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OF ORIGINALISM, REALITY, AND A CONSTITUTIONAL RIGHT TO EDUCATION

Susan H. Bitensky*

“The choice is always the same. You can make your model more complex and more faithful to reality, or you can make it simpler and easier to handle.”

—James Gleick¹

Professor Gregory E. Maggs' response to my article, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis* (hereinafter *Theoretical Foundations*),² should, at first glance, please those who value free speech³ and a flourishing marketplace of ideas.⁴ In *Innovation in Constitutional Law: The Right to Education and the Tricks of the Trade* (hereinafter *Tricks of the Trade*),⁵ Professor Maggs articulates a profound and lively disagreement with the arguments advanced by *Theoretical Foundations* in support of an implied positive right to public elementary and secondary education under the United States Constitution.

According to Professor Maggs, because the methodologies underlying the legal argumentation of *Theoretical Foundations* do not reflect a purely originalist way of interpreting the Constitution, these methodologies necessarily are “tricks,” a plying of the con artist's trade with lawyerly finesse.⁶ Professor Maggs also expresses ready skepticism, if not an

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¹ JAMES GLEICK, *CHAOS: MAKING A NEW SCIENCE* 278 (Penguin Books 1988).

² Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550 (1992).

³ Free speech is guaranteed by the Constitution's First Amendment which provides, in pertinent part, that “Congress shall make no law. . .abridging the freedom of speech.” U.S. CONST. amend. I.

⁴ The “marketplace of ideas” metaphor is derived from Justice Holmes' dissenting opinion in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting and joined by Brandeis, J.); see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-1, at 785-86 (2d ed. 1988) (referring to Justice Holmes' *Abrams* dissent as the source of the metaphor in American constitutional jurisprudence).

⁵ Gregory E. Maggs, *Innovation in Constitutional Law: The Right to Education and the Tricks of the Trade*, 86 NW. U. L. REV. 1038 (1992).

⁶ *Id.* at 1039, 1046-55.

altogether dismissive attitude, toward the practical benefits which a positive right to education could effectuate in ameliorating the nation's ongoing education crisis.⁷ Moreover, seeing in the theoretical and policy arguments supporting judicial recognition of the right a veritable Don Quixote tilting at windmills, Professor Maggs belittles the worth of making such arguments; he maintains that, in all probability, these arguments will fall on deaf ears at the United States Supreme Court as it is presently constituted.⁸

Such vigorous opposition by Professor Maggs may indeed have the immediate consequence of fueling robust debate. However, as appears more fully below, in the long run it is highly unlikely that constitutional jurisprudence, the educational prospects of young Americans, or even the marketplace of ideas will fare so well should Professor Maggs' perspective gain the day.

I. THE METHODOLOGIES ISSUE

Professor Maggs would discern a fatal flaw in the methodologies by which *Theoretical Foundations* finds an implied positive right to education in the federal constitution. The "flaw" is that these methodologies are the same ones repeatedly used by the U.S. Supreme Court. In other words, *Theoretical Foundations* stands accused of relying upon mainstream and enduring modes of legal analysis adopted by no less august an institution than the nation's highest court.⁹ This is good company with which to find oneself pigeonholed. Rather than rebut such a criticism, this author is more inclined to extend her thanks to Professor Maggs for bringing to the legal community's attention various Supreme Court opinions which, in terms of methodology, lend further support to a positive constitutional right to education.¹⁰

⁷ *Id.* at 1038, 1043-46.

⁸ *Id.* at 1042-43, 1054-55.

⁹ Professor Maggs cites the following opinions as symptomatic of the Supreme Court's supposedly erroneous methodologies: *Stanford v. Kentucky*, 492 U.S. 361, 390 & n.10 (1989) (Brennan, J., dissenting); *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Johnson v. Zerbst*, 458 U.S. 461 (1938); *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856).

¹⁰ Incidentally, I emphatically reject any implication made in *Tricks of the Trade* that the methodologies which give rise to a positive right to education pursuant to substantive due process doctrine must also give rise to a right to own slaves, the "right" recognized in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856). See Maggs, *supra* note 5, at 1049-51.

