

The Federal Right to an Adequate Education

Barry Friedman*

Sara Solow**

ABSTRACT

Common wisdom has it that there is no federal constitutional right to an education; indeed, under our charter of negative liberties the common understanding is that there are no positive rights at all. This Article challenges common wisdom, arguing that there is in fact a federal constitutional right to a minimally adequate education. In doing so it calls into question the value of long-standing debates about the proper way to interpret the Constitution and suggests an alternative—not a new one, but a time-honored methodology. While theoretical battles about interpretation rage, judges (on both the right and left) continue to interpret the Constitution in much the same way: by looking at text, framing intentions, pre-ratification practice, judicial precedents, and subsequent practice by the state and federal governments. Particularly in Due Process cases, this is how judges discern the “history and traditions of the American people.” Employing this methodology, the case for a federal right to a minimally adequate education is remarkably compelling. This analysis also raises interesting questions about the possibility of finding other positive rights in the Constitution.

TABLE OF CONTENTS

INTRODUCTION	93
I. TRADITIONAL CONSTITUTIONAL INTERPRETATION	97
II. THE FEDERAL RIGHT TO A MINIMALLY ADEQUATE EDUCATION	110
A. <i>The Roots</i>	111
1. Text	111
2. Intentions and Pre/Post Adoption Practice	112
B. <i>“Precedent”</i>	117
C. <i>Practice: The State Story</i>	121
1. Common Schools Movement	121
2. State Adequacy Movements	127
D. <i>Practice: The Federal Story</i>	133
1. Step One: Centralization in the States	135
2. Step Two: Progression Toward a Federal Role ..	136

* Jacob D. Fuchsberg Professor of Law, New York University School of Law.

** Third Circuit Court of Appeals, Law Clerk, Yale Law School, J.D. 2011.

3. Step Three: Federal Practice Today	146
III. WHAT A CONSTITUTION DOES	149
A. <i>What Might an Objector Say?</i>	149
B. <i>What Does It Mean to Have a Constitutional Right?</i>	150
1. Goads and Dialogue	151
2. Backlash	152
3. Constitutional Floor	154
CONCLUSION	155

INTRODUCTION¹

There is no federal right to an adequate education.² As to this, scholars on both the left and the right agree, although they may disagree about whether such a right should exist.³ The conclusion is somewhat depressing, if not unremarkable. By all accounts the American system of primary and secondary education is in terrible shape. Not only are there rampant inequalities, the system is dis-serving even its median and often its best students.⁴ What was once a golden gem of the United States has become a national embarrassment. No one disputes that education is vital to full participation in democratic govern-

1 For their perceptive comments on prior drafts of this piece, the authors would like to thank Jack Balkin, Philip Bobbitt, Dick Fallon, Rick Hills, Daryl Levinson, Robert Post, and Geof Stone. The final product was influenced by helpful comments at the Yale conference on Jack Balkin's *Living Originalism*. We also are grateful to Christina Dahlman, Margo Hoppin, Graham Lake, and David Lin for terrific research help. This project was supported by the Filomen D'Agostino and Max E. Greenberg Research Fund at New York University School of Law.

2 See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.").

3 Compare, e.g., Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 111–13 (2004) (arguing that judicial recognition of a fundamental right to education under the federal constitution is "imperative to deal with the problems in American public schools"), with Gregory E. Maggs, *Innovation in Constitutional Law: The Right to Education and the Tricks of the Trade*, 86 NW. U. L. REV. 1038, 1044–45 (1992) (questioning the efficacy of judicial recognition of a constitutional right to education).

4 See, e.g., WAITING FOR "SUPERMAN": HOW WE CAN SAVE AMERICA'S FAILING PUBLIC SCHOOLS 3–5 (Karl Weber ed., 2010) (citing "damning statistics" about American education, including that most states currently "hover around 20 percent or 30 percent proficiency" in math and reading and that the U.S. ranks last in comparing the top 5 percent of students from 30 developed countries); Derek Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally Protected Right*, 51 WM. & MARY L. REV. 1343, 1352–57 (2010) (reporting that about one in four American students attains less than a "basic level" in both math and reading, and that "[t]he achievement levels of poor, rural, and minority children consistently lag significantly below that of their counterparts").

ance and the national and global economies.⁵ As a nation, we are slipping behind, but the Constitution says nothing about this.⁶

This should come as no surprise—the Constitution of the United States doesn't have anything to say about positive rights. It is a charter of negative liberties, telling the government what it must not do, but not what it should.⁷ On this too the left and right agree, although—once again—they may differ on whether this is a good or a bad thing.⁸

But what if both of these conclusions are wrong? What if there is a federal right to an adequate education? And what if the very existence of that right suggests—*a fortiori*—that it is too strong to say the Constitution guarantees no positive rights?

That is the premise of this Article. And rather than resting on some new-fangled way of interpreting the Constitution, the argument here rests instead on an old one.⁹ Rather than getting lost in theory, the argument here is grounded in long-accepted interpretive practice.

⁵ See, e.g., JO BOALER, WHAT'S MATH GOT TO DO WITH IT: HELPING CHILDREN LEARN TO LOVE THEIR MOST HATED SUBJECT—AND WHY IT'S IMPORTANT FOR AMERICA 3–6 (2008) (reporting that experts estimate that “60 percent of all new jobs in the early twenty-first century will require skills that are possessed by only 20 percent of the current workforce”); WAITING FOR “SUPERMAN”: HOW WE CAN SAVE AMERICA'S FAILING PUBLIC SCHOOLS, *supra* note 4, at 25 (quoting Bill Gates as remarking, “We cannot sustain an economy based on innovation unless we have citizens well educated in math, science, and engineering. If we fail at this, we won't be able to compete in the global economy.” (internal quotation marks omitted)).

⁶ See *Rodriguez*, 411 U.S. at 35.

⁷ See, e.g., *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989) (“[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.”); Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 333 (2011) (noting that many state constitutions “guarantee ‘positive’ rights—obligations on the government to provide public education, for example—which are unheard of in the federal system”); Helen Hershkoff, “Just Words”: *Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521, 1523 (2010) (contrasting state constitutions’ commitments to positive rights with the Federal Constitution, which “has been interpreted as excluding affirmative claims to government assistance”).

⁸ Compare LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 1–7 (3d ed. 2000) (arguing that some promote the concept of affirmative governmental duties to ensure a “minimal level of access . . . to the material preconditions for human subsistence and shelter,” and that such a concept is actually built into our case law on negative prohibitions), with Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 923–24 (2001) (arguing that “the case for positive rights implicitly presumes that judges are benevolent magicians” and that judicial recognition of positive rights would not “improve the lives of the intended beneficiaries”).

⁹ Several scholars have employed various methods of constitutional interpretation to construct a federal constitutional right to education, though none in quite the straightforward way we do here. For instance, Susan Bitensky has argued an affirmative right to education “may be found implicitly to arise” from either the Due Process Clause or the Privileges and Immunities

Since at least the 1980s, the country has been tangled in endless theoretical debates about how the Constitution *should* be interpreted.¹⁰ The problem, of course, is that we have a very old Constitution. It is so old that it is simply implausible that the document as written and understood can perfectly address life in the twenty-first century, even as we desperately want to imagine that it does. And so, both “conservative” and “liberal” ideologies have struggled to advance a coherent interpretive technique that addresses the problem.

But while academics and pundits rage about how the Constitution *should* be interpreted, judges just do it. They do it because they have to, in ordinary cases, every day. And there is a way judges interpret the Constitution (and lawyers who appear before them to argue about its meaning). Although good empiricism on this is lacking, there is some evidence that the way in which judges interpret constitutional and statutory text has not changed notably over history.¹¹ No matter, there is a manner of interpreting that is dominant today. It involves—are you ready?—examining the constitutional text, the intentions of

Clause of the Fourteenth Amendment, the Free Speech Clause of the First Amendment, or from the constitutional right to vote. Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 553 (1992). But, her methods of interpretation involved quite creative extensions of constitutional text and doctrine. See Maggs, *supra* note 3, at 1046–55 (describing Bitensky’s argument as employing seven “tricks” of interpretative methodology, each of which “can make almost any proposition about the Constitution appear true”). Other methods are similarly creative. See e.g., Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 334–35 (2006) (grounding a right to education in the Fourteenth Amendment’s Citizenship and Enforcement Clauses together); Note, *A Right to Learn?: Improving Educational Outcomes Through Substantive Due Process*, 120 HARV. L. REV. 1323, 1324 (2007) (locating a constitutional right to education in the Due Process Clause by arguing that state compulsory education laws interfere with students’ liberty interests).

¹⁰ See, e.g., BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 299–313 (2009) (describing heated debate about legitimate methods of constitutional interpretation that arose after the Supreme Court’s decision in *Roe v. Wade*, and the subsequent development of competing liberal and conservative jurisprudential theories through the 1980s); James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523, 1529–52 (2011) (describing the historical evolution of the constitutional interpretation debate).

¹¹ See, e.g., R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121, 125–50 (1994) (describing “four main sources of meaning” judges draw upon to interpret the Constitution and tracking their use in judicial decisions from 1789 to the present); John M. Walker, Jr., *Judicial Tendencies in Statutory Construction: Differing Views on the Role of the Judge*, 58 N.Y.U. ANN. SURV. AM. L. 203, 232–33 (2001) (arguing that in the “real, as opposed to the theoretical, world, few judges approach the interpretative task armed with a fixed set of rigid rules” and that generally, appellate judges move “back and forth between text and context as the judge considers all available and persuasive or binding materials at the judge’s disposal”).

those who wrote and ratified the document as well as common understandings at the time, social and legislative practices both before and after ratification, constitutional structure, governing precedents, and paying some attention to consequences and ethics.¹² The process is evolutionary—slowly and conservatively evolutionary, as properly fits interpretation of a foundational document—but evolutionary nonetheless.¹³ And this method of interpretation is evident in countless familiar and seminal opinions of judges from the right and left alike.¹⁴ There is much on which they differ. But the mechanics by which they interpret the Constitution often displays a stunning similarity.

When one interprets the Constitution as judges and lawyers interpret, it turns out there is a federal right to an adequate education—at least to a minimally adequate one. The right has emerged over time, and thus its precise contours are not clear; they are subject to debate and definition. But once one engages in this very common form of constitutional interpretation, the presence of the right is every bit as clear as, say, the right to possess and bear arms in self-defense or the right of a woman to choose abortion—or so many other constitutional rights that at their core are part of American life in the early twenty-first century.

Part I is devoted to the question of constitutional interpretation. It demonstrates that when lawyers and judges seek constitutional meaning in the process of ordinary litigation, they regularly ignore the entreaties of theorists on the left and right in favor of what might be called “traditional constitutional interpretation”—the sort of thing law students are taught.¹⁵

Part II then applies the tools of traditional constitutional interpretation to the issue of whether there is a federal constitutional right to an adequate education. The conclusion is that there is. At least since the early twentieth century, this is a right that has been recognized by most states, which in and of itself—applying traditional interpretive methodology—would ground such a right under the Fifth and Fourteenth Amendment’s Due Process Clauses. Over recent years,

¹² See *infra* Part I.

¹³ Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 5–6 (1998) (arguing that to understand modern constitutional commitments, “all [of] American constitutional history . . . [must be taken] into account” because the Constitution has been “endlessly worked and reworked” since 1787).

¹⁴ See *infra* Part I.B.

¹⁵ Nor is this sort of methodology limited to what occurs in litigation: a brief review of congressional debates shows the same mechanics of interpretation. See Mark Tushnet, *Legal Reasoning in Congress*, 95 IOWA L. REV. BULL. 81, 81–82 (2010).

there has been a cascade of support in favor of a federal right. As Part II demonstrates, the contours and some critical aspects of the right have changed over time. To cite one example, although education has long been considered the quintessential responsibility of local government, there is increasing evidence of a consensus that effective educational policy requires greater centralization. But fuzziness around the edges hardly distorts the core: there is broad acceptance of a federal right to a minimally adequate education, one that is not foreclosed by judicial precedents.

Part III concludes by taking up briefly the question of why it matters whether the right to education is in the Constitution. If most states allege fealty to it, and if there is growing political support for education at all levels of government, why does it matter to call it a federal constitutional right? Part III explores the symbiotic nature of constitutional growth, showing how it is a to-and-fro between ordinary practice and constitutional aspirations. The education story always has been one of a tension between a profound belief in the value and importance of education and the unwillingness to pay for it—especially when it involves someone else’s children. Although constitutionalization is not an unalloyed good—it has its downsides, including the possibility of provoking backlash—the fact that something is in the Constitution prods society to gradually define and achieve its deeper aspirations.

I. TRADITIONAL CONSTITUTIONAL INTERPRETATION

For almost two generations now, the ideological left and right in this country have been at war with one another over the proper way to interpret the Constitution. If the relentless tug of war between originalism and living constitutionalism has gotten us anywhere, it is only to the point at which the originalism of the right is increasingly blurry and the living constitutionalism of the left is looking for a foundation. Yet, throughout this tumultuous debate lawyers and judges have continued to do what they always have done: interpret the Constitution in a manner that would look familiar to most law students. This familiar interpretive methodology utilizes no single or fixed metric, but employs many traditional interpretive techniques to answer constitutional questions.

Beginning in the late 1970s and early 1980s, conservatives looked for an interpretive methodology to roll back liberal constitutional de-

cisions of the prior twenty years.¹⁶ They settled on originalism, a choice that made sense.¹⁷ Even the Warren Court Justices occasionally resorted to original understandings to dispense with unwanted precedents.¹⁸ Since its inception, however, originalism has come to suffer from problems. First—driven in part by an effort to achieve desired results, and in part because some conservatives have confused a political agenda with an interpretive endeavor—originalism has become murky and incoherent.¹⁹ It is a slogan now, not an interpretive methodology. Second, like any interpretive theory, originalism has to grapple with the gap between 1789—or even 1868, when the Fourteenth Amendment was ratified²⁰—and the twenty-first century. It

16 See, e.g., FRIEDMAN, *supra* note 10, at 306–13 (describing the emergence of originalism as a strategic response by conservatives to certain Warren Court and early Burger Court decisions); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 547 (2006) (“Critics of the Warren Court began to argue that determining the original understanding of the Constitution’s framers was the *only* legitimate way of interpreting the Constitution . . .”).

17 See OFFICE OF LEGAL POLICY, U.S. DEP’T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 3 (1987) (characterizing originalism as the only legitimate method of interpretation and “the only approach that takes seriously the status of our Constitution as fundamental law, and that permits our society to remain self-governing”); JOHNATHAN O’NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 9–10 (2005) (“[T]he originalist idea stood as a fundamental and newly enlivened alternative to the reformist use and scholarly, legal liberal encouragement of modern judicial power.”); Dawn Johnsen, *Lessons from the Right: Progressive Constitutionalism for the Twenty-first Century*, 1 HARV. L. & POL’Y REV. 239, 244 (2007) (describing how the Reagan Administration presented policy goals “within the framework of [a new call for] originalism—the drive to limit constitutional meaning to the specific meaning the Framers had in mind at the time of drafting and ratification”).

18 See Friedman & Smith, *supra* note 13, at 22–25.

19 For sources critiquing the present state of originalism, as a doctrine, see Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 16 (2009) (“[L]iterally thousands of discrete theses can plausibly claim to be originalist.”); Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 244 (2009) (reporting that “[a] review of originalists’ work reveals originalism to be not a single, coherent, unified theory of constitutional interpretation, but rather a smorgasbord of distinct constitutional theories that share little in common except a misleading reliance on a single label”); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 758–72 (2009) (critiquing arguments put forth by prominent “original intent” and “original public meaning” scholars); Lawrence B. Solum, *Originalism as Transformative Politics*, 63 TUL. L. REV. 1599, 1611–12 (1989) (arguing “there are many different conceptions of originalism at work in the originalism debate” and some are “clearly implausible on theoretical grounds”).

20 The Fourteenth Amendment to the Constitution was ratified in 1868. *Constitution of the United States: Amendments 11–27*, U.S. NAT’L ARCHIVES & RECORDS ADMIN., http://www.archives.gov/exhibits/charters/constitution_amendments_11-27.html (last visited Aug. 28, 2012).

has done so by making a series of accommodations that profoundly undermine its integrity.²¹

Meanwhile, the left's long-held interpretive theory, living constitutionalism, also suffers significant shortcomings. Most importantly, as scholar James Ryan observes, it "[fails] to answer the following question: If the original meaning of the Constitution is not to be the guide, what is?"²² How do we distinguish between those changes in social attitudes and public expectations that are merely transient, and those that are sufficiently engrained in public understanding and institutions to be considered "constitutional"? In its effort to answer such questions, the left has been driven back to text and intent. Progressive scholars Doug Kendall and James Ryan advocate for "New Textualism," a mixture of text and intent reminiscent of some of the work of Akhil Amar.²³ Jack Balkin's book *Living Originalism* makes a powerful case for a left-based interpretive theory that has Founding-era roots.²⁴ And these are just a few examples.

What is truly notable, though, is that throughout two generations of interpretation wars, the judiciary has continued to interpret the

21 Most originalists concede that some nonoriginalist constitutional doctrines should be retained. See, e.g., PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 95–96 (1991) (quoting statements made by Judge Robert Bork during the 1987 Senate Hearings on his nomination to the Supreme Court, including that the nation's growth and development precludes altering some aspects of Commerce Clause jurisprudence that violate the intentions of the Constitution's drafters); RONALD DWORKIN, *LAW'S EMPIRE* 362–63 (1986) (justifying desegregation decisions by arguing that judges must determine whether "the framers' concrete opinion about segregation is consistent with their more abstract convictions about equality"); Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1808–09 (1997) (conceding that on issues like gender equality, "the reasoning of the Framers—viewed in modern perspective—will be so flawed or distasteful as to suggest that the Constitution means the opposite of what they assumed").

22 James E. Ryan, *Does It Take a Theory? Originalism, Active Liberty, and Minimalism*, 58 STAN. L. REV. 1623, 1631 (2006) (reviewing STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005) and CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005)).

23 Doug Kendall & Jim Ryan, *The Case for New Textualism*, 21 DEMOCRACY 66 (2011). For examples of Akhil Amar's text-based but progressive method of constitutional interpretation, see, e.g., Akhil Reed Amar, *America's Lived Constitution*, 120 YALE L.J. 1734, 1734 (2011) (arguing "the written Constitution signals [the] existence" of unenumerated rights and that "faithful constitutional interpreters" appropriately look to the expectations and practices of the American public to identify basic constitutional rights "not expressly listed in the terse text"); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 788–96 (1999) (advocating "intratextualism"—interpreting contested Constitutional text with reference to similar language in other provisions of the Constitution—as an alternative to "clause-bound textualism") [hereinafter Amar, *Intratextualism*].

24 JACK M. BALKIN, *LIVING ORIGINALISM* 101 (2011).

Constitution the old-fashioned way.²⁵ The old-fashioned way is a practice in which ordinary lawyers are trained and deeply embedded. And as a practice, it plays by certain rules, or conventions. Those within the practice may not even notice they are following the conventions, so ingrained are they, while those outside it may wonder exactly what is going on.²⁶ But the practice of interpreting in this way has done more than either originalism or living constitutionalism to make the Constitution both relevant and tenable today.

It is really stunning the paucity of empirical work devoted to how judges actually decide constitutional cases, as opposed to how they should.²⁷ This is true not only of judges, but other constitutional actors, including legislators and presidents.²⁸ There is some scholarship on the subject in statutory interpretation cases, and it is revealing as to the divergence of theory and practice.²⁹

²⁵ Whether the judiciary always interpreted the Constitution in this way is a complicated question. Scholars are apt to try to periodize the history of constitutional interpretation, suggesting that different eras had different approaches. *See infra* note 47; *see generally* Friedman & Smith, *supra* note 13, at 9–33 (analyzing “from the Founding-era to the present, how judges, lawyers, and legal academics have alternated between originalist understandings and living constitutionalism”). We suspect such periodicization is overstated, and that many of the interpretive devices discussed herein found their way into judicial decisions throughout history. For examples, *see infra* notes 48–58 and accompanying text. But the methodology described here is prevalent today, a fact readily apparent from the many cases we discuss—or even from scrutinizing a volume of almost any case reporter.

²⁶ *See, e.g.*, PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 234 (1982) (“To the layman . . . all legal opinions will appear to be creative acts, choices. To a judge or commentator working within a particular convention, its application will appear to be determined for us.”); DWORKIN, *supra* note 21, at 13 (“[L]aw is a social phenomenon. . . . Every actor in the practice understands that what it permits or requires depends on the truth of certain propositions that are given sense only by and within the practice . . .”).

