then, I provide a discussion of some of the international instruments that contain provisions regarding the right to education.

Human rights were first recognized internationally by the Universal Declaration on Human Rights in 1948, in the aftermath of the Second World War:

> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.[249]

Along with the UDHR, the other two human rights instruments which are commonly referred to as the International Bill of Human Rights are the International Covenant on Civil and Political Rights ("ICCPR"),[250] and the International Covenant on Economic, Social and Cultural Rights ("ICESCR").[251] These and other human rights instruments along with customary international law norms have been described as providing a "shared

246. *See, e.g.*, James A. Gross, *A Human Rights Perspective on U.S. Education: Only Some Children Matter*, 50 CATH. U.L. REV. 919 (2001); Connie de la Vega, *The Right to Equal Education: Merely a Guiding Principle or Customary International Legal Right?*, 11 HARV. BLACKLETTER L.J. 37 (1994); Susan Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550 (1992).

247. *See* Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367 (1985) (discussing attempt by *Plyler* plaintiffs to rely upon the right to education found in article 47(a) of the Protocol of Buenos Aires and the consequence of self-executing and non-self-executing treaties).

248. Katarina Tomasevski (Special Rapporteur on the Right to Education), *Mission to the United States of America (24 Sept.-10 Oct. 2001)*, U.N. Doc. E/CN.4/2002/60/Add.1 para.80 (Jan. 17, 2002), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G02/101/52/PDF/G0210152.pdf?OpenElement.

249. Universal Declaration of Human Rights, CA Res. 217A (III) (1948) ("UDHR").

250. International Covenant on Civil and Political Rights, 999 UNTS 171 (1966) ("ICCPR").

251. International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (1966).

moral consciousness"[252] that results in a legal obligation with respect to certain human rights. Human rights experts have noted that although the UDHR is "not a legally enforceable document, [but] articulates a specific and comprehensive set of rights-social, economic, cultural, civil and political rights - which all U.N. members pledge to uphold."[253] Some commentators have suggested that customary human rights law has been established based on either the UDHR in its entirety[254] or by select provisions.[255]

C. The Right to Education

In considering the role of international human rights law in the desire to find a right to education in the Constitution, it has been noted that "human rights law [can] be considered as a source of constitutional values,"[256] "[i]n human rights discourse, the right to education is a Johnny-come-lately,"[257] "placing education within a human rights framework ensures that there is no

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252. Joan F. Hartman, *'Unusual' Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 U. CIN. L. REV. 655, 676 (1983).

253. Risa E. Kaufman & JoAnn Kamuf Ward, *Using Human Rights Mechanisms of the United Nations to Advance Economic Justice*, 45 CLEARINGHOUSE REV. 259 (2011); *see, e.g.*, U.N. Charter arts. 55–56 (stating that all members of the U.N. pledge to promote universal respect for and observance of human rights for all); BASIC DOCUMENTS ON HUMAN RIGHTS 23 (Ian Brownlie & Guy S. Goodwin-Gill eds., 5th ed. 2006) (stating that UDHR is not a legally binding instrument but is an authoritative guide to the interpretation of the human rights to which the U.N. Charter commits all its members).

254. *See, e.g.*, Beharry v. Reno, 183 F. Supp. 2d 584, 596 (E.D.N.Y. 2002); Karen Parker, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 442 (1989) (UDHR Declaration "as a whole is itself customary international law") (citing M.G. Kaladharan Nayar, *Introduction to Human Rights: The United Nations and United States Foreign Policy*, 19 HARV. INT'L L. J. 813, 816–17 (1978)); Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 393–96 (1985); Kate Parlett, *The Individual in the International Legal System* (2011), 23 EUROPEAN J. OF INT'L LAW, 294; *see generally* Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287 (1995-96); W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 869 (1990) (asserting that the UDHR has acquired customary international law status).

255. *See, e.g.*, Alan A. Stevens, *Give Me Your Tired, Your Poor, Your Destitute Laborers Ready to Be Exploited: The Failure of International Human Rights Law to Protect the Rights of Illegal Aliens in American Jurisprudence*, 14 EMORY INT'L L. REV. 405, 419–20 (2000) (citing Bernard Graefrath, *Universal Declaration of Human Rights-1988*, *in* THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ITS SIGNIFICANCE IN 1988 45, 46 (Netherlands Institute of Human Rights ed., 1989) ("the [UDHR] has contributed to the developing emergence of some basic human rights as part of customary international law"); THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 32 (1988). *See also* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (holding deliberate torture perpetrated under color of official authority violates universally accepted norms of human rights); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 702 (1986) (enumerating seven types of conduct considered to be violations of the customary international law of human rights).