Professor Maggs would discredit substantive due process, in part, because the Supreme Court once relied upon it to reach the obnoxious result of upholding slavery. I suppose that, to be consistent, Professor Maggs would also disregard the Fourteenth Amendment's Equal Protection Clause because the Court once interpreted that provision to uphold Louisiana statutes mandating racially segregated train accommodations. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

It apparently is a matter of indifference to Professor Maggs that *Dred Scott*, like *Plessy*, was effectively overturned and that substantive due process has continued without the *Dred Scott* opinion

The ironic and radical nature of Professor Maggs' position on the methodology issue does not appear to disturb him because he counts himself an originalist in relation to constitutional interpretation. Professor Maggs would comprehend the Constitution's text only by relevant views of the Founding Fathers and the Constitution's framers. Through this prism, all other paradigms of constitutional analysis, even if they also include reliance on the Constitution's language and original intent, are but "tricks" performed by the sly tricksters populating nonoriginalist scholarly circles or formerly sitting on the Supreme Court.¹¹ Thus, Professor Maggs considers it no compliment to lump the methodologies of *Theoretical Foundations* with those of prior Supreme Court decisions because the Court's opinions that do not conform to the originalist formula are, in his estimation, just plain wrong—even if they were written or supported by a host of Justices during different periods of the Court's history.¹²

Although Professor Maggs has essentially used *Theoretical Foundations* as a springboard for expounding the originalist school of thought, a full-blown debate on the subject is clearly not feasible or appropriate in this reply. Therefore, on the methodologies issue, I will confine myself to

to support it. See, e.g., U.S. CONST. amend. XIII, § 1 (prohibiting slavery); *Id.* amend. XIV, § 1 (guaranteeing that states shall not deny any person equal protection of the laws); *Id.* amend. XV, § 1 (protecting against denial of the right to vote on account of race or previous servitude); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (Brown I) (holding that racially segregated public schooling violates the Fourteenth Amendment's Equal Protection Clause); *Strauder v. West Virginia*, 100 U.S. 303, 305-08 (1880) (denouncing racial subjugation as counter to equal protection principles).

By Professor Maggs' logic, anytime the Court errs in applying a constitutional doctrine, the doctrine should be abandoned instead of encouraging the Court to revise the mistaken application of it. In another context, Justice Joseph Story counseled against just this type of logic: "It is always a doubtful course to argue against the use or existence of a power, from the possibility of its abuse." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 344 (1816).

¹¹ Maggs, *supra* note 5, at 1039, 1046-55. Professor Maggs' intolerance toward theorists who do not belong to the originalist camp and his characterization of their methodologies as unprincipled manipulations are not unique to him among originalists. Robert H. Bork's defense of originalism has taken much the same tack. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 15-265 (1990); see also Bruce Ackerman, *Robert Bork's Grand Inquisition*, 99 YALE L.J. 1419, 1420 (1990) (reviewing ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990)) (commenting that Robert Bork has embarked upon the mission of rooting out as "heretics" and "crypto-Marxists" those Justices and scholars who depart from the originalist orthodoxy); Ronald Dworkin, *Bork's Jurisprudence*, 57 U. CHI. L. REV. 657, 658 (1990) (reviewing ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990)) (observing that Robert Bork "accuse[s] a significant portion of the academic legal profession of being tricksters and cynics who care only for results at whatever cost").

¹² E.g., *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (plurality opinion, Powell, J., and joined by Brennan, J., Marshall, J., and Blackmun, J.); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (majority opinion, Black, J., and joined by Warren, C.J., Brennan, J., Stewart, J., White, J., and Goldberg, J.); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (unanimous opinion, Warren, C.J., and joined by Black, J., Reed, J., Frankfurter, J., Douglas, J., Burton, J., Clark, J., Minton, J., and Jackson, J.); *Johnson v. Zerbst*, 304 U.S. 458 (1938) (majority opinion, Black, J., and joined by Hughes, C.J., Roberts, J., Stone, J., and Brandeis, J.).

three points: (1) locating where, along the continuum between originalism and nonoriginalism, *Theoretical Foundations* is methodologically located; (2) highlighting Professor Maggs' own peculiar disregard for original intent; and (3) briefly exploring the consequences that would attend originalism let loose in the real world of judicial decisionmaking.