²⁷ *See, e.g.*, BOBBITT, *supra* note 21, at 45 (contending “we should change our focus from attempts to explain why men and women think and argue as they do in constitutional law, to a description of how they have thought and argued”); Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 257 (2005) (“In the legal academy, scholarship about judicial review is predominantly normative. It is largely about how judges should decide cases and what posture they ought to take toward the work of other institutions.”).

²⁸ Scholarly attention to the process by which the legislative and executive branches make constitutional decisions is extremely limited. *See, e.g.*, Michael J. Gerhardt, *Constitutional Decision-Making Outside the Courts*, 19 GA. ST. U. L. REV. 1123, 1124 (2003) (“Legal scholars are regrettably preoccupied with the work of the federal courts [N]o systematic analysis of the quality and significance of [constitutional reasoning by political actors] . . . has yet been undertaken.”). Exceptions include: Amar, *Intratextualism*, *supra* note 23, at 779; Tushnet, *supra* note 15, at 81–82; and Mark Tushnet, *Non-Judicial Review*, 40 HARV. J. ON LEGIS. 453, 455 (2003).

²⁹ *See, e.g.*, Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L. J. 1750, 1771–1803 (2010) (describing the methods of statutory interpretation employed in state courts of last resort); Alex B. Long, “If the Train Should Jump the Track . . .”: *Divergent Interpretations of State and Federal Employment Discrimination Statutes*, 40 GA. L. REV. 469, 473–74 (2006) (arguing that state court

Two notable exceptions, however, are Philip Bobbitt's volumes *Constitutional Fate* and *Constitutional Interpretation* and Richard Fallon's *A Constructivist Coherence Theory of Constitutional Interpretation*.³⁰ These works seek to make sense of how we interpret, rather than how we should interpret. And both come to very similar conclusions.

Bobbitt famously identified six "modalities" of constitutional argument that he maintains legitimate the very practice of judicial review.³¹ These modalities are historical, textual, structural, doctrinal, ethical, and prudential.³² To the seasoned constitutional interpreter, these will require little elaboration. Bobbitt explains that "[t]here is a legal grammar that we all share and that we have all mastered prior to our being able to ask what the reasons are for a court having power to review legislation."³³ And arguments, he says, "are conventions[:] . . . they could be different, but . . . then we would be different."³⁴

Fallon sets out to deal with the problem of incommensurable arguments in constitutional law.³⁵ He begins by claiming that "[w]ith only a few dissenters, most judges, lawyers, and commentators recognize the relevance of at least five kinds of constitutional argument."³⁶ These five kinds of argument are: text, intentions of framers, purposes of a clause or the whole document (what Bobbitt might call "structure"), precedent, and "value arguments that assert claims about justice or social policy."³⁷ And while he wants to develop a hierarchy in cases of conflict, one of his central points is that "within our legal cul-

interpretations of state employment discrimination statutes are increasingly diverging from federal court interpretations of parallel federal statutes); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1076 (1992) (presenting the "first empirical study of the Supreme Court's use of authority in statutory cases").

³⁰ BOBBITT, *supra* note 26; BOBBITT, *supra* note 21; Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987) [hereinafter Fallon, *A Constructivist Coherence Theory*]. In Fallon's oeuvre on the subject one might add *How to Choose a Constitutional Theory*, which makes a similar point that judges tend not to adopt any one theory of interpretation. See Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535, 579 (1999).

³¹ See BOBBITT, *supra* note 26, at 1–119.

³² *Id.*

³³ *Id.* at 6. Bobbitt explains that "although a general theory of constitutional law may appear to establish the legitimacy of certain kinds of arguments . . . it is in fact the other way round." *Id.* at 5. In other words, normative arguments about interpretative methodology presuppose that certain interpretative tasks are legitimate, and that others are not.

³⁴ *Id.* at 6.

³⁵ Fallon, *A Constructivist Coherence Theory*, *supra* note 30, at 1189–90.

³⁶ *Id.* at 1189 (footnote omitted).

³⁷ *Id.* at 1189–90.

ture, it is the rare judicial opinion, the anomalous brief, the unusual scholarly analysis that describes the relevant kinds of arguments as pointing in different directions.”³⁸

These “arguments” that Bobbitt and Fallon are talking about obviously are not just those lawyers make, but also those judges employ in their opinions. Judge John M. Walker, Jr., in an article on statutory interpretation, explains that the arguments lawyers make and judges employ are related.³⁹ Even if a judge is persuaded by, say, the plain meaning of a statute, sound judging does not end there.⁴⁰ “Even a judge’s strongest theoretical inclinations are tempered by the judge’s desire to accord a fair hearing to the parties’ arguments and to be open to all credible materials that might enhance the judge’s understanding of the case.”⁴¹

Lawyers and judges disagree about outcomes, but rarely do they accuse one another of bad faith interpretation. Rather, they simply emphasize aspects of the interpretive methodologies in differing ways. This, admittedly, is true primarily of unsettled questions and higher courts; in the lower courts, interpretive flexibility is more constrained.⁴²

In the statutory interpretation context, William Eskridge and Philip Frickey developed a “funnel of abstraction” that might be thought to govern equally well—with some revision of sources—in the constitutional context.⁴³ In Figure 1 below, Eskridge and Frickey describe judges proceeding in statutory interpretation cases from the most tangible source of meaning (starting at the bottom) to the least:⁴⁴

³⁸ *Id.* at 1193. The discussion that follows, pace Fallon, finds coherence among the various modalities of argument as applied to education, while nodding to areas of possible disagreement. But even those areas of disagreement do not foreclose a finding of a federal due process right to an adequate education so much as leave room for it, eliminating any need—as does Fallon—to prioritize.

³⁹ See Walker, *supra* note 11, at 232–33.

⁴⁰ See *id.*

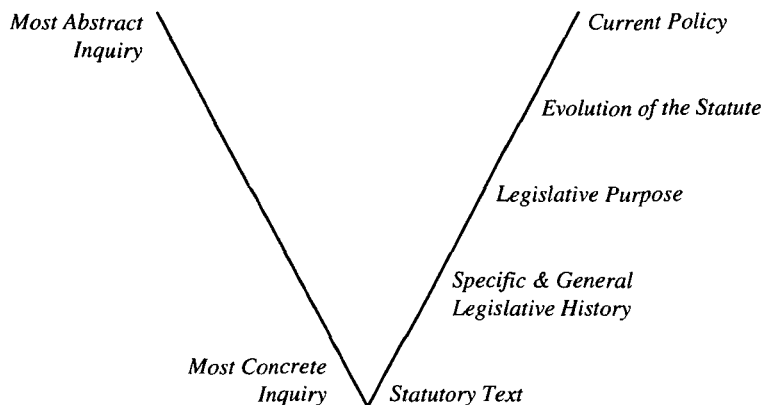
⁴¹ *Id.*

⁴² See Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 12 (1994) (“It is axiomatic that an inferior court must respect prior precedents created by its superior courts Unlike the Supreme Court, inferior courts cannot invoke a theory of mistakes to justify ignoring superior court precedents.”).

⁴³ See William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 353 (1990).

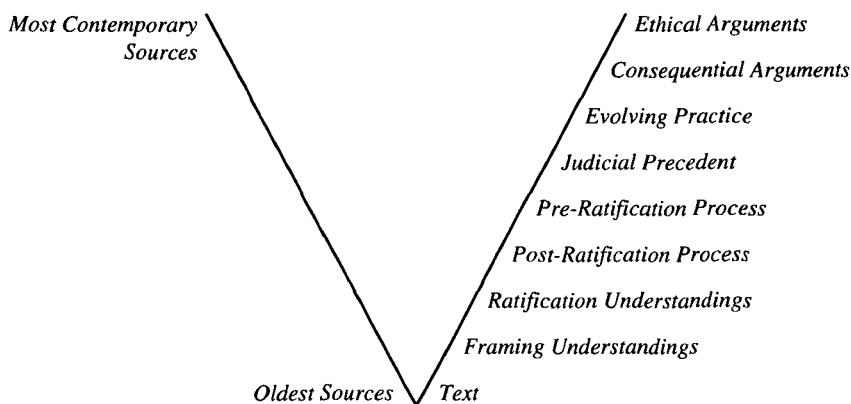
⁴⁴ *Id.* The figure is an exact copy of the diagram found in Eskridge and Frickey’s article.

FIGURE 1: ESKRIDGE AND FRICKEY'S STATUTORY INTERPRETATION



Were we to use this device in the constitutional arena, we might expand somewhat upon Bobbitt's categories to have a funnel that looks like Figure 2 below.⁴⁵

FIGURE 2: SOURCES OF CONSTITUTIONAL INTERPRETATION



Despite the dearth of empirical analysis, there is reason to believe that this form of argument has long been dominant in American constitutional law. Bobbitt suggests that one could take different colored pencils to an opinion underscoring various forms of argument and that "you would probably have a multi-colored picture when you finished."⁴⁶ It is often said that there have been different styles of interpretation that have dominated periods of judicial decisionmaking, and

⁴⁵ Note that even if they are apt in the statutory arena, the terms "concrete" and "abstract" do not work in the constitutional setting: Framing-era understandings can be quite abstract, and evolving practice quite concrete.

⁴⁶ BOBBITT, *supra* note 26, at 93–94.

perhaps different modalities have been more consequential at certain times.⁴⁷ But take the case of *Gibbons v. Ogden*,⁴⁸ one of Justice John Marshall's most consequential but uncontroversial opinions. The Supreme Court held that the Commerce Clause grants the federal government the power to regulate navigation as long as it is "connected with 'commerce . . . among the several States.'"⁴⁹ Marshall has been applauded both for his instinctive originalism and for his prescient living constitutionalism.⁵⁰ In the *Gibbons* opinion, we see textualism,⁵¹ intentionalism,⁵² allusions to pre- and postconstitutional practice,⁵³ structural arguments,⁵⁴ and consequential arguments.⁵⁵ Nor was Marshall alone in his use of these constitutional arguments: Justice Curtis's opinion in *Cooley v. Board of Wardens*⁵⁶ (famous in part because he

47 See, e.g., Morton J. Horwitz, Forward, *The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 30, 41–44 (1993) (describing the evolution of American constitutional interpretation from Founding-era originalism to progressivism in the early twentieth century, to the "aggressive originalist crusade . . . in the mid-1980s"); Kelso, *supra* note 11, at 148–50 (identifying "four main judicial decisionmaking styles in American history"); William E. Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 514–19 (1974) (contrasting early nineteenth century instrumentalist judicial reasoning, which emphasized that "courts should change the rules of law in order to effectuate socially desirable policies" and promote economic growth, with the subsequent emergence of formalistic, rules-based judicial decisionmaking by the end of the nineteenth century). But see *supra* note 25 and accompanying text.

48 *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

49 *Id.* at 197.

50 Friedman & Smith, *supra* note 13, at 11 n.25 (summarizing scholarship that credits Justice Marshall as "an instinctive originalist jurist" on the one hand, and a progenitor of living constitutionalism on the other).

51 *Gibbons*, 22 U.S. (9 Wheat.) at 189 ("The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word."); *id.* at 190–96 (interpreting the meaning of the words "commerce" and "among" in the Commerce Clause).

52 *Id.* at 190 ("All America understands, and has uniformly understood, the word 'commerce,' to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it.").

53 *Id.* ("[The power to regulate waterways and navigation] has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation.").

54 *Id.* at 195 ("The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation . . . but not to those which are completely within a particular state . . .").

55 *Id.* at 195–96 (explaining that if Congress's power to regulate commerce among the states did not extend to trade that originated within the territorial jurisdiction of a state, the power would be hollow).

56 *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299 (1851).

forged a rare moment of consensus over the dormant Commerce Clause) used similar methods of interpretation⁵⁷ and, as Bobbitt makes clear, Justice Holmes did the same in *Missouri v. Holland*.⁵⁸

Looking to the more recent decisions of the Supreme Court, we repeatedly see this dynamic, holistic manner of interpretation at play, with Bobbitt's modalities finding expression in varying degrees, depending on the specifics of the case. And interestingly, we see this method of constitutional interpretation being deployed by the Justices across the board, no matter the particular provision or concept being explored and no matter the Justices' political or interpretative ideology.

Consider *District of Columbia v. Heller*.⁵⁹ That decision is often referred to as "originalist."⁶⁰ And no wonder, given its authorship by Justice Scalia, and how drenched in history the opinion is. On careful examination, however, the Court's decision in *Heller* is a classic example of traditional interpretation. Yes, the weighting of Bobbitt's modalities is not balanced. The opinion includes a very lengthy textual analysis, informed by Founding-era evidence, such as English common law sources and early state constitutional language.⁶¹ Yet, this extensive analysis hardly establishes *Heller*'s critical holding that the Second Amendment's "right of the people to keep and bear Arms"⁶² confers an individual right to self-defense.⁶³ Nor could it, given—as Justice Alito makes clear in *McDonald v. Chicago*⁶⁴—that the self-defense strain of thinking about the Second Amendment did not really emerge until the antislavery movement and Reconstruction.⁶⁵ Instead, it is Justice Scalia's march through history in *Heller*, from the

⁵⁷ *Id.* at 312–15 (upholding a Pennsylvania fine on ships by explicating the original understanding of "imposts" and "fines" in Article I § 8, relying on the practices of states and foreign countries, and articulating a consequentialist concern with the ability to regulate pilotage in a manner appropriate to the "local peculiarities of each port").

⁵⁸ *Missouri v. Holland*, 252 U.S. 416 (1920); see BOBBITT, *supra* note 21, at 48–63.

⁵⁹ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

⁶⁰ See, e.g., Mark Tushnet, *Heller and the New Originalism*, 69 OHIO ST. L.J. 609, 609 (2008) ("*Heller* has been described, accurately enough, as the most originalist opinion in recent Supreme Court history.>").

⁶¹ See *Heller*, 554 U.S. at 581–603.

⁶² U.S. CONST. amend. II.

⁶³ *Heller*, 554 U.S. at 595 ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.>").

⁶⁴ *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

⁶⁵ See *id.* at 3038 ("By the 1850's, the perceived threat that had prompted the inclusion of the Second Amendment in the Bill of Rights—the fear that the National Government would disarm the universal militia—had largely faded as a popular concern, but the right to keep and bear arms was highly valued for purposes of self-defense.>").

Founding through the Civil War and the post-Reconstruction period; *together with* his long discussion of *United States v. Miller*,⁶⁶ the chief precedent he had to move to one side; and his prudential analyses of the purposes of gun regulations, by which he locates the ethos of self-defense at the center of the Second Amendment.⁶⁷ And it is these methods of analysis that reveal how very good *Heller* is as an example of traditional constitutional interpretation.

Or consider *Boumediene v. Bush*.⁶⁸ There, in an opinion by Justice Kennedy, the Supreme Court employed traditional constitutional interpretation to discern whether the writ of habeas corpus extended to foreign nationals at Guantanamo Bay. The Court's first step was to offer an "account of the history and origins of the writ," which involved surveying the Magna Carta, the use of the writ under English kings in the 1600s, and "[p]ost-1789 habeas developments in England" and in U.S. "common law courts."⁶⁹ Upon finding the historical evidence about the geographic scope and substantive content of the writ to be inconclusive,⁷⁰ the Court turned to other modalities in the Bobbitt toolkit—precedent,⁷¹ structural considerations (namely, separation of powers principles),⁷² legislative enactments concerning habeas corpus throughout U.S. history,⁷³ and "practical concerns" about what it would mean, geopolitically, to enable the writ to reach Guantanamo.⁷⁴ Ultimately, the majority concluded that the writ should be interpreted to extend to foreign nationals at Guantanamo Bay and that the Department of Defense's alternative procedures were not operating as effective substitutes.⁷⁵ Like Marshall's opinion in *Gibbons*, Kennedy's decision in *Boumediene* did not stand on any one interpre-

⁶⁶ *United States v. Miller*, 307 U.S. 174 (1939).

⁶⁷ See *Heller*, 554 U.S. at 605–19 (conducting historical exegesis); *id.* at 621–26 (analyzing *Miller*); *id.* at 629–36 (comparing the D.C. handgun ban to other historical gun regulations and concluding that "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban" because "they do not remotely burden the right of self-defense as much as an absolute ban on handguns").

⁶⁸ *Boumediene v. Bush*, 553 U.S. 723 (2008).

⁶⁹ *Id.* at 739–52.

⁷⁰ *Id.* at 752.

⁷¹ *Id.* at 756–66 (discussing previous decisions about the extraterritorial reach of constitutional rights).

⁷² *Id.* at 765–66.

⁷³ *Id.* at 773–79 (tracing Congress's modifications to traditional habeas corpus relief over time, and finding that "most of the major legislative enactments pertaining to habeas corpus have acted not to contract the writ's protection but to expand it or to hasten resolution of prisoners' claims").

⁷⁴ See *id.* at 764–66.

⁷⁵ See *id.* at 795.

tive strand—text, intent, consequences—but relied upon them collectively.

These cases are merely exemplars of traditional constitutional interpretation. Numerous other opinions could have been used to make the same point. In the Eighth Amendment context, *Roper v. Simmons*⁷⁶ and *Graham v. Florida*⁷⁷ are poignant examples;⁷⁸ in the substantive due process context, *Washington v. Glucksburg*,⁷⁹ *Lawrence v. Texas*,⁸⁰ and *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁸¹ stand out.⁸² And what is key is that these cases were authored by Justices across the political spectrum,⁸³ and all employed the wide and traditional range of interpretive methodologies.

In light of the argument to follow, due process cases deserve special attention. The idea of substantive due process has been particularly contested throughout American history.⁸⁴ Yet, even here, liberal and conservative Justices have in recent years come to a *rapprochement*. All agree that unenumerated rights exist. And regardless of the author of the opinion or the specific question in the case, the usual practice of the Supreme Court in substantive due process cases is to look at the history and traditions of the American people, while also taking account of emergent social views and understandings, to determine whether the Fifth and Fourteenth Amendment's Due Process Clauses have come to incorporate the substantive guarantee at issue.

Washington v. Glucksburg is instructive of the Supreme Court's approach to substantive due process issues. In *Glucksberg*, the question was whether there exists a constitutional right to physician-as-

⁷⁶ *Roper v. Simmons*, 543 U.S. 551 (2005).

⁷⁷ *Graham v. Florida*, 130 S. Ct. 2011 (2010).

⁷⁸ See *Graham*, 130 S. Ct. at 2021–34; *Roper*, 543 U.S. at 560.

⁷⁹ *Washington v. Glucksburg*, 521 U.S. 702 (1997).

⁸⁰ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁸¹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

⁸² *Lawrence*, 539 U.S. at 564–79; *Glucksburg*, 521 U.S. at 710; *Casey*, 505 U.S. at 846–69.

⁸³ See *Graham*, 130 S. Ct. at 2017; *Roper*, 543 U.S. at 555; *Lawrence*, 539 U.S. at 562; *Glucksburg*, 521 U.S. at 705; *Casey*, 505 U.S. at 843.

⁸⁴ See, e.g., RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 249 (1977) (noting that courts using substantive due process “substitute their own views of policy for those of [the] legislat[ure]”); Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling Planned Parenthood of Southeastern Pennsylvania v. Casey*, 22 CONST. COMMENT. 311, 331 (2005) (describing the need to “tame a line of substantive due process disasters that begins with *Dred Scott* and goes on to include *Lochner*”); Adam Lamparello, *Taking the “Substance” Out of Substantive Due Process and Returning Lawmaking Power to the Federal and State Legislatures*, 63 S.C. L. REV. 285, 286 (2011) (“[T]he concept of substantive due process is the most intellectually dishonest doctrine in the history of the United State [sic] Supreme Court’s jurisprudence.”).

sisted suicide.⁸⁵ The Court held no, but insofar as the methodology of constitutional interpretation is concerned, what the Justices said was far more important than what they held. Although there were a number of separate opinions, all nine Justices—of various ideological stripes—explicitly recognized the evolutionary nature of due process and its inclusion of unenumerated rights. Writing for the majority, Chief Justice Rehnquist said, “We begin, as we do in all due process cases, by examining our Nation’s history, legal traditions, and practices.”⁸⁶ The majority proceeded by tracing laws banning assisted suicide back to the thirteenth century.⁸⁷ It then turned to recent developments in the states, such as in Iowa, Rhode Island, and New York, where legislatures and task forces freshly considered the issue of assisted suicide and decided to prohibit (or continue prohibiting) the practice.⁸⁸ The majority thus concluded that bans on assisted suicide like Washington’s were not only “deeply rooted,” but were presently legitimate.⁸⁹ “Attitudes toward suicide itself have changed since Bracton, but our laws have consistently condemned, and continue to prohibit assisting suicide.”⁹⁰

Several of the concurring Justices expressed a willingness to reconsider the constitutionality of banning assisted suicide in light of unfolding events.⁹¹ But like the majority, these concurrences relied on evolving practices in the states to ground their reasoning, blessing that sort of analysis as proper in due process cases.⁹²

⁸⁵ *Glucksberg*, 521 U.S. at 705–07.

