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Resolving the Dissonance of Rodriguez and the Right to Education

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NOTES

Resolving the Dissonance of *Rodriguez* and the Right to Education: International Human Rights Instruments as a Source of Repose for the United States

ABSTRACT

Education exists as a fundamental right recognized by countries worldwide. Overwhelming support for the right to education is reflected in international human rights instruments, including the International Convention on Economic, Social, and Cultural Rights and the Convention on the Rights of the Child. Notwithstanding a near global consensus on this issue, the United States has refused to recognize a federal right to education since the 1973 Supreme Court decision San Antonio Independent School District v. Rodriguez. The ill-effects of Rodriguez linger today; glaring disparities continue to mar the educational prospects of women, minorities, and poor children in the United States. In this Note, the Author emphasizes the critical importance of a right to education for all people. The Author explains the purpose and function of education, presents a brief history of educational inequity in the United States, and summarizes the international human rights instruments that recognize the right to education. The Author also analyzes the Rodriguez decision and identifies the presence of a national consensus within the United States regarding the right to education. Ultimately, the Author argues that there is an international consensus recognizing the right to education. Accordingly, the Author suggests the following: (1) the United States should reconsider its treatment of the right to education by using the analytical framework employed by the Supreme Court in Roper v. Simmons; (2) recognition of a federal

right to education falls directly in line with recent governmental efforts to “federalize” education; and (3) recognition of the right to education would help the United States maintain its status as a global leader.

TABLE OF CONTENTS

I.	INTRODUCTION	231
II.	THE ESSENTIALITY OF EDUCATION	235
	A. <i>Discerning the Meaning, Purpose, and Function of Education</i>	235
	B. <i>Select Theories on the Importance of Education</i>	236
	1. The Empowerment Model	236
	2. The Citizenship Model.....	237
	3. The Multicultural Democracy Model.....	238
	4. The Economic Benefits Model.....	239
	C. <i>Exclusion and Marginalization: The Legacy of “Miseducation” in the United States</i>	240
	1. Gender	240
	2. Race	241
	3. Class	243
III.	INTERNATIONAL RECOGNITION OF THE RIGHT TO EDUCATION	244
	A. <i>The Right as Reflected in Major International Human Rights Instruments</i>	244
	1. The Universal Declaration of Human Rights	245
	2. The International Covenant on Economic, Social, and Cultural Rights	247
	3. The Convention on the Rights of the Child	248
	4. The International Convention on the Elimination of All Forms of Racial Discrimination	250
	B. <i>Ratification, Reservations, and the United States’ Reluctance</i>	251
	C. <i>The Force of the International Community and Customary International Law</i>	253
IV.	RODRIGUEZ: THE UNITED STATES’ FAILURE TO RECOGNIZE THE RIGHT TO EDUCATION	255
	A. <i>The Majority Opinion: Education Is Not a Fundamental Right</i>	255

B.	<i>Marshall's Dissent: All Children Deserve the Right to an Equal Start</i>	257
C.	<i>Dissatisfaction with Educational Disparities Gives Rise to a "National Consensus"</i>	259
V.	STRIKING THE RIGHT CHORD WITH INTERNATIONAL HUMAN RIGHTS INSTRUMENTS.....	261
A.	<i>Revising the Melody: Lessons from the Judicial Recognition of "International Consensus" in Roper v. Simmons</i>	261
B.	<i>Harmonizing with the Legislature: Acknowledging the "Federalization" of Education</i>	264
C.	<i>Learning to Blend: Accountability and Cooperation for Effective Leadership Abroad</i>	265
VI.	CONCLUSION.....	267

I. INTRODUCTION

Where, after all, do universal human rights begin? In small places, close to home—so close and so small that they cannot be seen on any map of the world. Yet they *are* the world of the individual person: the neighborhood he lives in; the school or college he attends; the factory, farm, or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.

—Eleanor Roosevelt¹

Education rests at the core of success and progress for children worldwide. By providing access to information and creating a gateway to opportunity, education permits the full and complete

1. Eleanor Roosevelt, *In Your Hands: A Guide for Community Action for the Tenth Anniversary of the Universal Declaration of Human Rights*, Address Before the United Nations Commission on Human Rights (Mar. 27, 1958), available at <http://www.udhr.org/history/inyour.htm>.

development of young minds.² Even more, it is meant to serve as “the great equalizer” within *and* among nations.³ This is especially profound in light of the historical misuse of education as a device for separation and oppression.⁴ For generations, “well-educated” members of society have reaped the benefits of enhanced knowledge and advanced skills, while the “undereducated” and “uneducated” have suffered financially and politically.⁵ Today, select groups continue to enjoy the simultaneous acquisition of financial and political power to the exclusion of others, due, in large part, to disparate educational opportunities.⁶

The legacy of education in the United States consists of the outright denial of educational opportunity for women and blacks during antebellum slavery, the perpetuation of inequality via segregated schooling during the Jim Crow era, and the continued provision of disproportionate education for minorities and poor students in under-funded school districts.⁷ Notwithstanding its turbulent past, the United States, like most countries, acknowledges the critical importance of education for all citizens.⁸ The landmark *Brown* decision served as judicial confirmation of this notion, hailing education as vital to the promotion of democratic ideals, essential to the exercise of constitutional guarantees, and critical to the creation and maintenance of a harmonious society.⁹ Educators and scholars from a range of professional disciplines espouse various theories that

2. See GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD* 232 (1995) (“Education is essential for children because it helps realise their full potential.”).

3. According to American education reformer Horace Mann, “Education then, beyond all other devices of human origin, is the great equalizer of the conditions of men—the balance-wheel of the social machinery.” HORACE MANN, REPORT NO. 12 OF THE MASSACHUSETTS SCHOOL BOARD (1848), *reprinted in* CRITICAL ISSUES IN EDUCATION: AN ANTHOLOGY OF READINGS 66 (Eugene F. Provenzo, Jr. ed., 2006).

4. Clear examples of this reality are the shameful legacies of slavery and apartheid in the United States and South Africa, respectively.

5. See Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 560 (1992) (“[T]he poorly educated are thwarted at every turn. They face the likely prospect of circumscribed earning power and they may well be rendered politically ineffectual.”).

6. See generally Julius Chambers, *Adequate Education for All: A Right, An Achievable Goal*, 22 HARV. C.R.-C.L. L. REV. 55 (1987) (discussing the ways that unequal access to quality education has circumscribed the political and economic power of poor and minority students in the United States).

7. See CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION* 97, 168 (2004) (discussing the historical context of segregation and inequality in educational resources in the United States).

8. See *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 493 (1954) (describing the importance of education for personal development).

9. *Id.*

further elucidate the integral nature of education.¹⁰ Moreover, the international community heralds the importance of education for all.¹¹ Yet, the United States exists as one of two countries that have persistently declined to outwardly recognize a federal “right to education.”¹²

The United States’ first open refusal to recognize a fundamental right to education surfaced within the Supreme Court decision *San Antonio Independent School District v. Rodriguez*.¹³ Specifically, the Court held that “[e]ducation . . . is not among the rights afforded explicit protection under our Federal Constitution.”¹⁴ From a strict textualist perspective, the Court was correct in its assertion. However, the Court also refused to “find any basis for saying [education] is implicitly so protected.”¹⁵ It is *this* refusal that represents the critical error of *Rodriguez*, and it is this error that requires a significant remedial response to ensure that all children are afforded equal educational opportunities.

The profoundly negative implications of *Rodriguez* linger, and its fruits continue to pervade American society today.¹⁶ The United States’ failure to recognize education as a fundamental right has caused a host of unwieldy ramifications including, the prolonged provision of substandard education for racial minorities and the urban poor.¹⁷ This failure also has hampered the United States’ ability to function as a democratic society—one in which citizens can fully exercise fundamental rights and liberties.¹⁸ Furthermore, it has reduced the influence of the United States as a global leader, and as a byproduct, has contributed to the decline of America’s image as an ultimate sovereign state.¹⁹ Stated more aptly, failure to recognize

10. See discussion *infra* Part II.

11. See discussion *infra* Part III.

12. “Every nation state in the world (191 nation states), except the United States and Somalia, is a party to [the United Nations Convention on the Rights of the Child],” which explicitly recognizes a right to education. Maria Grahn-Farley, *International Child Rights at Home and Abroad: A Symposium on the UN Convention on the Rights of the Child*, 30 CAP. U. L. REV. 657, 658 (2002).

13. 411 U.S. 1 (1973).

14. *Id.* at 35.

15. *Id.*

16. See Connie de la Vega, *The Right to Equal Education: Merely a Guiding Principle or Customary International Legal Right?*, 11 HARV. BLACKLETTER L.J. 37, 59 (1994) (discussing unequal distribution of education resources since *Rodriguez*).

17. See Chambers, *supra* note 6, at 55 (“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.”).

18. See Ian Millhisser, Note, *What Happens to a Dream Deferred?: Cleansing the Taint of San Antonio Independent School District v. Rodriguez*, 55 DUKE L.J. 405, 431 (2005) (stating that “an affirmative right to an adequate education is essential to preserving an intact right to vote.”).

19. For an excellent discussion of this point, see Eric Lerum et al., *Strengthening America’s Foundation: Why Securing the Right to an Education at Home*

such a right has placed the United States “out of step with the rest of the world.”²⁰

This Note will demonstrate the critical importance of a clear and open recognition of education as a fundamental right by the United States. Part II explains the meaning, purpose, and functions of education; articulates select theories that illustrate the critical importance of education for all; and briefly recounts the history of education in the United States. Part III details the overwhelming global recognition of the right to education as reflected in major international treaties and human rights instruments. Part IV outlines the United States’ failure to recognize a federal right to education by examining the *Rodriguez* decision. It also describes the resultant nationwide discrepancy in education and sheds light on the emergent national consensus regarding the right to education. Finally, Part V encourages decision-makers to examine the current crisis in American public education through an international lens. It proposes judicial reexamination of *Rodriguez* in light of the prevailing international consensus supporting the right to education and based upon the recent trends reflected in *Roper v. Simmons*.²¹ Specifically, this section recommends that the Court employ the analytical framework provided by *Roper* in order to recognize education as a fundamental right.²² This section also articulates the need for uniformity with respect to legislative efforts to “federalize” education. Furthermore, it advocates congressional ratification of both the International Covenant on Economic, Social, and Cultural Rights as well as the Convention on the Rights of the Child. Ultimately, this Note urges the United States to join the rest of the international community by recognizing a federal right to education.

is Fundamental to the United States’ Efforts to Spread Democracy Abroad, 12 HUM. RTS. BRIEF 13 (2005) (discussing failures of the United States’ public education system).