As a preliminary matter, the methodologies employed in *Theoretical Foundations* should make abundantly clear that its author does not entirely reject consideration of original intent as a guide in interpreting the Constitution. Rather, *Theoretical Foundations* manifests an approach which willingly takes into account any pertinent evidence of original intent as one source, useful in conjunction with other applicable modes of constitutional analysis and legal reasoning, that may enable constitutional understanding.¹³ Indeed, this approach might better be described as multimodal instead of nonoriginalist since the second term, at least on its face, connotes an antipathy toward original intent which is not present in *Theoretical Foundations*.¹⁴

It must provoke some wonder that Professor Maggs' methodological critique barely takes notice of the fact that *Theoretical Foundations* contains a serious exegesis of original intent in relation to a positive right to education.¹⁵ An entire section of the article, Part III.C.3, is devoted to an examination of the historical evidence that leading framers of the Constitution, as well as other prominent public figures of the emerging republic, not only thought education important, but also viewed the federal government as empowered to play a primary and direct role in the provision of education.¹⁶

Theoretical Foundations posits that an affirmative constitutional right to education will impose the correlative power and obligation upon the federal government to guarantee a certain quantum of education to the nation's children; in this sense, the right would conform to the original intent of the Founders to implicitly delegate direct power over educa-

¹³ Among those commentators who do not subscribe to originalism, there is variation in the weight that they would assign to original intent in deciphering the Constitution. Compare TRIBE, *supra* note 4, § 1-7, at 10 n.2 (noting that his "treatise is premised on the axiom that the Constitution—what it says, although not necessarily what some of its authors or ratifiers intended or assumed—is binding law") with Thomas C. Grey, *The Uses of an Unwritten Constitution*, 64 CHIKENT L. REV. 211, 213-14 (1988) (opining that "even when ascertainable, original understandings have no final authority in constitutional law today") and with Louis H. Pollak, "Original Intention" and the Crucible of Litigation, 57 U. CIN. L. REV. 867, 869 (1989) (presenting "an approach to constitutional adjudication which respects, but is not overwhelmed by . . . the 'intent' " of the framers).

¹⁴ See Bitensky, *supra* note 2, at 626-30 (discussing original intent's bearing on the existence of a positive right to education under the Constitution).

¹⁵ Professor Maggs lingers for no more than two sentences upon the original intent discussion of *Theoretical Foundations*. Moreover, those two sentences do no more than purport to describe what *Theoretical Foundations* says about original intent in relation to a positive constitutional right to education. Maggs, *supra* note 5, at 1041.

¹⁶ Bitensky, *supra* note 2, at 628-30.

tion to the national government. More broadly stated, *Theoretical Foundations* demonstrates that the right, instead of flouting the Constitution or original intent, would fit quite naturally into the constitutional structure of allocated powers envisioned by the eminent men who contributed to the Constitution's framing and ultimate adoption.¹⁷

While Professor Maggs is correct in asserting that *Theoretical Foundations* relies upon a variety of nonoriginalist methodologies, it would be a misconception to think that its author ignored, minimized, or contradicted original intent. The reality is that it is Professor Maggs who here ignores original intent inasmuch as he fails to furnish any contradictory evidence of the framers' intentions or otherwise respond to *Theoretical Foundations'* exposition on the subject.¹⁸

Be that as it may, there are more catholic, far-reaching reasons for repudiating the methodological objections raised by *Tricks of the Trade*. Professor Maggs selects and condemns an array of Supreme Court decisions that he characterizes as representative of the nonoriginalist methodological errors committed by the Justices before the advent of the Rehnquist Court in 1986.¹⁹ Professor Maggs would correct these Justices by now having the Supreme Court embrace his originalist methodology to the exclusion of all other modes of constitutional analysis.²⁰

Professor Maggs' timing could not be better, for, as he aptly points out, *stare decisis* may have a weakening hold upon the Court.²¹ Yet, the Court's adoption of his methodological preferences would entail far more than overturning individual or even whole lines of cases; it would mean an upheaval on an unprecedented scale that would effectively sweep aside the methodological foundations for some of the most longstanding and basic tenets of constitutional jurisprudence.²² One case, *Marbury v.*

¹⁷ *Id.* at 627-30.

