

# EDUCATION RIGHTS AND THE NEW DUE PROCESS

ARETO A. IMOUKHUEDE\*

## INTRODUCTION

This Article argues for a human dignity-based, due process clause analysis to recognize the fundamental duty of government to provide high quality, public education. Access to public education is a fundamental duty, or positive fundamental right because education is a basic human need and a constituent part of all democratic rights.

In *The Fifth Freedom*, I argued that there is a fundamental duty under the U.S. Constitution to provide public education and that the reason a fundamental right to public education has not been recognized is because of a profound confusion regarding fundamental rights as duties.<sup>1</sup> The Court is biased towards protecting negative rights or liberties over enforcing positive rights or duties.<sup>2</sup> As a result, the Court has failed to develop a framework for protecting even the most basic and widely accepted of fundamental duties, the constitutional duty to provide high quality, public education.<sup>3</sup>

Here, I demonstrate that education is essential to any meaningful concept of personal liberty and to democracy. Without an educated citizenry, liberty and democracy are merely empty concepts devoid of meaning for all but the economically privileged and socially advantaged. For instance, voter turnout is much lower amongst people with no college educations as compared to people with college and graduate level degrees.<sup>4</sup> The voter turnout rate for adults who

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\* Professor of Law, Nova Southeastern University; J.D., 2002, Georgetown University Law Center; B.A., 1999, Northwestern University. I offer a special thanks to Charlton Copeland, David A. Lacy, and Terry Smith, for their helpful comments and suggestions right from the earliest stages of this project. I thank all the scholars who participated in the 2012 John Mercer Langston Scholarship Workshop for exceptional feedback on an early draft of this Article. I thank Lean Alcantara, Melissa Aponte Martini, Harold A. Pryor, and Citra Registe for their excellent research assistance. I thank the Nova Southeastern University, Shepard Broad Law Center for supporting my work on this Article with a generous writing grant. Finally, I thank Bridget, Emmanuel, and Princess Imoukhuede for their unfailing support.

1. Areto A. Imoukhuede, *The Fifth Freedom: The Constitutional Duty to Provide Public Education*, 22 U. FLA. J.L. & PUB. POL'Y 45, (2011).

2. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973); Imoukhuede, *supra* note 1, at 81.

3. *Plyler v. Doe*, 457 U.S. 202, 223 (1982) ("Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.' Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population."); *Rodriguez*, 411 U.S. at 35 ("Education . . . 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.").

4. See, e.g., Barry C. Burden, *The Dynamic Effects of Education on Voter Turnout*, 28

have not completed high school is even lower.<sup>5</sup> Hence, it is well understood that education inspires and enables meaningful democratic engagement.<sup>6</sup>

Recognizing that public education is a basic capability that is essential to human dignity requires application of a due process clause analysis similar to that applied in the 2003 human dignity-based holding of *Lawrence v. Texas*.<sup>7</sup> Ironically, *Lawrence*, which is a negative-rights and liberty-based holding, can serve as the template for recognizing the positive right of access to public education.<sup>8</sup> While the basic right recognized in *Lawrence* is the right to privacy, free of government intrusion, *Lawrence* rests on a broader notion of substantive due process: that privacy is essential to liberty and human dignity.<sup>9</sup> Like the right to privacy, education is also essential to liberty. However, the case for a dignity-based due process clause protection of the right to public education is even stronger for education than the case for the right to privacy. This is because education is essential to both the liberty and the democracy components of human dignity.<sup>10</sup>

This Article begins in Part I by discussing the nature of the U.S. “national education crisis”<sup>11</sup> and reasons for why improving public education across the U.S. would help advance innovation and the nation’s long term gross domestic product. I then discuss empirical research that demonstrates that educational

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ELECTORAL STUD. 540 (2009) (analyzing survey data from 1952 to 2004, showing that the effect of college education increased starting in 1980s, thereby magnifying the ability of educational attainment to predict turnout); Aina Gallego, *Understanding Unequal Turnout: Education and Voting in Comparative Perspective*, 29 ELECTORAL STUD. 239, 240 (2010) (discussing findings that well-educated citizens vote more frequently than the poorly educated in some countries, including the United States).

5. Rachel Milstein Sondheimer & Donald P. Green, *Using Experiments to Estimate the Effects of Education on Voter Turnout*, 54 AM. J. POL. SCI. 174-79 (2009) (arguing that there is a powerful relationship between education and voter turnout and pointing out that political participation is the function of one’s level of education; people with mere high school education or less are less likely to vote).

6. See Terry Smith, *Autonomy Versus Equality: Voting Rights Rediscovered*, 57 ALA. L. REV. 261, 262 (2005) (arguing that autonomy as a constitutional value was always implied in many fundamental rights, but neglected in voting specially when the political autonomy to vote of the minorities and that minority voters must experience for themselves the value of autonomy).

7. 539 U.S. 558 (2003) (finding that the Texas statute which made it a crime for people of the same sex to engage in sexual conduct was unconstitutional as applied to males who engaged in these same sex sexual activities in the privacy of their own homes).

8. *Id.*

9. *Id.*

10. See Smith, *supra* note 6, at 301-02 (arguing that autonomy as a constitutional value was always implied in many fundamental rights, but neglected in voting especially when the political autonomy to vote of the minorities and that minority voters must experience for themselves the value of autonomy).

11. See *infra* note 29 and accompanying text.

inequality based on race, ethnicity, and wealth has only become worse.<sup>12</sup> Race and socioeconomic educational inequality comparisons between the U.S. and Canada demonstrate that the way things are with regard to U.S. educational inequity is not the way things have to be or have to remain. The section closes with the Deweyan insight that in addition to affecting economic prosperity, education also impacts the capability of citizens to fully and meaningfully engage in the political process.<sup>13</sup>

Part II demonstrates that equal and fair access to high quality education is essential to democracy and human dignity. This Part argues with the support of classical, enlightenment, and modern philosophers such as Aristotle,<sup>14</sup> Jacques Rousseau,<sup>15</sup> and John Dewey,<sup>16</sup> that a well-educated citizenry is essential to democracy. This Part connects concepts of liberty with the capabilities approach as applied by Amartya Sen<sup>17</sup> and Martha Nussbaum.<sup>18</sup> This approach supports protecting basic capabilities that enhance freedom; including the capability to be educated.<sup>19</sup> The capabilities approach treats education as important to economic and political participation.<sup>20</sup> Based on this capabilities based analysis, Part II

12. See *infra* note 27 and accompanying text.

13. See JOHN DEWEY, *DEMOCRACY AND EDUCATION* 4 (Free Press 1966) (1916); see also Thomas Jefferson, *Bill for the More General Diffusion of Knowledge (1779)*, in *Education in the United States: A Documentary History* 739-40 (Sol Cohen ed., 1974) [hereinafter *EDUCATION IN THE U.S.*]; MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* 32-33 (Harvard Univ. Press 2011); AMARTYA SEN, *THE IDEA OF JUSTICE* 231-35, 275-76, 283, 291-96, 300, 304 (Belknap Press 2011) [hereinafter *SEN, THE IDEA OF JUSTICE*].

14. Aristotle, *The Politics* 229 (Carnes Lord trans., Univ. of Chicago Press 1984) [hereinafter *ARISTOTLE, THE POLITICS*] (“Since there is a single end for the city as a whole, it is evident that education must necessarily be one and the same for all . . .”).

15. See, e.g., *DEMOCRACY: A READER* 100 (Ricardo Blaug & John Schwarzmantel eds., 2000). See generally JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSES*, 11-15 (G.D.H. COLE TRANS., 1968) (explaining that “through the social contract we gain civil liberty and moral liberty: the former involves being ruled by a general will instead of our individual self-interest. The latter means obedience to rules which we, in association with our fellow citizens, have made.”)

16. See DEWEY, *supra* note 13, at 4.

17. See AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 4-5, 10-11, 36-49, 144 (1999) [hereinafter *SEN, DEVELOPMENT AS FREEDOM*].

18. See NUSSBAUM, *supra* note 13, at 32-33. Among Nussbaum’s brief list of ten centrally important capabilities is the capability for “Senses, Imagination, and Thought.” *Id.* at 33. Nussbaum explains that the capability to think and reason in a “truly human” way requires an adequate education. *Id.*

19. See, e.g., *id.*

20. See SEN, *THE IDEA OF JUSTICE*, *supra* note 13, at 231-35, 275-76, 283, 291-96, 300, 304. Sen first discusses the link between economic wealth and substantive freedoms; for example, while there is a link between higher income and “freedom from premature mortality,” other factors come into play including public healthcare, access to medical care, access to education, and social unity.

concludes that being educated is essential to liberty, democracy, and human dignity.<sup>21</sup>

Part III explains how modern Equal Protection Clause jurisprudence has retreated from its early equality aspirations as it has continued to embrace an increasingly libertarian perspective.<sup>22</sup> This Part begins by discussing the U.S. Supreme Court's early proclamations regarding the importance of education and how the Warren Court overcame problematic liberal theories of equality that had previously been used to justify "separate but equal" in education and other contexts.<sup>23</sup> Part III concludes by recognizing that the modern Court has abandoned equality as a viable principle of justice, in favor of a liberty-centered jurisprudence that ignores the equality principle.<sup>24</sup>

Part IV prescribes an alternative approach for recognizing and protecting a right to public education based in a due process clause analysis. Such an approach would allow education rights advocates to overcome the Equal Protection Clause limitations described in Part III.<sup>25</sup> Part IV critiques Kenji Yoshino's "pluralism anxiety" and argues for applying the more accurate label of "xenophobia" to describe the societal pressures animating the Court's abandonment of equality. Despite this critique of Yoshino's pluralism anxiety label, this part embraces Yoshino's central argument that a due process clause-based human dignity approach to recognizing constitutional duties is more likely to achieve success, because the Court appears to have already applied human dignity as a proxy for other rights, most recently when examining privacy rights in *Lawrence v. Texas*.<sup>26</sup>

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21. *Id.* at 226-27.

22. *See, e.g.*, Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 55-57, 83 (2004); *see also* Jamie B. Raskin, *Affirmative Action and Radical Reaction*, 38 HOW. L.J. 521, 525-29 (1995) (arguing that the political gains made by African Americans and other minorities during the Civil Rights era and under the Warren Court have been reduced by the current conservative Court); Kyron Huigens, *Rethinking the Penalty Phase*, 32 ARIZ. ST. L.J. 1195, 1201-02 (2000) (arguing that the Court has made it clear that equality is not a factor to observing Eighth Amendment challenges).

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

24. *See* Leslie Meltzer Henry, *The Jurisprudence Of Dignity*, 160 U. PA. L. REV. 169 (2011). Henry explores and expands the concept of dignity in the U.S. Constitutional Law context and makes three important findings. First, the Court's reliance on dignity is increasing, and the Roberts Court is accelerating that trend. Second, in contrast to its past use, dignity is now as likely to be invoked by the more conservative Justices on the Court as by their more liberal counterparts. Finally, the study demonstrates that dignity is not one concept, as other scholars have theorized, but rather five related concepts.

25. *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 776-87 (2011). Kenji Yoshino connects liberty and equality through a concept of human dignity and suggests that a liberty-centered human dignity approach that derives respect and equal dignity for all is more likely to achieve litigation success than an equality based approach.

26. *Id.* at 776-96 (using *Lawrence v. Texas* as an example of the liberty-based dignity claim).

## I. THE NATURE OF THE EDUCATION PROBLEM

Ensuring that every child in the U.S. at least receives a high quality primary and secondary school education is obviously important in our increasingly complex, global society.<sup>27</sup>

[A]ccess to an equitable, empowering education for all people has become a critical issue for the American nation as a whole. No society can thrive in a technological, knowledge-based economy by depriving large segments of its population of learning. But at a time when three-quarters of the fastest-growing occupations require post-secondary education, just over one-third of our young people receive a college degree. Meanwhile, in many European and Asian nations, more than half of young people are becoming college graduates.<sup>28</sup>

Despite this need for what Darling-Hammond frames as an “equitable and empowering education,” the U.S. is in the midst of what some, including myself, have characterized as “a national education crisis.”<sup>29</sup> Fear of lagging economic growth lies at the heart of many current political and economic debates both in the U.S. and across the world.<sup>30</sup> Economists recognize high quality education can aid in enhancing innovation, thereby advancing a nation’s long term gross domestic product.<sup>31</sup> Thus, improving public education across the U.S. can be a

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27. See Linda Darling-Hammond, *Soaring Systems: High Flyers All Have Equitable Funding, Shared Curriculum, and Quality Teaching*, AM. EDUCATOR, Winter 2010-2011, <http://www.aft.org/pdfs/americaneducator/winter1011/DarlingHammond.pdf>, archived at <http://perma.cc/AX4U-47SG> [hereinafter Darling-Hammond, *Soaring Systems*].

28. *Id.* at 19.

29. Dennis J. Condrón & Vincent J. Roscigno, *Disparities Within: Unequal Spending and Achievement in an Urban School District*, 76 SOC. OF EDUC. 1, 20 (2003) (“[R]acial and class inequality in school funding illustrate[s] these realities in the contemporary era, showing how being of a minority or poor social-class is often synonymous with attending a school that is dilapidated, overcrowded, unsafe, and unhealthy”); Imoukhuede, *supra* note 1, at 49-50; Regina Ramsey James, *How to Mend a Broken Act: Recapturing Those Left Behind By No Child Left Behind*, 45 GONZ. L. REV. 683, 694-97 (2010) (“Millions of children in our nation’s public education system are still not receiving the fair, equal, and significant opportunity for a high-quality education”).