20. See generally Susan H. Bitensky, Children’s Rights—Is America Out of Step With the Rest of the World?, Keynote Address at the Activism and Human Rights Fourth Biennial Kansas City Conference on the United Nations Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women (Nov. 16, 2006), available at <http://www.kcglobalconcepts.org/SusanBitensky.pdf> (discussing American students’ poor educational performance vis-à-vis foreign students).

21. 543 U.S. 551 (2005) (holding that the Eighth and Fourteenth Amendments forbid the imposition of the death penalty on juvenile offenders and using international consensus to support this conclusion).

22. See discussion *infra* Part V.A.

II. THE ESSENTIALITY OF EDUCATION

A. *Discerning the Meaning, Purpose, and Function of Education*

Education is the act or process whereby individuals develop innate capacities, obtain knowledge or training in a particular area, and access information to achieve a level of understanding.²³ The educational process is also designed to stimulate mental and moral growth and the refinement of character.²⁴ Although the right to education affects people of all ages, Lawrence LeBlanc has stated that,

[f]or all practical purposes, to speak of a right to education is to speak of a right of the child. Adults too may be said to have a right to education, since the eradication of illiteracy has been a goal of many governments and organizations for many years. But ensuring that children have a right to education is the best place to begin.²⁵

Essentially, "it is the business of education to perfect the mind."²⁶ Yet, a true education also requires a tangible, value-added experience: "[u]nless it makes a difference, a very real difference, in the systematic procedure of human nature, it is not education."²⁷

Two divergent schools of thought exist regarding the purpose of education: (1) that education provides a communal benefit; and (2) that education is an individual's primary means of achieving personal autonomy.²⁸ The first view contends that education civilizes children and helps cultivate "common cultural goals."²⁹ Under this premise, education is intended to benefit the student as well as society.³⁰ The second theory argues that "the educational system must respect [a child's] inherent value and instill socially responsible self-determination."³¹ It shifts the goal from one intended to yield a societal benefit to one focused primarily on arousing independence and self-sufficiency.

While each view possesses a certain level of merit, a blend of the two approaches provides a more accurate picture of the overall purpose of education. Rev. Dr. Martin Luther King, Jr. blurred the distinction between the two theories quite well. According to Dr.

23. AMERICAN HERITAGE COLLEGE DICTIONARY 436 (3d ed. 1997).

24. *Id.*

25. LAWRENCE J. LEBLANC, *THE CONVENTION ON THE RIGHTS OF THE CHILD: UNITED NATIONS LAWMAKING ON HUMAN RIGHTS* 176 (1995).

26. *See* ERNEST CARROLL MOORE, *WHAT IS EDUCATION?* 16 (1915) (characterizing one view of education).

27. *Id.* at 151.

28. NANCY E. WALKER ET AL., *CHILDREN'S RIGHTS IN THE UNITED STATES: IN SEARCH OF A NATIONAL POLICY* 170-71 (1999).

29. *Id.* at 170.

30. *Id.*

31. *Id.*

King, "education has a two-fold function to perform in the life of man and in society: the one is utility and the other is culture."³² He further asserted that education is designed to promote efficient behavior and to permit the achievement of personal goals "with increasing facility."³³ Thus, education yields a dual benefit – to society and to self. Based on this theory, the advantages of education for all are undeniable.

B. *Select Theories on the Importance of Education*

Education undoubtedly entails a socialization process. Children interact with peers and learn to function as competent and productive members of society. However, the right to education entails much more than the mere right to be socialized. This section briefly outlines four theoretical models that highlight the importance of education, namely: (1) the empowerment model; (2) the citizenship model; (3) the multicultural democracy model; and (4) the economic benefits model.

1. The Empowerment Model

Education promotes the development of one's "intellectual capacity . . . to think seriously and critically about his or her place in society and the world at large," and, as such, exemplifies an "empowerment right."³⁴ According to the empowerment theory, "[p]eople must not simply be protected against attacks by the state or other citizens, they must be empowered to act and to lead autonomous lives."³⁵ Education encourages individual success and breeds confidence by providing an escape from poverty and enabling one to participate actively in his community as an informed citizen.³⁶ Furthermore, it plays "a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth."³⁷

32. Martin Luther King, Jr., *The Purpose of Education*, Speech at Morehouse College (1948), available at <http://www.drmartinlutherkingjr.com/thepurposeofeducation.htm> (last visited Nov. 26, 2007).

33. *Id.*

34. LEBLANC, *supra* note 25, at 175.

35. *Id.* at 157.

36. U.N. Econ. & Soc. Council, *Comm. on Econ., Soc., & Cultural Rights, Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 13*, ¶ 1, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999) [hereinafter *General Comment*].

37. *Id.*

Beyond its practical importance, education serves as a platform for enlightenment and freedom of thought.³⁸ It opens young minds and allows students to expand their horizons. Education also provides a sense of personal accomplishment and exists as “one of the joys and rewards of human existence.”³⁹ Mastery of various skills and topics typically evokes feelings of personal accomplishment. Consequently, education functions as a harbinger of individual empowerment.

2. The Citizenship Model

The founding fathers envisioned an educational system that would serve civic and moral purposes.⁴⁰ Under the citizenship model, education embodies a platform for the development of knowledgeable citizens and future political leaders.⁴¹ According to proponents of this view, the classroom is a place in which individuals come to understand the functions of government as well as their unique role as citizens in a free nation.⁴² Furthermore, advocates of this model believe education prepares young people for a variety of citizenship duties including, but not limited to, voting, allegiance, patriotism, knowledge of history, and “an interest in good government.”⁴³ Accordingly, the success of America’s “great experiment in government ‘by the people, for the people’” remains inextricably linked with education.⁴⁴

Focusing primarily on the need for leaders “who have the power to see a little farther, to imagine a little better life than the present,” the citizenship model seeks to create “a vast army of men and women capable of understanding and following these leaders intelligently.”⁴⁵ This model advocates an all-encompassing education that ensures a certain level of knowledge while cultivating a sense of collective responsibility.⁴⁶ Schools provide the perfect venue to achieve this goal, because “the conditions and problems of the larger society are more easily reproduced and met and solved” within the four walls of

38. *Id.*

39. *Id.*

40. See generally Eleanor Roosevelt, *Good Citizenship: The Purpose of Education*, PICTORIAL REV., Apr. 1930, available at <http://newdeal.feri.org/texts/528.htm> (discussing the role of education in developing good citizens).

41. *Id.*

42. *Id.*

43. *Id.* ¶ 6.

44. *Id.* ¶ 37.

45. *Id.* ¶ 13.

46. *Id.* ¶¶ 13–14.

the classroom.⁴⁷ Yet, this theory also acknowledges the need for supplementation in the home.⁴⁸

Ultimately, the citizenship model envisages an education whereby students, as a direct consequence of learning to be good citizens, discover ways to live and achieve at their maximum capacity.⁴⁹ Naturally, education facilitates the type of preparation needed to produce well-qualified leaders as well as an informed community of supporters.⁵⁰

3. The Multicultural Democracy Model

The multicultural democracy model favors an education that promotes democratic ideals to accommodate “the growing diversity of the citizens of this nation.”⁵¹ Created in response to demographic shifts, this model calls for the revamping of educational systems in order to remedy the history of hegemony that has vexed learning institutions in the United States.⁵² Under this model, education is meant “to prepare our young people for citizenship in an America which fully includes in its self-definition women as well as men, all races and all ethnic groups.”⁵³ Furthermore, multicultural education is designed to embody “visions of the future.”⁵⁴

Proponents of the multicultural democracy model insist that “if a democracy which includes all of America’s people is to be fostered and prefigured in this nation’s educational system, then multicultural education must be at the heart, and not on the margins.”⁵⁵ They seek “to re-vision America, to redefine American life and culture, and to develop metaphors, narratives, practices, and social and power relations consonant with this new definition.”⁵⁶ Because “the history of education in this country is a story of two competing and contradictory traditions—education for full citizenship and education for second-class citizenship,” this model accounts for the flaws of the citizenship model of education.⁵⁷ Schools designed in accordance with this model are “informed by the social realities of the communities

47. *Id.* ¶ 18.

48. *Id.* ¶ 33.

49. *Id.* ¶ 19.

50. *Id.* ¶ 13.

51. Theresa Perry & James W. Fraser, *Reconstructing Schools as Multiracial/Multicultural Democracies: Toward a Theoretical Perspective*, in *FREEDOM’S PLOW: TEACHING IN THE MULTICULTURAL CLASSROOM* 3, 9 (Theresa Perry & James W. Fraser eds., 1993).

52. *Id.* at 7, 9.

53. *Id.* at 17.

54. *Id.*

55. *Id.* at 3.

56. *Id.* at 5.

57. *Id.* at 12.

they serve and representative of the vision of the society in which they exist.”⁵⁸

4. The Economic Benefits Model

The global economy benefits from knowledgeable, skilled individuals. To that end, some theorists push for the inclusion of economic considerations in the debate surrounding the importance of education and reform efforts.⁵⁹ These scholars tout the importance of incentives and efficiency goals as a means of achieving favorable results.⁶⁰ The “economic benefits perspective” is based on the reality that “students coming out of America’s elementary and secondary schools fare poorly in head-to-head competition with students from many other parts of the world.”⁶¹ Supporters claim that “the schools have been unable to bring all students up to acceptable levels of achievement, leaving a long-term disadvantaged group that most likely will be unable to participate in the American dream of enjoying an ever improving standard of living.”⁶² Therefore, by focusing on outcomes, the economic benefits model links education with prospects of future success, financial gain, and a thriving economy.

Whereas the other models are widely accepted, the economic benefits perspective has been critiqued extensively. According to some, “the human rights dimension of education need[s] to be strengthened without looking at education from an utilitarian perspective that guarantees an economic result.”⁶³ Opponents reject the technocratic notion of education as a mere means of ushering young people into defined roles within the economy.⁶⁴ They see education as much more than a precursor to gainful employment and caution against the dangers of “preoccupation with receiving ‘value for the education dollar’ and with bottom line concerns that are ‘cost-effective’ and ‘outcome oriented.’”⁶⁵ Furthermore, they reject the view that education is only vital to maintaining the United States’ ability to compete internationally or that it is merely a tool to prepare the

58. *Id.* at 16.

59. See ERIC A. HANUSHEK, MAKING SCHOOLS WORK: IMPROVING PERFORMANCE AND CONTROLLING COSTS 2 (1994) (noting small returns despite increased spending on education).

60. See *id.* at 5 (arguing for performance incentives in education).

61. *Id.* at 2.