¹⁸ Maggs, *supra* note 5, *passim*. Professor Maggs does, at one point, engage in some speculation as to whether the framers and ratifiers of the First Amendment contemplated a link between education and effectuation of the free speech clause's purposes. Maggs, *supra* note 5, at 1052. However, Professor Maggs cites no authority supportive of his speculations or indicative of the framers' and ratifiers' views on this matter.

¹⁹ *Id.* at 1047-54; *see supra* note 9 and accompanying text.

²⁰ *See* Maggs, *supra* note 5, at 1047-55.

²¹ *Id.* at 1042 & n.28.

²² It is mentioned earlier in these pages that insofar as originalism is concerned, Professor Maggs appears to engage in the sort of analysis identified with Robert H. Bork. *See supra* note 11.

Professor Bruce Ackerman points out that Bork's critique of those judges and scholars who have not subscribed to originalist orthodoxy "extends backward before *Marbury v. Madison*, and unites such disparate sorts as Tribe and Epstein." Ackerman, *supra* note 11, at 1421. Professor Ackerman remarks that Bork's categorization of such pervasive and long-lived jurisprudence as heresy raises the question:

Why isn't it better to view such an historically entrenched and politically diverse theme [of nonoriginalist jurisprudence] as part of the *main line* of American constitutional development?

But Bork is prepared to take on all comers: From John Marshall to William Rehnquist, the heretics are legion. Each victim must be called to the dock. Each can be condemned only after

Madison,²³ suffices to illustrate the thoroughgoing, if not cataclysmic, revolution in constitutional analysis that would be triggered if a majority of the Justices were to opt for Professor Maggs' originalist methodology.

It was Chief Justice John Marshall who penned the opinion for the Court in *Marbury* in 1803, only fifteen years after the adoption of the Constitution.²⁴ It is interesting to consider that John Marshall was a contemporary of the Founding Fathers and the Constitution's authors and was advantageously positioned to interact and communicate with them. Notably, he was Thomas Jefferson's distant cousin.²⁵ He was retained as an attorney by the likes of George Washington and Thomas Jefferson.²⁶ He and Alexander Hamilton were friends.²⁷ He served with James Madison in the Virginia legislature during 1784.²⁸ He was a delegate to Virginia's special convention called to consider ratification of the then-proposed Constitution and there warmly urged its ratification.²⁹ And, he served as Secretary of State during the administration of President John Adams.³⁰ Presumably, then, John Marshall was not unfamiliar with the thinking and attitudes of the nation's forefathers. Yet, in *Marbury v. Madison*, Chief Justice John Marshall may be discovered to have engaged in those same methods of constitutional interpretation styled by Professor Maggs as "tricks."

However, before nabbing Chief Justice Marshall at his "sleight of hand" in *Marbury*, it is necessary to understand what Professor Maggs means by "tricks." The "tricks," as defined by Professor Maggs in abstract terms, include the following:

1. "Induction-Deduction Overgeneralization" by which Professor Maggs means that "the Court first identifies a theme common to several provisions of the Constitution"; "the Court then reasons that the Constitution protects the subject of [the] theme as a general matter"; and, as a third step, "the Court uses ordinary deductive reasoning to apply the general principle to a specific case";³¹
2. The "Magic Term," defined by Professor Maggs as "creating new terminology that proves that the Constitution provides what the Court wants

a representative sample of his or her error is considered. The overall impression is one of furious dispatch. . . .

Id. at 1421.

Professor Ackerman's comments are equally germane to Professor Maggs' originalism which, if implemented, would invalidate almost two centuries of Supreme Court precedents and "call to the dock" those theorists who agree with the precedents.

²³ 5 U.S. (1 Cranch) 137 (1803).

²⁴ The Constitution was ratified in 1788. Pollak, *supra* note 13, at 869.

²⁵ LEONARD BAKER, JOHN MARSHALL: A LIFE IN LAW 88 (1974).

²⁶ *Id.* at 88-89.

²⁷ *Id.* at 136.

²⁸ FRANCIS N. STITES, JOHN MARSHALL: DEFENDER OF THE CONSTITUTION 28 (Oscar Handlin ed., 1981).

²⁹ BAKER, *supra* note 25, at 118-36.