256. Susan Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 553 (1992).

257. Joshua E. Weishart, *supra* note 111, at 923.

discrimination,"[258] and "more than eight in ten Americans 'strongly agree' that 'equal access to quality public education' [is a human right]."[259] The U.S. has taken the position that based upon its international obligations it has the duty to "promote equal socio-economic as well as education opportunities for all both in law and in fact, regardless of their ethnicity, race, religion, national origin, gender or disability . . . ."[260]

Provisions in the three human rights instruments commonly referred to as the "International Bill of Human Rights", UDHR, ICCPR, and ICESCR, provide a starting point for establishing the fundamental right to education. UDHR is a declaration so has not been subjected to declaration. The UDHR was approved in the UN by a vote of 48-0 and the United States vigorously supported its adoption.[261] The ICCPR has been signed and ratified by the U.S. The ICESCR has not been ratified by the U.S.[262]

1. UDHR

The Right to Education is protected by Article 26 of the UDHR which proclaims in part that:

> Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education

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258. Leah K. McMillan, *What's in a Right? Two Variations for Interpreting the Right to Education*, 56 INT'L REV. EDUC. 531 (2010).

259. *See* COLUMBIA LAW SCH. HUMAN RIGHTS INST. & INT'L ASSOC. OF OFFICIAL HUMAN RIGHTS AGENCIES, STATE AND LOCAL HUMAN RIGHTS AGENCIES: RECOMMENDATIONS FOR ADVANCING EQUALITY THROUGH AN INTERNATIONAL HUMAN RIGHTS FRAMEWORK 1 (2010), https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/45408_HRI-Text%20%5Bonline%5D%20-%202nd%20printing%20%28updated%2010.1.09%29.pdf [https://perma.cc/9ALW-PN69].

260. U.N. HUMAN RIGHTS COUNCIL, REPORT OF THE WORKING GROUP ON THE UNIVERSAL PERIODIC REVIEW: UNITED STATES OF AMERICA, ADDENDUM: VIEWS ON CONCLUSIONS AND/OR RECOMMENDATIONS, VOLUNTARY COMMITMENTS AND REPLIES PRESENTED BY THE STATE UNDER REVIEW, para. 19 (2011) (referring to U.N. HUMAN RIGHTS COUNCIL, REPORT OF THE WORKING GROUP ON THE UNIVERSAL PERIODIC REVIEW: UNITED STATES OF AMERICA, para. 92 (2011)). *See generally* Gillian MacNaughton & Mariah McGill, *Economic and Social Rights in the United States: Implementation Without Ratification*, 4 NE. U. L.J. 365, 377–80 (2012).

261. *See generally* Daniel J. Whelan & Jack Donnelly, *The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight*, 29 HUM. RTS. Q. 908, 911 (2007); JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING AND INTENT 237 (1999) (explaining the position of Eleanor Roosevelt, the delegate for the United States, that all the articles in the UDHR were equally important and priority should not be given to one article over another); U.N. Secretariat, *Draft Outline of International Bill of Rights*, U.N. Doc. E/CN.4/AC.1/3 (June 4, 1947) (reprinted in MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 271–74 (2001); U.N. Comm'n on Human Rights, Drafting Comm., International Bill of Rights: Documented Outline, U.N. Doc. E/CN.4/AC.1/3/Add.1 (June 11, 1947).

262. *See generally* Hope Lewis, *"New" Human Rights? U.S. Ambivalence Toward the International Economic and Social Rights Framework, in* BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES 100, 121 (Cynthia Soohoo et al. eds., 2009).

> shall be compulsory. * * *
> 2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms.
> * * *
> 3. Parents have a prior right to choose the kind of education that shall be given to their children

If accepted that the rights contained in the UDHR, including education, are customary international law[263] then they are binding on the United States. Even if they are not, related aspects of foreign law should be persuasive. For example, a number of the positive rights, sometimes called second-generation rights,[264] have been codified in the constitutions of a number of nations.[265] The UDHR has formed the basis for the major international human rights treaties so specifics can be found in other instruments.

2. ICESCR

Articles 13 and 14 of the International Covenant on Economic Social and Cultural Rights provide a specific right to education which provides for ratifying nations and may be persuasive to nations like the United States who have not ratified the treaty.[266]

> Article 13 1:
> 1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
>
> 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;
> * * *

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263. *See supra* text accompanying notes 254–57.

