5-2024

Emancipatory or Merely Appropriate? Revealing the Right to Education under the Thirteenth Amendment and Its Implications for Students with Disabilities

Rachel Joyce Liazos
Bates College, rliazos@bates.edu

Emancipatory or Merely Appropriate?

Revealing the Right to Education under the Thirteenth Amendment and Its Implications for Students with Disabilities

An Honors Thesis
Presented To
The Faculty of the Bates College Program of Politics
In Partial Fulfillment of the Requirements for the Degree of Bachelor of Arts

By Rachel Joyce Liazos

Lewiston, Maine
April 1, 2024

Acknowledgements

I would like to express my deepest gratitude to my older brother, Chris, without whom this project would not be possible. I am incredibly fortunate to have grown up with such a wonderful role model. Thank you, Chris, for always challenging me to be kinder, making me laugh, and bringing joy into my life. This project is dedicated to you. I hope it makes you as proud as you make me. To my mom, thank you for your unwavering love and inspiration. Thank you for always being there for me, bringing me hot tea and cookies while I wrote, and encouraging me to use my voice. To my younger brother, Stephen, thank you for all your support. I loved calling you on Facetime during study breaks. To my grandparents, Nani and Papa, thank you for your encouragement. I feel very lucky to share this project with you. And to my best friend, Tyler, thank you for always being there.

To my advisor, Professor Engel, thank you for everything. I came to Bates with the hope that I would be able to take one of your classes. Little did I know that you would become such an important mentor in my life. Thank you for believing in my vision. The opportunity to work alongside you has been the best part of my Bates experience. This project would not be possible without your enthusiasm and dedication. Thank you for all the time you spent assisting me, the thousands of Google Doc suggestions you made, and for, the always entertaining, "story time with Engel." You inspire me to be a better writer and more critical thinker. Thank you for empowering me to use my voice. Lastly, I would like to thank Anita Charles for her support throughout my Bates career. Thank you for all your kindness and generosity. I am forever grateful to have taken Basic Concepts in Special Education. My experiences in your classroom have in many ways shaped not only this project, but my career goals as I pursue post-graduate education. Thank you for helping me discover my purpose.

Table of Contents

Table of Figures

Table of Tables

Abstract

The federal government has been invested in developing and advancing public education since the nation's inception. However, the Constitution remains silent on the notion of a constitutionally protected right to education. Several scholars have suggested that such a right would flow from the framework of the Fourteenth Amendment's Equal Protection, Due Process, or Citizenship Clause. After reviewing these claims, I provide a framework for a fundamental right to education, which flows from an expansive and emancipatory reading of the Thirteenth Amendment. This thesis proceeds in two parts. In Part One, I evaluate the modalities of evidence that support a fundamental right to education. In Part Two, I apply my theory of a fundamental right to education to the case of access for students with disabilities. I review the passage and subsequent reforms to a law initially passed in 1975, now known as the Individuals with Disabilities Education Act or IDEA. I then review the Supreme Court's evaluation of this law in *Board of Education of Hendrick Hudson Central School District., Westchester City. v. Rowley* (1982), and ultimately consider whether, if the Constitution does guarantee a right to education, the outcome of this Supreme Court decision would change.[1] This thesis offers policy, legal, and constitutional analysis on the fundamental right to education, specifically regarding the rights of students with disabilities.

[1] 458 US 176.

Introduction

On July 6, 2023, the Liberty Justice Center threatened to sue Howard University School of Medicine for racial discrimination. Howard University is one of the many historically black colleges and universities or HBCUs in the United States, that was chartered by the federal government shortly after the conclusion of the Civil War. In an open letter to the public, the Liberty Justice Center threatened to sue the university if they refused to comply with the ruling in *Students for Fair Admissions v. Harvard* (2023)[1], which struck down race-conscious admissions, writing to the university: "In accordance with the Supreme Court decision your medical school must immediately cease any and all policies, practices, programs, or procedures that include a racial component … Consequently, to the extent your medical school fails to immediately comply with the Supreme Court's recent decision, Liberty Justice Center will actively engage in strategic litigation to vindicate the *fundamental constitutional rights* of those individuals whose rights have been violated."[2]

In a recent article for *The New York Times Magazine*, Nikole Hannah-Jones discusses the irony created by this decision: the Supreme Court in *Students for Fair Admissions* undermines the mission of HBCUs to remedy historical inequalities that originally resulted from the institution of chattel slavery. In other words, institutions like Howard now face the threat of legal action for attempting to fulfill its mission.[3] As Hannah-Jones argues, "They [conservative

[1] 600 U.S. __ 2023.
[2] M.E. Buck Dougherty III, *"Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 2023 U.S. LEXIS 2791 (2023)," June 6, 2023. (emphasis added).
[3] Nikole Hannah-Jones, "The 'Colorblindness' Trap: How a Civil Rights Ideal Got Hijacked," *The New York Times*, March 13, 2024.

groups] have co-opted both the rhetoric of colorblindness and the legal legacy of Black activism not to advance racial progress, but to stall it. Or worse, reverse it."[4]

How could an institution designed to serve marginalized communities that have been historically denied access to education be forced to carry out policies that are contradictory to advancing its mission? Given that education, whether at the primary, secondary, or tertiary level, is regulated, at least to a degree, by the federal government, another salient question follows: what is the status of education from a constitutional standpoint? Perhaps even more importantly, who is entitled to access to education?

Despite the ever-increasing importance of education, educational outcomes, experiences, and access differ widely from state to state, district to district, and even school to school in our U.S. Federalist system. These outcomes are even more disparate when considering the implications among the most marginalized students: students of color, students with disabilities, immigrant and refugee students, multilingual students, and unhoused students. While education is acknowledged as an essential right to mobilize other rights, it has become increasingly privileged and less accessible. The question then becomes, how might such a right to education for *all* students be protected beyond the state and local levels? Put differently, does the Constitution speak to a fundamental right to education?

Is the Fourteenth Amendment No Longer a Viable Path to Rights Recognition?

The Fourteenth Amendment is situated in the nation's consciousness as a repository for identifying rights. The Amendment's most commonly cited constitutional pathways to identifying rights are its Equal Protection Clause, Due Process Clause, and, to a lesser extent, the Citizenship Clause. The Warren Court (1953-1969) and Burger Court (1969-1986) embraced a

[4] Ibid.

reading of the Fourteenth Amendment that maintained the federal government had an affirmative responsibility to ensure equal protection to what the Court had earlier referred to as so-called insular and discrete minorities.[5] The Equal Protection Clause was famously evoked to outlaw segregation in *Brown v. Board of Education* (1954), renounce anti-miscegenation laws in *Loving v. Virginia* (1967), reject sex-based discrimination in *Reed v. Reed* (1971), and legalize same-sex marriage in *Obergefell v. Hodges* (2015).[6] Similarly, the Due Process Clause has been activated to identify a right to privacy in *Griswold v. Connecticut* (1965), identify the rights of students in *Goss* (1975), and mandate *Miranda* warnings (1966).[7] To a lesser extent, the Citizenship Clause has been used to identify rights, including the right to travel in *Kent v. United States* (1966) and the right of citizenship for children with non-citizen parents in *United States v. Wong Kim Ark* (1898).[8] Each of these clauses embedded in the first section of the Fourteenth Amendment has been utilized to advance a more equitable society that remains true to the egalitarian intention of the Amendment as it was written. By the 1960s, this reading of the Fourteenth Amendment had evolved into the suspect or protected class doctrine[9] and was associated with an anti-

[5] See *United States v. Carolene Products Company,* 304 U.S. 144 (1938). In Footnote 4, Justice Stone wrote, "Prejudice against *discrete and insular* minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." (emphasis added). This statement acknowledges that marginalized groups are not always represented in the legislative process. As a result, Justice Stone suggests tiers of scrutiny must apply when laws are passed that directly target or impact discrete and insular minorities. According to the Court, in cases where a minority group may be systematically excluded from the pluralist process, laws that impact those excluded groups should be reviewed with heightened scrutiny.

[6] *Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954); *Loving v. Virginia*, 388 U.S. 1 (1967); *Reed v. Reed*, 404 U.S. 71 (1971); *Obergefell v. Hodges*, 576 U.S. 644 (2015).

[7] *Griswold v. Connecticut*, 381 US 479 (1965); *Goss v. Lopez*, 419 U.S. 565 (1975); *Miranda v. Arizona*, 384 U.S. 436 (1966).

[8] *Kent v. United States,* 383 U.S. 541 (1966); *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

[9] Suspect or protected class doctrine provides heightened scrutiny to the discrete and insular minorities referred to in Footnote 4 of *Carolene Products.* Race was initially identified as a protected class in Korema*tsu v. United States* 323 U.S. 214 (1944). The majority noted, "...all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can." In this case, the Court upheld Executive Order 9066, which granted the secretary of war the power to, "prescribe military areas in such places and of such extend as he or the appropriate Military Commander may determine, from which any or all persons may be excluded." The Court held that the

subordination reading of the Fourteenth Amendment.[10] According to anti-subordination theorists, equality cannot be realized within a racialized caste system, which requires heightened consideration for laws that impact traditionally marginalized groups.[11] To this extent, Jack Balkin and Reva Siegal write, "Antisubordination theorists contend that guarantees of equal citizenship cannot be realized under conditions of pervasive social stratification and argue that law should reform institutions and practices that enforce the secondary social status of historically oppressed groups."[12] Therefore, in attempting to answer my original question of which amendment could be read as providing for a nontextual right to education, the Fourteenth Amendment initially appeared to be the obvious solution.

However, by the late 1980s, the Court began to depart from the Warren and Burger Court's view of the Fourteenth Amendment to suggest that the Amendment, particularly its Equal Protection Clause, barred any classification by identity. Put differently, the Supreme Court Courts embraced what is commonly referred to as a "colorblind" or anti-classification reading of the Fourteenth Amendment, abandoning an anti-subordination reading of that Amendment's Equal Protection Clause, and thus presuming that any laws that classify by identity, regardless of whether that law aims to promote equal opportunities for suspect classes or marginalized communities, were presumptively unconstitutional.[13] This constitutional framework was

---

executive order survived strict scrutiny analysis because it served a compelling state interest, national security, despite the order's clear discriminatory impact on Japanese Americans.

[10] Jack Balkin and Reva Siegel, "The American Civil Rights Tradition: Anticlassification or Antisubordination?," *University of Miami Law Review* 58, no. 1 (2003).

[11] For a discussion of the prevalent of racial caste system, in the United States see Isabel Wilkerson, *Caste: The Origin of Our Discontents* (New York: Random House, 2020).

[12] Balkin and Siegel (2003): 9.

[13] For contemporary examples of anti-classification readings of the Equal Protect Clause, see *Regents of the University of California v. Bakke*, 438 U.S. 365 (1978); *Parents Involved in Community Schools v. Seattle School District No. 1,* 551 U.S. 701 (2007); *Students for Fair Admissions v. President and Fellows of Harvard College,* 600 U.S. __ (2023). In *Bakke*, the Court found the University of California at Davis's racial quota system unconstitutional while upholding the consideration of race in admissions. In the decision, Justice Powell rejected a "two-class" theory and an application of strict scrutiny to members of privileged groups, citing the Equal Protection Clause, which "cannot mean one thing when applied to one individual and something else when it applied to a

developed throughout the late twentieth and early twenty-first centuries in a series of landmark decisions.[14] In line with the irony pointed out by Nikole Hannah-Jones, legal scholar Richard Thompson Ford suggests that this particular reading of the Fourteenth Amendment has undermined its purpose: "The Fourteenth Amendment guarantee of equal protection has stymied sensible, if controversial, efforts to correct racial inequality, in direct contravention of its historical purpose."[15] Furthermore, as constitutional scholar, Stephen Engel, notes, the anti-classification reading contradicts the remedial aims of the framers, which sought to protect members of suspected minorities who experienced histories of discrimination.[16]

This approach is markedly different from the Warren Court, which adopted an anti-subordination reading of the Constitution, grounding its judgment of statutory classifications by whether and how they recognized and worked to overcome historical legacies of oppression.[17]

---

person of color." Justice Powell claims that anti-classification was the proper avenue to achieving racial equality. Powell argues that racial quotas are harmful to both groups - harming "innocent" Whites and reinforcing negative stereotypes about minorities. While *Bakke* prohibits using racial quotas, the case is significant insofar as it opens the door to the practice of affirmative action. As Powell notes, racial classification in admissions can survive strict scrutiny if narrowly tailored to achieve a compelling government interest. In *Bakke,* the compelling state interest was attaining a diverse study body and countering the effects of societal discrimination.
Similarly, in *Parents Involved,* the Court determined that racial diversity was not a compelling enough reason to justify the use of race in selecting students for admission to public high schools. Thus, a school district that permits students to attend the public high school of their choice based on race, in an effort to diversify its student body, violates the Equal Protection Clause. The Court rejected the argument that racial classifications, which attempt to remedy the effects of past intention discrimination, are legitimate. The majority writes, "In design and operation, the plans are directly only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate." Lastly, in *Students for Fair Admissions,* the Court struck down Harvard and the University of North Carolina's admission policies, writing, "both programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful endpoints. We have never permitted admissions programs to work in that way, and we will not do so today."

[14] For other anti-classification decisions involving access to education see: *Gratz v. Bollinger,* 539 U.S. 244 (2003) and *Fischer v. University of Texas,* 579 U.S. __ (2016).

[15] Richard Thompson Ford, "Why Civil Rights Lawsuits Are Becoming Irrelevant in the Fight for Social Justice (Excerpt)," in *Rights Gone Wrong: How Law Corrupts the Struggle for Equality*, 2011.

[16] Stephen M. Engel, "Dynamics of Constitutional Development and the Conservative Potential of U.S. Supreme Court Gay Rights Jurisprudence, or Why Neil Gorsuch May Stop Worrying and Learn to Love Same-Sex Marriage," no. Constitutional Studies 3 (2018): 1–40.

[17] Put differently, "the central distinction between these two constitutional readings is, "The anti-classification approach argues that the harm of inequality stems from classifying persons according to race, a practice that is assumed by its nature to be invidious. An anti-subordination approach argues that the harm of inequality arises from unjust social forms of hierarchy or social subordination. While the first approach looks at whether a statute or other

The current Court seems to be shifting away from a more expansive reading of the Fourteenth Amendment to address and overcome structures of oppression that have targeted discrete and insular minorities. As Ford observes, "Civil rights are an important part of many social justice struggles, but they are subject to the law of diminishing returns. Rights can offer limited improvements in a narrow set of circumstances. But the effectiveness of the civil rights approach diminishes, and its costs increase, as it is applied to more novel, complex, and elusive social problems."[18]

Not only is the contemporary Roberts Court unwilling to engage in an expansive understanding of the Fourteenth Amendment that was once exercised in the Warren and Burger Courts, but the Rehnquist Court (1986-2005) and Roberts Court (2005 - present) were and continue to be reluctant to engage in, or develop, suspect classification analysis, and its consequential implications for tiered scrutiny. For example, in *Romer v. Evans* (1996),[19] in a 6-3 decision, the Court struck down a 1992 Amendment to the Colorado Constitution prohibiting any statute from giving protected status to LGBTQ+ individuals as a violation of the Equal Protection Clause. While the Court struck down the act, the Court decided not to designate gays and lesbians as a suspect class or sexual orientation as a suspect classification. Indeed, this reluctance is repeated in *Lawrence v. Texas* (2003), which struck down the criminalization of same-sex intimacy, *United States v. Windsor* (2013), which found that Section 3 of the federal Defense of Marriage Act or DOMA that defined marriage as between one man and one woman was unconstitutional, and *Obergefell v. Hodges* (2015), which ruled that state governments'

government action involves a facial classification, the second approach looks at the impact of state action in fostering or reproducing an unjust social structure." See Paul Brest et al., "Chapter 7: Race and the Equal Protection Clause," in *Processes of Constitutional Decision Making: Cases and Materials*, 7th ed. (Wolters Kluwer, 2018), 1066.

[18] Ford (2011).

[19] 517 U.S. 620 (1996).

refusal to recognize same-sex marriage violated same-sex couples rights under both Due Process and Equal Protection guarantees.[20] In all cases, the Court majority recognized that gays, lesbians, and bisexuals bear the characteristics of a suspect class, namely a history of discrimination, a history of political powerlessness, the immutable nature of the quality on which the discrimination turns, and the irrelevancy of that quality to the government objective.[21] However, the Court refused to name this class or classification by sexual orientation as suspect, and thus, regulations of sexual orientation are subject to more skepticism or scrutiny.

The Court appears to depart from evaluating laws that impact discrete and insular minorities - a suspect class - with more scrutiny to evaluate laws that classify by race - a suspect classification with more scrutiny.[22] Justice Alito suggests in *Fischer II* (2016) that racial classifications are unworkable in an increasingly diversified country.[23] This distinction is important to note because such a finding would suggest that the Constitution operated under a

---

[20] *Lawrence v. Texas,* 539 U.S. 588 (2003), *United States v. Windsor,* 570 U.S. 744 (2013), and *Obergefell v. Hodges,* 576 U.S. (2015).