62. *Id.*

63. Interview by Farah Mihlar Ahamed with Vernor Munoz Villalobos, U.N. Special Rapporteur on the Right to Education (June 2005), in RESPECT: HUM. RTS. NEWSL., June 2005, available at <http://www2.ohchr.org/english/bodies/docs/Issue%20Nr%201+.pdf>.

64. See, e.g., James A. Gross, *A Human Rights Perspective on U.S. Education: Only Some Children Matter*, 50 CATH. U. L. REV. 919, 945 (2001) (describing the utilitarian view of education as “contrary to children’s human rights”).

65. *Id.*

future workforce.⁶⁶ However, the economic benefits model uniquely acknowledges the unquestionable correlation between education and the strength of the economy.

C. Exclusion and Marginalization: The Legacy of "Miseducation" in the United States

Exclusion has weakened the true function of education within the United States. A unique, albeit subtle, form of oppression was accomplished through the separation of certain groups in schools.⁶⁷ Specious justifications for these divisions were based primarily on gender, race, and class.⁶⁸ Denial of access to education for some enabled others to hold their post in the upper echelons of society. As demonstrated below, this denial ultimately shaped the lives of many of the individuals who were marginalized.

1. Gender

Traditionally, education was designed to prepare males for survival in the world.⁶⁹ With respect to the curriculum, teaching methods, and structure of schools, women were not given due consideration.⁷⁰ Prior to the 1950's, education bred a culture of separation and schools were characterized by sex segregation.⁷¹ For example, separate entrances were maintained for males and females.⁷² In fact,

the entire country has been operating separate systems for boys and girls despite the fact that they usually share classrooms. Not only are classes always lined up in two lines with boys in one and girls in the other, but teachers and other educators also have different expectations about the interests and abilities of individual children based largely on the sex of the child.⁷³

66. *Id.* at 944.

67. For example, the "separate but equal" doctrine, under which public facilities were segregated on the basis of race. *Plessy v. Ferguson*, 163 U.S. 537 (1896). This doctrine served as the justification for segregation within public schools. *Id.*

68. See Perry & Fraser, *supra* note 51, at 12. ("It is also a reality that for most of America's history, women and people of color were not included as full participants in the vision of democracy enunciated by many of the nation's most prominent voices.")

69. Barbara Anne Murphy, *Education: An Illusion for Women*, 3 S. CAL. REV. L. & WOMEN'S STUD. 19, 43 (1993).

70. *Id.*

71. Susan McGee Bailey & Patricia B. Campbell, *Gender Equity: The Unexamined Basis of School Reform*, 4 STAN. L. & POL'Y REV. 73, 76 (1993).

72. *Id.*

73. Carol Amyx, Comment, *Sex Discrimination: The Textbook Case*, 62 CAL. L. REV. 1312, 1312 (1974).

Even today, women continue to be stigmatized and victimized by sexism in education.⁷⁴ "As part of the system of patriarchy, education plays an active role in perpetuating the status quo of unequal social and economic roles of women and men within our society."⁷⁵ Schools also have consistently reinforced rigid, uneven gender roles.⁷⁶

"Discrimination in education is one of the most damaging injustices women suffer. It denies them equal education and equal employment opportunity, contributing to a second class self image."⁷⁷ Historically, the effects of such discrimination spilled over into other aspects of life for women.⁷⁸ As early as 1873, the Supreme Court upheld a state law barring women from the practice of law.⁷⁹ Prior to the Equal Pay Act of 1963, it was legal for employers to pay a woman less than what a man would receive for the same job.⁸⁰ Congress took specific action to remedy the disparities between men and women by enacting Title IX of the Education Amendments of 1972⁸¹ and the Women's Educational Equity Act.⁸² In spite of these legislative efforts, "many girls still do not receive an education that prepares them adequately for a world of work and economic independence."⁸³

2. Race

"Free public schooling in the United States began at a time when it was illegal in many states for Black people to learn how to read and write."⁸⁴ During the Jim Crow era, American public schools were segregated, and the facilities for blacks were substandard.⁸⁵ However, in 1954, the Court abolished this practice in the landmark

74. Murphy, *supra* note 69, at 24.

75. *Id.*

76. *Id.* at 108.

77. Tanya Neiman, *Teaching Woman Her Place: The Role of Public Education in the Development of Sex Roles*, 24 HASTINGS L.J. 1191, 1207 (1973) (quoting PRESIDENT'S TASK FORCE ON WOMEN'S RIGHTS & RESPONSIBILITIES, A MATTER OF SIMPLE JUSTICE 7 (1970)).

78. *Id.*

79. *Bradwell v. Illinois*, 83 U.S. 130 (1873).

80. Equal Pay Act of 1963, § 2, Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d) (2000)).

81. Education Amendments of 1972, tit. IX, Pub. L. No. 92-318, 86 Stat. 373 (codified as amended at 20 U.S.C. §§ 1681-1688 (2000)). Title IX provides that no individual may "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance" on the basis of sex. 20 U.S.C. § 1681(a).

82. Women's Educational Equity Act, Pub. L. No. 89-10, as added Pub. L. No. 100-297, 102 Stat. 234 (repealed 1994).

83. Bailey & Campbell, *supra* note 71, at 83-84.

84. Denise C. Morgan, *What Is Left to Argue in Desegregation Law?: The Right to Minimally Adequate Education*, 8 HARV. BLACKLETTER L.J. 99, 102 (1991).

85. See *id.* at 104 ("Even into the mid-twentieth century, when compulsory school attendance laws were in force in every state, segregated educational facilities for Black students continued to be unequal to those provided for white students.").

decision *Brown v. Board of Education*.⁸⁶ Specifically, the Court held that “the doctrine of ‘separate but equal’ has no place” in the field of public education, since “[s]eparate educational facilities are inherently unequal.”⁸⁷ In addition to establishing the unconstitutionality of separate but equal, *Brown* “gave the importance of education a constitutional dimension.”⁸⁸ Likewise, the context of the *Brown* decision was built upon a concern for the standard of education that children received.⁸⁹

In the years following *Brown*, small numbers of “qualified” black students entered the academy of higher education.⁹⁰ Many children were forced to travel unearthly distances in order to get to school after mandates of busing as a remedy.⁹¹ However, desegregation decrees and the rules of *Brown* and its progeny were not merely about racial-mixing; they were also *intended* to eliminate the inferior learning experiences of those who had long been subjected to second-rate education.⁹² Anything less “would be an incomplete, if not perverse, realization of *Brown*’s import.”⁹³

Slavery and segregation were major components in the social, political, and economic development of America as a nation. In the words of W.E.B. DuBois, “the problem of the Twentieth Century [was] the problem of the color-line.”⁹⁴ This statement continues to hold great significance for minorities today, particularly within the realm of public education, because the color line has a tendency to dictate educational opportunity in the United States. Centuries ago, African slaves fought long and hard to educate themselves in spite of adversity and oppression.⁹⁵ Notwithstanding slavery’s end, several negative thoughts and theories regarding the prospect of educational achievement and success for blacks in American society remain today.

86. 347 U.S. 483 (1954).

87. *Id.* at 495.

88. Sharon Elizabeth Rush, *The Heart of Equal Protection: Education and Race*, 23 N.Y.U. REV. L. & SOC. CHANGE 1, 2 (1997).

89. Susan H. Bitensky, *We “Had a Dream” in Brown v. Board of Education . . .*, 1996 DETROIT C. L. MICH. ST. U. L. REV. 1, 5 (1996).

90. Perry & Fraser, *supra* note 51, at 11.

91. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (holding that busing students to promote integration is constitutional).

92. See Bitensky, *supra* note 89, at 6 (“*Brown*’s ‘educational rationale’ is that *de jure* segregated public schools cheat [African American] children of educational content that would prepare them for responsible political participation, initiate them into the ranks of the culturally literate and give them the basis for later professional training.”).

93. *Id.*

94. W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK: ESSAYS AND SKETCHES*, at vii (3d ed. 1903).

95. Perry & Fraser, *supra* note 51, at 12 (“Extending back to slavery, against the backdrop of laws that made it a crime for slaves to learn to read and write, historians have documented the slaves’ tenacious pursuit sometimes at risk of death, of literacy.”).

Many of these questionable ideas can be attributed to slavery and its influence. Sadly, persistent harmful attitudes toward the education of minorities are a clear example of this phenomenon.⁹⁶

3. Class

Following World War II, the United States strategically reorganized its economy, and, in doing so, “created a bifurcated labor market, locking poorly educated inner-city youth into low-wage jobs, despite the implementation of social policies designed to improve their life chances.”⁹⁷ This postwar transformation exacerbated the “longstanding racial divisions and economic inequities” that were characteristic of schools in the United States and further amplified obstacles to educational success for poor and minority students.⁹⁸ The remnants of this process remain.⁹⁹ Even today, “the system of public education in reality perpetuates what it is ideologically committed to eradicate—class barriers which result in inequality in the social and economic life of the citizenry.”¹⁰⁰ Such miserable destitution will persist without an expedient increase in educational opportunity and economic power.

There is also an undeniable correlation between race and poverty.¹⁰¹ According to Katarina Tomaševski, former Special Rapporteur to the United Nations on the right to education, “efforts to eliminate racial discrimination have demonstrated that dissociating race from poverty has not led to desired outcomes.”¹⁰² She further noted that “[b]ecause economic exclusion has a visible racial and gender profile, revisiting the core concepts of equal and

96. See, e.g., Harvey Kantor & Barbara Brenzel, *Urban Education and the “Truly Disadvantaged”: The Historical Roots of the Contemporary Crisis, 1945–1990*, 94 TCHRS. C. REC. 278, 291 (1992) (“Some conservatives have argued that the reason for this connection between urban education and educational failure is that children from poor and minority families are simply less academically capable than their more advantaged peers.”).

97. *Id.* at 280.

98. *Id.*

99. Ray C. Rist, *Student Social Class and Teacher Expectations: The Self-Fulfilling Prophecy in Ghetto Education*, 40 HARV. EDUC. REV. 411 (1970), reprinted in 70 HARV. EDUC. REV. 266, 294–300 (2000).

100. *Id.* at 300.

101. See Bitensky, *supra* note 89, at 10 (“Adding insult to the historical injury of racial segregation, the crisis is most glaringly manifested in underfinanced school districts of which many are urban centers with high concentrations of impoverished minority children.”).