30. *Economic Crisis and Market Upheavals*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/subjects/c/credit\\_crisis/](http://topics.nytimes.com/top/reference/timestopics/subjects/c/credit_crisis/) (summarizing the chronology of the current economic crisis, from housing bubble to credit crunch and financial crisis) (last visited May 23, 2014); see also James Crotty, *Structural Causes of the Global Financial Crisis: A Critical Assessment of the ‘New Financial Architecture*, 33 CAMBRIDGE J. ECON. 563 (2012) (arguing that the current financial crisis is the result of deregulation, financial innovation, a variety of booms and bust, and the structural flaws of the financial system).

31. See Imoukhuede, *supra* note 1, at 74 (citing Philip Stevens & Martin Weale, *Education and Economic Growth*, in INTERNATIONAL HANDBOOK ON THE ECONOMICS OF EDUCATION 164, 164-67 (Geraint Johnes ed., 2004) (construing a formula regarding economic prosperity and quality of education in democratic society,  $Ln GDP \text{ per Capita} = 0.35 \text{ in enrollment rate} + 5.23$ ).

real factor in advancing our nation's long term gross domestic product.<sup>32</sup> The simple recognition that high quality public education positively effects long term economic growth should by itself be more than sufficient reason for our nation to take seriously the current national education crisis in order to ensure our nation's prosperity for posterity.<sup>33</sup>

Irrespective of the overall or average adequacy of the U.S. education system, one point that is not in serious debate is the woeful race and wealth-based inequities in public education.<sup>34</sup> Sadly, Julius Chambers' statement regarding race, poverty and education is as true today as it was back in 1987:

In America. . . the quality and quantity of education that children receive remain tied to the race and economic status of their family. Many black and poor children, through no fault of their own, continue to be deprived of training in even the most basic skills, such as reading, writing and arithmetic. This deprivation works a profound and lifelong injury to these neglected youths, and cripples their ability to participate in political and economic life.

The United States is often romantically portrayed as a meritocracy. Yet, the continuing poverty of a disproportionate number of black children, their increasing isolation in largely segregated school systems,

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"According to Stevens and Weale's theory, increased investments in education ultimately increase innovation, which in the long term increases a nation's GDP." *Id.*)

32. *Id.*

33. Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1467 (2007). Rebell argues:

Through state standards-based education reform initiatives and the Federal No Child Left Behind Act, the United States has made an unprecedented and extraordinary commitment to ensuring that all children will meet challenging academic proficiency standards. To date, however, little progress has been made toward meeting this ambitious mandate, largely because state and federal educational policies fail to deal with the enormous impediments to learning that are posed by the conditions of poverty in which millions of school children live.

*Id.* at 1467; see also Sarah L. Browning, *Will Residency Be Relevant to Public Education in the Twenty-First Century?*, 8 PIERCE L. REV. 297, 339 (2010) ("In order for present-day students to compete in this rapidly growing technological environment, our public education system may require a reconfiguration of both the curriculum and the delivery system to prepare our students for a promising future in the Information Age. This will require new thinking about the entire public policy dimension of public education at the national and state levels.").

34. See Linda Darling-Hammond, *Restoring Our Schools: The Quest for Equity in the United States*, 51 EDUC. CANADA, no. 5, 2011, at 14; see also Julius Chambers, *Adequate Education for All: A Right, an Achievable Goal*, 22 HARV. C.R.-C.L. L. REV. 55, 55-58 (1987) (arguing that racial and economic inequality lead to inequality in opportunity to adequate education and to make matters worse, racial and economic inequality are tied, thus minorities are prone to inadequate education.); Darling-Hammond, *Soaring Systems*, *supra* note 27, at 19.

and the resistance of white citizens both to full integration and to adequate funding of all school districts, have perpetuated a system in which the potential achievement of a child is highly correlated with the race and economic status of his parents.<sup>35</sup>

More recently, education scholar, Linda Darling-Hammond's research demonstrates that if anything, the racial inequities in education have only worsened.<sup>36</sup>

In 2011, the four-year high school graduation rate remains stagnant at about 70 percent; the achievement gap between minority and White students in reading and math is larger than it was in 1988; and U.S. performance on international tests has continued to drop...

... In the U.S., the impact of socio-economic factors on student performance is almost double what it is in Canada. . . . In the U.S., White and Asian students score just above the average for the European OECD nations in each subject area, but African-American and Hispanic students—many of whom are in highly segregated schools that lack qualified teachers and up-to-date materials—score so much lower that the national average plummets to the bottom tier. Thus, the poor U.S. standing is substantially a product of unequal access to the kind of intellectually challenging learning measured on these international assessments.<sup>37</sup>

Darling-Hammond's research demonstrates that many empirical studies regarding the overall or average quality of American education frequently overlook the abysmal quality of education the U.S. education system affords most racial and ethnic minorities and impoverished children.<sup>38</sup> Darling-Hammond's socioeconomic and racial comparisons between the U.S. educational system and Canada's, indicates that the way things are in the U.S. is not the way things have to be or have to remain. However, the notion of a U.S. education system is itself a bit of a misnomer. Under current Constitutional law doctrine, the federal government can only play a limited role in public education and therefore, the individual states are primarily involved in creating and ensuring the quality of their own state and local public education systems.<sup>39</sup> The federal government's

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35. Chambers, *supra* note 34, at 55-56.

36. Darling-Hammond, *Soaring Systems*, *supra* note 27, at 19.

37. *Id.*

38. *Id.*

39. *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974) (discussing that “no single tradition in public education is more deeply rooted than local control over the operation of schools); *see also* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 39 (1973) (stating that “the Texas system . . . should be scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution . . . [l]ocal control is not only vital to continued public support of the school, but it is of overriding importance from an educational

role in public education is limited largely to its constitutional power to tax and spend for the general welfare under Article I, Section 8, Clause 1 of the U.S. Constitution.<sup>40</sup> However if this power were coupled with the Fourteenth Amendment's Equal Protection Clause based duty of government to protect equal access to publicly provided services, ought to provide sufficient legal protection of the right of poor and minority children to receive at least the same quality of public education as their more privileged peers. However, as to the issues of economic privilege, current constitutional law doctrine fails to recognize wealth as a category of discrimination that would invoke meaningful constitutional law protection.<sup>41</sup> As to race and ethnicity, the U.S. Supreme Court, has largely retreated from its earlier mid-twentieth century integrationist and equality aspirations for protecting equal access to public education.<sup>42</sup>

The quality of education affects more than economic prosperity, it also impacts the capability of citizens to fully and meaningfully engage in the political process.<sup>43</sup> This connection between democracy and education has been recognized since the founding and has continued to be recognized since that time.

Thomas Jefferson and his fellow founding fathers wrote official declarations and papers that espoused a civic philosophy that public education is essential to a democracy. They espoused normative arguments favoring public education that have continued to be articulated by more contemporary educational philosophers like John Dewey.<sup>44</sup>

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standpoint as well.”); *Paynter v. State*, 797 N.E.2d 1225, 1229-30 (N.Y. 2003) (discussing how education has, and should always remain in, local control).

40. U.S. CONST. amend. I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.”).

41. ERICA FRANKENBERG ET AL., *A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM?* 14 (2003); Imoukhuede, *supra* note 1, at 85; Brenna Bridget Mahoney, *Children at Risk: The Inequality of Urban Education*, 9 N.Y.L. SCH. J. HUM. RTS. 161, 169 (1991).

42. Darling-Hammond, *Soaring Systems*, *supra* note 27, at 19 (discussing the quality of education in predominantly poor and minority communities; the inequity of results and the inequity of quality of teachers); Imoukhuede, *supra* note 1, at 49; Mahoney, *supra* note 41, at 162; Eric P. Christofferson, Note, *Rodriguez Reexamined: The Misnomer of “Local Control” and a Constitutional Case for Equitable Public School Funding*, 90 GEO. L.J. 2553, 2553-55 (2002) (“[d]isparities in the quality of education from one school district to the next are both real and considerable.”).

43. Jefferson, *Bill for the More General Diffusion of Knowledge (1779)*, in *EDUCATION IN THE U.S.*, *supra* note 13, at 739-40; Dewey, *supra* note 13, at 4; *see also* NUSSBAUM, *supra* note 13; SEN, *THE IDEA OF JUSTICE*, *supra* note 13.

44. Imoukhuede, *supra* note 1, at 60; *see also* Jefferson, *Bill for the More General Diffusion of Knowledge (1779)*, in *EDUCATION IN THE U.S.*, *supra* note 13, at 739-40; DEWEY, *supra* note 13, at 4.



In American democracy, “we the people” are not ruled, but rather we actively participate in deciding who will be elected to serve us by voting for representatives who we believe will further our interests.

Absent the capability of citizens to comprehend the issues and thereby make informed choices as to how best to further the public good, American democracy may begin to lose its democratic character.<sup>45</sup> Our republic will begin to look more like an aristocracy run exclusively by those with sufficient wealth or other privilege to attain a largely unattainable quality of education. Those few will effectively rule over a populace of largely uneducated people, incapable of meaningfully evaluating the performance of those they have technically “elected,” but who have actually been selected through a process that few understand.<sup>46</sup> Such a failure of education would diminish our grand republic into a form of aristocratic demagoguery that would be less institutionally accountable or limited than a straightforward aristocracy.<sup>47</sup> The highly regarded education philosopher, John Dewey, believed: “[T]he aim of education [is] to help in correcting unfair privilege and deprivation, not to help perpetuate them . . . . [T]he school becomes the chief means for the reform of society toward a better condition. . . . Yet education is not limited to the school.”<sup>48</sup> Dewey believed education to be a lifelong process: “Education is continuous travel through life in which the only arrival to speak of is death.”<sup>49</sup> This insight underscores education’s value to democracy and its role in avoiding a descent into an undemocratic aristocracy or plutocracy.

Education is the ultimate access point to opportunity.<sup>50</sup> Many in the U.S. believe that all should have an equal opportunity to obtain the basic skills necessary to succeed in life, even if there is disagreement as to what those basic skills might include before some demonstration of merit becomes necessary in order to be entitled to further education.<sup>51</sup> There is significant support for the

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45. See DEWEY, *supra* note 13, at 8; Imoukhuede, *supra* note 1, at 63 (“Formal education has become increasingly important as the scope of resources, achievements, and responsibilities in society has grown more complex. No longer can children get by with a mere three years of formal basic education and from there go on to apprentice themselves to adults.”).

46. See generally ANNE MICHAELS EDWARDS, EDUCATIONAL THEORY AS POLITICAL THEORY 81-96 (Avebury 1996) (summarizing John Dewey’s educational and political theories).

47. *Id.* at 85-87.

48. *Id.* at 87.

49. *Id.* at 95.

50. JOHN M. ALEXANDER, CAPABILITIES AND SOCIAL JUSTICE: THE POLITICAL PHILOSOPHY OF AMARTYA SEN AND MARTHA NUSSBAUM 126 (2008) (“[T]he political community needs to provide both the required level of material resources, education and social conditions for the pursuit of the good life.”); SEN, DEVELOPMENT AS FREEDOM, *supra* note 17, at 39 (“[P]olitical participation may be hindered by the inability to read newspapers or to communicate in writing with others involved in political activities.”).

51. See ALEXANDER, *supra* note 50, at 126; see also Goodwin Liu, *Interstate Inequality In Educational Opportunity*, 81 N.Y.U. L. REV. 2044, 2090 (2006).

modern need for higher education, here defined as any education after the twelfth grade.<sup>52</sup> This Article focuses on a matter of which there is even less dispute; the necessity for providing access to high quality, primary and secondary education as a vehicle for providing the equal opportunity that today's concept of human dignity requires.<sup>53</sup>

## II. EDUCATION IS ESSENTIAL TO DIGNITY

Dignity is fundamental to modern concepts of justice, and education is essential to human dignity.<sup>54</sup> Human dignity has been referenced by American judges with increasing frequency since World War II.<sup>55</sup> According to Leslie Meltzer Henry, there has been a resurgence of human dignity-based decision making in the current Roberts Court.<sup>56</sup> Human dignity has now become the basis for much of international human rights law.<sup>57</sup> Dignity was seen by Immanuel Kant as flowing from the uniquely human consciousness and the ability to discern, make laws and thereby shape reality.<sup>58</sup> For Kant, dignity was something every human being had, simply by virtue of being human.<sup>59</sup>

The modern view that dignity is fundamental to justice and that education is essential to human dignity was shared by the late American education philosopher and psychologist, John Dewey, who famously believed in an education-centered concept of meliorism.<sup>60</sup> Dewey believed that the world can be improved through

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52. See generally GEORGE VERNEZ ET AL., CLOSING THE EDUCATION GAP: BENEFITS AND COSTS, RAND CENTER FOR RESEARCH ON IMMIGRATION POLICY (1999), available at [http://www.rand.org/content/dam/rand/pubs/monograph\\_reports/2007/MR1036.pdf](http://www.rand.org/content/dam/rand/pubs/monograph_reports/2007/MR1036.pdf); Laura S. Yates, *Plyler v. Doe and the Rights of Undocumented Immigrants to Higher Education: Should Undocumented Students Be Eligible for In-State College Tuition Rates?*, 82 WASH. U.L. REV. 585 (1999).

53. "Education," unless specifically stated otherwise, refers in this Article to primary and secondary education, which is the focus of this Article. Focusing on primary and secondary education is not intended at all to indicate that higher education does not bring to bear similar concerns and implicate a similar duty under the U.S. Constitution.

54. BETTY A. REARDON, EDUCATING FOR HUMAN DIGNITY: LEARNING ABOUT RIGHTS AND RESPONSIBILITIES 5-7 (1995).

55. Henry, *supra* note 24, at 172-73, nn.17-26 ("[F]ew concepts dominate modern constitutional jurisprudence more than dignity does without appearing in the Constitution. The Supreme Court has invoked the term in connection with the First, Fourth, Fifth, Sixth, Eighth, Ninth, Eleventh, Fourteenth, and Fifteenth Amendments." *Id.*).

56. *Id.* at 169-73.

57. SEN, THE IDEA OF JUSTICE, *supra* note 13, at 226-27.

58. IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 42-43 (Mary Gregor ed. & trans., Cambridge Univ. Press 1997)

59. *Id.* 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.

