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Enforcing The Right to Public Education

Areto A. Imoukhuede*

ABSTRACT

This paper suggests that although each state within the United States currently recognizes a right to public education, the states do not provide meaningful and consistent judicial enforcement of the right. Recognizing a federal fundamental right to public education would be a step towards ensuring meaningful and consistent judicial enforcement of the right

INTRODUCTION

Public education has been recognized by each state in the United States of America as a right.¹ Yet, the U.S. has failed to consistently protect the right to public education. Most states have a right to public education explicitly recognized in the text of their state constitutions while the few that do not have it in their states constitution's text have judicially recognized education as an implied fundamental right or value under their state constitution. The broad recognition of the right to public

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1. Emily Parker, *50-State Review: Constitutional Obligations for Public Education*, EDUC. COMM'N OF THE STATES (Mar. 2016), <https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf> [<https://perma.cc/A32K-QMMH>].

education by the several states demonstrates that education is fundamental to ordered liberty within the United States. In short, although public education is not an enumerated right, it should nonetheless be recognized as a fundamental right under the U.S. Constitution. This symposium-inspired piece suggests that although each state within the United States currently recognizes a right to public education, the states do not provide meaningful and consistent judicial enforcement of the right. Recognizing a federal fundamental right to public education would be a step towards ensuring meaningful and consistent judicial enforcement of the right.

Part I of the article asserts that education is a fundamental human right. The part begins by considering the meaning of a fundamental right before addressing both the historical and philosophical arguments for recognizing the right to public education. Part II introduces how the states have constitutionally and judicially defined the right to public education. This part concludes by considering the ongoing racial inequalities in public education at the center of much of the failures to protect education rights. Part III evaluates the effectiveness of state judicial approaches in protecting the right to public education and concludes that there is inconsistent judicial enforcement of by the states of the right to public education. The part suggests that consistent and meaningful judicial enforcement of the right requires recognizing a federal fundamental right to public education.

I. EDUCATION IS A FUNDAMENTAL HUMAN RIGHT

Education is a fundamental human right and ought to therefore be recognized as a fundamental right under the U.S. Constitution. This part addresses both the historical and philosophical arguments for recognizing the right to public education before considering the ongoing racial inequalities in public education at the center of much of the education rights enforcement battles.

A. DEFINING FUNDAMENTAL RIGHTS

Before considering education as a fundamental right, we begin by defining a fundamental right. “[F]undamental rights are

defined as those rights that are so rooted in the nation's history and traditions that the Supreme Court recognizes them as fundamental."² Fundamental rights need not be explicitly stated in the text of the U.S. Constitution, which is to say that unenumerated rights have been recognized as fundamental rights.³ For example, the Court today recognizes as fundamental rights both the right to privacy and the right to interstate travel, neither of which are enumerated as rights within the Constitution.⁴

Rights can be framed in the negative—as freedoms from government action—liberties. Rights can also be framed in the positive—as obligations for the government to act—duties. Federally recognizing a fundamental right to public education would arguably require the government to fulfill a duty while protecting a fundamental liberty—the freedom from ignorance.⁵ The Court has a problematic “negative rights bias” which has “stifled the development of a positive rights-based jurisprudence.”⁶ This has specifically undermined the development of a consistent and meaningful jurisprudence regarding the fundamental right to public education.

2. Areto A. Imoukhuede, *The Fifth Freedom: The Constitutional Duty to Provide Public Education*, 22 U. FLA. J.L. & PUB. POL'Y 45, 53-54 (2011) (citing 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, 1409-10 (2006)); see also DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 195-97 (1989) (noting that the purpose of the Due Process Clause was to protect the people from the State and not to ensure that the State protected them from each other); Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) (“[T]he Constitution is a charter of negative rather than positive liberties.”).

3. Imoukhuede, *supra* note 2, at 53.

4. *Id.* at 47; see also Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (holding that a regulation “touch[ing] on the fundamental right of interstate movement” must promote a compelling state interest). For examples of unenumerated fundamental rights, see United States v. Guest, 383 U.S. 745 (1966) (right to interstate travel); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to privacy); Loving v. Virginia, 388 U.S. 1 (1967) (right to marriage); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) (right to procreate); Wisconsin v. Yoder, 406 U.S. 205 (1972) (right to direct a child's upbringing); Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833 (1992) (right to abortion included in right to privacy); Vacco v. Quill, 521 U.S. 793 (1997) (right to refuse medical treatment).

5. Imoukhuede, *supra* note 2, at 58; see also President Lyndon B. Johnson, Special Message to the Congress on Education: “The Fifth Freedom” (Feb. 5, 1968), in 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON, 1968-69, at 165, 171-762 (1970).

6. Imoukhuede, *supra* note 2, at 90.

B. EDUCATION IS A HUMAN RIGHT

Education is a human right. The human right is widely recognized under international treaty law. For example, the International Covenant on Economic, Social, and Cultural Rights (hereinafter, "The International Covenant") is one of several treaties and international agreements that recognizes the right to public education as a human right. The right is recognized throughout the International Covenant, including in Article 13, which states that:

[Parties to the] Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.⁷

Thus, the International Covenant proclaims the obligation of government that are party to the International Covenant to guarantee broad public access to education.

