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Every child's right to receive excellent education

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Half of the adults in the United States cannot read or do arithmetic, skills normally taught during elementary and secondary school. So said the U.S. Department of Education in September.¹ Such statistics probably do not shock the residents of Kalkaska, Michigan. Their public schools actually closed down three months early last year due to a lack of money; funds are so short there again this year that students do not even have enough textbooks.² Little Kalkaska is not a fluke – it is more an omen. As the academic year gets under way this fall, school systems around the country find themselves strapped financially, plagued by inequities in funding distribution, and unequipped to provide top quality or, in many cases, even adequate education.³

The strange thing is that this education debacle is occurring in the world's only remaining superpower. How is it possible that in the United States, a fabulously wealthy, highly developed country, there is a national education crisis of such menacing proportions that fully one half of the population is illiterate? Blame can, no doubt, be lodged in many quarters. After all, the public schools are confronted with the daunting task of educating children who are all too often the victims of poverty, family instability, crime-ridden environments, and other societal ills.⁴ It is a tall order to expect schools to educate successfully children whose stomachs are empty or whose psyches are traumatized.⁵ Yet, deleterious social conditions and the magnitude of the educators' task cannot justify giving up on the schools' mission. "Students,

¹ William Celis 3d, *Study says half of adults in U.S. can't read or handle arithmetic*, N.Y. Times, Sept. 9, 1993, p. A1, A16 [hereinafter *Half of adults can't read*].

² William Celis 3d, *Schools reopen in town that made them close*, N.Y. Times, Sept. 2, 1993, p. A8 [hereinafter *Schools Reopen*].

³ Susan Chira, *Schools open soon (with luck), to more trouble than usual*, N.Y. Times, Sept. 5, 1993, §4 (The week in review), p. 5; Bob Herbert, *On spelling kat*, N.Y. Times, Sept. 12, 1993, §4 (The week in review), p. 19; see also *Report offers more evidence of literacy woes in schools*, N.Y. Times, Sept. 16, 1993, p. A9 (reporting that federal officials have found that many American students read too poorly to understand simple written passages).

⁴ L. Stanley Chauvin, Jr. (1990) *Startling statistics about children*, A.B.A.J. 76: 8: *Schools are not families*, N.Y. Times, Mar. 4, 1991, at A16; T. Berry Brazelton, *Why is America failing its children?*, N.Y. Times, Sept. 9, 1990, §6 (Magazine), p. 40.

⁵ Susan Chira, *Schools new role: steering people to services*, N.Y. Times, May 15, 1991, p. A1; Suzanne Daley, *School chiefs are dropping out, plagued by urban problems*, N.Y. Times, Dec. 26, 1990, p. A1.

even from the most difficult backgrounds, can academically . . . succeed.”⁶ The public schools, as the outgrowth of the common school movement, were conceived of and have functioned to embrace and educate all children, be they poor, traumatized, or otherwise troubled.⁷

Now, however, massive numbers of children are emerging from the public schools undereducated and frequently unprepared to join the work force even in low-level jobs or to participate in meaningful political decision-making.⁸ It is no exaggeration to say that the very economic and political pre-eminence of the nation has been jeopardized, not by some aggressive foreign enemy, but by the humble local classroom.⁹ Alarmed by these developments, state governments have experimented with an array of education measures.¹⁰ Their efforts have been complemented by exhortations and proposals from national political leaders and by a plethora of studies and reports issued by education experts.¹¹ In spite of these efforts, the crisis has persisted with unnerving intractability.¹²

With such vital interests at stake, intractability is simply not an option. However, there is considerable controversy over what kind of reforms should be instituted to ameliorate the education crisis.¹³ Proposals have varied widely, ranging from enhanced parental involvement in the schools¹⁴ to expanded privatization of the education process¹⁵ to enhanced governmental involvement.¹⁶ Some leading education experts and political leaders have been courageous enough also to focus on the substantive and most obvious point: that what American children need most of all from their public schools is the guaranty of real excellence in education and that any schemes for structural changes in the provision of education should flow from this premise.¹⁷

⁶ Carnegie Foundation for the Advancement of Teaching (1988) *An imperiled generation: saving urban schools*, p. XV.

