

national lawyers guild

Volume 73
Number 3
Fall 2016

REVIEW

*A journal of
legal theory
and practice
“to the end
that human
rights shall
be more
sacred than
property
interests.”*

—Preamble, NLG
Constitution



**The Fundamental Right
to Literacy: Relitigating
the Fundamental Right
to Education After
*Rodriguez and Plyler*** 129
Malhar Shah

**Standing Rock and the
Erosion of Tribal Rights** 176
Amber Penn-Roco

A Victory for Education 180
Erwin Chemerinsky

**We Must Do Better:
The Clemency Case
of Charceil Kellam** 183
Richael Faithful

**Building on 80 Years
of Radical Lawyering
in the Age of Trump** 189
Natasha Lycia Ora Bannan

editor's preface

The foundation of democracy is universal education—the two exist in tandem. True democracy means self-government. It also means the abolition of artificial hierarchies and the distinction between the rulers and the ruled. The extension of education to disenfranchised people—giving them the ability to read, write, and self-advocate—is the first step toward the social and political equality democracy requires. This is why, after the 1831 slave uprising led by Nat Turner, whose reading of the Bible led to his unique brand of liberation theology, slaveholding states passed legislation outlawing the teaching of reading to slaves. Open minds can't abide bodies in chains.

In the wake of the inauguration of a President whose nominee for Secretary of Education is committed to defunding public schools,¹ Malhar Shah's "The Fundamental Right to Literacy: Relitigating the Fundamental Right to Education After *Rodriguez* and *Plyler*" could hardly be more timely. In it Shah argues for a fundamental constitutional right to literacy. The right is fundamental, he argues, both in the sense that it is a right of the highest order according to the standards set by the Supreme Court and that reading and writing are "preservative of all other rights"—that is, one cannot assert one's rights within our legal and political system without first reading and understanding them.

As Amber Penn-Roco points out in "Standing Rock and the Erosion of Tribal Rights," the Dakota Access Pipeline was a direct attack on the sovereignty of the tribe living on the Standing Rock Sioux Reservation. A leak in the pipeline could poison the tribe's water supply and threaten their very existence. Penn-Roco, an attorney for a native-owned firm that focuses on native rights, explains that the federal government has an obligation to "consult" with tribes before it allows corporations to launch such projects and that, legally, consultation requires more than just the delivery of bad news—it means a seat at the table where decisions are made. Activists from around the world, including many Guild members, converged on Standing Rock to protest the pipeline.

Continued on the inside back cover

NATIONAL LAWYERS GUILD REVIEW, formerly GUILD PRACTITIONER, is published quarterly by the National Lawyers Guild, a non-profit institution, at 132 Nassau Street, # 922, New York NY 10038. ISSN 0017-5390. Periodicals postage paid at New York, NY and at additional mailing offices. Subscription rates are \$75/yr for libraries and institutions; \$25/yr for lawyers; \$10/yr for legal workers/law students; \$5/yr for incarcerated persons; add \$5/yr for overseas; \$6.50/single copy, and should be sent to: 132 Nassau Street, # 922, New York NY 10038. POSTMASTER: Send change of address to: NATIONAL LAWYERS GUILD REVIEW, 132 Nassau Street, # 922, New York NY 10038. Address all editorial correspondence and law-related poems, criticisms, articles and essays to: Editor-in-Chief, NATIONAL LAWYERS GUILD REVIEW, 132 Nassau Street, # 922, New York NY 10038. Unsolicited manuscripts will not be returned unless accompanied by return postage. NATIONAL LAWYERS GUILD REVIEW is indexed/abstracted in Westlaw, PAIS-Public Affairs Information Service, The Left Index, and the Alternative Press Index.

Editorial Board: Nathan Goetting, Editor in Chief; Meredith Osborne, Executive Editor; Crystal Abbey, Managing Editor; Kathleen Johnson, Book Editor; Katherine Taylor, Notes Editor; Deborah Willis, Layout Editor. Contributing Editors: Alan Clarke, Marjorie Cohn, Ryan Dreveskracht, Richael Faithful, David Gespass, Ann Fagan Ginger, Laura Horton, Nathan H. Madson, Henry Willis. The opinions expressed in the articles are those of the various authors, and each article is Copyright, 2016, by the author and by NATIONAL LAWYERS GUILD REVIEW.

Advisory Panel: Elvia Arriola, John Brittain, Margaret Burnham, Erwin Chemerinsky, David Cole, Barbara Dudley, Richard Falk, Lennox Hinds, Sylvia A. Law, Staughton Lynd, Harold McDougall, Ruben Remigio Ferro, Jitendra Sharma, Kenji Urata, Frank Valdes, Patricia Williams.

Malhar Shah

**THE FUNDAMENTAL RIGHT
TO LITERACY: RELITIGATING
THE FUNDAMENTAL RIGHT
TO EDUCATION AFTER
*RODRIGUEZ AND PLYLER***

In 1973, and again in 1982, the Supreme Court of the United States avoided addressing whether education is a fundamental right guaranteed by the United States Constitution. Subsequent federal courts have, unfortunately, mistakenly interpreted those two opinions as holding that education is not a fundamental right, even in the absence of language indicating such a holding. In the 1973 case, *San Antonio Independent School District v. Rodriguez*, the Supreme Court rejected a challenge to a Texas city's school funding scheme and refused to reach the fundamental right issue because "[e]ven if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditures in Texas provide an education that falls short." In its 1982 opinion, *Plyler v. Doe*, the Supreme Court invalidated a Texas statute prohibiting undocumented children from receiving a public education under the Equal Protection Clause of the Fourteenth Amendment without reaching the fundamental right question. But the *Plyler* Court's opinion, when addressing the total deprivation of education experienced by undocumented children, implicitly identified deprivation of basic literacy skills as the line below which states could not fall.

This article is intended, in five sections, to pick up where the *Plyler* Court left off and to serve as the substantive basis for potential litigation seeking to secure a holding that the U.S. Constitution guarantees the fundamental right to acquire basic literacy skills. I will argue that, from a strictly historical perspective, the founders believed that education was such a foundational principle of the nation as to need no explicit mention in the Constitution.

Malhar Shah is a third-year student at Harvard Law School who received his bachelor's degree from the University of California, Riverside. For providing unbelievable inspiration and support, I am incredibly grateful to Mark Rosenbaum, Anne Hudson-Price, Kathryn Eidmann, and Alisa Hartz. For his essential historical insight into founding-era thoughts and sentiments, I am grateful to Jorge Gomez. And for providing thought provoking feedback on previous drafts I am indebted to Ryan Cohen, Nathan Goetting David Grespass, Kathryn Taylor, and Meredith Osborne. The errors are mine. Finally, this article is dedicated to my best friend Sebastian Cy Gomez, whose education was unfortunately cut short. May he rest in peace. .

Then, using the *Plyler* Court's opinion and the latest research on the effect of literacy and illiteracy on the human brain, I argue that the right to literacy is preservative of all other rights, especially of citizens' First Amendment right to free expression, to exercise political franchise, and the right to access justice. Next, using the Supreme Court's most recent "equal dignity doctrine" and drawing from Professors Laurence Tribe and Kenji Yoshino, I argue that depriving children of the right to acquire basic literacy skills deprives them of their equal dignity. I maintain that holding that children possess a fundamental right to literacy education would not lead to a slippery slope such that the Court would be forced to hold that there also exists a fundamental right to basic necessities, such as food, shelter, and clothing. Finally, I will describe the poor qualities of a school or school district sufficient to give students standing to claim they have been deprived of their right to acquire basic literacy skills.

I. The right to basic literacy education is fundamental and deeply rooted in this nation's history and tradition

The Due Process Clause of the Fourteenth Amendment "specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this nation's history and tradition.'"¹

Providing *all* children with a minimal standard of education, and more specifically a basic literacy education, was such an integral part of this nation's history and tradition that the founders believed it was a rudimentary and implicit principle requiring no explicit mention in the Constitution. This section will support this conclusion beginning with a pre-Constitutional analysis of the role of education in the colonies. It will then argue that the Northwest Ordinance, a pre-Constitutional statute that required all new states to provide children with a basic education, should be read as explicitly acknowledging education as a foundational principle of our nation implicit in the Constitution. This section will track the discussion around education in the Constitutional Convention to argue that the founders believed that the right to education was such a fundamental and underlying principle that it needed no explicit mention. Finally, I will track the educational beliefs and politics of three founders, Benjamin Franklin, Benjamin Rush, and Noah Webster, to further support the argument that the founders believed that the right to education was a fundamental, implicit principle integral to the survival of the nation.

Before the official founding of our nation, the puritans "held literacy instruction as a core value and inculcated it into their laws and practices."² As a result, in the seventeenth century, several American colonies passed education-related legislation leading to the establishment of the Massachu-

setts School of Law of 1642, and the Ye Olde Deluder Satan Act in 1647, which required towns of a certain size to set up grammar schools.³ It was a core tenet that schooling should be “public in purpose, public in access, public in control, and public in support.”⁴ Thus, “[b]y the 1670s all of the New England colonies then in existence, except Rhode Island, had passed legislation . . . mandating that children be *taught to read*.”⁵ And when the ideological foundations of public education began to disintegrate with the influx of religious minorities into the country in the early eighteenth century, public education institutions gave way to charity schools intended for poor children.⁶ The colonies’ prerevolutionary religious tradition placed education—especially for those who could least afford it—on a pedestal by granting it special protection during a time of potential chaos while they were framing the Constitution. This is illustrated by the fact that the colonies continued to exalt basic literacy education as an integral and implicit aspect of the nation’s identity, even after the tumultuous Revolutionary War period and through the start of the Constitutional Convention.

By the time the Constitutional Convention began in 1786, at least six states had constitutional provisions guaranteeing citizens’ right to education,⁷ demonstrating the people’s continued belief in education as a core tenet. Seeking to execute that objective into politics on a federal level, the Congress of the Confederation, with unanimous state approval,⁸ used its limited federal power to pass the Northwest Ordinance of 1787, which required new territories to include in their constitutions as a prerequisite to becoming a state the following statement: “religion, morality, and knowledge [are] necessary to good government and the happiness of mankind, *schools and the means of education shall forever be encouraged*.”⁹ This language established the principle that education should be an intrinsic characteristic of the nation’s culture moving forward, as evidenced by the fact that the Ordinance established a multitude of Constitutional principles consistently used throughout this nation’s history. The Ordinance was a vital step moving forward, for it laid the foundation for what were to become constitutional amendments and was further exalted during its time for its ability to attract settlers and investors. It also laid out rules of inheritance and conditions for the validity of contracts, prohibited higher taxation of nonresident proprietors, prohibited slavery, and promoted religious pluralism.¹⁰ These provisions gave the Ordinance constitutional dimensions because they “referred to the set of principles according to which a political community governs itself,”¹¹ principles which The Federalist Papers and the Declaration of Independence recite and on which the Constitution and our Constitutional jurisprudence implicitly rely.¹² Those principles—expansionism, development, imperialism, physical and economic risk, commercialism, and utopianism—lack a formidable presence

in presently recognized constitutional documents, which gives the Ordinance a “special claim to constitutional authority insofar as it is a founding text of those aspects of our political traditions that draw upon the principles it contains.”¹³ Those principles are constitutional in nature also because they “preserve[d] and perpetuate[d] the distinctive political life that the states had won in the War for Independence”¹⁴ and were enacted to address the same problems addressed by the Constitution: “the danger of factionalism and the value of an extended republic.”¹⁵ Further, not only did the Ordinance receive the same widespread popular acceptance as the Constitution,¹⁶ but it was “the first piece of legislation to address effectively the problems of the national domain” so as to “establish[] a governmental scheme dependent on maturation.”¹⁷ The Ordinance thus serves as the first document that laid out the core principles upon which our nation was founded, and by explicitly touting universal education as one of those principles it established the right to basic education as a fundamental, yet distinct, Constitutional principle deeply rooted in the nation’s history and tradition.

That the Ordinance has special constitutional dimensions and established education as a fundamental constitutional principle is further shown by the fact that it served as the basic outline for the Bill of Rights. Indeed, the right to free exercise of religion, habeas corpus, trial by jury, proportional representation in the legislature, prohibition of cruel and unusual punishment, and due process protections guarding liberty and property were derived from the Ordinance.¹⁸ And because the Bill of Rights is mostly a negative document—meaning that it protects against governmental deprivations of rights rather than requiring the government to provide positive rights—it would have made little sense to incorporate a positive right to education within that document from the Northwest Ordinance.¹⁹ Furthermore, because the Bill of Rights was meant to prevent *federal* intrusion on individual rights, by leaving education to the states, the Bill of Rights was arguably irrelevant to its protection. Indeed, the federalist structure of the nation was in of itself designed to insulate citizens’ state rights from federal intrusion. Because most states had already guaranteed their citizens the right to an education, the Bill of Rights did not need to create an additional safeguard for the fundamental right to education. Thus, by including education among the Ordinance’s provisions, the drafters already assigned basic education the status of a fundamental and implicit Constitutional principle.

Records from the Constitutional Convention further evidence the founders’ belief that education is an implicit right guaranteed by the Constitution. Towards the end of the convention, James Madison and Charles Pinckney jointly moved to insert a provision allowing Congress to establish a University.²⁰ The Convention denied that motion after Governor Morris stated that such a power

was unnecessary since “the exclusive power at the Seat of Government, will reach the object.”²¹ This statement meant that the delegates—already reluctant to enumerate more Congressional powers so late in the convention—believed that education was such an inherent part of the Constitution that it did not need explicit mention.²² Indeed, scholars argue that Morris was referring to the Article I, section 8, clause 1 power to “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States.”²³ The Supreme Court’s influential opinion in *U.S. v. Butler* adopted this very conception of the spending power by holding that the “general welfare” language in the Spending Clause does not act merely as a reference to the other enumerated powers in Article I but instead allows Congress to exercise its spending and tax powers to pursue any goal so long as it is for the general welfare.²⁴ Following suit, Congress has since consistently used its spending power to enact education-based legislation to provide for the general welfare.²⁵ Thus, for the founders, education was a core federal principle that they envisioned the federal government would further protect in order to provide for the general welfare of the Republic.

Madison and Pinckney’s joint motion to insert a provision allowing Congress to establish a national university came at the culmination of a rigorous and concerted effort by many of the founders to not only establish a national university, but also to secure educational rights for children on a widespread scale. Since the 1780s, the founders worked diligently to create institutions of education in order to collect and convey knowledge.

Benjamin Franklin’s views and politics around education are essential to understanding the Constitutional dimensions of the right to education.²⁶ Because of his past as a printer who ascended from rags to riches, Franklin inspired entrepreneurs who were emigrating to, and seeking to prosper in, North American culture, making his beliefs the most closely identifiable with those of post-revolutionary people.²⁷ Indeed, he has been proclaimed a “spokesman” of the new American middle-class.²⁸ Franklin observed that “the good education of youth has been esteemed by wise men in all ages, as the surest foundation of the happiness both of private families and commonwealth.”²⁹ Franklin believed that the connection between education and the nation’s identity, especially in its youth, was evidenced by the necessity of establishing a firm national economic base because, “with young counties as with young men, you must curb their fancy to strengthen their judgment . . . thus poetry, painting, music (and the stage as their embodiment), are all necessary and proper qualifications of a refined state of society.”³⁰ Thus, for Franklin, education was the means by which natural leaders would develop, as opposed to fabricated aristocracies,³¹ a principle eerily similar to Jefferson’s views that natural aristocracies are tied to the commonwealth and happiness

of the nation by serving as a necessary catalyst for creating future leaders who could exercise proper judgment to guide the young nation to prosperity. Those leaders could not attain such superior judgment by happenstance, as Franklin's philosophy was premised on the idea that one's personality is largely shaped by one's environment. Thus, "[n]othing [was] more important for the public weal, than to form and train up youth in wisdom and virtue." Indeed Franklin exalted education over riches and arms, whose utility an uneducated person could only use to create destruction,³² an especially dangerous circumstance for a new nation because "it is easier to educate youth than to cure adults."³³

But Franklin's educational philosophy was not by any means limited to ensuring the existence of strong leaders who could exercise strong judgment to shape the nation. Rather, Franklin felt the nation would deteriorate if it failed to educate every citizen, as the expanding colonies needed skilled craftsmen, technicians, businessmen, and agriculturalists.³⁴ Thus, Franklin, likely influenced by his own family's inability to afford the high cost of education,³⁵ concentrated much of his effort on instituting education programs for poor students by sending graduates to farm areas to teach children reading, writing, arithmetic, and grammar.³⁶ Like Benjamin Rush, he firmly held to the minority belief that every level of society, including women and Black folks, should achieve the same level of education as white men.³⁷

Most notable for the purposes of this article is Franklin's emphasis on basic literacy education. Franklin was harshly critical of children's reading and language skills, commenting that "[o]ur boys read as parrots speak, knowing little or nothing of the meaning."³⁸ Thus many of Franklin's proposals on education sought to change the way language and writing was structured, in order to reflect how children themselves understood language.³⁹ For example, Franklin critiqued the English alphabet for its phonetic anomalies and, in response, proposed spelling reforms.⁴⁰ His proposal for an English School further emphasized basic studies in grammar, rhetoric, and logic.⁴¹ Franklin's belief that education was intrinsic to the survival of the Republic thus served as a key insight into not only the founders' but also the people's belief in the need for a universal, basic education.

While Benjamin Rush also urged the need for basic education by vigorously campaigning for a national university, free postage for newspapers, and the education of women, his efforts arose from a different concern than Franklin's: a fear of chaos. For Rush, each individual was naturally wild, "taken from the woods . . . never happy in his natural state, till he returns to them again."⁴² Education was thus indispensable to the process of shaping individuals' intellect and integrating them into civilized society where only the construct of government and institutions of education would be able to prevent them

from reverting back to their natural state, where they would be more likely to commit heinous crimes.⁴³ By educating the citizenry, man could “produce such a change in his moral character as shall raise him . . . to the likeness of God himself. Whereby only through the construct of a strong government and education system would a republic have the fortitude to combat the inequities of man.”⁴⁴ Thus, Rush held the idea that educating the commonwealth was necessary to preventing the natural state of deprivation, which society could overcome only by educating the citizenry; only through education could we produce leaders capable of protecting fundamental rights.⁴⁵

Rush therefore advocated for universal education based on his belief that all citizens should be able to exercise their basic rights. Education is fuel for the “republican machine,” necessary “to establish a government to protect the rights of property, [] to establish schools which should encourage the virtue of its care,”⁴⁶ and to “insure that democracy is ruled by an ‘elite drawn from the whole,’” an idea in complete agreement with the Jeffersonian principle of natural vs. artificial aristocracy. For Rush, “[f]reedom can exist only in the society of knowledge. Without learning men are incapable of knowing their rights, and where learning is confined to a few people, liberty can be neither equal nor universal.”⁴⁷

On a more practical level, Rush desired even more than a basic education guaranteed to all children. He envisioned a universal, low-cost education system that would satisfy children’s academic and non-academic needs⁴⁸ and in which taxes to support the schools would be equally levied.⁴⁹ Most importantly, Rush touted literacy instruction as central to a basic education, arguing that children should focus solely on mastering English literacy skills for the first eight years of their education⁵⁰ and that parents could request that their children study different languages.⁵¹ Furthermore, Rush believed “unreservedly” that the education system needed to accommodate children’s innocent nature by hiring teachers who treat children gently and with familiarity, rather than institute corporal punishment.⁵² Indeed, educating the citizenry was so fundamental for Rush that he, like Franklin, emphasized the necessity of educating both women and Black folks at a time when those social groups lacked the most fundamental of rights.⁵³ For him, young women should read and write English well and be proficient in bookkeeping, arithmetic, geography, history, and religion, as “[i]t was undoubtedly the consequences of barbarism that depressed ‘the delicate female . . . far below the dignity of her rank.’”⁵⁴ Black folks, on the other hand, should also be taught to read and write and be provided with additional education to “maintain themselves.”⁵⁵ Rush’s educational goals expressed the ambitions of a nation obsessed with education where even the lowest levels of society were expected to attain knowledge for its survival.

Rush emphatically campaigned to carry out his educational vision. He devoted thirty years of his life to establishing and advancing the fortunes of Dickinson College, even against enormous political opposition. His beliefs were never lost among his colleagues, both domestic and abroad. Rush repeatedly urged eminent British scholars writing about the young republic to highlight his efforts to establish compulsory elementary education, to train competent schoolmasters, to establish colleges in each state, and his efforts to found a national university that would specialize in politics and international law.⁵⁶ Rush's influence is still felt today, as all fifty states guarantee their children an education, either by statute or constitution. In fact, Rush's educational stance was so widely shared in its day that even conservative thinkers politically campaigned for universal education.