Other international law that describes a human right to public education includes Article 26 of the Universal Declaration of Human Rights (hereinafter "the Universal Declaration"). Article 26 of the Universal Declaration states:

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations,

7. International Covenant on Economic, Social and Cultural Rights art. 13, Dec. 16, 1966, 993 U.N.T.S. 3.

racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.⁸

The Universal Declaration thereby declares education as a fundamental human right that government has a duty to protect and enforce.

Furthermore, the right to public education is rooted in contemporary approaches to maintaining liberty and democracy. As was discussed in *Education Rights and the New Due Process*:

Education is a basic human capability that is necessary for advancing both liberty and human dignity under Amartya Sen and Martha Nussbaum's capabilities approach. The capabilities approach is particularly relevant to the discussion of an education right because it has become an internationally embraced modern theory of justice that shares an American embrace of equal opportunity

Without equal and fair access to education, liberty becomes meaningless and democracy an empty concept capable of immediate devolution into aristocracy or plutocracy.⁹

Contemporary approaches to evaluating and maintaining liberty and democracy identify education as essential. The lack of equal and fair access to education undermines fundamental aspects of democratic self-governance.

C. PUBLIC EDUCATION IS A FUNDAMENTAL RIGHT IN THE U.S.

The right to public education is strongly rooted in the history, traditions, and laws of the U.S. Notwithstanding the problematic *San Antonio Independent School District v. Rodriguez* holding, the right to public education is a fundamental

8. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. XXVI (Dec. 10, 1948).

9. Areto Imoukhuede, *Education Rights and the New Due Process*, 47 IND. L. REV. 467, 481, 507 (2014); see also AMARTYA SEN, DEVELOPMENT AS FREEDOM 5 (1999) ("What people can positively achieve is influenced by economic opportunities, political liberties, social powers, and the enabling conditions of good health, basic education, and the encouragement and cultivation of initiatives.").

right in the U.S. and should be recognized as such under the U.S. Constitution.¹⁰

1. History and Traditions Show Education is Fundamental

U.S. leaders have pursued free, public education since the founding of the nation. Although they did not fully realize their goals during their time, founders of the nation, such as Thomas Jefferson and Samuel Knox, sponsored laws to further public education.¹¹ Thomas Jefferson's Virginia "Bill for the General Diffusion of Knowledge" of 1779, called for public funding for building schools and also guaranteed all free children three years of free, public education.¹² This bill is reflective of an early belief in the duty of government to provide public education—at least for those who were not enslaved.¹³ Jefferson believed that society had a duty to educate children who had demonstrated superior intellectual ability at the common expense, even if they could not afford education.¹⁴

Reverend Samuel Knox, another leader in the American Revolutionary War, called for broader government involvement in education than Jefferson. In his 1799 writing, *An Essay on the Best System of Liberal Education Adapted to the Genius of the Government of the United States*, he made what the earliest call for a national system of education in America.¹⁵ Knox, a republican and therefore a believer in local government, called for a national system of education, describing the historic superiority of public education over private education.¹⁶

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

11. Imoukhuede, *supra* note 2, at 61-62. See generally BENJAMIN RUSH, *Of the Mode of Education Proper in a Republic*, in *ESSAYS, LITERARY, MORAL, AND PHILOSOPHICAL* 6 (2d ed. 1806); SAMUEL KNOX, *AN ESSAY ON THE BEST SYSTEM OF LIBERAL EDUCATION ADAPTED TO THE GENIUS OF THE GOVERNMENT OF THE UNITED STATES* 4-7 (1799); Thomas Jefferson, *A Bill for the More General Diffusion of Knowledge* (1799), *reprinted in* 2 *THE WORKS OF THOMAS JEFFERSON* 414 (Paul L. Ford ed. 1904).

12. *A Bill for the More General Diffusion of Knowledge*, *supra* note 11, at 415, 417-18; see also Imoukhuede, *supra* note 2, at 61-62.

13. *A Bill for the More General Diffusion of Knowledge*, *supra* note 11, at 415; see also Imoukhuede, *supra* note 2, at 61-62.

14. *A Bill for the More General Diffusion of Knowledge*, *supra* note 11, at 415; see also Imoukhuede, *supra* note 2, at 62.

15. KNOX, *supra* note 11, at 66-71 (emphasis added).

16. *Id.* at 59-66.

The initial efforts of the founding generation did not result in a national system of public education. Later, after the Civil War, the Reconstruction Era freedmen's schools manifested the social, political, and legal recognition of the centrality of education to freedom and democratic self-governance.¹⁷ W.E.B. DuBois wrote in his widely lauded historical work, *Black Reconstruction*, how the public schools in the southern U.S. were founded.¹⁸

The first great mass movement for public education at the expense of the state, in the South, came from Negroes. Many leaders before the [Civil War] had advocated general education, but few had been listened to. Schools for indigents and paupers were supported, here and there, and more or less spasmodically. Some states had elaborate plans, but they were not carried out. Public education for all at public expense, was, in the South, a Negro idea.¹⁹

This history demonstrates the developing recognition of education's importance and relationship with the concept of freedom. So that as the nation's conceptions of liberty and democracy evolved, so too did conceptions regarding the fundamentality of public education.