⁷ See Kern Alexander and M. David Alexander (1992) *American Public School Law* 21 (3rd ed.); David Tyack *et al.* (1987) *Law and the Shaping of Public Education 1785–1954*, p. 16.

⁸ Susan H. Bitensky (1992) *Theoretical foundations for a right to education under the U.S. constitution: a beginning to the end of the national education crisis*, Nw. U.L. Rev. 86: 550, pp. 551, 558–560, 604–606 [hereinafter *Theoretical foundations*].

⁹ *Id.*, pp. 551–552.

¹⁰ *Id.*, pp. 552, 557–558, 632 n. 468.

¹¹ *Id.*, pp. 552, 555–557, 554 n. 29.

¹² *Id.*, p. 552; see also Celis 3d, *Schools reopen*, *supra* note 2, p. A8; Celis 3d, *Half of adults can't read*, *supra* note 1, pp. A1, A16.

¹³ Bitensky, *Theoretical foundation*, *supra* note 8, p. 561.

¹⁴ See Walter Anderson, *Reading, writing and power*, N.Y. Times, Sept. 12, 1993, §4 (The week in review), p. 19.

¹⁵ Myron Lieberman (1989) *Privatization and Educational Choice*, pp. 4–5.

¹⁶ Educational visions team, new world found. (1985) *Progressive Federalism: New Ideas for Distribution Money and Power in Education*, in Beatrice Gross and Ronald Gross (eds.), *The Great School Debate: Which Way for American Education?*, pp. 419–435.

¹⁷ Bitensky, *Theoretical foundations*, *supra* note 8, pp. 555, 556 and n. 39, 557, 639–640 (identifying sources of the idea that children need and should receive excellence in education).

I do not use the word "courageous" with any sarcasm. The most obvious solution is also a politically charged one. It raises sensitive questions as to who will be responsible for providing such high quality education and with what resources. Traditionally, in the United States the provision of education has been understood to be a matter reserved primarily to state and local governments by the Tenth Amendment to the federal Constitution,¹⁸ with the national government relegated to a supplemental role.¹⁹ With all due deference to past interpretation of our Constitution, the seriousness of the education crisis warrants some fresh thinking about which sector of society is optimally positioned to pull the country out of this crisis and whether, as a legal matter, that sector is empowered or obligated to undertake the task.

The states, as the governmental entities with current primary responsibility for education, have tackled the crisis for more than ten years, typically with only marginal success.²⁰ That this is the case should not occasion surprise. Many state constitutions enunciate a right to education, but these state constitutional rights usually either guarantee no particular quality of education or guarantee only very modest and vague standards of education.²¹ Moreover, many states have been pinched for money for years and all too often state and local reform plans have become bogged down in political bickering.²² The private sector has proven a valuable ally to states and localities in the search for an improved educational system. However, while welcoming continued assistance from this quarter, it should be recognized that the private sector has its own legitimate institutional interests to protect and, like the states, may find it more difficult to attain the national perspective and concern that comes from democratic governance of a country in its entirety. Nor is the private sector either organized, empowered, or obligated to cajole individual businesses into implementing a sustained and synchronized education strategy.²³

Perhaps what is needed, then, is a truly national effort, spearheaded by the federal government and developed in a new collaboration with the states and private sector, in order to overcome the crisis and stabilize elementary and secondary schools at an excellent level of educational quality. The federal government, after all, has the massive resources, unique powers, national perspective, coordinating capacity, and visible leadership that neither states, businesses, nor parents are equipped to provide.²⁴ Although the Bush admin-

¹⁸ The Tenth Amendment provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

¹⁹ Bitensky, *Theoretical foundations*, *supra* note 8, pp. 552, 626.

²⁰ *Id.*, pp. 555-561; see also Celis 3d, *Schools reopen*, *supra* note 2, p. A8; Celis 3d, *Half of adults can't read*, *supra* note 1, pp. A1, A16.