⁸⁶ *Id.* at 710.

⁸⁷ *Id.* at 711–16.

⁸⁸ *Id.* at 716–19.

⁸⁹ *Id.* at 716.

⁹⁰ *Id.* at 719.

⁹¹ See *id.* at 736–37 (O’Connor, J., concurring) (emphasizing as a reason for her concurrence that there are at present “no [state] legal barriers” to effective medical alleviation of suffering for terminally ill patients); *id.* at 789 (Ginsburg, J., concurring) (concurring in the decision “substantially for the reasons stated by Justice O’Connor”); *id.* at 792 (Breyer, J., concurring) (agreeing with Justice O’Connor that the challenged laws do not prevent terminally ill patients from receiving treatment to control severe pain, and stating that “[w]ere the legal circumstances different . . . the Court might have to revisit its conclusions in these cases”); *id.* at 738 (Stevens, J., concurring) (writing separately to “make it clear that there is also room for further debate about the limits that the Constitution places on the power of the States to punish the practice [of physician-assisted suicide]”).

⁹² See *id.* at 710–19 (majority opinion); see, e.g., *id.* at 749 n.12 (Stevens, J., concurring) (noting “that there is evidence that a significant number of physicians support the practice of hastening death in particular situations,” and citing multiple state-specific studies of physician views and practices).

Lawrence v. Texas is another substantive due process case in which Bobbitt's methodologies came into play.⁹³ The question in *Lawrence* was whether the Fourteenth Amendment's Due Process Clause should be construed to cover the right to engage in consensual, homosexual sodomy. The Supreme Court held that it should.⁹⁴ It began with history:

At the outset it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter. Beginning in colonial times there were prohibitions of sodomy derived from the English criminal laws . . . [but] [t]he English prohibition was understood to include relations between men and women as well as relations between men and men.⁹⁵

Continuing through the nineteenth century, the Court determined that sodomy laws "do not seem to have been enforced against consenting adults acting in private" during this period; and even when they were, convictions were rarely obtained.⁹⁶ Overall, the historical evidence revealed that "[i]t was not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so."⁹⁷ And while history worked against Texas, contemporary practices worked in favor of the petitioners. The Court was not shy in admitting "that our laws and traditions *in the past half century* are of most relevance here," and "[t]hese references *show an emerging awareness* that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."⁹⁸

Planned Parenthood of Southeastern Pennsylvania v. Casey provides a final demonstration of traditional constitutional interpretation at work in a substantive due process case. The plurality opinion began with an unabashed invocation of the holistic interpretive methodology:

Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.

. . . .

⁹³ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁹⁴ *Id.* at 564, 578.

⁹⁵ *Id.* at 568.

⁹⁶ *Id.* at 569.

⁹⁷ *Id.* at 570.

⁹⁸ *Id.* at 571–72 (emphases added).

The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment.⁹⁹

The plurality deployed such “reasoned judgment” in *Casey* primarily by following the Supreme Court’s substantive due process precedents over time, and concluding that “personal decisions relating to marriage, procreation, [and] contraception,” of which the abortion decision is one, are constitutionally protected.¹⁰⁰ Justice Rehnquist, in his dissent, similarly employed traditional constitutional interpretation, though he leaned more heavily not on the Court’s precedents, but on “the historical traditions of the American people,” “[t]he common law which we inherited from England,” and the “statutory prohibitions or restrictions on abortion” that were in place in 1868, the year the Fourteenth Amendment was adopted, and in 1973, when *Roe* was decided.¹⁰¹

In sum, there is a way we interpret the Constitution when we are actually called upon to do it. Call it “normal” constitutional interpretation, or “traditional” constitutional interpretation, or just plain old “constitutional interpretation.” And, interpreting in this usual way, we learn important things about our Constitution.

II. THE FEDERAL RIGHT TO A MINIMALLY ADEQUATE EDUCATION

Interpreting the Constitution in this familiar way, this Part demonstrates that there is a positive federal constitutional right to a minimally adequate education. That right is grounded in the Due Process Clauses of the Fifth and Fourteenth Amendments. In the roots of interpretive material—text, framing intentions, pre- and post-ratification practice—there are hints of such a right, but the matter remains up for grabs. When one turns to more recent developments, however—the very sort of thing prominent in today’s due process cases—the legitimacy of the federal right is easily equivalent to that of other rights the Court has identified. The fact that the right is federal does not mean education necessarily is under federal control; it means only that the states must provide the right in a way that meets minimal federal requisites.

⁹⁹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 849–50 (1992) (plurality opinion).

¹⁰⁰ *Id.* at 851–54.

¹⁰¹ *Id.* at 944, 952–53 (Rehnquist, J., concurring in part and dissenting in part).

A. *The Roots*

1. *Text*

The text of the Constitution of the United States does not speak specifically of a right to education, but that hardly is determinative. In *San Antonio Independent School District v. Rodriguez*,¹⁰² Justice Marshall's dissent made the obvious point that many settled rights and liberties find no place in the constitutional text:

I would like to know where the Constitution guarantees the right to procreate, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), or the right to vote in state elections, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964), or the right to an appeal from a criminal conviction, e.g., *Griffin v. Illinois*, 351 U.S. 12 (1956). These are instances in which, due to the importance of the interests at stake, the Court has displayed a strong concern with the existence of discriminatory state treatment. But the Court has never said or indicated that these are interests which independently enjoy full-blown constitutional protection.¹⁰³

That, of course, was 1973. In the intervening decades, additions to this list have blossomed, including *Lawrence v. Texas*¹⁰⁴ and *Cruzan v. Director, Missouri Dep't of Health*,¹⁰⁵ two decisions that few Americans are likely to assail.¹⁰⁶ Many other constitutional interpretations substantially bend or modify the text, and yet find wide acceptance, among them the recent decision in *District of Columbia v. Heller*¹⁰⁷ as well as fixtures such as *Griswold v. Connecticut*¹⁰⁸ and *Gideon v. Wain-*

¹⁰² *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

¹⁰³ *Id.* at 100 (Marshall, J., dissenting).

¹⁰⁴ *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (holding that consenting adults have the right to engage in homosexual sodomy).

¹⁰⁵ *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269–87 (1990) (acknowledging that patients in a “persistent vegetative state” have a right to refuse medical treatment).

¹⁰⁶ See, e.g., Richard S. Kay, *Causing Death for Compassionate Reasons in American Law*, 54 AM. J. COMP. L. 693, 697 (2006) (reporting that the right to refuse medical treatment “has now been widely recognized as constitutionally protected”); Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 SUP. CT. REV. 27, 27 (2003) (noting that “the Court’s remarkable decision in *Lawrence v. Texas* is best seen as . . . judicial invalidation of a law that had become hopelessly out of touch with existing social convictions” (citation omitted)).

¹⁰⁷ *District of Columbia v. Heller*, 554 U.S. 570, 576–636 (2008); see also *supra* notes 59–67 and accompanying text.

¹⁰⁸ *Griswold v. Connecticut*, 381 U.S. 479, 483–86 (1965) (holding that the Bill of Rights provides a right of marital privacy and that the prohibition of the use of contraceptives violates that right).

wright.¹⁰⁹ The text of the original Constitution is sparse, and it has become common and accepted practice to interpret the text in ways that elaborate more specific rights.

2. *Intentions and Pre/Post Adoption Practice*

Framing-era intentions regarding a right to education were ambivalent, and candor requires acknowledging that standing alone those intentions won't serve to establish the right to a minimally adequate education.¹¹⁰ Still, there were glimmers of an early national commitment to education, the roots from which contemporary sentiments grew. These glimmers appear in the writings of intellectual and political leaders, foundational statutes of the Continental Congress, and the language of early state constitutions.

At the time the Constitution was ratified and in the decades immediately following, education was a decentralized and patchy affair in the United States. Most towns and cities hosted "district schools" for average-income students and free schools for the poor, but these institutions were locally financed, disconnected from the state or federal government, and religiously oriented.¹¹¹ A district school would come about when a group of farms came together and decided to construct a public building for schooling, where their children could gather and be taught reading, writing, and moral codes of instruction.¹¹² The average district school often served dozens of students in one classroom, catered its schedule to the agricultural calendar, and lacked official textbooks.¹¹³ One recent article described schooling in the colonial period as "intermittent, unevenly distributed, and supported by parental initiative and tuition money rather than by state organization."¹¹⁴

The general public in these early years viewed education primarily in religious terms. Because most households farmed, schooling

¹⁰⁹ *Gideon v. Wainwright*, 372 U.S. 335, 342–45 (1963) (holding that the assistance of counsel in a criminal case is a constitutional right).

¹¹⁰ See, e.g., Paul L. Tractenberg, *Education*, in 3 *STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY* 241, 243 (G. Alan Tarr & Robert F. Williams eds., 2006).

¹¹¹ See, e.g., CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY 1780–1860*, at 13–17 (1983); EDWARD H. REISNER, *THE EVOLUTION OF THE COMMON SCHOOL* 278–79 (1930).

¹¹² See REISNER, *supra* note 111, at 278–80.

¹¹³ See KAESTLE, *supra* note 111, at 14–17; William A. Fischel, *Neither "Creatures of the State" nor "Accidents of Geography": The Creation of American Public School Districts in the Twentieth Century*, 77 U. CHI. L. REV. 177, 177–78 (2010).

¹¹⁴ Molly O'Brien & Amanda Woodrum, *The Constitutional Common School*, 51 CLEV. ST. L. REV. 581, 592 (2004).

was not an essential ingredient to their economic livelihoods.¹¹⁵ Rather, education was seen as a vehicle to a moral upbringing and religious salvation.¹¹⁶ When the Massachusetts legislature approved the Old Deluder Satan Act¹¹⁷ in 1647 requiring “towns of more than fifty households to employ a teacher for instruction in reading and writing,” the purpose was unabashedly religious: “to frustrate the ‘chiefe project of that ould deluder, Satan, to keepe men from the knowledge of the Scriptures.’”¹¹⁸

Still, many of the intellectual and political heavyweights of the Framing era championed education not just as an instrument for righteous living, but as a building block of democratic society. For Noah Webster, Thomas Jefferson, Benjamin Rush, and John Adams, government had a duty to make education widely available to safeguard the democratic order.¹¹⁹ In Virginia, Jefferson supported bills in 1779 and 1817 calling for public primary schools and public assistance for select students at the College of William and Mary.¹²⁰ He wrote to George Washington in the late 1780s expressing hope that the U.S. Congress would support public education in the new Constitution. In Pennsylvania, Benjamin Rush proposed “a state-supported university

¹¹⁵ KAESTLE, *supra* note 111, at 13 (explaining that ninety-five percent of the Founding-era population lived in farm-based communities of less than 2500 residents); *id.* at 22 (“The district school met the educational needs of rural people, broadly literate but not highly educated, whose communities still depended to a considerable extent upon . . . work for occupational training.”); REISNER, *supra* note 111, at 280–83 (“Some [men] were educated and some illiterate, but the great majority were neither. Even the so-called learned professions, the law, medicine, and the ministry, were largely filled with men who had slender technical training following a common school education . . . The conditions of life did not call for a great deal of schooling.”).

¹¹⁶ See, e.g., Joseph P. Viteritti, *The Inadequacy of Adequacy Guarantees: A Historical Commentary on State Constitutional Provisions That Are the Basis for School Finance Litigation*, 7 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 58, 70–71 (2007) (explaining that the federal Northwest Ordinance of 1787, which provided that “[r]eligion, morality, and knowledge being necessary to [good] government and the happiness of mankind, schools and the means of education shall forever be encouraged,” was influenced by the Massachusetts constitution and provided a model for other state constitutions (quoting Northwest Ordinance of 1787 art. III, *reprinted in* 1 U.S.C., at LV (2000))).

¹¹⁷ Massachusetts School Law of 1647 (Old Deluder Satan Act), *reprinted in* EDUCATION IN THE UNITED STATES: A DOCUMENTARY HISTORY 393 (Sol Cohen ed., 1974).

¹¹⁸ *Id.*, *reprinted in* EDUCATION IN THE UNITED STATES: A DOCUMENTARY HISTORY, *supra* note 117, at 394.

¹¹⁹ See LAWRENCE A. CREMIN, AMERICAN EDUCATION: THE NATIONAL EXPERIENCE: 1783–1876, at 103 (1980); KAESTLE, *supra* note 111, at 4–9.

¹²⁰ KAESTLE, *supra* note 111, at 8–9. The bill was consistently rejected. *Id.* at 9; see also CREMIN, *supra* note 119, at 107–10, (describing education proposals and Jefferson’s belief that education enabled commerce, morality, civic duty, social relationships, and the exercise of basic personal rights).

in Philadelphia” and a law creating “free schools in every town.”¹²¹ Rush envisioned that under his proposal, “the whole state [would] be tied together by one system of education.”¹²² Noah Webster wrote a treatise in 1790 describing education as a tool to develop the nation’s character.¹²³ He chastised state legislatures for not doing enough to establish public schools,¹²⁴ and urged district schools to shift away from biblical studies and towards secular subjects.¹²⁵

The early roots of America’s commitment to education also were immanent in two Land Ordinances enacted by the Continental Congress before the Constitution was even ratified. In 1785, Congress passed an ordinance governing the settlement of lands acquired through the 1783 Treaty of Paris. This act, the Land Ordinance of 1785, divided the United States’ new terrain into townships of 36 square miles.¹²⁶ The ordinance “reserved the lot N 16, of every township, for the maintenance of public schools, within the said township.”¹²⁷ Townships could sell those lands, but they had to dedicate the money to public schooling.¹²⁸ Two years later, Congress passed the Northwest Ordinance of 1787, which prescribed the procedures by which territories outside of the original thirteen states could apply for statehood.¹²⁹ Like the 1785 ordinance, the 1787 ordinance promoted education as a key principle of governance in newly admitted states.

¹²¹ KAESTLE, *supra* note 111, at 9.

¹²² *Id.* (quotation marks omitted).

¹²³ NOAH WEBSTER, *ON THE EDUCATION OF YOUTH IN AMERICA* (1790), *reprinted in* ESAYS ON EDUCATION IN THE EARLY REPUBLIC 41, 43 (Frederick Rudolph ed., 1965).

¹²⁴ *Id.* at 64–66 (“A good system of education should be the first article in the code of political regulations . . . In several States we find laws passed establishing provision for colleges and academies where people of property may educate their sons, but no provision is made for instructing the poorer rank of people even in reading and writing . . . The constitutions are *republican* and the laws of education are *monarchical*.”).

¹²⁵ *Id.* at 49 (“There is one general practice in schools which I censure with diffidence . . . this practice is the use of the Bible as a schoolbook.”). Webster believed schools should provide not “merely a knowledge of spelling books and the New Testament,” but an “acquaintance with ethics and with the general principles of law, commerce, money, and government.” *Id.* at 66.

¹²⁶ See An Ordinance for Ascertaining the Mode of Disposing of Lands in the Western Territory (May 20, 1785), 28 JOURNALS CONTINENTAL CONGRESS 375, 375–76 (1933).

¹²⁷ *Id.* at 378.

¹²⁸ See *Andrus v. Utah*, 446 U.S. 500, 507 (1980) (“The United States agreed to cede some of its land to the State in exchange for a commitment by the State to use the revenues derived from the land to educate the citizenry.”).

¹²⁹ Northwest Ordinance of 1787 art. III, *reprinted in* 1 U.S.C., at LVII (2006). For an exposition of how the Northwest Ordinance reflected the “organic law” of the first thirteen states of the United States, and shaped the constitutional law of the later-admitted states, see Matthew J. Hegreness, Note, *An Organic Law Theory of the Fourteenth Amendment: The Northwest Ordinance as the Source of Rights, Privileges, and Immunities*, 120 YALE L.J. 1820, 1855 (2011).

It declared: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."¹³⁰

The 1785 and 1787 ordinances laid the groundwork "for a policy of universal, free, public education."¹³¹ By providing each township a source of funds for education, namely funds tied to the sale of school lands, Congress disseminated an institutional model (already established in many parts of the country) in which local governments were intimately involved in the delivery of education. In obligating new states to "forever . . . encourage" schooling, Congress affirmed that education would be a public value.¹³² When Congress later passed "Enabling Acts" to formally admit new states to the Union, beginning with Ohio in 1802, it maintained the land grant system established by the 1785 ordinance, but made the states, rather than the townships, the recipients of the land grants.¹³³ New states established school funds to store the revenues earned from the sale of the federal land grants.¹³⁴ They often included provisions in their first constitutions to clarify that these funds were dedicated to education.¹³⁵ Although state school funds often turned out to be poorly managed, they served as

¹³⁰ 1 U.S.C., at LVII.

¹³¹ O'Brien & Woodrum, *supra* note 114, at 592 (quotation marks omitted).

¹³² See 1 U.S.C., at LVII.

¹³³ For a discussion and list of "Enabling Acts" for states admitted to the Union after 1802, see CTR. ON EDUC. POLICY, *PUBLIC SCHOOLS AND THE ORIGINAL FEDERAL LAND GRANT PROGRAM* 8, 10, 21–24 (2011). For an explanation of how the Enabling Acts maintained the model of the 1785 and 1787 ordinances but shifted the recipient of federal land grants from localities to states, see *Andrus v. Utah*, 446 U.S. 500, 522–24 (1980) (Powell, J., dissenting) ("Congress also imposed upon the State a binding and perpetual obligation to use the granted lands for the support of public education. All revenue from the sale or lease of the school grants was impressed with a trust in favor of the public schools. No State could divert school lands to other public uses without compensating the trust for the full market value of the interest taken.").

¹³⁴ Christopher J. Walker, *The History of School Trust Lands in Nevada: The No Child Left Behind Act of 1864*, 7 NEV. L.J. 110, 114 (2006) (explaining that new states "would place revenues earned from the sale of school lands in a permanent education fund or spent it directly on public school construction and maintenance").

¹³⁵ See, e.g., ALA. CONST. of 1819, art. VI ("[T]he General Assembly shall take measures to preserve, from unnecessary waste or damage, such lands as are or hereafter may be granted by the United States for the use of schools within each township in this State, and apply the funds, which may be raised from such lands, in strict conformity to the object of such grant."); NEV. CONST. art. XI, § 3 ("[A]ll property given or bequeathed to the State for educational purposes, and the proceeds derived from these sources, together with that percentage of the proceeds from the sale of federal lands which has been granted by Congress to this state without restriction or for educational purposes . . . are hereby pledged for educational purposes . . ."); Walker, *supra* note 134, at 117 (explaining that Michigan's constitution required "revenues from the sale of [federal] school lands be placed into a permanent education fund").

proto-public finance systems for education, which states later built upon during the common schools movement.¹³⁶

Even at the Founding, state constitutions signaled an early nationwide commitment to education. Six of the initial thirteen states included education clauses in their constitutions. The Massachusetts Constitution of 1780, drafted by John Adams, declared it the business of state legislators “to cherish . . . public schools.”¹³⁷ New Hampshire copied this language.¹³⁸ Four of the initial thirteen went further than Massachusetts, and included directives to their state legislatures to actually establish schools. For instance, the Pennsylvania Constitution of 1776 provided: “A school or schools shall be established in each county by the legislature, for the convenient instruction of youth, with such salaries, to the masters paid by the public, as may enable them to instruct youth at low prices.”¹³⁹ Georgia’s 1777 constitution not only required that schools “be erected in each county,” but that they be “supported at the general expense of the State, as the legislature shall hereafter point out.”¹⁴⁰

These early aspirations for education often ran into hard realities. Education costs money, money implied taxation, and taxation was anathema to many, especially for something that could still be consid-

¹³⁶ For descriptions of the mismanagement and poor performance of state school funds, see Steven M. Davis, *Preservation, Resource Extraction, and Recreation on Public Lands: A View from the States*, 48 NAT. RESOURCES J. 303, 327 (2008) (“[M]any states sold, gave away, or otherwise squandered their grants and thus never used them for their intended purpose.”); O’Brien & Woodrum, *supra* note 114, at 596 (explaining that in Ohio, “it was difficult to find renters for the state property,” that “the fund became vulnerable to fraud and diversion,” and that “[u]ltimately, the creation of a state-regulated, free school system could not depend on land grants from the federal government . . . [but] would require a transition from the land-use scheme to a system supported by general taxation”). For a discussion of the common schools movement, see *infra* Part II.C.1.