Unlike Rush, a Jeffersonian republican, Noah Webster was a Federalist who "veered toward extreme conservatism" and advocated for a strong federal government.⁵⁷ But despite their polarized political stances, Webster, Rush, and Franklin all agreed that education was a fundamental and distinct aspect of the nation's character. In furtherance of his beliefs, Webster went so far as to create the American Dictionary in order to remedy the inadequacies plaguing the learning of British English. As a linguist for forty years,⁵⁸ Webster wrote "Sketches of American Policy," a book that may have inspired the constitutional convention,⁵⁹ in which he "argued for a strong federal government supported by a constitutional and an educational system consonant with America's specific needs."⁶⁰ Webster, much like Benjamin Rush, believed that a system of education was needed to provide effective protection for people and property as well as to secure a strong representative democracy, since education "insures the stability of property and the perpetuation of freedom."⁶¹ Thus, as a publicist for the Constitution, Webster opposed a bill of rights, "declaring that an educated yeomanry needed no legislation to secure the rights of the populace."⁶²

Webster also believed that reading and writing skills were essential to one's successful development, emphasizing that only through learning to read and write could individuals provide for themselves.⁶³ In his *Fugitive Essays*, Webster asked that "each district provide children with at least four months of schooling annually." Furthermore, like Franklin and Rush, Webster was a strong proponent of education for women, especially an education that would teach them to speak and write elegantly, in addition to history, geography music, drawing, and dancing.⁶⁴

While outlining every founder's thoughts on education during the time of ratification is beyond the scope of this article, it is important to place their tireless dedication to spreading and conveying knowledge to children against the backdrop of the colonial system of education, the principles embodied

by the Northwest Ordinance, the Constitutional Convention debates around education, and the founders' own beliefs that education was key to the nation's maintenance and development. Situating the founders' sentiments reveals their shared belief that the right to education was so fundamental to the founding and structure of the nation that it needed no explicit mention in the Constitution.

II. The right to literacy is implicit in the concept of ordered liberty

While “history and tradition are the starting point” for examining whether a right is protected under our Constitution, it is “not in all cases the ending point of the substantive due process inquiry.”⁶⁵ The fundamental rights inquiry must be made with a focus on context:

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.⁶⁶

Thus, courts must decide whether a right is “‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if [it] were sacrificed’”⁶⁷ and “[w]hen new insight reveals discord between the Constitution’s central protections and a received legal structure, a claim to liberty must be addressed.”⁶⁸ Specifically, “[t]he fundamental liberties protected by this Clause . . . extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”⁶⁹

The Supreme Court has repeatedly referenced the fundamental importance of acquiring a minimum level of basic reading and writing skills to the nation’s concept of ordered liberty and democracy. More specifically, it has explicitly stated that basic literacy skills are a prerequisite to the meaningful exercise of all other rights, mainly the fundamental rights to free speech, to vote,⁷⁰ access justice, and to exercise choices central to all of the imports for the dignity and autonomy of the person.⁷¹

III. Literacy is preservative of all other rights because it is an indispensable tool for the development of children’s fundamental capabilities

The Supreme Court has maintained that some minimal quantum of education is preservative of all other rights and that literacy is at the core of that minimal education. In *Plyler v. Doe*, the Court invalidated a Texas statute that completely deprived children of an education,⁷² reasoning that the *total deprivation* would place an insurmountable burden on children.⁷³ But in discussing that burden, the Court emphasized the fundamental nature and importance only of basic *literacy* skills and the troubling consequences flowing from depriving children of those skills:

The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.⁷⁴

Thus, the *Plyler* Court implicitly identified deprivation of basic literacy skills as the line below which states could not fall without officially, and fully, depriving children of their education.⁷⁵ This recognition of the fundamental nature of basic reading and writing skills rested upon the fact that illiterate children lack not only important basic capabilities, but even the tools to begin developing those capabilities.⁷⁶ The opinion expressed the Court's concern that illiterate children are socially, culturally, and economically desolate. The Court stressed that "[t]o be faced with such an "unreasonable obstacle[] to advancement on the basis of individual merit . . . would pose[] an affront to one of the goals" of our system of ordered liberty, and deny children "the means to absorb the values and skill[s] upon which our social order rests."⁷⁷ Thus, for the Court, children deprived of the right to learn to read and write have no freedom or control over their lives. Without the basic skills necessary for almost all important human functions, without the capabilities that are the "defining characteristic of our species,"⁷⁸ such individuals become part of an "underclass [that] presents [the] most difficult problems for a Nation that prides itself on adherence to principles of equality under law."⁷⁹

But the *Plyler* Court was certainly not the first to emphasize the fundamental nature of basic education and its implicit role in the concept of ordered liberty. The Supreme Court stated in *Wisconsin v. Yoder* that "some degree of education is necessary to prepare citizens to *participate effectively and intelligently* in our open political system if we are to *preserve freedom and independence*."⁸⁰ The education system, the Court reasoned, attempts "to nurture and develop the human potential of . . . children . . . to expand their knowledge, broaden their responsibilities, kindle their imagination, foster a spirit of free inquiry, and increase their human understanding and tolerance."⁸¹ This language exemplified a legal understanding that literacy is a fundamental tool that provides the "formative structure" for the development of children's basic and indispensable capabilities.⁸² Following the same line of reasoning, the *Brown* Court premised its holding on the understanding that no government interest could be so compelling as to justify depriving select children of a quality education because education is integral to "awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."⁸³

A. The *Plyler* Court's conclusions are supported by research showing that illiteracy disrupts children's cognitive functioning

Studies show that when individuals fail to acquire basic literacy skills their cognitive functioning, brain development, motor functions, calculation and number processing, language skills, memory, reading comprehension, and their overall ability to grasp new concepts, become impaired.⁸⁴ With respect to cognitive functioning, because illiterate individuals receive less practice in reading, their performance is significantly worse than their literate counterparts in text processing, writing, arithmetic, and orientation to time.⁸⁵ Furthermore, “[the] failure to learn to read and write significantly burdens one’s visual perception, logical reasoning, remembering strategies, vocabulary development, phonological processing, and working memory.”⁸⁶ Even more troubling are studies showing a positive correlation between poor education and the odds of a clinical dementia diagnosis⁸⁷ and aphasia.⁸⁸ Language skills have also been shown to be diminished in illiterate individuals as a result of different information processing strategies. On average, illiterate individuals’ letter fluency—the ability to recognize letters, as opposed to reading—is only three to four words per minute on letter fluency tests,⁸⁹ while their metalinguistic skills⁹⁰ are severely underdeveloped because these children lose opportunities to rehearse language skills in the right contexts.⁹¹ Illiterate individuals also have substantially diminished complex motor skills, as evidenced by tests for apraxia, a motor disorder caused by damage to the brain, which show that illiteracy causes difficulty in “carrying out movements of the face on demand,” using communicative gestures, finger movements, meaningless movements, and “coordinated movements with both hands and motor impersistence tasks.”⁹²

Although most literacy studies have been conducted on illiterate adults, one groundbreaking study demonstrated that illiterate children already exhibit these debilitating symptoms. Illiterate children underperform in constructional abilities,⁹³ verbal memory coding and delayed recall,⁹⁴ visual memory coding and delayed recall,⁹⁵ visual perception, auditory perception, oral language, metalinguistic awareness,⁹⁶ calculation, and spatial abilities.⁹⁷ Furthermore, while metalinguistic awareness task performance⁹⁸ improves with age in literate children, it does not in illiterate children.⁹⁹ Illiterate children also score significantly below their literate counterparts in verbal fluency,¹⁰⁰ semantic verbal fluency,¹⁰¹ phonemic verbal fluency,¹⁰² and arithmetic problems, “suggesting that the differences in the development of executive functions between these two populations are already evident in childhood.”¹⁰³

It can hardly be denied then, that children who fail to acquire basic literacy skills face a daunting and exhausting struggle at a critical point in their lives. Not only has their school and community failed to provide them with the

minimal guidance needed to navigate the education system, but they have deprived them of skills indispensable for facing the basic economic, political, health-care, and intimate issues that will pervade their lives.

B. Illiteracy places an insurmountable burden on children's ability to thrive

Research shows that adults who fail to acquire basic literacy skills face insurmountable obstacles in their path to maintaining economic sustenance, mobility, and adequate health. This research, together with the above cited studies showing that illiteracy impairs individuals' cognitive functioning, supports the *Plyler* Court's conclusion that states denying children the opportunity to acquire basic literacy skills reproduce "[t]he existence of such an underclass" that it presents "significant social costs borne by our Nation" and "eliminates rights upon which our social order rests."¹⁰⁴

A stronger relationship exists between poor literacy skills and "lower incomes, lower status employment, and a range of other challenges"¹⁰⁵ than other more traditional measures,¹⁰⁶ and that relationship can be characterized in two ways. First, literacy is directly related to individual income by way of increasing capabilities and by serving as an integral aspect of personal liberty and autonomy.¹⁰⁷ In an age of continuing technological advancement,¹⁰⁸ basic literacy skills are extremely important because many employers continue to seek more skilled workers. This is especially true in a knowledge-based economy, in which employees must be able to "work productively and creatively in teams, to engage in technical and systems thinking, to manipulate abstract concepts and symbols," and to "read a range of printed, electronic and visual texts; master the new communication technologies via spoken and written language; locate, manage, evaluate and use information or knowledge; and engage critically with media and other text."¹⁰⁹ Employees must match that demand by gaining qualifications that "signal[] those skills to the labor market."¹¹⁰ But the failure to become literate diminishes the capabilities that individuals develop, which in turn diminishes their ability to signal qualifications to employers.¹¹¹ Thus, literacy is a "fundamental resource[]" for economic opportunity.¹¹² Quantitative studies also support this conclusion, showing that the "initial average level of schooling is strongly correlated with [economic] growth."¹¹³ Literacy capabilities are also "strongly associated with higher personal income and the related social benefits."¹¹⁴ For example, the lifetime earning of males with a bachelor's degree was 96 percent higher than their peers with only a high school diploma.¹¹⁵ This trend, the researchers suggest, is likely to entrench social divisions if not remedied,¹¹⁶ further contributing to the existence of an "underclass" of illiterate individuals. The Supreme Court has acknowledged this relationship between poor education and economic deprivation reasoning that "[t]he failure to provide education

to poor urban children perpetuates a vicious cycle of poverty, dependence, criminality, and alienation that continues for the remainder of their lives.”¹¹⁷ Thus, literacy operates at a fundamental level: it is indispensable to the development of important capabilities, which opens up opportunities for individuals to attain some means of sustenance and eliminates “obstacle(s) ... to individual achievement.”¹¹⁸

Facing an insurmountable obstacle to attaining stable employment and sustenance, illiterate individuals are more likely to turn to criminal behavior that further locks them into and perpetuates an “underclass” of individuals. Numerous studies have found a direct correlation between lower-educational achievement—and more specifically, illiteracy—and increased arrest and incarceration rates.¹¹⁹ Thus, 85 percent of all juveniles and 60 percent of all incarcerated individuals are functionally illiterate.¹²⁰ And because punishment serves neither a remedial function nor assists in carrying out rehabilitation, illiterate individuals are trapped into desolate lives of poverty which force them to resort to criminal behavior. Incarcerated individuals have a 54 percent greater chance of returning to prison if they fail to receive literacy assistance.¹²¹ And when children engage with the juvenile justice system, they are “more likely to experience stress-related illnesses such as poor birth outcomes, adult chronic disease and obesity, mental health disorders, heart disease, and substance abuse, in addition to psychiatric problems, suicide attempts, and increased HIV, Hepatitis C, and tuberculosis.”¹²² Poor health outcomes—the effects of which will be discussed later in this subsection—substantially detract from students’ academic achievement and thereby re-entrench the pattern whereby they are trapped in poverty and forced to engage in criminal activity for sustenance.¹²³

The second way that literacy is essential to economic performance is that when children acquire basic literacy skills, our nation’s productivity is increased and insulated from significant socioeconomic effects.¹²⁴ Studies show that measures of literacy have a “significant and positive effect on levels of per capita GDP and productivity and they do a better job than measures of educational attainment in predicting economic growth.”¹²⁵ There are multiple reasons for this strong correlation. One explanation is that education “encourages investment in capital equipment,” research, and development because highly educated workers enable innovation and adoption of new technology.¹²⁶ Another reason is that people with better literacy skills move on to tertiary education and better contribute to the economy.¹²⁷ Whatever the reasons are, however, it is clear that depriving children of the opportunity to acquire basic literacy skills imposes significant costs on the nation and further contributes to the existence of an underclass of illiterate individuals who are unable to change their “station in life.”¹²⁸

Research has also demonstrated a strong connection between higher literacy capabilities and higher levels of health and healthy behavior.¹²⁹ A number of factors explain this correlation. The ability to read helps patients understand information provided in a health-care context and independently act on that information.¹³⁰ Literate patients are also more likely to manage their health effectively because they can research health conditions and gain access to a variety of sources of health information and better interpret quantitative health information.¹³¹ Numerous studies support these conclusions: in general terms, people with stronger numeracy skills at the age of 33 have a six percent lower probability of long-term health problems, which is important in the context of literacy because literacy skills are a prerequisite for improving numeracy skills.¹³² Another study suggests that “people with better qualifications are more likely to have healthy lifestyles, [such as being] fit and slimmer.”¹³³ Further, people enrolled in adult learning get more cervical smear tests, which could prevent over 100 cancers for every 100,000 women, and they also exercise more and “display greater awareness of health issues than others of their age.”¹³⁴ This is supported by another study showing a causal relation between education and “self-reported health” and a negative relation to the number of chronic conditions.¹³⁵ That result followed even after controlling for health insurance and income.¹³⁶ Studies also demonstrate that illiteracy has a negative effect on mental health. For example, basic reading and arithmetic skills have been shown to lead to lower levels of depression.¹³⁷ Thus, it is clear that illiterate people lack the resources to educate themselves about necessary health choices and resources, which places them at a significant disadvantage with respect to their literate counterparts. This poses an alarming threat to individual liberty because health-care decisions involve “the most intimate and personal choices a person may make in a lifetime,” and the ability to make important health decisions is “central to personal ... autonomy” and individual liberty.¹³⁸ It would defy rational thought to hold otherwise.

Children who have failed to acquire basic literacy skills eventually become parents who are unable to help their children acquire literacy skills, ultimately reproducing an illiterate social underclass. One reason for the connection between childhood illiteracy and a social underclass is grounded in family structure: individuals with poor literacy skills also tend to be those who have experienced homelessness, are single parents, have large families, and have children who do not view reading as pleasurable.¹³⁹ Thus, those parents likely lack the financial resources and other support structures, such as a second parent, to help their children acquire and develop literacy skills. A second reason is that families with poor literacy skills are less likely to be able to create an atmosphere that “lead[s] to effective learning of school-like literacy

practices for all the members of the family.¹⁴⁰ Thus, in those circumstances, children may be unmotivated to acquire literacy skills at school because they are not strongly valued at home.¹⁴¹ A third reason is that illiterate children have lower self-confidence, self-esteem, and self-efficacy, which creates a feedback loop wherein those children are unable to set goals in any aspect of their lives, navigate their educational or employment environments, and acquire literacy and other necessary skills.¹⁴² Quantitative studies support the conclusion that children of illiterate parents possess poorer literacy, educational, and other life skills. The Adult Literacy and Basic Skills Unit “found that children of parents who reported having literacy difficulties were around twice as likely as others to be in the lowest quartile nationally on reading test scores.”¹⁴³ Another study shows that “children of parents with no qualifications are already up to a year behind the sons and daughters of graduates by the age of three.”¹⁴⁴

In totality, research strongly supports the *Plyler* Court’s conclusion that depriving children of basic literacy has far-reaching and debilitating consequences each and every day of their lives, not only in the form of individual and collective economic instability and poor health, but also in the reproduction of an underclass of illiterate individuals, which presents “most difficult problems for [the] Nation.”¹⁴⁵

C. Literacy is especially preservative of the rights to free expression and political franchise.

First Amendment rights are “so important to the preservation of the freedom in a democratic society”¹⁴⁶ that they constitute “the very foundation of constitutional government” and “maintain the security of the Republic.”¹⁴⁷ In *Reynolds v. Sims*, and more recently in *Bush v. Gore*, the Court ruled equal access to the franchise to be fundamental “because [it is] preservative of other basic civil and political rights”¹⁴⁸

The Supreme Court has repeatedly emphasized that education is indispensable to the exercise of free expression and political franchise, reasoning that “some degree of education is necessary to *prepare citizens to participate effectively and intelligently in our open political system* if we are to preserve freedom and independence.”¹⁴⁹ The Court believed—decades before the federal government emphasized the importance of education with the passage of the Elementary and Secondary Education Act—that “education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the *importance of education to our democratic society*.”¹⁵⁰ Indeed, “[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools”¹⁵¹ because the “[t]he classroom is peculiarly the ‘marketplace of ideas.’”¹⁵² The most

fundamental role of education is to give children the ability to read and write so as to prepare them to contribute to the marketplace of ideas that are the lifeblood of freedom of thought, expression, and belief. Education therefore enables them to “study, to engage in discussions and exchange views with other students, and, in general to learn [their] profession.”¹⁵³ And because literacy is essential for citizens to be informed of “election issues and governmental affairs,”¹⁵⁴ “public schools [inculcate] fundamental values necessary to the maintenance of a democratic political system”¹⁵⁵ and “*preserve* [our] democratic system of government”¹⁵⁶ by “prepar[ing] students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members.”¹⁵⁷

But to maintain some aura of First Amendment freedom in our democratic system and especially in our schools, children must acquire sufficient literacy skills so as to “[put] the decision as to what views shall be voiced largely into the hands of each of us ... [because] no other approach would comport with the premise of individual dignity and choice upon which our political system rests.”¹⁵⁸ Furthermore, the Court has clearly established that “the Constitution protects the right to receive information and ideas,”¹⁵⁹ especially in the education context.¹⁶⁰ In fact, in its First Amendment jurisprudence, the Supreme Court has presumed that citizens possess basic literacy skills as a prerequisite to holding that the government has not deprived them of their first amendment rights. Thus, in *FCC v. Pacifica Foundation*, by a vote of 5–4, the Court rejected the argument that an FCC regulation punishing broadcasters for use of expletives over radio transmissions would burden listeners’ First Amendment rights because “[t]he Commission’s holding does not prevent willing adults from purchasing [George] Carlin’s record, from attending his performances, or indeed, *from reading the transcript reprinted as an appendix to the Court’s opinion.*”¹⁶¹

However, as research shows, illiterate children have severely underdeveloped cognitive, memory, visual, auditory, and oral language skills. Children who grow up in an environment with “low levels of engagement with education lack the cultural capital necessary to navigate the educational system.”¹⁶² Literacy also gives children “both status and identity as it [becomes] the medium of shared experience; it facilitate[s] the temporal integration of their social histories as the highly valued artefacts [sic] of family life [become] the prized commodity of the schools.”¹⁶³ Thus, illiterate children face a struggle at the inception of the development of their political, artistic, and personal thoughts and expression and are consequently unlikely to overcome those obstacles in the educational system later on.

Moreover, without literacy, children lose the opportunity to acquire valuable political information. As technology exponentially advances each year

and the world progresses further into the digital and information age, literacy becomes ever more essential to the exercise of free speech and political franchise. In 2011, Americans received most of their news about national and international issues from the television and internet, with newspapers coming in third and the radio fourth.¹⁶⁴ But among 18–29 year-olds, 65 percent of people received their news from the internet while only 15 percent used the radio.¹⁶⁵ Another study shows that in 2013, almost 6 out of 10 children, ages 3 to 17, used the Internet at home, nearly 6 times as many as in 1997.¹⁶⁶ Justice Thomas acknowledged this trend in *Federal Communications Commission v. Fox Television stations, Inc.*, noting that “[t]raditional broadcast television and radio are no longer the ‘uniquely pervasive’ media forms they once were. For most consumers, traditional broadcast media programming is now bundled with cable or satellite services. Broadcast and other video programming is also widely available over the Internet.”¹⁶⁷ This trend is important in the context of the Supreme Court’s 1997 holding in *Reno v. American Civil Liberties Union* that speech on the Internet is equally worthy of the First Amendment’s historical protections. In *Reno*, the Court emphasized the “phenomenal” growth of the Internet and its importance to “encouraging freedom of expression in a democratic society.”¹⁶⁸ But since then, the Internet has evolved even more from a forum where the “most relevant” forms of communication were “electronic mail,” “automatic mailing list services,” “newsgroups,” and “chat rooms,”¹⁶⁹ to one where participants share and receive countless political and personal beliefs in the form of news articles, videos, music, pictures, memes (new-age political cartoons), and blogs (informal and personalized websites), among others. Other internet resources such as social networking websites (Facebook and Twitter), video-sharing websites (YouTube), and artistic and literary programs (iMovie, MovieMaker, Garageband, Kindle, and iTunes), put these forms of expression at children’s fingertips at earlier ages and make them indispensable to expression, communication, political knowledge and forming “relationships between people and relationships between people and organizations”¹⁷⁰ in the twenty-first century.