²¹ Bitensky, *Theoretical foundations*, *supra* note 8, p. 587 and n. 224.

²² *Id.*, p. 632.

²³ *Id.*, p. 562.

²⁴ *Id.*, pp. 552-553, 632-633.

istration is not likely to be remembered for achieving any major improvements in public education and although President Bush has not been an admirer of expanded intervention by the national government in domestic matters, it is interesting to note that the Bush White House floated various calls for national education goals, the elements of a national core curriculum, national education standards, and national student testing.²⁵ In spite of the political incongruities, these calls were only natural and logical. Sheer common sense would seem to dictate a national mobilization in response to so threatening a national crisis. This is common sense the American people possess as well: polls have shown that most Americans wish *the federal government* to institute such national remedial measures.²⁶ Indeed, evidently responding to the popular perception, this spring Congress passed legislation that recommends to the states national academic standards but that still imposes no obligation upon government to assure educational excellence.²⁷

Given that education experts, Congress, United States Presidents, and the majority of the American people see the need for a national solution, why are children still waiting for the increase in federal governmental involvement that could assure them an excellent public education? Why hasn't the federal government rushed into the breach in a more meaningful way?

One substantial impediment to the federal government's assumption of such a role is the Tenth Amendment to the U.S. Constitution as it relates to education. As was mentioned previously, conventional wisdom in the legal community holds that the federal government is precluded from exercising too much power over education because education is a matter primarily reserved to the states.²⁸ The mainstream view also has it that even with respect to the federal government's supplementary powers over education, such powers are to be exercised according to the government's discretion and not as an obligation or duty.²⁹ What this means from a legal standpoint is that public schoolchildren cannot demand, as a matter of *right*, that the federal government rush into the breach.³⁰ Indeed, the U.S. Constitution does not expressly provide for a right to education.³¹ The upshot of this ossified thinking about the Tenth Amendment in conjunction with such constitutional silence about education rights is that the American legal structure places out of reach an untried and most potent antidote to the crisis – governmentally compelled nationwide educational excellence.³²

²⁵ *Id.*, pp. 557, 562, 640.

²⁶ *Id.*, pp. 633–634.

²⁷ William Celiz 3d, *New education legislation defines federal role in nation's classrooms*, N.Y. Times, Mar. 30, 1994, p. 87.

²⁸ *Id.*, pp. 552, 626.

²⁹ See Susan H. Bitensky (1992) *Of originalism, reality, and a constitutional right to education*, Nw U.L. Rev. 86: 1056, p. 1065 [hereinafter *Of originalism*].

³⁰ *Id.*, p. 1065; Bitensky, *Theoretical foundations*, *supra* note 8, p. 632.

³¹ Bitensky, *Theoretical foundations supra* note 8, p. 553.

³² *Id.*, pp. 552–553, 563, 632–633.

Fortunately, the legal structure is not immutable. It can, within the framework of our political system, be developed and realigned so as to empower schoolchildren to demand, as a right, the educational response that they so urgently need and deserve. To borrow a phrase from President Clinton, we can "grow" the legal system in its relation to education.

One way to "grow" the legal system would be for the United States to ratify the United Nations Convention on the Rights of the Child.³³ The Convention, among other things, obligates ratifying countries to recognize that the child has a positive right to education, i.e., a right to have government provide the child with education.³⁴ Under the Convention's version of the right, the United States would "agree that the education of the child shall be directed to . . . [t]he development of the child's personality, talents and mental and physical abilities to their fullest potential."³⁵ By ratifying the Convention, the United States government would make clear before the world community and the American people wholehearted acceptance of an education right encompassing high standards.³⁶ The enforceability of the right would, however, be a more complicated matter, depending on whether the United States would ultimately regard the Convention as a self-executing or non-self-executing treaty.³⁷ The focus and nature of this paper do not permit exploration of these complications here. Suffice it to say that with ratification of the Convention, the basis would be laid for eventually making the new right enforceable against the state and/or national governments.³⁸

Another way to "grow" the legal system would be to amend the U.S. Constitution in order to add an express positive right to public elementary

³³ Convention on the Rights of the Child, Nov. 20, 1989, G.A. Res. 44/25, 44 U.N. GAOR Supp. No. 49 at 165, U.N. Doc. A/44/736 (1989) [hereinafter Convention of the Child].