2. U.S. Treaty Obligations Create a Duty to Provide Public Education

U.S. law obligates government to enforce the human right to public education.²⁰ The previously described international laws as well as the state laws, form a grid/network/combination/tapestry of legal obligations that together create a duty for the government to provide public education.²¹

As to the international obligations, the U.S. is a signatory to

17. Imoukhuede, *supra* note 9, at 495; *see also* W. E. BURGHARDT DU BOIS, BLACK RECONSTRUCTION: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860-1880, at 637 (1935).

18. DU BOIS, *supra* note 17, at 638.

19. *Id.* at 638.

20. *See* 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, 550-53 (1992).

21. *See* discussion *supra* Section I.B.

the International Covenant which as described earlier, recognizes an international duty for states to provide public education.²² While the U.S. has not ratified the International Covenant it is signatory to and has ratified several other United Nations Conventions, including the U.N. Charter, which proclaims the duty of states to protect “human rights and fundamental freedoms.”²³ The U.N. Charter depends upon subsequent treaties and conventions, to define the scope of protected human rights.²⁴ The Universal Declaration is one of those conventions. As was previously mentioned, Article 26 of the Universal Declaration describes the right to public education as a human right.²⁵ As discussed in *Freedom from Ignorance: The International Duty to Provide Public Education*:

U.S. courts ought to recognize the Universal Declaration of Human Rights as binding, both because the Universal Declaration has been ratified by the U.S. and because it is widely viewed to have now attained the status of customary international law

Given that international treaties are on the same level as federal statutes on the domestic hierarchy of laws, the fact that the U.S. is a party to this Convention serves as more than a normative justification for the right, but describes its actual existence under federal law.²⁶

The existence of Article 26 supports a human right to public education and the U.S. being party to the Universal Declaration supports recognizing the human right as a fundamental right within the U.S.

The significance of the U.S. being a signatory to these international treaties and the ratification of such treaties makes the right a part of federal law, which arguably creates a statutory right to public education that supersedes state laws, pursuant to the Supremacy Clause of Article VI to the U.S. Constitution.²⁷

22. Ann I. Park, *Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation*, 34 UCLA L. REV. 1195, 1221 (1987).

23. Areto A. Imoukhuede, *Freedom from Ignorance: The International Duty to Provide Public Education*, in PUBLIC LAW AND SOCIAL HUMAN RIGHTS 59, 63-64 (David A. Frenkel ed. 2013); U.N. Charter art. 55.

24. U.N. Charter art. 55.

25. G.A. Res. 217 (III) A, *supra* note 8, art. XXVI.

26. Imoukhuede, *supra* note 23, at 64.

27. “This Constitution . . . and all Treaties made . . . under the Authority of the United

The 1900 *Paquete Habana* case establishes the legal precedent for the domestic recognition of international law and ratified treaties as binding upon U.S. courts.²⁸ This notwithstanding, at least one U.S. federal district court in Texas has avoided enforcing the international right to public education, suggesting that “the right to education, while it represents an important international goal, has not acquired the status of customary international law.”²⁹ A treaty obligation need not be customary international law to be enforceable by a member to the treaty.

Furthermore, while there is no acknowledged federal fundamental right to public education, each state within the United States recognizes the right to public education. The fact that every state recognizes a right to public education would suggest that for purposes of defining a fundamental right, today each state within the United State has acknowledged and deigned to protect this right to public education as a fundamental component to ordered liberty either by way of the explicit text of their state constitutions or by way of judicial acknowledgement that the right is part of their state constitutions. These state guarantees regarding the right to public education are the subjects of our next part.

II. EACH STATE RECOGNIZES THE RIGHT TO PUBLIC EDUCATION

While there is no federal “fundamental right” to public education, each state recognizes the right.³⁰ *San Antonio Independent School District v. Rodriguez* held that there is no right to public education under the U.S. Constitution.³¹ The impact of that holding was that Mexican-American school children who were challenging a Texas statute that funded

States, shall be the supreme Law of the Land.” U.S. CONST. art. VI, cl. 2.

28. See generally *The Paquete Habana*, 175 U.S. 677 (1900).

29. *In re Alien Children Education Litigation*, 501 F. Supp. 544, 596 (S.D. Tex. 1980); Derek Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 790 (2018).

30. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (stating that there is no explicit right to education under the U.S. Constitution); *But cf.* Karen Swenson, *School Finance Litigation: Why Are Some State Supreme Courts Activist and Others Restrained?*, 63 ALB. L. REV. 1148, 1148 (2000) (“All fifty state constitutions contain provisions guaranteeing a right to free public education.”).

31. *Rodriguez*, 411 U.S. at 35.

elementary and high schools with property taxes failed because there was no fundamental right at stake that would elevate the case to a higher level of constitutional scrutiny. The case was evaluated under the rational basis test. Additionally, wealth was found not to be a suspect classification, so the law was not found to fall within a suspect classification under equal protection scrutiny.