But because children lacking the most basic literacy skills cannot possibly access even newspapers because they cannot read, understand basic to intermediate vocabulary, or easily grasp new concepts, it is irrefutable that they lack the skills essential to access Internet resources for their “self-education and individual enrichment.”¹⁷¹ The Internet does not simply involve “traditional print literacy transferred to on-line environments,” but requires “more sophisticated reading and writing strategies” and involves “unique processes and skills and competencies for participation in the new times.”¹⁷² Because the Internet features both conventional and unconventional text, such as hyperlinks and hypermedia, children must acquire “skills and

abilities beyond those required for the comprehension of conventional, linear print.”¹⁷³ Those skills include “rapidly locating the most useful information within complex ICT networks such as the Internet;” “reading and critically evaluating that information for validity and utility;” “writing effectively with word processing software;” and “communicating information clearly to others with e-mail.”¹⁷⁴ And because thousands of new websites, articles, and social media posts are created every day,¹⁷⁵ illiterate children fall further behind their counterparts each day. Furthermore, because illiterate children fail to develop their vocabulary through reading and writing, have significantly diminished cognitive, memory, visual, auditory, and oral language skills,¹⁷⁶ it is quite unlikely that turning to radio or televised news sources will in any way compensate for their already diminished political awareness so that they can form and articulate even basic political viewpoints. Even more, illiterate students cannot “explore the unknown, and discover areas of interest and thought not covered by the prescribed curriculum.”¹⁷⁷

Beyond protecting one’s right to express oneself and acquire valuable political information, the First Amendment also protects individuals’ ability to define their identity.¹⁷⁸ But in order to define their personal identity, children need the tools necessary to acquire information, and to form and express political thought. While the constitution may not guarantee children the most effective political speech or exercise of political franchise, schools that deprive children of the opportunity to acquire basic literacy skills burden them on a more fundamental level. These children, especially the youngest students, face a significant, if not insurmountable, impediment to their development at an age when their language acquisition should be at its height.¹⁷⁹ To hold that the Constitution guarantees a right to acquire basic literacy skills, then, is not to assert that it guarantees the most effective speech or franchise, it is to hold that it protects against their complete deterioration.

D. Literacy is preservative of the right of access to justice.

The Due Process Clause of the Fourteenth Amendment guarantees certain protections so that individuals can access the justice system. In *Douglas v. California*, the Supreme Court, relying on the Equal Protection Clause and on Procedural Due Process, found that a Fourteenth Amendment violation occurs when the rich have access to a meaningful appeal, while indigents have only a “meaningless ritual.”¹⁸⁰

When children—especially poor children and children of color—are deprived of the right to acquire basic literacy, certain rights the Court has identified as essential components of fair process are reduced to “meaningless rituals” and constructively denied. With impaired reading, writing, cognitive, and oral language skills, illiterate individuals cannot possibly make a claim

or defend themselves in civil or criminal court. The Court acknowledged this in *Reece v. Georgia*, reasoning that it would be “utterly unrealistic” for even a “semi-literate” defendant “of low mentality” “to raise his objection . . . before indictment” without the assistance of counsel and that it would violate his due process rights not to provide it.¹⁸¹ Indeed, even if illiterate individuals were able to acquire counsel—which would be nearly impossible outside of the criminal context as illiterate individuals are significantly less likely to be able to afford a lawyer—they would be unable to read and understand a contract with their lawyer or to effectively communicate with their lawyer about the case. Thus, illiterate individuals are likely to be left utterly helpless when seeking to remedy a legal wrong, which is especially troubling when they seek to vindicate their violated constitutional rights.

Illiteracy also serves as a bar to justice after criminal prosecution. In *Lewis v. Casey*, the Supreme Court—even while reversing the District Court’s system-wide injunction requiring remedying inadequate legal assistance programs in Arizona prisons—distinguished the case of illiterate inmates, whom the Court found were actually injured by the circumstances. The prison, Justice Scalia explained, would have had to provide “special services” to the illiterate prisoners in order to protect the constitutional guarantee of adequate access to courts.¹⁸² Most significantly, Scalia concluded by emphasizing that illiteracy is a “particular disability” in society.¹⁸³

Moreover, besides showing that literacy is critical to protecting all of the essential rights within the ambit of the Due Process Clause, the access to justice cases provide an analogy to a scenario in which the Court has identified a threshold, a quantum of a right, below which the right has been functionally denied. In a potential lawsuit, plaintiffs may argue that an education that fails to provide them with even basic literacy is a functional denial of any education whatsoever. Indeed, *Rodriguez* left open the possibility that states could unconstitutionally fail to provide a minimum quantum of education.¹⁸⁴

E. Depriving children of the opportunity to acquire basic literacy skills deprives them of their right to equal dignity.

Recent Supreme Court precedent has previewed the availability of a new form of constitutional analysis: “substantive due process flecked with equality concerns.”¹⁸⁵ Under this doctrine, advanced primarily by Justice Kennedy, the “Equal Protection Clause can help to identify and correct inequalities . . . vindicating precepts of liberty and equality under the Constitution.”¹⁸⁶ “[R]ights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other. . . . This interrelation of the two principles furthers our understanding of what freedom is

and must become.”¹⁸⁷ Thus, in *M.L.B. v. S.L.J.* the Court “invalidated under due process and equal protection principles a statute requiring indigent mothers to pay a fee in order to appeal the termination of their parental rights.”¹⁸⁸ In *Eisenstadt v. Baird*, the court “invoked both principles to invalidate a prohibition on distribution of contraceptives to unmarried persons but not married persons.”¹⁸⁹ In *Skinner v. Oklahoma*, the court invalidated “under both principles a law that allowed sterilization of habitual criminals.”¹⁹⁰ And in *Obergefell v. Hodges*, the court invalidated under both principles state laws barring same-sex couples from marrying.¹⁹¹

While the exact definition of “dignity” remains the subject of scholarly debate,¹⁹² it is clear that it is closely related with social status and esteem, autonomy, personal choice, and freedom of identity, thought and expression, privileges and responsibilities, and stability.

In the context of a potential lawsuit, an argument utilizing this framework would assert that depriving this group of students of literacy deprives them of the dignity that the Constitution promises to each individual. To prove this argument, the plaintiffs would have to show: (1) that the Constitution guarantees equal access to dignity; (2) that literacy is entwined with dignity; and (3) that state action grants this dignity to some, while denying it to others.

1. The Supreme Court’s precedents discuss the right to equal dignity

The Supreme Court has discussed the constitutional right to equal dignity in five contexts: the right to social status and esteem; the right to individual autonomy and personal choice; the freedom to define one’s identity, thought, expression, and existence; the right to possess privileges and responsibilities; and the right to lead a somewhat stable life.

The right to social status and esteem is a common thread in the Supreme Court’s equal dignity jurisprudence. More specifically, the right to live free from stigma has deep roots in the Supreme Court’s constitutional jurisprudence, beginning with libel laws that eroded First Amendment freedoms. Thus, “the legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood” and the “individual’s right to the protection of his good name ‘reflects no more than our *basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.*”¹⁹³

The right to social status and esteem has also been historically encompassed by the liberty clause of the Fourteenth Amendment, even before the Court developed the equal dignity doctrine, in the form of the stigma plus doctrine. The Supreme Court in *Wisconsin v. Constantineau* recognized that “[w]here a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him,” and that loss of reputation

is “coupled with some other tangible element” there is a loss of a protected liberty interest.¹⁹⁴

The Court expanded the role of social status in its dignity jurisprudence in *Lawrence*, where it reasoned that a criminal sodomy ban imposed stigma on the defendants who would “bear on their record the history of their criminal convictions.”¹⁹⁵ Justice O’Connor’s concurring opinion in that 5-4 decision emphasized that “[t]he Texas sodomy statute subject[ed] homosexuals to ‘a lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass . . . cannot be reconciled with’ the Equal Protection Clause.” In the same vein, the Court in *U.S. v. Windsor* emphasized that it was a statute’s imposition of disadvantages and separate status that cast “stigma upon all who enter into same-sex marriages.”¹⁹⁶ Finally, in its most recent discussion of equal dignity, the *Obergefell* Court emphasized that dignity means being able to lead “more open and public lives,” and to have a “shift in public attitude toward greater tolerance.”¹⁹⁷ Thus, dignity is most closely intertwined with the concept that each individual should be free from disadvantages that cast stigma on them by way of creating a separate status that disrupts their public lives. One should also note that these references to dignity as social status significantly overlap with the concept of dignity as personal autonomy.

Equal dignity also encompasses “the most intimate and personal choices a person may make in a lifetime, choices central to *personal dignity* and autonomy.”¹⁹⁸ That means that individuals must be left alone in “their own private lives and still retain their dignity as free persons.”¹⁹⁹ In *Obergefell*, the Court expanded the role of the right to individual choice in the equal dignity doctrine by emphasizing the future implications of those choices, reasoning that “choices about marriage shape an *individual’s destiny*,” and that “there is dignity in the bond between two men or two women who seek to marry in their *autonomy to make such profound choices*.”²⁰⁰

Dignity encompasses not only those intimate and personal choices, but also those political choices that are integral to our democratic system. Thus, in *McNabb v. U.S.*, the Court stated that in a “democratic society . . . respect for the dignity of man is central.”²⁰¹ That theme was vital to the holding in *Romer v. Evans*, in which the Court reasoned that an amendment to the Colorado Constitution that prohibited all legislative, executive, or judicial action designed to protect gay and lesbian people from discrimination violated the Equal Protection Clause because it “infringed the fundamental right of gays and lesbians to participate in the political process.”²⁰²

There can be no doubt that the preservation of the right to define one’s thought, expression, existence and identity, is closely intertwined with the

right to individual and political autonomy. To be sure, such values served as the driving force in the Supreme Court's jurisprudence in the same-sex intimacy and marriage cases.²⁰³ In *Lawrence*, the Court held that choices central to "personal dignity and autonomy," are secured by the right to "define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."²⁰⁴ Indeed, the Court held that liberty actually "presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."²⁰⁵ According to the Court's logic, then, when individuals are left alone to control these characteristics, they are able to define their own identity and make a full claim to dignity.²⁰⁶ Thus, in *Obergefell*, the Court reasoned that when individuals are granted the full right to marry, then "two persons together can find other freedoms, such as expression, intimacy, and spirituality."²⁰⁷

The right to secure privileges and responsibilities is central to equal dignity. Thus, in *Obergefell* and *Windsor*, the Court extended the right to receive marriage benefits from the state, reasoning that same-sex couples "seek [marriage] for themselves because of their respect – and need – for its privileges and responsibilities."²⁰⁸ The *Windsor* Court emphasized the significance of those responsibilities for "the definition and regulation of marriage [that] date[] back to the Nation's beginning" and the indignity that is cast upon the "hundreds of thousands of person" to whom they were withheld.²⁰⁹

Finally, the Supreme Court has recognized that dignity flows from the ability to lead a stable life. This theme was especially important in *Obergefell*, where the Court reasoned that same-sex couples who seek state recognition of their marriages "seek[] relief from the continuing uncertainty their unmarried status creates in their lives."²¹⁰ Most significant, however, was the Court's reference to same sex couples' children, where it reasoned that "without the recognition, *stability, and predictability* that marriage offers, children suffer the stigma of knowing their families are somehow lesser."²¹¹

Although Justice Kennedy might be unwilling to extend dignity outside of the same-sex marriage context, he is quite progressive on first amendment issues, as illustrated by his opinions in *Citizens United v. FEC*,²¹² which directly relate to political autonomy. This commitment might make him willing to extend dignity to the education context.

2. Depriving children of the right to receive basic literacy education deprives them of their dignity, as defined by the Supreme Court

The Supreme Court has made clear on multiple occasions that illiteracy is stigmatized in American society. In *Plyler*, the Court made clear that illiteracy "mark[s]" children with a lifelong stigma, explaining:

By depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority. . . . The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education within the framework of equality embodied in the EPC . . . Section 21.031 imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. *The stigma of illiteracy will mark them for the rest of their lives.*²¹³

The Court's discussion of the stigma fits neatly within the concept of dignity as social status. Because illiterate children will face insurmountable obstacles compared to their literate counterparts in cognitive functioning, economic mobility, healthy living, and political speech and expression,²¹⁴ they will enter an "underclass [that] presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law."²¹⁵

Moreover, children who are denied the opportunity to acquire literacy skills are deprived of the dignity that flows from personal and political autonomy. As discussed above, illiterate individuals are significantly more likely than their literate counterparts to have their autonomy completely eroded by their lack of education with respect to their chances of interacting with the juvenile and criminal justice systems, health-related behavior, development of their political viewpoints, free speech, and exercise of their political franchise. Thus, these children will be unable to effectively manage their health by researching health conditions and by interpreting and acting on essential health information. This information may be crucial to deeply intimate decisions, such as whether to receive an abortion,²¹⁶ receive or reject life-saving treatment to protect their dignity,²¹⁷ or choose between a risky yet life-saving treatment and a more modest or safer treatment, all of which "originate within the zone of conscience and belief."²¹⁸ Furthermore, because illiterate children will be unable to learn about basic political information due to their poorly developed reading, writing, and vocabulary skills, they will be unable to exercise informed political choices at the core of their right to free speech and political franchise. Thus, illiterate children will be closed off from the part of our democratic society that is so central to the dignity of every citizen.

Similarly, states that fail to teach children basic literacy skills deprive them of their dignity because they impede their ability to define their thoughts, expression, existence, and identity. Research shows that illiterate children have diminished cognitive abilities, which, in conjunction with their poor reading, writing, and vocabulary skills, impairs their cognition and their

verbal, memory, visual, auditory, and oral language skills that are so important to freedom of expression.²¹⁹ These impediments make it impossible for children to access basic political, literary, or scientific information through the Internet, television, newspapers, or even the radio, which will further burden their speech and expression. Without the proper tools, to define their own “concept of existence, of meaning, of the universe, and of the mystery of human life,”²²⁰ they will be deprived of autonomy to shape their identity and make a claim to basic dignity.

Finally, illiterate children are forced to live a life characterized by instability and uncertainty both in their educational, personal, and economic lives. Such children develop “a feeling of uncertainty.”²²¹ This conclusion is supported by studies showing that illiterate and poorly educated adults are more likely to face economic immobility, increased incarceration, significantly lower incomes, homelessness, and single parenthood.²²² Thus, these individuals will face uncertainty while trying to secure some means of sustenance for themselves and their family. Moreover, because these individuals will be less able than their literate counterparts to research and act on health information, they will face an uncertain future with respect to the fate of their health. The same analysis applies to these individuals’ general attitude, demeanor, and sentiments.

The Court has also acknowledged that deprivation of literacy was a tactic used to dehumanize slaves,²²³ and that literacy requirements have served as a means to discriminate against populations by barring them from voting.²²⁴

Moreover, the Court has identified the lasting effects of stigma on children, particularly on their ability to obtain a meaningful education. In *Brown v. Board of Education*, the Court, in barring school segregation on equal protection grounds, said that such a “sense of stigma and inferiority . . . affects the motivation of a child to learn.” “To separate them from others of similar age and qualifications,” the Court declared, “solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”²²⁵

IV. Holding that the right to basic literacy education is fundamental is not a slippery slope

In *San Antonio School Dist. v. Rodriguez*, the Supreme Court expressed hesitation in reaching the issue of whether education was a fundamental right. Most significant was the Court’s fear that deciding this issue would lead to a slippery slope resulting in a requirement to hold other positive rights as fundamental as well. The Court found it hard to distinguish the role of education from that of food, clothing, and shelter in deriving enjoyment from the benefits of the First Amendment.²²⁶

But the Court's fear in *Rodriguez* was unwarranted in two respects. First, it mischaracterized the nexus between food, clothing, and shelter and First Amendment rights by assuming those resources are just as preservative of that right. While it is inarguable that the child who has little to no access to food, clothing, and shelter is unlikely to ever have the opportunity to exercise her First Amendment rights because she would have lacked the proper environment to survive, the Supreme Court has never emphasized that food, clothing, and shelter are "necessary to *prepare citizens to participate effectively and intelligently in our open political system* if we are to preserve freedom and independence."²²⁷ Indeed, the nexus between education and exercise of First Amendment rights is much closer than that between food, clothing, and shelter and the exercise of such rights, because education directly inculcates one with the tools necessary to speak, read, write, communicate, and acquire basic knowledge.

Second, the *Rodriguez* Court assumed, without discussing, that education lacks the deep roots in this nation's history that would distinguish it from food, clothing, and shelter. As already argued, education had special countenance in this nation's colonial era, when the colonies sought to secure it for all children, especially indigent ones. It was exalted by our nation's founders as imperative to the maintenance of our republic and necessary for the maturity of the nation. Indeed, many of our founders focused their political stances and actions on securing education for all children, including black children and young girls. Finally, the right to education, derived from the Northwest Ordinance, was implicitly recognized and in need of no explicit mention in the Constitution. The founders regarded education as such a basic imperative for the nation that they could not fathom a successful nation that did not educate its citizenry.

V. How can students to successfully argue that they have not been provided with the minimal education guaranteed by the Constitution?

If a group of students were to launch a successful litigation against their school to secure literacy as a fundamental right, their school must, of course, fail to provide them with the minimum federal standard of education. That standard should be defined by four guidelines. First, it must be constrained by the Supreme Court's *Rodriguez* opinion holding that the Texas school-funding scheme did not deprive appellee students of a minimal standard of education. Second, it should be informed by the *Rodriguez* Court's discussion of essential elements of any public education. Third, because the founders envisioned that states would be able to protect individuals' fundamental right to literacy education, their insights into a minimum standard of education are important to articulating the federal educational standard. Thus, the minimum federal educational standard should also be informed by states'

constitutional and legislative standards for a minimum education. Finally, the standard should be informed by the latest research demonstrating which resources are essential to maintain an educational institution's capacity to teach students basic literacy skills.

The most important constraint on the articulation of a minimum standard of education is the Supreme Court's opinion in *Rodriguez*, where, by holding that a Texas school-funding scheme did not deprive appellee students of a minimum educational program, the Court identified a constitutionally adequate education that cannot be challenged as depriving students of a minimum standard of education. However, because the majority, concurring, and dissenting opinions failed to detail which educational programs the school district provided appellees, those facts must be gleaned from the appellees' and appellants' briefs and expert witness testimony.

The appellees (Plaintiff students) contended that that the Texas state-funding program failed to provide them with a minimum educational program, reasoning that the allocation to the low-income districts of \$356 in per pupil local, state, and federal funds²²⁸ (which equals \$1,938.19 today when adjusted for inflation),²²⁹ failed to "assure a district any particular number or quality of teachers."²³⁰ They further noted the defendant's failure to demonstrate what courses were offered in the schools, whether there were teaching aids and equipment, whether they offered extracurricular activities, such as music, drama, and art, how many hours of education they offered, and the quality of their physical plant and teaching facilities.²³¹ Based on this evidence, or lack thereof, the appellees' expert witnesses testified that the state failed to provide students with a minimum educational program.²³²

The appellants (the State of Texas), without introducing any formal evidence,²³³ argued that no deprivation of minimum education occurred because the state provided the following services or resources to students: twelve years of schooling,²³⁴ one classroom teacher for every twenty-five students, one special service teacher for every twenty classroom teachers, one principal for the first twenty classroom teachers and an additional principal for each additional thirty classroom teachers, one superintendent for school districts with at least one four-year high school, supervisors and counselors based on the number of classroom teachers, vocational teachers, professional personnel for special education, minimum salaries for teachers, funds toward operating costs beyond salaries at the rate of \$660 per teacher, allotments for student transportation, free textbooks for all public school children, media and service centers to make facilities and services available to schools in an area where it would be too costly for individual school districts to provide, and elaborate regulations with which schools must comply to be accredited.²³⁵

The appellees and appellants identified three essential characteristics of a school that, together, the Supreme Court, state constitutions, and the latest research demonstrate are essential to a minimum standard of education: the presence of a sufficient number of well-qualified teachers; adequate facilities conducive to learning; and an adequate curriculum. That each of these three elements is essential to a minimum standard of education is supported by the Supreme Court's subsequent opinions, state minimum educational standards, and the latest educational research. I will discuss each of the three characteristics in the following paragraphs.