[21] In constitutional decision-making, there are four characteristics of a suspect or protected class: political powerlessness, history of discrimination, immutability of trait, and irrelevancy to government objective. See *Washington v. Glucksberg*, 521 U.S. 720-721 (1997): "Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," id., at 503' (plurality opinion); Snyder v. Massachusetts, 291 U. S. 97, 105 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," Palko v. Connecticut, 302 U. S. 319, 325, 326 (1937)." The Court identified race as a suspect class in *Korematsu* in 1944, and gender as a quasi-suspect class in *Reed v. Reed,* 404 U.S. 71 (1971). However, as Jack Balkin notes, "There is no necessary limitation on what characteristics can serve to distinguish status groups in a status hierarchy. They can be mutable or immutable, physical or ideological, matters of behaviors or matters of appearance. The most familiar ones in the United States are organized along lines of race, sex, religion, immigrant status, and ethnicity. Conversely, not ever distinguishing traits or characteristics corresponds to a status group in a status hierarchy. The number of traits that might be used to distinguish human beings is limitless, but the organization of a status hierarchy is a result of a particular history of social stratification and subordination." See Jack Balkin, "The Constitution of Status," 1997, 2323–24.

[22] See *City of Richmond v. J.A. Croson Company,* 488 U.S. 469 (1989). In a 6-3 decision, the Supreme Court struck down a Virginia statute that required companies awarded city construction contracts to subcontract thirty percent of their business to minority business enterprises. Justice O'Connor, writing for the majority, held that generalized assertions of past racial discrimination could not justify the use of racial quotas for the awarding of public contracts. O'Connor essentially asserts that any classification based on race is immediately suspect. At the same time, Justice Marshall, in dissent, adopts an anti-subordination reading of the Constitution, which is cognizant of how racial classifications can remedy past historical inequalities.

[23] 579 U.S. (2016).

colorblind ideology, in which any racial classification, regardless of whether it is designed to remedy institutional or historical discrimination, is unconstitutional.[24]

Furthermore, the recent Fourteenth Amendment claims of Equal Protection guarantees have proven ineffective at the Supreme Court. In *Masterpiece Cakeshop vs. Colorado Civil Rights Commission* (2018), the Supreme Court concluded that the Colorado Civil Rights Commission's conduct in evaluating a baker's reasons for refusing to bake a wedding cake for a same-sex couple violated the First Amendment Free Exercise Clause.[25] Similarly, in *303 Creative LLC v. Elenis* (2023), the Court found that the First Amendment freedom of speech, not to design a same-sex wedding website, superseded the Equal Protection concerns for LBGTQ+ individuals.[26] All of these distinct elements – the Court's move away from an anti-subordination reading to an anti-classification reading, the Court's refusal to apply classification and tiered scrutiny to laws that regulate by sexual orientation, and the Court's refusal to recognize equal rights in commerce - seem to suggest that the contemporary Court has altogether abandoned the Warren and Burger Court's reading of the Fourteenth Amendment that viewed the amendment as a repository of rights. If the Equal Protection Clause and the Fourteenth Amendment writ large can no longer be leaned upon to advance notions of equal treatment or the identification of fundamental rights, where else may the Constitution speak to the expansive rights of protected

[24] To this extent the Court writes, "UT's failure to provide any definition of the various racial and ethnic groups is also revealing. UT does not specify what it means to be "African American," "Hispanic," "Asian American," "Native American," or "White." And UT evidently labels each student as falling into only a single racial or ethnic group, without explaining how individuals with ancestors from different groups are to be characterized. As racial and ethnic prejudice recedes, more and more students will have parents (or grandparents) who fall into more than one of UT's five groups…UT's classification system is ill suited for the more integrated country that we are rapidly becoming."

[25] 584 U.S. __ (2018). The Court sides with the baker on procedural grounds, holding that the Colorado Commission was not neutral when evaluating the law. Thus, the Court fails to address the substantive question: Does the Colorado law compel a cake maker to design and make a cake for a same-sex couple to violate the First Amendment freedom of speech, or is this an action of discrimination that the Equal Protection Clause bars?

[26] 600 U.S. 570 (2023).

persons? Put differently, which constitutional pathways beyond the Fourteenth Amendment may be activated to identify a right to education?

The current Court's reluctance to take an expansive approach to the Fourteenth Amendment leaves scholars searching for another amendment to accomplish what the Fourteenth fails to do. Many scholars have long suggested igniting the use of the Ninth Amendment.[27] The Ninth Amendment was utilized in *Griswold* (1965), in which Justice Goldberg, writing in concurrence with the majority, determined that a right to privacy is included in the Ninth Amendment.[28] However, scholars have taken issue with Goldberg's logic and applying the Ninth Amendment more broadly.[29] Furthermore, the Courts seem unwilling to invoke the Ninth Amendment as an opportunity to identify nontextual fundamental rights. The Courts have seemingly ignored the Ninth Amendment framework developed by Justice Goldberg in *Griswold*. Given the Court's more contemporary resistance to reading the Fourteenth Amendment as a repository of rights, I must find an alternative constitutional pathway to identify a right to education, which I identify through the Thirteenth Amendment.

Reconceptualizing the Potential of the Thirteenth Amendment

While the Thirteenth Amendment is generally considered an abolitionist amendment, which merely abolished the peculiar institution of chattel slavery, I build upon the work of a broad range of constitutional scholars to highlight the emancipatory possibilities of the

[27] By way of background, the Ninth Amendment was written into the Constitution as a compromise with the anti-Federalists- who believed the Bill of Rights could be weaponized to limit the rights of individuals to those explicitly defined in the first eight amendments.

[28] In *Griswold*, Justice Goldberg writes, "The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments."

[29] Central scholars have suggested, "the problem with Douglas's textual implication argument lies elsewhere. What leads him to imply liberties from these rights but not others? Couldn't one as easily derive the Lochner's era conception of liberty and property, and the Taking Clause?" See Paul Brest et al., (2018): 1396.
Furthermore, the ambiguity of the amendment is cause for concern. As the casebook editors Brest, Levinson, Balkan, Amar, and Siegal offer, "The purpose of the amendment is ambiguous, however. Was it designed to safeguard individual liberties not enumerated in the first eight amendments or only to protect the states against the national government's assumption of powers not delegated by Article I, II, and III?" See Paul Brest et al., (2018):172. They write, "Furthermore, any attempt to elucidate the amendment's purposes must deal with some enigmatic data. On the one hand, if the amendment were concerned primarily with safeguarding federalism, it seems to make surplusage of the Tenth Amendment, which speaks explicitly to powers "reserved to the States." Can one plausibly respond that the Ninth Amendment is a ruler requiring narrow interpretation of those oilers that are undoubtedly assigned to the national government, whereas the Tenth Amendment refers to powers that could not even be implied from the assigned power? On the other hand, if the amendment were concerned primarily with safeguarding individual liberties, one might expect to find similar provisions in some of the bills of rights of contemporary state constitutions. There is a further complexity here. In 1791, the Ninth Amendment was unique, but the bill of rights of many nineteenth-century state constitutions paraphrases the amendment." See Paul Brest et al., (2018):174. citing See John Ely, Democracy and Distrust (1980): 202-204.

Thirteenth Amendment. The Thirteenth Amendment has been criticized for its role in legalizing slavery and involuntary servitude through the expansion of mass incarceration - which disproportionately impacts Black and Brown communities.[30] While this exception to the abolition of slavery embedded in the Amendment is deeply problematic, I explore the capacity of the Thirteenth Amendment to be a repository of rights with transformative capacities that have been severely undermined. My argument has at least two prongs: first, by contextualizing the criminalization and deprivation of education as a central tenet of American slavery, it follows that such an infringement upon education can be considered a relic of slavery - which the Thirteenth Amendment bans outright. Second, if the Thirteenth Amendment is read as an emancipation requirement rather than a mere abolition Amendment – a reading supported by history and text – then a question necessarily follows as to what that emancipation requires. Education can logically be understood as a tool to enable the full development of the freedom of capabilities that emancipation guarantees.

The Court has been reluctant to identify expansive rights in the Fourteenth Amendment and has been ever more hesitant to acknowledge the potential implications of the Thirteenth Amendment to serve as the foundation for nontextual foundational rights. While this argument may seem unlikely to gain ground with the current Court, there is value in constitutional innovation. The constitutional system in the United States embraces a central principle of stare decisis or the idea of letting precedent stand. This principle is a necessary condition of the rule of law because it promotes stability in constitutional and legal interpretation regardless of any turnover in judicial personnel. Nevertheless, stare decisis also produces a kind of perversion of

[30] For further discussion on how the Thirteenth Amendment has been interpreted to implement legal forms of slavery and involuntary servitude, which adversely impact Black and Brown communities, see Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: New York Press, 2010).

path dependency in the following way. Early rulings, particularly rulings that may reflect now-discredited ideologies of white supremacy, may get embedded early on and thus reproduced by the demands of stare decisis. In other words, our constitutional interpretative logic creates path dependency, which inhibits creativity and reinforces precedents that can often be overly narrow and, particularly in a country with a history of slavery, rooted in white supremacist ideology.[31] Thus, it can be challenging to find ways to break new ground. This thesis views the narrow readings of the Thirteenth Amendment that currently prevails as a manifestation of that narrowness and the path-dependent constitutional logic of stare decisis. The ideas offered in this thesis, namely the proposition that a non-textual fundamental right to education can flow from an emancipatory reading of the Thirteenth Amendment rather than the Fourteenth Amendment, attempt to break the current path and provide a new one. Such a constitutional pathway is an opportunity for the Court to recognize the broad emancipatory potential within the Thirteenth Amendment and, in so doing, protect the right to education for *all* students.

A right to education enshrined in the Constitution, as opposed to other governmental branches, provides unique advantages. The Constitution provides a discursive anchor by which to issue claims about what justice and equality require, what the government must do, and what the government cannot do. The Constitution provides a framework to engage in policy discussion and legal debate. The Constitution opens opportunities to discuss implications for the right to education. For example, if a fundamental right to education, grounded in the Thirteenth

[31] Path dependency is a concept which suggests that past processes, events, or decisions have bearings on later decisions or events. This theoretical framework helps political scientists and other scholars evaluate political action. As Paul Pierson writes, "Path-dependence arguments also provide a useful and powerful corrective against tendencies to assume functionalist explanations for important social and political outcomes - the supposition that the existence of current social arrangements is to be explained through reference to the needs they address for the currently powerful. More an appreciation of the prevalence of path dependence forces attentiveness to the causal significance of temporally remote events or processes." See Paul Pierson, "Introduction," in *Politics in Time: History, Institutions, and Social Analysis* (Princeton University Press, 2004), 11.

Amendment, were accepted, the question of its impact on the most marginalized students arises. This thesis explores this question by focusing on the implications of a fundamental right for students with disabilities and how it may change or alter special education. Put differently, *if such a right to education is identified and supported by the Thirteenth Amendment, what are the implications for students with disabilities under the Individuals with Disabilities Education Act (IDEA)? In other words, would a fundamental right to education change or inform current legal protections for students with disabilities?* This thesis answers this question by arguing that a fundamental right to education can be most effectively identified by liberating the emancipatory guarantees of the Thirteenth Amendment and that identifying such a right would situate any deprivation of equal educational access for students with disabilities unconstitutional.

How This Thesis Proceeds

The thesis proceeds in two parts to fully flesh out the claim that the Thirteenth Amendment is a repository of emancipatory rights that include education. Part I (Chapters 1-2): *Building a Fundamental Rights Claim to Education Under the Thirteenth Amendmen*t is dedicated to developing a framework for a fundamental right to education rooted in an emancipatory reading of the Thirteenth Amendment. In Chapter I, I provide a brief overview of what constitutes a right and how a right to education would hypothetically fit into such a framework. In doing so, I discuss the difference between substantive and procedural rights and explore how the Supreme Court has classified fundamental rights. I then transition into a comparative international study, which situates the United States as an outlier among Western countries with an explicit right to education enshrined in their national constitutions or federal legislation. However, I suggest that the United States does not need to have an enumerated right to realize such a right. In the final section of this chapter, I present the scholarly evaluations of

constitutional pathways in which a right to education may be argued. I contend that arguments that situate the Equal Protection Clause, Due Process Clause, or Citizenship Clause as a constitutional pathway to identify a fundamental right to education are limited and thus require an alternate constitutional pathway.

In Chapter 2, I contend that the Thirteenth Amendment should be activated to recognize a fundamental educational right. To build this position, I provide an account of the Court's early interpretation of the Thirteenth Amendment, which reveals the motivations for the Court's decisions were grounded in White Supremacy and fears of racial integration. I juxtapose this discussion with the congressional history of the ratification of the Thirteenth Amendment, which demonstrates that the founders of the Amendment intended for an expansive reading that would enable formerly enslaved individuals the capacity to participate in society meaningfully. In other words, the Thirteenth Amendment was not passed to abolish chattel slavery only but to eradicate the systems, structures, and vestiges inherent within the peculiar institution. Lastly, I evaluate scholarship that embraced this interpretation of the Thirteenth Amendment to extend to other unenumerated rights, situating the right to education's grounding in the Thirteenth Amendment as a natural continuation of this argument. I conclude Part I by offering that the Thirteenth Amendment as a constitutional pathway presents many advantages compared to the frequently cited Fourteenth Amendment, which has broader implications for activating the revolutionary potential of the Thirteenth Amendment.

Part II (Chapters 3-5): *Evaluating Special Education Jurisprudence Under a Fundamental Rights Framework* is centered on answering the second research question: *if a fundamental right to education exists, what are the implications for students with disabilities under the Individuals with Disabilities Education Act (IDEA)?* In other words, *does IDEA hold*

merit under the fundamental rights framework I have developed in Part I? Or rather, has how IDEA been implemented and interpreted by the Courts been misconstrued in a way that does not reflect education as a fundamental right?

In Chapter 3, I provide a brief historical overview of the relationship between the federal government and public education. I suggest that federal involvement in public education has a long and storied history in the United States, with periods of retraction and expansion of federal power. In my analysis, I position the IDEA within a period of Access and Inclusion, in which the federal government's role was more expansive to promote racial equality. Within this chapter, I provide congressional testimony of the legislative debate surrounding the IDEA to provide insight into the legislative process behind this essential piece of special education law.

In Chapter 4, I provide an extensive overview of *Hendrick Hudson Central School District v. Rowley*, the first significant case the Supreme Court reviewed that dealt with IDEA - which I ultimately concluded was incorrectly decided using a fundamental rights framework to education.[32] In this decision, the Court held that the central provision of IDEA, free appropriate public education (FAPE), provided that a school district was not obligated to provide Amy Rowley, a hard-of-hearing student, with a sign language interpreter as Amy was otherwise making passing grades. I include summaries of the case findings through the district, appellate, and Supreme Court. After this overview is completed, I present the contemporary scholarship on *Rowley*, who has criticized the decision as historical and inconsistent with the goals of IDEA. The primary evidence demonstrating a collective backlash to *Rowley* is subsequent state litigation, which expanded on what constitutes adequate education, the expansion of state

[32] 458 US 176.

educational standards, and later amendments to IDEA in 1997, which explicitly attempted to undo the harm committed in *Rowley*.

In Chapter 5, I return to the constitutional analysis I developed in Part I and apply my findings to the *Rowley* decision. I present two distinct constitutional pathways, both of which arrive at the same conclusion: *Rowley* is incompatible with a fundamental rights framework under the Thirteenth Amendment and, more broadly, inconsistent with the spirit of the Constitution. First, I argue that because education is a fundamental right, any deprivation or infringement upon such a right should be interpreted with strict scrutiny. The refusal to provide a sign language interpretation for Amy Rowley (which, as I suggest, is deeply implicated in cost efficiency concerns) is not a compelling state interest. Second, even if education was not considered a fundamental right, or if the Court is unwilling to engage in tiered levels of scrutiny, the Thirteenth Amendment could still be activated to overrule *Rowley* because the Amendment prevents badges of inferiority.[33] The condition of "badges of inferiority" has been expanded by scholars to address contemporary relics of slavery, most notably racial discrimination. Some scholars have even suggested that the badges of inferiority may speak to rights for marginalized groups without a history of enslavement in the United States. Grounded in this analysis, I suggest that the Thirteenth Amendment's ban on badges of inferiority can be extended to education, given the historical legacy of how the deprivation of education was used as a tool of White Supremacy - as argued in Chapter 2.

[33] In *Jones v. Alfred H. Mayer Company,* 392 U.S. 409 (1968), the Court held that Section 2 of the Thirteenth Amendment to enforce Section 1 by appropriate legislation included the power to eliminate all racial barriers to the acquisition of property. The Court concluded, "Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." *Jones* developed the language of "badges and incidents of slavery," which was supported by an expansive reading of the Thirteenth Amendment. I will further explore *Jones* and its precedential value in Chapter 2 and 5.

An expanded scope of the Thirteenth Amendment would be advantageous, as it would protect rights for other marginalized groups and allow scholars and jurists to see discrimination and violence at an intersectional level. In other words, badges of inferiority are not solely issues of racism, sexism, ableism, homophobia, and other "isms" - many people exist at the intersections of these identities. However, I provide this constitutional pathway toward identifying a fundamental right to education grounded in the Thirteenth Amendment with a degree of caution. While I advocate for an expansive approach to understanding the Thirteenth Amendment, it is necessary to situate contemporary relics of slavery and badges of inferiority within the larger context of its relationship to chattel slavery to respect and uphold the integrity of the Amendment.