However, the problem with this case was avoided in *Plyler v. Doe*, which came after *Rodriguez*. There, the Court treated education as an important right that receives more than the minimal level of constitutional scrutiny.³² *Plyler* held that despite not being a fundamental right, education was such an important right that undocumented children cannot be denied it simply because they are undocumented.³³ The state was found to be required to demonstrate an important reason for the denial of the right—despite the fact that the Court does not deem it to be a fundamental right.³⁴

The relevance of these cases is unclear in the contemporary education context where, despite the failure to formally recognize a federal right to public education, each state recognizes a right under its own state constitution. This fact would suggest that for purposes of defining a fundamental right, today each state within the United States has acknowledged and deigned to protect this right to public education as a fundamental component to ordered liberty. Therefore, following the definition of fundamental rights being those rights that are fundamental to ordered liberty in the U.S., there exists a right to public education that exists with the support of state constitutions.³⁵ However, this fragmented approach to a right is problematic because of the lack of uniformity in both the language and its mode for enforcement.

A. SOME STATES RECOGNIZE A RIGHT TO A HIGH-QUALITY EDUCATION

Some state constitutions go as far as to recognize a right to a high quality education. The states that fall under this category

32. *Plyler v. Doe*, 457 U.S. 203, 221-23 (2005).

33. *Id.* at 230.

34. *Id.* at 223-24.

35. Swenson, *supra* note 30; Black, *supra* note 29. .

include the states of Illinois, Florida, and Rhode Island.

1. ILLINOIS - Ill. Const. Art. 10, § 1.

According to the Illinois state constitution:

A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities.

The State shall provide for an efficient system of high quality public educational institutions and services. Education in public schools through the secondary level shall be free.³⁶

This language suggests that Illinois is committed to more than the existence of free, public school but also to a high quality standard for those schools.

2. FLORIDA - Fla. Const. Art. 9 § 1.

According to the Florida state constitution:

The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.³⁷

The language here similarly invokes a high quality standard, like Illinois. The Florida Constitution's Article 9 Education mandate goes further by providing detailed requirements for fulfilling high quality standard for Florida schools.

36. ILL. CONST. art. X, § 1.

37. FLA. CONST. art. IX, § 1(a).

B. OTHERS RECOGNIZE A RIGHT TO AN ADEQUATE EDUCATION

Other state constitutions are more limited, recognizing a right to an adequate education. The states that fall under this category include the states of Arkansas and New York.

1. ARKANSAS - Ark. Const. Art. 14, § 1

According to the Arkansas state constitution:

Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education.³⁸

The guarantee of “suitable” public education has been interpreted as invoking right to an adequate education.

2. NEW YORK - McKinney’s Const. Art. 11, § 1

According to the New York state constitution:

The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.³⁹

Thus, despite *Rodriguez* and in accord with *Brown v. Board of Education* and *Plyler v. Doe*, we have by way of the states, a right to public education that exists with the support of state constitutions. As noted above, this fragmented approach to a right, is problematic in the lack of consistency and meaningful enforcement, which we will discuss next.

III. INSUFFICIENT STATE JUDICIAL ENFORCEMENT OF THE STATE RIGHT

This part suggests that recognizing an equal right to a public

38. ARK. CONST. art. XIV, § 1.

39. N.Y. CONST. art. XI, § 1.

education is essential to establishing a meaningful right to public education. The section argues that to protect an equal right to public education, the most stringent standard for constitutional scrutiny—strict scrutiny—must be updated to more fully protect positive rights. In advancing this argument, it first suggests that a uniform national standard is necessary for evaluating fulfillment of the obligation to provide a high quality, public education. Next, this part critiques current state standards for review and the extent to which they succeed and fall short of meaningfully guaranteeing racial equality with regard to the right to public education for non-white children. This part concludes by suggesting that in the context of positive rights, the intent requirement for demonstrating discrimination is particularly burdensome and must be circumvented in order to fully guarantee an equal right to public education.

A. STATES HAVE NOT ENFORCED RACIAL EQUALITY IN PUBLIC EDUCATION

This would be an ideal space for application of Congressional powers under section 5 of the Fourteenth amendment to at least prevent discrimination in the application of this state created right, irrespective of the Congress' desire to create full-blown administration that protects and enforces a federal right to public education.⁴⁰ Equal Protection could also stand in to protect the right to public education on an individualized basis through lawsuits or even class actions.

The current problem is that the U.S. Supreme Court has limited the scope of Fourteenth Amendment enforcement powers in two especially problematic ways. First, the Court has held that notwithstanding the expansive rights protection goals of the Fourteenth Amendment as articulated by its framers, Congress may not use its powers under section five of the Fourteenth Amendment to expand the scope of rights.⁴¹

40. See U.S. CONST. amend. XIV, § 5.

41. *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966) (“By including [Section 5] the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause. The classic formulation of the reach of those powers was established by Chief Justice Marshall in *McCulloch v. Maryland*: ‘Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end,

In *City of Boerne v. Flores*, local zoning authorities denied a Catholic Archbishop building permit to enlarge the church under a historic preservation ordinance.⁴² The Archbishop brought suit challenging the ordinance under Religious Freedom Restoration Act of 1993 (RFRA).⁴³ The United States District Court for the Western District of Texas entered judgment for the city, determining that Congress had exceeded the scope of its enforcement power under Section 5 of the Fourteenth Amendment in enacting RFRA.⁴⁴

A second problematic limitation on the Fourteenth Amendment powers of Congress is the rule from *Washington v. Davis*, which limits heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment only to those instances where intent to discriminate against a suspect classification can be shown.⁴⁵ This rule makes it all but impossible to obtain meaningful review of government actions that undermine equal access to public education, such as those taken in *Rodriguez*.⁴⁶ Constitutionalizing the right would mandate uniformity in the level of scrutiny and analysis.