¹³⁷ MASS. CONST. ch. V, § 2.

¹³⁸ N.H. CONST. pt. II, art 83 (“[I]t shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools, to encourage private and public institutions, rewards and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and natural history of the country . . .”).

¹³⁹ PA. CONST. of 1776, § 44. North Carolina and Vermont had similar language. N.C. CONST. of 1776, § XLI (“That a school or schools shall be established by the legislature for the convenient instruction of youth, with such salaries to the masters paid by the public, as may enable them to instruct at low prices; and all useful learning shall be duly encouraged and promoted in one or more universities.”); VT. CONST. of 1777, ch. II, § XL (“A school or schools shall be established in each town, by the legislature, for the convenient instruction of youth, with such salaries to the masters, paid by each town; making proper use of school lands in each town, thereby to enable them to instruct youth at low prices. One grammar school in each county, and one university in this State, ought to be established by direction of the General Assembly.”).

¹⁴⁰ GA. CONST. of 1777, art. LIV.

ered a luxury good.¹⁴¹ There was no federal or state-run school system anywhere in the United States as late as 1830.¹⁴² The decisions over where to site schools were made at the most local levels, not by any state or federal decisionmaker. And in an era in which transportation was difficult, community members frequently fought over where the school should be situated.¹⁴³ In 1829, Sarah Hale wrote that measuring the center point of the district could land the school next to a frog pond.¹⁴⁴ While a link between schooling and government had been forged in the public imagination and had been implemented to varying degrees at the local level, no secure right to an education yet existed.

B. "Precedent"

An interpreter seeking to establish a federal right to education next encounters the seeming difficulty posed by judicial precedents, particularly those beginning with the Supreme Court's 1973 decision in *San Antonio Independent School District v. Rodriguez*. "Precedent" is in scare quotes in the subtitle for two notable reasons. First, education precedents generally sound in equal protection, leaving ample space for the Court to find a federal right to a minimally adequate education within the Due Process Clause. Second, in establishing due process rights, courts look not only or even primarily to judicial precedents, but also to the actual practices of citizens at the state and federal levels over time. This Section addresses the first point; subsequent Sections address the latter.

Rodriguez examined a challenge to Texas's funding method for public schools, which created a sharp disparity between what the richest and poorest districts received.¹⁴⁵ Such was often the case given states' heavy reliance on property taxes to fund school districts.¹⁴⁶ In brushing away the plaintiffs' claims, Justice Louis Powell emphasized the fact that plaintiffs were focusing on a positive right, not a negative

¹⁴¹ See KAESTLE, *supra* note 111, at 9 (describing factors that stymied early attempts at state education systems, including "[r]esistance to new taxes, devotion to local control and individual choice," and skepticism among the public about the necessity of formal education).

¹⁴² FREDERICK M. BINDER, *THE AGE OF THE COMMON SCHOOL, 1830-1865*, at 20 (1974).

¹⁴³ See KAESTLE, *supra* note 111, at 14.

¹⁴⁴ See SARAH J. HALE, *SKETCHES OF AMERICAN CHARACTER* 121 (Boston, Putnam & Hunt, and Carter & Hendee, 1829); KAESTLE, *supra* note 111, at 14.

¹⁴⁵ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 8-17 (1973).

¹⁴⁶ See, e.g., *id.*

one, and stated dismissively: "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution."¹⁴⁷

In every major case involving education from *Rodriguez* onward, the Justices arguably have failed to find such a right. *Plyler v. Doe*¹⁴⁸ was a challenge to a Texas law denying unlawful alien children access to public schools.¹⁴⁹ The Court found that the statute violated the Equal Protection Clause of the Fourteenth Amendment but reiterated that "[p]ublic education is not a 'right' granted to individuals by the Constitution," citing *Rodriguez*.¹⁵⁰ In *Kadramas v. Dickinson Public Schools*,¹⁵¹ the Court turned away a challenge to a state law permitting certain school districts to require parents to pay part of the cost of transporting their kids to school.¹⁵² The Supreme Court noted, "[I]t is difficult to imagine why choosing to offer the service should entail a constitutional obligation to offer it for free."¹⁵³ Ultimately, the Court concluded, "[T]he statute challenged in this case discriminates against no suspect class and interferes with no fundamental right."¹⁵⁴

Still, the Justices of the Supreme Court have had a very difficult time closing the book on a right to education. Their decisions frequently contain a paean to education and hedge on what has been resolved. Even in the Equal Protection Clause cases, the Court has reserved the question of what should occur if the state were to provide less than a minimally adequate education to public school pupils.¹⁵⁵ In *Rodriguez*, the state "assure[d]" the Court that it provided "'every child in every school district an adequate education,'" and "[n]o proof was offered at trial persuasively discrediting or refuting the State's assertion."¹⁵⁶ Accordingly, the Court held that "[e]ven if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either [the] right [to speak or vote], we have no indication that the

¹⁴⁷ *Id.* at 35.

¹⁴⁸ *Plyler v. Doe*, 457 U.S. 202 (1982).

¹⁴⁹ *See id.* at 205.

¹⁵⁰ *Id.* at 221, 230 (citing *Rodriguez*, 411 U.S. at 35).

¹⁵¹ *Kadramas v. Dickinson Pub. Sch.*, 487 U.S. 450 (1988).

¹⁵² *See id.* at 452, 454, 456, 462.

¹⁵³ *Id.* at 462.

¹⁵⁴ *Id.* at 465.

¹⁵⁵ *See* Penelope A. Preovolos, *Rodriguez Revisited: Federalism, Meaningful Access, and the Right to Adequate Education*, 20 SANTA CLARA L. REV. 75, 83 (1980) (contending that *Rodriguez* "did not decide that education is not a fundamental right, but that the facts of *Rodriguez* did not violate that right").

¹⁵⁶ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973) (quoting appellants' brief and reply brief).

present levels of educational expenditures in Texas provide an education that falls short.”¹⁵⁷ Seven years later, Justice Powell (the author of *Rodriguez*) affirmed a district court when it drew on *Rodriguez* to enjoin Texas officials from closing public schools to undocumented children.¹⁵⁸ The district court had read *Rodriguez* as leaving open whether there was “a constitutional right to a minimal level of free public education,” and Justice Powell found this reading to be “reasoned.”¹⁵⁹ While not deciding “the merits of this case,” Powell acknowledged that the “[district] court’s decision is reasoned.”¹⁶⁰ In *Plyler*, the Supreme Court found that an outright denial of public education to undocumented children flunked even the rational basis test.¹⁶¹ The Court explained that “[b]y denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.”¹⁶² In *Papasan v. Allain*,¹⁶³ the Supreme Court described as open the question of whether there is a federal right to minimally adequate education.¹⁶⁴

When one looks to Due Process Clause cases, one finds not only an open question, but a jurisprudential basis for a federal right to education. Modern-day substantive due process, which is to say substantive due process in the service of something other than economic liberty, got its start in cases involving education. In *Meyer v. Nebraska*,¹⁶⁵ the Court struck down a state law forbidding the teaching of foreign languages to students before they finished the eighth grade.¹⁶⁶

¹⁵⁷ *Id.* at 36–37.

¹⁵⁸ *Certain Named & Unnamed Non-Citizen Children v. Texas*, 448 U.S. 1327, 1327–32, 1334 (1980). Technically, the Court vacated a stay of the district court’s decision, which had been imposed by the Fifth Circuit.

¹⁵⁹ *Id.* at 1332 (“[T]he court relied on a reservation in *San Antonio Independent School District v. Rodriguez* . . . to find room for its holding that there is a constitutional right to a minimal level of free public education. Thus, while not finding direct support in our precedents, the court concluded that these holdings are consistent with established constitutional principles.”).

¹⁶⁰ *Id.*

¹⁶¹ See *Plyler v. Doe*, 457 U.S. 202, 223–30 (1982).

¹⁶² *Id.* at 223.

¹⁶³ *Papasan v. Allain*, 478 U.S. 265 (1986).

¹⁶⁴ *Id.* at 285 (“As *Rodriguez* and *Plyler* indicate, this Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review.”).

¹⁶⁵ *Meyer v. Nebraska*, 262 U.S. 390 (1923).

¹⁶⁶ *Id.* at 400, 403.

*Pierce v. Society of Sisters*¹⁶⁷ toppled a state law prohibiting private education.¹⁶⁸ And in *Troxel v. Granville*,¹⁶⁹ Justice Souter's opinion concurring in the judgment reaffirmed the principles in *Meyer* and *Pierce*, stating, "We have long recognized that a parent's interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment."¹⁷⁰

Finally, if ever there were a precedential promise to deliver on, it was issued in *Brown v. Board of Education*.¹⁷¹ In *Brown*, the Court famously declared:

*Today, education 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. Today it 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.*¹⁷²

Brown focused on citizenship and opportunity. In an age of global supercompetitiveness, its sentiment—"it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education"—rings even truer. For some, *Brown*'s landmark holding that segregation in schools was unconstitutional is centered more squarely on the "fundamental" status of education, rather than on the universal impermissibility of racial classifications.¹⁷³ Even the equal protection precedents since *Brown* denying a federal right to education frequently have alluded to *Brown*'s promise.¹⁷⁴

¹⁶⁷ *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

¹⁶⁸ *Id.* at 530, 534–35.

¹⁶⁹ *Troxel v. Granville*, 530 U.S. 57 (2000).

¹⁷⁰ *Id.* at 77 (Souter, J., concurring in the judgment).

¹⁷¹ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹⁷² *Id.* at 493 (emphasis added).

¹⁷³ See Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 239 (1991).

¹⁷⁴ See, e.g., *Plyler v. Doe*, 457 U.S. 202, 222–23 (1982) (stating that the passage excerpted

C. Practice: The State Story

When it comes to rights under the Due Process Clause, what matter are the actual practices in the states and the federal government, those that constitute our national history and tradition.¹⁷⁵ Take as a guide one of the most conservative statements of that principle, by Justice Scalia in *Michael H. v. Gerald D*¹⁷⁶:

In an attempt to limit and guide interpretation of the Clause, we have insisted not merely that the interest denominated as a “liberty” be “fundamental” . . . but also that it be an interest traditionally protected by our society. As we have put it, the Due Process Clause affords only those protections “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”¹⁷⁷

It is here, in the “traditions and conscience” of the country, reflected in our laws and practices over the 150 years from the 1830s through the 1980s, that the constitutional right to an adequate education is evident.

The story of education’s implantation into the de facto American Bill of Rights is one of punctuated equilibrium. At times the process was gradual, as the public’s notion of the appropriate guarantor of education shifted from the local community to the state, and then in some important respects even to the federal government. But there also were periods of rapid development and change. This Section describes developments in the states between the mid-1800s through Reconstruction, and then in the period following the Supreme Court’s decision in *Rodriguez*. The following Section describes a similar process of punctuated equilibrium at the federal level.

I. Common Schools Movement

The first period of rapid development concerning the right to education was the common schools movement, dating roughly from 1830 through 1870. The common schools movement left two key legacies. First, it bestowed upon American society the statewide public school system—a centrally administered organization of public schools, over-

above from *Brown* “still holds true” and describing the “inestimable toll” inflicted upon those without access to education); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29–30 (1973) (describing the continuing vitality of the *Brown* Court’s description of the paramount importance of education for state and local government and citing cases that express the “abiding respect for the vital role of education in a free society”).

¹⁷⁵ See *supra* Part I.

¹⁷⁶ *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

¹⁷⁷ *Id.* at 122 (footnote omitted) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

seen by a state superintendent or department of education and financed by state income tax revenues in addition to local taxes. Second, by the end of the movement, almost all state constitutions provided for an affirmative right to education.

The period of 1790 through 1850 saw substantial growth in the public's demand for education. In rural districts, particularly in the North, district school enrollment spiked as trade and capitalism elevated the value of an education, even in the countryside.¹⁷⁸ Rural families increasingly were eager to send their children, including daughters, to school.¹⁷⁹ In urban districts, the demand for education accelerated due to higher rates of urbanization and industrialization.¹⁸⁰ City and state governments began to pump money into charity schools so they could operate as the "common schools" for students in metropolitan areas—open and free for all.¹⁸¹

The common schools movement was motivated in part by nativist sentiments, as waves of immigrants arrived from Ireland and Germany in 1810 through 1840. Immigrants from Europe brought new languages and new religions, particularly Catholicism, sparking fears of moral decay and sectarian fragmentation among the Anglo-Saxon, Protestant public.¹⁸² Many looked to public schooling as a key tool for preserving "American" values and identity.¹⁸³

178 See KAESTLE, *supra* note 111, at 23–25, 65–66, 69.

179 *Id.* at 26–29.

180 See *id.* at 63–65.

181 See *id.* at 57–59. For example, the New York Free School Society was "[i]ncorporated in 1805 to serve children of churchless indigent parents." *Id.* at 57. It later "changed its name to the Public School Society and invited all children to attend its schools," and in 1832, the school stopped charging tuition to any students. *Id.* at 57–58. In Philadelphia, a system of charity schools for the poor created around the turn of the nineteenth century was eventually taken over by a "Board of Controllers" formed by the state legislature. *Id.* at 58. In 1836, the Pennsylvania legislature made the system accessible to all students. *Id.* at 58, see also Binder, *supra* note 142, at 14 (describing New York City charity schools during the 1820s and recounting how the "non-governmental Public School Society" declared in 1829, "[T]hese schools should be supported from public revenue, should be public property, and should be open to all, not as charity, but as a matter of common right." (quotation marks omitted)).

182 See BINDER, *supra* note 142, at 10–11 (recounting fears of moral decay); Rosemary C. Salomone, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, 14 YALE L. & POL'Y REV. 169, 174 (1996) ("The communal isolation of newly arrived immigrants, their low economic status, and their high rates of illiteracy posed a threat to the vitality of the republic. The school would teach the newcomers the proper attitudes and values of American democracy and foster an understanding and appreciation for American social institutions.").

183 See DAVID TYACK & ELISABETH HANSOT, *MANAGERS OF VIRTUE* 54 (1982) ("[T]he common school was expected to inculcate the Protestant-republican ideology in the newcomers. Nothing less was at stake, thought the reformers, than the perpetuity of the republic.").

But the movement was also driven by egalitarian and progressive idealism—the notion that all students in America deserve a quality education, because education is foundational to the myriad other rights protected by the republic. According to one observer, one of the movement’s journals, the *Common School Advocate*, “declared ‘*It is the child’s right to be educated*; and it is not only his right but it is *our* indispensable duty to provide for the education of every child in the State.’”¹⁸⁴ A group of dedicated activists was primarily responsible for publicizing this message.¹⁸⁵ The inspirational leaders of the common school movement included Calvin Stowe, Horace Mann, Henry Barnard, John Pierce, and William Seward.¹⁸⁶ These and other supporters traveled from town to town like “circuit riders,” giving speeches to local communities, teachers, parents, and elected officials.¹⁸⁷ They collaborated across states to publish journals and run training institutes for teachers.¹⁸⁸ After several decades of their tireless campaigning, the common schools crusaders succeeded in galvanizing a social movement that took root locally throughout the United States.¹⁸⁹

The goals of the common schools movement were multiple, and largely successful. First, reformers sought to consolidate schooling. They advocated merging district schools into town school systems and placing all common schools under the supervision of a newly established office of the state superintendent.¹⁹⁰ They lambasted the “evils of the district system,” arguing that decentralized management was responsible for incompetent teachers, insufficient school resources (because local communities were reluctant to tax themselves), and inequalities between districts.¹⁹¹ Second, reformers sought for every

¹⁸⁴ Editorial, *The Right of a Child to Education—Robbery to Withhold It*, COMMON SCH. ADVOC., Jan. 1, 1847, at 98; see also Emily Zackin, Positively Constitutional 98 (May 5, 2012) (unpublished Ph.D. dissertation, Princeton University) (on file with author) (quoting Editorial, *supra*, at 98).

¹⁸⁵ See KAESTLE, *supra* note 111, at 104–05.

¹⁸⁶ See Binder, *supra* note 142, at 91; KAESTLE, *supra* note 111, at 103–05; REISNER, *supra* note 111, at 394; TYACK & HANSOT, *supra* note 183, at 50, 55–56.

¹⁸⁷ See TYACK & HANSOT, *supra* note 183, at 47–51.

¹⁸⁸ See *id.*

¹⁸⁹ See *id.* For an in-depth study of how common schools activists such as Calvin Stowe galvanized a social movement in Ohio, see O’Brien & Woodrum, *supra* note 114, at 599–605.

¹⁹⁰ See KAESTLE, *supra* note 111, at 112, 114. Vermont’s state superintendent in 1846 called “small districts . . . the ‘paradise of ignorant teachers.’” *Id.* at 112. John Pierce in Michigan advocated “union schools,” which “brought together children from several districts, allowing grading . . . [and] more advanced instruction.” *Id.* Illinois’ superintendent in 1861 also called for rural schools to be consolidated, moving local control from districts to towns. *Id.* at 113.

¹⁹¹ See *id.* at 111–12.

child to be guaranteed a free education.¹⁹² Statewide school taxes were the alternative to “rate bills” and “subscription terms” many poor parents could ill afford.¹⁹³ Third, the reformers sought to professionalize teaching and to enhance the quality of education. They sought a longer school year, more regular attendance, and teacher training.¹⁹⁴

By 1880 most state legislatures had created centralized, administrative infrastructures to oversee public education.¹⁹⁵ Typically there was a superintendent or education commissioner’s office, a statewide tax to help fund public schools, and a legislative formula for distributing the revenues to local districts.¹⁹⁶ Echoing Founding-era funding concerns, imposition of the statewide tax was the most politically controversial piece of the common schools agenda, though it ultimately prevailed.¹⁹⁷

State constitutions reified these tangible reforms in a way that makes the case for a federal right under the Due Process clause particularly compelling. In 1834, only eleven out of twenty-four state constitutions, or just under fifty percent, had contained any language on education.¹⁹⁸ By 1868, thirty-six out of thirty-seven states, or ninety-seven percent, included constitutional provisions obligating state governments to provide public education to all students.¹⁹⁹ In an exhaustive survey of state constitutions at the time of the framing of the Fourteenth Amendment, Steven Calabresi and Sarah Agudo characterize this figure as “in many ways the most important, and perhaps the most surprising” finding.²⁰⁰ They further calculate that “[n]inety-

¹⁹² See BINDER, *supra* note 142, at 13.

¹⁹³ See, e.g., *id.* at 88–90 (recounting the work of education reformers in Pennsylvania to implement a statewide “school tax”); KAESTLE, *supra* note 111, at 117; O’Brien & Woodrum, *supra* note 114, at 608–10 (describing the campaigns of Ohio’s teachers’ association to convince the public to support general taxation for schooling).

¹⁹⁴ KAESTLE, *supra* note 111, at 111.

¹⁹⁵ See Tractenberg, *supra* note 110, at 245.

¹⁹⁶ See O’Brien & Woodrum, *supra* note 114, at 625–26; Tractenberg, *supra* note 110, at 245.

¹⁹⁷ In Wisconsin, voters created, abolished, and reestablished a free school system. KAESTLE, *supra* note 111, at 149. In Pennsylvania, the legislature began with an optional program in 1834, in which districts that taxed their bases for common schools would receive matching funds, but even this program was controversial. BINDER, *supra* note 142, at 89. Thaddeus Stevens delivered a famous speech in defense of the statewide school tax in 1835, saving it from repeal. *Id.* at 89–90.

¹⁹⁸ Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 ALB. L. REV. 1459, 1467 (2010).