Not only does this thesis project identify a long-sought fundamental and federally recognized right to education, but it also vitalizes the emancipatory promises of the Thirteenth Amendment, which have gone unrecognized since its ratification. I offer that such a right to education would have implications for and benefit *all* students - especially students with disabilities and other marginalized students who experience (intersectional) barriers to achieving equal educational access. Furthermore, a reconsideration of a fundamental right to education would have normative implications for all aspects of educational policymaking, including but not limited to special education, vocational and technical schools, school budgets, support for multilingual students, standardized testing, school resource officers, and more. Put differently, scholars and jurists can activate the emancipatory guarantees of the Thirteenth Amendment to reimagine educational access and equity.

Chapter 1: Reckoning with Rights

The United States Constitution is a rights-based document. Since its inception, the Constitution was revolutionary in its capacity to not only ensure democratic processes and institutions of government, but also provide for certain unalienable rights. The Constitution, as written in 1787, however, could not anticipate how rights would develop and transform with the document. Thus, there continues to be significant debate concerning what rights the Constitution provides, either explicitly or implicitly, how these rights are guaranteed, and which governing bodies are responsible for identifying them.

The goals of this foundational chapter are fourfold. First, I briefly distinguish between substantive and procedural rights. This distinction is a necessary foundation for evaluating how a fundamental right to education might be grounded in contemporary rights analysis in a U.S. constitutional context. Second, I provide a definition for fundamental rights and discuss the United States Supreme Court's metric for identifying a fundamental right, which has developed over time to have two characteristics: deeply rooted in history and tradition and necessary for the maintenance of ordered liberty.[1] Third, I provide a comparison of the United States to other countries that have an identified right to education - either explicit in the Constitution or enshrined in legislation - as well as contrast the United States' lack of cooperation with international human rights treaties that provide certain substantive educational rights to the

[1] See *Washington v. Glucksberg*, 521 U.S. 720-721 (1997): "Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," id., at 503' (plurality opinion); Snyder v. Massachusetts, 291 U. S. 97, 105 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," Palko v. Connecticut, 302 U. S. 319, 325, 326 (1937)." For the purposes of this thesis, I intend to adopt the standards for a fundamental right development in *Glucksberg* to reveal a fundamental right to education.

universal cooperation of other democracies. This comparison situates the United States is an outlier relative to other countries: both in its identification of a right to education and in its willingness to enforce a right on a national and international scale. Nevertheless, this thesis ultimately contends that there is nothing within the U.S. Constitution that requires the U.S. to be so. In other words, read in a particular way, the U.S. Constitution does, in fact, enshrine a fundamental right to education. To this extent, I conclude this chapter by summarizing the contemporary legal scholarship in which a fundamental right to education has been defended through either or all of Fourteenth Amendment's Equal Protection Clause, Due Process Clause, and Citizenship Clause. I propose that contemporary scholarship's reliance on the Fourteenth Amendment is misguided given the limitations of each of these constitutional pathways. At the end of the chapter, I suggest that the constitutional pathway to a fundamental right ought to be identified not through the historically invoked provisions of the Fourteenth Amendment, but rather through the seldomly invoked, and widely misconstrued, Thirteenth Amendment.

Positioning Educational Rights within a Substantive and Procedural Rights Framework

Rights have generally been dichotomously categorized as either procedural or substantive. The United States Constitution is often considered to provide procedural rights.[2] Procedural rights can refer to the guarantees of certain processes. For example, due process of law, covered under the Fifth and Fourteenth Amendments are procedural rights. In the event that an individual has been deprived of life, liberty, or property there is a procedure in place for

[2] Cass Sunstein, "Why Does the American Constitution Lack Social and Economic Guarantees?" *University of Chicago Public Law & Legal Theory, Working Paper*, no. 36 (January 2003): 1–19.

redress. Substantive rights, in contrast, include rights to material goods.[3] For example, a right to housing, basic income, employment or healthcare would be examples of substantive rights.

Substantive and procedural rights can be understood as existing within the larger framework of positive and negative rights. As Emily Zackin writes, "Positive rights are those that require government intervention in order to protect people from threats that are not directly or solely governmental. Negative rights, by contrast, require government to restrain itself in order to protect people from threats that stem directly from an overbearing and intrusive state."[4] In other words, there are two key distinctions between positive and negative rights: type of government response to dangers - interventionist or restraint - and whom protection is needed against - government or other entities.[5] Emily Zackin's framework is illustrated in Figure 1, which demonstrates the components of positive and negative rights under U.S. constitutional law.[6]

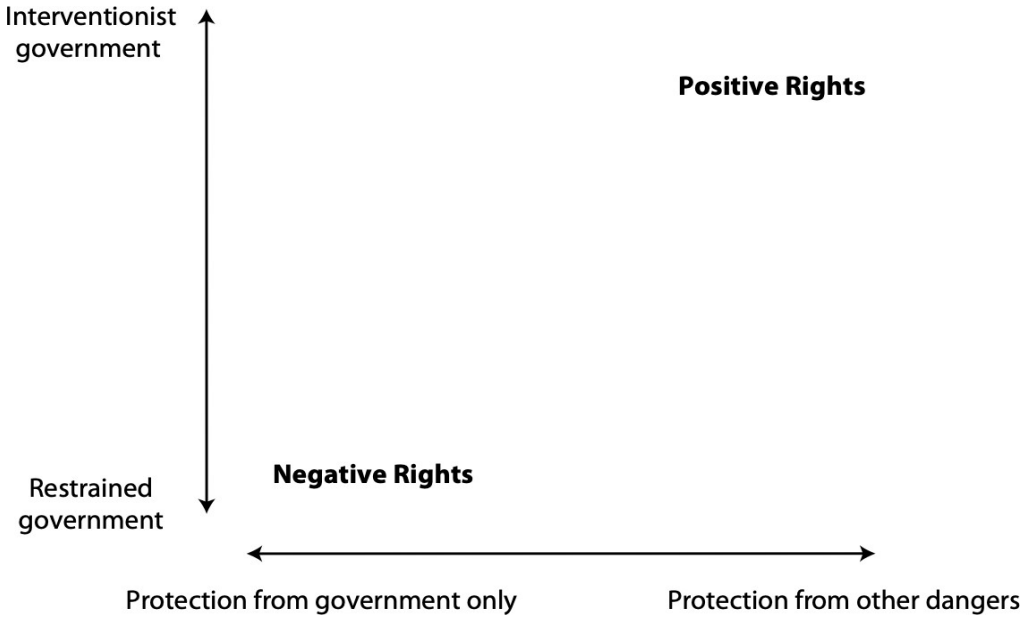
[3] Put differently, substantive due process allows Courts to establish and protect certain rights from government interference. In contrast, procedural due process ensures that the government has followed the necessary procedures when taking away life, liberty, or property.

[4] Emily Zackin, "Chapter 3: Defining Positive Rights," in *Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights* (Princeton University Press, 2013), 37.

[5] Before diving into an analysis of substantive and procedural rights, it is essential to note that identifying procedural and substantive rights do not guarantee protection from government infringement or ensure protection against other dangers from the government. In other words, merely because the Constitution provides protection and guarantees does not mean they will be recognized under the law. However, these protections are important as they provide an explicit or implicit jurisprudential anchor. As Cass Sunstein argues, constitutional guarantees (either in the form of procedural or substantive rights) are necessary to protect those who lack political power and preserve rights that are at a "systematic risk." See Cass R. Sunstein. "Social and Economic Rights? Lessons from South Africa." *John M. Olin Program in Law and Economics, Working Paper*, no. 124 (2001): 223. In sum, while procedural and substantive rights are limited insofar as they are bound to the political system to be self-actualized, they provide a crucial grounding for jurists and scholars to rely upon.

[6] Zackin (2013).

Figure 1: Emily Zackin's Two Dimensions of Positive and Negative Rights



The U.S. constitution has been characterized as primarily a negative rights and procedural rights document, while state constitutions, in contrast, provide substantive protections and positive rights.[7] Take for instance, the right to education. All state constitutions have language that requires the development of a public education system, which is largely understood as a procedural right, unlike the federal constitution which does not explicitly speak to the right of education.[8] With regard to the dominance of negative rights in the federal constitution, Zackin writes, "Indeed, the conventional wisdom holds that American rights focus almost exclusively on keeping government out of people's lives, that movements for other kinds of rights have generally failed to alter the country's constitutional commitments, and as a consequence, that positive rights remain foreign to America's constitutional tradition."[9] And, with regard to the bias

[7] Ibid., 39-40.
[8] While education is primarily conceptualized as a substantive right, I will later address the limitations of understanding this view by breaking down the dichotomy between substantive and procedural rights. Instead, I find that these two rights are interrelated, and therefore, rights, such as education, have substantive *and* procedural components.
[9] Ibid., 40.

toward procedural rights, Cass Sunstein argues that it may stem from chronology or simply, "the age of the American constitution, which is the oldest in force in the world,"[10] or that substantive rights cannot exist in a system of strong judicial review as it leaves judges open to accusations of activism and values imposition.[11]

Despite this limited understanding of the U.S. constitution as a procedural rights document, Sunstein suggests that some economic and social rights that make up the category of substantive rights have, to some extent, been embraced by the U.S. Supreme Court during the 1960s and 1970s. As such, it is not immediately evident that the Constitution privileges one kind of right over another. Indeed, as Sunstein writes from a legal realist perspective, "the Constitution means what the Supreme Court says it means, and with a modest change in personnel, the Constitution would have been understood to create social and economic rights of the sort recognized in many modern constitutions, and indeed in the constitutions of some American states."[12] Sunstein's insight triggers the question animating this thesis: can the Constitution be read to support a right to education, and if it can be, what are the implications of such a right for the policy provision of access to education for students with disabilities?

Indeed, other scholars have suggested that this dichotomy between substantive and procedural rights is ultimately unhelpful and misleading. Upon closer scrutiny, the Constitution does seem to provide substantive rights. Laurence H. Tribe, for example, argues that the Constitution contains openly substantive commitments. For example, the Fifth Amendment, Contracts Clause, and Due Process Clause demonstrate a commitment to the institution of private property, arguing, "most of us would readily concede that the Framers of the 1787 Constitution

[10] Sunstein (2005): 1.
[11] Ibid., 5
[12] Ibid.

adopted a federal system of government organization in order to, among other goals, help secure the institution of private property."[13] To this extent, Tribe concludes " What is puzzling is that anyone can say, in the face of this reality, that the Constitution is or should be predominantly concerned with process and not substance."[14]

Furthermore, Sunstein has argued that the United States came close to adopting a substantive rights framework during the Warren Court of the 1960s. Thus, he points primarily to the mechanism of judicial appointment to explain why recognition of these rights has been inhibited over time. To this extent, Sunstein positions the Court's refusal to recognize such rights as primarily a result of the presidential election of 1968 and in particular of four critical appointments by President Nixon.[15] To support this argument Sunstein provides case studies from the Warren Court which highlight the evolving understanding of the Fourteenth Amendment as providing certain social and economic rights. For example in *Griffin v. Illinois (1956)*, the Court ruled that a fee for court transcripts was unconstitutional, providing that the government must produce Court documents free of charge to any prospective appellees.[16] Other scholars have also made similar claims by examining the development of substantive rights afforded to the poor during the Warren Court.[17] For John Hart Ely, the expansion of substantive rights was "fueled not by a desire on the part of the Court to vindicate particular substantive values it had determined were important or fundamental, but rather by a desire to ensure that the political process - which is where such values are properly identified, weighed, and

[13] Laurence H. Tribe, "The Puzzling Persistence of Process-Based Constitutional Theories," *The Yale Law Journal* 89, no. 6 (1980): 1066.
[14] Ibid., 1067.
[15] Sunstein (2005): 1.
[16] 351 U.S. 12 (1956). For additional cases during the Warren Court where the substantive social and economic rights were more expansive see *Douglas v. California*, 372 U.S. 353 (1963) and *Shapiro v. Thompson*, 394 U.S. 618 (1969). In *Douglas*, the Court held that the State's failure counsel to defendants violated the Equal Protection Clause. In *Shapiro,* the Court identified a fundamental right to travel.
[17] See Frank I. Michelman, "The Supreme Court, 1968 Term," *Harvard Law Review* 83, no. 1 (1969): 7–61.

accommodated - was open to those of all viewpoints on something approaching an equal basis."[18] Put differently, the substantive values that were identified by the Warren Court were not imposing political opinions of the Justices, but, instead, directly tied to ensuring procedural fairness.[19] This widening understanding of rights was stymied after the election of President Nixon in 1968 and the appointments of four Justices to the Court (Warren Burger in 1969, Harry Blackmun in 1970, Lewis Powell, and William Rehnquist in 1972). In summation, during the 1960s and 70s the Court adopted a substantive rights framework. However, after the election of Nixon and the shift in the Court's ideological balance, the Court returned to its narrow understanding of the status of social and economic rights outside the explicit bounds of the Constitution.

Several scholars have criticized the dichotomy between substantive and procedural rights as unhelpful and ultimately misleading, as it is impossible to distinguish between the two properly given its interconnectivity. For instance, the right to a fair trial appears to be a classic example of procedural due process under the Sixth Amendment. However, there are resources and costs associated with hearings such as the fee of an attorney, which is, at times, provided by the state. As Alexander Larry argues, this is an instance in which substantive values have strong procedural implications."[20] Historically, the "construction of substantive law necessarily entails making assumptions about how that law ultimately will be enforced. Many of those assumptions

[18] John Hart Ely, "Policing the Process of Representation: The Court as Referee," in *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980), 74.
[19] As Ely notes this power of the Court to serve as a overseer of the political process is foreshadowed in Footnote 4 of *United States v. Carolene Products Company*, which suggests, "that it is an appropriate function of the Court to keep the machinery of democratic government running as it should, to make sure the channels of political participation and communication are kept open." See Ely (1980): 76.
[20] Larry Alexander, "Are Procedural Rights Derivative Substantive Rights?," *Law and Philosophy* 17, no. 1 (1998): 32.

are rooted in the procedures pursuant to which a claim to vindicate that law would be litigated."[21] It is within this framework that procedural law has generally been understood to have substantive implications. However, Thomas O Main has suggested that the converse is also true, writing, "procedure is an instrument of power that can, in a very practical sense, generate, or undermine substantive rights."[22] Thus, procedural and substantive rights are inherently connected to each other and cannot be separated in this false dichotomy that has been embraced by American legal scholars and theorists.

The reluctance among Justices to delve into the substantive rights provided in the Constitution is often perceived as a strategic move to avoid controversy and accusations of judicial activism.[23] However, such an approach can, "permit courts to perceive and portray themselves as servants of democracy, even as they strike down the actions of supposedly democratic governments."[24] The debate on substantive and procedural rights represents a larger theoretical disagreement about the role of government in democracy - as either limited to avoid tyranny or strong to provide certain guarantees. While a full discussion of this debate is beyond the scope of this thesis, it is important to note that education tends to be understood as a

[21] Thomas O. Main, "The Procedural Foundation of Substantive Law," SSRN Scholarly Paper (Rochester, NY, July 14, 2009): 802.
[22] Ibid.
[23] For example, in *Lochner v. New York,* 198 U.S. 45 (1905) the Court identified a fundamental right to contract. Justice Harlan, writing in dissent, concluded that the Court had overstepped its reaches to identify a nontextual fundamental right to contract that was inconsistent with the democratically approved New York State law. To this extent, Justice Harlan writes: "Our duty, I submit, is to sustain the statue as not being in conflict with the Federal Constitution, for the reason - and such is an all-sufficient reason - it is not shown to be plainly and palpably inconsistent with that instrument. Let the State alone in the management of its purely domestic affairs, so long as it does not appear beyond all question that it has violated the Federal Constitution. This view necessarily results from the principle that the health and safety of the people of a State are primarily for the State to guard and protect." The Justices' reluctance to identify a fundamental right via substantive due process due to issues of institutional legitimacy will be an important trend to note through Chapter 1.
[24] Tribe (1980): 1063.

substantive right because education can be conceptualized as a material good.[25] As such, part of grappling with why the U.S. Constitution is believed to not guarantee a fundamental right to education and relies on the characterization of the Constitution as primarily a procedural and negative rights document. Scholarship suggests that this characterization is both too limiting and ultimately inaccurate. This framework reflects a larger ideological claim about the purpose of government more so than a definitive reading of the Constitution. Instead, I merely offer that if we accept Tribe's theory that the Constitution provides for substantive rights, education logically flows as a substantive right that the government provides from a fundamental rights analysis. Conversely, if one does not accept Tribe's theory, education could arguably be provided as a fundamental right if understood as a procedural right given the erosion of the dichotomy between procedural and substantive rights.

The Supreme Court and Fundamental Rights Jurisprudence

The U.S. Supreme Court has provided an extensive jurisprudential line that discusses fundamental rights. Fundamental rights are rights considered so important that the Court must exercise rigorous scrutiny when faced with legislation that encroaches on such a right. Such rigorous scrutiny of a regulation is called strict scrutiny, and this level of judicial review means that regulation of such a right can only be upheld if it is narrowly tailored to achieve a compelling government interest.[26] Fundamental rights can be enumerated or implied, which raises the larger question of how they are identified and by whom. The Court may justify the

[25] However, given the ambiguous nature of substantive and procedural rights, there is a plausible way to interpret education as a procedural right. In this sense, education serves as an end to securing a good through effective citizenship and democratic engagement, making it a procedural right.