³⁰ STITES, *supra* note 28, at 75-76.

³¹ Maggs, *supra* note 5, at 1047-48.

it to provide";³²

3. The "Means-Ends Assumption," a trick which, Professor Maggs states, involves the Justices' concealment of "personal preferences in valid-sounding means-ends analysis";³³
4. "Informed Wishful Thinking," another "trick" that conceals the Justices' personal preferences, but which involves "using outside sources to 'inform'—a buzzword in legal scholarship meaning to give content to—the Constitution";³⁴ and
5. The "Perfection Fallacy," which Professor Maggs claims is achieved by conjuring up the illusion that "if society has a problem, the Constitution must solve it; and if something is good, the Constitution must protect it."³⁵

In *Marbury*, one of "the most celebrated of all Supreme Court opinions,"³⁶ the Court held, among other things, that the federal judiciary is endowed with authority, in a case or controversy, to find federal legislation unconstitutional, if the legislation contravenes the Constitution, and to invalidate the offending statutes.³⁷ The Court, through Chief Justice Marshall's "celebrated" opinion, reasoned its way to this holding by employing all five of the foregoing "tricks."

For example, Chief Justice Marshall arguably indulged in "Induction-Deduction Overgeneralization" by extrapolating the common theme of implied power of judicial review and judicial invalidation of unconstitutional laws from such facially unrelated and specific constitutional provisions as Article VI, Section 3 (requiring "judicial Officers" to take an oath or affirm that they will support the Constitution)³⁸; Article I, Section 9, Clause 3 (prohibiting enactment of *ex post facto* laws or bills of attainder)³⁹; Article I, Section 9, Clause 5 (prohibiting each state from imposing taxes or duties upon items exported from that state);⁴⁰ Article III, Section 2, Clause 1 (providing that the judicial power of the United States is extended to all cases arising under the Constitution);⁴¹ and Article VI, Section 2 (providing that the Constitution and federal laws made pursuant thereto are the supreme law of the land).⁴² He then applied the general principle legitimating judicial review to the case before him by reviewing and invalidating a provision of the Judiciary Act of 1789 because that statutory provision expanded the Supreme Court's original jurisdiction in violation of Article III, Section 2, Clause 2 of the

³² *Id.* at 1049.

³³ *Id.* at 1051.

³⁴ *Id.* at 1053.

³⁵ *Id.* at 1054.

³⁶ Senator Orrin G. Hatch, *Modern Marbury Myths*, 57 U. CIN. L. REV. 891, 891 (1989).

³⁷ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-80 (1803).

³⁸ *Id.* at 180.

³⁹ *Id.* at 179.

⁴⁰ *Id.*

⁴¹ *Id.* at 178.

⁴² *Id.* at 180.

Constitution.⁴³

Likewise, the Chief Justice substantively, although not literally, resorted to the "Magic Term" by fashioning the concept of judicial review of congressional enactments, a concept that is nowhere mentioned or even alluded to in the Constitution's text.⁴⁴ Nor was Chief Justice Marshall adverse to employing the "Means-Ends Assumption"; he imbued the Court with the power to review and invalidate federal statutes that run afoul of the Constitution (the "End") by assuming, as one reason for the holding, that this power must exist because the Constitution is written rather than oral (the "Means").⁴⁵ He chose to endow the Court with this power; he could have given Congress the power to pass upon the constitutionality of its own laws. This choice may reflect Marshall's personal preference "for preserving limited government against the inroads of an ever more powerful democracy."⁴⁶

Finally, in Professor Maggs' methodological universe, Chief Justice Marshall may also be guilty of "Informed Wishful Thinking" and of the "Perfection Fallacy." For, Marshall must have used the former "trick" when he considered what other governments do when faced with legislation contradicting their own written constitutions,⁴⁷ and relied upon the latter "trick" to solve the problem society faces when its national legislature defies that society's constitution.⁴⁸

The long and the short of it is that the methodologies that undergird *Marbury*, *Theoretical Foundations*, and the Supreme Court decisions cited with disparagement in *Tricks of the Trade* are not tricks at all, but, rather, time-honored modes of constitutional interpretation and legal analysis. Were Professor Maggs' originalism to become the norm, the methodological underpinnings of American constitutional jurisprudence, from the very beginnings of Supreme Court decision-making, would be delegitimated and destroyed.⁴⁹ The result would be the wholesale negation of stare decisis and destabilization of the adjudicatory function,⁵⁰

⁴³ *Id.* at 173-80.

