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Strengthening America's Foundation: Why Securing the Right to an Education at Home is Fundamental to the United States' Efforts to Spread Democracy Abroad

by Eric Lerum, Sheila Moreira, and Rena Scheinkman

THE FOUNDING DOCUMENT of the United States memorializes an impressive embrace of a common human rights paradigm—"all men are created equal . . . endowed by their creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness." This ideal of respecting the inherent rights of all people is an essential element of democracy, and, as such, it has become a core value in our national identity. Yet the conflicted history of this country is one of ongoing struggle to grant all people those unalienable rights that have been denied to them, from our shameful history of slavery, to the current gap in opportunities and status based on wealth and class. Closing that gap and delivering on the promises of "Life, Liberty, and the pursuit of Happiness," in short, granting all people the rights they deserve, begins with and requires a commitment to education.

SELF-GOVERNANCE REQUIRES EDUCATION

THE BUSH ADMINISTRATION repeatedly communicates its lofty goals of extending democracy and freedom throughout the world as a solution to instability and conflict. Secretary of State Condoleezza Rice recently remarked, "We are on the right side of freedom's divide and we have an obligation to help those who are unlucky enough to have been born on the wrong side of that divide. America's experience as a democracy affirms our conviction that all people can live and prosper in peace . . . Freedom, democracy and human rights are not American principles or Western values. These ideals are shared by all people. They are the non-negotiable demands of human dignity."

A true democracy, however, is a system that requires the consent of the governed; and genuine consent is informed consent. Because the United States has positioned itself as a champion of democracy, it too must become an outspoken champion of education.

Unfortunately, our public education system continues to fail too many of our students and serves as a poor model for developing democracies around the world. Access to educational opportunities in the United States varies based on race and wealth. Disparities also exist among urban, suburban, and rural schools. A recent study by the Harvard Civil Rights Project found that during the 1990s, the proportion of black students in majority-white public schools in the United States decreased to a level lower than any year since 1968. Today, a growing number of public schools are comprised mostly or entirely of students of color. These schools tend to have much higher concentrations of students below the poverty line and students with other social and health concerns that interfere with, or take priority over, their ability to learn. Not

coincidentally, these schools also offer less robust educational opportunities compared to schools with predominantly white student bodies. In general, they offer less rigorous curricula; fewer courses and extracurricular activities; larger class sizes; limited textbooks, computers, supplies, and educational materials; and fewer qualified teachers and counselors. Our country's persistent lack of commitment to education, manifested in the continued failure over the past four decades to deliver on the promise of equal education for *all* children, calls into question our commitment to democracy at home.

EDUCATION AS A FUNDAMENTAL HUMAN RIGHT: COMPARISON OF EDUCATION RIGHTS INTERNATIONALLY AND IN THE UNITED STATES

THE UNITED STATES MUST ARTICULATE AND PROMOTE a strong commitment to education, both as a mechanism to provide the fulfillment of human rights envisioned in our founding documents and as a way to promote democracies that are sovereign and stable. The time is ripe for the United States to align its domestic priorities with those it promotes throughout the world.

INTERNATIONAL RECOGNITION OF EDUCATION AS A HUMAN RIGHT

The world community understands the importance of education. Internationally, the right to education has been codified in numerous human rights treaties and in international humanitarian law. Article 26 of the Universal Declaration of Human Rights provides that everyone has the right to an education. The UN Declaration of the Rights of the Child promotes special safeguards for children to ensure they enjoy the rights and freedoms to which they are entitled; among those rights is the right to an education. The UN Convention on the Rights of the Child includes provisions that aim to guarantee children's access to an adequate education. The amended Charter of the Organization of American States calls for the "rapid eradication of illiteracy and expansion of educational opportunities for all." Through these documents, the international community recognizes that education accomplishes dual goals of providing children with the tools they need to personally succeed in life and preparing them for their roles as active participants in a democracy.

To be sure, treaties alone cannot provide educational opportunities for children. Much work remains to be done before "education for all" is more than an ambitious goal. For instance, according to Katarina Tomasevski, the former UN Rapporteur on the Right to Education, although many countries have ratified all of the international treaties that guarantee free and compulsory primary education to all children, these countries do not always fully endorse their commitment to education. The United Nations' Committee on Economic, Social and Cultural Rights recently noted that not a single member country submitted a detailed plan to promote educational opportunities, despite acknowledgement from almost half of those countries that educa-

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tion was “neither free, nor compulsory, nor all-encompassing.” Still, the recognition of education as a basic right in international human rights instruments demonstrates a growing consensus that education is fundamental to realizing other social, political, and human rights.