Likely the most indispensable element of a minimum standard of education is the presence of a sufficient number of qualified teachers, as the Supreme Court has emphasized this feature the most. In *Ambach v. Norwick*,²³⁶ the Court stated that without teachers, students could hardly be expected to achieve their academic goals because teachers are “crucial to the continued good health of a democracy.”²³⁷ This is because teachers “play a critical part in developing students’ attitude toward government and understanding of the role of citizens”²³⁸ in society by serving as “role model[s] for [their] students, exerting a subtle but important influence over their perceptions and values”²³⁹ and influencing their attitudes “toward government, the political process, and a citizen’s social responsibility.”²⁴⁰ Thus, beyond highlighting teachers’ roles in imparting to students an education, the Court emphasized their importance in providing students the very tools the founders believed made education a fundamental right—those that are essential to the “continued good health of a democracy” and maintenance of the Republic. Moreover, the Court emphasized that this was true of *all* teachers, “not just those responsible for teaching the courses most directly related to government history, and civic duties”²⁴¹ because teachers are in “direct, day-to-day contact with students both in the classrooms and in the other varied activities of a modern school.”²⁴²

Even states whose constitutions offer the least educational protection emphasize the paramount significance of teachers. In both Montana and Ohio, for example, the state supreme courts have held that an adequate state education requires teachers.²⁴³ Oklahoma and West Virginia have gone beyond those protections by requiring “competent teachers.”²⁴⁴ The Ohio state supreme court has further emphasized that “it is virtually impossible for students to receive an adequate education with a student-teacher ratio of [more than thirty students per classroom teacher].”²⁴⁵ As of 2011, over thirty states have supported this conclusion by enacting legislation for class size reduction.²⁴⁶

Numerous studies support the conclusion that the presence of quality teachers is integral to students’ minimum academic achievement. These studies demonstrate that, within grade levels, “the single most dominant

factor affecting student academic gain is teacher effect.”²⁴⁷ Consistent with common sense, students placed with more qualified teachers have an “extreme advantage” in terms of academic achievement,²⁴⁸ with one study revealing that students score up to 50 percentile points higher in their classes when placed with better qualified teachers.²⁴⁹ That study further demonstrated that lower achieving students are the first to benefit from teacher effectiveness, while students of all achievement levels still achieve excellent gains.²⁵⁰ Most important for the purposes of this article are statistics providing substantial evidence that teaching experience significantly improves students’ vocabulary and reading,²⁵¹ which reinforces the conclusion that teachers are demonstrably imperative to providing students with a basic literacy education. Beyond academic outcomes, however, teachers also have “substantial influences” on behavioral outcomes, high school graduation, college attendance, earnings,²⁵² and absences.²⁵³

The ratio of teacher to students in a classroom has also been shown to substantially affect students’ academic performance by exerting pressure on teachers and students.²⁵⁴ With more students per classroom, the potential for distraction is greater, while in small classes teachers have more opportunities to “engage children and keep them on task.”²⁵⁵ This is especially true with relatively young students, such as four to five year olds, who are more likely to be disengaged when working on their own as opposed to working with teachers or peers.²⁵⁶ Similar results have been observed in secondary students, for whom an increase in class size is positively correlated with a decrease in on-task behavior.²⁵⁷ From a logical perspective, these results may be attributed to the fact that class size significantly affects the amount of teacher interactions with individual students directly concerning the substantive content of subject knowledge,²⁵⁸ the number of students requiring the teacher’s attention,²⁵⁹ and active interaction with the teacher at the primary and secondary levels.²⁶⁰ Furthermore, studies have shown that in smaller primary schools, teachers have more freedom to deal with and correct any negative behavior for low and medium attaining pupils.”²⁶¹ Thus, “when seen as a percentage of all observations, there was between two and three times more of these [negative] behaviors in smaller classes of 15 compared to larger classes of 30.”²⁶²

In conclusion, teachers are indispensable to a minimum standard of education because they guide children’s minds at a time when they are the most vulnerable to corruption, but also possess the highest potential for success. Teachers instill in children the tools to develop not only basic literacy skills but also the critical thinking skills they will use, as the founders envisioned, to shape and maintain the nation’s democratic future. Teachers shape our future leaders and, ultimately, the fate of our nation.

While teachers are the most integral part of a basic education, no public education system can be effective in teaching children basic literacy skills and democratic values without adequate facilities and resources.

The Supreme Court emphasized the necessity of providing students adequate school facilities in the *Brown v. Board of Education* line of cases. While *Brown* was premised on the idea that “separate but equal” facilities are inherently unequal because of the effect of racial classifications, desegregation remedies such as busing fell out of favor with the Court over time. Instead the Court instituted remedies to compensate for what it felt were more objective ramifications of racial segregation, rather than simply focusing on social stigma. Facilities, the Court concluded, are “the most important indicia of racially segregated school systems”²⁶³ and in order to ensure that students in majority Black schools received the same minimal standard of education as students in majority white schools, “simple corrective action [was] taken with regard to the maintenance of buildings and the distribution of equipment.”²⁶⁴ Thus, the Supreme Court explicitly identified adequate facilities as a necessary component for a minimal standard of equal education.

Various state constitutions underscore two key qualities that school facilities must embody in order to satisfy a minimum standard of education. First, school facilities must create a structural environment conducive to students’ ability to master the curriculum. The Arizona state constitution, for example, requires students be provided with “adequate capital facilities,”²⁶⁵ which means “facilities and equipment necessary and appropriate to enable students to master the educational goals set by the legislature.”²⁶⁶ Similarly, the Ohio Supreme Court has held that its constitution requires an efficient system, which means one that includes teachers, buildings, equipment,²⁶⁷ and sufficient funds to provide students with a *safe and healthy* learning environment.²⁶⁸ Ohio requires not only adequate capital, but also mandates that school districts provide personnel and facilities that keep students safe from harm. Similarly, Connecticut specifically focuses on making their students comfortable enough to learn, requiring “minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn.”²⁶⁹ Other state constitutions, recognizing the necessity of creating a school environment attuned to students’ specific needs in the twenty-first century, require additional services such as special education and technology programs. Thus the New Jersey Supreme Court has held that “adequate physical facilities are an essential component” of the state’s constitutional mandate²⁷⁰ as well as “kindergarten and pre-school programs, facilities maintenance, alternative school programs, school-to-work and college transition programs, and technology programs.”²⁷¹ Like New Jersey, the Montana Supreme Court also held that an adequate state

education required state curriculum and learning standards, teacher pay, expenditure of fixed costs and costs of special education, and setting standards for adequate performance.²⁷²

The second component of minimally adequate facilities emphasized by state constitutions are up-to-date instructional materials, such as textbooks, pencils, and sufficient technology, so that students may engage with their coursework independent of teacher interactions. Connecticut requires students to be provided with “minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks.” West Virginia also requires “good physical facilities, instructional materials and personnel.”²⁷³ The need for these resources is supported by the latest educational research.

Educational research demonstrates the significant role that structural facilities play in students’ academic achievement and learning. One particular study demonstrated a strong relationship between students’ achievement in affective and psychomotor learning²⁷⁴ and school facilities, particularly the number of classrooms, furniture and seats for teachers and students, well-equipped laboratories and libraries, adequate instructional materials for teaching-learning activities, adequate health facilities for students’ first-aid and emergencies, recreational facilities, playgrounds, and bathrooms.²⁷⁵ Furthermore, a 2002 report released by the U.S. Department of Education states that the environmental factors most strongly linked to student achievement are indoor air quality, ventilation, thermal comfort, lighting, acoustics, building age and quality, school and class size, spatial configurations, as well as noise, heat, cold and light.²⁷⁶ Most of these findings are supported by common sense. For example, poor indoor air quality is associated with airborne bacteria, mold, and asthma, which increase absentee rates.²⁷⁷ In turn, high temperatures, humidity, and poor ventilation contribute to poor indoor air quality by increasing the chances of mold²⁷⁸ and causing the buildup of carbon dioxide and contaminants such as perfumes, shampoos, deodorants, materials and cleaning agents, and pathogens, which cause students to experience headaches, drowsiness, and the inability to concentrate.²⁷⁹ Inadequate temperature and humidity further exacerbate student discomfort and decrease their attention spans²⁸⁰ while affecting morale and inhibiting teachers’ abilities to teach.²⁸¹ Lighting, on the other hand, specifically natural light, greatly improves test scores, reduces off-task behavior, and overall plays a significant role in students’ achievement.²⁸² Acoustics can both improve and detract from students’ academic achievement. While students obviously benefit from being able to hear their teachers and peers speak in class, external noise detracts from students’ performance by causing students to experience “increased student dissatisfaction with their classrooms,”²⁸³ stress,²⁸⁴ high blood pres-

sure,²⁸⁵ feelings of helplessness, inability to concentrate, “lack of extended application to learning tasks,” and diminished reading and verbal abilities.²⁸⁶ Finally, school building age and quality is likely the most important aspect of an educational institution’s physical capacity to support student learning. Better building quality, newer school buildings, better laboratories and libraries are all correlated to higher student achievement,²⁸⁷ though the degree depends on the study and subject area.²⁸⁸ Building quality has also been linked to student behavior, with better quality buildings being linked to fewer disciplinary incidents²⁸⁹ as well as improved general attitudes, behavior, and relationships between students and staff.²⁹⁰ These studies demonstrate that, overall, a minimum standard of education must provide students with an atmosphere that is not only safe and comfortable, but one that is conducive to learning and where students will be more likely to excel academically.

Instructional resources on the other hand, as emphasized by state constitutions, are an indispensable aspect of adequate facilities because they convey valuable academic information to students, especially in the absence of teacher instruction, and thereby serve as valuable resources and support systems for teachers both inside and outside the classroom. As used in this article, “instructional resources” include full courses, course materials, modules, textbooks, streaming videos, tests, software, and “any other tools, materials, or techniques used to support access to knowledge.”²⁹¹ The central role of instructional materials, especially textbooks, is the accumulation and convenient presentation of essential knowledge in one location,²⁹² but that role “extends beyond the dissemination of information.” Instructional materials also “play an important role in mediating the politics of what is taught” and the methods used to teach students.²⁹³ Thus, they enable teachers to devote less time to lecturing and more to spending time with individual students to clarify any material they failed to understand from the textbook.²⁹⁴ They further serve as valuable organizing tools for teachers by offering suggested structures for teaching particular subjects, day-to-day lesson plans, daily objectives, guidance in implementing those objectives, and advice on materials necessary for the accomplishment of the objectives.²⁹⁵

Studies demonstrate a strong relationship between quality instructional material and academic achievement. In general, high quality standards-based textbooks enhance students’ achievement and facilitate “comprehensiveness, coherence, development of in-depth ideas, and promot[e] sense making, engag[e] students[,], and learning motivation.”²⁹⁶ This improvement in students’ ability to comprehend difficult material, think creatively, and more easily engage in cognitive thinking demonstrates that students with high-quality instructional material achieve better grades in their courses, have lower withdrawal rates, and score better on the final examinations.²⁹⁷

Beyond textbooks, however, in the twenty-first century, when it is almost impossible to gain access to news about important current events, the latest breakthroughs in various fields of study, and multiple self-help resources such as Khan Academy and YouTube, the Internet, computers, and other technology must be part of any minimum standard of education. Technology serves a number of functions in the classroom, such as bringing “exciting curricula based on real-world problems,” providing students and teachers more “opportunities for feedback, reflection and revision,” and “building local and global communities.”²⁹⁸ Thus, not only does technology expose students to the most up-to-date and relevant information, thereby enabling them to teach themselves, but it saves teachers time and resources by providing feedback, promoting classroom interaction,²⁹⁹ and enabling teachers to be the facilitators in the classroom.³⁰⁰ Studies demonstrate that technology in classrooms and academic achievement are significantly related.³⁰¹

Finally, and most important for the purposes of this article, a minimum standard of education must implement a curriculum that effectively teaches students basic literacy skills.

Numerous state constitutions emphasize that any educational system must guarantee students the right to learn basic literacy and numeracy skills. The Connecticut Constitution, for example, assures students “minimally adequate teaching of reasonably up-to-date basic curricula such as *reading, writing, mathematics, science, and social studies*,”³⁰² while the Wisconsin legislature has required that all students be afforded the “opportunity ...to be proficient in mathematics, science, *reading and writing*, geography, and history.”³⁰³ But other state constitutions have extended even more protections. For example, New Hampshire has extended its curriculum far beyond basic literacy skills, reasoning that “[g]iven the complexities of our society today, the State’s constitutional duty extends beyond mere reading, writing and arithmetic. It also includes broad educational opportunities in today’s society to prepare citizens for their role as participants and as potential competitors in today’s marketplace of ideas.”³⁰⁴ The Washington Constitution further entrenches basic literacy skills as part of a minimum standard of education by reiterating New Hampshire’s principles but also accentuating the importance of literacy to its students’ exercise of their fundamental rights: “the State’s constitutional duty goes beyond mere reading, writing and arithmetic. It also embraces broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today’s market as well as in the marketplace of ideas. Education plays a critical role in a free society. It must prepare our children to participate intelligently and effectively in our open political system to ensure that system’s survival. It must prepare them to exercise their First Amendment freedoms both as

sources and receivers of information. It must also prepare them to be able to inquire, to study, to evaluate and to gain maturity and understanding. The constitutional right to have the State ‘make ample provision for the education of all [resident] children’ would be hollow indeed if the possessor of the right could not compete adequately in our open political system, in the labor market, or in the marketplace of ideas.”³⁰⁵ Thus, various state constitutions not only guarantee their students the right to attain basic literacy skills, but they treat those skills as such a fundamental building block that the skills themselves become an afterthought.

While scholars, educators, and lawyers may disagree among themselves as to what qualities a minimum standard of education must possess, they would be hard-pressed to deny that teachers, adequate facilities, and basic literacy instruction are all indispensable to that standard. Most educators and scholars are likely to argue that even these three elements, without more, are not enough to ensure their students excel academically. And although my analysis does not establish a thoroughly clear standard of education, it should provide litigators with the basic guidelines to define such a standard for a federal court.

Conclusion

Any successful lawsuit must take all necessary steps bridge the gap between the Supreme Court’s deplorable lack of knowledge regarding the effects of poor education on children in the *Rodriguez* opinion to the present-day context, where it is largely assumed that education is indispensable to the maintenance of our Republic. Our generation must convince the Supreme Court that the meaning of “liberty” has infinitely changed not only since the ratification of the Constitution, but since the Court’s *Rodriguez* opinion. Our arguments must also undermine the assumption that an individual let alone our nation can somehow function and prosper while remaining illiterate. We must convince the Court that “[n]othing is more important for the public weal, than to form and train up youth in wisdom and virtue.”³⁰⁶

NOTES

1. *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997) (citing *Moore v. East Cleveland*, 431 U.S. 494, 503 (1937) (plurality opinion)).
2. John E. Haubenreich, *Education and the Constitution*, 87 *PEABODY J. EDUC.* 436, 439 (2012).
3. *Id.*; *The Old Deluder Satan Act in 1647*, CONSTITUTION SOCIETY, <http://www.constitution.org/primarysources/deluder.html> (last visited on Nov. 13, 2016) (“And it is further ordered, that when any town shall increase to the number of one hundred families or householders, they shall set up a grammar school, the master thereof being able to instruct youth so far as they may be fitted for the university, provided that if any town neglect the performance hereof above one year that every such town shall pay 5 pounds to the next school till they shall perform this order.”).

4. Haubenreich, *supra* note 2, at 439 (citing R. F. BUTTS, PUBLIC EDUCATION IN THE UNITED STATES: FROM REVOLUTION TO REFORM (1978)).
5. E. JENNIFER MONAGHAN, LEARNING TO READ AND WRITE IN COLONIAL AMERICA 31 (2007) (emphasis added).
6. Haubenreich, *supra* note 2, at 439.
7. Ga. Const. of 1777, art. LIV (“Schools shall be erected in each county, and supported at the general expense of the State, as the legislature shall hereafter point out.”); Mass. Const. of 1780, ch. V, § II (“Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of the rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislators and magistrates, in all future periods of this Commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools, and grammar schools in the towns; to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humor and all social affections, and generous sentiments among the people.”); N.H. Const. of 1776, § LXXXIII (“Knowledge and learning generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various arts of the county being highly conducive to promote this end, it shall be the duty of the legislatures and magistrates, in all future periods of this government, to cherish the interests of literature and the sciences, for the promotion of agriculture, arts, sciences, commerce, trade, manufactures, and natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections and generous sentiments among the people.”). N.C. Const. of 1776, art. XLI (“That a school or schools shall be established by the Legislature, for the convenient instruction of youth, with such salaries to the masters, paid by the public, as may enable them to instruct at low prices; and all useful learning shall be duty encouraged, and promoted, in one or more universities.”); Pa. Const. of 1776, § 44 (“A school or schools shall be established in each county by the legislature, for the convenient instruction of youth, with such salaries to the masters paid by the public, as may enable them to instruct youth at low prices; And all useful learning shall be duly encouraged and promoted in one of more universities.”); Vt. Const. of 1777, § XL (“A school or schools shall be established in each town, by the legislature, for the convenient instruction of youth, with such salaries to the masters, paid by each town; making proper use of school lands in each town, thereby to enable them to instruct youth at low prices. One grammar school in each county, and one university in this state, ought to be established by discretion of the General Assembly.”); Haubenreich, *supra* note 2, at 444.
8. Dennis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929, 937 (1995).
9. The Northwest Ordinance of 1787, art. 3 (emphasis added).
10. Duffey, *supra* note 8, at 938.
11. *Id.* at 933.
12. *Id.* at 933, 951 (“[T]he principles reflected in the Ordinance – expansionism, development, imperialism, risk (both physical and economic), commercialism, and a certain strain of utopianism – do not figure prominently in presently recognized constitutional documents. Thus the Ordinance has a special claim to constitutional authority insofar as it is a founding text of those aspects of our political traditions that draw upon the principles it contains.”).
13. *Id.* at 946 (arguing that the Constitution primarily addressed *structural* problems with the Union).
14. *Id.* at 942 (footnote omitted).

15. *Id.* at 946 (arguing that the Constitution primarily addressed *structural* problems with the Union).
16. *Id.*
17. *Id.* at 950.
18. Haubenreich, *supra* note 2, at 444.
19. *Id.* at 448.
20. *Id.* at 446.
21. *Id.*
22. *Id.*
23. *Id.* at 447.
24. U.S. v. Butler, 297 U.S. 1, 66–67 (1936).
25. See Elementary and Secondary Education Act, 20 U.S.C. § 6301 (2012); Individual and Disabilities Education Act, 20 U.S.C. 1400 et seq. (2012).
26. Franklin’s views may be described as a combination of “a revised Puritan ethic and the secular principles of the Enlightenment.” John Hardin Best, *Franklin and the Enlightened Education in America*, in BENJAMIN FRANKLIN ON EDUCATION 8 (Lawrence A. Cremin ed., 1962).
27. GORDON WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 713 (2009).
28. Best, *supra* note 26, at 1–2. Franklin was enrolled in grammar school at the age of eight and later studied under George Brownell, a master in writing and arithmetic, where he excelled in writing. *Id.* at 3.
29. Benjamin Franklin, *Proposals Relating to the Education of Youth In Pennsylvania* 28 J. GEN. EDUC. 256, 256 (1976).
30. ABRAHAM BLINDERMAN, THREE EARLY CHAMPIONS OF EDUCATION: BENJAMIN FRANKLIN, BENJAMIN RUSH, AND NOAH WEBSTER 7 (1976).
31. See Best, *supra* note 26, at 10 (commenting on Franklin’s faith in “the common man and confidence in his ability to rule himself wisely”).
32. BLINDERMAN, *supra* note 30, at 10–11.
33. *Id.*; see also Best, *supra* note 26, at 9 (“Franklin never confused the progress in material things with the improvement of man’s character. The one may aid the other, but they are not equated in Franklin’s thinking.”). Consider, for example, that Franklin’s attitude towards the French-Indian war was one of disdain. He commented, “[t]he only crime of these poor wretches [the Conestoga Indians] seems to have been that they had a redish-brown skin and black hair . . .” *Id.* at 10 (alterations in original).
34. BLINDERMAN, *supra* note 30, at 12.
35. Best, *supra* note 26, at 3.
36. BLINDERMAN, *supra* note 30, at 12. Franklin also devoted a great number of years to establishing the first subscription library in the Colonies and proposed a “modern school” in Philadelphia for “improving the citizen and society.” Best, *supra* note 26, at 5. “The Academy” as it was called, “would not only prepare young men for college; it would also officer a complete ‘secondary’ education for the trades and professions.” *Id.* at 13.
37. See Best, *supra* note 26, at 9 (commenting on Franklin’s deep “sense of justice” and commitment to “greater humanitarianism”). Franklin felt strongly about the propriety of educating women at a young age when he debated his peers on the subject. *Id.* at 22, 25.
38. BLINDERMAN, *supra* note 30, at 13. Indeed, from his infancy, Franklin was always passionate about reading; see also Best, *supra* note 26, at 22–23.
39. BLINDERMAN, *supra* note 30, at 10–11.
40. *Id.* at 14.
41. Best, *supra* note 26, at 13.
42. BENJAMIN RUSH, AUTOBIOGRAPHY OF BENJAMIN RUSH: HIS “TRAVELS THROUGH LIFE” TOGETHER WITH HIS COMMONPLACE BOOK FOR 1789–1813, 72 (1948).