³⁴ Article 28 of the Convention provides that "States Parties recognize the right of the child to education . . ." Convention of the Child, *supra* note 33, at art. 28, ¶ 1.

³⁵ *Id.*, at art. 29, ¶ 1 (a).

³⁶ Susan H. Bitensky (1990) Educating the child for a productive life (Articles 28 and 29), in Cynthia Price Cohen and Howard A. Davidson (eds.), *Children's Rights in America: UN Convention on the Rights of the Child Compared with United States Law*, pp. 167, 183 [hereinafter *Educating the child*].

³⁷ Self-executing treaties entered into by the United States become the law of the land as of the time they come into force internationally for the United States. The American Law Institute (1987) *Restatement of the law third: The foreign relations law of the United States*, p. 41. In contrast, non-self-executing treaties cannot be implemented without enabling legislation. *Id.*, pp. 46-47.

³⁸ Incidentally, according to at least one group of jurists, if the United States were to ratify the U.N. Convention on the Rights of the Child, U.S. compliance could be achieved by having the state governments alone, and without federal help, provide the sort of education that would fulfill the Convention's education right. Report of the American Bar Ass'n Working Group on the Rights of the Child (1993), p. 80. However this may be, it is also true that a treaty is regarded as federal law. U.S. Const. art VI, § 2. Under the scenario suggested by these jurists, I would argue, therefore, that if a state should fail in fulfilling the Convention's education right, the federal government would still have the ultimate responsibility to assure compliance and there would still be a federal right to such compliance.

and secondary education. Such an amendment is, of course, very desirable. But, while efforts to effectuate it should be encouraged, at this juncture the likelihood of such an amendment seems improbable. The process for amending the Constitution is onerous;³⁹ the document has, relatively speaking, rarely been amended in its two hundred year history.⁴⁰ Moreover, the country's current preoccupation with health rights, as well as with deficit cutting, may pose prolonged political difficulties in drumming up support for an education amendment.

There is, though, an alternative way to "grow" the legal system in the constitutional context: develop a legal analysis that would permit the courts to discover a positive right to public elementary and secondary education in the U.S. Constitution despite that document's silence on education. Indeed, that the Constitution does not expressly posit a right to education, by itself, is not determinative of whether the right exists. It should be noted that rights may arise by implication from the Constitution's provisions as well as by explicit reference.⁴¹ Such implied rights are not aberrational; over the years, the Supreme Court has recognized an extensive array of implied constitutional rights which has become an accepted part of modern constitutional law.⁴²

Regrettably, the United States Supreme Court specifically ruled, in *San Antonio Independent School District v. Rodriguez*⁴³ and subsequent cases,⁴⁴ that children have no positive implied right under the federal Constitution to have government provide them with education. The ruling is in no way unusual in the sense that the Court has recognized few positive rights in the U.S. Constitution, i.e., rights to have government provide something to the people.⁴⁵ Rather, the Constitution traditionally has been regarded as a charter of negative

³⁹ Article V of the Constitution covers the subject of amendments, as follows:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One Thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

U.S. Const. art. V.

⁴⁰ There are only twenty-six amendments to the U.S. Constitution. The effectiveness of a purported twenty-seventh amendment is in controversy. U.S. Const. amends. I-XXVII.

⁴¹ Bitensky, *Theoretical foundations*, *supra* note 8, p. 574.

⁴² *Id.*, p. 574.

⁴³ 411 U.S. 1, pp. 35-37 (1973).

⁴⁴ *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, pp. 458, 465 (1988); *Plyler v. Doe*, 457 U.S. 202, p. 221 (1982); cf. *Papasan v. Allain*, 478 U.S. 265, p. 285 (1986) (stating that the question of whether a fundamental affirmative constitutional right to education exists "has not yet [been] definitively settled").