¹⁹⁹ See *id.*

²⁰⁰ Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions*

two percent of all Americans in 1868 lived in states whose constitutions imposed this duty on state government.”²⁰¹ Calabresi and Agudo contend that the right to education is not only “deeply rooted in American history and tradition,” it arguably became federalized with the ratification of the Fourteenth Amendment.²⁰²

Moreover, the texts of these education clauses ensured that education was a right with concomitant duties for government.²⁰³ Rather than simply “encourage” the legislature to support schools, states now required their legislatures to establish or maintain schools, and to provide enough financial support such that public school education would be free. The Mississippi Constitution of 1868 was typical, providing:

[I]t shall be the *duty of the legislature* to encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement, by *establishing* a uniform system of *free public schools*, by *taxation or otherwise*, for all children between the ages of five and twenty-one years, and shall, as soon as practicable, establish schools of higher grade.²⁰⁴

Ohio in 1851, Minnesota in 1857, West Virginia in 1863, South Carolina in 1868, and Pennsylvania in 1874 all amended their state constitutions to add similar language.²⁰⁵ North Carolina’s drafters inserted an educational guarantee directly into the state’s bill of rights.²⁰⁶ Pennsylvania’s drafters even went so far so as to include a mandatory appropriations clause, instructing that the legislature “shall appropriate at least one million dollars each year” to support public schools.²⁰⁷ Several states specified the age range of students who should benefit, as well as the minimum school terms that must be pro-

when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?, 87 TEX. L. REV. 7, 108 (2008).

²⁰¹ *Id.* at 109.

²⁰² *Id.* at 108–11.

²⁰³ Tractenberg, *supra* note 110, at 245 (documenting the “evolution from relatively simple to much lengthier and more detailed education provisions”); Zackin, *supra* note 184, at 98–100 (contending that “the texts of these provisions were understood and drafted in order to justify demands on government, and that as a result, we should recognize these provisions as rights”; describing, for example, how delegates at the Ohio constitutional convention in 1850 crafted a constitutional provision that would “leave the state legislature with no choice but to act . . . to ensure that [the] government[] would be forced to establish and support public schools”).

²⁰⁴ MISS. CONST. of 1868, art. VIII, § 1 (emphases added).

²⁰⁵ OHIO CONST. of 1851, art. VI, § 2; MINN. CONST. art. XIII, § 1 (amended 1974); W. VA. CONST. of 1872, art. XII, § 1; S.C. CONST. of 1868, art. X, §§ 3–4; PA. CONST. of 1874 art. X, § 1.

²⁰⁶ N.C. CONST. of 1868, art. I, § 27 (“The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.”).

²⁰⁷ Zackin, *supra* note 184, at 98.

vided.²⁰⁸ One of the key objectives of education clauses of this mold was to require the state to standardize the curriculum from locality to locality. As the Minnesota Supreme Court explained in 1871: “The object [of the Education Clause] is to insure a regular method throughout the state whereby all may be enabled to acquire an education which will fit them to discharge intelligently their duties as citizens of the republic.”²⁰⁹

In the decades following the common school movement, states focused on developing and refining their new bureaucratic structures for education.²¹⁰ David Tyack describes the years between roughly 1890 and 1930 as an era of “administrative progressives”—a period during which a new generation of professionally trained educators, professors, and superintendents pushed state legislators to further centralize and professionalize the administration of education.²¹¹ One priority among reformers was for states to take over the licensing of teachers.²¹² Another was for states to increase the aid extended to districts so that curriculums and resources could be standardized.²¹³ When Oregon overhauled its school tax in 1903 to equalize per-pupil expenditures, it was championed as a model.²¹⁴ Finally, reformers promoted school surveys. Between 1905 and 1910, states appointed a whopping twenty-eight education commissions to evaluate their schools and recommend improvements.²¹⁵ Positive state law governing schooling mushroomed during the first half of the twentieth century, with state legislatures and state departments of education in-

208 For examples, see Tractenberg, *supra* note 110, at 275–77. For instance, the Mississippi Constitution of 1868 mandated free public schools for “all children between the ages of five and twenty-one-years.” *Id.* at 275 n.37. California’s Constitution of 1879 mandated six months of free public schooling, while Colorado and Michigan required three months. *Id.* at 277 n.43.

209 *Bd. of Educ. v. Moore*, 17 Minn. 391, 394 (1871).

210 See Tractenberg, *supra* note 110, at 242–43.

211 DAVID TYACK ET AL., *LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785–1954* 111–12 (1987); see also TYACK & HANSOT, *supra* note 183, at 107 (“[T]he twentieth-century managers sought to ‘take schools out of politics’ and to shift decision making upward and inward in hierarchical systems of management.”); Aaron J. Saiger, *The School District Boundary Problem*, 42 URB. LAW. 495, 511 (2010) (describing Progressive Era efforts to “realize the economies of scale” in education through school district consolidation and centralization of control).

212 See TYACK ET AL., *supra* note 211, at 111. By the 1930s, this had become the norm. See DAVID L. ANGUS, EDUC. CONSUMER FOUND., *PROFESSIONALISM AND THE PUBLIC GOOD: A BRIEF HISTORY OF TEACHER CERTIFICATION* 16 (Jeffrey Mirel ed., 2001), http://education-consumers.org/briefpdfs/1.7-history_teacher_certification.pdf.

213 See TYACK ET AL., *supra* note 211, at 110–11.

214 See Barbara Bennett Woodhouse, “Who Owns the Child?”: Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995, 1033 & n.162 (1992).

215 See TYACK ET AL., *supra* note 211, at 113.

volving themselves in everything from curriculum, to attendance, to student assignments, to teacher training.²¹⁶

By 1918, education was compulsory in every state of the union.²¹⁷ Reality may have fallen behind rhetoric; otherwise FDR would not have had to include “[t]he right to a good education” in his Second Bill of Rights.²¹⁸ Still, the compulsory nature of the right throughout the nation is not without its own significance. Even for a Supreme Court skittish about positive rights in general, the presumptions change somewhat in cases—such as prisons—where the person seeking the right is in effect the state’s ward.²¹⁹ Although the analogy to schools is not perfect, it is not far off. Had the state(s) not created a right to education and made it compulsory for a child to attend a public school or its equivalent, it is difficult to say what the private provision of education would look like. But the compulsory nature of the state’s command encouraged reliance on the state and the creation of limited alternatives, in a manner not so terribly different from cases in which the Court has found a positive right.²²⁰

2. State Adequacy Movements

In the years following the Supreme Court’s decision in *Rodriguez*, another burst of activity in the states took hold, which ultimately guaranteed that the right to education meant something. Between the

²¹⁶ See *id.* at 114–15.

²¹⁷ Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 823 (1985).

²¹⁸ Franklin D. Roosevelt, President of the United States, State of the Union Message to Congress (Jan. 11, 1944), available at http://www.fdrlibrary.marist.edu/archives/address_text.html.

²¹⁹ E.g., *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983) (holding that the Due Process Clause of the Fourteenth Amendment requires a state to provide medical care to persons in police custody); *Youngberg v. Romeo*, 457 U.S. 307, 317–19 (1982) (holding that “[w]hen a person is institutionalized—and wholly dependent on the State . . . a duty to provide certain services and care does exist” under the Fourteenth Amendment, and this duty includes “provid[ing] minimally adequate or reasonable training [to involuntarily committed, developmentally disabled individuals] to ensure safety and freedom from undue restraint”); *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (holding that under the Eighth Amendment, the state has an “obligation to provide medical care for those whom it is punishing by incarceration”).

²²⁰ See Jenna MacNaughton, Comment, *Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune*, 3 U. PA. J. CONST. L. 750, 768–69 (2001) (tracing how lower courts have expanded affirmative duties of states to a broader set of situations where “a government actor’s failure to fulfill a promise of protection . . . created a special relationship due to the [individual’s] reliance on that promise”); see also Note, *supra* note 9, at 1341–44 (arguing that, taken together, compulsory education laws and the widespread failure of public schools to meet standards set by the No Child Left Behind Act “might provide a . . . viable basis for recognizing educational rights”).

Progressive Era and the 1970s, actual practice fell behind the guarantees of positive law, particularly in certain communities.²²¹ When the members of those disadvantaged communities sought redress in the federal courts, they were—as we have seen—turned away.²²² So the movement for improvement quickly turned back to the states for redress, continuing its relentless march toward educational adequacy, as guaranteed by state constitutions.

What mattered most, ultimately, for the expansion of education rights during this period, was the judicial and legislative dialogue that was part of the “third wave” of school reform. The lawsuits filed in federal courts in the 1960s and 70s challenging the inequality of school funding as a matter of federal equal protection law, up through and including *Rodriguez*, are often termed the “first wave” of education reform litigation. Following *Rodriguez*, education reformers initiated a “second wave” of suits, seeking to equalize district funding as a matter of *state* equal protection law.²²³ These “equity” suits experienced mixed success at best; about twice as many state courts ruled against plaintiffs as for them.²²⁴ Third-wave suits were brought not to equal-

²²¹ See *supra* notes 145–54 and accompanying text.

²²² See *supra* notes 145–54 and accompanying text.

²²³ See Jeffrey S. Sutton, *San Antonio Independent School District v. Rodriguez and its Aftermath*, 94 VA. L. REV. 1963, 1980 (2008) (“If there is one thing that the last 35 years have shown, it is that when *Rodriguez* indicated that solutions to the country’s public-school funding problems would have to come from state courts (or legislatures), the political pressures at the state level increased—to considerable effect. One can fairly wonder whether the reforms developed by 50 state legislatures and required by 28 state supreme courts over the last 35 years would have been as far-reaching if the *Rodriguez* Court had not shifted the spotlight on this issue to the States.”).

²²⁴ Our research shows plaintiffs were successful in six states in equity-based lawsuits. Four of these decisions postdated *Rodriguez*. See *DuPree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 91 (Ark. 1983) (holding that Arkansas’s system for school finance violated the state’s equal protection clause); *Horton v. Meskill*, 376 A.2d 359, 375 (Conn. 1977) (holding the same for Connecticut’s system); *Pauley v. Kelley*, 255 S.E.2d 859, 863 (W. Va. 1979) (holding that plaintiffs could proceed to trial on their state-based equity claim); *Washakie Cnty. Sch. Dist. No. One v. Herschler*, 606 P.2d 310, 315 (Wyo. 1980) (same). Two predated *Rodriguez*. See *Serrano v. Priest*, 487 P.2d 1241, 1244, 1249 n.11 (Cal. 1971) (en banc) (finding that California’s school finance system violated the state’s equal protection clause); *Robinson v. Cahill*, 287 A.2d 187, 214 (N.J. Super. Ct. Law Div. 1972) (“The New Jersey system of financing public education denies equal protection rights guaranteed by the New Jersey and Federal Constitutions. . . . No compelling state interest justifies New Jersey’s present financing system. It is doubtful that this system even meets the less stringent ‘rational basis’ test normally applied to the regulation of state fiscal or economic matters.”). Meanwhile, Michael Rebell counts fifteen states in which plaintiffs lost on their equity claims by 1988. Michael A. Rebell, *Educational Adequacy, Democracy, and the Courts*, in *ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL: CONFERENCE SUMMARY* 218, 227 (Timothy Ready, Christopher Edley, Jr., & Catherine E. Snow eds., 2002); see also Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48

ize district funding under state constitutions' equality provisions, but to ensure an adequate education for every child under state constitutions' education clauses—exactly what is germane to the present inquiry.²²⁵

Today, every state constitution contains a provision on education.²²⁶ In addition, some thirty-one state courts, most of them high courts, have held that the state constitutional provision has substantive content: it guarantees a right to a minimally adequate education.²²⁷

VAND. L. REV. 101, 116, 136 (1995). Two notable cases where plaintiffs lost equity-oriented lawsuits were *Olsen v. State*, 554 P.2d 139, 149 (Or. 1976), and *Danson v. Casey*, 399 A.2d 360, 363 (Pa. 1979).

²²⁵ An early adequacy suit was *Seattle School District No. 1 v. State*, 585 P.2d 71, 76–77 (Wash. 1978). For a description of this development in litigation strategy, see William H. Clune, *The Shift from Equity to Adequacy in School Finance*, 8 EDUC. POL'Y 376 (1994).

²²⁶ Tractenberg, *supra* note 110, at 241. In 1985, Gershon Ratner published an article listing forty-eight states' constitutional provisions on education. Ratner, *supra* note 217, at 814 & n.138 (listing provisions in every state except Alabama and Mississippi). But the constitutions of both states not listed by Ratner do contain such provisions. ALA. CONST. art. XIV, § 256; MISS. CONST. art. 8, § 201.

²²⁷ Our research shows that in twenty-nine states, the highest state court has so held. *See* *Hull v. Albrecht*, 950 P.2d 1141, 1145 (Ariz. 1997) (en banc); *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 492 (Ark. 2002); *Serrano v. Priest*, 557 P.2d 929, 951 (Cal. 1977); *Lobato v. State*, 218 P.3d 358, 374 (Colo. 2009) (en banc); *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 253–54 (Conn. 2010); *McDaniel v. Thomas*, 285 S.E.2d 156, 165 (Ga. 1981); *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724, 734–35 (Idaho 1993); *Montoy v. State*, 62 P.3d 228, 235 (Kan. 2003); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 205 (Ky. 1989); *Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134, 1152 (Mass. 2005); *Skeen v. State*, 505 N.W.2d 299, 313–16 (Minn. 1993); *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 109 P.3d 257, 261 (Mont. 2005); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1376 (N.H. 1993); *Abbott ex rel. Abbott v. Burke*, 693 A.2d 417, 428 (N.J. 1997); *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661, 665 (N.Y. 1995); *Leandro v. State*, 488 S.E.2d 249, 254 (N.C. 1997); *Bismarck Pub. Sch. Dist. No. 1 v. State*, 511 N.W.2d 247, 259 (N.D. 1994); *DeRolph v. State*, 677 N.E.2d 733, 737 (Ohio 1997); *Abbeville Cnty. Sch. Dist. v. State*, 515 S.E.2d 535, 540 (S.C. 1999); *Davis v. State*, 804 N.W.2d 618, 643–49 (S.D. 2011); *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 752–53 (Tex. 2005); *Brigham v. State*, 692 A.2d 384, 395 (Vt. 1997); *Scott v. Commonwealth*, 443 S.E.2d 138, 141–42 (Va. 1994); *Seattle Sch. Dist. No. 1*, 585 P.2d at 85; *Pauley v. Kelly*, 255 S.E.2d 859, 877–78 (W. Va. 1979); *Vincent v. Voight*, 614 N.W.2d 388, 411 (Wis. 2000); *Campbell Cnty. Sch. Dist. v. State*, 907 P.2d 1238, 1258–59 (Wyo. 1995). We include Oregon in this group even though the Oregon Supreme Court has consistently refused to find the state in breach of its constitutional duty. *See, e.g., Pendleton Sch. Dist. 16R v. State*, 200 P.3d 133, 144–45 (Or. 2009) (“We agree that Article VIII, section 3, requires that the legislature provide a ‘minimum of educational opportunities.’ However, the legislature’s failure to fund the public schools sufficient to meet the quality goals established by law does not demonstrate that the legislature has *ipso facto* failed to provide a minimum of educational opportunities.” (citations omitted)). We also include Nevada, although the statement by the supreme court of that state that education was a “basic, substantive right” under the Constitution emerged in a case that dealt with the legislature’s failure to balance the state budget. *Guinn v. Legislature of Nev.*, 71 P.3d 1269, 1275 (Nev. 2003).

The ruling of the Washington Supreme Court is representative:

[T]he State's constitutional duty goes beyond mere reading, writing and arithmetic. It also embraces broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today's market as well as in the market place of ideas. . . . The constitutional right to have the State "make ample provision for the education of all [resident] children" would be hollow indeed if the possessor of the right could not compete adequately in our open political system, in the labor market, or in the market place of ideas.

In short . . . we hold that the[se constitutional concepts] constitute broad guidelines and that the effective teaching and opportunities for learning these essential skills make up the *minimum* of the education that is constitutionally required.²²⁸

Moreover, unlike the second-wave equity suits, successes have far outstripped failures in adequacy litigation. In only four states have courts ruled against plaintiffs on the issue of whether the constitution's education clause has substantive content, while in seven, the matter was deemed nonjusticiable.²²⁹ In the remaining nine states,

In two states, the highest court to consider whether the state constitution provides for a right to an adequate education, and to find in the affirmative, has been a trial court. For decisions in Alaska, see Consent Decree and Settlement Agreement, *Kasayulie v. State*, No. 3AN-97-03782CI (Alaska Super. Ct. June 26, 2012); *Moore v. State*, No. 3AN-04-9756, slip op. at 173-91 (Alaska Super. Ct. June 21, 2007). *Kasayulie* settled in 2012, with the state agreeing to provide \$146 million in additional funding to rural districts. For a decision regarding New Mexico, see *New Mexico*, NAT'L EDUC. ACCESS NETWORK (Mar. 2008), http://www.schoolfunding.info/states/nm/lit_nm.php3 (discussing *Zuni Sch. Dist. v. State*, CV-98-14-II (N.M. Dist. Ct. Oct. 14, 1999)).

²²⁸ *Seattle School Dist. No. 1*, 585 P.2d at 94-95.

²²⁹ For the four states in which courts ruled against the plaintiffs, see *Bonner v. Daniels*, 907 N.E.2d 516, 521 (Ind. 2009) ("As can be seen from the text of the Education Clause, its language speaks only of a general duty to provide for a system of common schools and does not require the attainment of any standard of resulting educational quality. . . . The Clause says nothing whatsoever about educational quality."); *King v. State*, 818 N.W.2d 1, 15-16 (Iowa 2012) ("[I]t seems untenable to argue that section 3 contained a judicially enforceable right to a free public education with certain minimum standards of quality." . . . In sum, given the wording and location of the education clause in our constitution, . . . we do not believe plaintiffs have stated a claim thereunder."); and *Jones v. State Board of Elementary and Secondary Education*, 927 So. 2d 426, 429-32 (La. Ct. App. 2005); *Committee for Educational Equality v. State*, 294 S.W.3d 477, 488 (Mo. 2009) ("Plaintiffs are attempting to read a separate funding requirement into section 1(a) that would require the legislature to provide 'adequate' education funding Such language does not exist."). For the seven states in which the matter was deemed nonjusticiable, see *Ex parte James*, 836 So. 2d 813, 815 (Ala. 2002); *Coalition for Adequacy & Fairness in School Funding, Inc. v. Chiles*, 680 So. 2d 400, 407 (Fla. 1996); *Lewis E. v. Spagnolo*, 710 N.E.2d 798, 800 (Ill.

there has not yet been a court ruling on the meaning of the right to education—either no suit challenging the state’s education system has been filed, or any suit initiated was settled or dismissed for other reasons.²³⁰

Adequacy litigation has resulted in tangible change on the ground. In West Virginia, for example, litigation prompted two rounds of legislative changes. Following a 1979 state supreme court decision interpreting the state constitution’s education clause to impose an affirmative obligation on the state, the legislature passed a statute overhauling school funding.²³¹ After a trial court in 1997 found that the state was still in breach of its duties, the legislature went further, and established a state office to perform school reviews.²³² In 2003, a trial court found that these reforms had made a difference, and the West Virginia system could finally be deemed constitutional.²³³

Similar stories can be told in Kentucky, North Carolina, Wyoming, and other states. In Kentucky, a watershed state supreme court decision in 1989, finding the state’s education system fell shy of constitutional adequacy,²³⁴ resulted in Kentucky’s Education Reform Act.²³⁵ The Act mandated a new funding formula to mitigate large financial disparities between school districts, as well as the use of new assessment tools and benchmarks throughout the state.²³⁶ In North Carolina, after a trial court judge in 2000 found the state’s education system deficient,²³⁷ the state created the “More at Four” preschool program, which by 2008 was serving about 30,000 low-income children each year.²³⁸ In Wyoming, the high court’s decisions in 1995 and 2001

1999); *Nebraska Coalition for Educational Equity & Adequacy v. Heineman*, 731 N.W.2d 164, 169 (Neb. 2007); *Oklahoma Education Ass’n v. State ex rel. Oklahoma Legislature*, 158 P.3d 1058, 1061 (Okla. 2007); *Marrero v. Commonwealth*, 739 A.2d 110, 113–14 (Pa. 1999); and *City of Pawtucket v. Sundlun*, 662 A.2d 40, 57–58 (R.I. 1995).

²³⁰ Our research shows that in Delaware, Hawaii, Maryland, Michigan, Mississippi, Tennessee, and Utah, no suit challenging the adequacy of the state’s education system has been filed.

²³¹ *Tomblin v. W. Va. State Bd. of Educ.*, Civil Action No. 75-1268, slip op. at 2–7 (W. Va. Cir. Ct. Jan. 3, 2003).

²³² *Id.*; see W. VA. CODE § 18-2E-5 (2011) (establishing the Office of Education Performance Audits).