43. BLINDERMAN, *supra* note 30, at 18.
44. WOOD, *supra* note 27, at 475.
45. See FEDERALIST NO. 10 (James Madison).
46. BLINDERMAN, *supra* note 30, at 18.
47. DAGOBERT D. RUNES, *THE SELECTED WRITINGS OF BENJAMIN RUSH* 97 (1947).
48. Rush foresaw boys participating in athletics and young girls participating in music and dancing. BLINDERMAN, *supra* note 30.
49. *Id.* at 18–19.
50. Rush felt that children were not ready for arithmetic, geography, natural history, and conversation. *Id.* at 18.
51. *Id.* at 19.
52. *Id.* at 18.
53. *Id.* at 21.
54. WOOD, *supra* note 27, at 504. Indeed, what makes Rush’s views on education more mundane is that “[v]irtually every American reformer [during the creation of the union], male or female, endorsed the education of women.” *Id.* at 504.
55. BLINDERMAN, *supra* note 30, at 21.
56. *Id.* at 18.
57. *Id.* at 25.
58. *Id.*
59. Webster believed that his book had inspired the constitutional convention, “but Madison regarded ‘sketches of American Policy’ as only one of many similar proposals for establishing a strong central government.” *Id.* at 25–26.
60. *Id.*
61. *Id.* at 26.
62. *Id.*
63. *Id.* at 28.
64. *Id.* at 29.
65. *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J. concurring)).
66. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).
67. *Washington v. Glucksburg*, 521 U.S. 702, 721 (1998).
68. *Obergefell*, 135 S. Ct. at 2598.
69. *Id.*
70. See *Bush v. Gore*, 531 U.S. 98, 107 (2000) (“The recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the *fundamental right* [to vote for the President]”) (emphasis added).
71. See *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (citing *Planned Parenthood of Southern Pennsylvania v. Casey*, 505 U.S. 833 (1997)) (“These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment”).
72. The *Plyler* case arose out of a May 1975 action by the Texas Legislature which “revised its education laws to withhold from local school districts any state funds for the education of children who were not ‘legally admitted’ into the United States. The 1975 revision also authorized local school districts to deny enrollment in their public schools to children not ‘legally admitted’ to the country”). *Plyler v. Doe*, 457 U.S. 202, 205 (1982).
73. *Id.* at 222.
74. *Id.*

75. While Justice Powell, writing for the majority in *Rodriguez*, reasoned that the Texas school financing system was not so inadequate as to deprive children of some minimal threshold of education, he explicitly recognized the possibility that at some point, a state could be enjoined from further depriving educational rights: “Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditures in Texas provide an education that falls short.” While there exists some language in the *Rodriguez* opinion indicating that the Court held that there exists no fundamental right to education, *see* Erwin Chemerinsky, *The Conservative Assault on the Constitution* 35 (2010), that language is misleading. On page 35 of its opinion, the Court ultimately stated an obvious proposition: that education is not “[a]mong the rights afforded *explicit* protection under our Federal Constitution.” *Rodriguez*, 411 U.S. at 35 (emphasis added). Indeed, this is the same language that the *Plyler* Court cited when it stated in dicta that “public education is not a ‘right’ granted to individuals by the Constitution. *Plyler* 457 U.S. at 221 (1982) (citing *Rodriguez*, 411 U.S. at 35). Any reliance on *Rodriguez* or *Plyler* for the proposition that education is not a fundamental right is thus misplaced—not having to address the issue of whether education is a fundamental right *implicitly* guaranteed by the Constitution, both opinions simply stated that education is not *explicitly* guaranteed. This interpretation of the cases is supported by the fact that in *Plyler*, Justice Powell, again writing for the majority, refused to allow states to completely deprive children’s access to public schools while identifying literacy as the minimal threshold of education below which the states had unlawfully crossed. *Plyler*, 457 U.S. at 223.
76. Ralf St. Clair defines literacy as a capability, which “refers to what people are actually able to be and do, rather than to what resources they have access to. It focuses on developing people’s capability to choose a life that they have reason to value.” RALF ST. CLAIR, *WHY LITERACY MATTERS: UNDERSTANDING THE EFFECTS OF LITERACY EDUCATION FOR ADULTS* 34. (2010). Viewed this way, literacy is not only one of many skills that children acquire in the educational context or a “supplement to human thought,” but is also a “formative structure for that thought” that provides children with the basis for acquiring and mastering new abilities. *Id.* at 87.
77. *Plyler*, 457 U.S., at 221 (emphasis added).
78. ST. CLAIR, *supra* note 76, at 6.
79. *Plyler v. Doe*, 457 U.S. 202, 219 (1982).
80. *Wisconsin v. Yoder* 406 U.S. 205 (1972) (emphasis added).
81. *Yoder*, 406 U.S. at 238 (White, J., concurring).
82. ST. CLAIR, *supra* note 76, at 86-87; *see, e.g.*, *Plyler*, 457 U.S. 202; *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954); *Yoder*, 405 U.S. 205.
83. *Brown*, 347 U.S. at 691.
84. Oh Dae Kwon et al., *Effect of Illiteracy on Neuropsychological Tests and Glucose Metabolism of Brain in Later Life*, 22 J. NEUROIMAGING 292, 292 (2012); Karl Magnus Petersson et al., *Cognitive Processing in Literate and Illiterate Subjects: A Review of Some Recent Behavioral and Functional Neuroimaging Data*, 42 SCANDINAVIAN J. PSYCHOL. 251, 251 (2001); Alfredo Ardila et al., *Illiteracy: The Neuropsychology of Cognition Without Reading*, 25 ARCHIVES CLINICAL PSYCHOL. 689, 693 (2010).
85. Ardila, *supra* note 84, at 696; *see also* ST. CLAIR, *supra* note 76, at 25.
86. “Phonological processing is an auditory processing skill. It relates to words, but occurs in the absence of print. It involves detecting and discriminating differences in phonemes or speech sounds under conditions of little or no distraction or distortion . . . Working memory is the system responsible for the transient holding and processing of new and already stored-information and is an important process for reasoning, comprehension, learning and memory updating.” Ardila, *supra* note 84, at 696; Illiterate adults perform more poorly than schooled literates on neuropsychological memory measures such as wordlist learning and recall, story learning and recall, verbal paired associates, digits backwards, number-months, and complex figure drawing. *Id.* at 699–700.

87. *Id.* at 703–04.
88. *Id.* at 705–06; Aphasia is a communication disorder that results from damage or injury to language parts of the brain. It's more common in older adults, particularly those who have had a stroke. Aphasia gets in the way of a person's ability to use or understand words. Aphasia does not impair the person's intelligence. People who have aphasia may have difficulty speaking and finding the right words to complete their thoughts. They may also have problems understanding conversation, reading and comprehending written words, writing words, and using numbers. *An Overview of Aphasia*, WEBMD, <http://www.webmd.com/brain/aphasia-causes-symptoms-types-treatments> (last visited May 3, 2016).
89. Letter Naming Fluency is a standardized, individually administered test that provides a measure of risk and is based on research by Marston and Magnusson. Students are presented with a page of upper- and lower-case letters arranged in a random order and are asked to name as many letters as they can. If they do not know a letter, the examiner provides the name of the letter. The student is allowed 1 minute to produce as many letter names as he/she can, and the score is the number of letters named correctly in 1 minute. Students are considered at risk for difficulty achieving early literacy benchmark goals if they perform in the lowest 20 percent of students in their district. Students are considered at some risk if they perform between the 20th and 40th percentile using local norms. Students are considered at low risk if they perform above the 40th percentile using local norms. *DIBELS Letter Naming Fluency*, UNIVERSITY OF OREGON, <https://dibels.uoregon.edu/assessment/dibels/measures/lnf.php> (last visited May 3, 2016).
90. Metalinguistic skills “involve the awareness and control of linguistic components of language. Simply put, it implies the ability to think and discuss language. These skills require an awareness of others as listeners and an ability to recognize significant details that indicate changes in speech.” Katy Connolly, *What Are Metalinguistic Skills and What Do They Look Like in My Child?*, NORTHERN SHORE PEDIATRIC THERAPY (Mar. 25, 2013), <http://nspt4kids.com/parenting/what-are-metalinguistic-skills-and-what-do-they-look-like-in-my-child/>.
91. ST. CLAIR, *supra* note 76, at 91–92.
92. Ardila, *supra* note 84, at 697.
93. Visuospatial and visuoconstructional ability involves the “perception of spatial aspects of visual stimuli” and the ability to build, assemble, or draw objects. Shari R. Waldstein, *Health Effects on Cognitive Aging*, in *THE AGING MIND: OPPORTUNITIES IN COGNITIVE RESEARCH 206* (Paul C. Stern & Laura L. Carstensen eds., 2000).
94. Verbal memory coding refers to the interpretation of verbal stimuli. Andreas Jansen et al., *Assessment of Verbal Memory by fMRI: Lateralization and Functional Neuroanatomy*, 111 *CLIN. NEUROL. NEUROSURG.* 57, 57–58 (2009).
95. Visual memory coding is the “process of encoding images and visual sensory information” into one's memory. Luke Mastin, *Memory Encoding*, HUMAN-MEMORY.NET, http://www.human-memory.net/processes_encoding.html (last visited May 3, 2016).
96. “Metalinguistic awareness (MA) is defined as an awareness or bringing into explicit consciousness of linguistic form and structure in order to consider how they relate to and produce the underlying the meaning of utterances. MA is also termed metalinguistic ability. The construct describes the ability to make language forms objective and explicit and to attend to them in and for themselves. MA is the ability to view and analyze language as a ‘thing,’ language as a ‘process,’ and language as a ‘system.’” Jill Kerper Mora, *Metalinguistic Awareness As Defined Through Research*, SAN DIEGO STATE UNIVERSITY 1, <http://archive.is/vBF6p> (last visited Dec. 10, 2016).
97. Ardila, *supra* note 84, at 701–02.
98. *See supra* note 90 and accompanying text.
99. Ardila, *supra* note 84, at 702.
100. Verbal fluency is a “cognitive function that facilitates information retrieval from memory. Successful retrieval requires executive control over cognitive processes such as selective attention, selective inhibition, mental set shifting, internal response generation, and self-

monitoring.” Janet Paterson, *Verbal Fluency*, in *ENCYCLOPEDIA OF CLINICAL NEUROPSYCHOLOGY* 2603, 2603 (Jeffrey S. Kreutzer et al. eds., 2011).

101. Semantic verbal fluency refers to cognitive function that facilitates phonemic retrieval of words from language, which requires people to access their mental lexicon and involves executive control processes. “[S]erious deficits in either verbal ability or executive control should manifest themselves in poor performance in the fluency tasks. Therefore, the fluency tasks can be used as an efficient screening instrument of general verbal functioning.” Zeshu Shao et al., *What Do Verbal Fluency Tasks Measure? Predictors of Fluency Performance in Older Adults*, 5 *FRONTIERS IN PSYCHOL.* 1, 1 (2014).
102. Phonemic verbal fluency refers to cognitive function that facilitates retrieval from memory, such as words that begin with certain letters. Claudia Rodriguez-Aranda & Monica Martinussen, *Age-Related Differences in Performance of Phonemic Verbal Fluency Measured by Controlled Oral Word Association Task (COWAT): A Meta-Analytic Study*, 30 *DEVELOPMENTAL NEUROPSYCHOLOGY* 697, 697–98 (2006).
103. “Executive functions (EFs) make possible mentally playing with ideas; taking the time to think before acting; meeting novel, unanticipated challenges; resisting temptations; and staying focused. Core EFs are inhibition [response inhibition (self-control—resisting temptations and resisting acting impulsively) and interference control (selective attention and cognitive inhibition)], working memory, and cognitive flexibility (including creatively thinking ‘outside the box,’ seeing anything from different perspectives, and quickly and flexibly adapting to changed circumstances).” Adele Diamond, *Executive Functions*, 64 *ANNU. REV. PSYCHOL.* 135, 136 (2013).
104. *Plyler v. Doe*, 457 U.S. 202, 219 (1982) (emphasis added).
105. *ST. CLAIR*, *supra* note 76, at 100.
106. *Id.* at 109.
107. *Id.* at 99.
108. *Id.* at 106, (citing STEPHEN REDER & JOHN BYNNER, *TRACKING ADULT LITERACY AND NUMERACY: FINDINGS FROM LONGITUDINAL DATA 1* (2009)).
109. Marianne McTavish, *‘I Get My Facts from the Internet’: A Case Study of the Teaching and Learning of Information Literacy in In-School and Out-Of-School Contexts*, 9 *J. EARLY CHILDHOOD LITERACY* 3, 5 (2009).
110. *ST. CLAIR*, *supra* note 76, at 112.
111. *Id.* at 112.
112. *Id.* at 114.
113. *Id.* at 109 (citing Richard Blundell et. al., *Human Capital Investment: The Returns from Education and Training to the Individual, the Firm and the Economy*, 20 *FISCAL STUD.* 1, 17 (1999)).
114. *Id.* at 114.
115. *Id.* at 101 (citing IRWIN KIRSCH ET AL., *AMERICA’S PERFECT STORM: THREE FORCES CHANGING OUR NATION’S FUTURE 4* (2007)).
116. IRWIN KIRSCH ET AL., *AMERICA’S PERFECT STORM: THREE FORCES CHANGING OUR NATION’S FUTURE 3* (2007).
117. *Zelman v. Simmons-Harris*, 536 U.S. 639, 683–84 (2002) (Thomas, J., concurring).
118. *Plyler v. Doe*, 457 U.S. 202, 222 (1982).
119. *See, e.g.*, ALLIANCE FOR EXCELLENT EDUCATION, *SAVING FUTURES, SAVING DOLLARS: THE IMPACT OF EDUCATION ON CRIME REDUCTION AND EARNING 3* (2013) (finding a direct correlation between lower-educational achievement and increased arrest/incarceration rates).
120. Ruben Rosario, *Ruben Rosario: Troubled Youths Get a Message of Hope*, PIONEER PRESS, (Nov. 12, 2015) <http://www.twincities.com/2010/11/13/ruben-rosario-troubled-youths-get-a-message-of-hope/>.

121. *See id.*
122. Brief for Amici Curiae at 9, *A.M. v. Holmes*, 830 F.3d 1123 (10th Cir. 2016) (Nos. 14-2066), *9 (citing HUMAN IMPACT PARTNERS, HEALTH IMPACT ASSESSMENT OF SCHOOL DISCIPLINE POLICIES 2 (2013)).
123. *See, e.g.*, Weili Ding et al., *The Impact of Poor Health on Education: New Evidence Using Genetic Markers*, 28 J. HEALTH & ECON. 578, 595–96 (2008) (finding that depression and obesity both lead to a decrease of 0.45 GPA points on average).
124. ST. CLAIR, *supra* note 76, at 99–100.
125. KIRSCH ET AL., *supra* note 116, at 17.
126. Richard Blundell et. al., *Human Capital Investment: The Returns from Education and Training to the Individual, the Firm and the Economy*, 20 FISCAL STUD. 1, 17 (1999); St. Clair, *supra* note 76, at 108–09.
127. ST. CLAIR, *supra* note 76, at 110.
128. KIRSCH ET AL., *supra* note 116, at 18.
129. ST. CLAIR, *supra* note 76, at 118.
130. *Id.* at 119–20 (citing Don Nutbeam, *Literacies Across the Lifespan: Health Literacy*, 9 LITERACY & NUMERACY STUD. 47, 47–55 (1999)).
131. *Id.* at 124 (“[P]eople with lower numeracy skills find it harder to make the right health choices in the face of quantitative information.”).
132. *Id.* at 118 (citing JOHN BYNNER ET AL., IMPROVING ADULT BASIC SKILLS: BENEFITS TO THE INDIVIDUAL AND TO SOCIETY 7 (2001)).
133. *Id.* at 117 (citing LEON FEINSTEIN ET AL., THE SOCIAL AND PERSONAL BENEFITS OF LEARNING: A SUMMARY OF KEY RESEARCH FINDINGS 10 (2008)).
134. LEON FEINSTEIN ET AL., THE SOCIAL AND PERSONAL BENEFITS OF LEARNING: A SUMMARY OF KEY RESEARCH FINDINGS 10–11 (2008).
135. ST. CLAIR, *supra* note 76, at 119–20 (citing PETTER LUNDBORG, THE HEALTH RETURNS TO EDUCATION: WHAT CAN WE LEARN FROM TWINS? 21 (2008)).
136. *Id.* (citing PETTER LUNDBORG, THE HEALTH RETURNS TO EDUCATION: WHAT CAN WE LEARN FROM TWINS? 21 (2008)).
137. *Id.* at 118 (citing JOHN BYNNER ET AL., IMPROVING ADULT BASIC SKILLS: BENEFITS TO THE INDIVIDUAL AND TO SOCIETY 9 (2001)).
138. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).
139. ST. CLAIR, *supra* note 76, at 135 (citing SAMANTHA PARSONS & JOHN BRYNNER, ILLUMINATING DISADVANTAGE: PROFILING THE EXPERIENCES OF ADULTS WITH ENTRY LEVEL LITERACY OR NUMERACY OVER THE LIFECOURSE 65–77 (2007)).
140. *Id.* at 138.
141. *Id.* at 138 (citing DENNY TAYLOR, FAMILY LITERACY: YOUNG CHILDREN LEARNING TO READ AND WRITE (1993) (“Growing up in an environment where literacy is the only option, they learned of reading as one way of listening, and of writing as one way of talking. Literacy gave the children both status and identity as it became the medium of shared experience; it facilitated the temporal integration of their social histories as the highly valued artifacts of family life became the prized commodity of the schools”)).
142. *See infra*, part (A)(d)(2).
143. ST. CLAIR, *supra* note 76, at 135 (citing GREG BROOKS ET AL., EFFECTIVE AND INCLUSIVE PRACTICES IN FAMILY LITERACY, LANGUAGE AND NUMERACY: A REVIEW OF PROGRAMMES AND PRACTICE IN THE UK AND INTERNATIONALLY 12 (2008)).
144. *Id.* at 136 (citing FEINSTEIN ET AL., THE SOCIAL AND PERSONAL BENEFITS OF LEARNING: THE SOCIAL AND PERSONAL BENEFITS OF LEARNING: A SUMMARY OF KEY RESEARCH FINDINGS 11 (2008)).
145. *Plyler v. Doe*, 457 U.S. 202, 219 (1982).
146. *Cox v. Louisiana*, 379 U.S. 558, 574 (1964).

147. *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).
148. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *Bush v. Gore*, 531 U.S. 98, 107 (2000).
149. *Plyler*, 457 U.S. at 221 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)).
150. *Id.* at 222–23 (quoting *Brown v. Board of Education of Topeka*, 347 U.S. 483, 691 (1954)) (emphasis added).
151. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 512 (1969).
152. *Id.*
153. *Brown*, 347 U.S. at 493.
154. *Katzenbach v. Morgan*, 384 U.S. 642, 655 (1966).
155. *Ambach v. Norwick*, 441 U.S. 68, 77 (1979)
156. *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (quoting *Abington School District v. Schempp*, 374 U.S. 203, 230 (1963)) (emphasis added).
157. *Board of Education v. Pico*, 457 U.S. 853, 867–68 (1982); *See Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (“[P]ublic education must prepare pupils for citizenship in the Republic It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the Nation.”) (alteration in original); *Healy v. James*, 408 U.S. 19, 180–81 (1972) (“[t]he vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools.”) (alteration in original).
158. *Cohen v. California*, 403 U.S. 15, 24 (1971).
159. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).
160. *Pico*, 457 U.S. at 867 (“[T]he Constitution protects the right to receive information and ideas”).
161. *FCC v. Pacifica Foundation*, 438 U.S. 726, 760 (1996) (Powell, J., concurring). *Pacifica* involved an FCC order declaring that the radio station “Pacifica” “could have been subject of administrative sanctions” for playing the monologue of a comedian who listed and repeated over and over again a certain set of “filthy words”—words “you couldn’t say on the public, ah, airwaves, um, the ones you definitely wouldn’t say, ever.” *Id.* at 729–30.
162. *ST. CLAIR*, *supra* note 76, at 93.
163. *Id.* at 138 (citing DENNY TAYLOR, FAMILY LITERACY: YOUNG CHILDREN LEARNING TO READ AND WRITE (1984)) (“Growing up in an environment where literacy is the only option, they learned of reading as one way of listening, and of writing as one way of talking. Literacy gave the children both status and identity as it became the medium of shared experience; it facilitated the temporal integration of their social histories as the highly valued artifacts of family life became the prized commodity of the schools.”).
164. *Internet Gains on Television as Public’s Main News Source: More Young People Cite Internet than TV*, PEWRESEARCHCENTER (Jan. 4, 2011), <http://www.people-press.org/2011/01/04/internet-gains-on-television-as-publics-main-news-source/>.
165. *Id.*
166. *Home Computer Access and Internet Use*, CHILD TRENDS DATABANK 2 (Dec. 2015), <http://www.childtrends.org/?indicators=home-computer-access>.
167. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 533–34 (2009) (Thomas, J., concurring).
168. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 885 (1997).
169. *Id.*
170. *McTavish*, *supra* note 109, at 6.
171. *Board of Education v. Pico*, 457 U.S. 853 (1982); *see McTavish*, *supra* note 109, at 5 (“What appears to be crucial for success . . . are ‘the abilities to “read” a range of printed, electronic and visual texts; master the new communication technologies via spoken and written language; locate, manage, evaluate and use information or knowledge; and engage critically with media and other texts.”).
172. *McTavish*, *supra* note 109, at 5–6.