102. U.N. Econ. & Soc. Council, Comm’n on Human Rights, *Report of the Special Rapporteur on the Right to Education Mission to the United States of America 24 September–10 October 2001*, ¶ 81, U.N. Doc. E/CN.4/2002/60/Add.1 (2002) (prepared by Katarina Tomaševski), available at <http://www.right-to-education.org/content/unreports/unreport6prt1.html> [hereinafter *Special Rapporteur Report*].

unequal rights seems timely.”¹⁰³ This is because an invisible dividing line based on race and class has perpetuated a “class-based stratification” system in America.¹⁰⁴ Julius Chambers provides a poignant description of this reality, stating that

[p]roblems which plague minority students are not only a function of race but of class. As time passes, it becomes painfully obvious that three centuries of racial subjugation, de jure and de facto segregation, as well as overt and covert discrimination, have left black Americans disproportionately economically impoverished. Inadequate education, in turn, perpetuates economic caste distinctions.¹⁰⁵

As it stands, the fundamental problem is that “[d]espite frequent good intentions and abundant rhetoric about ‘equal educational opportunity,’ schools have rarely taught the children of the poor effectively--and this failure has been systematic, not idiosyncratic.”¹⁰⁶ Therefore, class-based distinctions further demonstrate the importance of a federal right to education.

III. INTERNATIONAL RECOGNITION OF THE RIGHT TO EDUCATION

Education is the single most popular topic of discussion concerning the international rights of a child.¹⁰⁷ The international community’s emphasis on this aspect of life underscores the need for a universal right to education. This section presents a synopsis of select international human rights instruments that contain provisions for a right to education. It also explains the significance of treaty ratification and discusses the United States’ reluctance to ratify two of the most influential international treaties that include a right to education. Finally, it analyzes the strength of the international community’s conviction on the issue of a fundamental right to education.

A. *The Right as Reflected in Major International Human Rights Instruments*

The international community possesses an unequivocal reverence for education.¹⁰⁸ This is demonstrated by the presence of

103. *Id.*

104. Chambers, *supra* note 6, at 58.

105. *Id.*

106. DAVID B. TYACK, *THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION* 11 (1974).

107. See VAN BUEREN, *supra* note 2, at 233–34 (discussing the international agreements related to a child’s right to an education).

108. See generally Roger J.R. Levesque, *Educating American Youth: Lessons from Children’s Human Rights Law*, 27 J.L. & EDUC. 173 (1998) (describing the international development of a right to education).

major provisions asserting a right to education in several key international human rights instruments.¹⁰⁹ Although some international instruments only address the issue of education indirectly, others bear directly upon education as a substantive right. The three human rights instruments that address the right explicitly are: (1) the Universal Declaration of Human Rights; (2) the International Covenant on Economic, Social, and Cultural Rights; and (3) the Convention on the Rights of the Child.¹¹⁰ These international instruments share a few basic ideas about education; that it should be free, compulsory for primary levels, equally accessible, and free from discrimination.¹¹¹ In addition, the International Convention on the Elimination of All Forms of Racial Discrimination is noteworthy for its considerable relation to the right to education.¹¹² Notwithstanding the right to education as a common thread, these international instruments vary in purpose, content, and form.

1. The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) was adopted by the United Nations General Assembly in 1948.¹¹³ According to drafting committee chairwoman and former United States First Lady, Eleanor Roosevelt, this Declaration was intended “to serve as a common standard of achievement for all peoples of all nations.”¹¹⁴ The UDHR catalogues human rights for all individuals.¹¹⁵ Its basic framework consists of thirty articles that

109. Convention on the Rights of the Child arts. 28–29, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; Convention on the Elimination of all Forms of Discrimination Against Women art. 10, Dec. 18, 1979, 1249 U.N.T.S. 13; International Covenant on Economic, Social and Cultural Rights arts. 13–14, Dec. 16, 1966, 933 U.N.T.S. 3 [hereinafter ICESCR]; International Convention on the Elimination of all Forms of Racial Discrimination art. 5, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter ICERD]; Convention Against Discrimination in Education, Dec. 14, 1960, 429 U.N.T.S. 93; Universal Declaration of Human Rights, G.A. Res. 217A, art. 26, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR].

110. CRC, *supra* note 109, arts. 28–29; ICESCR, *supra* note 109, arts. 13–14; UDHR, *supra* note 109, art. 26.

111. CRC, *supra* note 109, arts. 28–29; ICESCR, *supra* note 109, arts. 13–14; UDHR, *supra* note 109, art. 26.

112. ICERD, *supra* note 109, arts. 1–5.

113. UDHR, *supra* note 109.

114. Eleanor Roosevelt, Address to United Nations General Assembly on Adopting the Universal Declaration of Human Rights (Dec. 9, 1948), available at <http://www.americanrhetoric.com/speeches/eleanorrooseveltdeclarationhumanrights.htm> (“This Universal Declaration of Human Rights may well become the international Magna Carta of all men everywhere.”); see also UDHR, *supra* note 109, pmb1. (“[A] common standard of achievement for all peoples and all nations.”).

115. VAN BUEREN, *supra* note 2, at 17.

enumerate fundamental principles of equality, set out civil and political rights, and outline economic, social, and cultural rights.¹¹⁶

Article 26 establishes the right to education.¹¹⁷ It summarizes the purpose and function of education and acknowledges the corresponding rights of parents with respect to the education of their child.¹¹⁸ Specifically, it provides:

- (1) Everyone has the right to education. . . .
- (2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
- (3) Parents have a prior right to choose the kind of education that shall be given to their children.¹¹⁹

By making education a fundamental right, the UDHR substantiates the universal importance of education. Moreover, the UDHR breathes life into the right by clarifying the purpose of education and extending the liberty interest in education beyond a mere right to receive formal instruction.¹²⁰ Instead, the right to education pursuant to the UDHR carries concomitant benefits to the individual and to society. Accordingly, the right to education under the UDHR is consistent with the aforementioned theories of education and their central purposes.¹²¹

Unlike international covenants and treaties, the UDHR does not have signatories or ratifying parties.¹²² Furthermore, it arguably lacks any legally binding effect.¹²³ However, there are three conflicting views regarding the legal status of this Declaration within the international community.¹²⁴ The “minimalist approach” views the Declaration as non-binding.¹²⁵ The “middle-ground” approach considers the Declaration “an authoritative interpretation . . . of the human rights provisions of the United Nations Charter.”¹²⁶ Finally, the “high ground approach” asserts that the Declaration is binding

116. *Universal Declaration of Human Rights*, in 12 ENCYCLOPÆDIA BRITANNICA 162, 162–64 (15th ed. 2005).

117. UDHR, *supra* note 109, art. 26.

118. *Id.*

119. *Id.*

120. *Id.*

121. See generally discussion *supra* Part II.

122. See VAN BUEREN, *supra* note 2, at 18 (discussing the legal effect of the UDHR as adopted by the General Assembly but without states as parties to its provisions).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

customary international law.¹²⁷ Notwithstanding apparent conflicts over interpretation, the UDHR is significant for two reasons. First, it is used to measure the compliance of U.N. member-states with human rights obligations.¹²⁸ Second, and more importantly, the presence of a right to education in the UDHR prompted the ultimate creation of similar provisions in the International Covenant on Economic, Social, and Cultural Rights, a binding treaty which specifically incorporates the right to education.¹²⁹

2. The International Covenant on Economic, Social, and Cultural Rights

The International Covenant on Economic, Social, and Cultural Rights (ICESCR) entered into force in 1976 after a long process of drafting, debate, and adoption.¹³⁰ This treaty applies explicitly to men and women, and implicitly to children.¹³¹ The ICESCR contains language almost identical to the UDHR, yet it has the benefits of legally binding effect on its parties.¹³² Moreover, the provisions that establish a right to education give state parties additional leeway to develop a plan of action in order to progressively implement the rights contained therein.¹³³ Hence, the ICESCR offers a sense of flexibility for nations that may lack the resources necessary for successful and immediate compliance.

The right to education is defined explicitly in Articles 13 and 14 of the ICESCR.¹³⁴ Article 13 requires states to provide education at varying levels, while Article 14 permits the gradual realization of educational goals.¹³⁵ Although much of this Covenant's language mirrors the language of the UDHR, Article 13(1) of the ICESCR also provides that "education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace."¹³⁶ Article 13(3) protects the liberty interest of parents by allowing them to choose schools "to ensure the religious and moral

127. *Id.*

128. Office of the U.N. High Comm'r for Human Rights, *Fact Sheet No. 2 (Rev. 1) on the International Bill of Human Rights* (June 1996), <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf> (last visited Nov. 10, 2007).

129. *Id.*

130. ICESCR, *supra* note 109.

131. VAN BUEREN, *supra* note 2, at 19.

132. *See id.* at 20 ("A State Party is under a duty to the maximum of its available resources to implement progressively the rights enshrined in the [ICESCR].").

133. ICESCR, *supra* note 109, art. 14.

134. *Id.* arts. 13–14.

135. *Id.*

136. *Id.* art. 13(1).

education of their children in conformity with their own convictions.”¹³⁷ Article 13(4) permits the establishment of educational institutions by individuals and bodies, provided that they adhere to the standards set forth by the Covenant.¹³⁸ To bolster the guarantee of free and compulsory primary education, Article 14 permits noncompliant states “to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.”¹³⁹

General Comment No. 13 of the ICESCR makes clear “the import of the right to education” and “elucidates the obligations of [each] State . . . to respect, protect and fulfill” the aims of the right to education provision.¹⁴⁰ Member-states are required to provide an education comprised of four interrelated, critical features: availability, accessibility, acceptability, and adaptability.¹⁴¹ According to the General Comment, an “available” education provides a safe learning environment fully-equipped with necessary facilities.¹⁴² An “accessible” education is one free from discrimination on the basis of race, physical disability, or socioeconomic status, while an “acceptable” education involves the teaching of relevant and culturally appropriate concepts.¹⁴³ Finally, an “adaptable” education is flexible enough to respond to the needs of the students and of society.¹⁴⁴

3. The Convention on the Rights of the Child

Adopted in 1989 and entered into force the following year, the Convention on the Rights of the Child (CRC) “defines the minimum standards of human rights for children and calls on governments to devote resources to implementing those rights.”¹⁴⁵ To date, it is the most widely ratified international human rights treaty in the history of the United Nations.¹⁴⁶ In fact, the United States and Somalia are the only remaining countries that have not ratified the CRC.¹⁴⁷

137. *Id.* art. 13(3).

138. *Id.* art. 13(4).

139. *Id.* art. 14.

140. John Daniel & Virginia Dandan, *Foreword*, in *General Comment*, *supra* note 36, at 2. General Comments are interpretive statements typically issued to clarify the meaning of treaty provisions.

141. *Id.* at 5–6.

142. *Id.* at 5.

143. *Id.* at 6.