[26] The design of strict scrutiny can be sourced from Footnote 4 in *U.S. vs. Carolene Products* in which Justice Stone concluded that, "...whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." Footnote 4 provides the framework for the varying tiers of judicial scrutiny: rational basis review (lowest tier of scrutiny), intermediate review, and strict scrutiny (highest tier of scrutiny).

development of a fundamental right based on national consensus and may also look to state legislatures for guidance.[27] Judicial evaluation of a fundamental right requires contemplation of at least two questions: first, is the right fundamental and second, if the right is fundamental, what is the threshold that the government must pass in order to regulate it?

With regard to the first question, the Court has diverged into at least two distinct schools. Constitutional originalists restrict the category of fundamental rights to textual rights as evidence of the clear intentions of the framers. By contrast, non-originalists have argued that non-enumerated or non-textual rights can also be fundamental. In cases in which non-textual fundamental rights have been identified, the Court has traditionally defined those rights as being deeply rooted in the history and tradition of the country and necessary for the maintenance of ordered liberty.[28] Perhaps one of the most important examples of an identified, implied, or non-textual fundamental is the right to privacy. In the case of *Griswold v. Connecticut*[29] the Court reasoned that the right of privacy was deeply historical and embedded within either a penumbra of rights from the Bill of Rights or stemmed from a substantive reading of the Fourteenth Amendment's Due Process Clause.[30] This exact framework was also used as a rationale in the

[27] The Court may also identify a fundamental right or expand the protection of a fundamental right based on the consensus of state legislatures who inform national politics as laboratories of democracy.

[28] The framework for a fundamental right was identified in *Washington v. Glucksberg*, 521 U.S. 720-721 (1997). However, there have been earlier iterations. These concepts were developed in *Griswold v. Connecticut*, 381, U.S.. 479, (1965): 485-486 in which the Court found intrusions into the "sacred precincts of marital bedrooms" offend rights "older than the Bill of Rights." Justice Goldberg in concurrence wrote, "the law in question "disrupt[ed] the traditional relations of the family-a relation as old and as fundamental as our entire civilization." Fundamental rights analysis has placed a central role in abortion, Second Amendment, and LGBTQ+ jurisprudence. For further references see Matthew Grothouse, "Implicit in The Concept of Ordered Liberty: How Obergefell v. Hodges Illuminates the Modern Substantive Due Process Debate," 49 *J. Marshall L. Rev.* 1021 (2016)," *UIC Law Review* 49, no. 4 (January 1, 2016).

[29] 381 U.S. 479 (1965). This was a landmark case from 1965 in which the Supreme Court struck down a Connecticut state law that banned contraceptives. A married couple from Connecticut was found in violation of this law, which was challenged at the Supreme Court. In a 7-2 decision, the Court concluded that a right to privacy was implied in the Constitution, which barred state restrictions on access to contraception.

[30] The right to privacy is an implied fundamental right that flows from a penumbra of rights, primarily the First, Third, Fourth, Fifth, and Ninth Amendments. According to Justice Douglas, these textual rights suggest a broader understanding of privacy.

fight for marriage equality which relied upon the Court's identification of a non-textual, but nevertheless fundamental, right to marriage in *Loving*.[31]

Fundamental rights are at the forefront of contemporary debates on reproductive rights and abortion access, sexuality and sexual orientation, and a constitutional right to self-defense.[32] A fundamental right is distinct from other rights because there is a heightened standard of judicial scrutiny in which a law that infringed upon a fundamental right is constitutional insofar as it is narrowly tailored to a compelling governmental interest - this is known as strict scrutiny analysis, which is the highest level of review. The Court has often been reluctant to identify a fundamental right given the controversy concerning the Court's legitimacy[33] as well as disagreement of the constitutional pathways argued to identify a fundamental right.

The right to education has never been recognized as a non-textual fundamental right by the United States Supreme Court. In *San Antonio Independent School District v. Rodriguez*[34] the Supreme Court, in a contentious 5-4 decision, declared that education was not a fundamental right protected under the United States Constitution. In the Court's discussion the majority held that although education played an important role in society, "the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause."[35] The Court, aware of the

---

[31] In *Loving v. Virginia,* 388 U.S. 1 (1967), the Supreme Court decision that struck down anti-miscegenation laws. Chief Justice Earl Warren wrote in the opinion, "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." Nearly fifty years later, in O*bergefell v. Hodges*, 576 U.S. 644 (2015), Supreme Court upheld same sex marriage. Justice Kennedy wrote for the Court, "The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same sex may not be deprived of that liberty. Same-sex couples may exercise the fundamental right to marry."

[32] Paul Brest et al.,(2018): 1018–1648.

[33] There has been a long-standing controversy over the Court's institutional role as identifying fundamental rights. The court has used this power to maintain and uphold White Supremacy and exploit the working class. See: *Dred Scott v. Sandford* 60 U.S. 393 (1857) and *Lochner v. New York*, 198 U.S. 45 (1905). Additionally, there are prudentialism concerns about the use of identifying a fundamental right by an unelected branch of officials.

[34] 411 U.S. 1 (1973).

[35] Ibid., 30.

controversy of identifying fundamental rights, was responsive to prudentialism concerns. In the decision, Justice Powell cited Justice Harlan's objection to applying strict scrutiny in *Shapiro v. Thompson*[36] finding that in identifying education as a fundamental right, "we would have gone 'too far towards making this court a 'super-legislature.'"[37] Justice Stewart in a concurring opinion also spoke to concerns of institutional legitimacy citing Justice Harlan to convey this argument: "The Court today does not pick out particular human activities, characterize them as 'fundamental,' and give them added protection … To the contrary, the Court simply recognizes, as it must, an established constitutional right, and. gives to that right no less protection than the Constitution itself demands."[38]

In the opinion, Justice Powell spoke to the concerns of prudentialism in the context of a shift in the Court's ideological makeup following the confirmations of several Nixon appointees. While the Warren Court was known for its innovative understanding of the Fourteenth Amendment as providing certain economic and social benefits, "Justice Powell's lengthy opinion understood previous cases in an exceedingly narrow way, as involving absolute deprivations of constitutionally protected interests."[39] As Cass Sunstein suggests, *Rodriguez* was effectively, "the death knell for social and economic rights in the United States."[40]

However, while the Court failed to identify a fundamental right to education in *Rodriguez*, the dissenting opinions of Justice Brennan and Marshall, as well as earlier case law, suggest that the Supreme Court has embraced the idea that there is some minimal right to education. In the dissenting opinion in *Rodriguez*, Justice Brennan was very explicit about what

[36] 394 U.S. 618 (1969).
[37] *Rodriguez* (1973): 31.
[38] *Thompson* (1969): 642.
[39] Sunstein (2003), 15.
[40] Ibid.

he perceived to be the Court's error in refusing to identify education as a fundamental right. To this end he writes, "I also record my disagreement with the Court's rather distressing assertion that a right may be deemed 'fundamental' for the purposes of equal protection analysis only if it is 'explicitly or implicitly guaranteed by the Constitution."[41] Justice Marshall echoed a similar sentiment writing, "more unfortunately, though, the majority's holding can only be seen as a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprived children in their earliest years of the chance to reach their full potential as citizens."[42] These excerpts from the dissenting opinions suggest that there was strong opposition to the Court's decision to not identify education as a fundamental right in a 5-4 decision that could have easily resulted in a different verdict. Most significantly, however, the dissenting opinions provide the groundwork for a fundamental rights analysis for education that I will build upon in Chapter 2.[43]

The majority opinion *Rodriguez* seems to depart from the Court's previous understanding of education as cemented in the role of American society. In *Brown v. Board of Education* and *Bolling v. Sharpe* the Court laid the foundation for identifying education as a fundamental right by highlighting education's deeply rooted history and necessity for the maintenance of ordered

[41] *Rodriguez* (1973): 62.
[42] Ibid., 70-71.
[43] Supreme Court Justices have repeatedly highlighted education's role in a functioning democracy and in preparing citizens. In my analysis, I build upon these arguments to demonstrate that the decisions in *Brown* and *Plyler* situate education as deeply rooted in the history and tradition of the United States and necessary for the maintenance of ordered liberty. There have been historical arguments, however, that have manipulated the importance of education to suggest that education must serve as a requirement for voting. John Stuart Mill, for example, supported a weighted voting system in which people with more education should be given more votes. See Lederman, Shmuel. "Representative Democracy and Colonial Inspirations: The Case of John Stuart Mill." *American Political Science Review* 116, no. 3 (2022): 927–39. These exclusionary ideas about requirements for civic participation have been used to promote white supremacy, particularly regarding the history of literacy tests, which were used to prevent Black Americans from voting. See Dayna L. Cunningham, "Who Are to Be the Electors - A Reflection on the History of Voter Registration in the United States," Yale Law & Policy Review 9, no. 2 (Spring/Summer 1991): 370-404. While it is essential to identify how the Justices have positively linked education to democracy to establish the role of education as deeply embedded in the history and tradition of the United States, it is vital to make a distinction that education should not be a prerequisite to participation in democracy.

liberty.[44] In 1954, the Court outlawed racial segregation on the premise of equal protection and given the fundamental role that education plays in society. Writing for the majority, Chief Justice Warren famously wrote:

> Today, 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…Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[45]

Although the Court did not explicitly identify a fundamental right to education in *Brown*, the decision provides concrete evidence that education is deeply rooted in the history and tradition and necessary for the maintenance of ordered liberty. In *Brown's* counterpart case, *Bolling* (1954) records suggest that an early draft of the opinion stated explicitly that education is a fundamental interest for constitutional purposes. The draft read:

> This Court has applied similar reasoning to analogous situations in the field of education, the very subject now before us. Thus children and parents are deprived of the liberty protected by the Due Process Clause when the children are prohibited from pursuing certain courses, or from attending private schools and foreign-language schools. Such prohibitions were found to be unreasonable, and unrelated to any legitimate governmental objective. Just as a government may not impose arbitrary restrictions on the parent's right to educate his child, the government must not impose arbitrary restraints on access to the education which the government itself provides ....We have no hesitation in concluding that segregation of children in the public schools is a far greater restriction on their liberty than were the restrictions in the school cases discussed above.[46]

---

[44] *Brown v. Board of Education,* 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954).
[45] *Brown* (1954): 483.
[46] Memo on D.C. Case at 2-3 (no date), supra note 355 cited from Dennis Hutchinson, "Unanimity and Desegregation: Decision Making in the Supreme Court, 1948-1958," *Georgetown Law Journal* 68 (January 1, 1980): 1.

The Court continued to develop a fundamental rights analysis for education after the *Rodriguez* decision. In the case of *Plyer v. Doe,*[47] which was decided nine years after *Rodriguez*, the Court suggests an understanding of education as akin to a fundamental right - while still upholding *Rodriguez*. *Plyler* involved a Texas law that permitted schools to deny entry to undocumented students. The Court ruled in a 5-4 decision the Court ruled that the state statute was violative of the Equal Protection Clause of the Fourteenth Amendment. In the opinion, the Court noted the importance of education to the maintenance of basic political, economic, and social institutions. To this extent the majority opinion stated, "In sum, education has a *fundamental* (emphasis added) role in maintaining the fabric of our society."[48]

Furthermore, Justice Blackman in concurrence for the majority wrote, "In a sense, then, denial of an education is the analogue of denial of the right to vote: the former relegates the individual to second-class social status; the latter places him at a permanent political disadvantage."[49] While *Plyer* still upholds *Rodriguez*, the opinion appears to provide contradictory language that emphasizes the fundamentality of education. *Brown, Bolling*, and *Plyer* demonstrate the idiosyncrasy of the Court in recognizing that education fits the Court's own metrics of a fundamental right to education, it plays an essential role in the maintenance of ordered liberty and deeply embedded in the history and tradition of the country but does not identify it as a fundamental right. This reluctance to identify a right to education makes the United States a distinct international player.

[47] *Plyler v. Doe*, 457 U.S. 202 (1982): The Supreme Court struck down a Texas statute that charged tuition for undocumented children to be able to access public K-12 schooling. See Maria Lopez, "Reflections on Educating Latino and Latina Undocumented Children: Beyond Plyler v. Doe," *Seton Hall Law Review* 35, no. 4 (January 1, 2005).
[48] *Plyler* (1982): 203.
[49] Ibid., 234.

The United States as an Outlier: A Comparative International Study on Guarantees to a Right to Education

The United States deviates from international norms and standards concerning the explicit guarantee of education.[50] The United States does not explicitly acknowledge a right to education in any of its governing documents, which is an exception to other Western democracies.[51] One such country that does include a constitutional promise of education is South Africa. Its constitution promises substantive rights including the right to housing, health care, food, and water. Among these substantive rights is the right to education located in Section 29 which states, "everyone has the right to basic education, which the state, through reasonable measures, must make progressively available and accessible."[52]

Table 1: Selected Country Comparison

Countries with Constitutional Right to Education	**Countries with a Right to Education in Statutory Law**	**Countries with Neither a Constitutional or Statutory Right to Education**
Argentina, Brazil, China, Egypt, France, Greece, India, Italy, Japan, Lebanon, Mexico, Nicaragua, Russia, South Africa, Sweden, Turkey (16 total)	Germany, Israel, New Zealand, England and Wales (5 total)	United States of America

From this identified constitutional right to education, there has been subsequent legislation and litigation that have followed in attempts to describe the duties and responsibilities

[50] I use South Africa's comparative case study to highlight the United States' aberration for international explicit access to education standards. As previously mentioned in the discussion of substantive and procedural rights, the existence of a right in the constitutional or statutory text does not guarantee that the right will be actualized. However, this section will limit my analysis to the differences in explicit constitutional guarantees to education between the United States and South Africa.

[51] See Table 1: Selected Country Comparison Information adapted from Law Library of Congress (U.S.), ed., *Constitutional Right to an Education in Selected Countries*, HeinOnline Foreign & International Law Resources Database (Washington, D.C.: The Law Library of Congress, Global Legal Research Center, 2016).

[52] *Constitution of the Republic of South Africa*, 1996.

of the government in providing education. *The South African Schools Act* immediately followed the passage of the Constitution in 1996, which defined the basic education standards and responsibilities of the states. The purpose of the act was "to provide for a uniform system for the organization, governance and funding of schools; to amend and repeal certain laws relating to schools; and to provide for matters connected therewith."[53] In the Act there are defined expectations about compulsory attendance, school admissions policies, language policy, freedom of conscience and religion in public schools, code of conduct, suspension and expulsion from public school. Additionally, there was also a layout for nationalized funding of public schools. Only a mere few months later, the legislature passed the *Employments of Educators Act* of 1988, regulating the responsibilities of educators. The South African Courts have mirrored a similar understanding of the constitutional text of the right to education. In 2011, the Constitutional Court[54] described the nature and importance of the right to basic education in *Juma Musjid Primary School v Essay.*[55]

> [it is important, for the purpose of this judgment, to understand the nature of the right to "a basic education" under section 29(1)(a) [of the Constitution]. Unlike some of the other socio-economic rights, this right is immediately realizable. There is no internal limitation requiring that the right be "progressively realized" within "available resources" subject to "reasonable legislative measures". The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". This right is therefore distinct from the right to "further education" provided for in section 29(1)(b). The state is, in terms of that right, obliged, through

[53] *South African Schools Act*, 1996.
[54] The Constitution Court is the highest Court established by the Republic of South Africa Constitution in 1996. It is primarily called upon to establish a framework for understanding fundamental rights outlined in Chapter 3 of the Constitution of the Republic of South Africa. See: Hoyt Webb, "The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law," *University of Pennsylvania Journal of Constitutional Law* 1, no. 2 (October 1, 1998): 205.
[55] *Governing Body of the Juma Musjid Primary School & Others v Ahmed Asruff Essay N.O. and Others (CCT 29/10) [2011] ZACC 13; 2011 (8) BCLR 761 (CC).*

> reasonable measures, to make further education "progressively available and accessible.[56]

The South African constitution has positively identified a substantive right to basic education, in alignment with most democracies in the world. The right to education has been acknowledged, developed, and informed by the Parliament of the Republic of South Africa and its Constitutional Court.[57]

Not only is the United States a major outliner regarding a lack of an identified right to education in its constitution and laws, but the United States has also stymied international efforts to identify the right to education and other human rights concerns. There are two major pieces of international declarations that speak to a universally protected right to education: the Convention on the Rights of the Child and the International Covenant on Economic, Social, and Cultural Rights - both of which the United States has refused to ratify. The Convention on the Rights of the Child was signed by 140 signatories in November of 1989. The purpose of this convention was to ensure certain substantive rights, including education, were provided to all children - regardless of nationality, race, gender, etc. The Act has been ratified by nearly two-hundred countries and is considered to be one of the most central civil rights treaties to have ever been passed, and yet, the United States has not ratified it.[58] It provides several promises on account of access to education. Article 28 of this Act lays out several standards:

---

[56] Juma Musjid (n 2) para 37.
[57] It is worth noting that significant scholarship indicates that countries with explicit rights to education, either in a constitution or in law, tend to produce better educational outcomes compared to countries with explicit educational rights. See Jody Heymann, Amy Raub, and Adèle Cassola, "Constitutional Rights to Education and Their Relationship to National Policy and School Enrolment," *International Journal of Educational Development* 39 (November 1, 2014): 121–31; Nicole Lawler, "The Right to Education in the United States and Abroad: A Comparative Analysis of Constitutional Language and Academic Achievement," *The Federal Lawyer*, 2018, 32–40.
[58] Somalia is the only other country that has not ratified the treaty.