THE LEGAL STATUS OF EDUCATION IN THE UNITED STATES

Presently, the United States’ record on ratifying human rights treaties leaves much to be desired, as does its history of rejecting scrutiny or accountability regarding its own human rights violations. To date, the United States has failed to ratify a number of the major international human rights treaties. For many of the treaties it has ratified, the United States has included reservations that establish that the rights in each treaty, including the express right to educational opportunity, do not expand existing rights under U.S. law. Yet even without substantive entitlements at stake, the United States remains the only United Nations-member country, aside from the collapsed state of Somalia, that has not ratified the Convention on the Rights of the Child, a key treaty in the global advocacy for children’s right to education.

Despite the United States’ reluctance to join the international consensus formally acknowledging education as a human right, the political discourse in this country demonstrates a recognition that education is a fundamental right. Ambassador L. Paul Bremer, former leader of the Iraq Coalition Provisional Authority, stated shortly after the end of Saddam Hussein’s regime in Iraq, “This practice of denying women and girls their basic human right to an education has stopped.” In Washington, D.C., commenting on poor school-system management that led to a high school remaining closed on the first day of school, incoming Superintendent Clifford Janey stated that the students had been denied their “right to an education.” Referring to education as a basic right or a human right is a natural and accurate affirmation of what we already know—that everybody deserves an opportunity to learn. But for this designation to have meaning, the United States must first legally validate the existence of this right by guaranteeing it to all of its children.

EDUCATION IS NOT RECOGNIZED AS A FUNDAMENTAL RIGHT UNDER U.S. LAW

ALTHOUGH THE LEGAL AND POLITICAL INSTITUTIONS in the United States implicitly recognize the importance of education in an effective democracy, these institutions have repeatedly refused to incorporate explicitly the international consensus that education is a fundamental human right and have resisted the opportunity to use this international norm to inform our laws, set our political priorities, or define our moral will.

In the 1954 landmark decision of *Brown v. Board of Education*, the Supreme Court boldly proclaimed the importance of education in our democratic society:

[Education] is required in the performance of our most basic responsibilities It is the very foundation of good citizenship. Today it is the principle instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

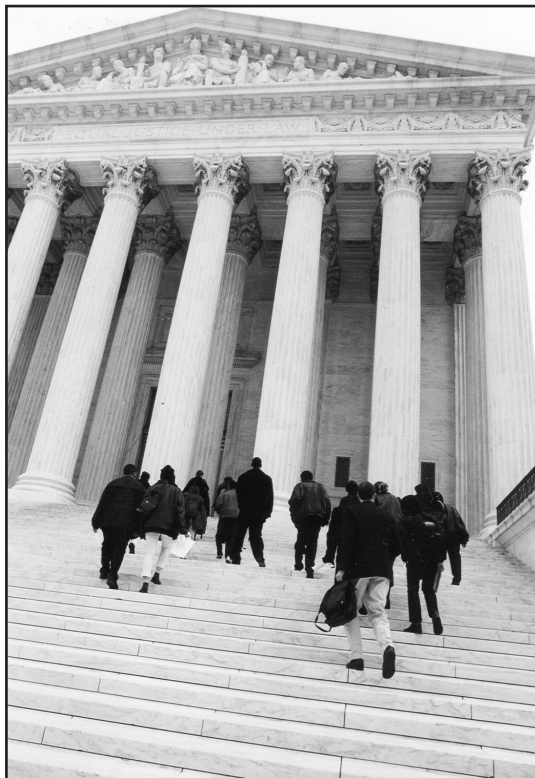
Unfortunately, the Court stopped short of defining education as a fundamental right and left education vulnerable to varied constitutional interpretations and shifting political priorities. As the political climate changed after *Brown*, it did not take long for the Court to chisel away at the right of all students to have equal access to educational opportunities.

In the early 1970s, the right to education, and Chief Justice Warren’s bold declaration in *Brown*, took a fatal blow. In *San Antonio Independent School District v. Rodriguez*, the Court explicitly declared that education is not a fundamental right under the Constitution. Importantly, but perhaps ironically, the *Rodriguez* decision is filled with dicta reiterating the sentiment clearly articulated in *Brown*—that education is the backbone of a democratic society. But, *Rodriguez* highlights the limitations of “reading” a right to education into the Constitution. The Court explained in *Rodriguez*:

It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. . . . 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. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State’s social and economic legislation.

VULNERABILITIES AND WEAKNESSES OF THE CURRENT LEGAL FRAMEWORK

TODAY, EDUCATION IN THE UNITED STATES REMAINS an area of governance relegated to the states. Although constitutional principles such as the Due Process Clause of the 5th Amendment and the Equal Protection Clause and the Privileges and Immunities Clause of the 14th Amendment have all been used as bases for challenging inadequate and unequal education offered by the states, the fundamental principle uniformly applied by the courts is that *if* states provide education, they must do so in accordance with these constitutional



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D.C. high school students visit the U.S. Supreme Court building in Washington, D.C.

provisions. In *Brown*, the Court explained that “where the state has undertaken to provide” educational opportunities, it must make education “available to all on equal terms.”

