UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 81 | Number 3 Article 9

3-1-2003

Education as a Right of National Citizenship under the Privileges or Immunities Clause of the Fourteenth Amendment

Kara A. Millonzi

Education as a Right of National Citizenship Under the Privileges or Immunities Clause of the Fourteenth Amendment

Education is a prerequisite to American democracy.[1] The democratic republic set forth in the Constitution created the necessity for public education because an educated populace is essential to self-governance.[2] According to Thomas Jefferson, "free citizens, in order to remain free, must be educated."[3] The United States Supreme Court recognized this principle in its 1954 landmark decision, *Brown v. Board of Education*.[4] The *Brown* Court affirmed the principle that education is essential to aid the public in performing important civic responsibilities, including voting and serving in the armed forces.[5] For these reasons the Court found education to be "perhaps the most important function of state and local governments."[6] Accordingly, the Court indicated that the right to an education, "where the state has undertaken to provide it, is a *right which must be made available to all on equal terms*."[7] Numerous Supreme Court decisions since *Brown* have recognized that education is vital to the maintenance of

---

1. *See* THE CONSTITUTION AT WORK: PUBLIC VIRTUE, THE EDUCATED CITIZEN AND THE CONSTITUTION (Jan. 13, 2002), *at* http://www.constitutioncenter.org/sections/work/virtue.asp (on file with the North Carolina Law Review) [hereinafter THE CONSTITUTION AT WORK] ("At the core of the framers' conception of a democratic representative government lay a virtuous public, citizens prepared to exercise their constitutional rights and responsibilities in an informed and meaningful manner.").

2. Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 182, 187–88 (1995); *see* Elizabeth Reilly, *Education and the Constitution: Shaping Each Other and the Next Century*, 34 AKRON L. REV. 1, 1 (2000).

3. THE FOUNDERS' ALMANAC: A PRACTICAL GUIDE TO THE NOTABLE EVENTS, GREATEST LEADERS & MOST ELOQUENT WORDS OF THE AMERICAN FOUNDING 93 (Matthew Spalding ed., 2002) [hereinafter THE FOUNDERS' ALMANAC] (noting that Thomas Jefferson advocated for free public education for all elementary school children).

4. 347 U.S. 483 (1954) (*Brown I*).

5. *See id.* at 493.

6. *See id.* The Court elaborated,

> [c]ompulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society .... It is the very foundation of good citizenship ... [and] it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Id.

7. *Id.* (emphasis added).

our democratic government.[8] Contemporary educational policies and structures, however, ignore this seminal principle. American leaders and politicians boast that the United States is a land of possibility, but our current education system actually reinforces a class structure whereby different opportunities are available based on socio-economic status.[9] The Supreme Court, while explicitly recognizing the important role of education in our society, has also failed to mandate educational adequacy, let alone equality, under the Equal Protection or Due Process Clauses of the Fourteenth Amendment.[10]

---

8. *See infra* notes 134–51 and accompanying text.

9. James Wilson, *Why a Fundamental Right to a Quality Education Is Not Enough*, 34 AKRON L. REV. 383, 390 (2000).

10. In *Brown I*, for example, the Supreme Court espoused the ideal of equal educational opportunity, but it failed to define the meaning of equality. While *Brown I* opened the door to judicial oversight of public education on equal protection grounds, it had an important omission. Chief Justice Warren could not convince his colleagues that all children had a "fundamental right" to an education. *See* Wilson, *supra* note 9, at 387. Subsequent decisions in turn refused to mandate equality in education. *Brown I*'s impact, accordingly, has been doctrinally confined mainly to the issue of race. *See, e.g.*, Keyes v. Denver Sch. Dist. No. 1, 413 U.S. 189, 208 (1973) (holding that a "finding of intentionally segregative school board actions in a meaningful portion of a school system creates a presumption that other segregated schooling within the system is not adventitious"); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26 (1971) (holding that desegregation must be achieved in each of a district's schools to the greatest extent possible); Green v. County Sch. Bd. of New Kent County, 391 U.S. 430, 437 (1968) (holding that schools must dismantle segregated systems "root and branch" and that desegregation must be achieved with respect to facilities, staff, faculty, and extracurricular activities). The focus of desegregation during the 1970s and 1980s became the physical integration of black and white students, "through such measures as busing, school choice, magnet schools, use of ratios, redrawn school district boundaries, mandatory and voluntary intra- and interdistrict transfers, and consolidation of city districts with suburban districts." Jeanne Weiler, *Recent Changes in School Desegregation*, Clearinghouse on Urban Education Digest (Apr. 1998), *at* http://www.ed.gov/databases/ERIC_Digests/ed419029.html (on file with the North Carolina Law Review). *See generally Swann*, 402 U.S. 1 (finding where *de jure* segregation existed, school districts must integrate by whatever means necessary, including busing); Griffin v. County Sch. Bd., 376 U.S. 960 (1964) (ruling that school districts cannot close public schools to escape desegregation); Cooper v. Aaron, 358 U.S. 1 (1958) (ruling that states may not delay integration because of threats of violence); Brown v. Bd. of Educ., 349 U.S. 294 (1955) (*Brown II*) (mandating enforcement of the decision in *Brown I* by federal district courts). This approach is illustrated in the Supreme Court's treatment of funding disparities:

> Tragically, the federal judiciary's focus on race frequently came at the expense of class-based concerns. Instead of requiring a high-quality education for everyone—something that could be partially measured through such basic techniques as class size, teacher payrolls, types of classes, and classroom support—the Court made desegregation its immediate goal and school busing its primary remedy.

Wilson, *supra* note 9, at 388. In *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1 (1973), for example, the Supreme Court specifically rejected the claim that equal protection mandated equal funding across public school districts within a state,

The Court has never, however, directly addressed the question of whether the right to education is protected by the Privileges or Immunities Clause of the Fourteenth Amendment. Because the early history of the Privileges or Immunities Clause indicates that the clause was designed to protect rights of national citizenship,[11] the clause is potentially a more appropriate constitutional source for protecting the right to education than the Equal Protection Clause.[12] This is not to say, however, that the case in favor of recognizing a right to education under the Privileges or Immunities Clause is without obstacles. This provision became a relatively dead letter for protecting constitutional rights after the Supreme Court's 1835 *The Slaughter-House Cases*[13] decision.[14] In the recent case of *Saenz v. Roe*,[15] however, the Court has signaled that the Privileges or Immunities Clause has a renewed vitality, thereby paving the way for later courts to recognize the right to education under this provision.[16] The implications of recognizing the right to education include, for example, that the failure of states to provide an adequate education to their citizens is unconstitutional. Because inadequacy is closely tied to resources, this conclusion has particular resonance in the area of public school funding. Whether adequacy is measured by inputs (educational opportunities) or outputs (educational outcomes), the lack of proper funding results in many of our nation's poor students not receiving a basic minimum level of education.[17]

All fifty states guarantee their citizens the right to a public education.[18] All citizens, however, do not necessarily receive an

---

holding that the right to education was not a fundamental right under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. *Id.* at 30.

11. *See infra* notes 60–68 and accompanying text.

12. Professor Philip B. Kurland advocated that we should not be concerned with equality, but rather with quality of education. Philip B. Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last"?*, 1972 WASH. U. L.Q. 405, 419 (1973) ("For equality can be secured on a low level no less than a high one."). He believed that the Privileges or Immunities Clause provided the proper vehicle for securing "adequate and appropriate educational opportunity." *Id.*

13. 83 U.S. 36 (1873).

14. *See infra* notes 69–78 and accompanying text.

15. 526 U.S. 489 (1999).

16. *See infra* notes 84–96 and accompanying text.

17. *See infra* notes 37–43 and accompanying text. What constitutes an "adequate" or "basic minimum level" of education is beyond the scope of this article. For an analysis of various definitions of adequacy, see Kristen Safier, Comment, *The Question of a Fundamental Right to a Minimally Adequate Education*, 69 U. CIN. L. REV. 993, 1012–15, 1018–20 (2001).

18. *See* LAWRENCE KOTIN & WILLIAM E. AIKMAN, LEGAL FOUNDATIONS OF COMPULSORY SCHOOL ATTENDANCE 34 (1980) (noting that education is not just

education of equal quality.[19] The disparity in the quality of education stems primarily from the unequal funding of public schools.[20] To understand why local funding of our public school system contributes to the inadequacy of education for some students and is therefore potentially unconstitutional under the Privileges or Immunities Clause of the Fourteenth Amendment, one must first explore how the funding system operates. The major source of revenue for education is comprised of property taxes levied on residential and commercial properties within individual school districts' boundaries.[21] Wealthy districts with high property values are able to generate revenue for public educational facilities and curricula that far exceeds that generated by less affluent districts.[22] Though poorer districts tax residents at higher rates, they are unable to raise the same level of funds as wealthy districts.[23] Compounding this problem is the fact that in wealthier districts there is usually only one family living per unit of taxable property,[24] while in poorer districts, multiple families live in apartment complexes that comprise a single taxable unit.[25]

---

provided, it is mandated in all states except Mississippi). Mississippi reenacted its compulsory school attendance statute in 1987. MISS. CODE ANN. § 37-13-91 (1999).