⁴⁴ *Id.*

⁴⁵ *Id.* at 176-80.

⁴⁶ STITES, *supra* note 28, at 91.

⁴⁷ Chief Justice Marshall wrote in this regard: "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void." *Marbury*, 5 U.S. (1 Cranch) at 177.

⁴⁸ The societal problem created by congressional disregard for the Constitution would be that "it thus reduces to nothing what we have deemed the greatest improvement on political institutions—a written constitution." *Id.* at 178.

⁴⁹ Indeed, Robert Bork traces the Supreme Court's nonoriginalism all the way back to Justice Chase's opinion in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). BORK, *supra* note 11, at 19-20.

⁵⁰ Professor Robert F. Nagel points out that the originalism espoused by Bork "savages not only exotic judicial inquiries proposed by academics, but also ordinary doctrinal analyses of the sort judges actually employ every day" and that originalism "calls into question a great mass of constitutional doctrine." Robert F. Nagel, *Meeting the Enemy*, 57 U. CHI. L. REV. 633, 653 (1990) (review-

possibly bringing in their wake a society thrown into further turmoil⁵¹ and a Supreme Court shorn of its credibility and dignity.

Nevertheless, with a nihilist's abandon, Professor Maggs prefers to discard such traditional means of constitutional interpretation and substitute for them his simplified, two-criteria formula for understanding the Constitution. The criteria, of course, are the Constitution's text and original intent. While this originalist formula may have a superficial appeal to those who yearn for theoretical certitude and tidiness, such goals cannot be attained by this kind of oversimplification. First, the language of much of the Constitution is broadly drawn and undeniably cryptic⁵² while dispositive or clear evidence of original intent is, in many instances, not available.⁵³

Second, and more importantly, Professor Maggs' simplified model is not consonant with the process of legal reasoning in the constitutional context—a process that involves more variables and more sophisticated logical progressions and syllogisms than originalism would allow. The Supreme Court's nonoriginalist or multimodal decisions merely manifest the reality of this complex process.⁵⁴ That a positive constitutional right to education arises from such traditional, more encompassing methods of constitutional analysis (which, it bears repeating, include reliance on both the Constitution's text and original intent), only puts the right to

ing ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990)). Professor Maggs' methodologies would have the same effect. See *supra* notes 22-48 and accompanying text. Thus, the courts would be left to start from scratch in developing an unsullied originalism-based constitutional jurisprudence.

⁵¹ For example, Professor Maggs argues that *Bolling v. Sharpe*, 347 U.S. 497 (1954), was incorrectly decided because the Court engaged in the "trick" of the "Disappearing State-Federal Distinction." Maggs, *supra* note 5, at 1052-53. *Bolling* held that the Due Process Clause of the Fifth Amendment implicitly embraces equal protection principles and, hence, requires that public schools located in the District of Columbia must cease racial segregation. I leave it to the readers' respective imaginations as to how residents of the District of Columbia might react if informed that equal protection principles do not apply to them.

⁵² Bitensky, *supra* note 2, at 621-22.

⁵³ Indisputable evidence of original intent can be hard to come by. Dworkin, *supra* note 11, at 669; see Jack N. Rakove, *The Madisonian Moment*, 55 U. CHI. L. REV. 473, 504-05 (1988); cf. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856 (1989) (noting that "many of the reports of the ratifying debates, for example, are thought to be quite unreliable").

⁵⁴ See Tom Gerety, *The Justice, the Senator, and the Judge: Essays in Constitutional Interpretation*, 57 U. CIN. L. REV. 847, 848 (1989); cf. Ackerman, *supra* note 11, at 1425-27 (advocating a holistic approach to constitutional understanding that considers "the implications of the general themes" of the Constitution); Dworkin, *supra* note 11, at 675-77 (rejecting Bork's apparent contempt for "the complexity of contemporary constitutional theory" and maintaining that "the Constitution lays down abstract principles whose dimensions and application are inherently controversial, that judges have the responsibility to interpret those abstract principles in a way that fits, dignifies, and improves our political history, and that . . . take[s] account of . . . the work of others who have . . . written about those difficult matters"); Pollak, *supra* note 13, at 869-70 (contending that the Constitution is comprised of a process involving the interaction of live controversies with the words of the Constitution and with two hundred years of history and judicial precedent).

education on the firmer, more fertile ground to which John Marshall so sagaciously led us in *Marbury*.