173. Julie Coiro, *Exploring Literacy on The Internet: Reading Comprehension on the Internet: Expanding Our Understanding of Reading Comprehension to Encompass New Literacies Reading*, 56 THE READING TEACHER 458, 458 (2003).
174. McTavish, *supra* note 109, at 6.
175. Every minute there are 571 new websites created, 1.8 million new likes on Facebook, 204 million emails sent, and 278,000 tweets created. *Revealed, What Happens in Just ONE Minute on the Internet: 216,000 Photos Posted, 278,000 Tweets and 1.8m Facebook Likes*, DAILYMAIL.COM (July 30, 2013), <http://www.dailymail.co.uk/sciencetech/article-2381188/Revealed-happens-just-ONE-minute-internet-216-000-photos-posted-278-000-Tweets-1-8m-Facebook-likes.html>.
176. *Supra* note 162.
177. Board of Education v. Pico, 457 U.S. 853, 868 (1982).
178. Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015).
179. EDWARD FINEGAN, LANGUAGE: ITS STRUCTURE AND USE 505 (Karen Judd ed., 5th ed. 2008).
180. Douglas v. People of State of Cal., 372 U.S. 353, 355 (1963); *see also* Griffin v. Illinois, 76 S. Ct. 585, 591 (1956) (“There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”).
181. Reece v. Georgia, 350 U.S. 85, 90 (1955).
182. Lewis v. Casey, 518 U.S. 343, 344 (1996) (citing *Bounds v. Smith*, 430 U.S. 817 (1977)).
183. *Id.* (“Only one named plaintiff, Bartholic, was found to have suffered actual injury—as a result of [Arizona Department of Corrections’] failure to provide the special services he would have needed, *in light of his particular disability (illiteracy)*, to avoid dismissal of his case.”) (emphasis added); *see also* Glenn v. Secretary of Health and Human Services, 814 F.2d 837 (7th Cir. 1987) (holding that claimant, who could perform sedentary work, was not “illiterate,” and was thus not entitled to disability benefits).
184. *Supra* note 75 and accompanying text.
185. *See* Kenji Yoshino, *The Supreme Court, 2014 Term – Comment: A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 168, 173–75 (2015).
186. Obergefell v. Hodges, 135 S.Ct. 2584, 2604 (2015).
187. *Id.* at 2603.
188. *Id.* at 2604 (citing *M.L.B. v. S.L.J.*, 519 U.S. 102, 119–24 (1996)).
189. *Id.* (citing *Eisenstadt v. Baird*, 405 U.S. 438, 446–54 (1972)).
190. *Id.* (citing *Skinner v. Oklahoma*, 316 U.S. 535, 538–43 (1942)).
191. *Id.* at 2584.
192. *See, e.g.*, Laurence Tribe, *Equal Dignity: Speaking its Name*, 129 HARV. L. REV. FORUM 16 (2015); Kenji Yoshino, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1738 (2008) (“Dignity in these passages is concerned with respect, honor, and social standing, and concerns the right of persons to be respect as an equal member of the polity rather than denigrated, subordinated, or excluded.”).
193. *See* *Gertz v Welch*, 418 U.S. 323 (1974) (emphasis added).
194. *Wisconsin v. Constantineau*, 400 U.S. 433, 510 (1971).
195. *Lawrence v. Texas*, at 539 U.S. 558, 575 (2003).
196. *U.S. v. Windsor*, 133 S. Ct. 2675, 2681 (2013).
197. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
198. *Lawrence*, 539 U.S. at 573 (2003) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)) (emphasis added).
199. *Id.* at 558.
200. *Obergefell*, 135 S. Ct. at 1599 (emphasis added).
201. *McNabb v. U.S.*, 318 U.S. 332, 342 (1943).
202. *Romer v. Evans*, 512 U.S. 620, 625 (1996).

203. *See Romer*, 512 U.S. 620; *Lawrence*, 539 U.S. 558; *Obergefell*, 135 S. Ct. 2584.
204. *Lawrence*, 539 U.S. 558, 574 (2003) (quoting *Planned Parenthood of Southern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1997)).
205. *Id.* at 562 (emphasis added).
206. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2584 (2015) (“The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to *define and express their identity*.”).
207. *Id.*
208. *Obergefell*, 135 S. Ct. at 2594.
209. *U.S. v. Windsor*, 133 S. Ct. 2675, at 2691 (2013).
210. *Obergefell*, 135 S. Ct. at 2595.
211. *Id.* at 2600.
212. 558 U.S. 310.
213. *Plyler v. Doe*, 457 U.S. 202, 223 (1982) (emphasis added).
214. *See supra* Part (A)(2)(a)(1).
215. *Plyler*, 457 U.S. at 219.
216. *See Roe v. Wade*, 410 U.S. 113 (1973).
217. *See Washington v. Glucksberg*, 521 U.S. 702 (1997) (holding there is a fundamental right to refuse life-saving treatment).
218. *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992).
219. *Supra* Part (A)(2)(a)(1).
220. *Lawrence*, 539 U.S. at 574.
221. *ST. CLAIR*, *supra* note 76, at 94.
222. *Supra* note 139.
223. *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 387-88 (1978) (“Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, the slave was deprived of all legal rights. *It was unlawful to teach him to read*; he could be sold away from his family and friends at the whim of his master; and killing or maiming him was not a crime. The system of slavery brutalized and dehumanized both master and slave.”) (emphasis added); *see also South Carolina v. Katzenbach*, 383 U.S. 301, 310–12 (1966) (“[A]s of 1890 in . . . States [with literacy tests], more than two-thirds of the adult Negroes were illiterate while less than one-quarter of the adult whites were unable to read or write,” because “[p]rior to the Civil War, most of the slave States made it a crime to teach Negroes how to read or write.”).
224. *See, e.g., Katzenbach v. Morgan*, 86 S. Ct. 1717, 1725 (1966); *see also Oregon v. Mitchell*, 400 U.S. 112, 216 (1970) (“Congress could have determined that racial prejudice is prevalent throughout the Nation, and that literacy tests unduly lend themselves to discriminatory application, either conscious or unconscious.”); *Id.* at 147 (Douglas, J., concurring in part) (“[L]iteracy tests] have been used at times as a discriminatory weapon against some minorities, not only Negroes but Americans of Mexican ancestry and American Indians.”).
225. *Brown v. Board of Education of Topeka*, 347 U.S. 483, 691 (1954).
226. *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973) (“Furthermore, the logical limitations on appellees’ nexus theory are difficult to perceive. How, for instance, is education to be distinguished from the significant personal interests in the basis of decent food and shelter? Empirical examination might well buttress an assumption that the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process, and that they derive the least enjoyment from the benefits of the First Amendment.”) (footnote omitted).
227. *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)).
228. *Rodriguez*, 411 U.S. at 12.

229. CPI Inflation Calculator, DATA.BLS.GOV, <http://data.bls.gov/cgi-bin/cpicalc.pl> (last visited on Dec. 10, 2016).
230. Brief for Appellees at 17, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) (No. 71-1332), 1971 WL 134333, at *17.
231. *Id.* at *18.
232. *Id.* at *19.
233. Appellants argued that this evidence constituted hearsay. *Id.* at *8.
234. Brief for Appellants at 38, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) (No. 71-1332), 1971 WL 137565 at *38.
235. Reply Brief for Appellants at 15–16, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) (No.71-1332), 1971 WL 136439, at *15–16.
236. *Ambach v. Norwick*, 441 U.S. 68 (1979).
237. *Id.* at 86.
238. *Id.* 77.
239. *Id.* 78–79.
240. *Id.* 79.
241. *Id.*
242. *Id.* 78.
243. *Columbia Falls Elm. Sch. Dist. 6 v. State*, 109 P.3d 257, 262 (Mont. 2005); *Miller v. Korn*s, 140 N.E. 773, 776 (Ohio 1923).
244. *Miller v. Childers*, 238 P. 204, 206 (Okla. 1924); *Pauley v. Kelley*, 255 S.E.2d 859, 877 (W.V. 1979).
245. *DeRolph v. State*, 677 N.E.2d 773 (Ohio 1997).
246. Peter Blatchford et al., *Examining the Effect of Class Size on Classroom Engagement and Teacher–Pupil Interaction: Differences in Relation to Pupil Prior Attainment and Primary vs. Secondary Schools*, 21 LEARNING & INSTRUCTION 715, 715 (2011) [hereinafter *Teacher-Pupil Interaction*]
247. William L. Sanders & June C. Rivers, *Research Progress Report: Cumulative and Residual Effects of Teachers on Future Student Academic Achievement*, UNIVERSITY OF TENNESSEE VALUE-ADDED RESEARCH AND ASSESSMENT CENTER 6 (Nov. 1996), <http://beteronderwijsnederland.net/files/cumulative%20and%20residual%20effects%20of%20teachers.pdf>; see c.f. Jonah E. Rockoff, *The Impact of Individual Teachers on Student Achievement: Evidence from Panel Data*, 94 AM. ECON. REV. 247, 251 (2004) (suggesting that raising teacher quality is a “key instrument in improving student outcomes.”); Elizabeth Leisy Stosich, *Teaching and Teacher Education: Building Teacher and School Capacity to Teach to Ambitious Standards in High-Poverty Schools*, 58 TEACHING AND TEACHER EDUC. 43, 44 (2016) (“Mounting evidence suggests that teachers have the largest effect on student achievement of any school-based factor and that this effect is especially pronounced for low-income students”) (citations omitted).
248. Sanders & Rivers, *supra* note 254, at 6; see Rockoff, *supra* note 254, at 251 (“There is already substantial evidence that principals’ opinions of teacher quality are highly correlated with student test scores.”) (citations omitted).
249. Sanders & Rivers, *supra* note 254, at 7.
250. *Id.*
251. Rockoff, *supra* note 254, at 251.
252. James Cowan & Dan Goldhaber, *National Board Certification and Teacher Effectiveness: Evidence from Washington State*, 9 J. RES. EDUC. EFFECTIVENESS 233, 233 (2016).
253. Seth Gershenson, *Linking Teacher Quality, Student Attendance, and Student Achievement*, 11 EDUC. FIN. & POL’Y 125 (2016) (suggesting that teachers have statistically significant effects on student absences by affecting student attitudes and preferences).
254. *Teacher-Pupil Interaction*, *supra* note 253, at 717.

255. *C.f. id.* (citing J.D. Finn et al., *The “Why’s” of Class Size: Student Behavior in Small Classes*, 73 REV. EDUC. RES. 321 (2003)); H.M. Cooper, *Does Reducing Student-to-Teacher Ratios Affect Achievement?*, 24 EDUC. PSYCHOLOGIST 79 (1989).
256. Peter Blatchford et al., *Teachers’ and Pupils’ Behavior in Large and Small Classes: A Systematic Observation Study of Pupils Aged 10/11 Years*, 97 J. EDUC. PSYCHOL. 454 (2005).
257. Teacher-Pupil Interaction, *supra* note 253, at 723 (“The results for secondary pupils indicated that . . . [a] five pupil increase in class size was associated with the odds of on task behavior decreasing by almost a quarter.”)
258. *Id.* at 725.
259. *Id.*
260. *Id.*
261. *Id.* at 726.
262. *Id.* at 727.
263. *C.f. Swann v. Charlotte-Mcklenburg Bd. of Ed.*, 402 U.S. 1, 2 (1971); *Milliken v. Bradley*, 433 U.S. 267, 283 (1977); *Missouri v. Jenkins*, 515 U.S. 70, 89 (1995).
264. *Swann*, 402 U.S. at 18.
265. *Roosevelt Elementary Sch. Dist. v. Bishop*, 950 P.2d 1141 (Ariz. 1997).
266. *Id.*
267. *Miller v. Korn*, 140 N.E. 773, 776 (Ohio 1923).
268. *DeRolph v. State*, 667 N.E.2d 773 *opinion clarified*, 678 N.E.2d 886 (1997) and *order clarified* 669 N.E.2d 518 (1995) (emphasis added).
269. *CCJEF v. Rell*, 990 A.2d 206, 2015 (Conn. 2010).
270. *Abbott by Abbott v. Burke*, 693 A.2d 417, 437 (N.J. 1997).
271. *Abbott by Abbott v. Burke*, 710 A.2d 450, 473 (N.J. 1998).
272. *Columbia Falls Elm. Sch. Dist. 6 v. State*, 109 P.3d 257, 262 (Mont. 2005).
273. *Pauley v. Kelly*, 255 S.E.2d 859, 877 (1979).
274. Affective learning refers to “an increasing internalization of positive attitudes toward the content or subject matter,” while psychomotor learning refers to “physical skills such as speed, dexterity, grace, use of instruments, expressive movement, and use of the body in dance or athletics.” Alfred P. Rovai et al., *Development of an Instrument to Measure Perceived Cognitive, Affective, and Psychomotor Learning in Traditional and Virtual Classroom Higher Education Settings*, 12 INTERNET & HIGHER EDUC. 7, 8 (2009).
275. *C.f. Hastrup Timilehin Ekundayo, School Facilities as Correlates of Students’ Achievement in the Affective and Psychomotor Domains of Learning*, 8 EUROPEAN SCIENTIFIC J. 208, 211–13 (2012).
276. Mark Schneider, *Do School Facilities Affect Academic Outcomes?*, NAT’L CLEARINGHOUSE FOR EDUC. FACILITIES 16–17 (Nov. 2002), <http://files.eric.ed.gov/fulltext/ED470979.pdf>.
277. *Id.* at 2 (citing G. Smedje & D. Norback, *The School Environment: Is It Related to the Incidence of Asthma in the Pupils?*, 5 INDOOR AIR ’99 445 (1999); K. G. Rosen & G. Richardson, *Would Removing Indoor Air Particulates in Children’s Environments Reduce Rate of Absenteeism—A Hypothesis*, 234 SCI. TOTAL ENV’T 87 (1999); ENVIRONMENTAL PROTECTION AGENCY, INDOOR AIR QUALITY AND STUDENT PERFORMANCE, EPA REPORT NUMBER EPA 402-F-00-009 (2000), <http://www.epa.gov/iaq/schools/performance.html>; AMERICAN LUNG ASSOCIATION, ASTHMA IN CHILDREN FACT SHEET (2002), <http://www.lung.org/lung-health-and-diseases/lung-disease-lookup/asthma/learn-about-asthma/asthma-children-facts-sheet.html>).
278. *Id.* at 3 (citing David Harner, *Effects of Thermal Environment on Learning Skills*, 12 EDUC. FACILITY PLANNER 4 (1974); D. P. Wyon et al., *The Effects of Moderate Heat Stress on Mental Performance*, 5 SCANDINAVIAN J. WORK ENV’T & HEALTH 352 (1979)).
279. *Id.*
280. *Id.* at 6 (citing J. KING & R. W. MARANS, THE PHYSICAL ENVIRONMENT AND THE LEARNING PROCESS, REPORT NUMBER 320-ST2 (1979); C. McGuffey, *Facilities*, in IMPROVING

- EDUCATIONAL STANDARDS AND PRODUCTIVITY: THE RESEARCH BASIS FOR POLICY (H. Waldberg ed., 1982)).
281. *Id.* (citing Heschong Mahone Group, *Daylighting in Schools: An Investigation into the Relationship Between Daylighting and Human Performance*, PACIFIC GAS AND ELECTRIC (Aug. 20, 1999), http://www.pge.com/003_save_energy/003c_edu_train/pec/daylight/di_pubs/SchoolDetailed820App.PDF; J. M. Lowe, *The Interface Between Educational Facilities and Learning Climate in Three Elementary Schools* (1990) (Ph.D. dissertation, Texas A&M University) (on file with author)) (“[P]roblems caused by working conditions may result in higher absenteeism, reduced effort, lower effectiveness in the classroom, low morale, and reduced job satisfaction.”).
 282. *Id.* (citing Heschong Mahone Group, *Daylighting in Schools: An Investigation into the Relationship Between Daylighting and Human Performance*, PACIFIC GAS AND ELECTRIC (Aug. 20, 1999), http://www.pge.com/003_save_energy/003c_edu_train/pec/daylight/di_pubs/SchoolDetailed820App.PDF) (indicating that students with the most classroom daylight progressed twenty percent faster in one year on math tests and twenty-six percent faster on reading tests than those students who learned in environments that received the least amount of natural light); *see also id.* (citing P. Plympton et al., *Daylighting in Schools: Improving Student Performance and Health at a Price Schools Can Afford* (June 16, 2000) (paper presented at the American Solar Energy Society Conference), available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.466.4527&rep=rep1&type=pdf>).
 283. *Id.* at 6–7 (citing G. Earthman & L. Lemasters, *Where Children Learn: A Discussion of How a Facility Affects Learning* (Feb. 1998) (paper presented at the annual meeting of Virginia Educational Facility Planners)).
 284. *Id.* at 7 (citing K. Fisher, *A Critical Pedagogy of Space* (2000) (Ph.D. dissertation, University of South Australia) (on file with author)).
 285. *Id.*
 286. *Id.*
 287. *Id.* at 8 (citing C. McGuffey, *Facilities*, in *IMPROVING EDUCATIONAL STANDARDS AND PRODUCTIVITY: THE RESEARCH BASIS FOR POLICY* (H. Waldberg ed. 1982); G. Earthman & L. Lemasters, *Review of Research on the Relationship Between School Buildings, Student Achievement, and Student Behavior* (Oct. 1996) (paper presented at the annual meeting of the Council of Educational Facility Planners International); G. Earthman & L. Lemasters, *Where Children Learn: A Discussion of How a Facility Affects Learning* (Feb. 1998) (paper presented at the annual meeting of Virginia Educational Facility Planners)).
 288. *Id.* at 8 (citing R. Phillips, *Educational Facility Age and the Academic Achievement of Upper Elementary School Students* (1997) (D. Ed. dissertation, University of Georgia) (on file with author); M. Edwards, *Building Conditions, Parental Involvement and Student Achievement in the D.C. Public Schools* (1992) (M.A. thesis, Georgetown University) (on file with author)).
 289. *Id.* at 9 (citing C. McGuffey, *Facilities*, in *IMPROVING EDUCATIONAL STANDARDS AND PRODUCTIVITY: THE RESEARCH BASIS FOR POLICY* (H. Waldberg ed. 1982)).
 290. *Id.* at 9 (citing PricewaterhouseCoopers, *Building Performance: An empirical Analysis of the Relationship Between Schools’ Capital Investment and Pupil Performance* (2001)).
 291. Jared Robinson et al., *The Impact of Open Textbooks on Secondary Science Learning Outcomes*, 43 *EDUC. RESEARCHER* 341, 341 (2014).
 292. *See* Daniel Attakumah & Vincent Tulasi, *Relationship Between Textbook Availability and Academic Achievement in Public Senior High Schools in the Volta Region*, 5 *JEPPA* 1, 1 (2015).
 293. *Id.*
 294. *See id.* (citing JERRY G. GEBHARD, *TEACHING ENGLISH AS A FOREIGN OR SECOND LANGUAGE* (1996)).
 295. *Id.*
 296. *Id.* at 2; *see also id.* at 3 (suggesting that the presence of textbooks increases student achievement) (citing Dean T. Jamison et al., *Improving Elementary Mathematics Education in*

- Nicaragua: An Experimental Study of the Impact of Textbooks and Radio on Achievement*, 73 J. EDUC. PSYCHOL. 556 (1981)); *id.* (finding that students' achievement test scores in science, mathematics, and language are strongly linked to being in classes with textbooks); *id.* at 16 (finding a "significant relationship" between core subject textbook availability and public senior high school academic achievement in core subjects).
297. Robinson et al., *supra* note 298, at 343.
298. Elissa Alsafran & Davis S. Brown, *The Relationship Between Classroom Computer Technology and Students' Academic Achievement*, 15 RES. HIGHER EDUC. J. 1, 5 (2012).
299. *Id.* at 6.
300. *Id.* at 5–6.
301. *Id.* at 12. Although this study revealed that, in the U.S., there is no relationship between technology in classrooms and students' academic achievement, the authors clarified that the result was the result of the fact that technology is improperly utilized as an instruction tool in math and science classrooms. *Id.*
302. CCJEF v. Rell, 990 A.2d 206, 253 (Con. 2010) (emphasis added).
303. Vincent v. Voght, 514 N.W.2d 388, 396 (N.D. 2000).
304. Claremont School Dist. v. Governor, 142 N.H. 462, 474 (N.H. 1997).
305. Seattle Sch. Dist. No. 1. v. State, 585 P.2d 71, 94–95 (Wash. 1978).
306. BLINDERMAN, *supra* note 30, at 10–11; *see also* Best, *supra* note 26, at 9 ("Franklin never confused the progress in material things with the improvement of man's character. The one may aid the other, but they are not equated in Franklin's thinking.").