19. *See infra* notes 37–43 and accompanying text.

20. *See generally* JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS 54 (1991) (providing an extensive survey of the unequal and unfair conditions of inner-city schools); John C. Reitz, *Public School Financing in the United States: More on the Dark Side of Intermediate Structures*, 1993 BYU L. REV. 623 (noting that funding of "public school districts has been considered vital to ensure local control over schools").

21. *See, e.g.*, STATE AID TO SCHOOLS: A PRIMER, The University of the State of New York State Education Department (Dec. 2000), *at* http://stateaid.nysed.gov/primer98.pdf (describing school financing in New York) (on file with the North Carolina Law Review). Public school funding generally derives from three sources—the federal government, state governments, and local property taxes. *See Public School Funding: Where Do School Districts Get Their Money, and How Do They Spend It?*, *at* http://www.pcpe.org/infoseries/funding.htm (last visited Feb. 18, 2003) (on file with the North Carolina Law Review). School districts typically receive only 3.5% of their revenue from the federal government. *See id.* State funding programs often attempt to equalize revenue across districts by providing more aid to poorer districts and less to wealthier districts, but the percentage of state support of school operating costs continues to decrease. *Id.* The decline in state support "effectively shift[s] a greater funding obligation onto the local tax base." *Id.* (noting that for more than twenty years the portion of public school expenses subsidized by state aid in Pennsylvania has decreased from 50% to 35.6%).

22. *See* KOZOL, *supra* note 20, at 54–55.

23. *Id.* (asserting that poor communities typically place a high priority on education and therefore tax themselves at a higher rate than wealthier districts).

24. *See, e.g.*, EDUCATION FOR ALL—FACING THE CHALLENGES OF NEW JERSEY'S PUBLIC SCHOOL SYSTEM (Jan. 13, 2002), *at* http://www.princeton.edu/~lawjourn/Fall97/II1morley.html (explaining problems with local property tax funding of public schools) (on file with the North Carolina Law Review).

25. *Id.*

Thus, the ratio of students to taxable property in poorer districts is much higher, resulting in less money generated per student each year.[26]

The federal income tax scheme exacerbates the funding disparities. The federal government allows taxpayers who itemize to deduct taxes paid to state and local governments from federally taxable income.[27] The tax deduction essentially functions as a public education subsidy by the federal government.[28] Direct federal aid to schools is consistently less than ten percent of the total funding they receive, but this subsidy creates an incentive for individuals who itemize to spend more on public education.[29] While poorer homeowners receive this subsidy, the amount of money flowing back to them from the tax deduction is less because their property tax contributions are less.[30] Many poorer homeowners also take the standard deduction, as opposed to itemizing, and therefore do not receive any benefit from this indirect government subsidy.[31]

Those who support localized funding for public education argue that it is essential to local control over education.[32] Under a localized funding scheme, voters in each school district dictate their own priorities with regard to education and set the property tax accordingly.[33] Many believe that along with the control over funding comes control over the content and structure of educational services.[34] This argument, however, ignores the reality. The

---

26. *Id.* In some cities as much as thirty percent or more of the population may not be subject to property taxes. *See* KOZOL, *supra* note 20, at 55 (citing a study by Jonathon Wilson, former chairman of the Council of Urban Boards of Education). This is compared to as little as three percent in adjacent suburbs. *See id.*

27. Susanna Loeb & Miguel Socias, *Federal Contributions to High-Income School Districts: The Use of Tax Deductions for Funding K–12 Education* 1 (2001) (on file with the North Carolina Law Review).

28. *Id.*

29. *Id.* at 1–2.

30. *Id.* at 2–3.

31. *See id.* at 9 (noting that the higher the income of the taxpayer, the greater probability of that taxpayer itemizing).

32. *See* Reitz, *supra* note 20, at 627–28.

33. *See id.*

34. *See, e.g., id.* (examining the misconceptions of localized educational funding). "[L]ocal school boards [also] provide a 'school for citizenship,' training citizens to run the larger democracies of state and federal governments by first giving them opportunities to manage an important affair on the local level." *Id.* at 627. Another argument advanced by proponents of local control is that pressure from taxpayers ensures that residents have incentive to monitor local public school expenditures and quality of services provided. *Education Funding: Fair or Flawed?*, Illinois Economic and Fiscal Commission 22 (Oct. 2002) (on file with the North Carolina Law Review) [hereinafter Illinois Commission]. This argument ignores the fact that residents have an independent reason for closely

unfortunate fact is that the effectiveness of poor residents' control over their public education under this system is greatly limited by their lack of financial resources. The result is that for the poorer districts the notion of local control is no more than "cruelly illusory."[35] Individuals in these districts are restrained from controlling the quality of the education they provide because of the low ceiling on their school expenditures.[36]

Poorer school districts thus lack the funding to adequately educate their students.[37] Funding, or lack thereof, is a significant contributor to low academic achievement.[38] Concentrated poverty levels are related both to less educational opportunities and lower educational outcomes. As a Harvard University study concludes, "[s]chools with high poverty concentrations have lower school test score averages, few advanced courses, fewer teachers with credentials, inferior courses and levels of competition, and send fewer graduates

---

monitoring the performance of local schools—namely that the quality of education provided directly impacts their children.

35. Reitz, *supra* note 20 at 630. To illustrate the reality of the disparities, in 1995–1996, New Jersey's per pupil expenditures ranged from a low of $5,900 in a poor district to a high of $11,950 in one of the most affluent districts. Elizabeth Jean Bower, Recent Development, *Answering the Call: Wake County's Commitment to Diversity in Education*, 78 N.C. L. REV. 2026, 2040 (2000). New York's expenditures ranged from $7,525 to $13,146. *Id.* Per-pupil spending in Illinois spanned from $3,000 to $15,000. *Id.* In *Savage Inequalities*, Jonathan Kozol described a New Jersey public high school where lab rooms had no equipment, the boiler was broken, there were no working computers and the drop-out rate exceeded fifty-eight percent. KOZOL, *supra* note 20, at 138–40 (exposing the inequities in American public school systems). This school was in a district with a per-pupil expenditure level of $4,000. *Id.* at 149. That same year, a nearby school district spent over $6,000 per student and other New Jersey districts spent upwards of $8,000. *Id.* There is evidence that this trend continues. In 1998, school district per-pupil expenditures in the Chicago, Illinois region ranged from $4,517 to $13,366. Illinois Commission, *supra* note 34, at 11.

36. Reitz, *supra* note 20, at 630. The system of localized funding actually results in an overall under-funding of education. If schools were funded on a state-wide basis with equal distribution across districts, "it seems likely that the average voters would not be satisfied with the level of school funding until their students—and hence all students—received at least the same funds as the 'average student' now receives." *Id.* at 631–32 (claiming the current system underfunds public schools). An increase in the overall level of spending would be required to accomplish this equal distribution. *Id.* at 632.

37. For a discussion of the literature on the correlation between expenditures on education and academic achievement, see MARK G. YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW 596–99 (3d ed. 1992); David Card & Alan B. Krueger, *The Changing Educational Quality of the Workforce: School Resources and Student Outcomes*, 559 ANNALS 39 (1998).

38. *See* Durham Public Education Network, *Closing the Achievement Gap: A Call for Community Action: Summary Report*, THE HERALD-SUN NICHE MAGAZINES, SUMMARY REPORT (Spring 2002).

on to college."[39] For example, forty percent of students in Washington D.C.'s poorest districts fail to finish high school.[40] Forty percent of high school students in Philadelphia's poor districts score below the fifteenth percentile on standardized tests as compared to a mere six percent of students from Philadelphia's wealthy districts.[41] More than fifty percent of Baltimore's low-income district students fail to pass a basic math skills exam in the ninth grade.[42] These are just a few examples of how our current education system is failing our nation's poorest youth.