II. THE POLICY ISSUE

Professor Maggs censures *Theoretical Foundations* for taking the position that an affirmative constitutional right to education could contribute, in a decisive way, to overcoming the national education crisis. He suggests that Congress already is empowered to directly regulate public schools in whatever way it sees fit and that the existence of this power has not defused the crisis.⁵⁵ While this suggestion reflects neither the conventional wisdom nor the day-to-day reality of Congress' involvement with education matters,⁵⁶ the notion that Congress presently is so empowered is certainly an intriguing and most welcome concession from an unexpected quarter. However, Professor Maggs' focus only on such empowerment misses the point.

Theoretical Foundations contends that, from a pedagogical and policy standpoint, what is needed is not merely the empowerment of the federal government but also the constitutionally imposed *obligation* upon the federal government to guarantee each schoolchild the minimum quantum of education necessary to enable the development of the child's mental abilities to his or her fullest potential. It is the recognition of such an obligation, as well as empowerment, on the part of the national government that *Theoretical Foundations* offers as a new and untried palliative.⁵⁷ Since the reasons why such an obligation would have a remedial effect are fully discussed in *Theoretical Foundations*, they require no reiteration here.⁵⁸

Professor Maggs additionally makes a cursory reference to the notion that further involvement of the national government in providing public schooling would stifle state experimentation in the education arena.⁵⁹ He supplies no data whatsoever indicating that this would be the case.⁶⁰ In any event, if the national government were obligated to fulfill the educational guarantee inherent in the right, experimentation would more than likely be facilitated at all levels of government. For instance, infusion of the national government's resources would provide the wherewithal to fiscally pinched states to experiment with programs that require more funding, such as programs to reduce the teacher-student ratio, to enrich curricula, to extend the school year or school day, to

⁵⁵ Maggs, *supra* note 5, at 1044 & n.43.

⁵⁶ Bitensky, *supra* note 2, at 626 & n.431. In fact, at present, "[s]tates and towns pay 94 percent of all education costs." Susan Chira, *In Classrooms, the Economy Is Teaching a Harsh Lesson*, N.Y. TIMES, Feb. 19, 1992, at A1, B6.

⁵⁷ Bitensky, *supra* note 2, at 631-42.

⁵⁸ *Id.* at 632-41.

⁵⁹ Maggs, *supra* note 5, at 1044.

⁶⁰ *Id.*

modernize school buildings and equipment, and so on.⁶¹

III. THE PURPORTED FUTILITY OF IT ALL

Professor Maggs concludes that, all in all, *Theoretical Foundations* is a well researched waste of its author's time.⁶²

He opines that if the intent behind *Theoretical Foundations* were merely "to demonstrate the abstract truth of propositions about the Constitution as a matter of intellectual inquiry, regardless of whether the Court ever will adopt them as law," then the article "ought to concern itself more with theory than with results."⁶³ However, as Professor Maggs himself remarks in a more gracious moment, "The article, indeed, may contain the most extensive collection of arguments for a right to education available."⁶⁴ In fact, *Theoretical Foundations* is ninety-two pages long, sixty-seven pages of which are devoted exclusively to an exposition of the theoretical bases supporting judicial recognition of a positive right to education under the Constitution.⁶⁵

Professor Maggs also finds *Theoretical Foundations* a pointless exercise because "with the change in the membership of the Court" since 1986, when William H. Rehnquist became Chief Justice, "the practice of recognizing innovative, unenumerated constitutional rights has diminished."⁶⁶ Professor Maggs declares with finality that "the time for new substantive due process arguments, broad First Amendment readings, and reliance on the Ninth Amendment has ended."⁶⁷