²³³ *Tomblin*, Civil Action No. 75-1268, at 14–16.

²³⁴ *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 215 (Ky. 1989).

²³⁵ Kentucky Education Reform Act of 1990, 1990 Ky. Acts 1209.

²³⁶ See *id.*

²³⁷ *Hoke Cnty. Bd. of Educ. v. State*, No. 95 CVS 1158, slip op. at 43–46 (N.C. Super. Ct. Oct. 26, 2000).

²³⁸ Judge Howard E. Manning, Jr. found that North Carolina’s public education system failed to meet the state constitution’s mandate to provide children an equal opportunity to receive a sound basic education in *Hoke County Board of Education v. State*, No. 95 CVS 1158, slip

finding the education system unconstitutional prompted a series of reforms—from teachers' salaries, to the level of funding for at-risk students, to grants for capital construction—such that by 2008, the court announced the system's problems were cured.²³⁹

The claim here is not that third-wave litigation was an unqualified success; only that taken as a whole, it confirms that in a majority of states, and in the vast majority of states where courts have considered the issue, a constitutional right to education exists and mandates minimal adequacy. In some states, the realization of that right has nonetheless remained elusive or ephemeral. In New Jersey, two decades of litigation involving twenty different rulings by the state's courts led to substantial changes in the state's funding formula in 2008, only to be followed by legislative retreats from that formula three years later.²⁴⁰ In Ohio, four rulings by the state's supreme court in litigation that spanned over thirteen years resulted in insufficient legislative progress, with the court terminating its jurisdiction in 2003.²⁴¹ Still, combined with the state constitutional language of the late 1800s, the dialogue over adequacy made clear that those provisions had bite, and were recognized as such.

op. at 104–05 (N.C. Super. Ct. Apr. 4, 2002). His opinion was issued in four parts: October 12, 2000; October 26, 2000; March 26, 2001 (as amended by May 29, 2001 order); April 4, 2002. The opinions are available at *Index of States, NC, NAT'L EDUC. ACCESS NETWORK*, <http://schoolfunding.info/states/nc> (last visited August 31, 2012); see also ELLEN S. PEISNER-FEINBERG & JENNIFER M. SCHAAF, UNIV. OF N.C. AT CHAPEL HILL, EVALUATION OF THE NORTH CAROLINA MORE AT FOUR PRE-KINDERGARTEN PROGRAM: PERFORMANCE AND PROGRESS IN THE SEVENTH YEAR (2007–2008) 5 (2008), available at <http://fpg.unc.edu/project-related-resources/2863> (reporting that North Carolina's More at Four Program served 29,978 low-income and at-risk children during the 2007–2008 academic year).

²³⁹ See *Campbell Cnty. Sch. Dist. v. State*, 181 P.3d 43, 48, 51, 57–59, 73, 83–84 (Wyo. 2008) (describing this historical back-and-forth, and declaring that by 2008, the state had brought the system into compliance with the constitutional mandate).

²⁴⁰ In *Abbott ex rel. Abbott v. Burke*, 971 A.2d 989, 991, 1009 (N.J. 2009), which “mark[ed] the twentieth opinion or order issued in the course of the Abbott litigation,” the state supreme court held that New Jersey's School Funding Reform Act of 2008 had yielded an education funding system that, for the first time in decades, passed constitutional muster. Accordingly, the court granted the state relief from its prior remedial orders. *Id.* at 1009–10. But no less than two years later, the Abbott plaintiffs were back in court challenging the legislature's budget cuts to education, and the New Jersey Supreme Court again declared the state system constitutionally deficient. *Abbott ex rel. Abbott v. Burke*, 20 A.3d 1018, 1023–24 (N.J. 2011).

²⁴¹ The court ended its jurisdiction in *State ex rel. State v. Lewis*, 789 N.E.2d 195, 202–03 (Ohio 2003). For a summary of Ohio's education adequacy litigation, and the constitutional problems that went unmitigated, see Sonja Ralston Elder, Note, *Standing Up to Legislative Bullies: Separation of Powers, State Courts, and Educational Rights*, 57 DUKE L.J. 755, 777–78 (2007).

D. Practice: The Federal Story

Although the Supreme Court frequently relies on evolving state practices to identify due process rights, it also relies on evolving federal practice to discern commitments so deeply engrained in American consciousness that they must be recognized as *de facto* constitutional.²⁴² The federal story shows that just as the responsibility for education has shifted from local to state governments, it also has shifted in important ways to the federal government. Both Democratic and Republican administrations have urged, encouraged, and fostered this shift. And as control over education has centralized, the public's belief that the federal government must bear a responsibility for *guaranteeing* that right, as a constitutional matter, has deepened.

The third rail of education reform has long been the conviction—deeply grounded in federalism, but more aptly localism—that the responsibility for educating children should take place at the local level. In this the United States differs from most other countries.²⁴³ As the Court in *Rodriguez* explained:

The Texas system of school finance . . . assur[es] a basic education for every child in the State, [but also] permits and encourages a large measure of participation in and control of each district's schools at the local level. In an era that has witnessed a consistent trend toward centralization of the functions of government, local sharing of responsibility for public education has survived. The merit of local control was recognized last Term in both the majority and dissenting opinions in *Wright v. Council of the City of Emporia*, 407 U.S. 451 (1972). MR. JUSTICE STEWART stated there that “[d]irect control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society.”²⁴⁴

²⁴² One common source that courts use for guidance in this enterprise is congressional “super-statutes.” See William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001) (“A super-statute is a law or series of laws that (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does ‘stick’ in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law—including an effect beyond the four corners of the statute.”). Several of the education statutes discussed in this Section arguably possess this status.

²⁴³ See, e.g., Sean Cavanagh, *Resurgent Debate, Familiar Themes: Common-Standards Push Bares Unsettled Issues*, 29 EDUC. WK., Jan. 14, 2010, at 5 (noting that in “several higher-performing nations, a single set of national academic standards guides all or most . . . decisions [related to the public education system]” but that Americans often “regard nationwide standards as a threat to the United States’ federal system and the widely supported principle of state and local control over curriculum”).

²⁴⁴ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49 (1973).

Of course, one of the ironies of the *Rodriguez* language quoted above is that by the time the case reached the Supreme Court, the San Antonio School District had been dismissed as a defendant and actually filed a brief in support of the plaintiffs-appellees, advocating against local control.²⁴⁵ Their brief argued:

Education is a fundamental interest in every sense of the words.

. . . .

While a reasonable measure of local controls of schools is desirable, the present statutory financing system should not be justified in the name of local control. The state imposed system which necessarily results in wide variations in expenditures for education should be subordinate to the goal of providing equal educational opportunity for all.²⁴⁶

The motivations of local control have not always been noble ones. Originally they were grounded in religious animosities and fears about curricular control.²⁴⁷ The politics of racism later played their part.²⁴⁸ Funding also has been an issue, with wealthier districts seeking to devote resources to their own children.²⁴⁹

But today, there is notable evidence that the traditional preference for localism itself may be receding. As control over education's content, delivery, and funding increasingly comes from the federal government—through, for example, grants conditioned on meeting federal standards—school districts and states not only are losing their monopoly over education, but also their legitimacy in the public consciousness as the sole guarantors of the education right.²⁵⁰ Inceas-

²⁴⁵ See *id.* at 5 n.2.

²⁴⁶ Brief for San Antonio Independent School District as Amicus Curiae Supporting Respondents at 4, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1972) (No. 71-1332), 1972 WL 136437.

²⁴⁷ See *supra* notes 181–82 and accompanying text.

²⁴⁸ See Saiger, *supra* note 211, at 504 (“[T]he racialized school district boundary is no mere artifact of racial stratification. Since the United States began to enforce the prohibition on de jure school segregation, the territorially sovereign district, responsible only for its own resident students and not those nearby, has been a preeminent tool for resisting the racial integration of schools.”).

²⁴⁹ See, e.g., KEVIN CAREY & MARGUERITE ROZA, CTR. ON REINVENTING PUB. EDUC., SCHOOL FUNDING’S TRAGIC FLAW 6–9 (2008), http://crpe.edgateway.net/cs/crpe/download/csr_files/pub_crpe_disp_may08.pdf.

²⁵⁰ See Kimberly Jenkins Robinson, *Resurrecting the Promise of Brown: Understanding and Remediating How the Supreme Court Reconstitutionalized Segregated Schools*, 88 N.C. L. REV. 787, 793–94 (2010).

ingly, Americans see the federal government as playing a vital role in ensuring the adequacy of education.²⁵¹

1. Step One: Centralization in the States

The first step toward centralization was from localities to the states. As explored above, that process began during the common schools movement; continued through the late 1800s with the imposition of statewide school taxes;²⁵² and vastly accelerated from the 1970s through the present day, in response to adequacy reform movements.²⁵³ These developments yielded an unquestionable shift in funding for education to the state level.²⁵⁴ States now outspend localities; in the 2008–2009 school year, the states contributed approximately forty-seven percent of all funds for public elementary and secondary schools, while local governments contributed approximately forty-four percent.²⁵⁵

Accompanying fiscal centralization has come administrative control over education at the state level. States license teachers according to their own professional standards.²⁵⁶ State boards of education set curriculum and content standards for grades K–12, as well as achieve-

²⁵¹ See *id.* at 793 (“[T]he role of the federal government in public schools has risen to historic heights in recent years. The second Bush administration was able to obtain bipartisan support for the No Child Left Behind Act (“NCLB”) despite the fact that it represented the most significant federal involvement in public elementary and secondary schools in the nation’s history. In spearheading this expansion, the Bush administration acted in direct contradiction to prior Republican efforts to limit the federal role in education. One scholar has noted that passage of the NCLB occurred because both parties and the American public now realize that substantial federal action will be necessary to improve the nation’s schools.” (citations omitted)). But see Roderick M. Hills, Jr., *The Case for Educational Federalism: Protecting Educational Policy from the National Government’s Diseconomies of Scale*, 87 NOTRE DAME L. REV. 1941–2, 1978 (2012) (advocating against “federalization of curriculum, evaluation of teachers or students, or management and finance of schools,” because policymakers should give “deference to stably governed households in their educational decisions” and national control undermines “household” autonomy).

²⁵² See *supra* Part II.C.1.

²⁵³ See *supra* Part II.C.2.

²⁵⁴ See, e.g., John Meyer et. al, *Centralization, Fragmentation, and School District Complexity*, 32 ADMIN. SCI. Q. 186, 186 (1987) (documenting that before 1930, states supplied under twenty percent of school revenues and that this figure still hovered around forty percent in 1973).

²⁵⁵ U.S. CENSUS BUREAU, PUBLIC EDUCATION FINANCES: 2009, at 5 (2011), available at <http://www2.census.gov/govs/school/09f33pub.pdf>. In fiscal year 2010, K–12 spending represented 20.5% of state budgets. NAT’L ASS’N OF STATE BUDGET OFFICERS, FISCAL YEAR 2010 STATE EXPENDITURE REPORT 17 (2011).

²⁵⁶ Black, *supra* note 4, at 1404 (“[T]he states, rather than the local school districts, set teacher qualification and certification standards, as well as control teacher preparation programs.”).

ment standards for K–12 students.²⁵⁷ Today, thirty-three states have state takeover laws, and there have been an estimated seventy-three takeovers since the early 1980s.²⁵⁸ Notably, a large number of state takeovers in recent years have been for academic reasons, not just financial ones.²⁵⁹ State control efforts also are taking on innovative dimensions. For example, the state legislatures in Louisiana and Tennessee have authorized their departments of education to place persistently failing schools into statewide “school districts” run by the central government.²⁶⁰

2. Step Two: Progression Toward a Federal Role

The federal government’s direct activities in the educational sphere were limited before World War II.²⁶¹ During the Civil War,

²⁵⁷ See, e.g., VA. CODE ANN. § 22.1-253.13:1(B) (2011) (“The Board of Education shall establish educational objectives known as the Standards of Learning, which shall form the core of Virginia’s educational program At a minimum, the Board shall establish Standards of Learning for English, mathematics, science, and history and social science.”); KY. REV. STAT. ANN. § 156.160(1)(a) (2009) (“[T]he Kentucky Board of Education shall promulgate administrative regulations establishing . . . [c]ourses of study for the different grades”); N.C. GEN. STAT. § 115C-81(a)–(b) (2009) (“[T]he State Board of Education shall adopt a Basic Education Program for the public schools of the State.”). Under the No Child Left Behind Act of 2001, every state receiving Title I funding was required to create proficiency standards in the subjects of reading and mathematics for public school students. See *infra* notes 309–11 and accompanying text.

²⁵⁸ Kristi L. Bowman, *Before School Districts Go Broke: A Proposal for Federal Reform*, 79 U. CIN. L. REV. 895, 925 (2011). On takeovers generally, see Joseph O. Oluwole & Preston C. Green, III, *State Takeovers of School Districts: Race and the Equal Protection Clause*, 42 IND. L. REV. 343, 343 (2009).

²⁵⁹ Oluwole & Green, *supra* note 258, at 343.

²⁶⁰ The Louisiana legislature passed the Recovery School District Act in 2003, providing that any school throughout the state that “has been labeled an academically unacceptable school for four consecutive years” would be placed into the Recovery School District (“RSD”). See Recovery School District Act of 2003, 2003 La. Acts. 1293; LA. REV. STAT. ANN. § 17:10.5(A). Today, 123 schools in Louisiana are within the RSD. *Frequently Asked Questions, RECOVERY SCH. DIST.*, <http://www.rsdl.net/Resources/FAQs.aspx> (last visited Aug. 31, 2012). The Tennessee legislature passed the Tennessee First to the Top Act in 2010, creating the Achievement School District (“ASD”). Tennessee First to the Top Act of 2010, 2010 Tenn. Pub. Acts 1. Similar to the Louisiana RSD, the ASD was granted authority to take over consistently underperforming schools statewide. See Joy Resmovits, *Tennessee’s State-Controlled School District Puts Reform to the Test*, HUFFINGTON POST (May 13, 2011, 10:33 AM), http://www.huffingtonpost.com/2011/05/13/tennessee-state-controlled-school-district_n_860324.html. As of 2011, the ASD operated four schools in Memphis and one in Hamilton County. *Id.* Eight other schools have been classified as eligible for inclusion. *Id.*

²⁶¹ See Michael Heise, *Equal Educational Opportunity By the Numbers: The Warren Court’s Empirical Legacy*, 59 WASH. & LEE L. REV. 1309, 1316 (2002) (“Prior to the twentieth century, the federal government largely remained in the background Congress’s posture in the education sector during the nineteenth century is best described as passive and reactive.”).

Congress passed the Morrill Land Grant Act,²⁶² creating a network of agricultural colleges financed with funds from federal lands.²⁶³ In 1867, Congress established the U.S. Office of Education, but endowed it with a small staff and a narrow purpose of collecting statistical information on the country's schools.²⁶⁴ Congress broke ground during the Progressive Era with the Smith-Hughes Act of 1917,²⁶⁵ which created the first set of federal grants flowing directly to primary and secondary schools.²⁶⁶ However, Congress specified that the funds be used only to support vocational programs in agriculture, home economics, "trade," and "industrial subjects."²⁶⁷ The federal role remained limited.

After World War II, three important changes in American society brought the central government deeper into the sphere of education. First, the middle class expanded significantly as a result of broader socioeconomic opportunities and the G.I. bill.²⁶⁸ A greater slice of Americans came to view high school graduation and college attendance as the norm, and to expect supportive policies from their federal government.²⁶⁹ Second, the Supreme Court's decision in *Brown v. Board of Education* and the civil rights movement of the 1950s and 60s elevated federal judges to local managers over the integration of public schools in dozens of cities and counties.²⁷⁰ Third, an increase in social awareness around issues of poverty and inequality provided an impetus for President Lyndon Johnson's Great Society Program, a key

²⁶² Morrill Land Grant Act of 1862, ch. 130, 12 Stat. 503 (codified as amended at 7 U.S.C. § 301 (2006)).

²⁶³ *Id.*

²⁶⁴ PATRICK J. MCGUINN, *NO CHILD LEFT BEHIND AND THE TRANSFORMATION OF FEDERAL EDUCATION POLICY, 1965–2005*, at 26 (2006).

²⁶⁵ Smith-Hughes Act, Pub. L. No. 64-347, 39 Stat. 929 (1917).

²⁶⁶ *See id.* §§ 1–4, 39 Stat. at 929–31.

²⁶⁷ *See id.* Congress appropriated several million dollars under the Act, from 1917 through 1926, and directed states to use the money for teachers' salaries and teacher training in the prescribed vocational programs. *Id.*

²⁶⁸ Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284. For sources tracing the expansion of the middle class in the postwar decade due, in great part, to the G.I. bill, see ROBERT A. BEAUREGARD, *WHEN AMERICA BECAME SUBURBAN* (2006) (tracing the growth in homeownership rates and middle class employment opportunities after World War II); EDWARD HUMES, *OVER HERE: HOW THE G.I. BILL TRANSFORMED THE AMERICAN DREAM* (2006) (analyzing how the G.I. bill helped expand the middle class).

²⁶⁹ MCGUINN, *supra* note 264, at 27. From 1940 to 1970, the American high school graduation rate among twenty-five and twenty-nine-year-olds rose from thirty-eight percent to seventy-five percent. *Id.* at 27 n.8.

²⁷⁰ *See, e.g.,* MARTHA MINOW, *IN BROWN'S WAKE: Legacies of America's Educational Landmark* 22–23 (2010) (describing how, after *Brown* and the passage of the 1964 Civil Rights Act, federal judges and other public officials "began actually to dismantle officially dual school districts . . . the Supreme Court itself joined in enforcing school desegregation").

component of which was the broadening of educational opportunities.²⁷¹ In 1965, Johnson secured passage of the Elementary and Secondary School Act (“ESEA”),²⁷² a path-breaking law that provided federal grants to every poor school district—or “Title I” districts—in America.²⁷³

The conversion of education by the 1960s from a state and local policy issue to one with significant national dimensions can be seen by tracing the number of speeches made by the Presidents of the United States containing the word “education.” Between 1789 and 1913, these speeches averaged two per year.²⁷⁴ By the presidencies of Truman (1945–1953) and Eisenhower (1953–1961), they rose to seventy-four and ninety-six per year, respectively.²⁷⁵ Under President Johnson, between 1963 and 1969, these speeches reached a whopping 621 per year.²⁷⁶

Still, the federal government’s focus in the 1950s, 60s, and 70s was primarily on expanding equity and access for disadvantaged groups—African Americans, the poor, the disabled, non-English speakers—but not on monitoring the quality or content of education in the nation’s schools.²⁷⁷ The Department of Education (“DoE”) finally

271 Patrick McGuinn & Frederick Hess, *Freedom from Ignorance?: The Great Society and the Evolution of the Elementary and Secondary Education Act*, in *THE GREAT SOCIETY AND THE HIGH TIDE OF LIBERALISM* 292–93 (Sidney M. Milkis & Jerome M. Mileur eds., 2005) (explaining how works by Michael Harrington, James Conant, and other social scientists in the 1950s and 60s “create[d] a much greater public awareness of the economic and educational inequalities” in the United States and helped fuel Johnson’s “war on poverty” in the 1960s).

272 Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended at 20 U.S.C. ch. 70 (2006)).

273 See *id.* The phrase “Title I” school districts derives from the fact that federal grants for low-income districts were codified in Title I of the statute. Note, though, that even during the passage of this Act, both the President’s Commissioner of Education and lead sponsors of the bill in Congress were careful to reiterate that the goal was for “the Federal Government [to] participate—not to seek domination, but to serve as a partner” in improving education. See 111 CONG. REC. 5964 (1965) (statement of Francis Keppel, Comm’r of Education); see also 111 CONG. REC. 5734 (1965) (statement of Rep. Adam Clayton Powell).