The current funding system of public schools results in vast disparities in the per pupil expenditures on education provided to our nation's youth.[43] Does this disparity, however, rise to the level of a constitutional problem? The United States Supreme Court addressed this question in *San Antonio Independent School District v. Rodriguez*.[44] Parents of children enrolled in Texas schools brought a class action suit on behalf of school children throughout the state who

39. Gary Orfield & John T. Yun, *Resegregation in American Schools, A Report of The Civil Rights Project*, Harvard University, *at* http://www.law.harvard.edu/civilrights/publications/resegregation99/resegregation99.html (1999) (on file with the North Carolina Law Review) [hereinafter *The Civil Rights Project*]. This problem is inextricably linked to issues of race, which is why the focus on the quality of education for all students is so important in the wake of granting unitary status to many school districts and the potential resegregation of public schools. With the granting of unitary status, "the reality is that many urban students return to schools that are segregated and inferior." Weiler, *supra* note 10. Racially isolated schools "for all groups except whites are usually schools with high concentrations of poverty." *Resegregation in American Schools*, The Civil Rights Project, Harvard University, *at* http://www.law.harvard.edu/civilrights/alerts/reseg.html (last visited Feb. 28, 2002) (on file with the North Carolina Law Review) [hereinafter *Resegregation of American Schools*]. The Harvard Project on Desegregation reported that intensely segregated African-American schools are fourteen times more likely to be high poverty schools. *The Civil Rights Project*, *supra*. *See generally* RACE, POVERTY, AND AMERICAN CITIES (John Charles Boger & Judith Welch Wegner eds., 1996) (providing a collection of essays that explores the relationship between race and poverty in America's urban centers). The educational achievement of racial minorities continues to lag behind that of white students. Weiler, *supra* note 10. In North Carolina alone, more than half of the 400,000 black students failed standardized math and reading tests, whereas eighty percent of white students passed both exams. Bower, *supra* note 35, at 2040.

40. *See* Safier, *supra* note 17, at 996.

41. *See id.*

42. *See id.*

43. *See supra* notes 37–42 and accompanying text. To illustrate this reality, note that a number of state supreme courts have found that inequalities in funding of public schools violate their state constitutions because students within their states are receiving vastly different levels of education. *See, e.g.*, Serrano v. Priest, 557 P.2d 929 (Cal. 1977); Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989); Abbott v. Burke, 575 A.2d 359 (N.J. 1990); Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139 (Tenn. 1993); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989).

44. 411 U.S. 1 (1973).

resided in school districts having low property tax bases, claiming that the school finance system was unconstitutional under the Equal Protection Clause.[45] Texas's system of funding public education was based largely on local property tax revenue.[46] This system enabled wealthy school districts to spend more on education than poor districts, even though the individual properties in poor districts were taxed at a higher rate.[47] The level of disparity in spending led the district court to conclude that Texas's system of public school financing violated the Equal Protection Clause.[48] The Supreme Court rejected this conclusion, however, holding that "the Equal Protection Clause does not require absolute equality or precisely equal advantages."[49]

The Court then addressed the parents' claim that citizens have a fundamental right to education under the Due Process Clause of the Fourteenth Amendment. Justice Powell, writing for the majority, noted that education is essential to effective exercise of a democratic political process. "[T]he electoral process, if reality is to conform to the democratic ideal, depends on an informed electorate: a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed."[50] The significance of education to individuals and society, however, did not persuade the Court to conclude that a right to education was fundamental. According to the Court, "the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause."[51] Applying only rational basis review, the Court found that, although Texas's system resulted in unequal expenditures, such disparities were not "so irrational as to be invidiously

45. *Id.* at 5–6.

46. *Id.*

47. *See id.* The Court illustrated the disparity by comparing two school districts within the same county. The town of Edgewood, Texas had an assessed property value of $5,960 per pupil, the lowest in the metropolitan area. *Id.* at 12. Its tax rate on assessed property was the highest in the metropolitan area. *Id.* A revenue of only $26 per pupil was generated in 1967–1968. *Id.* In contrast, Alamo Heights, Texas had an assessed property value of $49,000. *Id.* at 13. Its tax rate on assessed property was significantly lower than Edgewood's, yet it generated $36 per pupil for the same academic year. *Id.*

48. *Id.* at 16–17.

49. *Id.* at 24. The Court refused to recognize wealth as a suspect classification and therefore applied only rational basis review to find a legitimate state objective. *Id.* at 28–29.

50. *Id.* at 36.

51. *Id.* at 30, 33–34 (noting that courts must assess "whether there is a right to education explicitly or implicitly guaranteed by the Constitution").

discriminatory."[52] The *Rodriguez* Court, however, did not foreclose all future Constitutional challenges to educational funding systems. The majority noted that there was no claim that any student was being absolutely deprived of an education,[53] suggesting that it would be receptive to a claim where a system failed to provide basic educational skills "necessary for the enjoyment of the rights of speech and of full participation in the political process."[54]

Although the *Rodriguez* Court denied that a fundamental right to education exists under the Equal Protection Clause of the Fourteenth Amendment, another avenue pertinent to this inquiry has not been explored. The Privileges or Immunities Clause of the Fourteenth Amendment,[55] specifically in its protection of rights of national citizenship,[56] may implicate the question of whether inadequate funding is constitutionally permissible.[57] At the time *Rodriguez* was decided, this clause lay dormant after its "evisceration" by the Supreme Court in *The Slaughter-House Cases*.[58] Since *Rodriguez*, however, developments in this area of jurisprudence suggest that the Privileges or Immunities Clause has a renewed vitality.[59]

Before addressing the specifics of education as a right of national citizenship under the Privileges or Immunities Clause, it is useful to first explore the history and development of this constitutional provision. Section 1 of the Fourteenth Amendment states that "[n]o State shall make or enforce any law which shall abridge the privileges

52. *Id.* at 23.

53. *Id.* at 55.

54. *Id.* at 37. In a dissenting opinion, Justice White expressed concern over the vast disparity in educational opportunities: "[T]his case would be quite different if it were true that the Texas system, while insuring minimum educational expenditures in every district through state funding, extended a meaningful option to all local districts to increase their per-pupil expenditures and so improve their children's education . . . ." *Id.* at 64 (White, J., dissenting). Justice Marshall emphatically claimed that education was far too vital to Americans to allow states to discriminate. *Id.* at 71 (Marshall, J., dissenting).

55. U.S. CONST. amend. XIV, § 1.

56. *See infra* note 103.

57. Perhaps Professor Philip B. Kurland best summarized the view that the claim is for adequate and appropriate educational opportunities and this claim "derives more cogently from concepts of privileges and immunities rather than equality of treatment." Kurland, *supra* note 12, at 419.

58. 83 U.S. 36, 76 (1872) (holding that a state's grant of a monopoly did not abridge the plaintiffs' privileges or immunities even if it denied them the right to practice their trade); *see* Gregory S. Wagner, Comment, *A Proposal for the Continued Revival of the Privileges or Immunities Clause of the Fourteenth Amendment: Invalidate the Alcohol Direct Shipment Laws*, 9 GEO. MASON L. REV. 863, 876 (2001).

59. *See infra* notes 84–96 and accompanying text.

or immunities of the citizens of the United States . . . ."[60] The framers of the Fourteenth Amendment believed that this provision protected "great principles of English and American liberty."[61] These included the common law natural rights—embodied in the Bill of Rights— plus other fundamental rights.[62] The framers were guided in the meaning of these rights by Justice Washington's interpretation of the Article IV, section 2, Privileges and Immunities Clause of the United States Constitution in *Corfield v. Coryell*.[63] Article IV, section 2 states: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[64] In *Corfield*, Justice Washington defined privileges and immunities under Article IV, section 2, as those "which are, in their nature, fundamental; which belong of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free,

60. U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment was passed in the aftermath of the Civil War. National Archives and Records Administration, *Cornerstones of American Democracy* (1998) (indicating that the Fourteenth Amendment was ratified on July 9, 1868). In examining the issues that led to the Civil War, the framers believed that an increase in national power was needed to protect the rights of individual citizens against infringement by the states. *The Slaughter-House Cases*, 83 U.S. at 128 (Swayne, J., dissenting). Legal scholars, however, have extensively examined and debated the meaning of this clause since its ratification. *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST 14–30 (1980) (claiming that the clause invites the Court to give it content by reference to process values implicit in constitutional structure of government); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1473–74 (1992) (claiming that the Privileges or Immunities Clause is an anti-discrimination provision); Christopher S. Maynard, Note, *Nine-Headed Caesar: The Supreme Court's Thumbs-Up Approach to the Right to Travel*, 51 CASE W. RES. L. REV. 297, 340 (2000) (claiming that the "anti-discriminatory school maintains that privileges and immunities are readily identifiable as those which are granted by each individual state to its own citizens."). *But see* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 134–56 (1977) (claiming that the clause constitutionalized only the rights set out in the Civil Rights Act of 1866); Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63, 63–67 (1989) (stating that the Privileges or Immunities Clause encompasses natural rights and this is the best protection of limited government and separation of powers).

61. CONG. GLOBE, 39th Cong., 1st Sess. 340 (1866) (quoting Sen. Cowan).

62. *See id.*

63. 6 F. Cas. 546 (E.D. Pa. 1823) (No. 3230). One of the framers of the Fourteenth Amendment, Senator Howard, indicated that the Privileges or Immunities Clause had a dual purpose: It protected the type of fundamental rights described in *Corfield v. Coryell* and provided absolute protection for "the personal rights guarantied [sic] and secured by the first eight amendments of the Constitution." CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (quoting Sen. Howard).