The proposed solution of constitutionalizing a right to public education on a federal level would mandate an explicit acknowledgment of education as a positive obligation of government. All too often, the Court demonstrates a libertarian bias that treats rights as only including liberties or freedoms from government action, as though government's only obligation is to not act under certain enumerated circumstances. It is clear throughout the U.S. Constitution that government, both federal and state, have an obligation to act. Government exists to further some purposes.⁴⁷ Those purposes include, as the Preamble states, "secur[ing] the Blessings of Liberty to ourselves and our

which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.") (citations omitted); *City of Boerne v. Flores*, 521 U.S. 507, 545 (1997) ("Congress lacks the ability independently to define or expand the scope of constitutional rights by statute.").

42. *City of Boerne*, 521 U.S. at 545.

43. *Id.*

44. *Id.*

45. *Washington v. Davis*, 426 U.S. 229, 237-38 (1976).

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

47. Areto A. Imoukhuede, *Gun Rights and the New Lochnerism*, 47 SETON HALL L. REV. 329, 390 (2017).

Posterity . . .” in the broad sense.⁴⁸ However, in the specific sense, to provide for “a Republican Form of Government” as well as to “regulate Commerce,” and “to coin Money, [and] regulate the value thereof”⁴⁹ As I have previously described, education is a tool that allows for people to develop the tools necessary to meaningfully participate in representative democracy.

The nation’s education systems have failed to consistently guarantee a high quality or even an adequate, basic education. These failures disproportionately undermine access for non-white children.⁵⁰ Despite the rhetoric of American Equality, the school experiences of African-American and other “minority” students in the United States continue to be substantially separate and unequal. Nonwhite children continue to receive fewer resources in their schools and a lower quality of public education. These disparities continue to exist notwithstanding the heightened scrutiny standard that ostensibly exists for discrimination based on race and national origin, non-white children continue to receive fewer resources in their schools and a lower quality of public education.⁵¹ Racial inequality in education must be corrected by way of enforcing the already recognized right to public education that is guaranteed under each state’s laws. This inequality is at the heart of the states’ failed enforcement of the right to public education.

Focusing on racial disparities, renowned education scholar, Linda Darling-Hammond, has demonstrated that in the state of California, a state where the minimal adequacy is the governing standard the state’s non-white students have far worse educational outcomes compared to white students.⁵² “In 1990 for example, the Los Angeles City School District was sued by students in predominately minority schools because their schools were not only overcrowded and less well funded than other schools, they were also disproportionately staffed by inexperienced and

48. U.S. CONST. pmbi.

49. U.S. CONST. art. 4, § 4.; U.S. CONST. art. 1, § 8.

50. Linda Darling-Hammond, *Unequal Opportunity: Race and Education*, BROOKINGS INST. (March 1, 1998), <https://www.brookings.edu/articles/unequal-opportunity-race-and-education/> [<https://perma.cc/4XWU-YP63>].

51. *Id.*

52. *Id.*

unprepared teachers hired on emergency credentials.”⁵³ Often, the educational outcomes for non-white students fall below established metrics for evaluating the receipt of a minimally adequate education. This is, in fact, the consistent result of Darling-Hammond’s studies throughout the “U.S. educational system, which is one of the most unequal in the industrialized world, and that students routinely receive dramatically different learning opportunities based on their social status.”⁵⁴

To be clear, the education problem is one of race. According to the studies, Black students and most other non-white students, receive a quality of education that is far less than that of their white peers. This, surprisingly, is true even when Black students attend the same schools. The problem becomes exacerbated when they attend increasingly segregated schools.⁵⁵ After years of efforts to desegregate, many, including the Supreme Court, seem to have given up on integration as a solution to the educational inequality problem.

B. HIGH-QUALITY PUBLIC EDUCATION STANDARDS NOT ENFORCED

Every state recognizes a right to public education in some form.⁵⁶ Illinois, Florida, and Rhode Island are among those that

53. Linda Darling-Hammond, *Inequality in Teaching and Schooling: How Opportunity Is Rationed to Students of Color in America*, in *THE RIGHT THING TO DO, THE SMART THING TO DO: ENHANCING DIVERSITY IN THE HEALTH PROFESSIONS: SUMMARY OF THE SYMPOSIUM ON DIVERSITY IN HEALTH PROFESSIONS IN HONOR OF HERBERT W. NICKENS, M.D.* (Smedley, B.D., Stith, A.Y., Colburn, L. et al., eds. 2001).