274 MCGUINN, *supra* note 264, at 30.

275 *Id.*

276 *Id.*

277 See, e.g., Equal Educational Opportunities Act of 1974, Pub. L. No. 93-380, § 204, 88 Stat. 484, 515 (codified as amended at 20 U.S.C. § 1703(f) (2006)) (mandating that states “take appropriate action to overcome language barriers that impede educational participation by its students in its instructional programs”); Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 704 (2006)) (mandating that “[n]o otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in . . . any program or activity receiving Federal financial assistance”); *Milliken v. Bradley*, 433 U.S. 267, 272–77, 291 (1977) (upholding the district court’s remedial education decree, which included instructions for changes in the areas of reading,

gained Cabinet status in 1979, but it continued to have “precious little concrete influence over most schools’ operations and policies,” beyond its “focu[s] on insular and discrete subpopulations of the nation’s students.”²⁷⁸

The march towards deeper federal involvement in education came to a halt altogether in the 1980s. President Reagan, consistent with his broader “New Federalism” agenda, sought to roll back federal activities in the education sphere and redelegate policymaking authority to the states.²⁷⁹ During the 1980 presidential race, the Republican Party called for “deregulation by the federal government of public education, and . . . the elimination of the federal Department of Education.”²⁸⁰ Over the next eight years, this was a constant mantra of Reagan’s. During his first year in office, he signed into law a bill that significantly reduced federal appropriations for education programs and broadened states’ discretion to spend federal education money.²⁸¹ By fiscal year 1988, Reagan had managed to cut spending for the DoE and the National Institute of Education by eleven and seventy percent, respectively, from their fiscal year 1981 levels.²⁸² Reagan’s consistent message was that the federal role in education should be limited to providing vouchers and block grants; meanwhile, designing curriculum, imposing standards, and directing where the money goes, was the province of states and localities.²⁸³

When Reagan left office, however, the centralizing trend resumed, picking up speed. In 1983, the National Commission on Excel-

teacher training, testing, and counseling, to foster racial equality); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 29–32 (1971) (upholding intradistrict busing to facilitate racial integration).

²⁷⁸ Michael Heise, *The Political Economy of Education Federalism*, 56 EMORY L.J. 125, 133–35 (2006). For the legislative act that elevated the DoE to cabinet-level status, see Department of Education Organization Act, Pub. L. No. 96-88, § 201, 93 Stat. 668, 671 (1979) (codified as amended at 20 U.S.C. § 3411 (2006)).

²⁷⁹ MCGUINN, *supra* note 264, at 42.

²⁸⁰ Republican Party Platform of 1980 (July 15, 1980), <http://www.presidency.ucsb.edu/ws/index.php?pid=25844#axzz1gGE2dc7G>.

²⁸¹ See MCGUINN, *supra* note 264, at 42; Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, §§ 509–15, 95 Stat. 357, 443–46.

²⁸² MCGUINN, *supra* note 264, at 45–46.

²⁸³ See, e.g., Ronald Reagan, U.S. President, Remarks on Receiving the Final Report of the National Commission on Excellence in Education (Apr. 26, 1983), available at <http://www.reagan.utexas.edu/archives/speeches/1983/42683d.htm> (“Your call for an end to Federal intrusion is consistent with our task of redefining the Federal role in education . . . [W]e’ll continue to work in the months ahead for passage of tuition tax credits, vouchers, educational savings accounts, voluntary school prayer, and abolishing the DoE. Our agenda is to restore quality to education by increasing competition and by strengthening parental choice and local control.”).

lence in Education published an extensive study on America's schools, entitled *A Nation at Risk*.²⁸⁴ Its prognosis was grim: "[T]he educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and a people."²⁸⁵ Citing concerns about the quality of curricula, the "expectations" for high school graduates, and "the use that American schools and students make of time," *A Nation at Risk* warned that America was falling behind its foreign counterparts.²⁸⁶ The report catapulted education to the forefront of the public's consciousness, even as President Reagan continued to push his decentralization agenda.²⁸⁷ Polls in 1987 showed that education climbed to the second highest priority among Americans after the federal debt; that sixty-six percent of Americans believed "the federal government should spend more on education than [President] Reagan had proposed"; that eighty-four percent of Americans wanted the national government to set standards for state and local educational bodies; and that seventy-four percent of Americans backed a "national testing program for public school students" across the country.²⁸⁸

The country was crying for a federal response, and Reagan's policies were fast becoming unpopular. A poll in the late 1980s showed that seventy-one percent of respondents believed the following President should embrace different education policies than Reagan's.²⁸⁹ During the 1988 presidential election, then-Vice President George H.W. Bush capitalized on education as a device to differentiate himself from the current Administration and appeal to moderates.²⁹⁰ He termed himself "the education president," and incorporated the topic into his stump speech.²⁹¹ While, like Reagan, Bush championed school choice and rejected "the federal government taking over [edu-

284 NAT'L COMM'N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* (1983), available at <http://reagan.procon.org/sourcefiles/a-nation-at-risk-reagan-april-1983.pdf>. The Commission was convened by Secretary of Education Terrell Bell. *Id.*

285 *Id.*

286 *Id.*

287 WILLIAM J. REESE, *AMERICA'S PUBLIC SCHOOLS: FROM THE COMMON SCHOOL TO "NO CHILD LEFT BEHIND"* 248–50 (2005).

288 MCGUINN, *supra* note 264, at 47.

289 *Id.* at 49.

290 *Id.* at 52–53 (quoting Charlie Kolb, a former Bush adviser, as stating: "[Bush] had to find a way to define himself differently than Reagan without undermining him. Bush used the education pledge as a friendly, subtle way of distinguishing himself from Reagan— it gave Bush something positive to stand for" (quotation marks omitted)).

291 See *id.* at 53; MARIS A. VINOVSIS, *FROM A NATION AT RISK TO NO CHILD LEFT BEHIND* 35–36 (2009).

cation],” he proposed a national governors’ conference in which state and federal officials could collectively brainstorm avenues of education reform.²⁹² Bush, unlike Reagan, believed that part of the “role of the president [is] using the bully pulpit to spell out excellence.”²⁹³

Although President George H.W. Bush did not secure the passage of any significant education legislation, he set the stage for yet another key shift in the federal government’s role.²⁹⁴ First, he held the national governors’ conference to which he had referred on the campaign trail, in Charlottesville, Virginia, in 1989.²⁹⁵ The participants released a document declaring that “the time has come, for the first time in U.S. history, to establish clear, *national* performance goals, goals that will make us internationally competitive.”²⁹⁶ Second, in April 1991, President Bush unveiled his “America 2000” education bill, which proposed the creation of new federal standards in the “core subjects” of English, math, and science, and creating an optional “American Achievement Test” that governors could adopt to assess student progress.²⁹⁷ Bush’s bill died in Congress, but like the governors’ conference, it left an important legacy. The need for a substantive federal role, which would include setting national standards and potentially even holding states accountable for students’ educational outputs, had garnered legitimacy with state governors, and a Republican president.²⁹⁸

This groundwork set the stage for another period of rapid change in our nation’s punctuated evolution towards a federal right to education. Beginning with the Goals 2000: Educate America Act²⁹⁹ (“Goals 2000”) and the Improving America’s School Act³⁰⁰ (“IASA”), both passed in 1994, and culminating with the No Child Left Behind Act of

292 MCGUINN, *supra* note 264, at 53 (quoting Reagan Walker, Bush: Capturing the ‘Education’ Moment?, *Educ. Wk.*, Oct. 19, 1988, at 1) (internal quotation marks omitted).

293 *Id.* at 53 (quoting speeches and newspaper articles from the 1988 election) (internal quotation marks omitted).

294 *Id.* at 51, 70.

295 *Id.* at 51, 60.

296 *Id.* at 61 (emphasis added) (quoting Bernard Weinraub, *Bush and Governors Set Education Goals*, *N.Y. TIMES*, Sept. 29, 1989, at A10) (internal quotation marks omitted).

297 U.S. DEP’T OF EDUC., ED/OS91-13, AMERICA 2000: AN EDUCATION STRATEGY 19–36, 43–44 (1993).

298 MCGUINN, *supra* note 264, at 70.

299 Goals 2000: Educate America Act, Pub. L. No. 103-227, 108 Stat. 125 (1994) (codified as amended in scattered sections of 20 U.S.C.).

300 Improving America’s Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (codified as amended in scattered sections of 20 U.S.C.).

2001³⁰¹ (“NCLB”), the federal government so deepened its involvement in America’s schools during the 1990s and early 2000s that it is fair to say that today, the provision of a minimally adequate education has become broadly accepted as one of the federal government’s core responsibilities. In 1994, President Clinton signed into law two bills that went further than what Bush’s America 2000 bill had envisioned. Goals 2000, the first such bill, articulated national content and performance standards for schools and schoolchildren, and dedicated \$440 million to helping states achieve those standards.³⁰² Although participation in Goals 2000 was optional for state governments, the logic behind the law was path-breaking. As a House Report noted: “Never in our 200 year history as a Nation have we had national standards for what students should know. Such standards can serve as a focal point for education reform efforts and set voluntary goals toward which all students can strive.”³⁰³ IASA, the second major education bill signed by President Clinton, created a mechanism through which the federal government could for the first time *require* that states develop educational standards, and hold states accountable in meeting them.³⁰⁴ Its key? IASA conditioned Title I funding, which totaled roughly \$10 billion by 1994, on states’ developing “challenging” benchmarks for content and performance, deploying student assessments, and creating “plans” for taking corrective action in schools in need of improvement.³⁰⁵ A program designed in the 1960s as a poverty alleviation device for poor students had become a hook for imposing federal oversight on the quality of education for *all* students.³⁰⁶ As President Clinton remarked at the signing of the bill:

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

302 Goals 2000: Educate America Act § 102 (“The Congress declares that the National Education Goals [include] the following[:]. . . [b]y the year 2000, all children in America will start school ready to learn[:]. . . [b]y the year 2000, the high school graduation rate will increase to at least 90 percent[:]. . . [b]y the year 2000, all students will leave grades 4, 8, and 12 having demonstrated competency over challenging subject matter including English, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography, and every school in America will ensure that all students learn to use their minds well, so they may be prepared for responsible citizenship, further learning, and productive employment in our Nation’s modern economy.”); *id.* § 303 (authorizing \$400,000,000 in fiscal year 1994 for states who apply for federal funding to improve their standards).

303 H.R. REP. NO. 103-168, at 38 (1993).

304 See Improving America’s Schools Act of 1994, §§ 1111–1120B.

305 See *id.* §§ 1111(a), 1111(b)(1)(A), 1111(b)(2)–(3), 1111(c)(1); Rosemary C. Salomone, Review, *The Common Schools Before and After Brown: Democracy, Equality and the Productivity Agenda*, 120 YALE L.J. 1454, 1477 (2011).

306 See Salomone, *supra* note 305, at 1477.

[IASA] . . . represents a fundamental change in the way the Federal Government looks at how we should do our job in helping you students achieve [this Nation's educational] goals.

. . . .

This bill says the National Government will set the goals. We will help develop measurements to see whether [you are] meeting the goals. But you will get to determine how you're going to meet the goals³⁰⁷

NCLB, signed into law by President George W. Bush, turned the federal government into an umpire, presiding over the education received by every child nationwide.³⁰⁸ Like IASA, NCLB conditioned the receipt of a state's Title I funds on its development of "challenging academic content . . . and . . . student academic achievement standards,"³⁰⁹ and its implementation of assessments.³¹⁰ But now, assessments had to be given to *all* public school students, not just Title I students, and they had to be given every year, rather than every three years.³¹¹ States also had to publish "plans" with the DoE spelling out in detail how they would work with localities and schools to ensure that by 2014, "all students . . . meet or exceed the State's proficient level of academic achievement."³¹² In addition, the statute required that there be a "highly qualified teacher" in every classroom, which in most cases meant the teacher had to have a bachelor's degree and to be certified.³¹³ Although states were still the master of their own content and performance standards, they had to participate in National Assessment of Education Progress testing for fourth and eighth grad-

³⁰⁷ William J. Clinton, U.S. President, Remarks on Signing the Improving America's Schools Act of 1994 in Framingham, Massachusetts (Oct. 20, 1994), in 2 U.S. GOV'T PRINTING OFFICE, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: WILLIAM J. CLINTON, 1994 at 1811-13 (1995).

³⁰⁸ NCLB is arguably a super-statute. See *supra* note 242.

³⁰⁹ No Child Left Behind Act of 2001, Pub. L. No. 107-110, §§ 101, 1111(a)-(b)(1)(A), 115 Stat. 1425, 1439, 1444 (codified as amended at 20 U.S.C. §§ 6301, 6311 (2006)).

³¹⁰ *Id.* § 1111(b)(3).

³¹¹ Under IASA, assessments had to be given to students served by Title I, and in at least one grade for grades 3-5, 6-9, and 10-12. See Improving America's Schools Act of 1994, Pub. L. No. 103-382, § 1111(b)(3), 108 Stat. 3518, 3523 (codified as amended at 20 U.S.C. § 6311 (2006)). Under NCLB, state assessments were required in "mathematics, and reading or language arts" for all public school pupils in each grade, 3 through 8, by the end of the 2005-2006 school year. See No Child Left Behind Act of 2001 § 1111(b)(3).

³¹² No Child Left Behind Act of 2001 §§ 1111(b)(1), 1111(b)(2)(F).

³¹³ See *id.* §§ 1114(b)(1)(C), 1115(c)(1)(E), 9101(23).

ers, meaning that there would now be a national metric to gauge the academic capacities of their pupils.³¹⁴

The legislative history of NCLB underscores Congress's intent to deliver what it had come to believe was a core duty of the federal government: ensuring that every child receives an adequate education. The following floor statements, from both Republicans and Democrats, are notable for their consistent references not only to what makes for good policy, but also to the rights of Americans and the responsibilities of the federal government.

[W]e have reached a major milestone. . . . We . . . have developed a bipartisan consensus that the Federal Government needs to accept substantial responsibility for improving the quality of education, and not just leave that to the States or leave that to local school districts.³¹⁵

Every child in this country has the right to a free public education. Every child. That is an awesome responsibility, and one that should not have to be shouldered by local communities alone. The States and the Federal Government are partners in this worthy goal³¹⁶

Every child has a right to a qualified teacher. All of us believe that. Every child has a right to a challenging curriculum. Every child has a right to go to school in a safe and quality school building. . . . I support high standards.

. . . .

I support accountability, but accountability measures alone are not sufficient to provide an adequate education. We must ensure that every school and every child has the level of resources necessary for a rigorous education and necessary to meet those standards.³¹⁷

Every child in America deserves a good education, and the President is exactly right when he says no child should be left behind. This bill takes a big step in that direction.³¹⁸

³¹⁴ *Id.* § 1111(b)(2). Nonetheless, several commentators have criticized NCLB for allowing states to create their own standards, claiming it has triggered a lowering of expectations. *See* Heise, *supra* note 278, at 144–45; James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 944 (2004).

³¹⁵ 147 CONG. REC. 26,354 (2001) (statement of Sen. Jeff Bingaman).

³¹⁶ *Id.* at 26,593 (statement of Sen. Russ Feingold).

³¹⁷ *Id.* at 10,144–45 (statement of Sen. Jon Corzine).

³¹⁸ *Id.* at 26,577 (statement of Sen. Jim Bunning).

[T]he proposal before the Senate represents an important step in the right direction by recognizing the right of every child to receive a high quality education.³¹⁹

Every child in America has a right to a world-class education. This bill enacts the reforms and provides the resources necessary to make this right a reality.³²⁰

[A]lmost 37 years ago, the Federal Government made a promise to the children of our Nation, a promise that all children, regardless of race, income, faith or disability, would have an equal chance to learn and to succeed. Thirty-seven years later, the Federal Government is still failing to meet that promise, and Republicans and Democrats have come together to say enough is enough.³²¹

[T]he right to a high quality public education goes to the very core of the American values of fairness, opportunity, hard work, and democracy. Ensuring that all American children can get an adequate education, despite their family income, race, or accident of geography, will pull families out of poverty and make our country stronger.³²²

We cannot stand idly by or be timid in fulfilling our responsibility to ensure that every child, rich or poor, white or of color, gifted or disabled have access to an education that gives them every chance to reach their full potential and exceed their goals and their parents' dreams for their future.³²³

NCLB demonstrates that by the turn of the century, a federal right to education had become an embedded public norm. It was the culmination of one hundred years of increased federal involvement in the educational sector. NCLB passed both Houses of Congress with broad bipartisan support, passing the Senate by a vote of 87–10 in favor and the House by a vote of 381–41.³²⁴ And it consistently received high public approval ratings.³²⁵

319 *Id.* at 26,601 (statement of Sen. Blanche Lincoln).

320 *Id.* at 26,588 (statement of Sen. John Edwards).

321 *Id.* at 26,134 (statement of Rep. John Boehner).

322 *Id.* at 26,148 (statement of Rep. Dennis Moore).

323 *Id.* at 8296 (statement of Rep. Deborah Pryce).

324 *Id.* at 26,635 (Senate vote); *id.* at 26,155 (House vote). For a description of the bipartisan support NCLB received, see Robert Gordon, *The Federalism Debate: Why the Idea of National Education Standards Is Crossing Party Lines*, EDUC. WK., Mar. 15, 2006, at 48.

325 Frederick M. Hess, *No Child Left Behind: What the Public Thinks*, AM. ENTERPRISE. INST. FOR PUB. POL'Y RES., Sept. 2007, at 1, available at http://www.aei.org/files/2007/02/22/2007_0222_EducationOutlook.pdf (reporting that in 1999, "72 percent of the American public said that a lack of adequate standards was a problem for K–12 schooling, more than 90 percent of

3. Step Three: Federal Practice Today

President Barack Obama's federal education policies underscore the present-day prominence of the federal government in setting substantive standards for the nation's schools and school systems. Through Race to the Top ("RTT"), the federal government launched a \$4.35 billion competitive grant program in which a state's score—in an evaluation of its grant application conducted by DoE—is determined by how many benchmarks, set by the DoE, the state pledges to adopt.³²⁶ What is notable about RTT is the depth and breadth of state educational policies it hopes to influence—everything from the state's method of tracking students, to its treatment of charter schools, to its willingness to sign onto "common core standards."³²⁷ In a short time, RTT spurred considerable reform efforts, as Illinois doubled the amount of charter schools authorized statewide, California, Delaware, and Tennessee passed laws allowing student assessment data to be used in evaluating teachers, and Colorado devoted \$10 million to experimental initiatives such as alternative compensation methods.³²⁸ Presently, forty-five states and three territories have signed on to the Common Core Standards, a set of national achievement standards, promulgated by a joint effort of the Council of Chief State School Officers and the National Governors Association.³²⁹

Although of lesser magnitude, the story of education funding at the national level mirrors the centralization that has occurred at the state level. At the beginning of 1965, the federal share of funding for primary and secondary schools was less than five percent.³³⁰ Today it is over ten percent.³³¹ And this ten percent figure only takes into ac-

parents thought students should have to pass a standardized test in order to be promoted to the next grade, and more than 70 percent of the public favored raising the requisite standards, even if it meant significantly more students would be held back").

³²⁶ See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 14006, 123 Stat. 115, 283–84; Race to the Top Fund, 74 Fed. Reg. 59,688, 59,688–89 (Nov. 18, 2009).

³²⁷ See Race to the Top Fund, 74 Fed. Reg. at 59,688–89, 59,691, 59,732–33.

³²⁸ Benjamin Michael Superfine, *Simulating School Reform: The American Recovery and Reinvestment Act and the Shifting Federal Role in Education*, 76 Mo. L. Rev. 81, 108–09 (2011).

³²⁹ Tamar Lewin, *Many States Adopt National Standards for Their Schools*, N.Y. TIMES, July 21, 2010, at A1; *In the States*, COMMON CORE STATE STANDARDS INITIATIVE, <http://www.corestandards.org/in-the-states> (last visited Sept. 5, 2012).

³³⁰ See Table 180: *Revenues for Public Elementary and Secondary Schools, by Source of Funds*, NAT'L CTR. FOR EDUC. STATISTICS (June 2011), http://nces.ed.gov/programs/digest/d11/tables/dt11_180.asp.

³³¹ See *The Federal Role in Education*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/about/overview/fed/role.html> (last visited Sept. 5, 2012) (showing that in the 2011–2012 school year, federal spending accounted for 10.8% of all education spending).

count direct education expenditures.³³² The federal government also provides indirect funding through the deductibility of state and local taxes on federal returns.³³³ Estimates vary on the amount of the indirect subsidy, but some suggest they come close to equaling the direct federal contribution.³³⁴ Then, of course, there is federal support for private schools. Because private schools are charitable institutions, contributions to them are deductible for taxpayers. Additionally, charitable institutions do not pay any direct taxes. Thus, while the federal government provides billions of dollars annually for educating children in public schools,³³⁵ it also subsidizes the students who opt out of the public system altogether.