64. U.S. CONST. art. IV, § II.

independent, and sovereign."[65] Analogously, the Privileges or Immunities Clause of the Fourteenth Amendment was designed to protect rights of citizens against infringement by the states.[66] The framers of the Fourteenth Amendment did not explicitly list the rights they deemed fundamental; they merely defined the framework as "the fundamental rights enjoyed by free persons in a democratic society."[67] Thus, the framers created a minimum standard below

65. *Corfield*, 6 F. Cas. at 551–52 (stating that the fundamental principles were too numerous to enumerate); *see also* James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 AKRON L. REV. 435, 442 (1985) (stating that the privileges or immunities were natural rights).

66. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (statement by Rep. Bingham) (stating that section 1 of the Fourteenth Amendment "would allow Congress to protect by national law the privileges and immunities of citizens and the inborn rights of persons when the same were denied or abridged by any state . . . ."); Wagner, *supra* note 58, at 870. Unlike the Article IV, section 2, Privileges and Immunities Clause, however, the source of the constitutional right for section 1 of the Fourteenth Amendment was national citizenship rather than state citizenship. *See* U.S. CONST. amend. XIV, § 1.

67. Michael J. Gerhardt, *The Ripple Effects of* Slaughter-House*: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 427 (1990) (claiming many supporters "advocated that the Fourteenth Amendment include broad language that they (mistakenly) hoped would be explicated later and clarified by either the federal judiciary or the Congress as the fundamental rights enjoyed by free persons in a democratic society").

An 1871 interpretation of the Privileges or Immunities Clause of the Fourteenth Amendment by the Ohio Supreme Court indicated that the Clause guaranteed equality of rights to the citizens of a state, "as one of the privileges of citizens of the United States." State *ex rel.* Garnes v. McCann, 21 Ohio St. 198, 210 (1871) (finding that the law in question recognized the right "to equal common school advantages, and secures to [African-Americans] their equal proportion of the school fund"). The court found that no infringement on equal rights of citizens arose in classifying the youth of the state for school purposes. *Id.* at 211 (noting that the law did not cause a "substantial inequality of school privileges" among children of different classes).

Commentators, however, have provided different interpretations of the framers' original intent regarding the purpose of the Privileges or Immunities Clause. Raoul Berger argues that the sole purpose of the provision was to transform the Fourteenth Amendment so that it constitutionalized guarantees contained in the Civil Rights Act of 1866. BERGER, *supra* note 60, at 20. Other commentators claim that the 39th Congress intended the Privileges or Immunities Clause to incorporate the Bill of Rights. *See* HORACE E. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 19–20, 57–59, 152–53 (1908). Still others argue that the clause protects a broad category of rights that is not necessarily limited to those enumerated in either the Civil Rights Act or the Bill of Rights. *See* Commager, *Historical Background of the Fourteenth Amendment*, *in* THE FOURTEENTH AMENDMENT 14, 24 (B. Schwartz ed., 1970) (claiming that the Privileges or Immunities Clause invites the Court to give it content by reference to extraconstitutional principles of natural right).

which the states could not go, but above which the states could add other rights, provided all citizens enjoy equal access to them.[68]

Despite the original understanding of the Privileges or Immunities Clause, the Supreme Court, in a 5–4 decision, virtually nullified the clause just five years after it was ratified.[69] *The Slaughter-House Cases*[70] arose after Louisiana granted a monopoly to a slaughterhouse company.[71] Several butchers brought suit challenging the grant of the monopoly, arguing that the state law impermissibly violated their right to practice their trade.[72] The butchers invoked many of the provisions of the recently adopted constitutional amendments, including a claim that the monopoly abridged their privileges or immunities as citizens.[73] The Supreme Court narrowly construed all of the constitutional provisions at issue and rejected the plaintiffs' challenge to the legislature's grant of a monopoly.[74] Justice Miller, writing for the majority, indicated a distinction between citizenship of the United States, referred to in section 1 of the Fourteenth Amendment, and citizenship of the states.[75] The Privileges or Immunities Clause of the Fourteenth Amendment protected only those rights already explicitly protected by the Federal Constitution.[76] According to the Court, the Clause was not intended to invalidate state laws that infringed upon individual rights; rather it was the states themselves that were responsible for defining and securing those rights.[77] The Court concluded that the right to practice a trade belonged to citizens of the states and should be "left to the State governments for security and protection, and not by this article placed under the special care of the Federal government . . . ."[78]

---

68. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1760 (1866) (providing Senator Tumbull's argument that states can grant or reduce rights as long as they do not dip below the minimum of the "great fundamental rights").

69. *See The Slaughter-House Cases*, 83 U.S. 36, 41 (1872); Wagner, *supra* note 58, at 876.

70. 83 U.S. 36 (1872).

71. *Id.* at 59. The legislature gave a monopoly in the livestock landing and the slaughterhouse business for the City of New Orleans to Crescent City Livestock Landing and Slaughter-House Company. *Id.* The law required that the company allow any person to slaughter animals in the slaughterhouse for a fixed fee. *Id.*

72. *Id.* at 60.

73. *Id.*

74. *Id.* at 76–81.

75. *Id.* at 73–75.

76. *Id.* at 76.

77. *Id.*

78. *Id.* at 78.

The Slaughter-House Cases dissenters noted that the majority's construction of the Privileges or Immunities Clause robbed the clause of all meaning.[79] They interpreted the clause to encompass rights not otherwise explicitly provided for in the Constitution, arguing for federal protection of national rights inherent to all people.[80] Justice Field asserted that the Fourteenth Amendment reflected the belief in "a free government, in the American sense of the term, under which the inalienable right of every citizen to pursue his happiness is unrestrained, except by just, equal, and impartial laws."[81] Justice Bradley claimed that the framers of the Fourteenth Amendment intended to provide federal protection against state intrusions of individual rights.[82] The dissenters' interpretation of the Privileges or Immunities Clause arguably parallels the original framers' conception of the Clause; they failed to convince a majority of the Court, however, and the clause was rendered a dead letter.

Since 1873, the Privileges or Immunities Clause of the Fourteenth Amendment remained virtually unused by the Supreme Court as a source of constitutional protection.[83] In a 1999 decision involving the right to travel,[84] however, the Supreme Court resurrected the Privileges or Immunities Clause to invalidate a California law involving the distribution of welfare benefits to new

---

79. *Id.* at 96 (Field, J., dissenting). Justice Field lamented:

> If [the Privileges or Immunities Clause] only refers, as held by the majority of the court . . . to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people in its passage.

Id.

80. Wagner, *supra* note 58, at 883.

81. *The Slaughter-House Cases*, 83 U.S. at 93 (Field, J., dissenting) (claiming that the Fourteenth Amendment "was adopted to . . . place the common rights of American citizens under the protection of the National government").

82. *Id.* at 122 (Bradley, J., dissenting).

83. *But see* Colgate v. Harvey, 296 U.S. 404, 436 (1935) (invalidating a state tax that applied solely to income and dividends earned outside the state under the Privileges or Immunities Clause). The Supreme Court overruled this decision, however, just five years later in *Madden v. Kentucky*, 309 U.S. 83, 92 (1940) (holding that the right to practice one's trade is not a right of national citizenship under the Privileges or Immunities Clause). In several instances, a minority of the Court has relied on the clause. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 162–65 (1968) (Black, J., concurring) (claiming the right to jury trial is a privilege of national citizenship); Edwards v. California, 314 U.S. 160, 170 (1941) (Douglas, J., concurring) (claiming right of interstate travel is a privilege of national citizenship); Hague v. Comm. For Indep. Org., 307 U.S. 496, 512 (1939) (stating that the right to assemble and discuss national issues is a privilege of national citizenship).

84. Saenz v. Roe, 526 U.S. 489, 501–03 (1999).

residents.[85] The California Legislature passed legislation in order to reduce its welfare budget.[86] The legislation limited the welfare benefits of new residents to the level of benefits they would have received in their prior state of residence.[87] The Supreme Court found that the legislation violated the citizens' right to travel.[88] The majority explained that one of the components to the right to travel encompassed the right of "travelers who elect to become permanent residents, the right to be treated like other citizens of that State."[89] The Court declared that this component of the right to travel stemmed from the Privileges or Immunities Clause of the Fourteenth Amendment.[90] Quoting Justice Bradley's dissenting opinion in *The Slaughter-House Cases*, the Court found that the states did not have power to restrict the rights of citizenship to any classes or persons.[91] That the right to travel was affected only incidentally by the unequal distribution of welfare benefits did not sway the majority's view that an infringement of a constitutional right had occurred.[92]

---

85. *Id.*

86. *Id.* at 493.