This is, in truth, not a very flattering portrait of the Rehnquist Court. Professor Maggs essentially depicts the Court as bent upon a rigid, lockstep rejection of innovative implied constitutional rights, regardless of what arguments are put before the Justices. Fortunately, reality does not seem in accord with so fatalistic a vision since, as Professor Maggs phrases it, this Court, too, has "succumb[ed]" to the recognition of some innovative unenumerated rights.⁶⁸

But, assuming *arguendo* that Professor Maggs' assessment of the

⁶¹ It has been reported that "[j]ust when politicians are calling for a revival in American education, the recession is leaving principals and teachers across the country with less money for more students." Chira, *supra* note 56, at A1. As of mid-February, 1992, at least thirty states were suffering budget deficits or revenue shortfalls. The result has been that "in many places schools are hobbled" such that a variety of educational programs have been eliminated and school facilities and equipment have been allowed to deteriorate. Chira, *supra* note 56, at A1, B6.

⁶² Maggs, *supra* note 5, at 1038, 1055.

⁶³ *Id.* at 1055.

⁶⁴ *Id.* at 1038.

⁶⁵ Bitensky, *supra* note 2, at 563-630.

⁶⁶ Maggs, *supra* note 5, at 1043.

⁶⁷ *Id.*

⁶⁸ *Id.* at 1043 & n.37 (citing *Minnick v. Mississippi*, 111 S. Ct. 486 (1990) and *United States v. Eichman*, 110 S. Ct. 2404 (1990) as cases where the Court has succumbed to recognizing additional unenumerated rights in the Constitution).

Court were accurate, does that mean that members of the legal profession should fall silent because of the Court's preconceived indisposition to their legal and policy arguments? It seems implausible that the Court does not even want to hear and think about arguments with which it may initially or finally disagree. And, even if this Court does ultimately disagree, might not articles like *Theoretical Foundations* have a persuasive effect on future Justices of the Supreme Court? Professor Maggs, after all, concedes that, to date, the Supreme Court decisions addressing whether a positive constitutional right to education exists have left the issue "open."⁶⁹

The intent behind *Theoretical Foundations* has been both "to demonstrate the abstract truth of propositions about the Constitution" as well as to marshal those propositions for the purpose of convincing the Court that it should recognize a positive constitutional right to education. If Professor Maggs is suggesting that the makeup of the Supreme Court means that I must give up the latter objective as futile, then I suggest, in turn, that not only our children's education,⁷⁰ but also the adversarial system of justice and a bona fide marketplace of ideas are in trouble.⁷¹

⁶⁹ Maggs, *supra* note 5, at 1043. Professor Maggs arrives at the conclusion that Supreme Court precedent leaves open the question of whether such a positive right to education exists based upon *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), *Plyler v. Doe*, 457 U.S. 202 (1982), *Papasan v. Allain*, 478 U.S. 265 (1986), and, especially, *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450 (1988). Maggs, *supra* note 5, at 1039-40, 1042-43.

⁷⁰ It bears mentioning that since the writing of *Theoretical Foundations*, the education crisis appears to be deepening. See Chira, *supra* note 56. The most recent studies show that the intellectual development of American children and the future competitive vitality of the nation are in jeopardy. International achievement tests, the results of which were made public in February, 1992, reveal that in the areas of mathematics and science, the "United States ranked near the bottom." Barbara Kantowitz & Pat Wingert, *An 'F' in World Competition: A Major Test Shows U.S. Students Don't Measure Up*, NEWSWEEK, Feb. 17, 1992, at 57.

Even assuming that a further worsening of the education crisis may be partly attributable to a situational phenomenon, *i.e.*, the recession, the question must be posed whether the health of the public school systems should be allowed to wax and wane with the impact of the economy's vicissitudes on state and local governments. Leaving matters as they are is an affirmative answer to this question and is also the end result of Professor Maggs' rejection of a positive right to education under the Constitution. For, without the right, the federal government has no present duty to guarantee that any quantum of education will be consistently provided. Bitensky, *supra* note 2, at 552-53, 632-34, 637-42.

⁷¹ Professor Maggs evidently desires to discourage even the *expression* among academics of a preference for methodologies that do not fully comport with originalism if the objective of those academics is to influence the Supreme Court. See Maggs, *supra* note 5, at 1042-43, 1054-55.