Article 28.

1. States Parties recognize *the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity*, they shall in particular:
2. Make primary education compulsory and available free to all;
3. Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
4. Make higher education accessible to all on the basis of capacity by every appropriate means;
5. Made educational and vocational information and guidance available and accessible to all children;
6. Take measures to encourage regular attendance at school and the reduction of drop out rates[59]

Additionally, the United States is one of only six members of the United Nations to not agree to the International Covenant on Economic, Social, and Cultural Rights. While the treaty was signed by President Jimmy Carter on October 5, 1977, Senate approval did not reach the two-thirds threshold needed for ratification. The treaty aims to ensure the protection of certain political, social, and economic rights, including the right to education. Article 13 of the treaty specifically states:

> *The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity and shall strengthen the respect for human rights and fundamental freedoms.* They further agree that education shall enable all persons to participate effectively in a free society, promoting understanding, tolerance and friendship among all nations and all racial, ethnic, or religious groups, and further the

[59] United Nations, Convention on the Rights of Children, November 20, 1989 (emphasis added).

> activities of the United Nations for the Maintenance of Peace.[60]

There are many other United Nations sponsored treaties that the United States has either not signed or not ratified including: Convention on the Rights of Persons with Disabilities, Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Protection of the Rights of All Migrant Workers and Members of their families, among others. The United States has only signed and ratified five international human rights treaties out of eighteen international human rights treaties.[61] Scholars have posited different explanations for why the United States has such a poor track record on international cooperation. Some scholars have suggested that entering into international treaties may infringe upon national sovereignty.[62] For example in a congressional record on The United Nations Convention on the Rights of the Child it states that, "Opponents argue that ratification would undermine U.S. sovereignty by giving the United Nations authority to determine the best interests of U.S. children."[63] Additionally, there are structural barriers to ratification in accordance with Article 2, Section 2 of the Constitution, which requires a two-thirds majority. Cooperation between the executive and legislative branches may be difficult in an increasing politically polarized world. The political factors and differing political attitudes towards the ratification of international human rights treaties is beyond the scope of this thesis. Nevertheless,

---

[60] United Nations, International Covenant on Economic, Social, and Cultural Rights, December 16, 1966 (emphasis added).
[61] These treaties include International Convention on the Elimination of All Forms of Racial Discrimination (1965); International Covenant on Civil and Political Rights 1976); Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (1984); Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2000); and the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography (2000).
[62] Oona A. Hathaway, "International Delegation and State Sovereignty," *Law and Contemporary Problems* 71, no. 1 (2008): 115–49.
[63] Luisa Blanchfield. 2015. *The United Nations Convention of the Rights of the Child*. Congressional Research Service.

the fact remains that the United States continues not to ratify treaties that secure basic human rights - namely the right to education.

While the United States is an outlier in international law and policy, there is an active debate on whether the United States ought to align with international standards and laws. In other words, the Supreme Court must decide for itself what is the role of international law in domestic constitutional adjudication. This debate has intensified in recent years and is amplified in *Lawrence v. Texas.*[64] In the decision for the majority, Justice Kennedy concluded that a Texas statute forbidding two persons of the same sex to engage in sexual conduct was a violation of the Fourteenth Amendment. In his reasoning, he cites contemporary movements to abolish criminalizing same sex intimacy in other parts of the world. Kennedy writes, for instance, that the European Court of Human Rights considered a case similar to *Lawrence* and held that the same-sex criminalization laws were invalid under the European Convention of Human rights.[65] However, Justice Scalia in dissent, found Kennedy's use of comparative international law to be dangerous, writing, "The Court's discussion of these foreign views is therefore a meaningful dicta"[66] In dissent Scalia quotes fellow Justice Clarence Thomas in the case of *Foster v. Florida*[67] who held that, "The court should not impose foreign models, fads, or fashions on Americans."[68] Another notable case from the early twenty-first century in which this debate took place was *Atkins v. Virginia.*[69] In this case, the Supreme Court found that the statue of Virginia could not execute Daryl Renard Atkins, a convicted felon, because he was intellectually disabled.

---

[64] *Lawrence v. Texas* 539 U.S. 558 (2003): The Supreme Court case overturned *Bowers v. Hardwick, 478 U.S. 1886* (1968), which upheld state laws that criminalized same-sex intimacy. In the decision, the Court found that the Texas Homosexual Conduct law violated the Due Process Clause.
[65] *Lawrence* (2003): 574.
[66] Ibid., 598.
[67] *Foster v. Florida,* 537 U.S. 990 (2002).
[68] *Foster* (1990) (Thomas, J., concurring in denial of certiorari).
[69] *Atkins v. Virginia* 536 US 304 (2002).

The Court's decision was, in part, informed by the knowledge that the international community disapproves of the death penalty for persons with intellectual disabilities.[70]

Some critics would concur with Justice Scalia arguing that a reliance on international law in dealing with domestic matters undermines democracy and American sovereignty. However, many Justices seem to support the practice of invoking international law as, "persuasive - in other words, non-binding - authority within the framework of U.S. constitutional decision making and nothing else."[71] A notable jurist who favors this approach is former Justice Stephen Breyer, who advocates that abiding by international standards does not put the United States' sovereignty and democracy in jeopardy. To this extent he writes:

> In calling attention to the need for harmonization (which sometimes goes by the name of *comity*), I do not ignore the basic fact that the American people can and must democratically determine their own laws, But listening to those who understand the content of relevant foreign law is perfectly consistent with the democratic formulation and international of our law law. That is because, often, the best way to further the basic goals of, for instance, an American statute with foreign implications, or to properly enforce a treaty, or to determine how far beyond our shores our Constitution's protection may extend, is to take account of a foreign as well as the domestic legal landscape.[72]

While the role of international standards in domestic law remains an ongoing debate in legal and political thought, the United States' lack of identification of a right to education in its government documents and reluctance to ratify international human rights treaties that guarantee substantive rights to education is an important development to note. The circumstances for this discrepancy can be explained by positing that the United States Constitution is primarily

---

[70] *Atkins* (2002): 317 (Footnote 21: "..within the world community, the imposition of the death penalty for crimes committed by mentally *disabled* offenders is overwhelmingly disapproved.")
[71] Rex D. Glensy, *The Use of International Law in U.S. Constitutional Adjudication*, 25 Emory International Law Review. 197 (2011) 201.
[72] Stephen Breyer, "Introduction," in *The Court and the World: American Law and New Global Realities.* (United States: Knopf Doubleday Publishing Group 2015), 7.

concerned with procedural rights. However, as Laurence Tribe has compellingly argued, there is no reason why the Constitution should be read in this narrow fashion. Furthermore, a range of more recent twentieth-century Supreme Court decisions have highlighted how education advances the broader aims of the Constitution even if these decisions do not specifically refer to education as a right in and of itself. While other countries have an explicit textual constitutional right to education, jurisprudential tradition in the United States does not require a fundamental right to be explicitly textual. In other words, the Constitution does not have to have an explicit mention of a fundamental right to education to have one acknowledged by its government.

The Fourteenth Amendment Defense for a Fundamental Right to Education

Many legal scholars have developed distinct claims as to how a fundamental right to education may be identified within the federal Constitution. On this question of where a right to education may come from, legal scholars fall within several distinct camps within the Fourteenth Amendment. Most commonly, scholars have pointed to the Equal Protection Clause, the Due Process Clause, and the Citizenship Clause as the most important and compelling constitutional pathways for identifying a fundamental right to education.

Constitutional Strategy #1: Equal Protection Clause

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" (Section 1 of the Fourteenth Amendment).

When the fundamental right to education was struck down in *Rodriguez*, the majority did so because it suggested that the right did adhere to an original understanding of the Equal Protection Clause.[73] Several scholars have since concluded that this decision was wrongly

[73] In *Rodriguez,* appellees brought suit against the San Antonio Independent School District, challenging the school financing policy, arguing that it disadvantaged low-income students, who had a weaker property tax base than other school districts. The reliance on property taxes to fund public education, which was subsequently causing disparities

interpreted and revealed a narrow and dangerous understanding of the Equal Protection Clause. Carl Noll wrote one of the first law review articles following the *Rodriguez* decision in 1973, mere months after the decision was released.[74] Noll argues that *Rodriguez* marks a departure from Equal Protection jurisprudence which reached its peak in litigation, namely *Brown*, which used an equal protection framework to outlaw racial segregation in public schools and concluded that "such an opportunity [education], where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[75]

Whereas in the *Rodriguez* decision, Justice Powell and the majority argue that the promise of education alludes to a standard of adequacy rather than equality, which was, ironically, the exact argument used against the *Brown* decision with pro-segregationists arguing that segregated schools were providing adequate educational opportunities for Black students.[76] Noll speaks to the danger of this precedent, writing, "What the Fourteenth Amendment demands is equal protection of the laws. To strive for anything less is to do a grave injustice to the citizens of every state and to the integrity of the Constitution."[77] Noll is very critical of the *Rodriguez* decision and its narrow interpretation of what the Equal Protection Clause guarantees, arguing that it creates a dangerous precedent and works to counteract the legacy of *Brown*.

---

in inter and intra-district education, was alleged to violate the Equal Protection Clause. In a 5-4 decision, the Court refused to examine the San Antonio school finance system with heightened scrutiny because they did not consider education a fundamental right. Furthermore, in Powell's opinion, he concludes that Equal Protection would be an inappropriate clause to use in this case because, "the Equal Protection Clause does not require absolute equality or precisely equal advantage."

[74] Noll, Carl F. 1973. "San Antonio Independent School District v. Rodriguez: A Retreat from Equal Protection." *Cleveland State Law Review.*

[75] *Brown* (1954): 493.

[76] To this extent Justice Powell writes "…the Equal Protection Clause does not require absolute, equality or precisely equal advantages" (24). However, this exact argument is a more modern form of the "separate but equal" doctrine that was developed in *Plessy v. Ferguson* (1896) and overturned in *Brown*.

[77] Noll (1973): 9.

Timothy Lynch makes a similar argument in which he calls for a reconsideration and ultimately reversal of the *Rodriguez* decision, arguing that the Court's narrow interpretation of the Equal Protection Clause was inappropriate and sets a dangerous precedent for a narrowing understanding of rights.[78] Lynch's argument is based on the historical underpinnings of the Equal Protection Clause which, "was intended by the framers to eradicate caste-based, as well as malicious, class-based legislation."[79] Lynch argues that although the Equal Protection Clause was written in the context of Black liberation and Reconstruction, that did not mean limit the Equal Protection Clause to only be used in the context of racism to remedy inequality. As such, Lynch finds that the Court's rigid interpretation of the Equal Protection Clause as only applicable in the context of Black Americans is violative of the intentions behind the amendment which were to "protect particularly the poor, the lowly, and the humble."[80] It is important to note that these two law review articles were written within the first twenty years of the Rodriguez decision, demonstrating a reluctance to explore any other constitutional text besides the Equal Protection Clause to make a fundamental rights claim.

Other scholars, in later years, have argued that the Equal Protection Clause is inconsistent with fundamental rights claim to education, and can - at worst - serve as a deterrent to confuse the issue altogether. For instance, Thomas Walsh finds that the Equal Protection Clause is inappropriate for a fundamental rights analysis because 'equal' is relational and raises the scrutiny given to the law, which serves to minimize the importance of the right. Walsh instead finds that, "Rather, a person should not be denied a fundamental right because certain rights simply are not to be denied instead of traditional Equal Protection analysis [which] provides that

[78] Lynch, Timothy. 1998. "Education as a Fundamental Right: Challenging the Supreme Court's Jurisprudence." *Hofstra Law Review.*
[79] Ibid., 39.
[80] Ibid.

a non-suspect class person should not be denied a fundamental right because others are granted such a right."[81] Walsh is essentially arguing that Equal Protection is the wrong framework to make a fundamental rights claim because the Clause is based on relational treatment between suspect and non-suspect classes–and the distinct tiers of scrutiny that follow–which distracts the issue of fundamentality altogether. Walsh goes to far as to argue that even if there was a plausible constitutional pathway for the Equal Protection Clause, it would not be advantageous for litigation, writing, "Given the Court's inconsistency in applying heightened scrutiny to a case in which there is neither a suspect class nor a fundamental right, the Equal Protection Clause is not the best method of consistently protecting education rights."[82] The Court has been hostile to naming suspect classes and non-textual fundamental rights for issues of judicial legitimacy,[83] and depending on the Equal Protection Clause to identify a fundamental right to education is not likely.

Derek Black elaborates further on other unintended consequences of using the Equal Protection Clause in which he concludes that using the Equal Protection Clause in defense of a fundamental right to education confuses the question of fundamentality, writing, "In short, states must provide equal access to the cornerstones of the social and civic order they create. From this perspective, education's treatment under equal protection does not rest on whether the Constitution references or implies a right to education, nor on whether the provision of education stems from state or federal law. The question is, as a factual matter, whether the government has

[81] Walsh, Thomas J. 1993. "Education as a Fundamental Right Under the United States Constitution." *Willamette Law Review* 29(2): 285.
[82] Ibid., 284.
[83] The Court has been reluctant to identify fundamental rights that are not explicitly stated in the Constitution because of its problematic history in which identifying such rights has been used to advance racist and exploitative agendas. See *Dred Scott v. Sandford and Lochner v. New York* Additionally, as explored in the Introduction, the Court seems reluctant to identify suspect classes, particularly for sexual orientation. See *Romer* (1996), *Lawrence* (2003)*, Windsor* (2013), and *Masterpiece* (2023) as earlier explored in the introduction.

made education a cornerstone of civic and social life."[84] In other words, the issue of fundamental rights is directly connected to the question of if the right is deeply rooted in the history and tradition and necessary for the maintenance of ordered liberty. Black illustrates that this exact argument was used, and ultimately successful, in *Obergefell v. Hodges* in which marriage was determined to be a fundamental right given evidence of the way in which marriage serves as a cornerstone of civic and social life. [85] While the Fourteenth Amendment was originally utilized to advance the argument for a fundamental right to education, recent scholarship has suggested that such a framework is no longer compatible with the current Court's approach and distracts from the issues of fundamentality.

Constitutional Strategy #2: Due Process Clause

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" (Section 1 of the Fourteenth Amendment).

The Constitution makes no explicit mention of a right to education and the word itself never appears in the document - a fact that proponents of the *Rodriguez* decision have cited frequently as one of the strongest arguments for striking down a potential fundamental right to education.[86] However, many legal scholars have addressed this gap by offering a pathway towards identifying a fundamental right to education through the Due Process Clauses found within both the Fifth and Fourteenth Amendments.[87] The Due Process Clause has historically

[84] Black, Derek. 2022. "Freedom, Democracy, and the Right to Education." *Northwestern University Law Review* 116(4): 1081-1082.
[85] In a Supreme Court case in 2015, the Court made a 5-4 decision that the Fourteenth Amendment prohibits same-sex marriage bans. The Petitioner's attorneys were able to sway the Court by emphasizing that marriage played a central role in civic and social life and, therefore, must be available on equal terms. Black suggests that borrowing the logic used in the *Obergefell* decision could prove applicable and successful in the case of a fundamental right to education.
[86] *Rodriguez* (1973).
[87] By offering a pathway for a fundamental right through the Fifth Amendment's Due Process Clause as well as the Fourteenth Amendment's Due Process Clause, such a right would be incorporated to State governments.

been used to identify fundamental rights that are not explicitly stated in the Constitution but are related to other enumerated rights, such as the right to privacy (see *Griswold v. Connecticut*)[88] and marriage (see *Loving v. Virginia*).[89]

These unenumerated rights are known as substantive due process rights[90] and legal scholars have used this exact framework to argue for a fundamental right to education. Thomas Walsh, for example, contends that the Due Process Clause is the best approach to declaring a fundamental right to education. In his analysis, Walsh used the penumbral framework developed by the Court in 1965 in *Griswold* to extend to a right to education.[91] Under this logic, the fundamental right to education could be developed through a Due Process framework because the right to education is implicated in or follows from other defined fundamental rights, such as the First Amendment right to freedom of speech, freedom of petition. In short, it serves as the basis for which all rights can be understood and exercised. As Walsh concludes, "The Due Process Clause is a better approach because that clause specifically addresses the preservation rights as a liberty interest. Under a rights combination argument, a claim could be made that education is required for Americans to effectuate their various rights under the Constitution."[92]

However, the Due Process Clause is not without its limitations and criticism. First, the text of the Due Process Clause does not guarantee that rights will not be infringed upon. Instead,

[88] This was a landmark case from 1965 in which the Supreme Court struck down a Connecticut state law that banned contraceptives. A married couple from Connecticut was found in violation of this law, which was challenged at the Supreme Court. In a 7-2 decision, the Court concluded that a right to privacy was implied in the Constitution, which barred state restrictions on contraception.
[89] This was a unanimous decision in which West Virginia's anti-miscegenation law was struck down as a violation of the Fourteenth Amendment's Due Process Clause. *Loving* and *Obergefell* speak of a fundamental right to marriage, implied from other enumerated rights.
[90] A principle in constitutional law, where there are rights that are protected by the Constitution that are not explicitly stated but derive from other explicitly stated rights.
[91] In *Griswold*, the Court established a right to privacy in a 7-2 decision. Although the right to privacy is unenumerated in the Constitution, the justices reasoned that it could be inferred from several different constitutional amendments, including but not limited to the First, Third, Fourth, and Ninth Amendments.
[92] Walsh (1993): 296.

it requires due process of law before infringing upon a right. As Nicholar Kresl argues, "The Due Process Clause by itself implies that no matter how fundamental the right, there exists some level of process which allows the government to infringe and possibly deprive one of that right."[93] Put differently even fundamental rights under the Due Process Clause can be regulated by the federal government insofar as there is due process that is followed in carrying out the regulation. Additionally, several scholars raise concerns about the legitimacy of the entire concept of substantive due process - even in the pursuit of progressive ideals. Substantive Due Process has been used to identify a range of controversial so-called rights. Most famously, in 1857, the Court used something akin to what we today identify as substantive due process to announce a right to own enslaved persons in *Dred Scott v. Sandford*.[94]

Legal scholar Akhil Reed Amar has been a vocal critic of substantive due process given its problematic and racist history. As Kresl writes, "Amar opines that the underlying concept of substantive due process evolved out of many of the most repugnant Supreme Court decisions to date *Dred Scott v. Sanford* and *Lochner v. New York*."[95] Given this historical context, the Supreme Court is reluctant to identify fundamental rights using a due process framework and, as other scholars have noted, are not likely to invoke a fundamental right to education via the Due Process Clause.