144. *Id.*

145. WALKER, *supra* note 28, at 29; *see also* CRC, *supra* note 109 (setting forth the rights of children).

146. SHARON DETRICK, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 1 (1999).

147. Grahn-Farley, *supra* note 12, at 658.

Characterized as a “universal benchmark on the rights of the child,” the CRC is the only comprehensive international treaty that focuses extensively and exclusively on children’s rights.¹⁴⁸

Article 28 outlines the right to education.¹⁴⁹ Specifically, Article 28(1) recognizes “the right of the child to education . . . with a view to achieving this right progressively and on the basis of equal opportunity.”¹⁵⁰ In addition to requiring free and compulsory primary education, Article 28(1) also enumerates a variety of educational areas that require special attention, including general and vocational secondary education, financial assistance for secondary students in need, access to higher education for children with the capacity to attend, educational and vocational information and guidance, and school attendance and drop-out rates.¹⁵¹ Article 28(2) addresses the issue of school discipline and requires that it be “administered in a manner consistent with the child’s human dignity.”¹⁵² Finally, Article 28(3) “promote[s] and encourage[s] international cooperation in matters relating to education.”¹⁵³

The CRC has been classified broadly in terms of “the four P’s.”¹⁵⁴ The CRC is concerned with “the *participation* of children in decisions affecting their own destiny; the *protection* of children against discrimination and all forms of neglect and exploitation; the *prevention* of harm to children; and the *provision* of assistance for their basic needs.”¹⁵⁵ These four tenets are enshrined in Article 29 of the CRC, which summarizes the primary goals of education.¹⁵⁶ The goals are as follows:

- (a) The development of the child’s personality, talents and mental and physical abilities to their fullest potential;
- (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
- (c) The development of respect for the child’s parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

148. DETRICK, *supra* note 146, at 721.

149. CRC, *supra* note 109, art. 28.

150. *Id.* art. 28(1).

151. *Id.*

152. *Id.* art. 28(2).

153. DETRICK, *supra* note 146, at 493.

154. VAN BUEREN, *supra* note 2, at 15.

155. *Id.* (emphasis added).

156. CRC, *supra* note 109, art. 29.

- (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin; [and]
- (e) The development of respect for the natural environment.¹⁵⁷

Much of the language of Articles 28 and 29 of the CRC parallels that contained within the Article 13 of the ICESCR.¹⁵⁸ Yet, there are a few fundamental differences between the two treaties. First, more nation-states are parties to the CRC.¹⁵⁹ Second, contrary to the ICESCR, the CRC does not include a specific time frame within which states must progressively implement compulsory primary education.¹⁶⁰ Finally, as demonstrated above, the CRC is "the most authoritative standard-setting international instrument on children's rights."¹⁶¹

4. The International Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) was entered into force in 1969.¹⁶² CERD proscribes discrimination by member-states and was designed "to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language, or religion."¹⁶³ The treaty centers on the premise that "the existence of . . . barriers is repugnant to the ideals of any human society."¹⁶⁴ Notwithstanding its primary goals of eradicating and preventing various forms of discrimination, this treaty correlates with the right to education, particularly in Article 5. Under Article 5(e)(v), member states must guarantee the enjoyment of the right to education and training without discrimination.¹⁶⁵

157. *Id.*

158. Compare CRC, *supra* note 109, art. 28(1) ("States Parties recognize the right of the child to education."), with ICESCR, *supra* note 109, art. 13(1) ("The States Parties . . . recognize the right of everyone to education.").

159. DETRICK, *supra* note 146, at 720.

160. *Id.*

161. Lawrence J. Leblanc, *Reservations to the Convention on the Rights of the Child: A Macroscopic View of State Practice*, 4 INT'L J. CHILD. RTS. 357, 357 (1996).

162. ICERD, *supra* note 109.

163. *Id.* pmbl.

164. *Id.*

165. *Id.* art. 5(e)(v).

B. Ratification, Reservations, and the United States' Reluctance

Generally, treaty ratification occurs in two stages.¹⁶⁶ First, an organized body—comprised of governmental delegates from nation states—negotiates the substance of the treaty and formally adopts the selected text.¹⁶⁷ Next, each individual state decides whether to formally ratify the treaty.¹⁶⁸ If a state approves ratification, it “specifically and explicitly accepts to be bound.”¹⁶⁹ However, this stage of the process is not always streamlined.¹⁷⁰ Occasionally, an individual state may opt to include one or more reservations for provisions that “may not be deemed acceptable because the government does not wish to or cannot comply with their requirements.”¹⁷¹

A number of countries have made reservations in response to the provisions requiring a right to education in the international human rights instruments discussed above.¹⁷² For example, specific reservations to the ICESCR “range from acknowledgments that financial constraints to access to primary education were beyond the capacity of the state, to assertions that education should be treated as the monopoly of the state, or that parents should be allowed to educate their children themselves, in their own home.”¹⁷³ Thus, the reservation process offers a viable alternative for countries that prefer not to be bound in entirety by an international treaty.¹⁷⁴ The problem with extensive reservations is that “[t]hey diminish human rights obligations of the respective governments and human rights guarantees for the affected population.”¹⁷⁵ Furthermore, in some instances the reservations “are so wide-reaching that their compatibility with the spirit and wording of the treaties has frequently been challenged and their withdrawal urged.”¹⁷⁶

166. Katarina Tomaševski, *Free and Compulsory Education for all Children: The Gap Between Promise and Performance*, RIGHT TO EDUCATION PRIMER NO. 2, at 14 (2004), available at http://www.right-to-education.org/content/primers/rte_02.pdf.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* Any conflict between U.S. law and the CRC can be resolved through the use of Reservations, Understandings of Declarations (RUDs), which grant the Senate discretion in the implementation of the Convention on U.S. soil. See WALKER, *supra* note 28, at 38–39.

172. Tomaševski, *supra* note 166, at 14.

173. *Id.* at 14–15.

174. *Id.* at 15.

175. *Id.*

176. *Id.*

In the United States, ratified treaties are accorded the same weight as federal law.¹⁷⁷ Despite its status as a leading nation, the United States' history of treaty ratification pales in comparison to that of other democratic states.¹⁷⁸ In fact, many authoritarian states that frequently violate fundamental human rights have a more impressive history of ratification.¹⁷⁹ Interestingly, the United States ratified the International Convention on the Elimination of All Forms of Racial Discrimination on October 21, 1994, albeit with extensive reservations.¹⁸⁰ The United States has not, however, ratified the International Covenant on Economic, Social, and Cultural Rights.¹⁸¹ More significantly, the United States is the only industrialized country that has not ratified the Convention on the Rights of the Child.¹⁸²

There are several underlying reasons behind the United States' failure to ratify the Convention on the Rights of the Child (CRC), including: (1) an unimpressive record of ratification of human rights treaties; (2) the federalist structure of the United States government; (3) the fact that United States law is "less protective" than the CRC; (4) conflict between treaty provisions and United States law;¹⁸³ and (5) a lack of understanding and widespread misconception regarding the overall effect of the CRC upon national and state sovereignty.¹⁸⁴ Some scholars have criticized the United States' failure to ratify major human rights instruments that directly relate to children, particularly the CRC.¹⁸⁵ They contend, based on its status as a world

177. U.S. CONST. art. VI, cl. 2; see also SARAH H. RAMSEY & DOUGLAS E. ABRAMS, *CHILDREN AND THE LAW: IN A NUTSHELL* 38 (2003) ("Under the federal Constitution's Supremacy Clause, a ratified treaty becomes the 'supreme law of the land,' with authority equal to a federal statute.")

178. HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 750 (1996).

179. *Id.*

180. International Obligations and Access to Remedies, United States of America, http://www.right-to-education.org/content/rights_and_remedies/usa.html (last visited Nov. 27, 2007).

181. Martin Scheinin, *The Proposed Optional Protocol to the Covenant on Economic, Social and Cultural Rights: A Blueprint for UN Human Rights Treaty Body Reform—Without Amending the Existing Treaties*, 6 HUM. RTS. L. REV. 131, 136 (2006).

182. See RAMSEY & ABRAMS, *supra* note 177, at 37 (noting that "Somalia (which does not have a recognized government capable of ratifying a treaty) and the United States are the only holdouts.")

183. For example, the CRC is interpreted as forbidding corporal punishment, which is permitted under U.S. law. See WALKER ET AL., *supra* note 28, at 36–37.

184. *Id.* Other asserted reasons for the United States' delay in signing the CRC are: (1) the lengthy review process and (2) political controversy. Michelle Z. Hall, *Convention on the Rights of the Child—Has America Closed Its Eyes?*, 17 N.Y.L. SCH. J. HUM. RTS. 923, 924–25 (2001).

185. "How can we as Americans accept that the affirmation of fundamental children's human rights is nearly universal with the exclusion of our own country?" Catherine Langevin-Falcon, *Second Class Citizen?*, HUMANIST, Nov.–Dec. 1998, at 11, 15, available at <http://www.thirdworldtraveler.com/Children/SecondClassCitizens.html>; see

power, that the United States' feeble commitment to international human rights consequently weakens the human rights movement.¹⁸⁶ Others maintain, however, that reluctance to ratify prevents the United States from engaging in hypocrisy.¹⁸⁷ According to this view, since ratification signals compliance, failure to ratify necessarily exempts the United States from observing or implementing any human rights principles that conflict with American law.¹⁸⁸

Instead of ratification, a member-state may offer its "preliminary and general endorsement" by agreeing to sign the treaty.¹⁸⁹ A signature "is not a legally binding step, but is an indication that the country intends to undertake a careful examination of the treaty in good faith to determine its position towards it."¹⁹⁰ The United States signed the CRC "subject to ratification," indicating general agreement with the treaty's objectives, but a desire to scrutinize all provisions thoroughly before submitting the treaty for final ratification.¹⁹¹ As a mere signatory, the United States is not formally bound, but is obligated to refrain from frustrating "the object and purpose" of this treaty.¹⁹² However, many argue that by signing the CRC, the United States signaled its clear intent to pursue ratification.¹⁹³

C. The Force of the International Community and Customary International Law

Amidst an increasingly global economy, a growing sense of interdependence has emerged among nations around the world. To some extent, the international community has the power to influence the actions of its sister-nations. "If nations fail to respect standards, the international community typically encourages, pushes, prods, and ultimately embarrasses states into taking steps to guarantee the proper implementation of rights."¹⁹⁴ Typically, this influence

also Bitensky, *supra* note 20, at 2 (stating that "lack of political will is also manifest in the politicians' failure to make the legal commitments that would mandate treating children as a real national priority.").

186. STEINER & ALSTON, *supra* note 178, at 750.

187. *Id.* at 750–51.