Does your library have *National Lawyers Guild Review*?

Over two hundred law school and county law libraries do. If yours does not, take this copy with you and request that your library subscribe to *National Lawyers Guild Review*, now in its 76th year. Issued quarterly. Library subscription rate \$75.00 per year, ISSN 0017-5390. You may order through the library's subscription agent or directly from: **NATIONAL LAWYERS GUILD REVIEW**, 132 Nassau Street, # 922, New York NY 10038.

Amber Penn-Roco

STANDING ROCK AND THE EROSION OF TRIBAL RIGHTS

The protests at the Standing Rock Sioux Reservation are, in a word, inspiring. The protests have included members of more than 100 tribes and are considered by many to be one of the largest Native American protests in modern times.

The protesters oppose the construction of the Dakota Access Pipeline. The pipeline will be nearly 1,200 miles long and will connect oil fields from North Dakota to Illinois. The pipeline crosses the burial grounds and other sacred and historically significant sites of the Standing Rock Sioux Tribe and threatens its only source of drinking water. In August the Tribe filed a lawsuit in federal district court seeking an injunction to halt construction of the pipeline. In September the injunction was denied.

However, the district court's denial was counterbalanced by a joint statement issued by the Department of Justice, the Department of the Army, and the Department of the Interior that acknowledged the district court's opinion but stated that the Army will not yet authorize construction of the pipeline. The joint statement asked the pipeline company, to "voluntarily pause" all construction activity within 20 miles of Lake Oahe, until the agencies reach a determination as to whether the project violates the National Environmental Policy Act.

The denial was appealed to the U.S. Court of Appeals for the District of Columbia. However, the U.S. Court of Appeals again refused to grant the Tribe's request for an injunction. The Department of Justice, the Department of the Army, and the Department of the Interior issued a second joint statement, again refusing to authorize construction of the pipeline and requesting that the pipeline company voluntarily pause construction activity. In October the pipeline company defied the agencies' requests and proceeded with construction.

The tension between the protesters, also referred to as "water protectors," and the police escalated throughout the protests. The police used pepper spray, rubber bullets, tear gas, and fire hoses on protesters. Over the course of the protests, hundreds were arrested. In November the U.S. Army Corps of Engineers and the Governor of North Dakota ordered the protesters to vacate their campsite. In December thousands of U.S.

Amber Penn-Roco is an attorney specializing in tribal sovereignty issues with Galanda Broadman, a native-owned Indian Country Law Firm in Seattle, Washington.

military veterans traveled to Standing Rock to serve as human shields between the police and protesters. In response to a request from the Tribe, the U.S. Commission on Civil Rights sent a delegation to Standing Rock to observe the situation.

In December the Army Corps issued a statement indicating that it would not approve an easement that would allow the proposed pipeline to cross under Lake Oahe. The Army based its decision “on a need to explore alternate routes” which it believes would be best accomplished through further environmental review. The decision essentially halts construction of the pipeline, granting a major victory to protesters. While many are celebrating the decision, many remain wary, pointing out that the conclusion of further environmental review is not certain and that the Trump administration may have a different approach to the pipeline. The pipeline company stated that it “fully expect[s] to complete construction of the pipeline without any additional rerouting in and around Lake Oahe.”¹

The Standing Rock protests have thrust into the limelight the plight of tribes and the continual erosion of their rights. The protests are the culmination of the Standing Rock Sioux Tribe’s frustration with the development and approval process for the Dakota Access Pipeline. The Tribe’s rights, culture, and natural resources have been repeatedly disrespected.

Prior to the protests the Tribe’s Historic Preservation Officer (“THPO”) sent multiple communications to the Army Corps expressing the Tribe’s concerns about the project, including the potential destruction of burial grounds and sacred sites and the proximity of the project to the Tribe’s water sources. The federal government failed to meaningfully respond to these letters or consult with the Tribe. The Army Corps then published an environmental assessment that stated, “the Standing Rock THPO had indicated to DAPL that the Lake Oahu site avoided impacts to tribally significant sites.”² The assessment drew criticism from the U.S. Environmental Protection Agency, the U.S. Department of the Interior, and the American Council on Historical Preservation, among other tribal and environmental groups.

In forming an opinion about the struggle in Standing Rock, it is important to recognize the background and context surrounding the situation. For many legal practitioners in Indian Country the issues faced in Standing Rock are symptomatic of a larger problem—the erosion of tribal rights through the lack of meaningful consultation with tribes.

Tribes are sovereign nations. They are recognized as independent political communities, as distinct types of government, separate and apart from federal and state governments. The unique status of tribes, existing within but also outside of the federal and state government structure has led to difficulties

ensuring that tribal governments are allowed to adequately participate in matters and decision-making that affects their own well-being.

Federal and state agencies have routinely recognized the importance of developing government-to-government relationships with tribes. As part of this relationship, many laws, regulations, and federal and state agency policies require consultation with tribes on matters germane to tribal interests. Consultation, in theory, is an excellent concept. Tribes should be able to participate in decision-making that will impact them. However, in execution, consultation has left much to be desired. Many government agencies view the consultation requirement as merely a procedural step. Tribes, if they are provided with a consultation opportunity at all, are merely given a token opportunity to make their position known. Their views are often wholly ignored or dismissed with so-called mitigation measures that amount to nothing much. In many instances, a consultation requirement is disposed of by merely providing notice of a project and soliciting comments from a tribe. The difficulty in challenging this treatment is that the laws also seem to view consultation merely as a procedural requirement. Many laws, as written, require an agency to listen to a tribe's concerns but do not necessarily require the agency to do anything to address those concerns.

Tribes are sovereign nations. Consultation between one sovereign nation and another, regarding how the actions of one will affect the other, should culminate in informed consent. The United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") contains multiple articles that recognize the importance of informed consent. Article 32 of UNDRIP provides "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."³ Article 19 provides that "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."⁴ Accordingly, consultation between the United States and tribes must require informed consent. That is, they should require obtaining permission from tribes and that permission must come after tribes are fully informed about any potential consequences of the United States' actions.

The Standing Rock protests highlight the difference between consultation and *meaningful* consultation. Consultation that is done merely for the sake of fulfilling a statutory requirement does not fulfill the goals of the laws and policies requiring consultation. Meaningful consultation requires true col-

laboration, in which a tribe's input has an actual impact on the end result. And, most importantly, meaningful consultation between sovereigns should require informed consent.

Tribes are suffering from an onslaught of projects imposed on them by others that imperil their rights and their sacred duty to protect their surrounding natural resources and culture. A tribe's rights are often attacked on multiple fronts. Projects that threaten them are often wide-scale and multi-dimensional. Tribes are often forced into a battle of attrition, in which they must defend their rights before a wide variety of decision-makers. For just one project, a tribe can be forced to spend years in litigation, first in an administrative proceeding and then in an exhausting sequence of court hearings. At each step in the process the rights of tribes are placed in the hands of state and/or federal agencies.

Tribes are facing a slow erosion of their rights, of their ability to fish, hunt, and gather according to ancient customs and traditions. The health and quality of natural resources long considered sacred are in jeopardy. Tribes are suffering a death by a thousand cuts.

The Standing Rock protests and their impact on the Dakota Access Pipeline will influence the consultation process for years to come. The protests are already bringing national attention to tribal rights issues. The tribes, and those of us who fight on behalf of them, must capitalize on this attention and ensure that tribal consultation is seen as more than merely a box for a bureaucrat to check.

NOTES

- 1 *BRIEF-Energy Transfer Partners and Sunoco Committed to Ensure Dakota Access Pipeline Completion*, REUTERS (Dec. 4, 2016, 11:21 PM), <http://www.reuters.com/article/idUSFWNIDZ04I>.
- 2 Alexander Sammon, *A History of Native Americans Protesting the Dakota Access Pipeline*, MOTHER JONES (Sept. 9, 2016, 1:16 PM), <http://www.motherjones.com/environment/2016/09/dakota-access-pipeline-protest-timeline-sioux-standing-rock-jill-stein>.
- 3 United Nations Declaration on the Rights Indigenous Peoples, G.A. Res. 61/295, Annex, U.N. GAOR, 61st Sess. Supp. No. 53, U.N. Doc. A/61/53, at Art. 32 (Sept. 13, 2007), available at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.
- 4 *Id.* at Art. 19.



The Supreme Court's decision in *Fisher v. University of Texas* was a stunning victory for affirmative action and the ability of colleges and universities to pursue diversity in educating their students. In a 4–3 decision, with Justice Kennedy writing for the majority, the Court upheld a University of Texas plan that uses race as one among many factors in admissions decisions. The ruling means that colleges and universities can continue to use race conscious admissions programs to ensure a racially diverse student body.

In 2003, in *Grutter v. Bollinger*, the Supreme Court held that colleges and universities have a compelling interest in having a diverse student body and may use race as one consideration, among many, in admissions decisions. Justice Sandra Day O'Connor wrote the opinion for the Court, joined by Justices Stevens, Souter, Ginsburg, and Breyer.

In 2004, the Regents of the University of Texas, seeing a lack of diversity in their undergraduate population, adopted a new admissions policy. Pursuant to Texas state law, about 75 percent of each freshman class would be admitted by taking the top ten percent from every high school in the state. Because of racial segregation in Texas, this would produce some degree of diversity, but not enough to create a “critical mass” of minority students essential for their success and for diversity.

The University of Texas policy provided that about 25 percent of each class would be admitted based on an individualized review of applications. An admissions score was calculated for each student based on two numbers. One was an Academic Index, which was the student's grades and test scores. The other was a Personal Achievement Index which was calculated based on the assessment of two admissions essays and a consideration of seven factors, one of which was what the student would contribute to racial diversity.

The new policy worked in enhancing diversity. There was a significant increase in applications from minority students and a 20 percent increase in African-American and a 15 percent increase in Latino students attending the University of Texas.

Under *Grutter v. Bollinger*, this is clearly constitutional; the University of Texas used race as one factor among many in its admissions decisions. The Texas program was upheld by the federal district court and the United States Court of Appeals for the Fifth Circuit. However, the Supreme Court,

in a 7–1 decision in June 2013, remanded the case to the Fifth Circuit and held that Texas had to prove that there was no race neutral way to achieve diversity. Justice Kagan was recused from participating because she had been involved in the case as Solicitor General of the United States. The Court stressed that it was not sufficient for a college or university to have a compelling interest in diversity. The school had to show that there was no other means to yield a diverse student body.

In 2014, the Fifth Circuit, in a 2–1 decision, again ruled in favor of the University of Texas, holding that it sufficiently demonstrated the need to use race as a factor in admission decisions to achieve diversity. And to the surprise of many, on Thursday, June 23, 2016, the Supreme Court, in a 4–3 decision, affirmed and upheld the University of Texas program. Justice Kennedy wrote the majority opinion, joined by Justices Ginsburg, Breyer, and Sotomayor. Justice Alito wrote a vehement 52 page dissent joined by Chief Justice Roberts. Justice Thomas wrote a separate dissent. The three dissenting justices left little doubt that they would vote to eliminate all affirmative action.

Anthony Kennedy came on to the Supreme Court in February 1988. From then until June 23, he never once voted to uphold an affirmative action program, not in education or contracting or employment. Yet, his majority opinion and his tone left no doubt that there is, at least for now, a majority to uphold affirmative action.

To be sure, the Court reaffirmed that the burden is on the educational institution to prove the need for diversity and that there is no race neutral way to achieve diversity. The Court found that the University of Texas had met this burden. The Court said that a college or university does not need to quantify what is needed for a “critical mass of minority students” and that Texas did not need to prove that the top 10 percent plan was insufficient to achieve diversity.

Most important, the Court expressed the need for deference to educational institutions. The Court declared: “Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission. . . . In striking this sensitive balance, public universities, like the States themselves, can serve as ‘laboratories for experimentation.’”

Never before had Anthony Kennedy voted to uphold an affirmative action plan. Never before had he written of the need to defer to educational institutions or to allow experimentation in terms of how to achieve diversity.

Colleges and universities still must prove their need for diversity and for affirmative action. Also, the Court stressed a college or university that

is engaged in affirmative action has a continuing obligation to reassess the admission program's constitutionality and effectiveness and must tailor its approach to ensure that race plays no greater role than is necessary to meet its compelling interests. But these, as the Court's decision indicates, are manageable burdens.

The Court's decision in *Fisher* is a huge victory for the education of all students. Diversity in the classroom is essential. I have been a professor for 30 years now and have taught constitutional law in classes that are almost all white and those that are racially diverse. It is different to talk about racial profiling by the police when there are African-American and Latino men in the room who can talk powerfully about their experience of being stopped for driving while black or driving while brown. Preparing students for the racially diverse world they will experience requires that they learn in racially diverse classrooms.

Nor are there realistic alternatives for achieving diversity without affirmative action. Because of historic and continuing inequalities in education, color blindness in admissions would mean dramatic decreases in the number of African-American and Latino students in colleges and universities across the country. Giving preferences based on social class fails to achieve racial diversity because there are many more poor whites than poor African-Americans and Latinos, even if the percentage in poverty in the latter groups is larger.

Fisher means colleges and universities can continue to engage in affirmative action. By its terms, it is about equal protection under the Fourteenth Amendment and is limited to public colleges and universities. But the Supreme Court has said that the standards are the same under Title VI of the Civil Rights Act of 1964 which prohibits recipients of federal funds from discriminating based on race. Thus, in practical effect, it applies to all colleges and universities in the United States. *Fisher* is thus truly a huge victory for the education of all of our students.



Richael Faithful

WE MUST DO BETTER: THE CLEMENCY CASE OF CHARCEIL KELLAM

And while at the height of my addiction, I envisioned myself, imprisoned for life by my addiction, I never envisioned myself imprisoned for the rest of my life because of my addiction.

-- Charceil Kellam's Clemency Petition, June 28, 2015

On August 2, 2005, Charceil Kellam invited her cousin into her home. Like millions of others across the country, Charceil was struggling with drug addiction. In a moment of desperation, she asked her cousin to help her get a fix, and the cousin gave her a phone number. She made a phone call to a supplier that profoundly changed her life. It led to prison and a term of two life sentences plus thirty years. Charceil Kellam, a mother of two children, was going to spend the rest of her natural life and die in prison because of that one fateful phone call.

The only reason Charceil's future will be different is because she was granted a commutation by President Barack Obama on August 3, 2016.¹ I helped her prepare her clemency application.

How could Charceil did get such a harsh sentence in the first place? It can be attributed to the cumulative effect of a host of racially biased systems within the larger criminal justice system. Sadly, this outcome is not rare. Understanding the systemic design and perverse incentives of our criminal justice system will help explain how Charceil was sentenced to spend the rest of her life in prison. In this short essay I will focus on three elements of the system: racial profiling, prosecutorial discretion, and mandatory minimums.

Racial Profiling

Charceil Kellam was a long-time resident of Berryville, Virginia, a small town in the northwestern corner of the Commonwealth. Berryville is home to a few thousand people, 81 percent of whom are white and roughly 4 percent are Black.² Historically, relations between the town's white majority and Black residents have been strained, as they are in many rural southern communities. Whites control the local government, racial segregation is a fact of life, and the over-policing of Black neighborhoods is common. Racial profiling operates freely and is experienced on at least two levels. On a systemic level, a federal investigation had focused on the drug ring that

Richael Faithful is a folk healer and lawyer based in Washington DC.

implicated Charceil. The ring was known as “The Block.” The Block was concentrated in the predominately Black corner of the town and brought yet more law enforcement and surveillance into the small communities of color in Berryville. This federal scrutiny and local police cooperation is the backdrop against which Charceil stumbled into The Block dragnet.

On an individual level, negative encounters with police were a fact of life for Black folks in Berryville. Charceil went through a traumatic traffic stop not long before she made her fateful phone call. Like many others, she was mistreated by the police officer who stopped her. The officer had no reasonable suspicion of criminal activity, as the law requires, to make the stop. Then he physically assaulted her after she invoked her constitutional protections. Unlike most other Black folks however, Charceil reported the abuse to the police department. Far from being met with concern about her treatment and respect for fulfilling her duty as a citizen, Charceil became known to the police as a troublemaker. The mostly white rural police department did not like troublemakers, especially in the form of Black women with misdemeanor convictions.

Charceil was now in a precarious position which would later prove devastating in the world of small town politics. The pattern of systemic police scrutiny and mistreatment of Blacks is maintained by an absence of accountability. It is from this impunity that movements like Black Lives Matter have been born. Charceil’s unconstitutional³ stop was the first in a chain of events that led to her multiple-life sentences.

Prosecutorial discretion

Charceil’s phone call to an undercover informant put her within scope of the federal government’s investigation of The Block. The local police cooperated closely with the federal agencies. Even though she was a very minor character in the story of an investigation of a very sophisticated drug ring, she was aggressively prosecuted. The reasons remain unclear. Her family, who are activists, tend to assume that her previous challenges to the authority of the local police flagged her in some way. For a number of reasons, Charceil was at personal risk. This risk was compounded by the systemic racism and unchecked power in the offices of the prosecutors.

The role that prosecutorial discretion can play in the overpunishment of a criminal defendant should not be underestimated, particularly when it comes to drug cases involving Black defendants. Prosecutors are solely responsible for bringing charges, determining which charges to pursue, and securing convictions on behalf of the sovereign. Many knowledgeable critics, including professor and former Public Defender, Angela J. Davis, author of *Arbitrary Justice: The Power of the American Prosecutor*, point out the

systemic inequities that result because prosecutorial power is often hidden from public review and driven by perverse career-advancing incentives that do not deliver justice. “Very few are humbled by the power they held,” she writes. “[M]ost prosecutors with whom I had experience seemed to focus almost exclusively on securing convictions, without consideration of whether a conviction would result in the fairest or most satisfactory result for the accused or even the victim.”⁴

In Charceil’s case, federal prosecutors abused their discretion in two significant ways, which led directly to a sentence that was grossly unfair. First, federal prosecutors connected Charceil to The Block through conspiracy charges. There was no evidence that Charceil had any meaningful relationships to the drug ring architects, major distributors, or any other person connected to the inner-workings of the operation. According to court records, prosecutors didn’t even try to argue that she was a main player or proffer evidence to support such a claim. Rather, prosecutors brought her into the ring because Charceil met the barest of technical definitions of federal conspiracy from her single phone call to the informant. Prosecutors could have used their discretion to treat Charceil differently. Instead, they chose to increase their conviction count and incidentally ruin her life.

Second, federal prosecutors’ dependence on informants to induce plea bargains was shocking in this case. Many criminal justice stakeholders have roundly criticized the over-reliance on informants during criminal proceedings over the last two decades. Professor Paul Butler in his criminal justice critique, *Let’s Get Free: A Hip Hop Theory of Justice*, explains that the pervasive and uncontrolled use of informants compromises community safety because it often produces unreliable evidence, encourages laziness in police investigations, and undermines the community’s social fabric.⁵ As informants become extensions of the police through their cooperation, their incentives can become pretty sweet deals compared to the hard alternatives. These deals undermine any rational sense of justice to those who aren’t granted the privilege of informing on their fellow citizens or who simply refuse to cooperate. Plea bargains as used by prosecutors these days also exacerbate the worst aspects of the U.S. criminal justice system—by forcing criminalized people with few choices and resources to choose their own well-being over others. Charceil’s case is a prime example of the abuse of informants and their “incentives.”