264. *See, e.g.*, Rubin, *supra* note 146, at 1685; JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 30–31 (2d ed. 2003); WILLIAM F. FELICE, TAKING SUFFERING SERIOUSLY: THE IMPORTANCE OF COLLECTIVE HUMAN RIGHTS 144 (1996); JAMES GRIFFIN, ON HUMAN RIGHTS 12, 96 (2008); PAUL GORDON LAUREN, THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN 20–21 (2d ed. 2003); JAMES W. NICKEL, MAKING SENSE OF HUMAN RIGHTS 111 (2d ed. 2007); HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY 35–53 (2d ed. 1996).

265. *See generally* Rubin, *supra* note 146, at 1685–86.

266. *See generally* Ann Laquer Estin, *Voting Rights and Human Rights: Comments on "Civil Rights and the Administration of Elections"*, 8 J. GENDER RACE & JUST. 177, 180–81 (2004) (suggesting the failure to ratify also "reflects the relatively narrow conception of rights in the American political and legal tradition").

> Article 14:
> Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

General Comment No. 13: The Right to Education, para. 26 clarifies that "In order to provide equal access to education, States are obligated to equally distribute educational resources." The CESCR has noted that "[s]harp disparities in spending policies that result in differing qualities of education" may constitute discrimination.[267] Although this Covenant has the widespread international support, President Carter signed the Covenant in 1977, but the United States has yet to ratify it.[268]

3. ICCPR

The International Covenant on Civil and Political Rights was signed by the United States in 1977, but not ratified until 1992.[269] The ICCPR contains no explicit provision on the right to education, but the right to education is arguably recognized as a civil and political right if linked to the right to non-discrimination in Article 26. Article 26 of the ICCPR has been interpreted to cover discrimination beyond civil and political rights:

> [A]rticle 26 provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds.
>
> In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 [general guarantee against non-discrimination in the exercise of Covenant rights] but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the

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267. CESCR, General Comment No. 13: The Right to Education, para. 35., UN Doc. E/C.12/1999/10 (December 8, 1999), http://www.refworld.org/pdfid/4538838c22.pdf.

268. *See generally* Office of the U.N. High Comm'r for Human Rights, *Ratification Status for United States of America*, UN TREATY BODY DATABASE, http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=187&Lang=EN (last visited April 20, 2018).

269. The U.S. took several reservations to the ICCPR, including a provision that Articles 1 through 27 are not self-executing, i.e. they require implementing legislation before they are effective. U.N. General Assembly, *International Covenant on Civil and Political Rights*, Dec. 16, 1966, 999 U.N.T.S. 171, https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf.

application thereof.[270]

The ICCPR also protects procedural rights that may assist litigants who have been denied fair hearings on education rights claims.[271]

4. There are a number of other international and regional human rights instruments that recognize the right to education. Some of them are discussed here.

Convention on the Rights of the Child (CRC) relevant provisions are Articles 28, 29 and 40 of requiring States Parties to recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity.[272] Article 5(v) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) protects against racial discrimination in both civil and political rights, as well as economic and social rights, such as education.[273] ICERD is the principal human rights treaty on racial discrimination, and the United States is a party to ICERD. The treaty specifically prohibits discrimination in a number of areas including education. "States Parties undertake to prohibit and to eliminate racial discrimination . . . and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law . . . in the enjoyment of . . . the right to education and training. . . ."[274] Articles 10 & 14 of Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) require state parties among other things to "eliminate discrimination against women in order to ensure to them equal rights with men in the field of education" and "eliminate discrimination against women in rural areas."[275] The U.S. has not ratified this treaty. The Convention against Discrimination in Education[276] in Article 4 requires States parties to create national policies that promote equality of opportunity and of treatment in the field of education. The Convention on the Rights of People with Disabilities also recognizes the right to education.[277]

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270. U.N. Human Rights Comm., General Comment No. 18, Non-Discrimination, U.N. Doc. HRI/GEN/1/Rev.6 (Nov. 10, 1989).

271. *See, e.g.*, ICCPR, Articles 9 and 14 (listing procedures for criminal charges).

272. Convention on the Rights of the Child arts. 28, 29, 40, Nov. 20, 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., 61st plen. mtg. at 167, U.N. Doc. A/RES/44/2.

273. International Convention on the Elimination of All Forms of Racial Discrimination art. 5, Dec. 21, 1965, 660 U.N.T.S. 195, http://www2.ohchr. org/english/law/cerd.htm.