With no federal requirement to provide a free public education to all American children, education today is left in the hands of state political leaders to provide, or not provide, as they see fit. Although nearly every state has included some form of an education provision in its state constitution, legislative gaps and ambiguities litter the education law and policy landscape. Research documenting resegregation, achievement gaps, and the growing disparity between the wealthy and the poor indicates that children in our country are still denied equal access to educational opportunities and that the right to education is still far from guaranteed.

Perhaps most tellingly, the children in the nation’s capital have no defined right to an education. Like most urban school districts, the students in Washington, D.C.’s public school system are predominantly low-income children of color. What sets D.C. apart, however, is that its residents do not have any guaranteed right to an education. The D.C. Charter, unlike every other state constitution, contains no provision for guaranteeing even a minimal form of education for D.C. residents. Thus, while the United States is hard at work rebuilding schools in Kabul and Baghdad to ensure that children there have access to education, there is no similar effort to ensure the same opportunity in the U.S. capital.

The lack of an explicit right to education in the very heart of our country is hypocrisy at the highest level. Surely, if we can guarantee education in the capitals of newly formed democracies, we can guarantee it here. Our current scheme, which defines education as a governance *option* that can be provided to, or stripped from, the people at the will of state officials, minimizes the importance of education in our society and is wholly inconsistent with the otherwise universal understanding that education is essential for becoming an informed participant in any democracy.

USING INTERNATIONAL NORMS TO INFORM DOMESTIC LAW AND POLICY

Despite such glaring legal defects, the U.S. judiciary has frequently missed the opportunity to apply international norms to its interpretation of open-ended legal concepts such as due process of law and equal protection. Particularly interesting is the absence of any mention of the UN Charter in the Supreme Court’s decision in *Bolling v. Sharpe*, the companion case to *Brown* that extended the constitutional protections of *Brown* to the people of the District of Columbia. The petitioners’ brief in *Bolling* relied heavily on the United States’ membership in the United Nations to argue that the Court should apply a liberal interpretation of Articles 55 and 56 of the UN Charter to effectuate its objectives—“basic in any democratic society is public education.” The petitioners argued, alternatively, that even if the UN Charter is not specifically enforceable under the laws of the United States, “[t]he fact that the United States has obligated itself to cooperate [as a State Party to the United Nations Charter] may be taken into consideration in determining the national public policy.” The respondents dedicated a substantial part of their brief to rebutting the petitioners’ Charter arguments. Despite this extensive discussion of the applicability of the international unanimity in defining education as a human right to American jurisprudence, the

Supreme Court never even mentioned the UN Charter in its opinion. The Court missed, or perhaps passed on, a prime opportunity to define the role of international human rights doctrines in interpreting our domestic law.

But the instinct to read international values into our domestic law dates back to the birth of our nation. The first sentence of the Declaration of Independence calls upon “a decent respect to the opinions of mankind” as the basis for declaring our independence from England. Today, legal scholars and practitioners are still trying to use international human rights norms to “breathe a more complete and rational meaning” into open-ended clauses of the Constitution, encouraging courts to at least consider human rights norms.

[D]elivering on the promises of “life, liberty, and the pursuit of happiness,” in short granting all people the rights they deserve, begins with and requires a commitment to education.

Most recently, the U.S. Supreme Court cited evolving international human rights standards as a factor in striking down state laws permitting the execution of juveniles. In *Roper v. Simmons*, the majority found “confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.” The Court reasoned, “It does not lessen our fidelity to the Constitution . . . to acknowledge that the express affirmation of fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.” Though these attempts to read international human rights norms into our own jurisprudence have begun to weave some international mores into our domestic law and policy, history has proven that relying on interpretations of the Constitution to secure a right to education leaves the right vulnerable to unfavorable interpretations and shifting political priorities.

THE CASE FOR A CONSTITUTIONAL AMENDMENT GUARANTEEING THE RIGHT TO EDUCATION

GIVEN THE VULNERABILITY OF THE RIGHT TO EDUCATION when we attempt to read it into our laws, proponents of securing educational rights should also move to incorporate an explicit guarantee to education into our Constitution. Armed with a clear and potent pledge that the right to education will be protected as a fundamental right, victims of failed educational systems across the country could effectively challenge financing schemes, unequal distribution of resources, and *de facto* segregation.