Finally, public opinion polls confirm that average Americans endorse the role the federal government has come to play in the provision of education, including its commitment of tax dollars. As Figure 3 below reflects, in 1986, twenty-four percent of all parents and twenty-eight percent of public school parents believed the “best way” to fund public schools would be through the federal government. Twelve years later, after Goals 2000 and IASA, these numbers ticked up to thirty-seven percent and forty-one percent, respectively. These results suggest that the policies of Presidents George H.W. Bush and Bill Clinton only deepened the acceptance of a strong federal role in American education.

³³² See *id.*

³³³ Susanna Loeb & Miguel Socias, *Federal Contributions to High-Income School Districts: The Use of Tax Deductions for Funding K–12 Education*, 23 *ECON. EDUC. REV.* 85, 86 (2004).

³³⁴ Loeb & Socias, *supra* note 333, at 86; Table 384: *Federal Support and Estimated Federal Tax Expenditures for Education*, NAT’L CTR. FOR EDUC. STATISTICS (Oct. 2011), http://nces.ed.gov/programs/digest/d11/tables/dt11_384.asp (showing that in 2001, the estimated federal tax expenditures for education were roughly equal to the federal direct expenditures for primary and secondary education).

³³⁵ See NAT’L CTR. FOR EDUC. STATISTICS, *supra* note 330.

FIGURE 3: ENDORSEMENT OF FEDERAL GOVERNMENT'S ROLE IN EDUCATION³³⁶

<i>"There is always a lot of discussion about the best way to finance the public schools. Which do you think is the best way to finance the public schools: by means of local property taxes, by state taxes, or by taxes from the federal government in Washington?"</i>					
	All			Public School Parents	
	1998	1986		1998	1986
Local Property Taxes	21%	24%		19%	28%
State Taxes	33%	33%		31%	32%
Federal Taxes	37%	24%		41%	28%
Don't Know	9%	19%		9%	12%

Another poll, whose results have been summarized below, shows that in 2000, forty-six percent of adults and fifty percent of parents with children in grades K–12 believed the federal government should be more involved in education. Ten years later, after both NCLB and RTT, those numbers stood at forty-three percent and fifty-six percent, respectively. Again, this poll demonstrates that the policies of Presidents George W. Bush and Barack Obama, both of which deepened the federal role in education, were widely embraced.

The information in Figure 4 below comes from Gallup Poll Social Series: Work and Education, Question 21 (Aug. 5–8, 2010).³³⁷

FIGURE 4: GALLUP POLL SOCIAL SERIES: WORK AND EDUCATION, QUESTION 21

	Federal government's role "should be more involved in education than it currently is"	Federal government's role should be "about the same"	Federal government's role "should be less involved in education than it currently is"
All Adults (Aug. 2010)	43%	20%	35%
All Adults (Apr. 2000)	46%	22%	29%
Parents K–12 (Aug. 2010)	56%	16%	27%
Parents K–12 (Apr. 2000)	50%	22%	26%

³³⁶ *Phi Delta Kappa/Gallup Poll*, POLLING REP., INC. (June 5–29, 2000), <http://www.pollingreport.com/ed2.htm> (n = 1151 adults nationwide).

³³⁷ Lydia Saad, *Americans Support Federal Involvement in Education*, GALLUP, INC. (Sept. 8, 2010), available at <http://www.gallup.com/poll/142904/americans-support-federal-involvement-education.aspx> (citing *Federal Government's Role in Education—by Age*, GALLUP, INC. (Aug. 5–8, 2010)) (noting that the 2010 poll "[r]esults . . . are based on telephone interviews . . . with a random sample of 1,013 adults/aged 18 and older, living in the continental U.S.").

III. WHAT A CONSTITUTION DOES

Interpreting the Constitution as judges do, especially in Due Process cases, there is a federal constitutional right to a minimally adequate education. Its roots are tethered deep in the Founding, its limbs develop in the nineteenth century, and it finds full flower in the twentieth and twenty-first centuries. The precise contours of the right remain under constant and active discussion. It necessarily involves a basic set of educational necessities—from qualified teachers, to contemporary schoolbooks and buildings, to remedial programs and specialized forms of instruction—necessary to enable every child to reach a basic level of achievement. And in the methodology used to define the right to education, we can see a template for exploring other positive rights.

Is there room for objection? Of course. But as Part III.A explains, the acceptable form of objection is not one lodged in most theoretical debates over constitutional interpretation. It is one that comes from within this ordinary form of constitutional interpretation, not outside of it. And, as elaborated in Part III.B, the proper form of objection is tempered substantially by a candid acknowledgment of the role a Supreme Court decision recognizing a federal right to education can and would play—a role more expansive in some senses, more limited in others, than common conceptions would suppose.

A. *What Might an Objector Say?*

There are two objections one might raise to the foregoing account of a federal right to a minimally adequate education. One of them, grounded in ongoing theoretical debates about interpretive methodology, is both unhelpful and at some level completely out of bounds. It would assail the foregoing account of the right to education on the grounds that in abandoning an originalist reading of the Constitution, it has opened the floodgates to rule by judicial fiat and to Alexander Bickel's counter-majoritarian difficulty.³³⁸ The problem with this objection is that all it does is invite us to talk about *talking about* the Constitution. We wind up caught once again in the interpretive debates that have haunted the academy since the 1970s and 80s. The more useful sort of objection would be one grounded in the ordinary practice of interpretation—one that invites us to actually *talk about* the Constitution. This type of objection would adopt the “normal”

338 See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–17 (2d ed. 1986) (1962).

interpretive framework described in this Article, employ Bobbitt's modalities and Fallon's interpretive arguments, but nonetheless argue that under that framework, there is no such federal constitutional right. Reading the Constitution as judges actually do, this objector would provide a counter-interpretation to show why the argument in Part II is wrong *on its own terms*.

This is the sort of helpful objection that judges regularly make to the decisions or views of their colleagues, especially in Due Process cases. *Heller*, *Glucksberg*, *Michael H. v. Gerald D*, *Roper v. Simmons*, *Bowers v. Hardwick*, and *Lawrence v. Texas* are all examples of cases in which the battle among the shifting majorities and dissents was not over whether we should have a living or dead constitution, but over what the facts said about the "history and tradition" of the American people. What are our fundamental values, as found in our origins as a nation, in case law, and in subsequent state and federal practice?

So, for example, it is appropriate to argue that simply because all the states contain an education provision in their state constitutions, that does not add up to a federal right. Or, that thirty-one states having found and begun to implement a requirement of a minimally adequate education is still not enough. Or that ESEA, IASA, and NCLB still do not demonstrate a national commitment to provide an education to every child. Or that the Framers were in truth unconcerned about education. The facts presented in this Article seem to belie these arguments. Practices at the state and federal level demonstrate a clear trend of increasing state and federal responsibility for the quality of public education and of increasing public support for those trends.

The central point, though, is that these arguments are *within* the practice of constitutional adjudication and interpretation that judges regularly embrace, not outside it. These are arguments grounded in facts about the way the American people have manifested their most fundamental commitments, from the Founding to the present. When interpreting the Constitution, it is this sort of tangible fact that is found in actual opinions, far more than abstract arguments about methodology.

B. What Does It Mean to Have a Constitutional Right?

Part of the reluctance to find a constitutional right to education—or any positive right for that matter—no doubt stems from the notion that judicial decisions on the subject are the final word. If, when judges decide constitutional cases, compliance by political actors auto-

matically follows, then allowing judges to find positive rights, especially contested ones, would yield to judges an enormous amount of political power. Judicial decisions would mandate the expenditure of large sums of money, which in turn would require taxation to support them.

As we explain briefly below, however, this notion of instant and absolute judicial power does not reflect the history of education reform in the states. The judicial articulation of education as a constitutional right has had a significant positive impact on education reform, but often in more subtle ways than might be imagined for decisions involving constitutional rights. In many states experiencing judicial action in education, court decisions have served as a goad or a prod to political actors, motivating them to pass laws and enact policy reforms that move the reality in the schoolhouses towards society's fundamental values about what children should be able to achieve.³³⁹ But at the same time, the process of compliance has necessarily tempered judicial declarations. State supreme court judges have found that political opposition movements reacting to court decisions, through "backlash," have limited what can be accomplished through education litigation. Judges have their say, but so too do political actors. Still, and finally, constitutionalizing a right provides a constitutional floor, safeguarding education from cuts during times of economic difficulty.

1. Goads and Dialogue

The first lesson we learn from the education story in the states is that while judges cannot change a society, they can motivate it to move in a direction consistent with public norms. When courts tap into something fundamental—what Cass Sunstein might call a "constitutive commitment"—their identification of this value as constitutionally enshrined can serve as a catalyst, a goad, a call to action.³⁴⁰ This is precisely what we have seen when it comes to education.

³³⁹ For an argument that such processes have been triggered in extant Supreme Court decisions on welfare rights, see Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203, 211 (2008) ("[T]he judicial role is best understood as part of an ongoing dialectical process by which legislative judgments are brought into harmony not with transcendent moral principles, but with the values our society declares its own.").

³⁴⁰ See CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 62 (2004) (defining "constitutive commitments" as expectations for the conduct of American government that are so widespread and highly valued that they are free from political attack, whether or not they have been formally canonized in the written Constitution and listing the freedom "from racial discrimination by private employers" and "the right to social security" as examples); Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 726 (1998)

Massachusetts in the early 1990s shows how a lawsuit can compel legislative change. In December 1992, two actions challenging the constitutional adequacy of the state's education system were consolidated before the Massachusetts Supreme Judicial Court in *McDuffy v. Secretary of the Executive Office of Education*,³⁴¹ an event that garnered wide public attention. Within seven months, the legislature had passed the Education Reform Act ("ERA"), "revamp[ing] the structure of funding [for] public schools" in Massachusetts by enacting a centrally guaranteed "foundation budget" for every district.³⁴² The specter of a constitutional decision had served as an impetus for the legislature to act, for while education reform had been bandied about in Massachusetts for years, it was the impending *McDuffy* decision that pushed the ERA over the finish line.³⁴³

Or take Kansas in the 2000s. A decision by the state supreme court in 2003 kicked off a multi-year, iterative process with the legislature, during which the court set benchmarks for what a quality education must entail, the legislature responded increasing spending on and altering the method of financing education, the court evaluated the reforms and set new benchmarks, and the legislature responded yet again.³⁴⁴ Wyoming's story between 1995 and 2008 is similar.³⁴⁵

2. Backlash

The second lesson we learn from the education story is that the "success" rate of constitutional decisions has varied, as judicial power at times failed to deliver significant change, or worse, instigated a backlash. Ohio's story contains both features. In 1997, the Ohio Supreme Court declared that the state's system of funding for primary and secondary education ran afoul of the state's constitutional man-

("Background constitutional norms help determine what kinds of social meanings state action can legitimately express.").

³⁴¹ *McDuffy v. Sec'y of the Exec. Office of Educ.*, 615 N.E.2d 516, 517-18 (Mass. 1993).

³⁴² *Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134, 1141-42 (Mass. 2005); An Act Establishing the Education Reform Act of 1993, 1993 Mass. Acts 159, 183.

³⁴³ See *Hancock*, 822 N.E.2d at 1141 (describing how the threat of a judicial decision motivated the legislature to act); Rachel Wainer Apter, *Institutional Constraints, Politics, and Good Faith: A Case Study of School Finance Reforms in Massachusetts*, 17 CORNELL J.L. & PUB. POL'Y 621, 638-45 (2008) (describing how representatives in the legislature called for action in order to beat the state Supreme Judicial Court to the punch).

³⁴⁴ The 2003 decision was *Montoy v. State*, 62 P.3d 228 (Kan. 2003). For a description of the back-and-forth dialogue between the Supreme Court and the legislature between 2003 and 2006, see Richard E. Levy, *Gunfight at the K-12 Corral: Legislative vs. Judicial Power in the Kansas School Finance Litigation*, 54 U. KAN. L. REV. 1021, 1022-24 (2006).

³⁴⁵ See *supra* note 239 and accompanying text.

date to “provide for a thorough and efficient system of common schools.”³⁴⁶ The court noted it was neither “advocat[ing] a ‘Robin Hood’ approach to school financing reform,”³⁴⁷ nor “instruct[ing] the General Assembly as to the specifics of the legislation it should enact.”³⁴⁸ But it *was* ordering the legislature to make an “overhaul” of the state’s “public school financing scheme,” listing four groups of education statutes “which must be eliminated.”³⁴⁹ The *DeRolph I* decision spurred a backlash. Conservative legislators advocated “depriving the courts of jurisdiction in school funding” litigation, enacting a constitutional amendment to give the legislature “the final say on school finance issues,” and impeaching a Republican justice who had joined the majority opinion in *DeRolph I*.³⁵⁰ None of these proposals succeeded, but neither did significant changes to Ohio’s education statutes. The Ohio Supreme Court continued to find the state in breach of its duties in 2000, 2001, and 2002,³⁵¹ and after each decision, an increasingly broad set of voices decried the holding.³⁵² In 2003, the court terminated its jurisdiction in the *DeRolph* litigation altogether, even though “as a matter of basic case law, the mandates of *DeRolph I* and *II* remained unfulfilled.”³⁵³ It is hard to read this outcome as anything other than the Ohio Supreme Court throwing up its hands. Ironically, it was six years after the Court took itself out of the mix and a new governor was elected that the Ohio legislature finally put in place a set of sweeping education reforms of the type envisioned by the state supreme court in the *DeRolph* cases.³⁵⁴

³⁴⁶ *DeRolph v. State (DeRolph I)*, 677 N.E.2d 733, 737 (Ohio 1997) .

³⁴⁷ *Id.* at 746.

³⁴⁸ *Id.* at 747.

³⁴⁹ *Id.* (listing the four groups of statutes that needed to be changed as those concerning “the operation of the School Foundation Program . . . the emphasis of Ohio’s school funding system on local property tax . . . the requirement of school district borrowing through the spending reserve and emergency school assistance loan programs, and the lack of sufficient funding in the General Assembly’s bienium budget for the construction and maintenance of public school buildings”).

³⁵⁰ Larry J. Obhof, *DeRolph v. State and Ohio’s Long Road to an Adequate Education*, 2005 B.Y.U. EDUC. & L.J. 83, 112 (2005).

³⁵¹ *DeRolph v. State (DeRolph II)*, 728 N.E.2d 993, 1020 (Ohio 2000); *DeRolph v. State (DeRolph III)*, 754 N.E. 2d 1184, 1200 (Ohio 2001); *DeRolph v. State (DeRolph IV)*, 780 N.E.2d 529, 530, 532 (Ohio 2002).

³⁵² *E.g.* Obhof, *supra* note 350, at 125–30 (describing criticism of *DeRolph II* by leaders in the Ohio House and Senate, the press, and a law professor who advocated for the impeachment of judges who did not respect the separation of powers; also describing negative campaign advertisements against the author of the decision in *DeRolph II* when she ran for reelection in 2000).

³⁵³ *Id.* at 146; *State ex rel. State v. Lewis*, 789 N.E.2d 195, 202–03 (Ohio 2003).

³⁵⁴ Ohio enacted a series of reforms in the summer of 2009 under the leadership of Governor Ted Strickland. For instance, Ohio instituted a new evidence-based model for determining

3. *Constitutional Floor*

The final lesson from the history of education reform in the states, particularly from the recent period of judicially supervised enforcement, is that constitutional enshrinement of the right has served to safeguard it from shifts in economic currents. While backlash is a political reaction to judicial intervention, attacks on education during difficult economic times may represent nothing other than budget balancing on the back of a fundamental right. And that is why enshrinement can be so important.

Enshrinement has always been part of the state level education story. When delegates to Kentucky's constitutional convention in 1849 amended the constitution to establish that the state school fund would be "held inviolate," they were consciously pursuing a strategy to protect the fund from the whims of the elected branches.³⁵⁵ The Kentucky legislature had been notorious for "borrowing" from the school fund to finance various projects, with one such episode occurring in 1845.³⁵⁶ Education supporters thus lobbied delegates to the 1849 convention to protect the education fund from the legislature's games, and their efforts paid off.³⁵⁷ On the convention floor, delegates spoke of the need "to rescue from the vacillation of the legislation of the state, the common school fund" and warned of the foolishness of trusting the legislature with so precious a pool of money.³⁵⁸ The delegates ended up ratifying a constitutional amendment that contained specific commands on the management, investment, and disbursement of the school fund, ensuring it would be safeguarded from shifting political and economic winds.³⁵⁹

In multiple other states—Maryland in the 1860s,³⁶⁰ North Dakota in the 1880s,³⁶¹ Montana in the 1970s,³⁶² and Florida in the 1990s³⁶³—education activists similarly pursued state constitutional provisions to

the level of education funding awarded to each school district. See Press Release, Office of Governor Ted Strickland, Ohio Named Recipient of Educ. Comm'n of the States' Frank Newman Award (Jan. 26, 2010), available at <http://www.ecs.org/clearinghouse/83/81/8381.pdf>.

³⁵⁵ See *Zackin*, *supra* note 184, at 110.

³⁵⁶ See *id.* at 109–10.

³⁵⁷ See *id.* at 110.

³⁵⁸ See *id.* (quoting REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF KENTUCKY 893 (Frankfort, A.G. Hodges & Co. 1849)).

³⁵⁹ See *id.* at 110–11.

³⁶⁰ See *id.* at 117–20.

³⁶¹ See *id.* at 112–13.

³⁶² See *id.* at 133–34.

³⁶³ See *id.* at 134–35.

protect revenue streams for public education from competing political concerns. Historical records provide concrete evidence that supporters of these constitutional clauses, be they delegates, legislators, or members of the public, specifically sought constitutional text because they understood the need to remove questions of education finance from the hands of elected officials.³⁶⁴

Finally, California and New Jersey provide examples of states in which plaintiffs have successfully taken recourse to the courts in recent years to preserve education funds from deep and painful cuts. In California, the legislature “slashed the education budget” in 2009 as a result of the economic recession gripping the state, and large numbers of teachers were fired.³⁶⁵ Plaintiffs in Los Angeles initiated suit in February 2010 to enjoin the district from additional layoffs, arguing that the loss of more educators would mean the deprivation of students’ constitutional rights.³⁶⁶ The court agreed. It granted the plaintiffs a preliminary injunction, and subsequently approved of a settlement in which the school district agreed to refrain from budget-based layoffs in forty-five schools.³⁶⁷ In New Jersey, plaintiffs similarly obtained decrees in 2002 and 2011 preventing the state from cutting millions of dollars for education.³⁶⁸ Both states offer examples of episodes in which the legislature responded to a fiscal crisis by pillaging the education budget, and where the courts maintained fidelity to a constitutional education right by directing the legislature to find other ways to close its budgetary holes.

CONCLUSION

The very nature of a constitutional right is that it is one of the deepest and most fundamentally constitutive statements we can make

³⁶⁴ See *id.* at 109–13, 117–20, 133–36

³⁶⁵ See Complaint for Injunctive and Declaratory Relief at 1, *Reed v. State*, No. BC432420 (Super. Ct. Cal. Feb. 24, 2010), available at <http://www.schoolfunding.info/news/litigation/LAUSDLayouts.pdf>.

³⁶⁶ See *id.* para. 1–6, 105.

³⁶⁷ *California*, NAT’L EDUC. ACCESS NETWORK (Mar. 2011), http://www.schoolfunding.info/states/ca/lit_ca.php3.

³⁶⁸ See *Abbott ex rel. Abbott v. Burke*, 20 A.3d 1018, 1023–26, 1045 (N.J. 2011) (holding that “the State has failed to fully fund SFRA in Fiscal Year (FY) 2011” after cutting \$1.6 billion from the education budget; noting that these “cuts to school aid funding . . . have been instructionally consequential and significant”; and concluding that “the State has breached the very premise underlying the grant of relief it secured with *Abbott XX*” and that it must restore the “funding of SFRA in FY 2012 . . . to the plaintiffs granted relief in the earlier proceedings in these school funding cases”); *Abbott ex rel. Abbott v. Burke*, 798 A.2d 602, 604 (N.J. 2002) (enjoining the state from cutting “supplemental funding” to school districts).

about ourselves. It declares who we are and what we are about. Like much of life, we don't always measure up to our aspirations, but without them we are directionless. With them we have a goal, and a commitment we have made to ourselves.

It is both natural and appropriate that battles rage in state legislatures and Congress about how education is funded and what it means to be educated. But for well over a century and a half, there has been a consensus that education matters. Interpreting the Constitution in the way judges ordinarily do, there is a federal right to a minimally adequate education. Recognizing this right, however, does not mean the end of a discussion, but the beginning of one.