188. *Id.* at 751 ("If [the U.S.] ratifies, it intends to comply, and hence will take a careful look to be certain that full compliance is possible.").

189. Grahn-Farley *supra* note 12, at 694.

190. *Id.*

191. Hall, *supra* note 184, at 924.

192. See Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679 [hereinafter Vienna Convention]. It is important to note that while the United States is not a party to the Vienna Convention and is not "formally covered by it," United States officials consider most of its provisions customary international law, and thereby rely on its terms. BARRY E. CARTER ET AL., INTERNATIONAL LAW 94–95 (5th ed. 2007).

193. WALKER ET AL., *supra* note 28, at 30.

194. Levesque, *supra* note 108, at 198–99.

amounts to pressure to do the right thing. Although this pressure is not determinative, it is significant. Yet, “[w]hile it is laudable that courts have found international human rights standards useful, that is not enough. Many of those standards have risen to the level of customary international law and should be considered as such by the courts.”¹⁹⁵

The authority of customary international law is equally, if not more, significant than the moral peer pressure described above. “Customary international law ‘results from a general and consistent practice of states followed by them from a sense of legal obligation,’ and binds nations that have not dissented from the rule while it was developing.”¹⁹⁶ At the turn of the twentieth century, the Supreme Court held that customary law is “part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”¹⁹⁷ Therefore, in the United States customary international law typically has the status of federal law and supersedes contradictory state law.¹⁹⁸

Expressions of customary international law are also binding on all members of the international community.¹⁹⁹ According to the International Court of Justice, any specific provisions that constitute customary international law “cannot therefore be the subject of any right of unilateral exclusion exercisable at will” by any state within the international community.²⁰⁰ Some human rights advocates contend that “[t]he right to education and the right to enjoy it without discrimination are examples of economic, social and cultural rights that should be considered part of customary international law.”²⁰¹ In my view, the right to education is, in fact, a part of customary international law. Since the United States has declined to “manifest [its] dissent” to this general rule of customary international law, it does not qualify as a “persistent objector.”²⁰² Therefore, the United States has implicitly agreed to be bound by this international norm.

195. de la Vega, *supra* note 16, at 41.

196. RAMSEY & ABRAMS, *supra* note 177, at 39.

197. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

198. RAMSEY & ABRAMS, *supra* note 177, at 40.

199. VAN BUEREN, *supra* note 2, at 18.

200. *Id.*

201. de la Vega, *supra* note 16, at 44.

202. “Any state whatsoever can, by its persistent objection, prevent an emerging rule of customary international law becoming opposable to it.” CARTER ET AL., *supra* note 192, at 127–28 (quoting Int’l Law Ass’n Sixty-Ninth Conference, London, *Statement of Principles Applicable to the Formation of General Customary International Law, Report of the Sixty-Ninth Conference*, at 712, 719–21, 738–39 (2000)).

IV. RODRIGUEZ: THE UNITED STATES' FAILURE TO RECOGNIZE THE RIGHT TO EDUCATION

San Antonio Independent School District v. Rodriguez signaled the Supreme Court's first open refusal to recognize a federal right to education.²⁰³ The impetus for this suit was an equal protection challenge based upon Texas' school funding scheme.²⁰⁴ The Court issued a two-part holding, concluding that: (1) the Texas school funding scheme was constitutional and did not amount to systematic discrimination on the basis of wealth; and (2) education is not a fundamental Constitutional right.²⁰⁵ Hence, this decision directly implicated "the right to education" and led to the consequent lack thereof. Essentially, *Rodriguez* was responsible for putting an end to any further attempts to equalize the public education system through the federal courts.²⁰⁶

A. *The Majority Opinion: Education Is Not a Fundamental Right*

Plaintiffs filed a class action suit on behalf of Demetrio Rodriguez and other similarly situated Mexican-American families, each of whom expressed immense dissatisfaction with the Texas school financing system.²⁰⁷ They alleged that the funding scheme was an unconstitutional violation of the Equal Protection Clause of the Fourteenth Amendment.²⁰⁸ The scheme permitted public schools to rely upon local property taxes in order to supplement per pupil expenditures.²⁰⁹ While the ultimate source of contention was the extreme difference in property tax values among the neighboring districts, the essential problem was simple: the poorer neighborhood, the poorer the school. Addressing the merits of the original

203. 411 U.S. 1 (1973).

204. *Id.* at 5-6. At that time, state funding for Texas public schools was distributed on par with the amount of local revenues raised, which were determined by the local tax base. Due to lower property values, the poorer residents of the Edgewood school district were disadvantaged based on their inability to raise sufficient revenues. On the other hand, the wealthier residents of the neighboring Alamo Heights district received a generous amount of funding proportional to the ample revenue they were able to amass based on their higher tax base. *Id.* at 11-13.

205. See *id.* at 35 ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."); *id.* at 55 ("The constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest. . . . We hold that the Texas plan abundantly satisfied this standard.").

206. Litigants attempting to challenge inequitable funding distributions or the provision of an inadequate education must now resort to bringing claims in state court based upon state Constitutional provisions.

207. *Rodriguez*, 411 U.S. at 4-5.

208. *Id.* at 6.

209. *Id.* at 10.

complaint, the majority simultaneously issued a holding that has presented an everlasting challenge to quality public schooling in America.

In a sheer display of irony, the Court acknowledged the critical importance of education, yet contemporaneously refused to recognize education as a constitutional right.²¹⁰ Justice Powell, writing for the majority, asserted that education does not fall within the limited category of rights explicitly or implicitly protected under the Constitution.²¹¹ To justify the Court's position, he further stated that "it is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."²¹² However, by attempting to avoid judicial overstepping, the Court took a misstep.

The majority conveniently ignored the myriad contexts in which affirmative constitutional rights have been recognized. Generally, these rights are based upon flexible provisions of the Constitution in light of the framers' intent. As one scholar notes, the Supreme Court has continually engaged in the selective incorporation of open-ended provisions of the Constitution in order to fashion numerous implied rights "by deeming there to be a nexus between them and the Constitution."²¹³ A non-exhaustive list of these "scarcely at all specified" rights include:

the right to interstate travel; the right to procreate; the right to vote in state elections; the right to appeal from a criminal conviction; the freedom of association; the right of privacy; the right of choice in marital relations; the right to choose to have an abortion; the right of free access to the courts; the right to an open criminal trial; and the right of married couples to use contraceptives.²¹⁴

Furthermore, certain rights "have been defined by judges' conscious value preferences, including their conceptions of justice, reasonableness, custom, fair procedure, and equality before the law."²¹⁵ Arguably, this type of behavior amounts to unauthorized judicial overstepping or uncalled for judicial activism.²¹⁶ The appropriateness of such activities, however, begs the question. What matters is the Court's focused decision to shy away from its traditional tendencies in this case.

210. *Id.* at 35.

211. *Id.*

212. *Id.* at 33.

213. Gross, *supra* note 64, at 949.

214. *Id.* at 949-50.

215. *Id.* at 950.

216. See, e.g., William J. Michael, *When Originalism Fails*, 25 WHITTIER L. REV. 497, 519 (2004) (stating that "judges should apply the Constitution according to its original intent and not decide a constitutional issue if the text, as originally understood, does not reveal the answer.").

The Court's strategic choice in *Rodriguez* to remove education from the purview of federal enforcement bears an undeniable relation to the current state of public education in America. This, in turn, links with the limited ability of certain groups to exercise their basic rights today.²¹⁷ To refute this notion, the majority concluded that the Court "[has] never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice."²¹⁸ Stated otherwise, the Court hastened to reserve to the legislature what may properly belong to the judiciary.²¹⁹ As a consequence, underprivileged Americans without access to an adequate education are now deprived of "their most basic right to seek redress."²²⁰ Thus, "[b]y abdicating their responsibility to provide a meaningful forum to address educational adequacy, the courts ensured this basic civil right will never be attained."²²¹

B. Marshall's Dissent: All Children Deserve the Right to an Equal Start

Justice Marshall was a keen advocate for equality of educational opportunity.²²² This stance was apparent during his work with the NAACP, particularly his long, hard fight to abrogate the "separate but equal" doctrine that plagued the American school system in the pre-*Brown* era.²²³ Through advocacy and eventually through judicial pronouncements, Marshall has ardently and consistently opposed "practice[s] that would engrain second-class citizenship in children, and do so with respect to the social service most indispensable for an equal chance in life."²²⁴

The *Rodriguez* majority opinion struck at the heart of Justice Marshall's greatest passion—education for all.²²⁵ Essentially, "[t]wo of [his] deepest convictions converged in *Rodriguez*: that all children ought to be afforded educational opportunities sufficient to reach their full potential, and that no one ought to be denied equal protection of the laws on account of his or her financial status."²²⁶

217. See Gross, *supra* note 64, at 934 (stating that "[e]ducation is a basic right necessary to realize and exercise other rights.").

218. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 36 (1973).

219. Millhisser, *supra* note 18, at 408.

220. *Id.*

221. *Id.* at 418.

222. Cass R. Sunstein, Tribute, *On Marshall's Conception of Equality*, 44 STAN. L. REV. 1267, 1267 (1992).

223. See OGLETREE, *supra* note 7, at 136–37 (discussing Marshall's work with the NAACP).

224. Sunstein, *supra* note 222, at 1268.

225. See generally Ronald L. Ellis, In Memoriam, *Thurgood Marshall*, 68 N.Y.U. L. REV. 215 (1993) (describing Justice Marshall's lifetime of work).

226. *Id.* at 218.

For that reason, Marshall vehemently opposed the majority's conclusion that education is not a fundamental right.

In dissent, Justice Marshall "categorically rejected the notion that the Constitution requires no more than the provision of a minimal level of education to children."²²⁷ He argued that "the right of every American to an equal start in life, so far as the provision of a state service as important as education is concerned, is far too vital to permit state discrimination on grounds as tenuous as those presented by this record."²²⁸ Marshall's powerful dissenting opinion articulated his diametric view with reason and lucidity. It chided the majority for engaging in "a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens."²²⁹

Marshall's opinion did not render mere visceral notions of the type of education American children deserve. Rather, it laid out, in a very compelling way, three key arguments in favor of the right to education: (1) education is essential to overcoming poverty and disadvantage; (2) education is inextricably linked with the First Amendment right to freedom of speech; and (3) education is integral to self-government.²³⁰ Marshall understood that equal educational opportunities would transform the inauspicious beginnings of undereducated, disenfranchised citizens into a life circumstance characterized by power, pride, and promise.