THE IMPACT OF A CONSTITUTIONAL AMENDMENT

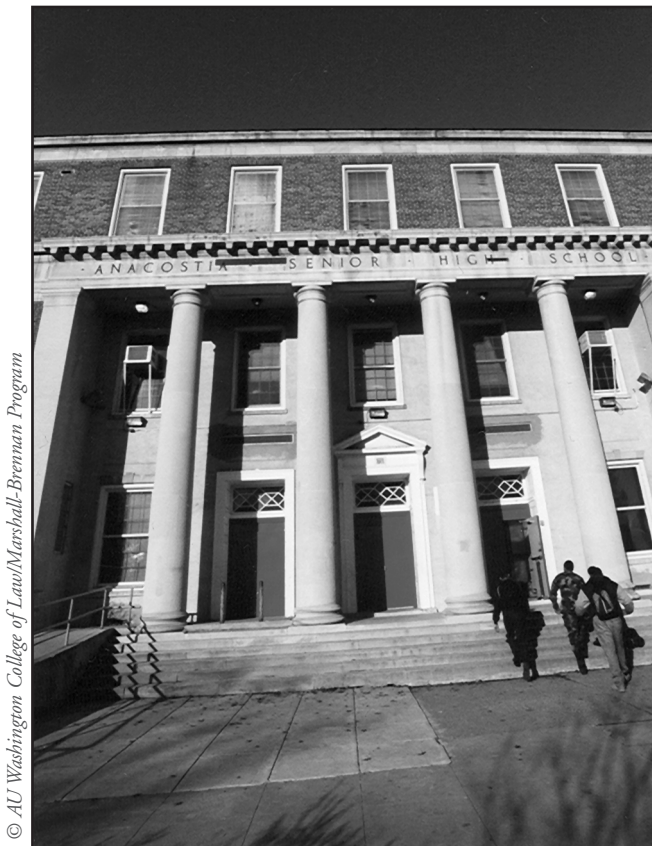
An amendment to the U.S. Constitution guaranteeing a right to education would place the United States in the company of nearly every industrialized nation. Without such a guarantee, the United States stands behind Iran, Iraq, Jordan, Libya, Pakistan, Sierra Leone, Sudan, Syria, and Yemen, each of which has some, although limited, constitutional guarantee to educational opportunity. The United States cannot legitimately lead the world as an example of freedom and democracy when it trails so far behind much of the world with respect to its commitment to a right that is so fundamental to effective participation in any democracy.

A constitutional amendment will also provide the catalyst to reverse our country's history of directly and indirectly linking educational opportunities to race and wealth. In *Rodriguez*, the Supreme Court not only rejected the argument that education is a fundamental right, it set the stage for resegregation of public schools and triggered the rapid decline of educational opportunities. On the heels of *Rodriguez*, the Court, in *Milliken v. Bradley*, declared that inter-district remedies for segregation were unconstitutional, leaving no legal basis to force desegregation across school-district lines. As constitutional law scholar Erwin Chermersky has argued, *Rodriguez* and *Milliken* reversed much of the progress

Of course, amending the Constitution will not immediately change the state of education in the United States: schools will not simply become better and students will not suddenly succeed overnight. But an amendment will have significant, broad-reaching policy implications. The act of passing an amendment itself will prove to be a unifying rally around the right to education and will turn national attention to the failing state of our public education system. Further, guaranteeing the right to an education will send the message to policymakers, parents, and students that education is as important as the right to speak, the right to worship, and the right to a fair trial. An amendment will be the "sea change" in our society and culture that is necessary for true education reform. Frederick Douglass, speaking about ending the "hypocrisy of American slavery," stated that "it is not light that is needed, but fire; it is not the gentle shower, but thunder. We need the storm, the whirlwind, and the earthquake." Amending the Constitution is the spark for the fire, the thunder for the storm, and the tremor that begins the quake. An amendment guaranteeing a right to education will end the hypocrisy of the American public education system.

CONCLUSION: FULFILLING THE PROMISE OF DEMOCRACY

THE PROMISE OF DEMOCRACY is one of personal and political autonomy. A healthy constitutional democracy exists when the people know and live out their rights, and genuinely govern themselves through their representatives. Education transforms this promise from rhetoric into reality. The right to education should therefore be the centerpiece of American efforts to build democracies around the world. As the United States claims to lead the world in the promotion and protection of freedom and democratic ideals, the right to an education is ripe for recognition at home. What is at stake is the future of this country and the very spirit and authenticity of its democracy. What is required is a commitment and a guarantee that every person has access to the educational opportunity needed to realize her own self-fulfillment and to become an active participant in our democracy. **HRB**



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Anacostia Senior High School

achieved under *Brown* and essentially constitutionalized a system that is both separate and unequal. An amendment to the Constitution will begin to undo the damage from the widespread denial of equal educational opportunity that has resulted from those decisions.