⁴⁵ Bitensky, *Theoretical foundations*, *supra* note 8, pp. 575-576, 578.

rights, i.e., rights to have the government refrain from interfering with people in various ways.⁴⁶ (For instance, in a 1923 case, the Supreme Court recognized that the American people do at least have a negative right to education under the Fourteenth Amendment's Due Process Clause, i.e., a right to have government refrain from interfering with the individual's efforts to acquire knowledge.)⁴⁷

But, the *Rodriguez* Court was not so shortsighted as to reject an affirmative right to education as an impossibility. The intriguing thing about the *Rodriguez* case is that the Court also stated that the possibility could not be foreclosed that at some point in the future the Court might rule that schoolchildren do have a positive implied right under the U.S. Constitution to "some identifiable quantum" of education – the quantum that would "provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process."⁴⁸ This equivocation by the Court, which was reiterated in two subsequent cases as well,⁴⁹ has made a number of legal scholars and lawyers take up the question of whether the U.S. Constitution is capable of being read to include such a positive right.⁵⁰

There are, it turns out, several clauses of the Constitution capable of such a reading. I have argued in detail in recent law review articles⁵¹ that an implied positive right to public elementary and secondary education may be discovered in the Free Speech Clause,⁵² the Due Process Clause,⁵³ the Privileges or Immunities Clause,⁵⁴ and in sundry references to voting in the U.S.

⁴⁶ *Id.*, pp. 575–576.

⁴⁷ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

⁴⁸ *Rodriguez*, 411 U.S., pp. 36–37.

⁴⁹ *Papasan v. Allain*, 478 U.S. 265, p. 285 (1986) (stating that the question of whether an affirmative right to education exists under the U.S. Constitution is still unsettled); *Plyler v. Doe*, 457 U.S. 202, p. 221 (1982) (noting that while "[p]ublic education is not a 'right' granted to individuals by the Constitution . . . neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation").

⁵⁰ For a survey of the scholarly literature raising this issue, see Bitensky, *Theoretical foundation*, *supra* note 8, pp. 579–630.

⁵¹ *Id.*, pp. 579–630; Bitensky, *Of originalism*, *supra* note 29, pp. 1056–1065.

⁵² The Free Speech Clause of the First Amendment provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. Legal arguments in support of finding the education right in the Free Speech Clause may be found in Bitensky, *Theoretical foundations*, *supra* note 8, pp. 596–602.

⁵³ The Due Process Clause of the Fourteenth Amendment prohibits the states from depriving any person of "life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1. The Fifth Amendment places the same prohibition on the federal government. *Id.* at amend. V. Legal arguments in support of finding the education right in the Due Process Clause may be found in Bitensky, *Theoretical foundations*, *supra* note 8, pp. 579–596.

⁵⁴ The Privileges or Immunities Clause of the Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV, § 1. Legal arguments in support of finding the education right in the Privileges or Immunities Clause may be found in Bitensky, *Theoretical foundations*, *supra* note 8, pp. 606–615.

Constitution.⁵⁵ I have maintained that these theoretical bases for recognizing the right, each sufficient on their own, are further supported by principles of constitutional interpretation derived from the Ninth Amendment,⁵⁶ the role of international human rights law as a source of constitutional values,⁵⁷ and from historical evidence of the Founding Fathers' original intent.⁵⁸ A repetition of the legal analysis set forth in my articles is clearly not feasible or appropriate in the context of this paper. However, by way of example, I will briefly summarize three of the legal arguments in support of judicial recognition of an implied positive right to public elementary and secondary education:

1) The Free Speech Clause

The Free Speech Clause is understood to embody certain specific purposes including the following: to assure individual self-fulfillment; to advance knowledge and discover truth; and to provide for participation in decision making by all members of society. Since none of these objectives are attainable without at least an elementary and secondary education, a positive right to such education is presupposed by and implied in this Clause.⁵⁹

2) The Due Process Clause

The Due Process Clause protects as rights certain interests rooted in the history and traditions of the United States. Since there is long history and tradition of government-provided elementary and secondary schooling in this country, there must also be a positive right to such education implied in this Clause.⁶⁰