87. *Id.*

88. *Id.* at 498 ("[T]he right is so important that it is 'assertable against private interference as well as governmental action . . . [It is] a virtually unconditional personal right, guaranteed by the Constitution to us all.' " (internal citation omitted)).

89. *Id.* at 500. The first two components are the right to enter and leave another state and the right to be treated as a welcome visitor when temporarily present in another state. *Id.*

90. *Id.* at 503 ("[M]ost notably expressed in the majority and dissenting opinions in the *Slaughter-House Cases*, it has always been common ground that this Clause protects the third component of the right to travel." (citation omitted)). For an explanation of the origins of the right to travel, see *infra* note 99.

91. *Id.* at 503–04. Justice Bradley, in dissent, used even stronger language to make the same point:

> The states have not now, if they ever had, any power to restrict their citizenship to any classes or persons. A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right.

Id. (citations omitted).

92. *Id.* at 504. The Court did not employ the same fundamental rights analysis as that traditionally used under the Due Process Clause of the Fourteenth Amendment. It did not address whether the statute posed a sufficient impingement or undue burden on the right. For an illustration of the traditional fundamental rights analysis, see *Moore v. City of East Cleveland*, 431 U.S. 494, 505–06 (1977) (establishing a fundamental right to keep one's family together); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that there is a fundamental right to marry); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (finding a fundamental right to purchase contraceptives); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (finding that the Court has recognized a right of parents to control the upbringing of their children).

California argued that the statute was justified by fiscal considerations and alleged a state-wide savings of $10.9 million per year.[93] The Court rejected this justification because discrimination among equally eligible citizens on the basis of their state of prior residence was an impermissible means to accomplish the purpose, even if legitimate.[94] The majority ultimately found that citizens, rich or poor, have the fundamental right to choose where to reside, but states do not have the right to select citizens.[95] The Court noted that the Fourteenth Amendment was " 'framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.' "[96]

Saenz does not provide much guidance as to the circumstances under which the Privileges or Immunities Clause of the Fourteenth Amendment should be applied in the future. Many commentators note that the majority's employment of the Privileges or Immunities Clause is likely limited to the right to travel.[97] If, however, the Supreme Court in *Saenz* signaled a desire to revitalize the Privileges or Immunities Clause as a constitutional source of rights of national citizenship,[98] then the recognition of a right to education under this

93. *Saenz*, 526 U.S. at 506.

94. *Id.* at 506. Although it is unclear what standard of review was employed, the Court indicated that neither rational basis nor intermediate scrutiny sufficed. *Id.* at 504.

95. *Id.* at 510–11.

96. *Id.* at 511 (quoting Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935)).

97. *See generally* Nicole I. Hyland, Note, *On the Road Again: How Much Mileage Is Left on the Privileges or Immunities Clause and How Far Will It Travel?*, 70 FORDHAM L. REV. 187, 253 (2001) (concluding that the right to interstate travel is best protected under the Privileges or Immunities Clause); April D. Lashbrook, Note, *Back from a Long Vacation: The Privileges or Immunities Clause of the Fourteenth Amendment in* Saenz v. Roe, 29 CAP. U. L. REV. 481, 510–11 (2001) (attempting to harmonize *Saenz v. Roe* with the Court's previous right to travel jurisprudence); Maynard, *supra* note 60, at 298–99 (arguing that the Court in *Saenz* simply applied equal protection analysis used in traditional right to travel cases). *But see* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 378 (1997) (claiming "the words of the [Privileges or Immunities Clause] suggest that it clearly protects rights—those that can be deemed privileges or immunities of citizenship—from state interference"); *see also* Duncan E. Williams, Note, *Welcome to California, Tom Joad: An Historical Perspective on* Saenz v. Roe *Stirring the Privileges or Immunities Clause from Its* Slaughter-House *Slumber*, 58 N.Y.U. ANN. SURV. AM. L. 85, 88–89 (2001) (noting that *Saenz*'s real importance is in the fact that it reveals that all nine justices "appear ready to reconsider the Privileges or Immunities Clause").

98. Rights of national citizenship in this context should be distinguished from personal rights. The Supreme Court has recognized personal rights that are not explicitly provided for in the text of the Constitution under the Due Process Clause. Such rights include the right to marry, *see* Loving v. Virginia, 388 U.S. 1, 12 (1967), the right to custody of one's children, *see* Santosky v. Kramer, 455 U.S. 745, 758–59 (1982), the right to keep one's

provision logically follows. The roots of this position are grounded in Justice Washington's analysis in *Corfield v. Coryell* and in Justice Bradley's dissenting opinion in *The Slaughter-House Cases*. As explained previously, *Corfield* defined Article IV, section 2 privileges and immunities as fundamental, belonging of right to every citizen of the Union.[99] These rights were not limited to an enumerated list or confined to rights already existing under the Constitution.[100] Drafters

---

family together, *see* Moore v. City of East Cleveland, 431 U.S. 494, 505–06 (1977), the right to control the upbringing of one's children, *see* Meyer v. Nebraska, 262 U.S. 390, 399 (1923), the right to procreate, *see* Skinner v. Oklahoma, 316 U.S. 535, 536 (1942), the right to purchase contraceptives, *see* Griswold v. Connecticut, 381 U.S. 479, 480 (1965), and the right to have an abortion, *see* Roe v. Wade, 410 U.S. 113, 164 (1973).

Rights of national citizenship, on the other hand, may include the right to vote, *see* Kramer v. Union Free Sch. Dist., 395 U.S. 621, 626 (1969); Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 667–68 (1966); Reynolds v. Sims, 377 U.S. 533, 555 (1964), the right to access to the courts, *see* Bounds v. Smith, 430 U.S 817, 828 (1977), and the right to interstate travel, *see* United States v. Guest, 383 U.S. 745, 757 (1966). Although the Court, prior to *Saenz*, has characterized these rights as personal ones, protected by the Due Process Clause, they are more aptly labeled rights of citizenship because of their importance to the maintenance of our democracy.

Saenz did not specifically indicate that rights would be re-categorized and protected by different clauses of the Fourteenth Amendment. The basis for this conjecture is the fact that the Supreme Court previously declared the right to travel to be a fundamental right under the Due Process Clause of the Fourteenth Amendment. *See* Shapiro v. Thompson, 394 U.S. 618, 641–42 (1969) (declaring unconstitutional laws that imposed one-year residency requirement in the state as a prerequisite for eligibility for welfare). The Court claimed that the law discriminated as to who can receive welfare benefits based on duration in the state; as such, the Court said that the law imposed a burden on those who have recently traveled and migrated to the state. *See id.* at 638. Thus, although *Saenz* did not deny new residents any welfare benefits, but merely provided benefits for the first year of residence at the same level as a new resident's previous state of residence provided, *Shapiro* set up a framework for the Supreme Court to invalidate California's welfare program under the Due Process Clause. The Court instead turned to the Privileges or Immunities Clause, thus indicating a purposeful revitalization of this clause. Saenz v. Roe, 526 U.S. 489, 503 (1999); *see supra* note 85 and accompanying text. Thus, the Privileges or Immunities Clause provides a vehicle for protecting citizenship rights that are fundamental to the maintenance of our democracy. *But see* Timothy S. Bishop, Comment, *The Privileges or Immunities Clause of the Fourteenth Amendment: The Original Intent*, 79 NW. U. L. REV. 142, 150 (1984) (noting that in passing the Civil Rights Act of 1866 and section 1 of the Fourteenth Amendment, the legislature sought only to protect civil rights, not political rights).

99. *See supra* note 65 and accompanying text.

100. Corfield v. Coryell, 6 F. Cas. 546, 551–52 (E.D. Pa. 1823) (No. 3230). The Court has provided little guidance as to identifying privileges and immunities of citizenship under Article IV, section 2. *See* Baldwin v. Mont. Fish & Game Comm'n, 436 U.S. 371, 380 (1978) (acknowledging that "the contours of [the clause] are not well developed"). The Privileges and Immunities Clause can be used to challenge state and local laws that discriminate against out-of-staters with regard to the exercise of constitutional rights. *See* Canadian N. Ry. Co. v. Eggen, 252 U.S. 553, 560–63 (1920) (finding right of access to the courts of the state is right protected under the Privileges and Immunities Clause); Blake v. McClung, 172 U.S. 239, 256–61 (1898) (holding that right to own and dispose of property is

of section 1 of the Fourteenth Amendment indicated that *Corfield*'s interpretation of the Privileges and Immunities Clause should serve as a guide to understanding the Privileges or Immunities Clause.[101] Bradley's dissent in *The Slaughter-House Cases*, in turn, is important in that it indicated that United States citizenship gives rise to certain "incidental rights, privileges, and immunities of the greatest importance."[102] Bradley believed that a citizen of the United States who claimed citizenship in any state of the Union, must enjoy equality of rights with every other citizen of that state.[103] The right to education fits into the framework set out by Washington and Bradley for determining rights of national citizenship—namely rights that were recognized by the framers (and continued to be recognized throughout history) as vital to the maintenance of our nation.[104]

---

protected under the Privileges and Immunities Clause). More recently, in *Doe v. Bolton*, 410 U.S. 179 (1973), the Court held that a state could not limit the ability of out-of-staters to obtain abortions in the state. *Id.* at 200. What is interesting about *Doe* is that the Court not only established that a state cannot discriminate with regard to access to the constitutionally protected right of abortion, but it expressly forbade states from discriminating against out-of-staters with regard to access to medical care, even though there is no constitutional right to medical care. *Id.* at 200–01.