[93] Kresl, Nicholas. 2022. "The Great (Un)Equalizer: Education as a Fundamental Right, 55 UIC L. Rev. 803 (2022)." *UIC Law Review* 55(4): 36.
[94] Franck, Matthew J. "What Happened to the Due Process Clause in the Dred Scott Case? The Continuing Confusion over "Substance" versus "Process"." American Political Thought 4, no. 1 (2015): 120-148.
[95] Ibid., 37.

Constitutional Strategy #3: Citizenship Clause

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside" (Section 1 of the Fourteenth Amendment).

The Fourteenth Amendment is frequently cited for its Equal Protection and Due Process Clause. By contrast, Citizenship Clause is a less frequently cited clause that provides textual evidence in support of a fundamental right to education. Derek Black is a strong advocate of this constitutional pathway to identify a fundamental right to education. The meaning of the Fourteenth Amendment's Citizenship Clause is heavily dependent on the context in which it was crafted, namely the emancipation from understanding of chattel slavery and the period of Reconstruction. In essence, Black argues that a key component of maintaining white supremacy and chattel slavery was the deprivation and criminalization of the education of enslaved persons. After the end of chattel slavery with the passage of the Thirteenth Amendment in 1865 and the passage of the Fourteenth Amendment in 1868, which granted citizenship rights to Black Americans, there was a massive increase in institutions of public education. To this end, Black writes, "If the raison d'être for mandating public education is to secure full and equal citizenship, systemically unequal education subverts that promise, rendering the public education system itself self-contradictory, if not pointless."[96] If citizenship requires free and public education, then education itself ought to be considered a fundamental right.

Derek Black, one of the leading scholars on the emergence of federal education laws following the Civil War, argues that education played a central role in slavery, freedom, and eventually citizenship for Black Americans. To support this theory, Black provides a thorough chronology of educational rights for Black Americans pre and post-Civil War. Firstly, Black

[96] Black (2022): 826.

argues that the criminalization of education during slavery was a central tenant to deny personhood to enslaved persons and to maintain White Supremacy. Secondly, Black demonstrates that after the Civil War public education became a major push and public schools in the South were proliferating, as Black writes, "The schoolhouse became the fundamental vehicle by which many Black students could distance themselves from their slave past and transition to freedom."[97] There were numerous federal policies in the Reconstruction Era that signify a federal obligation of education. For example, after 1867, Congress never admitted another State back into the Union without an education clause in their state constitution, as it became a condition of reentry.

Caroline A Veniero has also written extensively on this topic. In a case study analysis of the Freedmen's Bureau and the Bureau of Indian Affairs Compulsory Boarding Schools, Veniero concluded that the actions the federal government took during Reconstruction to ensure access to education demonstrated the right to education had deep roots and tradition within the nation's history. In essence, Veniero documents how the Freedmen's Bureau had a division that worked to establish school organizations that enabled literary education and educational outreach for new Black citizens following the passage of the Fourteenth Amendment. To this effect Venierio writes, "The Bureau viewed their mission as preparing these 'new' citizens to participate fully in democratic society. A key part of executing that mission was supporting the establishment of schools, as educating Black people while they were enslaved was illegal in much of the antebellum South."[98]Additionally, Veniero points to the Bureau of Indian Affairs Compulsory Boarding Schools, which the federal government undertook as a federalized education program

[97] Ibid, 1046.
[98] Caroline A. Veniero. "Education's Deep Roots: Historical Evidence for the Right to a Basic Minimum Education."| *The University of Chicago Law Review*.

because officials believe the program to be necessary for indigenous children to function in a "civilized" society. While this particular example is clearly implicated in racism and settler colonialism, "These case studies and the cycle of federal behavior that they both share mean that the federal government has a history of ensuring access to a minimum amount of education—specifically, basic literacy education—when it determines that local entities have failed. This history is directly from the period of the Fourteenth Amendment's enactment and thus supports the notion that the right to a basic minimum education has deep roots in our nation's history."[99] Black and Veniero's work suggests that education in the United States is deeply rooted in the history and tradition of the Nation, a critical characteristic of an unenumerated fundamental right.

The citizenship clause is considered to provide certain substantive rights.[100] Several scholars, notably Akhil Reed Amar, have suggested that "government-sponsored efforts to stigmatize blacks, to relegate them to a kind of second-class citizenship, violate the core concept of the Citizenship Clause"[101] that the drafters of the Amendment were trying to prevent.[102] Therefore as Amar suggests, "Congress could have power to define rights that in good faith it considers truly fundamental and basic, and these rights, once defined - 'badges and incidents of freedom and citizenship' - would thereafter be enforceable, even against states, as 'privileges' and 'immunities' of American 'citizens."[103] Additionally, it is worth noting that the Citizenship Clause is the first sentence of the Fourteenth Amendment. As the opening sentence in the

[99] Ibid.
[100] For examples of scholarship taking this approach, see Flack, supra note 73, at 84-85; Randy E. Barnett, The Proper Scope of the Police Power, 79 Notre Dame L. Rev. 429,456-64 (2004); John Harrison, Reconstructing the Privileges or Immunities Clause, 101 Yale L J. 1385 (1992) citation from Goodwin Liu, "Education, Equality, and National Citizenship," *The Yale Law Journal* 116, no. 2 (2006): 367.
[101] Akhil Reed Amar, "Intratextualism," *Harvard Law Review* 112, no. 4 (1999 1998): 824.
[102] Ibid., 768.
[103] Ibid, 842.

Amendment, it precedes the list of protections that follow, including the Equal Protection Clause, Due Process Clause, and Privileges or Immunities Clause. This sequence is important because it suggests that the protections provided in the Fourteenth Amendment flow from an understanding of what Citizenship provides. The Citizenship Clause was intended to provide formerly enslaved individuals with the rights of citizenship, which includes access to education. While education might not have been explicitly stated as an intended substantive right to be provided following the ratification of the Citizenship Clause, "The open-textured quality of the Fourteenth Amendment renders the guarantee of citizenship susceptible to expansion if a later generation should have a larger conception of what it means to belong to America, to be a citizen."[104]

It is virtually impossible to encounter scholarship that does not situate education as the cornerstone for civic and social debate, and economic development. More significantly, however, is the role of education at the time of the Fourteenth Amendment's adoption and ratification. Early research thus far has indicated that historical records - in the form of congressional debates, state constitutional amendments, and the emergence of federal oversight programs - support the notion that education was heavily pushed following the adoption of the Fourteenth Amendment, thus signifying that education was a condition of citizenship upon ratification. In sum, there are advantages of using this constitutional text compared to other provisions in the constitution. Black argues that the theory is originalist based and avoids the complicated and controversial issues of the Equal Process Clause, Due Process Clause. Furthermore, this approach does not require a reframing of issues of federalism. While education has generally

[104] Karst, supra note 45, at 54; see Kaczorowski, supra note 70, at 926 ("The Republicans' understanding of the fourteenth amendment and the Civil Rights Act thus encompassed a developmental conception of these civil rights provisions. The concept permitted the future inclusion of rights within ([its] protective guarantees that the framers might not have intended to protect in 1866." Cited from) Goodwin Liu, "Education, Equality, and National Citizenship," *The Yale Law Journal* 116, no. 2 (2006): 369.

been left to the discretion of the states, the Citizenship Clause of the Fourteenth Amendment would warrant a federal intervention and response. While the Citizenship Clause may provide a compelling framework for developing a fundamental right to education there is one simple - yet significant - limitation: its exclusivity. Under this framework, the right to education, as a privilege or immunity that may flow from the Citizenship Clause, is limited to citizens.

The ideas of citizenship and personhood can be understood as different concepts. As Linda Bosniak explains, "Whereas citizenship references national belonging and its associated rights, personhood evokes the rights and dignity of individuals independent of national status. Personhood stands for the universal, in contrast to citizenship, which is ultimately exclusionary."[105] Bosniak's analysis of persons and citizens have been influenced by Alexander Bickel, a vocal critic of citizenship constitutionalism, who concluded that the "authentic voice of the American constitution" finds expression through its protections of *persons* (emphasis added)*"* as opposed to *citizens.*[106] Bickel's (and Bosniak's) preferences for personhood-centric constitutionalism is premised on its expansive nature. To this extent, Bosniak writes, "Historically speaking the assignment of a legal personhood seems to have proceeded largely in an expansive direction, with subtraction from the category of already recognized cases from the category rare. And notwithstanding all of the disputes over its threshold, there is, today, a recognized core membership in the category of persons; at a minimum, conscious human beings are deemed to belong to the class."[107] This framework may potentially embrace an understanding

[105] Bosniak, Linda S., "Persons and Citizens in Constitutional Thought" (2010). *International Journal of Constitutional Law*, Vol. 8, No. 1, pp. 9, 2010.
[106] Kenneth Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 Harvard Law Review 1, 48 (1977).
[107] Bosniak (2010): 13.

of citizenship clause which has broad implications for all persons. However, the Court seems unwilling to pursue this expansive theoretical approach.

Furthermore, to suggest that the right to education flows from the rights of citizenship seems to run contrary to the Court's decision in *Plyler,* which explicitly held that the right to education must be interpreted expansively and therefore not limited to citizens. In this decision, the Court struck down a Texan statute which allowed the state to withhold local school districts from educating undocumented children relying on the expansive nature of the Equal Protection Clause, which relates to *persons* rather than *citizens*. In this sense, "What is significant about the holding [in *Plyer*] is that it says that unauthorized status under the immigration laws, even if relevant to the ultimate policy question, simply does not bear on the question of fundamental constitutional standing."[108] In sum, a reliance on the Citizenship Clause may be co-opted as a further means of exclusion rather than liberation and have the unintended effect of undoing the progressive goals set forth in *Plyler* - which sought to provide expansive access to education outside the limitations of citizenship status.

The Citizenship Clause provides a promising, albeit limited, pathway towards identifying a fundamental right to education. The Fourteenth Amendment's Citizenship Clause was originally ratified in response to overturn the *Dred Scott* decision, which withheld the rights of citizenship to formerly enslaved Black Americans. The Citizenship Clause, which is premised on citizenship rather than personhood, is directly tied to the Thirteenth Amendment's abolition of slavery. It is essential to note, however, that this amendment's emancipatory guarantees speak to *persons* rather than citizens. The limitations of the Citizenship Clause, Equal Protection Clause, and Due Process Clause of the Fourteenth Amendment, as I've previously laid out, may warrant

[108] Ibid., 14.

an investigation into another significant amendment of the Reconstruction Era that speaks to the expansive rights of persons: The Thirteenth Amendment.

Conclusion

In this chapter I have highlighted four critical ideas that provide the necessary foundation for constitutional analysis of a fundamental right to education. First, I distinguished between substantive and procedural rights, highlighting the ways in which education can be understood as *both* a substantive and procedural right which obviates this dichotomy. Second, I provided a brief overview of fundamental rights analysis which has been developed to be necessary for the maintenance of ordered liberty and deeply rooted in the history and tradition of the United States. Third, I discussed how the vast majority of Western democracies either have a constitutional right to education or statutory law that explicitly protects the right to education - positioning the United States as a major outlier in human rights law. Nevertheless, I argue that the United States does not need to have an explicit mention of a fundamental right to education because it can be plausibly identified within the Constitution. Fourth, I reviewed the legal scholarship on distinct ways the Constitution could be read to support a right to education. In the contemporary debates about a constitutional right to education, scholars rely on three clauses found in the Fourteenth Amendment: the Equal Protection Clause, the Due Process Clause, and the Citizenship Clause. Within each of these constitutional pathways there are clear limitations.

First, the Equal Protection Clause was rejected in *Rodriguez.* Second*,* the Court has repeatedly demonstrated its reluctance to invoke the due process clause to identify fundamental rights due to issues of institutional legitimacy and accusations of judicial activism, And, third, the Citizenship Clause may potentially inhibit an expansive understanding of educational rights to extend to undocumented individuals and uproot *Plyler*. Thus, a question emerges, have

scholars been looking in the wrong places to identify a right to education? Could there be an alternative constitutional pathway beyond the Fourteenth Amendment? In the following chapter I lay out a constitutional analysis for why I believe that it is not the commonly invoked Fourteenth Amendment, but rather the Thirteenth Amendment that provides a better pathway towards a fundamental right to education.

Chapter 2: The Emancipatory Guarantee to Education

Civil Rights advocates have relied on the Fourteenth Amendment to pursue progressive policy and legal aims including but not limited to: sex equality, abortion care access, racial equity goals, and rights for same-sex couples and LGBTQ+ individuals. However, in more recent years, the Supreme Court has rolled back the application of the Fourteenth Amendment to address anti-discrimination objectives.[1] While the previous chapter reviewed the range of pathways to rights recognition offered by the Fourteenth Amendment, this chapter explores the Thirteenth Amendment as an underutilized and perhaps even more promising route to a fundamental right to education.[2]

Several scholars have noted that the battle for equality may not only rely upon the Fourteenth Amendment but rather on the overlooked Thirteenth Amendment, which prevents badges and incidents of slavery.[3] To examine what this argument may look like, this chapter proceeds in four steps. First, I lay out the Court's original interpretation of the Thirteenth Amendment through a consideration of some of the earliest decisions to evaluate the Thirteenth Amendment: *Slaughterhouse Cases* of 1873 and *Civil Rights Cases* of 1883 to establish the

---

[1] See *Dobbs v Jackson Women's Health Organization* 597 U.S. __ (2022); *Students for Fair Admission v. President and Fellows of Harvard College* 600 U.S. __ (2023); *303 Creative LLC v. Elenis* 600 U.S. __ (2023).

[2] While this chapter examines the emancipatory implications of the Thirteenth Amendment, it must acknowledge that the amendment has an exception to slavery or involuntary servitude *except,* "as a punishment for crime whereof the party shall have duly convicted, shall exist within the United States, or any place subject to their jurisdiction." This expectation has been used to legalize slavery in the United States, namely through the mass incarceration system within the prison industrial complex. See Alexander, Michelle. *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York, The New Press, 2010; See Ava Duvernay and Jason Moran. 13TH. USA, 2016.

[3] The Supreme Court has considered the scope of Congressional authority to enforce the Thirteenth Amendment by any appropriate means. In 1883, the Court held that the Thirteenth Amendment prohibited "slavery and its incidents" in the *Civil Rights Cases of 1883,* 101 U.S. 3 (1883). In this decision, while I will further explore in this chapter, "badges and incidents of slavery" did not extend to private racial discrimination. However, during the Civil Rights Era, the Court expanded its understanding of Congressional authority to enforce Section 1 of the Thirteenth Amendment by finding that the Thirteenth Amendment did forbid forms of racial discrimination, which amounts to a "badge" or "incident" of slavery.

Court's earliest considerations of what the Thirteenth Amendment might mean and compel from state and federal government actors.[4] Second, I examine the Congressional history of the ratification of the Thirteenth Amendment and examine why the Radical Republicans and Northern Democrats had different understandings of the application of the Thirteenth Amendment, which I propose can be traced to the logics of White Supremacy that remained dominant among Northern Democrats in the immediate post-Civil War years. Third, to dispel the notion that the Thirteenth Amendment is primarily aimed at a particular historical objective, namely the abolition of slavery and thus has little application to contemporary legal questions, I turn to the legal scholarship that points to how and why the Thirteenth Amendment can be applied beyond abolition of chattel slavery, and I offer brief illustrations of its relevance to human trafficking, child abuse, labor law, and access to abortion care. Last, given these case studies, I argue that the Thirteenth Amendment can be interpreted to provide a fundamental right to education.