60. DEWEY, *supra* note 13, at 61-105 (arguing for the process of progress in society as

human action and that human action can be inspired and improved through education.<sup>61</sup> He criticized popular approaches to education as creating followers and conformists rather than leaders and reformers who would be capable of inspiring progress.<sup>62</sup> For Dewey, “[t]he whole point of democracy is to provide the wherewithal for change, for improvement.”<sup>63</sup> Education was viewed by Dewey as essential to progress. “If some people within a democratic society are practically enslaved, even those who are privileged suffer as a result.”<sup>64</sup> This insight connects with then State Senator Barack Obama’s acclaimed speech at the 2004 Democratic National Convention:

It’s not enough for just some of us to prosper. For alongside our famous individualism, there’s another ingredient in the American saga. A belief that we’re all connected as one people. If there is a child on the south side of Chicago who can’t read, that matters to me, even if it’s not my child. If there is a senior citizen somewhere who can’t pay for their prescription drugs, and having to choose between medicine and the rent, that makes my life poorer, even if it’s not my grandparent. If there’s an Arab American family being rounded up without benefit of an attorney or due process that threatens my civil liberties.<sup>65</sup>

Those famous words from 2004 continue to summarize the American ethic and observed reality that deprivation and oppression anywhere in society is detrimental even to the most privileged within that society. Protecting human dignity is therefore essential if the U.S. hopes to realize the words on the Great Seal of the United States of *E. Pluribus Unum*—out of many one.

I begin this section by first examining the concept of human dignity and its relationship to education.<sup>66</sup> Education rights advocates and leaders have suggested various educational approaches over the years, but a theme that most of these approaches share is an unstated but widely understood goal of enhancing human dignity.<sup>67</sup> I therefore look at the concept of liberty, its general relevance

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dependent in the education of citizenry, which in turn leads to society that progresses improves over time as a consequence of education being a social function); EDWARDS, *supra* note 46, at 78 (discussing the process of progression that fulfills the needs of the existing community and improves the existing life so that the future will be better than the past).

61. The belief has much in common with what is considered the cornerstone of progressive political ideology, which believes in progress through social and political change. See James W. Ceaser, *Progressivism and the Doctrine of Natural Rights*, 29 SOC. PHIL. & POL’Y 177, 177-95 (2012).

62. EDWARDS, *supra* note 46.

63. *Id.* at 78.

64. *Id.* at 75.

65. Senator Barack Obama, Keynote Address at the 2004 Democratic National Convention (July 27, 2004).

66. KANT, *supra* note 58, at 24, 43.

67. See, e.g., Robin West, *The Constitution and the Obligations of Government to Secure the Material Preconditions for a Good Society: Rights, Capabilities, and the Good Society*, 69

to democracy, and its special relevance to American democratic society. The idea of the individual and the protection of individual liberty are essential components to democracy. Human dignity is essential to any meaningful concept of liberty, and education is essential to dignity and democracy.

*A. Defining and Applying Human Dignity*

1. *The Components of Dignity.*—The relationship between education and dignity is that education is essential to the development of the capabilities necessary to be a fully realized human being.<sup>68</sup> Human dignity includes people's freedom to pursue their ambitions without being unfairly or unjustly hindered. Human dignity requires a degree of influence over those structures that occasionally impinge on individual freedom. Hence, modern political and legal theory views the protection of and respect for what is generally framed as "human dignity" as an essential function of any modern government or political system.<sup>69</sup> Such influence is relevant for ensuring that individual liberty is not undermined without individual consent. Liberty is an essential component to dignity, as is democracy.<sup>70</sup>

Leslie Meltzer Henry explains in *The Jurisprudence of Dignity* that the concept of dignity is dynamic, so that its meaning depends on the context of its usage.<sup>71</sup> In exploring the concept of dignity in the constitutional law context, she finds, among other things, that the Court's reliance on dignity is increasing and the Roberts Court is accelerating that trend.<sup>72</sup> A recent example of this increased

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FORDHAM L. REV. 1901, 1902 (2001). West argues:

Many citizens of even prosperous democratic states cannot possibly enjoy such a minimal threshold, furthermore, without some state involvement in the distribution of resources, particularly with the inequalities that persist and threaten to worsen today. States are required, by justice and goodness both, to treat citizens with dignity, and with equal dignity at that.

*Id.* at 1902; *see also* Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 68-69 (2011) (discussing the concept of human dignity and relevant approaches to reaching it, including negative and positive rights theories); Imoukhuede, *supra* note 1, at 60 ("Thomas Jefferson and his fellow founding fathers wrote official declarations and papers that espoused a civic philosophy that public education is essential to a democracy. They espoused normative arguments favoring public education that have continued to be articulated by more contemporary educational philosophers like John Dewey.").

68. There is a necessary connection between autonomy and dignity, as Kant proclaimed that "[a]utonomy is therefore the ground of the dignity of human nature and of every rational creature." KANT, *supra* note 58, at 43.

69. NUSSBAUM, *supra* note 13, at 77-79.

70. Alexander Tsesis, *Dignity and Speech: The Regulation of Hate Speech in a Democracy*, 44 WAKE FOREST L. REV. 497, 498-502 (2009).

71. Henry, *supra* note 24, at 177, 186-88.

72. *Id.* at 171-72.

application of dignity-based arguments is the decision in *Lawrence v. Texas*.<sup>73</sup>

2. *Lawrence v. Texas Applied Human Dignity to Expand Constitutional Rights*.—*Lawrence v. Texas* underscores the current application of human dignity-based arguments in construing and expanding U.S. constitutional rights. In *Lawrence*, the Court applied a human dignity-based due process clause analysis to hold that a Texas sodomy law was an unconstitutional infringement on the right to privacy.<sup>74</sup>

The facts of *Lawrence* involved local police responding to a neighbor's noise complaint to discover two men engaging in homosexual sodomy.<sup>75</sup> Police arrested the men pursuant to the Texas anti-sodomy law that was later challenged as an unconstitutional violation of the Fourteenth Amendment.<sup>76</sup> Here, the Court overturned *Bowers v. Hardwick*, holding that the right to privacy protects the right to be free from invasive governmental intrusion into a private sexual encounter between consenting adults because a right to privacy in such an intimate setting is essential to human dignity.<sup>77</sup>

Justice Kennedy's majority opinion explicitly relied on the concept of dignity as the basis for recognizing a protected "zone of liberty."<sup>78</sup> Kennedy's interpretation ultimately broadens the Court's liberty doctrine and effectively broadens the scope of recognized constitutional rights.<sup>79</sup> The liberty doctrine is broadened by applying and interpreting a concept that is never explicitly mentioned in the text of the Constitution, human dignity.<sup>80</sup> "These matters, involving the most intimate and personal choices a person may make in a

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73. *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003) (ruling a Texas anti-sodomy statute unconstitutional based on liberty, privacy, and dignity interest in having a safe zone for intimate relationships).

74. *Id.*

75. *Id.*; James Paulsen, *The Significance of Lawrence v. Texas*, 41 HOUS. LAW. 32, 33 (2004) (discussing the facts of the case and how Justice Kennedy's analysis that stressed dignity and liberty is a better approach than using Equal Protection Clause and that the case signifies a shift from privacy jurisprudence to liberty centered rationale).

76. *Lawrence*, 539 U.S. at 562-63.

77. *Id.* ("The liberty protected by the Constitution allows homosexual persons the right to choose to enter upon relationships in the confines of their homes and their own private lives and still retain their dignity as free persons."); Lisa K. Parshall, *Redefining Due Process Analysis: Justice Anthony Kennedy and the Concept of Emergent Rights*, 69 ALB. L. REV. 237, 238-39, 280-82 (2005) (discussing that liberty-centered approach is a better way to frame fundamental rights, that an Equal Protection analysis may be deemed erroneous with intolerable results (like the State could have banned sodomy altogether), and that the concept of emergent rights can be support by the analysis in *Lawrence*); Yoshino, *supra* note 25, at 779 (discussing the importance of the *Lawrence* Court's liberty-based dignity analysis, which could be asserted more often in the future).

78. *Lawrence*, 539 U.S. at 562; Parshall, *supra* note 77, at 239.

79. Glensy, *supra* note 67, at 68-69.

80. *Lawrence*, 539 U.S. at 574 ("these matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment").

lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”<sup>81</sup>

The Court has thus demonstrated its continuing willingness to first, recognize and enforce extra-textual constitutional rights, in the form of fundamental rights, and to interpret those rights using extra-textual terms. The *Lawrence decision* also demonstrates the Court’s willingness to interpret those rights by applying a particular extra-textual concept, human dignity as it relates to liberty.<sup>82</sup> A similar human dignity-based interpretation of the due process clause can be applied to recognize a right to public education.

### *B. Education is Essential to the Liberty Component to Human Dignity*

I have suggested that human dignity has two major components, a liberty component and a democracy component. Education is essential to the liberty component of human dignity because education is a basic human capability that is necessary to achieve valuable human functionings or achievements.<sup>83</sup> Any denial of opportunities for individuals to develop their capabilities undermines human dignity.<sup>84</sup>

*1. Rousseau and Dewey Connect Education with Liberty and Dignity.*—Jean-Jacques Rousseau and John Dewey have both suggested that education is essential to individual liberty and human dignity. Rousseau’s education philosophy holds that education is the vehicle through which the individual can be trained to fully participate in society.<sup>85</sup> In the *Emile*, Rousseau set out his paradigm for educating children as a vehicle for improving society, the individual, and the political community.<sup>86</sup> Rousseau uses the example of

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81. *Id.*

82. *Lawrence*, 539 U.S. at 574 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

83. AMARTYA SEN, *COMMODITIES AND CAPABILITIES*, 7, 9 (Oxford Univ. Press 1999) [hereinafter SEN, *COMMODITIES AND CAPABILITIES*] (“A functioning is an achievement of a person, what he or she manages to do or to be.”).

84. NUSSBAUM, *supra* note 13, at 18-20.

85. EDWARDS, *supra* note 46, at 7.

86. *Id.* Among his important contributions is the idea that education should be in harmony with the development of the child’s natural capacities by a process of apparently autonomous discovery. *Id.* Learning by way of autonomous discovery, otherwise known as discovery based learning, is frequently applied in the legal academy by way of a strategy popularly known as the Socratic method. *See also* JEAN JACQUES ROSSEAU, *EMILE* 142 (Barbara Foxley, trans. Nu Vision Publications, LLC 2009).

While specific pedagogical method evaluation is beyond the scope of this Article, it is within the scope to recognize that notwithstanding the costs and benefits to the autonomous discovery approach, there is an underlying philosophy of respecting individual autonomy and attempting to reinforce it when educating through a process of self-discovery. Discovery based learning, in part, is meant to cultivate individual liberty by encouraging independent thought and understanding. While Rousseau’s methods from *Emile* have been critiqued for their effectiveness in cultivating

educating a boy named Emile to examine education and development through childhood and emphasizes the significance of developing a child's capabilities and ensuring individual autonomy and liberty through education.<sup>87</sup>

Likewise, the more modern education philosophy of John Dewey calls for enhancing individual liberty by way of guaranteeing opportunities to learn and develop essential capabilities.

In educating to produce the 'best' person, Dewey stresses the freedom of the individual. . . . Their own particular talents, abilities, and qualities are to be developed in accord with their own nature. . . . The success and happiness of the individual is impossible without the individual being an integral part of the group, the society.<sup>88</sup>

Thus, Dewey emphasized individual freedom, development of capabilities, and acculturation into democratic society as cornerstone goals for education. Dewey, much like Rousseau, was "primarily interested in the development of the qualities [and] capacities which . . . make up autonomy."<sup>89</sup> In order for there to be any meaningful concept of personal liberty, as defined by the capability to think and act independently, both Rousseau and Dewey believed education was necessary. "An enormous part of personal liberty for Dewey [was what he referred to as] freedom of intelligence, observation, or judgment. . . . [P]eople cannot become significantly more autonomous without freedom of expression."<sup>90</sup>

For Dewey, education was a necessary component to being able to think well enough to effectuate the basic civil liberty of free expression. Dewey's approach foreshadowed the contemporary capabilities approach. Indeed, both Dewey and today's capabilities theorists share an insight regarding the fundamentality of education in protecting and advancing human dignity.

2. *Education Is a Basic Human Capability.*—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.<sup>91</sup> 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 while accepting some social and economic inequality when it is a consequence of meritocracy.<sup>92</sup>

individual liberty, this was clearly a central goal for Rousseau.

87. See ROUSSEAU, *supra* note 15.

88. EDWARDS, *supra* note 46, at 9-10; see also DEWEY, *supra* note 13, at 15 (arguing that education is a social function and that a person needs society to be educated and in turn, society as a whole benefit).

89. EDWARDS, *supra* note 46, at 6.

90. *Id.* at 73.

91. See, e.g., SEN, DEVELOPMENT AS FREEDOM, *supra* note 17, at 5 ("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.").