The main miscarriage of justice in this case comes down to Charceil’s extremely disproportionate sentence compared to others implicated in The Block case. When Charceil was charged and convicted of conspiracy, her sentence was subject to mandatory minimum enhancements, which will be discussed below. Other more highly involved members of The Block

enjoyed generous plea deals which significantly reduced their time. She received the longest sentence among the 28 co-conspirators named in the federal case. It is striking that Michael Adelson, The Block kingpin and architect, received no prison time, while Charceil, whose involvement with The Block was barely a blip on the investigation's radar, received more than two life sentences.

Clearly, this outcome would not have been consistent with the spirit of the law. Prosecutors' overzealousness against Charceil, and their decision to offer plea deals to more serious offenders were abuses of their power. Drug addiction treatment, a more rational and productive response to her conduct, was never an option for her. This illustrates how the War on Drugs uniquely impacts Black women, who are often mere associates to drug dealers but are sentenced as just as harshly. They are also more likely to be responsible for families that are shattered by draconian anti-drug policies.⁶ Charceil's two children were left to be taken care of by other women in her family. The children had to deal with the fact that they were never going to see their mother outside an institution again. Charceil is a quintessential casualty of the War on Drugs.

Mandatory minimums

Having been imperiled by her effort to hold local police accountable for their unconstitutional actions against her, targeted by a racialized federal investigation, charged with a conspiracy of which she was not a part, and thrown under a metaphorical bus by informants who were given plea deals, Charceil was convicted and found herself subject to mandatory minimums at sentencing. Mandatory minimums are sentence enhancements for people with multiple drug convictions. Prior to her federal conviction Charceil had three non-violent, small quantity, state misdemeanor drug convictions stemming from two incidents. However, because this time Charceil was convicted of conspiracy on the federal level, harsh penalties were activated. This is how she reached two lifetime sentences plus thirty years—for a single phone call.

Mandatory minimums, passed in the heyday of the War on Drugs, have since been discredited and repealed. They are congressionally mandated automatic sentence prison terms for certain crimes, mostly drug-related. They are triggered by drug quantity and the number of convictions. By passing them Congress stripped judges of their ability to use their own discretion during the sentencing process. Instead, there is a baseline offense upon which a Sentencing Table is applied. The combination of Charceil's prior convictions and federal conspiracy conviction took the matter largely out of the judge's hands.⁷ It is well documented that mandatory minimums most gravely impact "low-level offenders"⁸ and are directly responsible for the mass incarceration

crisis for Blacks in the U.S.⁹ As the crisis deepens, more people are learning about the alarming statistics connecting the War on Drugs in general, and mandatory minimums in particular, with mass incarceration and our current carceral state. But statistics are abstract. Charceil is not. She is a real person whose life was taken away from her—almost permanently. It is especially frustrating that although many mandatory minimum laws have been ended in practice, legal relief does not always apply retroactively.¹⁰ Plainly put, everyone knew (or should have known) that the laws were wrong, and yet not everyone suffering under them received justice because of the political reality that releasing these folks from prisons would be too disturbing to the American majority. We'd rather warehouse humans unfairly for long periods of time than admit that we enacted and enforced apartheid laws against our own citizens. This is just shameful.

Because she received executive clemency, Charceil will go home in about a year, perhaps less if she is able to transition into a group home for the remainder of her sentence. Clemency is a sentence reduction—not a full pardon that absolves her of all wrongdoing. Essentially, the commutation amounts to a resentencing of time served.

Executive clemency is an incredibly rare form of legal relief. Charceil had to exhaust all of her other legal options and then petition the President of the United States to intervene and reduce her sentence. She became an exception to a very harsh rule. She has been (partially) rescued from laws designed to punish Blacks in the wake of a national drug panic of nearly thirty years ago. Charceil was able to avail herself of a historic initiative by President Barack Obama to use his executive authority to correct some of these injustices. To my mind President Obama did not always act bravely throughout his presidency. At times he even perpetuated harms, as he did through his administration's cruel deportation policies. But he did the right thing by granting clemency to an unprecedented number of people, including Charceil. He took a political risk for the moral good.

There are two lessons that observers should take from Charceil's case. First, racism is pervasive in all of our legal systems. It devastates real lives, real families, and real communities that are already facing economic exploitation and other systems of oppression. Charceil's conviction is a case study of our racial caste system as described by critical legal scholars of color. Second, the clemency process isn't heroic. It is the last stop in a system rife with major failures, and in the case of Black folks in the U.S., one that is efficiently designed to control and discipline them. Drafting Charceil's petition with her was painful because there were so many things that we could not mention—including her abuse by police—if we wanted a successful petition. We had to play the game. We won this round, but she had lost so many

already. Yet she is far luckier than the countless inmates who, due to cruel and outrageous circumstances, never even get a chance to play.

We should celebrate the perhaps thousands of people who have and will go home before the end of President Obama's term. They are proof that miracles can happen. The only issue is that our systems of justice should not target certain communities and then depend on miracles to correct injustice. It is evil, and sloppy, and backward. We must do better.

NOTES

1. *President Obama Grants Commutations*, DEPT. OF JUSTICE (Aug. 3, 2016), <https://www.justice.gov/opa/pr/president-obama-grants-commutations-5>.
2. *Berryville, Virginia Population: Census 2010 and 2000 Interactive Map, Demographics, Statistics, Quick Facts*, CENSUSVIEWER, <http://censusviewer.com/city/VA/Berryville> (last visited Dec. 21, 2016).
3. No court has ruled on the constitutionality of the traffic stop. I base my assessment that it was unconstitutional on my viewing of the police video available here: <http://www.clarkedailynews.com/local-family-claims-conspiracy-responsible-for-conviction/>
4. ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 4 (2009).
5. PAUL BUTLER, *LET'S GET FREE: A HIP HOP THEORY OF JUSTICE* (2010), available at <https://books.google.com/books?id=gWpa8PhRkEUC&printsec=frontcover&dq=let%27s+get+free+a+hip-hop+theory+of+justice&hl=en&sa=X&ved=0ahUKewj9vbHOT-XQAhWC7iYKHSnLBncQ6AEIGjAA#v=onepage&q=informant&f=false>.
6. *Women and Gender in the Drug War*, WE ARE THE DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/women-and-gender-drug-war> (last visited Dec. 21, 2016).
7. *Sentencing 101*, FAMM, <http://famm.org/sentencing-101/> (last visited Dec. 21, 2016).
8. *Unjust Mandatory Minimums*, N.Y. TIMES (Feb. 18, 2013), <http://www.nytimes.com/2013/02/19/opinion/unjust-mandatory-minimum-prison-sentences.html>.
9. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012).
10. Scott Shackford, *Supreme Court Makes Important Mandatory Minimum Ruling Retroactive*, REASON.COM (Apr. 19, 2016, 2:00 PM), <http://reason.com/blog/2016/04/19/supreme-court-makes-important-mandatory>.



Natasha Lycia Ora Bannan

**BUILDING ON 80 YEARS OF
RADICAL LAWYERING
IN THE AGE OF TRUMP**

Eighty years from now, when future generations look back at the Trump candidacy and presidency and reflect on how institutions responded to the spread of neo-fascism and the attack on fundamental rights, I am confident that the Guild will stand out as a clear example of what social justice lawyering means. We will have stood with those who refused to be silent or complicit in state-sanctioned oppression. We have been doing this since our founding in 1937. For eight decades we have defended social justice movements and protected constitutional and human rights fearlessly in the face of tyranny and state violence. The advent of the Trump administration will only mean a rededication and continuation of our work—perhaps in ways we did not expect, but that we are prepared for.

The election of Donald J. Trump brought to light some tendencies in our national fabric many of us thought had been driven deep underground. For veteran Guild lawyers and activists, the 2016 election environment hearkened back to the days of McCarthyism, when constitutionally-protected speech questioning U.S. policies or expressing sympathy with groups and individuals targeted by the government could be branded as “un-American” and lead to prison. Others were reminded of the ’60s, when anti-war protestors and draft resisters refused to fight in an unjust war because they believed in peace and an alternative political model, while our government deemed them a threat to “democracy.” Each of these eras of repression from the last century were backed by our legal system. It comes as no surprise then that, in response to Trump’s racist, sexist, homophobic, and Islamophobic speeches, as well as his initial moves to consolidate his power, Guild members have begun to draw upon these past experiences.

As an anti-racist organization, we have long fought white supremacy and the laws and policies it engenders, regardless of who occupies the White House. We have called out the folly of trickle-down economics used as an excuse to eliminate social protections. We have fought against militarism, the expansion of empire, drone strikes, targeted assassinations, CIA black sites, and torture. We have pushed back against the war on drugs and its destructive effects on either side of the U.S.-Mexico border. We have challenged the surveillance and harassment of other countries’ socially progressive move-

Natasha Lycia Ora Bannan is the president of the National Lawyers Guild.

ments. We continue to challenge in the courts (and in the streets) the unlawful concentration of power into the executive branch of government. In essence, we've been fighting Trumpism, before the term was coined, since 1937.

Because of our history, we will be ready to challenge this administration even before its threats and rhetoric become policy. We will continue to challenge the normalization of racism and sexism in the public arena. Trump has called the largest group of people of color in this country, Latinos, "rapists" and "criminals." He has questioned the ability of a federal judge to adjudicate a case in which he was a defendant because of the judge's ethnicity. He has bragged about sexually assaulting women. And yet his language—regardless of how insulting, degrading, or hostile—has always been framed as American patriotism. For Trump, anyone who disagrees with him is "un-American." In this way, Trump has tapped into dangerous sentiments that have erupted periodically throughout this country's history. These reactionary sentiments, rooted largely in the ideologies of white supremacy, xenophobia, and patriarchy, are still felt every day in communities across the country.

We see the structural racism Trump embraces and seeks to exacerbate in the widespread police occupation and violence against communities of color, in the detention of immigrant families, in the warrantless wiretapping and surveillance of Arab and Muslim communities, in the over-regulation of poor citizens and in the under-regulation of corporations. While shocking to some, the signs of what is coming are no surprise to the many Guild members who represent, or are themselves part of, these over-policed and under-resourced communities, particularly communities of color. Economic and state violence has always operated in these communities, and we have always been ready to challenge the unregulated exercise of state and corporate power. And we are ready now.

The promise to "Make America Great Again" is the language of imperialism and war. It is language that sends chilling signals to who may be targeted by a Trump administration. Once we clearly identify the "us" against "them," any variations on dictated behavior and conduct can lead to harassment, discrimination, abuse, torture and aggression against other nations and peoples. We will be called upon to defend these communities in the streets, courtrooms, schools, churches, homes, and community centers. Our mass defense work, for which we have become renowned over the past decade, must and will be prepared to respond to the potential criminalization of dissent, speech, and assembly, all of which are basic rights guaranteed by the First Amendment.

The imperialist and racist campaign promise to "Make America Great Again," clearly implies who the country is intended to be "great" for, as well

as who will continue to be exploited, harassed, detained, and criminalized in their labor and in their lives. If transformed into policy, this promise will forcibly remove many immigrants who work low-wage jobs in often abusive conditions. Workers, regardless of their immigration status, will continue to be exploited as attacks on labor rights escalate, while the drive to concentrate wealth in the hands of a few will become official domestic and foreign policy. Anti-immigrant rhetoric will heighten the prejudice and fear in vulnerable communities in order to redirect their justifiable frustration with their economic position, lack of opportunities, and an unresponsive political system towards scapegoats. They will take their anger out on those “others.”

The Guild is prepared for the incoming administration because we were there during the Second Red Scare. During this period, when anti-communist hysteria peaked and spread its tentacles into all sectors of society, Guild members represented those most directly and famously under attack—the Hollywood Ten, the Rosenbergs, the leaders of the Communist Party, Paul Robeson, and many more. We also defended thousands of others suspected of “anti-American activities.” This work led to the Guild being labeled “subversive” by the House Committee on Un-American Activities. The heart and character of our organization has been tested as no other legal organization’s has. Our commitment to defending First Amendment freedoms still informs the work of our organization today—work that will undoubtedly continue as attacks to our fundamental freedoms and rights only intensify.

Trump has shown that he demands the full allegiance of those around him. When it is not given he resorts to disparaging, humiliating, bullying or worse. He relishes personal attacks and deploys them, however false, at the slightest provocation. He has used social media to publicly malign artists, journalists, and activists who’ve shown the temerity to disagree with him. He has misused the courts to sue those who criticize him in an effort to silence opposing voices. He has threatened to jail protestors—violating a basic tenet of dissent and democracy and a founding principle of our country that the Guild has fought to preserve for 80 years.

Trump’s actions and rhetoric foreshadow an effort to privatize public services and facilitate the corporate takeover of government. The Guild has long recognized that neither democracy nor social justice is possible anywhere the where dramatic economic stratification exists. His threats to cut the social safety net for millions of people, to roll back labor protections, and to make it harder to earn a living wage threaten democracy and violate core principles of international human rights laws that the Guild has long supported. The Guild’s new Human Rights Framework Project will be working across committees and chapters to educate members on how to hold the United States accountable for violating its legal obligation

to promote economic and human rights abroad while never violating them at home.

The tactic of the Trump administration to rule based on fear, domination, power, and privilege is something we've seen before. We've fought against politicians, here and abroad, who have deemed themselves unaccountable to anyone but themselves. Challenging unchecked presidential power and its inevitable abuses is at the core of the Guild's long history of international solidarity work, especially in countries and regions where the United States has intervened militarily and economically to prop up oppressive regimes, finance coups, and install dictators. We are familiar with with the hand of the state in silencing dissenting voices and squashing opposition through the violent tactics of state repression, here and abroad. We've fought alongside the Occupy movement and #BlackLivesMatter. We've represented *independentistas* and freedom fighters in Puerto Rico and defended Water Protectors in Standing Rock, North Dakota. We are prepared to work with our social justice allies around the world to challenge any efforts to reach beyond the constitutional limits of the Executive branch or use state resources to suppress, repress, punish, isolate, humiliate, or torture those who refuse to stay silent in the face of a government hostile to the genuine democracy we seek to promote.

As unprecedented as this election is, the National Lawyers Guild has withstood 80 years of attempted repression, surveillance, wars, attacks on social services, state-sanctioned or -administered violence, imprisonment and political persecution. Guild members have a deep history of resistance to draw upon. Many of our elders remain to guide us. The political and legal landscape may shift, but as movement lawyers, law students, and legal workers, we will not relent in our defense of fundamental rights nor in the pursuit of a righteous justice.

We will undoubtedly be called upon to think more expansively and creatively about our work. We will need to look beyond the courts for remedies, as well as to the international community, to organizing and people's tribunals and to legislative strategies. Perhaps we'll need to look at economic boycotts, technological support, at funding our work differently, building new alliances, and finding new leaders. But, whatever happens, this much is certain: we will be called upon and, as the people's advocates, we will show up, as we always have. There is no doubt that there are trying times ahead and our communities will be attacked in a myriad of ways. But we will prevail and we will do so under a united and expanded front. As difficult as the years ahead will be, ¡venceremos!



Their courageous opposition in the face of malevolent opposition caused the federal government to halt construction—at least for now. But the fight is far from over. History has shown that as long there are valuable natural resources on tribal land there will be corporations determined to exploit them. Ancient treaties oblige the federal government to protect tribes from such depredations. History has also shown that, without pressure, the government rarely feels compelled to honor these obligations.

In “The Future of Diversity,” published in *NLGR* in 2012 before the Supreme Court announced its decision in *Fisher v. University of Texas*, Erwin Chemerinsky explained what was at stake if, as expected, the Court ruled all forms of race-based affirmative action in higher education unconstitutional. Now, in “A Victory for Education,” Chemerinsky explains the consequences of the Court’s surprising decision to uphold the University of Texas’s affirmative action plan after rehearing the case in 2016. It was Associate Justice Anthony M. Kennedy’s unexpected change of heart in this case that preserved Texas’s modest form of affirmative action from constitutional erasure. As a result, colleges and universities can continue to use race as a consideration in their efforts to foster learning by introducing diverse viewpoints on campus.

President Obama granted either a pardon or commutation of sentence to just under 2,000 federal convicts, many of them in the final weeks of his presidency. Most of the beneficiaries were non-violent drug offenders who had been overpunished as part of the federal government’s notorious “War on Drugs.” The economic devastation caused by the government’s anti-drug laws over the past few decades, especially in predominately non-white communities, has been incalculable. Two thousand acts of clemency is a token gesture when nearly half the federal prison population, 82,415 human beings, are incarcerated for drug offenses.²

Clemency is a bandage, not a cure. In “We Must Do Better: The Clemency Case of Charceil Kellam” attorney and *NLGR* editorial board member Richael Faithful gives the context surrounding the conviction of her recently released client, a struggling drug addict and mother of two who was serving life without the possibility of parole for a non-violent drug offense. Faithful explains the many flaws and prejudices in the criminal justice system that made her client’s conviction possible.

Never in the history of the Lawyers Guild has there been a U.S. president so openly and avowedly—and obnoxiously—hostile to our mission and values as Donald J. Trump. In “Building on 80 Years of Radical Lawyering in the Age of Trump,” Guild President Natasha Lycia Ora Bannon describes her vision of how we will resist Trump’s agenda while staying true to our own.

—Nathan Goetting, *editor-in-chief*

1. Kate Zernike, *Betsy DeVos, Trump’s Education Pick, Has Steered Money From Public Schools*, N.Y. TIMES (Nov. 23, 2016), https://www.nytimes.com/2016/11/23/us/politics/betsy-devos-trumps-education-pick-has-steered-money-from-public-schools.html?_r=0.
2. *Offenses*, FEDERAL BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (last updated Dec. 24, 2016).

**CORRECTED U.S. POSTAL SERVICE STATEMENT OF OWNERSHIP,
MANAGEMENT & CIRCULATION (REQUIRED BY 39 U.S.C. 3685)**

1. Title of Publication: NATIONAL LAWYERS GUILD REVIEW. 2 Publication number: 231 560. 3. Date of filing: October 1, 2016. 4. Issue frequency: quarterly. 5. Number of issues published annually: Four. 6. Annual subscription price: \$25. 7. Complete mailing address of known office of publication: National Lawyers Guild Review, 132 Nassau Street, # 922, New York NY 10038. 8. Complete mailing address of the general business offices of the publisher: 132 Nassau Street, # 922, New York NY 10038. 9. Full names and complete mailing address of publisher, editor and managing editor: Publisher: National Lawyers Guild Review, 132 Nassau Street, # 922, New York NY 10038. Editor: Nathan Goetting, 132 Nassau Street, # 922, New York NY 10038. Managing editor: Deborah Willis. 10. Owner: National Lawyers Guild Foundation. 11. Known bondholders, mortgagees, and other security holders owning or holding 1 percent or more of total amount of bonds, mortgages, or other securities: none. 12. For completion by nonprofit organizations authorized to mail at special rates (Section 423.12DMM only): Status has not changed during the preceding 12 months. 13. Publication name: NATIONAL LAWYERS GUILD REVIEW. 14. Issue date for circulation data below: Spring 2016. 15. Extent and nature of circulation. Average number of copies of each issue during preceding 12 months. A. Total number of copies (net press run): 592. B. Paid and/or requested circulation (1) Outside county: 468. (2) Paid in-county subscriptions: 2. (3) Sales through dealers and carriers, street vendors, counter sales and other non-USPS paid distribution: 0. (4) Other classes mailed through the USPS: 0. C. Total paid and/or requested circulation: 470. D. Free distribution by mail (samples, complimentary and other free): 0 (1) Outside county: 0. (2) In-county: 0. (3) Other classes mailed: 0. E. Free distribution outside the mail (carriers or other means): 0. F. Total free distribution: 0. G. Total distribution: 470. H. Copies not distributed: 122. I. Total: 592. Percent paid and/or requested circulation: 100%. Actual number of copies of single issue published nearest to filing date. A. Total number of copies (net press run): 600. B. Paid and/or requested circulation (1) Outside county: 440. (2) Paid in-county subscriptions: 2 (3) Sales through dealers and carriers, street vendors, counter sales and other non-USPS paid distribution: 0. (4) Other classes mailed through the USPS: 0. C. Total paid and/or requested circulation: 442. D. Free distribution by mail (samples, complimentary and other free): (1) Outside county: 0. (2) In-county: 0. (3) Other classes mailed: 0. E. Free distribution outside the mail (carriers or other means): 0. F. Total free distribution: 0. G. Total distribution: 442. H. Copies not distributed: 158. I. Total: 600. Percent paid and/or requested circulation: 100% 16. This statement of ownership will be printed in the Fall 2016 issue of this publication. 17. I certify that the statements made by me above are correct and complete. Signature and title of editor, publisher, business manager or owner: National Lawyers Guild Foundation, owner, October 1, 2016.

NATIONAL LAWYERS GUILD REVIEW
132 NASSAU STREET, SUITE 922
NEW YORK, NY 10038

Periodicals
Postage Paid