101. *See supra* note 63 and accompanying text; *see also* Saenz v. Roe, 526 U.S. 489, 502 n.15 (1999) (noting that the framers of the Privileges or Immunities Clause modeled the clause after the Article IV, section 2 Privileges and Immunities Clause); *Id.* at 526–27 n.6 (Thomas, J., dissenting) (noting that the Civil Rights Act of 1866 is regarded as the precursor to the Fourteenth Amendment and Congress relied heavily on *Corfield* in drafting the legislation); 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, 614 (1992) (noting that framers of the Fourteenth Amendment repeatedly referred to *Corfield* "as explanatory of the sorts of rights guaranteed by the Privileges or Immunities Clause").

102. *The Slaughter-House Cases*, 83 U.S. 36, 116 (1872) (Bradley, J., dissenting).

103. *Id.* at 113 (Bradley, J., dissenting) ("Citizenship of the United States ought to be, and, according to the Constitution, is, a sure and undoubted title to equal rights in any and every State in this Union . . . .").

104. There may be another argument for finding the current public school system funding scheme unconstitutional under the Privileges or Immunities Clause. The Court in *Saenz* found California's providing different levels of welfare benefits to citizens within its borders based on length of residency violated the national right to travel under the Privileges or Immunities Clause. Saenz v. Roe, 526 U.S. 489, 498 (1999). Specifically, the Court found the third component of the right to travel to be the right to be treated equally to other citizens of one's state of residence. *Id.* at 500–03. Analogous to welfare benefits, the states guarantee public education to residents. *See supra* note 18 and accompanying text. Under the current funding scheme, education benefits are provided unequally across school districts within a state. *See supra* notes 19–31 and accompanying text. Thus, as with welfare benefits, providing unequal education benefits arguably violates the national right to travel. Educational benefits, however, can be distinguished from the welfare benefits at issue in *Saenz*. There, the welfare scheme was directly tied to length of residence. *Saenz*, 526 U.S. at 493. Thus, residents received varying levels of benefits based on how long they had lived in the state. Funds provided for education, on the other

The framers envisaged the right to travel as integral to the development and growth of our nation.[105] Likewise, the framers recognized the necessity of an educated public to the functioning of a successful democracy.[106] At the time of the adoption of the Constitution, the framers may have disagreed as to the structure or content of education, but they agreed on its importance to the success of a republic.[107] George Washington claimed that "[t]he best means of

---

hand, are not related to length of residence. The disparities are based on the local tax base. *See supra* notes 19–31 and accompanying text. Although this could vary over time, the spending levels are not fixed at different levels by the State. There is a far more tenuous connection to travel. Furthermore, one could argue that if society requires states to provide all benefits equally to residents, states will go bankrupt or decide to provide no benefits at all.

105. The United States Supreme Court has declared the right to travel to occupy "a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized." United States v. Guest, 383 U.S. 745, 757 (1966). The Court in *Saenz* found the right to travel to be firmly embedded in its jurisprudence. *Saenz*, 526 U.S. at 504–05. Thus, the framers of the Constitution envisioned the concept of unimpeded travel of citizens throughout the United States as essential to the preservation of the nation. This concept is reflected in numerous judicial opinions throughout our history. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (finding that denying right to vote to new residents for durational time period impeded fundamental right to travel); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (invalidating complete denial of welfare benefits to new citizens as violative of right to travel); *Guest*, 383 U.S. at 757 (1966) (finding right to travel encompassed the right to use highway facilities). *But see* Sosna v. Iowa, 419 U.S. 393, 410 (1975) (upholding one-year residency requirement before filing for divorce as not an infringement on right to travel).

106. *See* Reilly, *supra* note 2, at 2–3. As one commentator explained:

> But it is not only our political system that is dependent upon a viable and successful educational system. Our economic system also proclaims its reliance upon well-trained and educated workers. And our social system rests on two largely accepted goals that each require access to education—the "melting pot" which requires the successful absorption of diverse immigrant populations into a pluralistic social and cultural structure, and "upward mobility" which requires the permeability of class barriers. Both goals are achieved substantially through the education system.

Id.; *see also* CARL F. KAESTLE, PILLARS OF THE REPUBLIC 15 (Eric Foner ed., 1983) (claiming that founders envisioned the purpose of public education to promote national identity and social order); Bitensky, *supra* note 102, at 550 (claiming that the "freedom of mind, made possible by education has long been extolled by the nation's intelligentsia as an integral and quintessential component of American national identity."); Charles N. Quigley, *Education for Democracy: A Plan to Require Civics and Service to Build Tomorrow's Citizens*, Blueprint: Ideas for a New Century, *at* http://www.ndol.org/blueprint (last visited Feb. 14, 2003) (on file with the North Carolina Law Review) (noting that leaders such as Jefferson, Madison, and Adams recognized that "a vibrant democracy must rely on the knowledge, skill, and virtues of its citizens and their elected officials"). "Education that imparts that knowledge and skill fosters those virtues is essential to the preservation and improvement of American constitutional democracy and civic life." *Id.*

107. *See* Ross J. Pudaloff, *Education and the Constitution: Instituting American Culture*, *in* LAWS OF OUR FATHERS 26–27 (Ray B. Browne & Glenn J. Browne eds., 1986) ("By a necessary definition, a republican education was a mass education . . . .").

forming a manly, virtuous, and happy people will be found in the right education of youth. Without this foundation, every other means, in my opinion, must fail."[108] Thomas Jefferson believed that education was necessary to combat the ignorance he believed was the foe of self-government.[109] An enlightened citizenry was hailed by Jefferson as an indispensable safeguard of democracy.[110] "Education would provide the basic tools—knowledge, academic principles, and courage—to 'enable every man to judge for himself what will secure or endanger his freedom.' "[111] Jefferson deemed education so vital to the maintenance of our democratic society that he proposed extending free education to all children in the state of Virginia.[112] Benjamin Franklin believed in the importance of educating citizens to be efficient tradesmen and vigilant democratic citizens.[113] "Democratic citizens must cultivate certain personal virtues to be sure, but they must also become aware of the social preconditions of liberty, and learn to recognize the threats to it."[114] Thus, he was concerned with the enlightenment of the entire populace of

---

Prior to the ratification of the Constitution, the Congress of the Confederation reserved parcels of land in every township for the purpose of providing public schools. *See* Papasan v. Allain, 478 U.S. 265, 268 (1986).

108. George Washington, *Letter to George Chapman, December 15, 1784*, *in* THE FOUNDERS' ALMANAC, *supra* note 3, at 150.

109. Dorothea Wolfson, *Thomas Jefferson*, *in* THE FOUNDERS' ALMANAC, *supra* note 3, at 77, 89–90 (claiming that Jefferson believed that "free citizens, in order to remain free, must be educated").

110. *See* Thomas Jefferson, *A Bill for the More General Diffusion of Knowledge* (1778), *reprinted in* THOMAS JEFFERSON: WRITINGS 365, 372–78 (Merrill D. Peterson ed., 1984). "If a nation expects to be ignorant—and free—in a state of civilization, it expects what never was and never will be." Thomas Jefferson, *Letter to Colonel Charles Yancey, January 6, 1816*, *in* THE FOUNDERS' ALMANAC, *supra* note 3, at 149; *see also* Molly O'Brien, *Free at Last? Charter Schools and the "Deregulated" Curriculum*, 34 AKRON L. REV. 137, 141 (2000) ("Jefferson thought that citizens must be educated in order to vote, to protect liberty, and to be vigilant against government corruption.").

111. THE CONSTITUTION AT WORK, *supra* note 1. Noah Webster also commented on educating youth in America:

> It is an object of vast magnitude that systems of education should be adopted and pursued which may not only diffuse a knowledge of the sciences but may implant in the minds of the American youth the principles of virtue and of liberty and inspire them with just and liberal ideas of government and with an inviolable attachment to their own country.

Noah Webster, *On the Education of Youth in America, 1790*, *in* THE FOUNDERS' ALMANAC, *supra* note 3, at 150–51.