Post-Reconstruction Court and the Thirteenth Amendment

The Thirteenth Amendment has traditionally been interpreted by the Supreme Court as a historically bound amendment that is limited to the abolition of chattel slavery. Two cases are central to illustrate the Court's early understanding of the Thirteenth Amendment. The first Supreme Court case that dealt with interpreting the Thirteenth Amendment was the *Slaughterhouse Case* (1875). In this case, Louisiana passed a law that restricted slaughterhouses operations to a single corporation. A group of butchers argued that they would lose their right to practice their trade and earn a livelihood under the monopoly. The butchers made a range of claims as to why Louisiana's actions challenged the requirements of the new Fourteenth

[4] *Civil Rights Cases of 1883,* 101 U.S. 3 (1883); *The Slaughterhouse Cases,* 83 U.S. 36 (1875).

Amendment, but as this chapter focuses on the Thirteenth Amendment, it is important to note that they also argued that the state-empowered monopoly violated the Thirteenth Amendment.

The Court, in a 5 to 4 decision, rejected the butchers' arguments finding that the Thirteenth Amendment was inappropriate in this context because it was passed with the narrow intention of freeing enslaved people. In a majority opinion by Justice Samuel F. Miller says of the Thirteenth Amendment, "we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the new-made freeman and citizen from the oppressions of those who had formerly exercised dominion over him."[5] When speaking about the intention of the Thirteenth Amendment, Miller wrote, "the obvious purpose was to forbid all shades and conditions of African slavery."[6]

In dissent Justice Bradley counters, the narrow limits placed upon the Thirteenth Amendment, writing, "In my judgment, it was the intention of the people of this country in adopting that amendment to provide National security against violation by the States of the fundamental rights of citizens… It is futile to argue that none, but persons of the African race are intended to be benefited by this amendment. They may have been the primary cause of the amendment, but its language is general, embracing all citizens, and I think it was purposely so expressed."[7] In other words, Justice Bradley contends that the Thirteenth Amendment should not be historically bound to the abolition of chattel slavery.

Justice Swayne authored a separate dissenting opinion which echoed Bradley's criticism of the Court's narrow interpretation of the Thirteenth Amendment, arguing, "The protection provided was not intended to be confined to those of any particular race or class, but to embrace

[5] *Slaughterhouse Cases* (1873): 71.
[6] Ibid., 69.
[7] Ibid., 123.

equally all races, class, and conditions of men."[8] To this point, Justice Swayne offered that the Reconstruction Amendments are fundamentally different from the first eleven amendments of the Constitution because they speak to the role of the national government to protect individuals from state actions that interfere with rights and liberties rather than restrict the national government's range of actions.[9]

In short, in the highly controversial 5-4 decision Justice Bradley and Swayne offer a scathing critique of the Court's narrow interpretation of the Thirteenth Amendment - which will become the basis for the argument I made for a fundamental right to education through the Thirteenth Amendment. In the dissenting opinions of both Bradley and Swayne, both Justices suggest that their more expansive interpretation of the Thirteenth Amendment is based upon the intentions of the radical Republicans at the time of the amendment's ratification, which provided expansive protections. In sum, *Slaughterhouse* was the first case in which the Supreme Court interpreted the meaning of the Thirteenth Amendment following its ratification. The decision ultimately endorsed a narrow interpretation of the Thirteenth Amendment that is both historically bound and limited to the abolition of chattel slavery, which, as I will explore in future sections, is inconsistent with the original intent of the amendment and contributed to the legacy of Jim Crow and segregation.

The Civil Rights Cases of 1883 upheld the narrow analysis of the Thirteenth Amendment that was initially put forward by the small majority in *Slaughterhouse*. In this case, the Court struck down the Civil Rights Act of 1875, which affirmed the equality of all persons in the enjoyment of public, but not private, accommodations. In this decision Justice Bradley, nearly a decade after authoring one of the dissenting opinions in *Slaughterhouse*, wrote the majority

[8] Ibid.,129.
[9] Ibid., 126.

decision in this case.[10] The Civil Rights Act was argued to be constitutional under Congressional Reconstruction authority under both the Thirteenth and Fourteenth Amendments. However, the Court majority dismissed this claim in a 8-1 decision. Writing for the majority, Justice Bradley rejected the argument that the law was an appropriate exercise of congressional authority to abolish all badges and incidents of slavery. Instead, the Court found that the Thirteenth Amendment applies specifically to slavery, not to instances of racial discrimination; in other words, "mere discriminations on account of race color were not regarded as badges of slavery."[11] While the Court was reluctant to put forth a comprehensive understanding of what slavery meant, the Court suggested that discrimination was wholly separate from slavery and thus does not fall within the protection of the Thirteenth Amendment. To this extent Justice Bradley wrote, "Whether it might be a denial of a right which, if sanctioned by the state law, would be obnoxious to the prohibitions of the Fourteenth Amendment, is another question. But what has it to do with the question of slavery?"[12] In this opinion, the Court is explicit about its reluctance to apply the Thirteenth Amendment to badges or incidents that do not directly relate to chattel slavery. The Court was unable, or perhaps unwilling, to make the connection between racial discrimination as a legacy of slavery.

In a lone dissent, Justice Harlan concluded that the Civil Rights Act of 1883 was constitutional under the second section of the Thirteenth Amendment. Harlan accepted the notion that segregation perpetuated a system of Black inferiority and racial caste which was in conflict with the service of the Thirteenth Amendment, which was designed to, "complete freedom [that]

[10] It is interesting to note Bradley's change in opinion between *Slaughterhouse* and *Civil Rights Cases*. Documents suggest that this change in ideology was due to concerns about forcing integration. In private correspondence there are records in which he claimed that "Congress cannot guarantee to the colored people admission to every place of gathering and amusement. To deprive white people of the right of choosing their own company would be to introduce another type of slavery." See: Paul Brest et al., (2018): 411.
[11] The *Civil Rights Cases* (1883): 25.
[12] Ibid.

necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other race."[13] Harlan harbored a fundamentally different understanding of the purpose of the Thirteenth Amendment. To this extent he wrote:

> That there are burdens and disabilities which constitute badges of slavery and servitude, and that the power to enforce by appropriate legislation the Thirteenth Amendment may be exerted by legislation of a direct and primary character, for the eradication, not simply of the institution, but of its badges and incidents, are proposition which ought to be deemed indisputable.[14]

The *Slaughterhouse* and *Civil Rights Cases* highlight attempts to limit the reach of constitutional interpretation immediately following the ratification of the Thirteenth Amendment. More significantly, however, the Court's narrow reading also serves as the catalyst for the development of the "separate but equal" doctrine that was established in *Plessy v. Ferguson.*[15] An analysis of the *Plessy* decision reveals that Slaughterhouse and *Civil Rights Cases of 1883* are heavily cited as foundational precedent for the decision. Plessy's attorneys argued that the Louisiana Separate Car Act was, in part, unconstitutional under the Thirteenth Amendment. The Court immediately dismissed this argument, Justice Brown writing, "That it does not conflict with the Thirteenth Amendment, which abolished slavery and involuntary servitude…This amendment [thirteenth] was said in the *Slaughterhouse* cases, to have been intended primarily to abolish slavery."[16] The Court further argued that the Thirteenth Amendment was inapplicable in this case because state sanctioned segregation did not impose a badge of inferiority. To this extent the Court concluded:

---

[13] Ibid., 36.
[14] The *Civil Rights Cases* (1883): 85.
[15] *Plessy v. Ferguson* ,163 U.S. 537 (1896).
[16] Ibid., 542.

> So, too, in the Civil Rights cases, 109 U. S. 3, 24, it was said that the act of a mere individual, the owner of an inn, a public conveyance or place of amusement, refusing accommodations to colored people, cannot be justly regarded as imposing any badge of slavery or servitude upon the applicant, but only as involving an ordinary civil injury, properly cognizable by the laws of the State, and presumably subject to redress by those laws until the contrary appears. "It would be running the slavery argument into the ground," said Mr. Justice Bradley, "to make it apply to every act of discrimination which a person may see, fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business."[17]

The *Plessy* decision and the doctrine of "separate but equal" codified Jim Crow's racialized caste system in the United States for the greater part of the twentieth century.[18] It was not until the *Brown* decision, that *Plessy* was struck down and segregation was found to be unconstitutional. When the Thirteenth Amendment was first being interpreted by the Court, Justices favored a restrictive interpretation of the amendment, particularly as these cases related to issues of integration and substantive federal rights.[19] From this perspective, a question emerges: *To what extent was the Court's decision to favor a restrictive reading of the Thirteenth Amendment influenced by the blatant racism and fear of integration at the time in which these cases were decided?* I contend that the Court's narrow reading of the Thirteenth Amendment was racially motivated and in direct violation of the emancipatory guarantees that the framers of the Thirteenth Amendment designed.

---

[17] Ibid.
[18] Isabel Wilkerson, *Caste: The Origin of Our Discontents* (New York: Random House, 2020).
[19] Interestingly, Justice Bradley, who was in the dissent in Slaughterhouse, wrote the opinion for the Court in civil rights cases—seemingly "switching sides" between these two cases. Justice Bradley's decision to switch ideologies can logically be explained by a racially motivated decision to prevent integration, which the Civil Rights Act of 1875 was intended to do: enforce integration in public and private facilities.

Radical Republicans and the Thirteenth Amendment

In the previous section, I provided an overview of the Court's narrow understanding of the application of the Thirteenth Amendment following Reconstruction. I briefly touched upon how the precedents of *Slaughterhouse* and the *Civil Rights Cases of 1883* provided the legal framework for Plessy and subsequently, the codification of Jim Crow. In this section, I argue that the Court's rulings do not hold true to the original aspirations of the amendment. Instead, the narrow reading of the Thirteenth Amendment was ultimately an effort to uphold and maintain White Supremacy following the Reconstruction period.

When assessing the implications of the Thirteenth Amendment it is necessary to understand the historical context and intentions of the text's drafters. Historical records demonstrate that the Radical Republicans ratified this amendment with the intention that the amendment would be applied outside the historical bounds of chattel slavery. Radical Republicans viewed slavery beyond the particular status of bondage; instead, it represented "a culture of antebellum Southern hostility to individual civil liberties, such as free speech and assembly."[20]

Congressional debate records suggest that there were discussions about the application of the Thirteenth Amendment to extend beyond the prohibition of chattel slavery. For example, former Senator from Massachusetts, Charles Sumner, envisioned that, "without such a guarantee Emancipation will only be half done."[21] Additionally, during these congressional debates, "many

[20] Stephen M. Engel and Timothy S. Lyle, "Is Dignity a Dead End? Alternative Notions of Dignity and the Promise of Our Anti-Racist Constitution," in *Disrupting Dignity: Rethinking Power and Progress in LGBTQ Lives* (New York University Press, 2021), 287. Quoted from *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth* (Durham, NC: Duke University Press, 1999). See also George Rutherglen, "The Badges and Incidents of Slavery and the Power of Congress to Enforce the Thirteenth Amendment," in *Promises of Liberty: The History and Contemporary Relevance of the Thirteenth Amendment*, ed. Alexander Teseis (New York: Columbia University Press, 2010).

[21] Congressional Globe, 39th Congress, First Session 2394 (Phelps, May 4) cited from *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth* (Durham, NC: Duke University Press, 1999), 48.

congressmen described the Thirteenth Amendment's potential for ending any forms of oppression associated with slavery, not merely the exploitation of forced labor."[22] The adoption of the phrase "badges and incidents of slavery" was "used most frequently before the adoption of the Thirteenth Amendment to refer to the symbolic manifestation of political and social inferiority that was analogous, but hardly identical to the specific legal attributes of slavery."[23] Thus, as legal scholars have suggested, abolishing slavery required a positive federal guarantee of a range of individual rights.[24] As Representative James Garfield concluded, if freedom meant no more than being unchained, it was but a "bitter mockery" and a "cruel delusion."[25] As a result, a more expansive understanding of section 2 of the Thirteenth Amendment required an affirmation of rights through positive action by Congress. As Laurence Tribe argues:

> Congress possesses an almost unlimited power to protect individual rights under the Thirteenth Amendment. Seemingly, Congress is free, within the broad limits of reason, to recognize whatever rights it wishes, define the infringement of those rights as a form of domination of subordination, and thus an aspect of slavery, and proscribe such infringement as a violation of the Thirteenth Amendment.[26]

During the debate on the ratification of the Thirteenth Amendment there was resistance from Northern Democrats, who viewed the formal abolition of slavery as the height of emancipation. According to legal sociologist Pamela Brandwein, "the only postwar matter that Northern Democrats were willing to see taken out of local majoritarian control was former slave law. Otherwise, all matters regarding race, such as the choice to legislate differently for blacks

---

[22] Alexander Tsesis, "Interpreting the Thirteenth Amendment Symposium: The Second Founding," *University of Pennsylvania Journal of Constitutional Law* 11, no. 5 (2009): 1341.
[23] George Rutherglen, "State Action, Private Action, and the Thirteenth Amendment," *Virginia Law Review* 94, no. 6 (2008): 1368.
[24] Stephen M. Engel and Timothy S. Lyle, *Disrupting Dignity: Rethinking Power and Progress in LGBTQ Lives* (New York University Press, 2021), 287.
[25] "James A. Garfield, Oration Delivered at Ravenna, Ohio (July 4, 1865). Cited from Tsesis (2009): 1354.
[26] Lawrence H. Tribe, American Constitutional Law § 5-15, at 926-27 (3d ed. 2000). Cited from Tsesis (2009): 1354.

and whites, were regarded as local."[27] The Northern Democrats were only willing to abolish formal slave laws.

The insistence on popular sovereignty and polity principles following the ratification of the Thirteenth Amendment were heavily racialized.[28] Northern Democrats sought the right to pass local laws outside of the jurisdiction of the federal government, including the Black Codes, which were premised on the racist notion that Black people were unfit for citizenship.[29] As Senator Thomas A. Hendricks of Indiana stated: "I say we are not of the same race; we are so different that we ought not to compose one political community."[30] The Freedmen's Bureau was established in response to the development of Black Codes throughout the country following the ratification of the thirteenth amendment. In a criticism of the Freedmen's Bureau, Representative George Shanklin of Kentucky addressed Republicans:

> [Y]ou have freed four million slaves, who were productive laborers, who were contented and happy and well provided for … You have imposed upon the people a debt which I will not attempt to estimate, for the purpose of supporting a pet institution called the Freedmen's Bureau. Perhaps you have gained another objective. You have thought that the bureau manufactured the materials that have filled the galliards of this Hall during the whole session. Crowds of these negros have hung over us like a black and threatening cloud, while we were crucifying the Constitution of our fathers and trampling under the feet the rights and liberties of the people in passing the Freedman's Bureau bill.[31]

During the development of the Thirteenth Amendment and following its ratification, significant debate existed as to whether the provision spoke to merely the abolition of formal

---

[27] Pamela Brandwein, "Slavery as an Interpretive Issue in the 39th Reconstruction Congress: The Northern Democrats," in *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth* (Durham, NC: Duke University Press, 1999), 29.
[28] Ibid.
[29] Black codes were laws that made classifications based on race during the Reconstruction Period. See William J. F. Meredith, "The Black Codes," *Negro History Bulletin* 3, no. 5 (1940): 76–77.
[30] Brandwein (1999), 39
[31] Ibid., 25. (citation 76).

slavery or something else. Upon closer analysis, it is evident that Northern Democrat's narrow interpretation of the Thirteenth Amendment was informed by racism - which manifested in the Black Codes. As Brandwein writes, "Republicans expressed scorn for the Democrats' assertions that formal emancipation marked the achievement of the war's goals. Republicans identified the Black Codes, post-Appomattox political violence directed at black and white Republicans, and ex-Confederate takeovers of political institutions as among the continued threats of slavery."[32] In other words, Northern Democrats embraced a narrow interpretation of the Thirteenth Amendment, advocating instead for state sovereignty as a pretext to discriminate against Black Americans who were seen as "unfit" for citizenship.

However, it is worth noting that a significant number of Democrats voted across the aisle in support of the Thirteenth Amendment, suggesting that there was some bipartisan support for the broad view of the amendment. Twenty-three percent of Democrats and one hundred percent of Republicans supported the Thirteenth Amendment. The passage of the Thirteenth Amendment can be regarded as a relatively bipartisan effort compared to other Reconstruction Amendments. The Fourteenth and Fifteenth Amendment garnered zero votes from the Democrats compared to overwhelming support from the Republican base. The Thirteenth Amendment's legislative history suggests there was widespread support from Democrats representing Lincoln-backed states. For example, in the state of Oregon, both senators, Benjamin Franklin Harding and James Nesmith voted in favor of the Thirteenth Amendment. Harding and Nesmith were Democratic senators in a Republican-controlled State of Oregon, which had previously backed President Lincoln in the 1860 Presidential election. In other words, while the expansive nature of the Thirteenth Amendment was envisioned by the radical Republicans of Congress, these visions

[32] Ibid., 30.

were, in part, supported by Democrats - suggesting a unified understanding of the amendment's emancipatory potential.