92. Imoukhuede, *supra* note 1, at 46-47; see also NUSSBAUM, *supra* note 13, at ix-xii; *id.* at x.

The capabilities approach holds that the well-being of the people in a society should be assessed by the capabilities of the people living within that society to obtain what Sen describes as “valuable functionings,” which can be thought of as important life achievements.<sup>93</sup> Valuable achievements include such important components to life and liberty as education, as well as food, self-respect, and political participation.<sup>94</sup> Absent such valuable achievements, quality of life and meaningful freedom is undermined.<sup>95</sup> Capabilities can be simply defined as access or opportunity to achieve.<sup>96</sup> It is the capability to achieve and not the achievements themselves that are of central concern under the capabilities approach. Notably, under the capabilities approach, education is both an achievement and a capability.<sup>97</sup>

Sen has suggested that access to certain fundamental services that advance human capabilities must be considered when the United Nations and other international bodies evaluate a society or a nation.<sup>98</sup> Nussbaum has gone beyond Sen’s original approach and has generated a list of ten basic capabilities that are necessary for governments to guarantee; among those ten basic capabilities is education.<sup>99</sup> Nussbaum specifically advocates for the fundamentality of

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93. The capabilities approach is an approach to evaluating a society based on the capability of the people within the society to “achieve valuable functionings.” ALEXANDER, *supra* note 50, at 56 (citing Sen’s work). Under the capabilities approach, “functionings” refers to individual achievements and what individuals manage to do or become. See SEN, *COMMODITIES AND CAPABILITIES*, *supra* note 83, at 7-9. A just political system or ideal society is a society that enhance people’s capabilities, where capabilities refers to what “reflects the various combinations of functionings [a person] can achieve . . . and, “a functioning is an achievement of a person what he or she manages to do or to be.” *Id.* at 7.

94. See SEN, *DEVELOPMENT AS FREEDOM*, *supra* note 17, at 3 (arguing that freedom is contingent on social and economic arrangements that include facilities for education and health care).

95. See NUSSBAUM, *supra* note 13, at 17-18.

96. “A just political system or ideal society is a society that enhance people’s capabilities, where capabilities refers to what “reflects the various combinations of functionings [a person] can achieve . . . and, a functioning is an achievement of a person what he or she manages to do or to be.” SEN, *COMMODITIES AND CAPABILITIES*, *supra* note 83, at 7, 9.

97. NUSSBAUM, *supra* note 13, at 33-34, 152-54; see also Amartya Sen, *Capability and Well-being*, in *THE QUALITY OF LIFE* 30, 31 (Martha Nussbaum & Amartya Sen eds., 1993) (stating that “[t]he *capability* of a person reflects alternative combinations of functionings the person can achieve, and from which he or she can choose one collection.”).

98. SEN, *THE IDEA OF JUSTICE*, *supra* note 13, at 226-27.

99. NUSSBAUM, *supra* note 13, at 33-34. This is unlike Sen, who refuses to suggest a list of capabilities because he believes that any list ought to be the product of a deliberative democratic process and not dictated by experts and theorists. ALEXANDER, *supra* note 50, at 64. See generally SEN, *DEVELOPMENT AS FREEDOM*, *supra* note 17. Nussbaum, while sharing Sen’s commitment to democratic decision-making, argues for protecting a basic list of those capabilities that are so essential to Aristotle’s concept of “truly basic human functioning.” ALEXANDER, *supra* note 50, at 125; NUSSBAUM, *supra* note 13, at 125-31 (summarizing the views of Aristotle and the Stoics).



education and a few other essential rights as precursors to liberty and democracy.<sup>100</sup> The capabilities approach as an economic and legal theory today influences international evaluative criteria for a nation's well-being to the point that the United Nations Development Programme now uses capabilities approach inspired measurements as developmental goals, as bases for evaluating progress, and in formulating objective measures for comparing nations.<sup>101</sup>

As both Sen and Nussbaum have noted, without an education an individual cannot meaningfully engage in political deliberation.<sup>102</sup> Additionally, education is the vehicle for potentially furthering other basic human achievements such as longer life expectancy and good health, as well as the more complex human achievements of self-respect and social status.<sup>103</sup> If we translate capabilities as shorthand for equal opportunity, then we see education as the ultimate capability, and essential to any meaningful conception of dignity and freedom.

3. *Equal Opportunity to Achieve is Essential to Liberty.*—Equal opportunity in the form of equal access to public education is essential to liberty. The U.S. embraces individual liberty both politically and socially, so that respect for individual liberty and human dignity requires that individuals not be arbitrarily barred from developing their capabilities.<sup>104</sup> Stated differently, equal and fair opportunity is essential to American liberty.

During a less enlightened time in U.S. history it was acceptable for housing and occupation options to be limited based solely on place of birth, race, or gender.<sup>105</sup> All other limitations violate our principle of equality, which is itself based in a concept of meritocracy. Despite progress in advancing human dignity, even today everyone is not entitled to work and live wherever they want, but rather, people can live and work wherever they want only to the extent that their abilities and individual merit entitles them to that privilege. Hence, our concept of human dignity has transformed from one that is limited by immutable characteristics into one that is only limited by individual merit, ability or achievements.<sup>106</sup>

Today, the concept of American meritocracy is applied to help justify what are clear affronts to human dignity. For example, the unsafe and unclean living conditions of the impoverished are justified based on an unstated assumption that

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100. NUSSBAUM, *supra* note 13, at 33-35.

101. *See id.*

102. *Id.*

103. *Id.* at 16, 19-20, 29-33, 78-79.

104. A corollary to this national faith is the belief that government should play a role in removing arbitrary and unjust barriers to attaining the capabilities necessary for valuable achievements such as wealth and status. JOHN RAWLS, *A THEORY OF JUSTICE* 63, 87-88 (Belknap, rev. ed. 2003) (1971).

105. *Id.* at 87. John Rawls discusses undeserved merit. "The naturally advantaged are not to gain merely because they are more gifted, but only to cover the costs of training and education and for using the endowments in ways that help the less fortunate as well. No one deserves his greater capacity nor merits a favorable starting place in society." *Id.*

106. *See id.* at 87-88.

those who are impoverished—those who have less than they would need to function in a dignified manner—are where they are because they are somehow underserving. Under this ideology, poverty demonstrates that the impoverished lack the merit that would afford them the privileges of the more deserving, the more dignified. That human dignity is intrinsic to all human beings is a truism that still continues to have a qualifier, a qualifier based in merit. The concept of merit is itself justified as flowing from a respect for individual liberty. Underlying both the conceptions of merit and liberty is another qualifier, equal opportunity.

The existence of equal opportunity—an equal and fair chance to become capable of achieving—provides the popular justification for what are obvious affronts to human dignity in the forms of actual inequality of resources, power, and privilege.<sup>107</sup> Despite a respect for human dignity, such inequalities are acceptable under a meritocratic system that purports to reward the best and brightest who have achieved success in a fair political, legal and economic system that guarantees fair and equal access.<sup>108</sup>

Some undesirable and unjust inequality might be logically expected given that no human system is perfect.<sup>109</sup> However, America's failure to adequately and equally provide meaningful opportunities for the children of low-income and minority parents to develop their capabilities is consistent and systemic and not random.<sup>110</sup> This failure must be corrected because these failures undermine the ability of these children to develop their individual capabilities and therefore undermines their liberty to pursue their goals.<sup>111</sup>

Individual liberty has long been recognized as essential to democracy. Education philosopher and historian, Anne Michaels Edwards notes, “[w]hatever

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107. 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, 595 (1992).

108. *Id.* at 551, 618; see also NUSSBAUM, *supra* note 13, at 152-54; Imoukhuede, *supra* note 1, at 47-48.

109. Such acceptance would be based in a pragmatic view that secular and religious philosophies have at times begrudgingly accepted; such notions as “the poor you will always have with you” and “to err is human” encapsulate that even idealistic models recognize the limitations of human capabilities. *Mark 14:7* (New International Version), ALEXANDER POPE, POPE'S ESSAY ON CRITICISM (Frederick M. A. Ryland ed., Blackie & Son 1900) (1711).

110. See *supra* Part I; see also SEN, DEVELOPMENT AS FREEDOM, *supra* note 17, at 3-5. This situation is not based in the inevitability of human failure or the tragedy of imperfect human institutions. See Jerome McCristal Culp, Jr., *To the Bone: Race and White Privilege*, 83 MINN. L. REV. 1637, 1662-64 (1999).

111. See Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895, 1917 (2004); see also Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203, 210 (2008); Frank I. Michelman, *Foreword: On Protecting The Poor Through The Fourteenth Amendment*, 83 HARV. L. REV. 7, 18 (1969); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View Of Rawls' Theory Of Justice*, 121 U. PA. L. REV. 962, 991 (1973).

else education is, and whatever other goals it may have, it is clear that one of the goals of any and all education is a particular kind of person.”<sup>112</sup> Edwards, like others, recognizes that central to any system of education is a goal of inculcating the values necessary to function within a particular social and political system.<sup>113</sup> Therefore, it is important to appreciate that in the American context, education is concerned with using public education to inculcate democratic values such as a concept of individual liberty.

*C. Education Is Essential to the Democratic Component to Human Dignity*

Education is essential to the democratic component of human dignity because at the heart of democracy is the protection of individual autonomy.<sup>114</sup> As A. John Simmons has noted, for Locke, individuals ought not to be “obligated to support or comply with any political power unless he [or she] has personally consented to its authority.”<sup>115</sup> Locke’s government consent ideal is based in a respect for the liberty component of human dignity that is closely linked with the Greek roots for democracy, which literally translates to “rule by the people.”<sup>116</sup> Democracy, with its attendant requirement of popular consent, is an essential component to furthering human dignity.<sup>117</sup> Hence, at its very root, democracy is defined as the ultimate respect for liberty, the freedom of the people to make their own choices by deciding their own legal constraints.<sup>118</sup>

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112. EDWARDS, *supra* note 46, at 2.

113. *Id.* at 2-3.

114. Thus, the underlying theory is that the only legitimate system for passing laws that may constrain individual liberty is a form of government that functions with the consent of the individual’s being governed. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 55 (C. B. Macpherson ed., Hackett Pub. Co. 1980) (1690) (“[T]he governments of the world, that were begun in peace, had their beginning . . . , and were *made by the consent of the people*; there can be little room for doubt, either where the right is, or what has been the opinion, or practice of mankind, about the *first erecting of governments*.”). See also ROUSSEAU, *supra* note 15, at 148-149.

115. A. John Simmons, *Tacit Consent and Political Obligation*, 5 PHIL. & PUB. AFF. 274, 274 (1976).

116. *Id.* at 714. According to Locke: “Every man being, as has been shewed, *naturally free*, and nothing being able to put him into subjection to any earthly power, but only his own *consent*; it is to be considered, what shall be understood to be a *sufficient declaration* of a man’s *consent*, to *make him subject* to the laws of any government.” LOCKE, *supra* note 114, at 63; see ARISTOTLE, THE POLITICS, *supra* note 14, at 275 (defining “democracy” as “any regime in which the ‘people’ (*dēmos*) rule or control the authoritative institution of the city; more properly, rule of the poor or the majority in their own interests”).

117. John Locke’s model is not without its criticisms. Hume famously objects to John Locke’s consent theory as described in Locke’s social contract based on its concept of “tacit consent.” See DAVID HUME, A TREATISE ON HUMAN NATURE 490 (L. A. Selby-Bigge ed., Oxford Univ. Press 1978) (1739); see also Simmons, *supra* note 115, at 274.

118. ROUSSEAU, *supra* note 15, at 162 (“Strictly speaking, laws are merely the conditions of civil association. The populace that is subjected to the laws ought to be their author.”).

1. *Theories of Dignity and Education have Progressed Alongside Theories of Liberty and Democracy.*—The idea of the individual and the attendant concepts of dignity, democracy and public education, have developed together through a related historical progression towards greater respect for the dignity, capabilities, and rights of people.<sup>119</sup> Classical thinkers such as Plato and his student, Aristotle did not believe each person ought to participate in politics and governance nor did they believe that every citizen needed a shared baseline of education.<sup>120</sup> Plato and Aristotle instead believed in a form of aristocracy where the most innately brilliant and qualified would govern and that only those selected aristocrats ought to be educated enough to participate in governance and political decision-making.<sup>121</sup> The aristocrats would be the ruling elite and therefore needed to have a certain freedom to think and an education sufficient to ensure that they were capable of properly ruling.<sup>122</sup> It is notable that despite their restrictive theories of governance, both Plato and Aristotle recognized public education of the ruling elite as essential to responsible governing.<sup>123</sup>

Later, Rousseau suggested a broader scope for who ought to be educated, but, like the classical thinkers, he continued to believe that there ought to be a class of people not involved in governing.<sup>124</sup> Rousseau believed that for that non-

119. MICHAEL ROSEN, DIGNITY 11-18 (2012).

120. PLATO, *The Republic Book VI*, in THE PORTABLE PLATO 510-512 (Scott Buchanan, ed. and Benjamin Jovett, trans., Penguin Books 1977) [hereinafter PLATO, *The Republic Book VI*].

121. See ARISTOTLE, THE POLITICS, *supra* note 14, at 129 (“Only the regime that is made up of those who are best simply on the basis of virtue . . . is justly referred to as aristocracy . . .”); see also NUSSBAUM, *supra* note 13, at 129-30 (discussing how the Stoics put their theories into practice when they campaigned for the equal education of women, one former slave (Epictetus) and one foreigner (Seneca)). *Id.* at 492; PLATO, *The Republic Book VI*, *supra* note 120, at 510-12.

Until philosophers are kings, or the king and princes of this world have the spirit and power of philosophy, and political greatness and wisdom meet in one, and those commoner natures who pursue either to the exclusion of the other are compelled to stand aside, cities will never have rest from their evils—no, nor the human race, as I believe,—and then only will this our state have a possibility of life and behold the light of day.

122. ARISTOTLE, THE POLITICS, *supra* note 14, at 129; NUSSBAUM, *supra* note 13, at 129-130.

123. ARISTOTLE, THE POLITICS, *supra* note 14, at 229 (“Since there is a single end for the city as a whole, it is evident that education must necessarily be one and the same for all . . .”).