54. Darling-Hammond, *supra* note 50.

55. *Id.*

56. Karen Swenson, *School Finance Litigation: Why Are Some State Supreme Courts Activist and Others Restrained?*, 63 ALB. L. REV. 1147-49 (2000) (“All fifty state constitutions contain provisions guaranteeing a right to free public education.”).

Although every state constitution, except that of Mississippi, has a provision which, at a minimum, mandates that some sort of system of free public education be maintained, the duty imposed by the constitutional text varies a great deal. At one end of the spectrum are the seventeen “establishment provisions” which simply mandate that a free public school system be established and nothing more. In the middle are eighteen “quality provisions,” which mandate that an educational system of a specific quality be provided. Finally, at the other end of the spectrum are fourteen “high duty provisions” which seem to place education above other governmental functions such as highways or welfare.

William E. Throd, *A New Approach to State Constitutional Analysis in School Finance*

go further than simply announcing an education right, but include within its state constitution a quality component.⁵⁷ For example, Illinois guarantees a right to “high quality” educational services.⁵⁸ According to the Illinois Constitution:

A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities. The State shall provide for an efficient system of high quality public educational institutions and services. Education in public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law. The State has the primary responsibility for financing the system of public education.⁵⁹

Unfortunately, the high-quality component to the right has been read to be of little effect by the Illinois court as illustrated in *Committee for Educ. Rights v. Edgar*.⁶⁰

In *Edgar*, the court held that although a court would consider a constitutional challenge under the education clause of the state constitution based on a theory that poor school districts provided inadequate education, disparities in educational funding between school districts based on relative property wealth did not offend the “efficiency” provision of the Illinois State Constitution.⁶¹ Regarding the question of whether state educational institutions and services were of “high quality,” the court ruled that such a decision was outside sphere of judicial function because the state constitutional right to public education was not a fundamental

Litigation, 14 J. L. & POL. 525, 538-40 (1998).

57. Throd, *supra* note 52, at 539 n.40.

58. See ILL. CONST. art. 10, § 1 (West, Westlaw through April 1, 2019).

59. *Id.*

60.

[The court] conclude[d] that the question of whether the educational institutions and services in Illinois are “high quality” is outside the sphere of the judicial function. To the extent plaintiffs’ claim that the system for financing public schools is unconstitutional rests on perceived deficiencies in the quality of education in public schools, the claim was properly dismissed. For the foregoing reasons, we affirm the dismissal of plaintiffs’ claims under the education article of our state constitution.

Committee for Ed. Rights v. Edgar, 672 N.E.2d 1178, 1193 (Ill. 1996).

61. “[W]e agree with the courts below that disparities in educational funding resulting from differences in local property wealth do not offend section 1’s efficiency requirement.” *Id.* at 1189. “[W]e conclude that questions relating to the quality of education are solely for the legislative branch to answer.” *Id.*

right for purposes of equal protection analysis.⁶² Applying reasoning hauntingly similar to that used in *Rodriguez* the court ruled the funding system that had created disparities between school districts, based on local wealth was rationally related to a legitimate state goal of promoting local control of education.⁶³

Other state courts have also chosen to read-out of their constitutions' quality components.⁶⁴ The Florida court in *Coalition for Adequacy and Fairness in Sch. Funding v. Chiles*, expressed concerns about usurping the legislature's responsibility for education and the lack of manageable standards in evaluating education.⁶⁵ Similarly, in *City of Pawtucket v. Sundlun*, a Rhode Island court went as far as to direct the plaintiffs in that education case to instead seek relief from the legislature because the legislature had "virtually unreviewable discretion" over the

62. *Id.* at 1195 ("While education is certainly a vitally important governmental function, it is not a fundamental individual right for equal protection purposes, and thus the appropriate standard of review is the rational basis test. Under the rational basis test, judicial review of a legislative classification is limited and generally deferential.") (internal citations omitted).

63. *Id.* at 1196 ("In accordance with *Rodriguez* and the majority of state court decisions, and for all the reasons set forth above, we conclude that the State's system of funding public education is rationally related to the legitimate State goal of promoting local control.")

64. *Edgar*, 672 N.E.2d at 1196 ("While some decisions in other jurisdictions have concluded that there is no rational basis for funding disparities based on local wealth, financing schemes similar to ours have been upheld by a majority of those courts that have applied the rational basis standard.") (internal citations omitted).

65.

While the courts are competent to decide whether or not the Legislature's distribution of state funds to complement local education expenditures results in the required "uniform system," the courts cannot decide whether the Legislature's appropriation of funds is adequate in the abstract, divorced from the required uniformity. To decide such an abstract question of "adequate" funding, the courts would necessarily be required to subjectively evaluate the Legislature's value judgments as to the spending priorities to be assigned to the state's many needs, education being one among them. In short, the Court would have to usurp and oversee the appropriations power, either directly or indirectly, in order to grant the relief sought by Plaintiffs. While Plaintiffs assert that they do not ask the Court to compel the Legislature to appropriate any specific sum, but merely to declare that the present funding level is constitutionally inadequate, what they seek would nevertheless require the Court to pass upon those legislative value judgments which translate into appropriations decisions.

Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 406-407 (Fla. 1996).

public schools.⁶⁶ Together, these holdings amount to a withdrawal of judicial review over the implementation of constitutional mandates for high, quality education. Absent judicial review, these state constitutional rights to education lose their mandatory character and become merely aspirational, devoid of any real, legal significance. Leaving the mandate limited only to what Glensy's describes as the hortatory approach to human dignity—expressive of an ideal, but without a clear mandate for enforcement.⁶⁷

C. MINIMAL ADEQUACY STANDARDS SOMETIMES ENFORCED

Aside from Illinois, Florida, and Rhode Island, there are other states where the courts have read into their constitutions or otherwise actively enforced at least an adequacy requirement and

66.

We concur with plaintiffs that the right to an education is a constitutional right in this state, but we stress that article 12 assigns to the General Assembly the responsibility for that right. The plaintiffs have not persuaded us that this right was not capable of enforcement through the General Assembly's plenary powers in educational matters. Because the Legislature is endowed with virtually *unreviewable* discretion in this area, plaintiffs should seek their remedy in that forum rather than in the courts.

City of Pawtucket v. Sundlun, 662 A.2d 40, 57 (R.I. 1995) (emphasis added).

67.

The expressive approach, in many ways, is subsumed within each of the other three approaches, because one cannot detach the hortatory value from the use of the term without actually using the term, so it will always play a role regardless of which approach is chosen. Nevertheless, the weakness with having an approach that is solely expressive is just that—in a strictly legal sense it has little impact, and in the non-legal sense it would be difficult to predict what its influence eventually would be.

Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 141 (2011). The modern concept of dignity and its relation to autonomy, rationality, liberty and morality was first enunciated by a member of the intelligentsia in the works of Immanuel Kant. See generally, IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 42-43 (Mary Gregor ed. and trans.) (Cambridge University Press, 1997). In that work, Kant argued that dignity is an end in itself. It does not have an instrumental value, which has relative price or worth but rather dignity is an inner worth—something that is intrinsically endowed on any rational and autonomous individual. *Id.*; see also, Ronald Dworkin, *Three Questions for America*, N.Y. REV. BOOKS, Sept. 21, 2006, at 24, 26; RONALD DWORIN, *JUSTICE FOR HEDGEHOGS* 191-218, 255-75 (2011). This explores the meaning of dignity that the principles of human dignity . . . are embodied in the embodied in the Constitution and are now common ground in America.

thus demonstrate the potential meaningful enforcement of a right to public education.⁶⁸

Limited resources and deference to lawmakers makes “minimal adequacy” standard attractive. The challenge is identifying failures to provide public education that undermine the right in the context of budget shortfalls and other pressures on government. Given the economic realities of many states, courts have frequently applied a minimal adequacy standard, lest they co-opt the primary lawmaking and enforcement functions of the legislature and executive branch of a state.⁶⁹

The relative ease of finding a consensus is another appeal of minimal adequacy. As a matter of constitutional law, minimal adequacy’s appeal rises in this context insofar as a minimum standard may be more readily agreed upon by experts, whereas a high-quality standard may not be the subject of broad agreement. Notwithstanding this, some states actually have a high-quality standard or “quality” standard that has been interpreted to mean high quality, in their state constitution’s text or as central to the interpretation of that text.

One example of a state court attempting to breathe life into a state’s constitution’s quality requirement is *Rose v. Council for Better Educ.*⁷⁰ Here the court held that every Kentucky child must be provided with equal opportunity and access to an “adequate education.”⁷¹ Another such example is *Claremont II*, where the court held that the New Hampshire public schools have a duty to provide a “constitutionally adequate education” to every educable child.⁷² In both these cases the court acted in a manner quite contrary to that of Illinois and others, accepting their state constitutions as actually imposing some duties on the legislature that are not left for the legislature alone to interpret completely

68. See *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 211-12 (Ky. 1989); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1375-76 (N.H. 1993). See also *Edgar*, 672 N.E.2d at 1196 (“In accordance with *Rodriguez* and the majority of state court decisions, and for all the reasons set forth above, we conclude that the State’s system of funding public education is rationally related to the legitimate State goal of promoting local control.”).

69. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18, 58-59 (1973).

70. *Rose*, 790 S.W.2d at 186; see also Kelly Thompson Cochran, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 N.C. L. REV. 399, 401 n.12 (2000).

71. *Rose*, 790 S.W.2d at 211; see also Thompson Cochran, *supra* note 66, at 411.