3) The Ninth Amendment

This Amendment declares that just because the Constitution contains some expressly stated rights does not preclude future recognition of other rights that exist by implication in various provisions of the Constitution. Thus,

⁵⁵ Although there is no one clause of the Constitution expressly announcing a right to vote per se, the Constitution is filled with references to voting and mandatory federal elections that appear to presuppose the existence of a right to vote in federal elections. For a detailed enumeration of such references, see Bitensky, *Theoretical Foundations*, supra note 8, p. 602 and notes 304, 305, 306. In *Reynolds v. Sims*, 377 U.S. 533, p. 554 (1964), the U.S. Supreme Court explicitly acknowledged that the Constitution guarantees the right to vote in both federal and state elections. Legal arguments in support of finding the education right implied in the right to vote may be found in Bitensky, *Theoretical foundations*, supra note 8, pp. 602–606.

⁵⁶ The Ninth Amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. The role of the Ninth Amendment as such a rule of constitutional construction is described in Bitensky, *Theoretical foundations*, supra note 8, pp. 622–626.

⁵⁷ Bitensky, *Theoretical foundations*, supra note 8, pp. 616–622.

⁵⁸ *Id.*, pp. 626–630.

⁵⁹ *Id.*, pp. 596–602.

⁶⁰ *Id.*, pp. 579–596.

principles of constitutional interpretation do not forbid recognition of a positive right to education as implied, for example, in the Free Speech and/or Due Process Clauses.⁶¹

Lest it be thought that in urging recognition of a positive constitutional right to education I am proposing something unprecedented or preposterous, it should be pointed out that not only has the U.S. Supreme Court flirted with the idea but that several major international human rights treaties and declarations espoused a positive education right well before the 1989 adoption of the United Nations Convention on the Rights of the Child.⁶² As long ago as 1948 the Universal Declaration of Human Rights already had embraced such a right.⁶³ Perhaps in understanding and developing our own constitutional law, we Americans can learn a thing or two from the world community. Perhaps, when the U.S. Supreme Court again confronts the issue of whether there is a positive right to education under the federal Constitution, the Justices will take a cue from such expressions of international consensus as the Universal Declaration and the Convention on the Rights of the Child.⁶⁴

If the Justices do take that cue, however, I would urge that they define the new education right in a way that befits the dignity of American children and that accords with the intellectual aspirations of the nation as a whole. The right to be taught merely "basic minimal skills," referred to in the *Rodriguez* decision, has probably been rendered obsolete by the economic

⁶¹ *Id.*, pp. 622–626.

⁶² There are at least six international instruments which posit a positive right to education: Protocol of Amendment to the Charter of the Organization of American States (Protocol of Buenos Aires), Feb. 27, 1967, 21 U.S.T. 607, OAS Treaty Series No. 1-A OASOR, OEA/Ser. A/Z, Add. 2 (1967); Convention of the Child, *supra* note 33; International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 [hereinafter Economic, Etc. Rights Covenant]; Convention Against Discrimination in Education, Dec. 14, 1960, 429 U.N.T.S. 93; United Nations Declaration of the Rights of the Child, G.A. Res. 1386, 14 U.N. GAOR Supp. No. 16, p. 19, U.N. Doc. A/4354 (1959); American Declaration of the Rights and Duties of Man, May 2, 1948, O.A.S. Off. Rec. OEA/Ser. L/V/II. 23, Doc. 21, Rev. 6; Universal Declaration of Human Rights, G.A. Res. 217 A, 3 (1) GAOR Res. 71, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

⁶³ Article 26 of the Universal Declaration of Human Rights states: "Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit." Universal Declaration, *supra* note 62, at art. 26.