112. Wolfson, *supra* note 110, at 92.

113. Steven Forde, *Benjamin Franklin*, *in* THE FOUNDERS' ALMANAC, *supra* note 3, at 45, 55–56 (claiming that Franklin rejected the European model because it catered to the needs of a privileged class).

114. *Id.* at 56–57.

democratic virtues.[115] An educated public was also essential to James Madison's conception of a well-functioning democratic process.[116] According to Madison, "the best service that can be rendered to a Country, next to that of giving it liberty, is in diffusing the mental improvement equally essential to the preservation, and the enjoyment of the blessing."[117] He espoused a system of deliberate democracy[118] that was designed to allow new perspectives and information to influence citizens' judgments on potential courses of action.[119] Collective and individual decisions would be made on exposure to information and varied perspectives.[120] As Professor Sunstein explains, "[w]e might therefore understand the Madisonian system to build on the basic democratic commitment to education for all."[121]

The belief that education is necessary to ensure the survival of the nation is thus well-founded.[122] A leading educational theorist, John Dewey, noted, "a government resting upon popular suffrage cannot be successful unless those who elect and who obey their governors are educated."[123] Dewey asserted that democracy is more than just a form of government, it is an association of individual citizens.[124] Education instructs citizens how to interact with other

---

115. *Id.* at 557.

116. As Sunstein explained:

> We know enough to know that lack of interest is often a result of inadequate education, perceived powerlessness, unsatisfactory alternatives, or a belief that things cannot really be changed. Indifference to politics is frequently produced by insufficient information, the costs of gaining more knowledge, poor educational background . . . .

Id. at 21.

117. James Madison, *Letter to Littleton Dennis Teackle, March 29, 1826*, *in* THE FOUNDERS' ALMANAC, *supra* note 3, at 149.

118. CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 18–21 (1993).

119. *Id.* at 19.

120. *Id.* "Moreover, the system of deliberate democracy is premised on and even defined by reference to the commitment to political equality." *Id.* at 20.

121. *Id.* at 21.

122. An infrastructure and legal regime for universal schooling of our nation's children was put in place before the turn of the century. IRA KATZNELSON & MARGARET WEIR, SCHOOLING FOR ALL: CLASS, RACE, AND THE DECLINE OF THE DEMOCRATIC IDEAL 28 (1985). Currently, every state has enacted laws mandating the education or school attendance of children. *See* Bitensky, *supra* note 102, at 551.

123. JOHN DEWEY, DEMOCRACY AND EDUCATION 101 (1917). Education prepares young citizens for "the roles and responsibilities they must be ready to take on when they reach maturity." *See Education for Democracy*, *at* http://www.infed.org/biblio/b-dem.htm (last visited Feb. 27, 2003) (on file with the North Carolina Law Review) (internal quotes omitted).

124. DEWEY, *supra* note 123, at 101.

members of the association.[125] This is "equivalent to the breaking down of those barriers of class, race, and national territory which kept men from perceiving the full import of their activity."[126] Dewey stressed that unlike a society marked off into distinct classes where the only concern is education of the elite, a democratic society is mobile and readily open to social change.[127] Education provides all members of society the valuable skills of personal initiative and adaptability so they will not be overwhelmed by the ever-changing cultural, economic, or political landscape.[128] To focus only on the educational needs of some children, at the expense of others, will actually lead to the destruction of democracy.[129]

Thus, an educated citizenry is necessary to ensure democracy works. The need for education encompasses not only voting but also comprehends that citizens have the requisite level of knowledge in order to exercise other constitutional rights, such as freedom of speech and assembly. It recognizes that, in a democracy, citizens exert a powerful force in promoting societal change, through voicing opinions and working together to address the social and economic problems that face our nation. It understands that if democracy is to be effective in the promotion of collective self-interest, individuals must have the ability to ascertain what their self-interests entail. Finally, an educated populace is a check against tyranny. Although Justice Brandeis in his concurring opinion in *Whitney v. California*[130] was addressing freedom of speech, his words apply equally to the need for education. As he wrote, "[t]hose who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary."[131] The founders

125. *Id.*

126. *Id.*

127. *Id.* at 102. Dewey advocated that a Democracy should be open to revision in "light of continued social experience." JAMES BOWEN & PETER R. HOBSON, THEORIES OF EDUCATION: STUDIES OF SIGNIFICANT INNOVATION IN WESTERN EDUCATIONAL THOUGHT 166–67 (2d ed. 1987).

128. DEWEY, *supra* note 123, at 101. In fact, it can be argued that education actually aids citizens in becoming catalysts of social change.

129. John Dewey, *The School and Society*, *in* JOHN DEWEY ON EDUCATION: SELECTED WRITINGS 295 (Reginald D. Archambault ed., 1964). "Only by being true to the full growth of all the individuals who make it up, can society by any chance be true to itself." *Id. See generally* Sherry, *supra* note 2, at 131 ("The extent to which we take the commitment to democracy seriously is measured by the extent to which we take the commitment to education seriously." (quoting Hilary Putnam, *A Reconsideration of Deweyan Democracy*, 63 S. CAL. L. REV. 1671, 1697 (1990))).

130. 274 U.S. 357 (1927).

131. *Id.* at 375.

recognized that "the greatest menace to freedom is an inert people."[132] They believed in the power of educated reasoning applied through the process of popular government.[133]

For all these reasons, the Supreme Court has already acknowledged the importance of education in the development and maintenance of our society. As discussed *supra*, in *Brown v. Board of Education*,[134] the Supreme Court espoused the ideal of equal educational opportunities because of the importance of education to the basic functioning of our democracy.[135] Even prior to *Brown* the Court recognized acquisition of knowledge to be a matter of supreme importance[136] and education to be one of the first objects of public care.[137] Following *Brown*, the Supreme Court repeatedly stressed the importance of public schools in preparing individuals for participation as citizens.[138] In *Abington School District v. Schempp*,[139] Justice Brennan stated that Americans regard public schools as vital civic institutions for the preservation of a democratic government.[140] In *Wisconsin v. Yoder*,[141] the Court explained that education is necessary to prepare individuals to participate in society.[142] In *Bethel School District v. Fraser*,[143] the Court described the role and purpose of the American public school system as preparing " 'pupils for citizenship in the Republic.... It must inculcate the habits and manners of

132. *Id.*
133. *Id.* at 375–76.
134. 347 U.S. 483 (1954).
135. *Id.* at 493.
136. Meyer v. Nebraska, 262 U.S. 390, 400 (1923).
137. Interstate Consol. St. R. Co. v. Massachusetts, 207 U.S. 79, 87 (1907). State courts also have recognized the importance of education for citizenship. *See, e.g.*, Trs. of the Univ. of N.C. v. Foy, 5 N.C. (1 Mur.) 58 (1805) (describing the right to education as "a right highly esteemed in all civilized nations ... a right of acquiring knowledge and good morals, which have always been deemed most conducive to the happiness and prosperity of a people"). Professor Suzanna Sherry claims that this statement reflected "a wealth of American republican thinking on education and citizenship." Sherry, *supra* note 2, at 187 ("Under this view, a nation cannot prosper, nor can liberty be protected, without a good and virtuous citizenry, which in turn depends on an education stressing both knowledge and virtue.").
138. *See* Ambach v. Norwick, 441 U.S. 68, 81 (1979). In *Papasan v. Allain*, 478 U.S. 265 (1986), for example, the Court noted that even prior to the ratification of the Constitution, the Congress of the Confederation passed an ordinance to reserve a certain lot of land in every township for the maintenance of public schools in order to promote public education. *Id.* at 268.
139. 374 U.S. 203 (1963).
140. *Id.* at 230 (Brennan, J., concurring); *see also* Pierce v. Soc. of Sisters, 268 U.S. 510, 517 (1925) (explaining that schools foster patriotism).
141. 406 U.S. 205 (1972).
142. *Id.* at 213, 237–39.
143. 478 U.S. 675 (1986).

civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.' "[144] Justice Marshall remarked in *Milliken v. Bradley*[145] that education is vital to the ability of individuals to live together, which is essential to the survival of our nation.[146] Most recently, in *Zelman v. Simmons-Harris*,[147] Justice Thomas claimed that public schools promote democracy and an egalitarian culture.[148] Even in *San Antonio Independent School District v. Rodriguez*,[149] where the Court held that education is not a fundamental right,[150] the Court acknowledged that education is essential to the effectiveness of a democratic political process.[151] Thus, as did the framers, the

144. *Id.* at 681 (alteration in original) (quoting C. BEARD & M. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).

145. 418 U.S. 717 (1974).

146. *Id.* at 783 (Marshall, J., dissenting) (arguing that the Court severely restricted the ability of courts to fashion interdistrict desegregation orders).

147. 122 S. Ct. 2460, 2483 (2002) (Thomas, J., concurring) (noting that "[w]hile in theory providing education to everyone, the quality of public schools varies significantly across districts").