124. Rousseau and other Enlightenment era thinkers adopted broader views regarding the scope of who ought to be educated and trained for governance. However, even Rousseau believed that certain classes of people and forms of work were unsuitable for active participation in politics and governance, and hence, members of such classes were not seen as needing education. See Michalina Clifford-Vaughan, *Enlightenment and Education*, 14 BRIT. J. OF SOC. 135, 135-36 (1963). Dennis Diderot was another enlightenment thinker who valued education as much as “[d]isciples of Rousseau, the legislators of the First Republic wanted to make citizens free by liberating their minds from prejudice through education.” *Id.* at 135. See generally ARISTOTLE, THE POLITICS, *supra* note 14; ARISTOTLE, THE NICHOMECHAN ETHICS (Roger Crisp ed. & Trans., Cambridge Univ. Press 2000) [hereinafter ARISTOTLE, THE NICHOMECHAN ETHICS].

governing class of people, liberty should be constrained by the educated ruling class because the non-ruling class' preferences were irrelevant and potentially hostile to social order.<sup>125</sup> This history of education and liberty parallels Michael Rosen's history of the meaning of dignity.<sup>126</sup> Dignity, like education was initially viewed as an exclusive privilege for the powerful ruling elites.<sup>127</sup> Today the concept of dignity has been expanded to apply to all human beings.<sup>128</sup>

Likewise, democracy has not historically been the most widely used or preferred system of government; that has changed as the idea of the individual and the concept of human dignity has been broadened to grant a broader range of people individual liberty and freedom.<sup>129</sup> Liberty has different meanings and is arguably more constrained in the contexts of autocracy, aristocracy, and plutocracy.<sup>130</sup> Democracy, given its central concern with majority consent, provides the greatest respect for individual liberty for the greatest number of individuals.<sup>131</sup> Plutocracy, which literally means "rule by the wealthy," does not similarly value the concerns of all the people, but only those of the wealthy.<sup>132</sup> The democratic and dignity-based critiques of plutocracy directly apply to current fears regarding a rising "corporatocracy;"<sup>133</sup> the concerns regarding rule by

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125. See generally ARISTOTLE, THE NICHOMECHAN ETHICS, *supra* note 124; ARISTOTLE, THE POLITICS, *supra* note 14.

126. ROSEN, *supra* note 119, at 11-18.

127. *Id.*

128. *Id.*

129. ARISTOTLE, THE POLITICS, *supra* note 14, at 97 ("What makes democracy and oligarchy differ is poverty and wealth: whenever some rule on account of wealth, whether a minority or a majority, this is necessarily an oligarchy, and whenever those who are poor, a democracy.").

130. These forms of government are all quite unlike our modern U.S. democracy, where an individual's liberty to make life decisions is constrained by laws that are passed by representatives of the people. Aristocracy has as its Greek root "aristokratia," which literally means "rule by the best," where "aristos" means "best." WEBSTER'S DICTIONARY 24 (HarperCollins Publ'ns 2003) (definition of "aristocracy"). Autocracy is the authority of the autocrat, the government in which one person possesses unlimited power. *Id.* at 31 (definition of "autocracy"). Autocrat is defined as a monarch with unlimited power. *Id.* (definition of "autocrat"). In an autocracy, governance by a single ruler, the concept of autonomy and the related freedom of the individual to make life choices would be seen as being properly limited by the will of the autocrat, who could be a monarch or dictator.

131. See *id.* at 124 (definition of "democracy").

132. Plutocracy has as its root Pluto, the god of the underworld. Pluto is less widely known as the god of wealth and treasure. The Greek root of the word plutocracy is "plutos," which means "wealth" in Greek. *Id.* at 362 (definition of "plutocracy").

133. See Priti Nemani, Note, *Globalization Versus Normative Policy: A Case Study on the Failure of the Barbie Doll in the Indian Market*, 13 ASIAN-PAC. L. & POL'Y J. 96, 99-100; see also Thayer Watkins, *The Economic System of Corporatism*, SAN JOSE STATE UNIVERSITY, <http://www.sjsu.edu/faculty/watkins/corporatism.htm>, archived at <http://perma.cc/4GXH-78CH> (last visited May 7, 2014). Watkins states:

The basic idea of corporatism is that the society and economy of a country should be

wealthy interest groups whose only governing morality is the enhancement of their group's wealth and power.<sup>134</sup> As Priti Nemani notes:

Journalist John Perkins describes the advancement of the global empire as a result of the omnipotent "corporatocracy," a tripartite financial and political power relationship between multinational corporations ("MNCs"), international banks, and governments. The corporatocracy works to guarantee the unwavering support and belief of its constituents—schools, business, and the media--in the "fallacious concept" of growing global consumer culture. Members of the corporatocracy promote common values and goals through an unceasing effort "to perpetuate and continually expand and strengthen the system" of the current global culture. Unfortunately, the global culture is not one of social understanding and sensitivity to individual cultures; rather, the new global culture is one marked by the ability to empower one's citizens to consume as if product consumption is the ultimate civic duty.<sup>135</sup>

Arguably, the potential erosion of civic virtue in the face of plutocratic governance models coincides with a decrease in respect for individual liberty and human dignity.<sup>136</sup>

Respect for individual liberty and the dignity of every human being has long been central to the U.S. national creed.<sup>137</sup> As Alexis de Tocqueville observed, American democracy is structured to further equality.<sup>138</sup> In the U.S., the government and its leaders within it are defined as subject to the people, so that those who lead are public servants and not rulers.<sup>139</sup>

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organized into major interest groups (sometimes called *corporations*) and representatives of those interest groups settle any problems through negotiation and joint agreement. In contrast to a market economy which operates through competition a corporate economic [sic] works through collective bargaining.

*Id.*

134. See JOHN PERKINS, *CONFESSIONS OF AN ECONOMIC HIT MAN* 26-28 (2005); Nemani, *supra* note 133, at 99-100.

135. Nemani, *supra* note 133, at 99-100; see also PERKINS, *supra* note 134, at 26-28.

136. Linda L. Fowler, *The Best Congress Money Can Buy?*, 6 *ELECTION L.J.* 417, 419 (2007); ROUSSEAU, *supra* note 15, at 151 ("What man loses through the social contract is his natural liberty and an unlimited right to everything that tempts him and that he can acquire. What he gains is civil liberty and propriety ownership of all he possesses.").

137. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 94-95, 123-24, 175, 287-88 (David Campbell trans., Everyman's Library 1995) (1835, 1840).

138. *Id.*

139. This commitment to equality is not entirely unique to the U.S. Indeed, many modern autocracies style themselves "constitutional monarchies" and recognize a realm of individual liberty that even an autocrat may not infringe. However, the fundamental principle underlying even these constitutional monarchies is that the people are subjects to the ruler and thus sit beneath their government as subservient or subject to it. *Id.* According to Fowler,

American democracy in its ideal form represents progress towards a more inclusive concept of human dignity. However, because each citizen is expected to be capable of meaningfully participating in the political process, everybody, both the elected representatives and those who elect them, needs to be educated enough to be capable of self-governance.<sup>140</sup>

2. *Education Is Essential to Democratic Society*.—Education philosopher John Dewey recognized that education is essential to democratic society for reasons similar to those espoused by today’s capabilities approach theorists.<sup>141</sup> “The task of democracy is the creation of freer experiences in which all participate . . . . If democracy has an ideal meaning ‘it is that a social return be demanded from all and that opportunity for development of distinctive capacities be afforded all.’”<sup>142</sup> Dewey considered democracy as the most legitimate system of government because it educates citizens so that they are capable of ruling.<sup>143</sup> Likewise, Amy Gutmann also discusses the necessary constraints on democracy and expounds upon the need for “more democratic education to make our politics more democratic.”<sup>144</sup> Like Dewey, Gutmann

[I]n large part, opts for more of a collective control over education, but by recognizing that a democratic education is one where many individuals and groups have a say in the goals of education, she recognizes that parents, teachers, citizens, and public officials, as well as the children themselves, must all have a hand in determining goals,

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Every election cycle sparks stories of wealthy candidates pumping millions of their own money into campaigns to buy a seat in the House or Senate. The successful ones prompt cries of alarm about plutocrats hijacking the American democracy; the failures invite scorn for underestimating the capacity of ordinary voters to refuse to be bought.

*Id.* at 417; see RAYMOND V. PADILLA, *EPISTEMOLOGY, KNOWLEDGE PRODUCTION, AND SOCIAL CHANGE* 8 (2004) (citing ROBERT K. GREENLEAF, DON M. FRICK & LARRY C. SPEARS, *ON BECOMING A SERVANT LEADER* (1996)). According to Padilla,

Citizenship includes the cultivation of civic life and the creation of leaders as public servants. Through the practice of leadership and civic life, a set of relations is established by each individual with society. It is within this set of social relations that specific collective issues can be explored, such as justice, ethics, philanthropy, politics, etc., issues having to do with our need to get along with others and to lead productive lives.

*Id.* at 8.

140. EDWARDS, *supra* note 46, at 76.

141. See *id.* at 85.

142. *Id.* at 76 (quoting DEWEY, *supra* note 13, at 122).

143. *Id.*

144. EDWARDS, *supra* note 46, at 118. In *Liberal Equality*, Gutmann argues that “people who do not have a standard of living sufficient to secure basic welfare for themselves simply cannot be expected to participate in politics as extensively and with as much political information as the more advantaged.” *Id.* (quoting AMY GUTMANN, *LIBERAL EQUALITY* 190 (1980)).

policies, and functions for the schools.<sup>145</sup>

Regardless of what policies are enacted, or what definition of “quality” is ultimately applied, to be legitimate, quality definitions and school policies ought to be determined through a democratic process.<sup>146</sup>

Gutmann recognizes the special importance of education to democratic society by suggesting that as long as children are educated to a certain threshold for democratic participation, there is no concern regarding equality in funding or resources.<sup>147</sup> This insight suggests a need for at least a minimally adequate public education.<sup>148</sup> While Gutmann’s perspective regarding minimum adequacy is somewhat inconsistent with a full commitment to human dignity, at least she acknowledges that minimally adequate educational is essential to maintaining a functional democracy.<sup>149</sup> Preservation of democracy is important, the principle aim of both public education and democracy is to enhance human dignity by developing individual’s capabilities.<sup>150</sup> “[D]emocracy’s obligation to education goes beyond mere schooling. The state must provide access to a variety of other goods and services—‘decent housing, job training and employment for parents, family counseling, day care and after-school programs for children, etc.’”<sup>151</sup>

For believers in the modern, universal concept of human dignity, a possible reversion to less democratic and less inclusive form of governance after millennia of long historical progress in liberalizing the concept of human dignity is cause for concern.<sup>152</sup> Whether the alternative system of governance is autocracy, aristocracy, plutocracy, or some derivation thereof, in all these other forms of governance, only the members of the select ruling class are expected to obtain the basic education necessary to govern.<sup>153</sup> Education is, as it always has been, essential to ensuring that true democracy continues.

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145. EDWARDS, *supra* note 46, at 13-14.

146. For Gutmann, “the value of democratic deliberation is so great as to override ‘the value of being governed by just laws that are not democratically enacted.’” *Id.* at 119 (quoting AMY GUTMANN, *HOW LIBERAL IS DEMOCRACY?* 37 (1983)).

147. For Gutmann, the goal of education should be to ensure “‘children learn enough to participate effectively in the democratic process[.]’ . . . [I]t doesn’t require, however, that either the ‘inputs’ or the ‘outcomes’ be equalized.” *Id.* at 120-21 (quoting AMY GUTMANN, *DEMOCRATIC EDUCATION* 170 (1987) [hereinafter GUTMANN, *DEMOCRATIC EDUCATION*]).

148. *See id.* at 120-21.

149. *See* Imoukhuede, *supra* note 1, at 86.

150. From Gutmann’s perspective, positive rights connect together through what she views as the most essential obligations of democratic government: the duty to provide public education.

151. EDWARDS, *supra* note 46, at 120-21 (quoting GUTMANN, *DEMOCRATIC EDUCATION*, *supra* note 147, at 151).

152. As compared to autocracy, the scope of those with influence over law and liberty choices is expanded in an aristocracy and in plutocracy to include a group that is considered to be particularly suited to make such decisions—whether because of birth right, talent, or wealth in the case of plutocracy. However, that group remains small especially when compared to democracy.

153. EDWARDS, *supra* note 46, at 120-21.



Like the right to privacy, education is also essential to liberty. The connection between education and liberty has been recognized in the classical, enlightenment era, and modern philosophies of Aristotle, Rousseau, John Dewey, and today's capabilities theorists.<sup>154</sup> The case for a human dignity-based constitutional protection for the right to public education is even stronger than the already recognized human dignity-based constitutional protection for the right to privacy. This is because, unlike the right to privacy, education is essential to both the liberty component and to the democracy component of human dignity. Despite a broad consensus regarding the importance of primary and secondary education, educational opportunity is systematically denied to the children of racial-ethnic minorities and to underprivileged children of every race.<sup>155</sup> No single factor is more indicative of the sort of education a child will receive than the socioeconomic status of that child's parents.<sup>156</sup> As stated, systemic failures are not incapable of correction. However, U.S. Constitutional law doctrine has gotten in the way.

### III. FAILURES OF EQUAL PROTECTION DOCTRINE

Equal Protection clause jurisprudence has retreated from the early commitment to equal access to high quality, public education that the Court demonstrated in *Brown v. Board of Education*.<sup>157</sup> *Brown* demonstrated an unambiguous recognition that public education is important.<sup>158</sup>

Since *Brown*, there has been a marked jurisprudential shift away from this recognition by the Burger Court, the Rehnquist Court, and today's far right-of-center Roberts Court.<sup>159</sup> The Court has all but abandoned its earlier "equality jurisprudence" in favor of a "liberty-centered jurisprudence," which it wrongly perceives as being in conflict with the principle of equality. Equality remains a fundamental principle of American democracy, but because of the Court's negative rights bias, it has failed to recognize how equality and liberty can be reconciled.<sup>160</sup>

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154. See Part I.B.

155. Chambers, *supra* note 34, at 55-59.

156. *Id.*

157. 347 U.S. 483, 493 (1954).