⁶⁴ The idea that international human rights law infuses open-ended or cryptic clauses of the Constitution has been embraced by a significant number of international law scholars. Bitensky, *Theoretical foundations*, *supra* note 8, p. 619. It also received an approving nod from the four concurring Supreme Court Justices in *Oyama v. California*, 332 U.S. 650 (1948), when they looked to the United Nations Charter to help define constitutional norms under the Fourteenth Amendment.

and political complexities of life in the 1990s,⁶⁵ by the exigencies of the education crisis,⁶⁶ and by the burgeoning movement for children's rights.⁶⁷

The issue, perforce, arises as to what quality of education a new constitutional right should guarantee. Will American children be entitled "to receive an . . . education correspondent to their ability," as provided in the Japanese Constitution?⁶⁸ Or, will they be entitled to something less or something more than their Japanese counterparts? While there are a number of possible definitions of the right which are worthy of consideration, I would suggest the following formulation: children shall have a federal constitutional right to the minimum quantum of education necessary to enable the development of each child's mental abilities to his or her fullest potential.⁶⁹ The gist of this right, in analogous phraseology, may already be found in several international human rights documents, including the Universal Declaration of Human Rights,⁷⁰ the International Covenant on Economic, Social and Cultural Rights,⁷¹ and, as was mentioned previously, the U.N. Convention on the Rights of the Child.⁷² The norm that children should be educated to enable them to reach their fullest potential, then, has a most respectable lineage, and many scholars believe it is entirely appropriate for the courts to consult international human rights norms in interpreting our own national Constitution.⁷³ The proposed formulation also has American antecedents. The proposal closely parallels, in substance, the standard of education which President Bush and the nation's governors pledged to achieve in their Jeffersonian Compact and which the National Commission on Excellence in Education had earlier recommended. The idea has also surfaced in American academic circles.⁷⁴

More crucial than its pedigree, a constitutional right to education imbued with this sort of exacting content just might set in motion the beginnings of a genuine end to the education crisis. Whether the right is created as a matter

⁶⁵ See Bitensky, *Theoretical foundations*, *supra* note 8, pp. 558-559, 599, 604, 609-610.

⁶⁶ *Id.*, pp. 555-561.

⁶⁷ Philip E. Veerman (1992) *The Rights of the Child and the Changing Image of Childhood*, p. XV.

⁶⁸ Kenpo (Constitution) art. 26, ¶ 1 (Japan).

⁶⁹ Bitensky, *Theoretical foundations*, *supra* note 8, p. 639.

⁷⁰ The Universal Declaration of Human Rights states that the right to education "shall be directed to the full development of the human personality." Universal Declaration, *supra* note 62, at art. 26, ¶¶ 1-2.

⁷¹ The International Covenant on Economic, Social and Cultural Rights provides that "education shall be directed to the full development of the human personality and the sense of its dignity" and "shall enable all persons to participate effectively in a free society." Economic, Etc. Rights Covenant, *supra* note 62, at art. 13, ¶ 1.

⁷² It bears repeating that article 29 of the U.N. Convention on the Rights of the Child provides that, "States Parties agree that the education of the child shall be directed to . . . [t]he development of the child's personality, talents and mental and physical abilities to their fullest potential." Convention of the Child, *supra* note 33, at art. 29, ¶ 1 (a).

⁷³ See *supra* note 62.

⁷⁴ Bitensky, *Theoretical foundations*, *supra* note 8, p. 640.

of treaty law through ratification of the children's Convention or by judicial recognition of the right in the Constitution, a right of this ilk would teach American children that much more is required of them than going through a rite of passage so as to acquire, if they're lucky, basic minimal skills. The right, in partaking of the U.S. Constitution's authority or the Convention's international prestige, would impart the idea that educating children is a matter of supreme importance; this idea, when understood collectively, would give rise to a popular ethos of esteem for children and their intellectuality and scholarship.⁷⁵ In this environment, if the federal and state governments together were obligated by this right to commit the sort of resources and other involvement necessary to enable each child to reach his or her fullest educational potential,⁷⁶ children would stand a real chance of receiving that excellence in education that has been missing from so many public schools. The right, in transmitting its powerful pedagogical message and bringing to bear the full weight of superpower resources, is an untried palliative of staggering potential.

⁷⁵ *Id.*, pp. 636, 640.

⁷⁶ *Id.*, p. 640.