Justice Marshall's passionate disavowal of the majority stance is the natural consequence of his ultimate fear—the retrenchment of *Brown*. Susan Bitensky's description of the *Rodriguez* reflects this view. According to Bitensky:

[T]he Rodriguez majority ruled that a positive fundamental right to education is not among the panoply of rights afforded implicit protection under the Constitution. This was the sleight of hand that broke Brown's promise of quality education; Rodriguez simply withdrew the promise without even mentioning that Brown had been in any way affected."²³¹

Bitensky continues, arguing that *Rodriguez* fails to comport with *Brown*.²³² Specifically, she notes that "the consequence is that *Brown* has been sundered from its education context and substantially

227. *Id.* at 217–18.

228. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 71 (1973) (Marshall, J., dissenting).

229. *Id.*

230. *Id.* at 71, 112–13; see also Sunstein, *supra* note 222, at 1269 (comparing Justice Marshall's dissent in *Rodriguez* with similar themes appearing throughout his time on the Court).

231. Bitensky, *supra* note 89, at 11.

232. *Id.* at 12.

eviscerated.”²³³ Marshall’s apprehensions and Bitensky’s assertions with respect to the *Rodriguez* decision are substantiated by the current state of public education in the United States, the blatant disparities, and the emergent national consensus supporting the right to education.

*C. Dissatisfaction with Educational Disparities Gives Rise to a
“National Consensus”*

Rodriguez generated tremendous nationwide disparities with respect to the quality of education that children receive in the United States.²³⁴ As a direct response, individual states added constitutional provisions explicitly recognizing the right to education in a noble, yet insufficient, attempt to remedy the problem.²³⁵ This, in turn, has led to widespread inconsistency with respect to the quality of education that American children receive.²³⁶ Attorneys in school-finance litigation have turned to state constitutions in search of a practical remedy for those who are denied access to an adequate education.²³⁷ However, it remains apparent that “state-based education rights do not adequately safeguard the educational opportunities of the nation’s schoolchildren.”²³⁸

Education is not the only area of United States law that has been riddled with variation and conflict. For example, the Supreme Court traditionally sanctioned the imposition of capital punishment for juvenile offenders.²³⁹ However, the Court recently changed its position on this issue in *Roper v. Simmons*, thereby abolishing the

233. *Id.*

234. See Gross, *supra* note 64, at 937 (stating that “[t]he schools that minority children attend are still segregated racially and are still unequal in quality and resources in part because school funding across the nation is dependent predominately on local property taxes.”). See generally Goodwin Liu, *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. REV. 2044 (2006) (analyzing interstate disparities with respect to educational standards, resources, and outcomes, and illustrating the disproportionate burden on poor, minority, or limited English proficiency children).

235. See Timothy D. Lynch, Note, *Education as a Fundamental Right: Challenging the Supreme Court’s Jurisprudence*, 26 HOFSTRA L. REV. 953, 1000–01 (1998) (stating that “[t]he Court’s refusal to recognize education as a fundamental right has left many of the nation’s poorest children in the hands of states that for the most part have failed to effectively remedy the low levels of education these students are receiving.”).

236. *Id.* at 1000.

237. de la Vega, *supra* note 16, at 59.

238. Nicholas A. Palumbo, Note, *Protecting Access to Extracurricular Activities: The Need to Recognize a Fundamental Right to a Minimally Adequate Education*, 2004 BYU EDUC. & L.J. 393, 397 (2004).

239. *Stanford v. Kentucky*, 492 U.S. 361 (1989) (holding that the execution of sixteen- and seventeen-year-olds comports with the Eighth Amendment). Likewise, the Court in *Atkins v. Virginia* cited the national consensus among 25 states that mildly retarded offenders should not be executed. 536 U.S. 304, 316 (2002).

juvenile death penalty for offenders under the age of eighteen.²⁴⁰ In *Roper*, the Court found support for its conclusion based, in part, on the fact that capital punishment for juveniles is prohibited in 30 states.²⁴¹ Here, the Court drew on the presence of a “national consensus” opposing the juvenile death penalty.²⁴² Dissenting Justice O’Connor was not persuaded by the majority’s national consensus argument in this case, and, as a result, declined to assign a confirmatory role to the additional “international consensus” argument advanced by the Court.²⁴³ It is important to note, however, that O’Connor agreed with the overall analytical framework employed—*i.e.*, international consensus may play a confirmatory role in the Court’s analysis for decisions where a “genuine national consensus” exists.²⁴⁴ Justice Scalia, on the other hand, completely rejected the Court’s national consensus argument, noting that “[w]ords have no meaning if the views of less than 50% of death penalty States can constitute a national consensus.”²⁴⁵

There is considerable foundation for the claim that a “genuine national consensus” exists with respect to the right to education in the United States. Currently, a total of forty-eight state constitutions explicitly recognize a right to education.²⁴⁶ Although varying permutations of the right exist, the right is still recognized by an overwhelming majority of states.²⁴⁷ More importantly, unlike the debatable national consensus regarding the juvenile death penalty in *Roper*, the agreement among individual states that education should be considered a fundamental right is just short of unanimous. Therefore, the national consensus argument for the right to education does not suffer from the same uncertainties that troubled Justices O’Connor and Scalia in *Roper*. It follows then, that the presence of an international consensus regarding the right to education can and should play a confirmatory role in the United States’ decision to recognize a federal right to education.²⁴⁸

240. 543 U.S. 551, 578 (2005).

241. *Id.* at 564 (“[Thirty] States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach.”).

242. *Id.*

243. *Id.* at 604 (O’Connor, J., dissenting) (“I do not believe that a genuine national consensus against the juvenile death penalty has yet developed.”).

244. *Id.* at 604–05 (“At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus.”).

245. *Id.* at 609 (Scalia, J., dissenting).

246. Chambers, *supra* note 6, at 65.

247. *Id.*

248. See generally Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 568–70 (2005) (discussing the Court’s consideration of foreign and

V. STRIKING THE RIGHT CHORD WITH INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

A tripartite problem continues to plague the American public education system, namely: (1) the error and judicial inconsistency of *Rodriguez*; (2) the marginalization of women, minorities, and poor students; and (3) the unresolved crisis despite legislative efforts to establish federal guidelines. Judicial recognition of education as a fundamental right would help alleviate this problem by ensuring equal access to the invaluable benefits of knowledge and by facilitating adequate educational preparation for the exercise of explicit constitutional guarantees. As a corollary, a federal right to education would: give rise to increased personal empowerment, bolster good citizenship, teach students to succeed in a multicultural democracy, and generate a better-prepared workforce while simultaneously yielding economic benefits for society as a whole. The time has come for the United States to affirmatively recognize education as a fundamental right.

The unsuccessful attempts of the American courts, commentators, and policy makers to affirmatively decide who should control the right to education necessitates the consultation of international standards to begin resolving the educational crisis in the United States.²⁴⁹ First, the Supreme Court can and should continue its recent trend of consulting international norms, as in *Roper*, in order to recognize the right to education. Second, the government's attempts to conform with the international community by "federalizing" education will continue to miss the mark without the firm establishment of a federal right to education. Finally, since global leadership demands accountability, the United States should follow through on its half-fulfilled commitment to the international community by ratifying the International Covenant on Economic, Social, and Cultural Rights and the almost universally accepted Convention on the Rights of the Child.

A. *Revising the Melody: Lessons from the Judicial Recognition of "International Consensus" in Roper v. Simmons*

"[T]he instinct to read international values into our domestic law dates back to the birth of our nation."²⁵⁰ Architects of the American judicial system anticipated the active pursuit and conscious incorporation of international law standards into our

international law in *Roper* and explaining the Court's suggestion that "international norms can play a *confirmatory* role" in constitutional adjudication).

249. Levesque, *supra* note 108, at 187–88.

250. Lerum, *supra* note 19, at 15.

jurisprudence.²⁵¹ Consistent with this vision, there has been a recent shift in the Court's ideology regarding the use of "international consensus" as a factor during adjudication. A clear example is the case of *Roper v. Simmons*.²⁵²

In *Roper*, the Court held that the Eighth and Fourteenth Amendments forbid the imposition of the death penalty on offenders who were under the age of the eighteen at the time of the commission of the crime.²⁵³ Writing for the majority, Justice Kennedy found "confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."²⁵⁴ The majority also concluded that "[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."²⁵⁵ Accordingly, the international consensus opposing the juvenile death penalty was a decisive factor in the Court's ultimate conclusion. Moreover, Justice O'Connor's dissenting opinion also noted the Court's consistent reference to foreign and international law as germane factors in the assessment of "evolving standards of decency."²⁵⁶

Roper has been the subject of intense criticism by scholars who believe the decision signals a dangerous retreat from the long-held principles of federalism and separation of powers.²⁵⁷ Many of these critics call for a strict interpretation of the Constitution.²⁵⁸ A stalwart of this view, Justice Scalia issued a scathing dissent, arguing that

[t]he Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners' views as part of the *reasoned basis* of its

251. See generally Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 44-45 (2004) ("The framers and early Justices understood that the global legitimacy of a fledgling nation crucially depended upon the compatibility of its domestic law with the rules of the international system within which it sought acceptance.").

252. 543 U.S. 551 (2005).

253. *Id.* at 578.

254. *Id.* at 575. Prior to 1990, only seven countries—China, Iran, Pakistan, Saudia Arabia, Nigeria, Yemen, and The Democratic Republic of Congo—sanctioned the death penalty for juvenile offenders. Since then, each of these countries has abolished this practice. *Id.* at 577.

255. *Id.* at 578.

256. *Id.* at 604 (O'Connor, J., dissenting).

257. See, e.g., Ernesto J. Sanchez, *A Case Against Judicial Internationalism*, 38 CONN. L. REV. 185, 187 (2005) ("[L]egal scholars have both praised and criticized the direction the Court has taken, in addition to vehement criticisms of the Court in both print and electronic media.").

258. See *id.* at 188 ("[T]he decisions that have generated most of the debate concerning the proper role of foreign and international law in American jurisprudence have primarily involved purely domestic matters that mandate no reference to anything other than American law.").

decisions. To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.²⁵⁹

In their rejoinder, the majority stated that “[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.”²⁶⁰ Still, critics maintain that reliance on international law poses a threat to the very fabric of United States government.²⁶¹ Despite these criticisms, the Court's consultation of international norms in *Roper* is not an isolated occurrence.²⁶² Additional decisions have been predicated upon the existence of norms housed in international human rights instruments.²⁶³

Justices also have consulted international norms in decisions implicating key educational issues. For example, Justice Ginsburg's concurrence in the groundbreaking *Grutter v. Bollinger* decision commented that the requirement of a time-limit on race-conscious University admissions policies “accords with the international understanding of the office of affirmative action.”²⁶⁴ Using similar logic, there may be an occasion for overturning *Rodriguez* based on the existence of an “international consensus” regarding the right to education. This is feasible in spite of the Court's initial reluctance to consult international law on the issue of education as a fundamental right.²⁶⁵

Simply put, the *Rodriguez* decision is problematic. The United States' failure to recognize a federal right to education vitiates the

259. *Roper*, 543 U.S. at 627 (Scalia, J., dissenting).