158. *Id.*

159. Yoshino, *supra* note 25, at 748. According to Yoshino,

The jurisprudence of the United States Supreme Court reflects this pluralism anxiety. Over the past decades, the Court has systematically denied constitutional protection to new groups, curtailed it for already covered groups, and limited Congress's capacity to protect groups through civil rights legislation. The Court has repeatedly justified these limitations by adverting to pluralism anxiety. These cases signal the end of equality doctrine as we have known it.

*Id.*

160. See *id.*; CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 13 (2004) (noting the inclusion and

The negative rights bias refers to the concern that the Court favors negative rights, which are otherwise referred to as liberties, over positive rights, which are otherwise referred to as duties.<sup>161</sup> The Court's preference towards recognizing liberties, which have been defined as freedoms from government action, has animated a libertarian perspective that has driven our constitutional jurisprudence to the point that the Court is so deeply biased against recognizing the most obvious situations where government ought to have a duty to act.<sup>162</sup>

Education is an obvious example of where there is a well-recognized duty to fairly and equally provide quality education.<sup>163</sup> A right to public education is obviated by the modern concepts of human dignity and related democratic theory-based support for the duty of government to ensure a well-educated citizenry.<sup>164</sup> Additionally, each state within the U.S. today recognizes a right to public education. Despite the fact that each of the United States recognizes this duty, the Supreme Court would have us believe that the United States Constitution does not.<sup>165</sup>

The Court was clearly wrong in *San Antonio Independent School District v. Rodriguez* when it declared that there is no right to public education.<sup>166</sup> The Court has not always gotten this wrong.<sup>167</sup> *Brown v. Board of Education* and

importance of "the right to a good education" in President Franklin D. Roosevelt's Second Bill of Rights); Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 123 (2004) (concluding that federal courts have been "tragically wrong" in failing to find a constitutional right to education); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 334 (2006) (arguing that the federal government has a constitutional duty to ensure that every child has the opportunity to receive an education).

161. See CHARLES FRIED, *RIGHT AND WRONG* 110 (1978) (1935).

162. See Jenna MacNaughton, *Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune*, 3 U. PA. J. CONST. L. 750, 759-61 (2001); see also Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 913-14 (2001).

163. See Jon Mills & Timothy McLendon, *Strengthening the Duty to Provide Public Education*, 72 FLA. B.J., no. 9, 1998, at 28, 34.

164. See ROSEN, *supra* note 119, at 25-27; Henry, *supra* note 24, at 171-73 (discussing the concept of dignity being a governing notions in many cases).

165. See *Plyler v. Doe*, 457 U.S. 202, 223 (1982) ("Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.' Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population."); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) ("Education . . . 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.");

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

167. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493-95 (1954) (holding public school segregation unconstitutional); Daniel S. Greenspahn, *A Constitutional Right to Learn: The Uncertain Allure of Making a Federal Case out of Education* 59 S.C.L. REV. 755, 762 (2008); see also Donald E. Lively, *Equal Protection and Moral Circumstance: Accounting for Constitutional Basics*, 59 FORDHAM L. REV. 485, 485-87 (1991) (arguing that the concept of equal protection has

other Warren Court era decisions indicate a prior willingness to consider freedom and equality from more than a negative perspective.<sup>168</sup> However, from the Burger Court onward, the Supreme Court has been redefining equality and freedom from a libertarian perspective, without appreciation for the basic tools and access required for any meaningful concept of liberty or democracy.<sup>169</sup>

One solution that is alluded to in the title of the *Fifth Freedom* is to conceive of education as a liberty rather than as a duty.<sup>170</sup> Deconstructing the negative versus positive rights dichotomy to the point that an education, a positive duty of government, is treated as a freedom<sup>171</sup> is a strategy that could hold some promise beyond the education rights setting.<sup>172</sup> So-called “false dichotomies” in law tend

probably raised and dashed more expectations of social progress than any other constitutional provision and that the Equal Protection Clause has under-achieved its promise). Lively argues:

[T]he Court’s school desegregation jurisprudence not only promised unitary school systems but also equal educational opportunity. Such aspirations have not been realized, however, and have actually been undercut by limiting constructions of the amendment that have left educational equality interests substantially unimproved or worse off. Recent decisions, despite their rhetoric, exhibit a reluctance to confront the persistent reality of racial discrimination and suggest that the usefulness of the equal protection guarantee as a means of accounting for minority interests has been substantially undercut.

*Id.* at 489-90.

168. Greenspahn, *supra* note 167, at 762. Greenspahn argues that *Brown* clearly recognized the fundamental right to education, but the Court has since retreated from the promise of *Brown*.

*Id.* at 776.

169. Imoukhuede, *supra* note 1, at 77-78. In that article, I argue that

The *libertarian perspective* is primarily concerned with maintaining existing privileges and liberties, while deemphasizing the importance of positive rights or duties. The *libertarian perspective* helps to enshrine an unjust distribution of resources by protecting the rights of the unfairly privileged to maintain exclusive privileges.

*Id.* at 81 (emphasis added).

170. *Id.* at 83.

171. *Id.* at 47.

172. See Kenneth B. Nunn, *Rights Held Hostage: Race, Ideology and The Peremptory Challenge*, 28 HARV. C.R.-C.L. L. REV. 63, 78-79 (1993) (“The theoretical limitations of colorblindness arise from its obsession with procedure and its willful ignorance of results. Colorblind analysts tinker with the rules but need not attend to the outcome of the game. Richard Delgado calls this preference for equality of opportunity over equality of result a false dichotomy.” (footnote omitted)); Dorothy E. Roberts, *The Priority Paradigm: Private Choices And The Limits Of Equality*, 57 U. PITT. L. REV. 363, 389 (1996) (“The process of counterbalancing white individuals’ private interests against government programs that promote racial equality sets up a false dichotomy between private choices on the one hand and government action on the other.”); see also Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 845; Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515 (1991); Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251 (1992); Mark Tushnet, *The Left Critique of Normativity: A Comment*, 90 MICH. L. REV. 2325 (1992).

to reify legally constructed differences to the point of creating unnecessary policy challenges.<sup>173</sup> Such a false dichotomy arguably exists in the context of negative versus positive rights.<sup>174</sup> Education is a liberty, the liberty that President Lyndon B. Johnson famously referred to as “the freedom from ignorance.”<sup>175</sup>

#### A. Early Proclamations regarding Importance of Education

1. *Education Was Viewed as Essential to Component to Freedom During Reconstruction.*—Education has long been recognized and officially proclaimed as especially important by America’s founding leaders, law makers, and judges.<sup>176</sup> America’s founders shared the previously described recognition that education is fundamental to democracy.<sup>177</sup>

Education’s significance continued to be emphasized through declarations in the post-Civil War Reconstruction era by various leaders who recognized the importance of education to the freedom and full citizenship for the newly freed slaves.<sup>178</sup> During the Reconstruction, the federal agency known as the Freedman’s Bureau worked to do many things in order to help integrate the newly freed slaves into society, including establishing public schools throughout the South, where none had previously existed.<sup>179</sup> Senators Blair, Hoar, and Perce were among the greatest proponents for establishing these “freedmen’s schools.”<sup>180</sup> They and other proponents of education legislation respected the

173. See Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 710 (2000); see also Erwin Chemerinsky, *Making The Right Case For A Constitutional Right To Minimum Entitlements*, 44 MERCER L. REV. 525, 535-36 (1993).

174. See Jeanne M. Woods, *Justiciable Social Rights As A Critique of the Liberal Paradigm*, 38 TEX. INT’L L.J. 763, 764-65 (2003); see also Chemerinsky, *supra* note 173, at 535-536 (arguing for the affirmative duty of government to provide basic entitlements as Constitutional rights, including education); Liu, *supra* note 111 (modifying and formulating theory of social welfare rights, which justify and include the positive right to education).

175. President Lyndon B. Johnson, Special Message to the Congress on Education: “The Fifth Freedom,” Pub. Papers 54 (Feb. 5, 1968) (“The fifth freedom is freedom from ignorance. It means that every[one], everywhere, should be free to develop his talents to their full potential—unhampered by arbitrary barriers of race or birth or income.”). See Imoukhuede, *supra* note 1, at 61.

176. See, e.g., Thomas Jefferson, *A Bill for Amending the Constitution of William and Mary, and Substituting More Certain Revenues for Its Support* (1779), in EDUCATION IN THE U.S., *supra* note 13, at 745-47; Thomas Jefferson, *From Thomas Jefferson to George Wythe (Aug. 13, 1786)*, in EDUCATION IN THE U.S., *supra* note 13, at 750-51; Thomas Jefferson, *Notes on the State of Virginia* (1801), in EDUCATION IN THE U.S., *supra* note 13, at 747-51.

177. See generally SAMUEL KNOX, AN ESSAY ON THE BEST SYSTEM OF LIBERAL EDUCATION, ADAPTED TO THE GENIUS OF THE GOVERNMENT OF THE UNITED STATES (1799).

178. W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 638 (Atheneum 1975).

179. *Id.* at 647-48.

180. Liu, *supra* note 160, at 371-99.

centrality of education to any meaningful concept of liberty and full democratic citizenship and political participation.<sup>181</sup>

The Reconstruction Era freedmen's schools were a manifestation of the social, political, and legal recognition of the centrality of education to any meaningful concept of American liberty and citizenship.<sup>182</sup> As W.E.B. DuBois notes in his ground-breaking classic, *Black Reconstruction in America*, these efforts to establish freedmen's schools in the South were the first efforts in the South to provide public education.<sup>183</sup> Up until the Civil War, education in the South was largely seen as an enterprise for the privileged few; hence, there was no system of public schools prior to the efforts of African Americans and their northern allies.<sup>184</sup> DuBois discusses in his lauded historical work, *Black Reconstruction in America*, how the public schools in the southern United States were founded:

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.<sup>185</sup>

That free public education was a foreign concept to the South, imported from the North, is hardly surprising given the substantially different pre-Civil War or antebellum economies of both regions.<sup>186</sup> The Northern economy was at the forefront of the global industrial revolution and therefore an educated populace was centrally important, if not to labor, then to innovation.<sup>187</sup> Whereas, the Southern economy an exploitative system of free slave labor, where the majority of "free" southern whites were subsistence level laborers with little hope of sharing in the wealth generated by such labor.<sup>188</sup> Within this system, owners of property in the antebellum South did not believe laborers needed education and therefore did not want to be taxed for it.<sup>189</sup> This further demonstrates the Southern ruling class's adherence and continuing belief in an undemocratic, Aristotelian model for aristocratic governance and restrictive access to education.<sup>190</sup>

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181. DUBOIS, *supra* note 178, at 641.

182. *Id.*

183. *Id.* at 647-48.

184. *Id.* at 638

185. *Id.*

186. *Id.* at 641.

187. *Id.*

188. *Id.*

189. *Id.*

190. See ARISTOTLE, *THE POLITICS*, *supra* note 14, at 96 (defining "aristocracy" as "[rule] of the few (but of more than one person) is called aristocracy—either because the best persons are

Poor white laborers also saw no need for being educated.<sup>191</sup> According to DuBois, poor whites accepted “their subordination to the slaveholders, and looked for escape from their condition only to the possibility of becoming slaveholders themselves.<sup>192</sup> Education was “regarded as a luxury connected with wealth.”<sup>193</sup> The concept of education as a luxury good may seem foreign to our modern understandings.<sup>194</sup> Implicit to the current constitutional doctrine that education is not a fundamental right is a belief that even if education is important, it is something that people should find for themselves if they have the means. This again harkens to a view of education that is inconsistent with modern views of democratic participation and governance. In this case, the education limitation appears to follow Rousseau’s view that certain forms of occupation were incompatible with the ability for self-governance and full education.<sup>195</sup>

According to DuBois, “[i]t was only the other part of the laboring class, the black folk, who connected knowledge with power; who believed that education was the stepping-stone to wealth and respect, and that wealth, without education, was crippled.”<sup>196</sup> Southern public schools owe their existence to the triumph of the North, the legitimizing of what began in the pre-Civil War South as clandestine African American schools, and the post-Civil War Freedman Bureau’s sponsorship of mixed and segregated public schools.<sup>197</sup> These schools, founded after the emancipation of the slaves, were the foundation for the creation of public schools throughout the South.<sup>198</sup>

Despite the Southern whites early and general disdain for public education, southern state constitutions came to embody, at least on paper, a progressive approach to education.<sup>199</sup> Some states mandated systems of free, racially mixed, public schools.<sup>200</sup> Some even went so far as to create a duty for the legislature to construct a system of free, public education for children up to the age of twenty-one.<sup>201</sup>

Animating much of this was the previously-described recognition by the newly freed women and men that education was the path to full constitutional personhood, to full human dignity.<sup>202</sup> DuBois recognized that early on local control was the enemy of educational progress, explaining that “wherever there

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ruling, or because they are ruling with a view to what is best for the city and those who participate in it . . .”).

191. DUBOIS, *supra* note 178, at 641.

192. *Id.*

193. *Id.*

194. *Id.* at 665-66.

195. *See* ROUSSEAU, *supra* note 15.

196. DUBOIS, *supra* note 178, at 641.

197. *Id.* at 664-65.

198. *Id.* at 664.

199. *Id.* at 665.

200. *Id.* at 637-69.