274. *Id.*

275. Convention on the Elimination of All Forms of Discrimination against Women arts. 10, 14, Dec. 18, 1979, 1249 U.N.T.S. 13, http://www.un.org/womenwatch/daw/cedaw/ ("CEDAW").

276. UNESCO Convention against Discrimination in Education art. 4, Dec. 14, 1960, 429 U.N.T.S. 93, http://www.unesco.org/education/pdf/DISCRI_E.PDF [https://perma.cc/26B2-LBVB].

277. *See generally* Arlene S. Kanter, *The Americans with Disabilities Act at 25 Years: Lessons to Learn from the Convention on the Rights of People with Disabilities*, 63 DRAKE L. REV. 819 (2015) ("People with disabilities are still among the poorest Americans, . . . without access to adequate education, housing, employment or the support and accommodations they may need to participate fully in society."); Michael Ashley Stein, *A Quick Overview of the United*

Various nations and regional bodies through human rights documents have developed their own requirements for fulfilling equal access and the right to education.[278] For example, Article 17 of the African Charter on Human and Peoples' Rights guarantees the right to education,[279] the Organization of American States[280] provides for the right to education in (1) Article 12 of American Declaration on the Rights and Duties of Man ". . . that will prepare him to attain a decent life, to raise his standard of living, and to be a useful member of society"[281] and (2) the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" in Article 13 which requires that primary education be "compulsory and accessible to all without cost"[282] and states that "[e]very child has the right to free and compulsory education, at least in the elementary phase."[283] The Charter of Fundamental Rights of The European Union emphasizes human dignity in Article 1 and includes in Article 14 a provision on the right to education which includes the right to equal access to education and vocational training; it protects the right to compulsory education and the freedom to found educational establishments.[284] Article 2 Protocol No.1 of the European Convention on Human Rights (formerly the European Convention for the Protection of Human Rights and Fundamental Freedoms) provides that every person has the right to receive, free, at least a primary education.[285] It states: "No person shall be denied the right to education."[286] A

Nations Convention on the Rights of Persons with Disabilities and Its Implications for Americans with Disabilities, 31 MENTAL & PHYSICAL DISABILITY L. REP. 679, 679–80 (2007). Second-generation rights focus on standards of living such as the availability of housing and education. These are thought of as "positive rights."

278. *See generally* RIGHT TO EDUCATION PROJECT, INTERNATIONAL INSTRUMENTS, RIGHT TO EDUCATION (2014), http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/RTE_International_Instruments_Right_to_Education_2014.pdf.

279. African (Banjul) Charter On Human And Peoples' Rights, June 27. 1981, 21 I.L.M. 58, http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf.

280. Charter Of The Organization Of American States, April 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3, amended by Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607. The Managua Protocol created the Inter-American Council for Integral Development (CIDI) to replace the Economic and Social Council and the Council for Education, Science, and Culture signed in 1993, which entered into force in January 1996; and by the Protocol of Washington, signed in 1992, which entered into force in September 1997.

281. American Declaration on the Rights and Duties of Man art. XII, *adopted at* Bogotá by the Ninth International Conference of American States, May 2, 1948, O.A.S. No. 30, https://www.cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm.

282. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, "Protocol of San Salvador" art. 13(3)(a), Nov. 16, 1999, O.A.S.T.S. No. 69.

283. *Id.* at art. 16.

284. EUROPEAN COMM'N, CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:en:PDF.

285. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, art. 2, 213 U.N.T.S. 262.

number of cases from these three regions have been collected in a volume which is helpful to understand the provisions mentioned here.[287]

CONCLUSION

What is the right to education? All children deserve equal education opportunity public schools. For decades, parents, children and advocates have attempted to answer this question and convince courts, primarily state courts, that either by measures of equity or adequacy, many American children are being denied that right. The search for the best method to correct the lack of equal education opportunity perseveres. In some other areas of human rights, challenges brought in federal courts have been successful because the courts were open to considering a broader interpretation of rights under substantive due process and also in some instances were willing to be informed by international human rights instruments and the treatment of human rights issues in other countries. It may be the appropriate time now to revisit these claims in federal court. Although there is the alternative of turning to the political branches for a federal solution, the political climate at this time does not seem promising.

286. European Court of Human Rights Council of Europe, Council of Europe, at 32 https://www.echr.coe.int/Documents/Convention_ENG.pdf.

287. Celina Giraudy, *Summaries of Jurisprudence, Right to Education*, CTR. FOR JUSTICE AND INT'L LAW (2014), http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/CEJIL_CLADE_RTE_SUMMARIES_OF_JURISPRUDENCE_2015_EN.pdf.