260. *Id.* at 578 (majority opinion).

261. See Sanchez, *supra* note 257, at 238 (“A judge's unnecessary reliance on the law of any foreign country or inapplicable international convention to any degree in interpreting American law is quite simply a grave error that seriously endangers the concept of the United States as an independent nation with the Constitution as its highest legal authority.”).

262. See generally Koh, *supra* note 251, at 45–46 (noting the historical trends evincing incorporation of international law into American law).

263. For example, in *Lawrence v. Texas*, international consensus was used as support for the majority's holding that a Texas law prohibiting homosexual sodomy violated the privacy and liberty guaranteed to adults by the Due Process Clause of the Fourteenth Amendment. 539 U.S. 558, 576 (2003). Writing for the majority, Justice Kennedy acknowledged that “[o]ther nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct.” *Id.* at 577. He further noted that “[t]here has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.” *Id.*

264. 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring). °

265. See Lerum, *supra* note 19, at 15 (discussing the Court's refusal to address the petitioner's arguments about the United States' obligation to comply with the U.N. Charter on the issue of education in *Bolling v. Sharpe*, 347 U.S. 497 (1954)).

legacy of equal educational opportunity set forth by *Brown*. The Court's refusal to recognize education as an implicit right has led to the persistent exclusion of poor and minority students from access to an adequate education. In addition, education is a fundamental right implicitly protected by the Constitution.²⁶⁶ Notwithstanding the absence of a federal right to education, the recognition of such a right to "is not precluded by *Rodriguez*."²⁶⁷ The Court made clear that "its limited ruling was not intended to foreclose future consideration of a claim alleging that a child had been denied an education on account of indigence."²⁶⁸ Furthermore, a national consensus supporting the right to education exists. By referencing the international consensus on this issue, a judicial decision recognizing education as an implicit constitutional right is possible and practical.

B. *Harmonizing with the Legislature: Acknowledging the "Federalization" of Education*

Although state and local governments have traditionally administered laws and policies that govern the education of their citizens, the increased federalization of education further justifies judicial recognition of education as a fundamental right. The most current educational reform efforts are embodied in the No Child Left Behind Act (NCLB).²⁶⁹ Likewise, the enactment of the Individuals With Disabilities Education Act (IDEA) exemplifies a congressional commitment tailored to students with special needs.²⁷⁰ These federal responses to the education crisis in the United States are laudable, but there can be no real action or realization of the goals of each without an established federal right.

While congressional policies make clear our political commitment to the education of America's children, the effective implementation of these policies will require exactly the type of legal commitment embodied in international treaties such as the Convention on the Rights of the Child.²⁷¹ As in the CRC, the right to education must be formally recognized by the United States. In addition, cooperative action among each branch of government is vital

266. See Lynch, *supra* note 235, at 991 (noting that "a person's right has been traditionally regarded as 'fundamental' where the Constitution explicitly or implicitly guarantees a person's right to enjoy a certain freedom."). But see Michael, *supra* note 216, at 518 (asserting that "nothing in the Constitution mandates protection of implicit rights or protection of rights that are important to the exercise of explicitly protected rights. Thus, there is no constitutionally protected right to an education.").

267. Chambers, *supra* note 6, at 68.

268. Edward B. Foley, *Rodriguez Revisited: Constitutional Theory and School Finance*, 32 GA. L. REV. 475, 486-87 (1998).

269. 20 U.S.C. §§ 6301-6319 (2003).

270. *Id.* §§ 1400-1487.

271. LEBLANC, *supra* note 25, at 287.

in order to successfully remedy dominant problems associated with the current state of education in the United States.

NCLB is intended to address disparities reflected in the academic outcomes of poor, minority, disabled, and limited-English proficiency students.²⁷² Its primary objective is to close the achievement gap using four techniques: high stakes accountability measures, state and local flexibility, focus on proven educational methods, and improved educational choice.²⁷³ In reality, however, the goal of leaving no child behind amounts to mere fantasy without an underlying fundamental right to support it. Moreover, the secondary and tertiary roles of education to eliminate teen pregnancy, to promote self-sufficiency, and to minimize violence in the community, also demand the recognition of education as a federal right.

The bi-partisan enactment of NCLB proves that “[t]he political capital for supporting many of the provisions of the CRC is evident in current domestic legislation.”²⁷⁴ This is further underscored by the fact that the “countries in which the right to education is fully guaranteed experience improvements in some of the aforementioned problem areas.”²⁷⁵ Establishment of a federal right to education therefore falls directly in line with America’s recent decision to shift responsibility for education from individual states and localities to the federal government.

C. Learning to Blend: Accountability and Cooperation for Effective Leadership Abroad

As noted previously, the overwhelming majority of international human rights instruments explicitly recognize the right to education. More significantly, the United States played a significant role in the development of human rights. For example, “the Universal Declaration of Human Rights emerged, with the unstinting support of the United States, as a pledge to remedy the previous absence of human rights safeguards—civil, political, economic, social and cultural.”²⁷⁶ It is difficult to reconcile the United States’ direct involvement in drafting the UDHR with its subsequent refusal to ratify its offspring of treaties; specifically, the International Covenant

272. Anita F. Hill, *A History of Hollow Promises: How Choice Jurisprudence Fails to Achieve Educational Equality*, 12 MICH. J. RACE & L. 107, 138 (2006).

273. The White House, Fact Sheet: No Child Left Behind Act (Jan. 8, 2002) <http://www.whitehouse.gov/news/releases/2002/01/20020108.html> (last visited Nov. 10, 2007).

274. Lainie Rutkow & Joshua T. Lozman, *Suffer the Children?: A Call for the United States’ Ratification of the Convention on the Rights of the Child*, 19 HARV. HUM. RTS. J. 161, 188 (2006).

275. *Special Rapporteur Report*, *supra* note 102, ¶ 78.

276. *Id.* ¶ 85.

of Economic, Social, and Cultural Rights and the Convention on the Rights of the Child. This is particularly disturbing in light of the option to make reservations or to use other mechanisms that would give the United States a voice in determining the force of treaties and covenants within its borders.

Given the overwhelming recognition of the right to education in international treaties and human rights instruments, the United States' hesitancy to follow suit presents a distinct quandary. "This is a nation that has often been portrayed as the paragon of democracy and the leader in human rights reform. However, this enduring vision that other nations equate with America may slowly deteriorate as others see the United States fall behind on certain human rights' issues."²⁷⁷ Recognizing the right to education by ratifying the ICESCR and the CRC would help avoid this consequence. Ratification would benefit children in the United States and throughout the world.²⁷⁸ Moreover, if the right to education amounts to customary international law, the United States should not continue to refuse to recognize that right within its borders.²⁷⁹

In light of its traditional role in the development of human rights, the United States should abandon its wavering stance on the right to education and join its sister-nations by openly recognizing the right. Proponents of transnationalist jurisprudence maintain that

the United States expresses its national sovereignty not by blocking out all foreign influence but by vigorous "participation in the various regimes that regulate and order the international system." The nationalists' suggestion that U.S. courts should disregard the rest of the civilized world by ignoring parallel foreign precedents only invites charges of parochialism, and undermines U.S. influence over the global development of human rights.²⁸⁰

If the United States continues to ignore the needs of its own citizens, its image as a champion of human rights will fade away and become a mere façade.²⁸¹ As demonstrated extensively in Part II of this Note, education is a prime example of what the United States needs in order to promote democracy. It follows then, that the right to education should exist as "the centerpiece of American efforts to build democracies around the world."²⁸² To stand as a legitimate world leader and to promote and to protect freedom and democratic ideals in the distant lands of Latin America, Southeast Asia, and the Middle

277. Josh Hsu, *Looking Beyond the Boundaries: Incorporating International Norms into the Supreme Court's Constitutional Jurisprudence*, 36 N.M. L. REV. 75, 97-98 (2006).

278. Hall, *supra* note 184, at 928.

279. See generally de la Vega, *supra* note 16 (discussing the use of customary law to address the lack of equal educational opportunity in the United States).

280. Koh, *supra* note 251, at 56.

281. de la Vega, *supra* note 16, at 60.

282. Lerum, *supra* note 19, at 16.

East, the United States must first recognize the right to education in its own backyard.

VI. CONCLUSION

“Next in importance to freedom and justice is popular education, without which neither freedom, nor justice can be permanently maintained.”²⁸³ Unfortunately, educational disparities represent one of this country’s most pressing issues. Notwithstanding state-based constitutional provisions and federal legislative action, a solution is needed to reduce, and in time eradicate, the persistent, nationwide educational inequities that disproportionately affect minorities and poor children. Furthermore, due to the United States’ reluctance, a universal belief in education as a fundamental right remains to be seen.

International law provides a potential avenue for judicial recognition of education as a fundamental right. The decisive use of an international consensus argument in overturning *Rodriguez* would be consistent with the Court’s analysis in *Roper*. Moreover, recognition of education as a fundamental right would complement the current legislative efforts to remedy the education crisis via the No Child Left Behind Act and the Individuals With Disabilities Education Act. This choice would not endanger the dual sovereignty characteristic of our nation’s government. Rather, it would promote cohesion and ensure tangible results and progress in America’s public schools. Ratification of the International Covenant on Economic, Social, and Cultural Rights and the Convention on the Rights of the Child would solidify our commitment to education, enhance accountability, and signal our cooperation with global peers on one of the most important issues facing young people today.

Establishing a federal right to education is an essential step if America ever hopes to resolve its public education crisis. More importantly, it is necessary in order to ensure that the nation’s students are empowered, culturally aware, prepared to demonstrate good citizenship, and equipped to enter the workforce upon graduation. We have recognized international precedent for other pressing issues. Education should not be an exception to this practice. Recognition of education as a fundamental right through the use of international instruments will lead us one step closer to resolving the dissonant chords that have prevented this country from

283. Letter of Acceptance from James A. Garfield, President of the United States (July 12, 1880), in EDWARD B. KENNEDY ET AL., OUR PRESIDENTIAL CANDIDATES AND POLITICAL COMPENDIUM 19 (1880).

achieving harmony of opportunity for all students—male or female, rich or poor, white or black.

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