148. *Id.* Other branches of the federal government have explicitly recognized the importance of education to our nation. For example, President George H. W. Bush convened an education summit with all fifty state governors in 1989 because of a recognition that many American students failed to make adequate academic gains. Joint Statement Following the Education Summit with Governors in Charlottesville, Va., 25 WKLY. COMP. PRES. DOC. 1487 (Sept. 28, 1989). At the end of the conference, the President and governors issued a "Jeffersonian compact to enlighten our children and the children of generations to come." *Id.* at 1279. More recently, President George W. Bush signed into law the No Child Left Behind Act of 2001 in an effort to help close the achievement gap among our nation's youth. *See* Pub. L. No. 107-110, 115 Stat. 1425 (2002); *Policy Statement of No Child Left Behind Act of 2001: Reauthorization of the Elementary and Secondary Education Act Legislation and Policies Website*, U.S. Department of Education, *at* http://www.ed.gov/offices/OESE/esea/ (last visited on Feb. 27, 2003) (on file with the North Carolina Law Review).

149. 411 U.S. 1 (1973).

150. *See supra* notes 50–52 and accompanying text. Note, however, that many state courts have found a fundamental right to education under their state constitutions. *See, e.g.*, Serrano v. Priest, 557 P.2d 929, 951 (Cal. 1977); Rose v. Council for Better Educ., 790 S.W.2d 186, 206 (Ky. 1989); McDuffy v. Sec'y of Educ., 615 N.E.2d 516, 552 (Mass. 1993).

151. *Rodriguez*, 411 U.S. at 113.

In a 1982 decision, *Plyler v. Doe*, 457 U.S. 202 (1982), the Supreme Court reiterated that there is no fundamental right to education under the United States Constitution; however, the Court cited the importance of education to society in invalidating a state law that denied educational opportunities to illegal aliens. *Id.* at 221 ("Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction."). The majority found that the State had acted to burden the educational opportunities of a disadvantaged group of children, who need an education to become full participants in society. *Id.* at 221–22. The majority found:

> In addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront

Supreme Court consistently has recognized the essential role of education in maintaining the fabric of American democracy.

A potential objection to recognizing a right to education, unlike the right to travel, is that the right to education is an affirmative right. Although the right to travel is not provided for in the text of the Constitution, it is distinguishable from a right to education because the right to education is a positive right, imposing an affirmative obligation on the states. The right to travel is only implicated negatively, that is, it is only asserted when states attempt to abridge the right.[152] This is far different than requiring a state to provide a certain level or quality of education to its citizens. In fact, the Supreme Court has been very reluctant to impose affirmative obligations on the states.[153] There is some precedent, however, for implying positive rights from constitutional guarantees. The Constitution provides for elections for members of Congress and for the president,[154] but it does not explicitly require elections for state and local officers.[155] Despite this Constitutional silence, the Supreme

---

to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.

Id. Unfortunately, only six years later, in *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450 (1988), the Supreme Court underscored its holding in *Rodriguez* that education is not a fundamental right. *Id.* at 458 (finding that requiring fees for transportation to public schools did not violate Equal Protection Clause of the Fourteenth Amendment). The Court distinguished *Plyler* claiming that it involved unique circumstances in which children were being punished for the illegal conduct of their parents. *Id.* at 459. In a dissenting opinion, however, Justice Marshall noted the "extraordinary nature of this interest" in education. *Id.* at 469. "Since *Brown*, we frequently have called attention to the vital role of education in our society. We have noted that 'education is necessary to prepare citizens to participate effectively and intelligently in our open political system . . . .' " *Id.* (quoting Wisconsin v. Yoder, 406 U.S. 205, 221 (1972)). He claimed that education is often the only means through which the poor can become full participants in society. *Id.*

152. *See* Saenz v. Roe, 526 U.S. 489, 499 (1999).

153. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 325 (1980) (upholding constitutionality of laws that denied public funding for medically necessary abortions except where necessary to save the life of the mother); Maher v. Roe, 432 U.S. 464, 480 (1977) (upholding limitations on Medicaid funds for abortion).

In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Supreme Court indicated that the pursuit of knowledge may have a constitutional dimension, finding that a statute prohibiting teaching foreign languages to students was unconstitutional as violative of the Due Process Clause of the Fourteenth Amendment. *Id.* at 401, 403. This is a negative right, however, in that it simply forbids a state government from impeding individuals in their quest for information.

154. *See* U.S. CONST. art. I, § 2; U.S. CONST. art. II, § 1; U.S. CONST. amend. XVII.

155. The Supreme Court has allowed state and local governments to select their public officials through means other than elections. *See* Kramer v. Union Free Sch. Dist., 395 U.S. 621, 629 (1969) (indicating that it is constitutional to have an elected city council

Court has imposed an affirmative obligation on states to ensure that the right to vote is safeguarded because it is regarded as essential to our democratic society.[156] Because of this, the Court has determined that any laws that deny or limit the ability of citizens to vote must meet strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment.[157] Analogously, the right to education is essential to our democratic society and should qualify for the same exception to the general reluctance to impose affirmative obligations on the states.[158]

---

choose the mayor who has broad administrative powers); Fortson v. Morris, 385 U.S. 231, 235 (1966) (upholding the ability of a state to have its legislature choose its governor when no candidate received a majority of the popular votes in an election).

At least one commentator argues that Article IV, section 4 of the Constitution requires states to provide elections for state and local officials but the Supreme Court has determined that this argument presents a nonjusticiable political question. *See* CHEMERINSKY, *supra* note 97, at 711.

156. *See* Reynolds v. Sims, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."). Similarly, the Supreme Court has found that there is a "fundamental constitutional right of access to the courts." Bounds v. Smith, 430 U.S. 817, 828 (1977). *But see* Lewis v. Casey, 518 U.S. 343, 360, 363 (1996) (undercutting that right by applying only rational basis review to restrictions on prisoners' access to courts, but accepting the statement that there is a right to access to the courts). As further support for the proposition that it may impose affirmative obligations, in *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968), the Supreme Court declared that states had an affirmative obligation to integrate students in segregated school districts. *Id.* at 437 (holding that schools must dismantle segregated systems "root and branch" and that desegregation must be achieved with respect to facilities, staff, faculty, and extracurricular activities). These cases suggest at least that the Supreme Court is willing to impose affirmative obligations on states in appropriate circumstances. *See* Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990) (critiquing the notion that the Constitution only imposes negative obligations on government and not affirmative duties).

157. *See, e.g.*, O'Brien v. Skinner, 414 U.S. 524, 530 (1974) (holding that the government must provide absentee ballots to jail inmates not being held in their county of residence, if they have no other means of voting); *Kramer*, 395 U.S. at 633 (holding that voting cannot be restricted to those who owned taxable real property or had children enrolled in local public schools); Harper v. Va. State Bd. of Elections, 383 U.S. 663, 666 (1966) (holding that the Equal Protection Clause is violated by poll taxes); Gray v. Sanders, 372 U.S. 368, 380–81 (1963) (finding equal protection requires that all voting districts be approximately the same population size); Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960) (finding denial of equal protection when city borders were redrawn to exclude black voters). *But see* Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 70 (1978) (holding that a city may limit voting in city elections to its residents); Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 53–54 (1959) (upholding statute that conditioned voting eligibility on a person's ability to read or write any section of the Constitution in the English language).

158. An argument also could be made that the right to travel is directly fundamental to the maintenance of our nation, whereas education is only indirectly important because of its role in producing an informed citizenry. In setting out the structure of our democratic

In *Saenz*, the Supreme Court resurrected the Privileges or Immunities Clause of the Fourteenth Amendment as a source for the protection of rights of national citizenship. Although the Court did not explicitly identify the rights of national citizenship beyond the right to travel, the legislative history of the Privileges or Immunities Clause suggests that these rights are defined by their importance to the survival of our nation. Education is such a right. Implicit in our democratic republic is the requirement of an educated populace to support and maintain the government. Our founders understood that an enlightened citizenry was necessary in order for democracy to flourish, and the interrelationship between education and democracy continues to be seen as inextricably intertwined. The recognition of the right to education under the Privileges or Immunities Clause suggests that public school systems that fail to provide an adequate education to our nation's youth are unconstitutional. Thus, because educational inadequacy is often linked to lack of financial resources, public school funding systems that fail to provide sufficient financial resources are constitutionally suspect. Although in the context of a school funding case, the Supreme Court held that education is not a fundamental right under the Equal Protection Clause, *Saenz* signals that school funding schemes may be vulnerable to challenge under the Privileges or Immunities Clause. If so, then the promise of *Brown*, that no children shall be denied educational opportunity, and the accordant ability to fully participate in the American dream, may finally be realized.

KARA A. MILLONZI

---

government, however, the framers recognized the fundamental role of an educated citizenry. It was implicit in the design. *See supra* notes 107–22 and accompanying text.