72. *Claremont Sch. Dist.*, 635 A.2d at 1376; see also Thompson Cochran, *supra* note 66, at 401 n.12.

independent of judicial review.⁷³

Still other states have actively enforced a holding that education is a fundamental right under their constitutions.⁷⁴ For example, in *Leandro v. State* the court enforced the right under the North Carolina Constitution guaranteeing every child the opportunity to receive a “sound basic education.”⁷⁵ Similarly, in *Seattle Sch. Dist. No. 1 v. State* the court held that the Washington legislature must provide funding to ensure a “basic education” to students.⁷⁶ The New York courts have also strongly enforced the right to public education. In *Board of Educ. v. Nyquist* the New York court held that New York schools must provide a “sound basic education.”⁷⁷ A New York court recently affirmed *Nyquist*, in *Campaign for Fiscal Equity v. State* where New York’s funding mechanisms were found to have an adverse and disparate impact on the city’s minority public school students.⁷⁸ Though the court recognized that the legislature should be afforded the first opportunity to reform public school financing, the state had failed to assure that New York City’s public schools receive adequate funding to afford students the “sound basic education” guaranteed by the Education article of the New York State Constitution.⁷⁹

We may now consider these examples of states where the right to public education is vigorously enforced by the judiciary and contrast them with those previously described states where the right to public education is minimally enforced.⁸⁰ If we add into the comparison the formerly described states where the state constitutional adequacy and quality requirements are essentially dead-letters, for example Illinois, and the landscape of interstate

73. *Rose*, 790 S.W.2d at 208-09; *Claremont Sch. Dist.*, 635 A.2d at 1377-78.

74. See *Leandro v. State*, 488 S.E.2d 249, 254-55 (N.C. 1997); *Seattle Sch. Dist. No. 1 of King Cty. v. State*, 585 P.2d 71, 90-92 (Wash. 1978); see also Thompson Cochran, *supra* note 66, at 401 n.13.

75. *Leandro*, 488 S.E.2d at 255.

76. *Seattle School Dist. No. 1 of King Cty.*, 585 P.2d at 76-77.

77. *Nyquist*, 439 N.E.2d at 359.

78. *Campaign for Fiscal Equity v. State*, 719 N.Y.S.2d 475, 541-42 (2001).

79. See *id.*

80. Compare *Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359, 366-69 (N.Y. 1982); *Leandro v. State*, 488 S.E.2d 249, 254-55 (N.C. 1997); *Seattle Sch. Dist. No. 1 of King Cty. v. State*, 585 P.2d 71, 90-92 (Wash. 1978) with *Committee for Ed. Rights v. Edgar*, 672 N.E.2d 1178, 1189-93 (Ill. 1996); *Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 404-408 (Fla. 1996); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 57 (R.I. 1995).

divergence in the recognition and enforcement of the right to public education becomes quite apparent.⁸¹ Given what Lundberg describes as the nearly unanimous recognition of the importance of the right to public education across the states; such divergent enforcement undermines the significance of this national priority.⁸² In other situations where local enforcement of national priorities fails to achieve equivalent standards of application, it is deemed necessary for federal recognition and enforcement of the fundamental right.⁸³ This should also be so for public education.

D. DEFINING EQUALITY IN TERMS OF FUNDING IS INSUFFICIENT BECAUSE THIS APPROACH WOULD CONTINUE TO DISADVANTAGE NON-WHITE CHILDREN

This leads to a concern about the use of funding as the basis for evaluating equality. The *Nyquist* case was a fiscal equity law suit that framed enforcement of the right around equal funding.⁸⁴ However, quality of funding alone does not necessarily guarantee equal results. The concern raised by James Ryan that poor and non-white students need more resources not equal resources in order to achieve equal results with their white counterparts. The reasons for that have been framed around resource deprivation in homes and in communities, but even those explanations fail to fully capture the scope of the concern. Equal funding within a

81. Compare *Nyquist*, 439 N.E.2d at 366-69; *Leandro*, 488 S.E.2d at 254-55; *Seattle Sch. Dist. No. 1 of King Cty.*, 585 P.2d at 90-92 with *Edgar*, 672 N.E.2d at 1178; *Chiles*, 680 So. 2d at 400; *Sundlun*, 662 A.2d at 40.

82. See Paula J. Lundberg, *State Courts and School Funding: A Fifty-State Analysis*, 67 ALB. L. REV. 1101, 1101 (2000).

83. Areto A. Imoukhuede, *The Fifth Freedom: The Constitutional Duty to Provide Public Education*, 22 U. FLA. J. L. & PUB. POL'Y 45, 50 (2011) ("Education problems in poor, urban, and predominantly minority communities are the result of numerous factors, including an antiquated curriculum, inexperienced and underpaid teachers, and higher student-to-teacher ratios when compared to wealthier, predominantly white suburban districts. Factors in addition to school financing exacerbate the education problem. Students in poor, urban districts tend to have greater educational needs than students in the suburbs because of background factors such as poverty, poorly educated parents, malnutrition, high crime rates and limited English proficiency, to name a few. It follows that merely equalizing funding to districts will not alleviate the pervasive problems of unequal education. What is needed is full protection of the right to equal access to a high quality public education.").

84. *Nyquist*, 439 N.E.2d at 359.

structure that has institutionalized racial discrimination and that is therefore built around a hierarchy where non-whites are at the bottom of that hierarchy, will by definition be expected to yield results that validate that structure.

CONCLUSION

Despite the failure of the U.S. Supreme Court to recognize education as a U.S. constitutional right, each state has recognized it as a fundamental right under their state constitutions. This means that notwithstanding the U.S. Supreme Court's holding, education is a right within each of the U.S. Therefore, the U.S. ought to protect the right to public education by recognizing a federal fundamental right to public education. This would be a step towards ensuring meaningful and consistent judicial enforcement of the right.

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