201. *Id.*

202. *Id.* at 639, 664-65.

was retrogression, particularly in Negro schools, it can be traced to the increased power of the county and district administrators.”<sup>203</sup> African Americans and their northern allies who helped fund these education reforms recognized the connection between education and any meaningful conception of liberation.<sup>204</sup>

2. *The U.S. Supreme Court Revised Its Rights Doctrine Because of Education’s Importance.*—Finally, in the rightly famous *Brown v. Board of Education* case,<sup>205</sup> a Court that was reluctant to end segregation in other contexts nonetheless found that education was so especially important that segregation was not just morally wrong, but contrary to America’s foundational law, the U.S. Constitution.<sup>206</sup> This recognition in the context of education laid the foundation for later holdings that racial segregation was unconstitutional in other contexts.<sup>207</sup> It is noteworthy that the end of segregation and “separate but equal” began with an education case.<sup>208</sup>

Despite obviously significant examples of the publicly-recognized social, political, and legal significance of education, the U.S. Supreme Court has retreated from its doctrinal recognition that education is especially important.<sup>209</sup> The Court has instead embraced a confused conception of liberty over the duty to provide public education. Donald Lively argues that *Brown* was a good starting point for equal protection, but recognizes that the Court’s subsequent failure to clearly define equality has led to the trampling of minority rights.<sup>210</sup> Lively states:

Absent an explicit command to actuate the equal protection guarantee in comprehensive and substantive fashion, it is not surprising that the provision has demonstrated limited utility in vindicating minority interests. Born of limited aims and aspirations and crafted by a culturally homogeneous group, much like the Constitution’s original provisions, the fourteenth amendment reflected the influence of white superiority. The result was a fundamental but qualified demand for racial equality limited to contract and property rights, individual security and legal

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203. *Id.* at 665.

204. *Id.*

205. 347 U.S. 483 (1954).

206. See U.S. CONST.; Katherine Tonnas, *The Legacy of Brown v. Board of Education*, 51 LA. B.J. 346 (2004).

207. *Loving v. Virginia*, 388 U.S. 1 (1967); see also Tonnas, *supra* note 206.

208. See *Brown*, 347 U.S. at 493.

209. Greenspahn, *supra* note 167. Greenspahn argues that *Brown* clearly recognized the fundamental right to education. *Id.* at 762. But the Court has retreated from the promise of *Brown*. *Id.* at 772. Greenspahn suggests that *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) does not necessarily foreclose the possibility of a right to public education. *Id.* at 768. However, Greenspan acknowledges that litigating for a fundamental right to education would be useless because of the current Court’s reluctance to add rights. *Id.* at 783.

210. Lively, *supra* note 167.

status.<sup>211</sup>

Education was important to the newly freed slaves and several bills were passed to ensure that education was made available to them.<sup>212</sup> Goodwin Liu explains that the Freedmen's Bureau and its education bills were enacted pursuant to the newly-enacted Fourteenth Amendment's creation of national citizenship.<sup>213</sup> National citizenship had not previously existed in a clear and obvious fashion under the Constitution.<sup>214</sup> With the creation of national citizenship came a new responsibility to "extend educational opportunity to all children."<sup>215</sup> The Freedmen's Bureau's creation and charges were a legislative recognition by the U.S. Congress of their duty under the Constitution to "enforce and give substance to the guarantee of American citizenship" that was granted in the Fourteenth Amendment.<sup>216</sup> As Liu notes, "guided by a national standard of literacy for effective citizenship, the proposals envisioned a distribution of aid that would lessen educational inequality across states."<sup>217</sup>

*B. Liberal Theories of Equality Effectively Abandon Equality as a Viable Principle of Justice*

The primary weakness of the Equal Protection Clause as the Court is currently interpreting it, is that rights may be violated, so long as they are violated equally. Such a definition of equality is obviously problematic. As a matter of constitutional doctrine, it effectively resurrects a theory of equality that was the foundation for the infamous "separate but equal" doctrine.<sup>218</sup> *Plessy v. Ferguson*<sup>219</sup> and *The Civil Rights Cases*<sup>220</sup> narrowly construed the equality principle embedded within the equal protection clause to be limited to liberal equality.<sup>221</sup>

Together these cases served to limit the possibilities of the Fourteenth Amendment generally.<sup>222</sup> Of particular relevance here is that these cases completely undermined the central equality concerns that inspired passage of the Fourteenth Amendment.<sup>223</sup> Those concerns were to further racial equality and to

211. *Id.* at 486-487.

212. DUBOIS, *supra* note 178, at 637-69; Liu, *supra* note 160, at 335 (arguing that the federal government has a constitutional duty to ensure that every child has the opportunity to receive an education).

213. Liu, *supra* note 160, at 335.

214. *Id.* at 339.

215. *Id.*

216. *Id.* at 330, 394.

217. *Id.* at 395.

218. *Plessy v. Ferguson*, 163 U.S. 537, 547 (1896).

219. *Id.*

220. 109 U.S. 3 (1883).

221. *Id.*; *Plessy*, 163 U.S. 537.

222. *Plessy*, 163 U.S. 537; *The Civil Rights Cases*, 109 U.S. 3.

223. See Francisco M. Ugarte, *Reconstruction Redux: Rehnquist, Morrison, and the Civil*



end institutionalized white supremacy in the form of legally sanctioned slavery as well as the American racial caste system.<sup>224</sup>

As William Julius Wilson notes, the Court's retrograde concept of liberal equality<sup>225</sup> is limited in that this concept of equality leaves out considerations of historical context, but instead focuses almost exclusively on treating people identically.<sup>226</sup> The sameness standard of liberal equality does not appreciate or adjust to concepts of social hierarchy or historical context.<sup>227</sup> Under such an ahistorical approach, a law that mandates separate facilities based solely on race is not necessarily furthering inequality unless it can be shown that the quality of those facilities are themselves unequal.<sup>228</sup> The social hierarchy that such a law reinforces is ignored. This liberal construction of the equality principle was applied for over half a century in the form of the infamous, separate but equal doctrine to validate segregation laws as consistent with the principle of equality so long as the facilities were "equal."<sup>229</sup>

The decisions in these cases flowed not from some outdated academic exercise that yielded unintentionally unjust results. The Reconstruction Era Court's members were contemporaries of the Civil War Amendments' framers and therefore had every reason to be fully aware of the context of racial oppression, exclusion, and white supremacy that together those amendments were meant to address.<sup>230</sup> Yet, the Court chose to ignore the context of the Fourteenth Amendment in order to weaken the scope of what ought to have been broad protective powers to further a uniquely American conception of equality.<sup>231</sup>

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*Rights Cases*, 41 HARV. C.R.-C.L. L. REV. 481, 483-84 (2006).

224. *Id.*

225. William Julius Wilson, *Public Policy Research and the Truly Disadvantaged*, in THE URBAN UNDERCLASS 461-479 (Christopher Jencks & Paul Peterson eds., Brookings 1991) (criticizes the concept of colorblindness for not appealing to the reasons why minorities are poor to begin with); see also Barbara Flagg, "Was Blind, But Now I See:" *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993) (arguing that colorblindness fails, which is why liberal conception of equality also fails); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN L. REV. 317 (1987) (arguing that color-blindness as advocated by classical liberals, who also use the term "formal equality," is flawed due to the fact that liberal conception of equality through color-blindness does not take into account unconscious racism).

226. See Richard Delgado, *Introduction to Critical Race Theory*, in CRITICAL RACE THEORY: THE CUTTING EDGE, at xiii, xv (Richard Delgado ed., 1995).

227. See Timothy D. Lynch, Note, *Education as a Fundamental Right: Challenging the Supreme Court's Jurisprudence*, 26 HOFSTRA L. REV. 953, 954 (1998).

228. *Id.* at 955.

229. See Martin Schiff, *Reverse Discrimination Re-Defined as Equal Protection: The Orwellian Nightmare in the Enforcement of Civil Rights Laws*, 8 HARV. J.L. & PUB. POL'Y 627 (1985).

230. See Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303, 304-05.

231. *Id.*; see also Daniel R. Gordon, *One Hundred Years After Plessy: The Failure of Democracy and the Potentials for Elitist and Neutral Anti-Democracy*, 40 N.Y.L. SCH. L. REV. 641

Today's Supreme Court is in the process of reverting to Jim Crow Era constructions of "equality" and therefore abandoned "equality" as a viable principle of justice.<sup>232</sup> The Court's holdings in *Rodriguez* and later in *Milliken v. Bradley* demonstrate a transparent avoidance if not outright abandonment of the principle of equality.<sup>233</sup> These cases more closely resemble *Plessy*'s doctrine of "separate but equal" than *Brown* and *Brown's* progeny's conclusion that separate is inherently unequal.<sup>234</sup>

Absent robust protection of a right to high quality public education, minority and economically disadvantaged children will have no recourse as the quality of their education continues to erode.<sup>235</sup> The previously referenced data and research demonstrates that the average quality of American education has fallen sharply.<sup>236</sup> Minority and economically disadvantaged children as a group, however, underperform even this already low and plummeting U.S. average.<sup>237</sup>

According to Julius Chambers, schools that predominantly serve non-white children are underfunded in comparison to majority white public schools.<sup>238</sup> These funding differences have been argued to be contributing factors in the overall performance gap between students graduating from majority white versus majority non-white public schools.<sup>239</sup> Similarly, schools in impoverished and working class communities tend to be significantly underfunded compared to more economically privileged public schools.<sup>240</sup> Here again, these funding differences have also been argued to be contributing factors to the overall performance gap between students graduating from public schools in economically privileged communities.<sup>241</sup> If there is currently a general U.S. education crisis, then the education situation for racial and ethnic minorities and working class children who as a group receive an even worse than average education is nearing a state of complete dysfunction.

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(1996).

232. See Roy L. Brooks, *American Democracy and Higher Education for Black Americans: The Lingering-Effects Theory*, 7 J. L. & SOC. CHALLENGES 1, 11 (2005); Klarman, *supra* note 230, at 304-05.

233. *Milliken v. Bradley*, 418 U.S. 717 (1974); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

234. *Plessy v. Ferguson*, 163 U.S. 537 (1986); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

235. See Chambers, *supra* note 34, at 55-58 (arguing that racial and economic inequality lead to inequality in opportunity to adequate education and to make matters worse, racial and economic inequality are tied, thus minorities are prone to inadequate education).

236. See Darling-Hammond, *Soaring Systems*, *supra* note 27, at 19; Floyd D. Weatherspoon, *Racial Justice and Equity for African-American Males in the American Educational System: A Dream Forever Deferred*, 29 N.C. CENT. L.J. 1, 4-5 (2006).

237. See Darling-Hammond, *Soaring Systems*, *supra* note 27, at 19.

238. See *id.*

239. See Linda Darling-Hammond, *Cracks in the Bell Curve: How Education Matters*, 64 J. NEGRO EDUC. 340 (1995).

240. Darling-Hammond, *Soaring Systems*, *supra* note 27, at 19.

241. *Id.*

The decisions in these cases were not merely the result of some unintentional confusion regarding how best to define equality.<sup>242</sup> Much like the Reconstruction Era Court, which issued contextually inconsistent and racially hostile rulings that effectively bolster what has been referred to alternatively as a racial caste system or system of white supremacy, so too, the modern Court has chosen to ignore the lessons from *Brown*: that Fourteenth Amendment equality means more than just identical but separate facilities.<sup>243</sup> Equality connects with the Preamble's acclamation to form "a more perfect Union."<sup>244</sup> The Supreme Court has all but abandoned the principle of equality as a viable principle of justice in the education context.<sup>245</sup>

#### IV. PROTECTING HUMAN DIGNITY VIA THE DUE PROCESS CLAUSE

An alternative approach for recognizing a right to public education, based instead in a due process clause analysis, would allow us to overcome the current Court's libertarian bias and equal protection clause limitations. The seeds of a new, expanded due process clause approach can be found in *Lawrence v. Texas*, where the majority recognized a liberty interest in human dignity.<sup>246</sup> *Lawrence* ultimately expanded the scope for protecting the right to privacy by way of a human dignity-based argument.<sup>247</sup> *Lawrence* broadened the right to privacy to protect the liberty to privately engage in intimate sexual relations based on the recognition that liberty is an essential to human dignity.<sup>248</sup> Hence, *Lawrence* agrees with the long held view that liberty is an essential component to human dignity.<sup>249</sup>

An advantage to framing the education rights concern in terms of human dignity is that human dignity is necessarily defined as an evolving standard that is inherently contextual as to time and circumstances.<sup>250</sup> Thus, a human dignity-based analysis has the potential for overcoming the current limits of the Equal Protection Clause analysis by inserting a contextual component that is universally applicable.<sup>251</sup>

The Due Process and Equal Protection clauses are both central to our

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242. See Imoukhuede, *supra* note 1, at 51.

243. *Loving v. Virginia*, 388 U.S. 1 (1967); *Brown v. Bd. of Educ.*, 347 U.S. 483(1954).

244. U.S. CONST. pmb.

245. Imoukhuede, *supra* note 1, at 51.

246. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) ("Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."). See Paulsen, *supra* note 75, at 34-37 (arguing that the significance of *Lawrence* can be extended to other contexts); Yoshino, *supra* note 25, at 749-50, 776-80.

247. See *Lawrence*, 539 U.S. 558.

248. *Id.* at 567.

249. *Id.* at 574.

250. See Henry, *supra* note 24, at 171-73, 203-05, 209-12 (discussing a line of U.S Supreme Court cases that invoke dignity).

251. See Yoshino, *supra* note 25.

fundamental rights doctrine.<sup>252</sup> The Equal Protection Clause analysis of fundamental rights is primarily used to protect people from being selectively deprived of their fundamental rights. The Due Process Clause analysis is primarily concerned with whether a right even exists. One component of the *San Antonio v. Rodriguez* analysis was a Due Process Clause determination that education is not a fundamental right.<sup>253</sup>

Kenji Yoshino suggests that in *Rodriguez*, the Court conducted an equality-based due process clause analysis that focused squarely on the fundamentality of the right to public education and on wealth as a suspect classification.<sup>254</sup> While the Court has consistently avoided identifying wealth as a separate suspect classification,<sup>255</sup> as Yoshino notes, the Court has in other contexts found ways to protect the impoverished by applying its liberty-based analyses to protect against blatant forms of discrimination.<sup>256</sup>

#### A. *Xenophobia Animates Modern Judicial Abandonment of Equal Protection*

Kenji Yoshino suggests that rather than directly acknowledging the racial, ethnic, and other group based inequalities in education and other areas, the Court prefers to avoid finding an Equal Protection Clause concern.<sup>257</sup> For Yoshino, the solution to this avoidance of the Equal Protection clause is to instead frame inequality concerns in terms that universalize the application of a liberty interest and in so doing obscure any group based inequalities and subordination concerns.<sup>258</sup> Obscuring the subordination aspects of such cases is among the purported advantages of a liberty based dignity approach.<sup>259</sup> This Article joins Yoshino in endorsing a dignity-based due process clause analysis.<sup>260</sup> However, obscuring the truth is rarely if ever advantageous, especially when dealing with matters of justice.<sup>261</sup>

Yoshino's human dignity approach suffers from at least two problems. First, it frames the central animating concerns regarding Equal Protection in terms of the seemingly benign concept of "pluralism anxiety,"<sup>262</sup> which obscures what

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252. U.S. CONST. amend. XIV (1868).

253. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). See Imoukhuede, *supra* note 1, at 71.

254. See Yoshino, *supra* note 25, at 791 n.311.

255. *Id.* at 790-91 (discussing the Court's unwillingness to recognize the poor as suspect class); *id.* at 791 n.311. See *Rodriguez*, 411 U.S. at 22-25 (holding that wealth-based classifications do not draw heightened scrutiny).

256. Yoshino, *supra* note 25, at 790-91.

257. *Id.*

258. *Id.*

259. See *id.*

260. *Id.*

261. See MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 7-10 (1993).

262. Yoshino, *supra* note 25.

truly animates the decreasing effectiveness of the Equal Protection jurisprudence. The misleading characterization of pluralism anxiety bleeds into the second problem, which is Yoshino's failure to appreciate that civil rights advocates, particularly education rights advocates, have long been pioneers in framing equality concerns using the universalist concept of civil liberties.<sup>263</sup> In fact, the infamous *Rodriguez* case is actually an emblematic example of advocates applying liberty-based arguments to what could also have been framed as an equality concern. Despite applying this universalist approach, the court still failed to recognize a fundamental right to public education.<sup>264</sup>

Regarding the first problem, Yoshino's concept of "pluralism anxiety," is premised on alleviating what he terms as a post-Warren Court, "pluralism anxiety," which he defines as "apprehension of and about [America's] demographic diversity."<sup>265</sup> He sees this anxiety as flowing from the legal recognition of "'new' kinds of people and 'newly visible' kinds of people."<sup>266</sup> Pluralism anxiety is a new, euphemistic umbrella term for concepts that are all too familiar. Where the "new" or "newly visible" are people with different national origins, such a fear is typically described as xenophobia.<sup>267</sup> Where those people are non-whites, such a fear is called racism.<sup>268</sup> Where the "newly visible" are women, then the fear is called sexism.<sup>269</sup> Where the "new" or "newly visible" are gay, lesbian, bi-sexual, or transgendered, the fear is called homophobia. "Fear of outsiders" or "fear of the other" is what Yoshino's "pluralism anxiety" is truly describing.<sup>270</sup> Framed thusly, Yoshino's observation is nothing new or controversial. Using the term "pluralism anxiety" is problematic because it appears to white-wash foul views, implicitly validating what is a disturbingly retrograde influence on American jurisprudence. The term "xenophobia" more fully captures the concerns and motivations than the neutral sounding and potentially misleading term "pluralism anxiety."

Xenophobia under the classical definition of the term is etymologically the more appropriate umbrella term for encapsulating these fears or "anxieties" because, despite its more limited English language definition, its origin literally means fear of strangers, foreigners, or in short, "fear of outsiders."<sup>271</sup> Xenophobia, used as a term to summarize this fear of outsiders, crystallizes the value of human dignity as a counterbalance. Any fear that "we," who view

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263. See LESLIE BENDER & DAAN BRAVEMEN, *POWER, PRIVILEGE, AND LAW: A CIVIL RIGHTS READER* 1-5 (2d ed. 1995).

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

265. Yoshino, *supra* note 25, at 751.

266. *Id.*

267. See MATSUDA ET AL., *supra* note 261, at 7-10.

268. See *id.*

269. See *id.*

270. See Yoshino, *supra* note 25.

271. The term "xenophobia" owes its etymology to the Greek. Its constituent roots are the term "*phobia*," which means "fear" or "fear of" and "*xenos*," which means stranger or outsider. WEBSTER'S DICTIONARY, *supra* note 130, at 542 (definition of "xenophobia").

ourselves as insiders, will lose power and privilege by fully dignifying the presence of outsiders, can be countered by recognition that we and the outsiders are all human beings who have a shared right to human dignity.

The second concern that Yoshino introduces the universal concept of human dignity without acknowledging that civil rights advocates have long been dealing with a xenophobia-inspired, post-*Brown* jurisprudence by consciously invoking universalist themes, such as a right to public education.<sup>272</sup> What appears to be lost is what once upon a time was obvious. The term “civil rights” itself embodies a universalist theme that is meant to resound beyond the limiting and frequently dismissible confines of racial equality.<sup>273</sup> Use of “civil rights” as a term is meant to elevate these concerns for inclusion within the broader inclusive arena of American civil liberties.<sup>274</sup> Far from embracing a paradigm of difference, as Yoshino indicates, civil rights advocates have consistently sought to universalize the struggle for civil rights and equality.<sup>275</sup> Yoshino’s approach to overcoming xenophobia’s retrograde influence on equality fails to appreciate the sophistication of civil rights advocates and thus mischaracterizes the scope of the equality concerns,<sup>276</sup> while exaggerating the liberty potential, especially in the context of public education.<sup>277</sup>

Race and ethnicity have long been problematic to invoke directly; this is why the *Rodriguez* plaintiffs couched what was clearly an issue of Mexican-American school children being denied equal educational opportunities as a question of liberty: their freedom to obtain a public education.<sup>278</sup> The plaintiffs went a step further in providing an opportunity for the Court to avoid xenophobia concerns.<sup>279</sup> They addressed the inequality aspects alternatively, in terms of wealth-based inequality, thus giving the Court the option of avoiding the more inflammatory

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272. *But see* Yoshino, *supra* note 25, at 794 (arguing that application of a dignity-based approach would help overcome *Rodriguez* by approaching education issues not as issues of equality, but as an issue regarding a due process clause-based right to public education).

273. BENDER & BRAVEMEN, *supra* note 263, at 1 (quoting Alice Walker: “‘Civil Rights’ is a term that did not evolve out of black culture, but, rather, out of American law. As such, it is a term of limitation. It speaks only to physical possibilities—necessary and treasured, of course—but not of the spirit.”).

274. *See id.*

275. *See* JESSE L. JACKSON, JR. & FRANK E. WATKINS, *A MORE PERFECT UNION: ADVANCING NEW AMERICAN RIGHTS* 330 (2001) (arguing for a proposed constitutional amendment guaranteeing to all citizens the right to a high-quality public education); Martin Luther King, Jr., Speech at the March on Washington: I Have a Dream (Aug. 28, 1963), available at <http://www.archives.gov/press/exhibits/dream-speech.pdf>, archived at <http://perma.cc/QL2T-3XQ8>.

276. *See* Yoshino, *supra* note 25, at 751.

277. *Id.* at 794.

278. R. Craig Wood, *Constitutional Challenges to State Education Finance Distribution Formulas: Moving from Equity to Adequacy*, 23 ST. LOUIS U. PUB. L. REV. 531, 535 (2004); Matthew A. Brunell, Note, *What Lawrence Brought for “Show and Tell:” The Non-Fundamental Liberty Interest in a Minimally Adequate Education*, 25 B.C. THIRD WORLD L.J. 343, 368 (2005).

279. Yoshino, *supra* note 25, at 751.

xenophobic concerns regarding race and ethnicity.<sup>280</sup> Yet, the *Rodriguez* Court failed to recognize either a right to public education, or that this form of obvious and systemic subordination of the children of the less fortunate violated either equality or due process.<sup>281</sup> *Rodriguez* is just one of many examples of where sophisticated civil rights advocates were thwarted in their creative attempts to apply universalist themes to class specific inequalities.<sup>282</sup>

Despite these weaknesses within Yoshino's human dignity-based liberty approach, this approach may still be helpful in furthering a right to public education.

### B. Human Dignity as a Proxy for Education Rights

The Court's failure to recognize a fundamental right to public education does not necessarily foreclose the possibility that access to a high quality, public education can be protected as a component to human dignity. A human dignity-based due process clause analysis could be applied as a vehicle to affect a right to public education. This approach would be similar to the Court's application of the fundamental right to privacy as a vehicle for recognizing other important rights, including women's reproductive rights.<sup>283</sup> More recently, the Court applied its dignity-based due process clause analysis to use the constitutional right to privacy to protect the rights of homosexuals by protecting a broader right to intimate sexual relations.<sup>284</sup>

*Lawrence* broadened the right to privacy to protect the liberty to privately engage in intimate sexual relations based on the recognition that liberty is essential to human dignity.<sup>285</sup> Hence, *Lawrence* agrees with the long held view that liberty is an essential component to human dignity. The case for applying a dignity-based due process clause protection of the right to public education is even stronger for education than for the right to privacy. This is because, unlike the right to privacy, education is essential to both the liberty component and to the democracy component of human dignity.

Treating access to high-quality public education as a component to a fundamental right to human dignity would fit well within already existing U.S. constitutional law doctrine. Human dignity has already been recognized by the U.S. Supreme Court as fundamental to American concepts of liberty and equality. Human dignity has already been applied by the U.S. Supreme Court as a vehicle for protecting other rights, most notably, the right to privacy.<sup>286</sup>

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280. *Id.*

281. *See* Brunell, *supra* note 278, at 353-54.

282. *See* Plyler v. Doe, 457 U.S. 202 (1982) (discussing the right to education in the context of undocumented alien children).

283. *See* Roe v. Wade, 410 U.S. 113 (1973).

284. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

285. *Id.* at 558.

286. *See* Glensy, *supra* note 67; Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 751 (2006); Yoshino, *supra* note 25, at 749-50.

The right to privacy has since been applied to add universal character to subordination critiques involving women and homosexuals. The right to dignity's potential to universalize rights, avoids Yoshino's xenophobia concerns. For as *Lawrence* demonstrates, when the Court has been willing to correct for obvious inequalities, it would rather "universalize" rights rather than confront the xenophobia-based fears that would come from recognizing a new suspect classification. However, the goal is not to placate xenophobia but to overcome it.

Given that *Lawrence* applied dignity to interpret and expand the extra-textual but yet judicially recognized fundamental constitutional right to privacy, this opens the door to finding other dignity-based due process clause rights, including the right to public education.<sup>287</sup> Obviously, the right to privacy is a negative right or liberty that fits squarely within the current Court's negative rights biased, libertarian perspective as elucidated in *The Fifth Freedom*.<sup>288</sup> However, *Lawrence*'s application of dignity, with its attendant positive rights implications regarding ensuring opportunity to achieve basic and essential human achievements,<sup>289</sup> demonstrates the falsehood of the negative and positive rights dichotomy.<sup>290</sup> Applying the concept of human dignity to interpret a due process clause based right, helps expose the true connection between duty and freedom as well as the connection between democracy and liberty.

#### CONCLUSION

Education is essential to human dignity because education is essential to the two fundamental components to human dignity: liberty and democracy. Despite the importance of education to liberty and democracy, the U.S. Supreme Court has refused to recognize education as a fundamental right or even to consistently protect against blatant inequalities in access to and quality of public education. However, the Court's human dignity jurisprudence opens a possibility for recognizing a right to public education by way of a dignity-based due process clause analysis.

*Lawrence v. Texas* has expanded the scope for protecting the right to privacy through a human dignity-based argument that privacy is essential to liberty and liberty is essential to dignity. The case for a human dignity-based recognition of the right to public education is even stronger for education than for the right to privacy. This is because, unlike the right to privacy, education is essential to both the liberty and the democracy components of human dignity.

The Court's continuing failure to recognize and protect the right to education undermines liberty and jeopardizes the very foundation of American democracy.

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287. Yoshino, *supra* note 25, at 749-50.

288. Imoukhuede, *supra* note 1, at 81.

289. SEN, DEVELOPMENT AS FREEDOM, *supra* note 17, at 4-5, 10-11, 36-49, 144 (arguing for basic capabilities that enhance freedom, including the capability to be educated, and arguing that education is important to economic and political participation).

290. See Nunn, *supra* note 172, at 78-79; Roberts, *supra* note 172, at 389.



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

Applying this analysis in the context of public education would be a significant step towards unhinging our constitutional doctrine from the false rights dichotomy inherent in the current Court's libertarian and anti-equality bias. Today, education is once again specially situated as the bridge for overcoming separate but equal styled inequality, just as it did before in *Brown v. Board of Education*.

The positive right of access to public education will require a new form of constitutional analysis under the due process clause if it is to be recognized and meaningfully enforced. This new due process would be based in a human dignity jurisprudence<sup>291</sup> that applies the insights from the capabilities approach pioneered by Amartya Sen and Martha Nussbaum.<sup>292</sup> The mechanics of this new due process will need to be further developed, but it promises to have ramifications well beyond the education rights context. Applying this new due process could finally lead to meaningful recognition and enforcement of government's other fundamental duties or positive rights.

Government has a duty to act, if for no other purpose than to preserve human dignity. Education is essential to human dignity and a duty for government to provide equal access to a high quality, public education can and should be enforced by way of a dignity-based due process clause analysis.

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291. Glensy, *supra* note 67 (discussing the concept of human dignity and relevant approaches to reaching it, including negative and positive rights theories).

292. NUSSBAUM, *supra* note 13, at 17-18. According to Nussbaum:

“Capability Approach” and “Capabilities Approach” are the key terms in the political/economic program Sen proposes in works such as *Inequality Reexamined* and *Development as Freedom*, where the project is to commend the capability framework as the best space within which to make comparisons of life quality, and to show why it is superior to utilitarian and quasi-Rawlsian approaches.