A Glimpse of Hope for the Thirteenth Amendment

Much of the Court's interpretation of the Thirteenth Amendment has been severely restricted as applying only to the abolition of chattel slavery, which is in conflict with the Radical Republicans understanding of the amendment's reach and purpose and as previously explained, implicated in the maintenance of white supremacy. However, the mid- to late-twentieth century Warren and Burger Court offered a brief period in which the Court endorsed a more expansive understanding of the Thirteenth Amendment. *Jones v. Alfred Mayer*[33] represents an optimistic – albeit short lived –ideological shift in the Court's attitude towards the Thirteenth Amendment.

This case involved a black man, Alfred Jones, who sued a real estate company in violation of 42 USC Section 1982 for refusing to sell him a home in his preferred neighborhood on account of his race.[34] The Court was tasked to consider the legitimacy of Congress to enforce the Thirteenth Amendment by "appropriate legislation" including the power to eliminate all racial barriers to the acquisition of property under the Civil Rights Act of 1968. The Court upheld the Civil Rights Act under section 2 of the Thirteenth Amendment, also known as the enforcement clause of the Thirteenth Amendment.

This decision represented an expansive reading of the Thirteenth Amendment to prevent discrimination by private actors. In the decision of the Court, Justice Steward wrote of Congress' duties under section 2 of the Thirteenth Amendment, "Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery,

[33] 392 U.S. 409 (1968).
[34] "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

and the authority to translate that determination into effective legislation"[35] The *Jones* majority found that the Enabling Clause of the amendment empowered Congressional action and suggested that the Thirteenth Amendment prohibited legacies of slavery: "[W]hen racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery."[36] The decision was significant as "... the Court went far beyond what any previous Court had said about what section 1 of the Thirteenth Amendment independently prohibited… Rather the *Jones* Court explicitly recognized that Congress's powers under section two went beyond what judges could plausibly prohibit under section 1."[37] Several scholars noted the significance of *Jones* as " broadly read Congress's powers to remedy the "badges and incidents of slavery," a phrase taken from the 1883 Civil Rights Cases, which had construed Congress's powers far more narrowly."[38]

The Court cited *Jones* as precedent in other cases following the decision. First, in *Tillman v. Wheaton-Haven Recreation Association*,[39] the Court heard a case in which a Black couple was denied entry into a community swimming pool in violation of the Civil Rights Act of 1866. In an unanimous decision, the Court found in favor of the couple, citing *Jones* as precedent. In the majority opinion, Justice Blackmun wrote, "In *Jones v. Alfred H. Mayer Co*., 392 U. S. 409 (1968), this Court, after a detailed review of the legislative history of 42 U. S. C. § 1982, id., at 422-437, held that the statute reaches beyond state action and is not confined to officially sanctioned segregation."[40] Additionally, *Runyon v. McCrary*,[41] involved a claim of

[35] *Jones* (1968): 441.
[36] Ibid., 442-443.
[37] Paul Brest et al., (2018): 651-652.
[38] Jack Balkin and Sanford Levinson, "The Dangerous Thirteenth Amendment," *Faculty Scholarship Series*, January 1, 2012, 113.
[39] 410 U.S. 431 (1973).
[40] Ibid., 435.
[41] 427 U.S. 160 (1976).

discriminatory admissions practices for private schools. The respondents argued that the denials were due to race-based discrimination, violative of Section 1981 of the Civil Rights Act. The Court ruled that the 1981 Civil Rights Act prohibited racially discriminatory practices of the schools. In the ruling, the Court heavily relied on *Jones* holding that private acts of racial discrimination were a badge of inferiority that the Thirteenth Amendment prohibited. The majority opinion stated:

> Section 1981, as applied to the conduct at issue here, constitutes an exercise of federal legislative power under § 2 of the Thirteenth Amendment fully consistent with Meyer, Pierce, and the cases that followed in their wake. As the Court held in Jones v. Alfred H. Mayer Co., supra: "It has never been doubted . . . 'that the power vested in Congress to enforce [the Thirteenth Amendment] by appropriate legislation' . ..includes the power to enact laws 'direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not.' " 392 U. S., at 438 (citation omitted).[42]

The *Jones* decision, and the subsequent cases that followed demonstrate that, "the Court recognized that the Thirteenth Amendment enables Congress to prevent discrimination and private school segregation, neither of which is directly tied to slavery as a form of labor exploitation."[43] Therefore the "scope of the amendment encompasses liberty interests far beyond receiving reasonable compensation for work."[44] The Court's expansive interpretation of the Thirteenth Amendment eventually came to an end after the election of Richard Nixon in 1968 and his four appointments to the Court: Warren Burger in 1969, Harry Blackmun in 1970, and Lewis Powell and William Rehnquist in 1972. These appointees were essential in shifting the ideology of the Court back to strict textualism and limiting the reach of the Warren Court.[45]

---

[42] *Runyon* (1976): 179.
[43] Tsesis (2009): 1346.
[44] Ibid.
[45] Sunstein (2003).

However, the impact of the *Jones* decision under the Warren Court cannot be overstated. These cases indicate that, "Congress can go still further in protecting fundamental rights by passing laws pursuant to its Section 2 power. Courts can review the constitutionality of such laws by assessing whether they are legitimate means for ending discrimination that Congress found to be rationally related to the incidents of involuntary servitude."[46]

Resuscitating Jones in the Contemporary Supreme Court Jurisprudence: Addressing Modern Forms of Slavery and Badges of Inferiority

Jones represented a brief moment in United States Supreme Court history in which a more expansive understanding of the Thirteenth Amendment was embraced. Several scholars have noted that the implications of this decision and its expansive understanding of the Thirteenth Amendment have far reaching implications. There are many examples of the application of the Thirteenth Amendment to prohibit modern forms of enslavement. These examples exist on a spectrum of most directly related to enslavement to least directly connected to enslavement - but still prohibited by the Thirteenth Amendment. The most directly applicable instances of modern slavery include human trafficking and child abuse. However, scholars have also suggested that less directly applicable forms of modern slavery are prohibited by the Thirteenth Amendment, including labor laws for undocumented workers and restrictions on abortion care access.

Bans on human trafficking are a logical application of the Thirteenth Amendment's prohibition on forced labor and involuntary servitude. Azmy makes a compelling argument that human trafficking can be remedied under the Thirteenth Amendment's prohibition of forced labor. When individuals are trafficked to come to the United States they endure a process of dehumanization that "harkens to critical aspects of antebellum chattel slavery" regarding the

[46] Tsesis (2009): 1347.

restriction of movement, lack of bodily autonomy, separation from family and loved ones, and exposure to physical, emotional, and sexual abuse.[47] If we are to accept an understanding of slavery as a dominating relationship based on an notion of inferiority,[48] then human trafficking is a type of "modern slavery" that the Thirteenth Amendment forbids. Azmy advocates that the "denial of basic personal freedom and subjugation is a severe degradation that therefore deserves a legal remedy more substantial than mere repayment of back wages" and instead should be remedied through the Thirteenth Amendment.[49] In short, the prohibition of human trafficking should, in theory, be a non-controversial reading of the Thirteenth Amendment given the clear connection between trafficking and slavery.

Another, related, example is the prohibition of child abuse. In the case of *DeShaney v. Winnebago County Department of Social Services*,[50] the Rehnquist Court found that the state's failure to protect an individual against private violence was not a violation of the Due Process Clause of the Fourteenth Amendment.[51] However, scholars have noted that the claim perhaps should have been a Thirteenth Amendment violation given the Court's previous analysis in *Jones* and earlier cases. For example, in *Slaughterhouse*, the Court concluded that "the judges must look to the "pervading spirit" of the Civil War amendments when interpreting the terms slavery and involuntary servitude" [52] Furthermore, in the *Civil Rights Cases*, "the Court declared that the amendment is not a mere prohibition on state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United

[47] Baher Azmy, "Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda," *Fordham Law Review* 71, no. 3 (2002): 995.
[48] Akhil Reed Amar and Daniel Widawsky, "Child Abuse As Slavery: A Thirteenth Amendment Response to DeShaney Commentary," *Harvard Law Review* 105, no. 6 (1992): 1365.
[49] Azmy (2002): 999
[50] 489 US 189 (1989)
[51]Joshua DeShaney was a four-year-old boy, who became comatose and suffered traumatic head injuries inflicted by his father who beat the child for years.
[52] Amar and Widawsky (1992): 1370.

States."[53] Lastly, as established in *Jones*, the Thirteenth Amendment "not only forced labor for the master's economic enrichment, but all forms of chattel slavery whether the ultimate motive for such domination, degradation, and dehumanization was greed, as in the cotton market, or sadism ,as at the end of a lash."[54] These precedents would seem to suggest that any system of physical abuse is a type of domination which the Thirteenth Amendment prohibits.

To this end, Scholars Akil Reed Amar and Daniel Widawsky have argued that given this expansive interpretation of the Thirteenth Amendment, in this case, child abuse is analogous to a form of slavery. While there is no clear definition of slavery, Amar and Widawsky propose that slavery can be defined as a form of domination in which human beings are treated as inferior subjects.[55] Based on this understanding, "a person can be a Thirteenth Amendment 'slave' whether or not she is a minor; whether or not the 'master' is a blood relation of the 'slave'; whether or not she has African roots; whether or not the enslavement takes the form of forced 'labor'; and whether or not the enslavement is officially sanctioned by state law."[56] Therefore, in the case of *DeShaney*, "when a parent perverts this coercive authority by systematically abusing and degrading his ward - treating his child not as a person but as a chattel, acting as if he had title over the child rather than a trusteeship on behalf of the child - the parent violates the Thirteenth Amendment and should be subject to suit."[57]

Additionally, the Thirteenth Amendment has been used in the advancement of securing fair pay for employees. In the case of *Hoffman Plastics Compounds v. National Labor Relations Board* [58] the Court concluded that the NLRB was not authorized to award back pay to

[53] Ibid.
[54] Ibid., 1359.
[55] Ibid., 1365.
[56] Ibid.
[57] Ibid., 1364.
[58] 535 U.S. 137 (2002).

undocumented workers. Maria L. Ontiveros, a professor at the University of San Francisco's Law School, has argued that the development of a tiered labor hierarchy, as developed by the Court in *Hoffman Plastic Compounds, Inc. v. NLRB* (2002), is violative of the Thirteenth Amendment which is designed to enforce free and fair labor relations.[59] Based on the research of existing scholarship, Ontiveros concluded, "...former slaves involved in the early labor movement expressed the visions of the Thirteenth Amendment as prohibiting slavery-like practices that impinged on a vision of free labor, as denied in opposition to slave labor."[60] Given this understanding, the Court should revisit the decision rendered in *Hoffman* and instead, invoke the Thirteenth Amendment in cases involving fair labor practices. As Ontiversos writes:

> By harkening back to the legislative history and social understanding of the Amendment, Thirteenth Amendment doctrine can tackle a broader range of race, labor, and class issues. The evil of slavery was not just that people were not allowed to quit. It was the treatment of people as less than human and as property. The wrong of slavery was the commodification and dehumanization of a racially defined group of workers. The current treatment of undocumented immigrant workers mirrors this commodification and dehumanization.[61]

Lastly, several scholars have argued that restrictions on access to abortion are violative of the Thirteenth Amendment's ban on involuntary servitude. To the naked eye, this comparison generates skepticism as there is no direct historical tie to slavery and modern abortion care access. However, forced pregnancy and motherhood can be considered a type of forced labor that the Thirteenth Amendment prohibits.[62] Andrew Koppelman, for example, explains that: "The

[59] Maria L. Ontiveros, "Immigrant Workers' Rights in a Post-Hoffman World - Organizing Around the Thirteenth Amendment Symposium: Supreme Court Review," *Georgetown Immigration Law Journal* 18, no. 4 (2004): 651–80.
[60] Ibid., 662.
[61] Ibid., 674.
[62] See Dorothy Roberts, "Killing the Black Body: Race, Reproduction, and The Meaning of Liberty," *All Faculty Scholarship*, January 1, 1997 and Samantha Pinto, "After Choice, after Justice?: Race, Reproduction, and the Uncertain Futures of Feminist Political Desire," *The International Journal of Human Rights*, (2023): 1–21.

injury inflicted on women by forced motherhood is lesser in degree than that inflicted on blacks by antebellum slavery, since it is temporary and involves less than total control over the body, but it is the same kind of injury. When abortion is outlawed, the pregnant woman must serve the fetus, and that servitude is involuntary."[63] In other words, when women are compelled to give birth for the interests of the state, they lack bodily autonomy - which is a type of slavery. Koppleman's argument has been met with resistance and depicted as a "bizarre" vilification of motherhood. However, in response to these criticisms, Koopelman notes the distinction between voluntary and involuntary motherhood, saying that the Thirteenth Amendment claim of involuntary servitude *only* applies to birthing people who are compelled or forced into the birthing process and motherhood and does not apply to birthing people who *chose* to become pregnant.[64]

In essence these examples demonstrate that "the idea of slavery, focusing as it does on non-domination and self-sufficiency, can apply to many different societies, including modern ones."[65] There are other modern examples of slavery that I have not touched upon. As Balkin and Levin note, "One does not have to be a Marxist to recognize that unregulated capitalism might create its own forms of domination and oppression to replace the chattel slavery of older societies. Nor does one have to be a Hayekian to recognize that unchecked and unaccountable government power can reduce citizens to new forms of servitude."[66] A more expansive understanding of the Thirteenth Amendment's anti-stigma[67] and non-domination guarantee can be increasingly applied to modern situations in which there is a form of servitude directly or less

[63] Andrew Koppelman, "Forced Labor, Revisited: The Thirteenth Amendment and Abortion," *Faculty Working Papers*, January 1, 2010, 4.
[64] Ibid.
[65] Balkin and Levinson (2012): 119.
[66] Ibid.
[67] Engel (2021).

directly related to slavery, which the amendment forbids. I argue that the Thirteenth Amendment has been limited due to its substantial power to challenge hierarchical, dominating, and subordinating systems such as discrimination towards LGBTQ+ individuals.[68] In sum, "insisting that 'slavery' shall not exist anywhere in a nation does more than end the practice of owning human beings; once we understand the term as broadly as we understand parts of the Bill of Rights and the Fourteenth Amendment, the command to abolish it puts all aspects of society into question."[69]

Educational Access as Emancipatory

Many legal scholars have adopted the argument that the Thirteenth Amendment can be read expansively to prevent "badges and incidents" of slavery. These scholars have suggested that such expansion can be applied to modern instances of slavery that suggest lack of power over one's own body. However, to my knowledge, no scholar has so far suggested that the Thirteenth Amendment speaks to a right to education. In this section, I argue that the Thirteenth Amendment is helpful in terms of understanding a right to education if read expansively to prevent the "badges and inferiorities" of slavery. To make this argument, I, first, suggest that the Thirteenth Amendment can be understood as an emancipatory clause - not merely abolitionist. Hence, if we understand the Thirteenth Amendment to be emancipatory, this will prevent any infringements on access to education as this would serve as a "badge or incident of inferiority." In sum, this clause serves as a repository power that both guarantees a right to education and authorizes Congress to pass legislation to enforce such a right.

The Thirteenth Amendment can be understood as an emancipatory Amendment given both the documented history of the aims of the Radical Republicans, as previously established

[68] Ibid.
[69] Balkin and Levinson (2012): 119.

earlier in this chapter, above as well as given the expansion of educational access for formerly enslaved people following the ratification of the Thirteenth Amendment and subsequent Reconstruction Amendments. The deprivation of access to education was a critical component of chattel slavery that worked to enforce and strengthen White Supremacy. Anti-literacy laws were passed in the Antebellum South, "deliberately fostered the structural production of ignorance."[70] For example, Georgia's 1829 Anti-Literacy Act stated:

> Sec. 11. And be it further enacted, That if any slave, negro, or free person of colour, or any white person, shall teach any other slave, negro, or free person of colour, to read or write either written or printed characters, the said free person of colour or slave shall be punished by fine and whipping, or fine or whipping at the discretion of the court; and if a white person so offending, he, she, or they shall be punished with fine, not exceeding five hundred dollars, and imprisonment in the common jail at the discretion of the court before whom said offender is tried.[71]

As Derek Black notes, "education denials, however, were also a core aspect of slavery rather than just a form of oppression coinciding with or incidents to slavery."[72] Black's perspective is consistent with the historical understanding that chattel slavery was premised upon the educational deprivation of enslaved people and the criminalization of access to education. Therefore, "understanding the denial of education as a badge and core aspect of slavery offers the justification for Congress to expand education and remedy African American illiteracy following the Civil War."[73]

---

[70] Slavery and the Origin of Georgia's 1829 Anti-Literacy Act Cited from *agnotology: The Making and Unmaking of Ignorance* (Stanford: Stanford University Press, 2008).
[71] Georgia, Acts of the General Assembly of the State of Georgia, Passed in Milledgeville at an Annual Session in November and December 1829 (Milledgeville: Camak & Ragland, 1830), 170-71. Cited from Kim Tolley, *Slavery and the Origin of Georgia's 1829 Anti-Literacy Act*, 2019.
[72] Derek Black, "Freedom, Democracy, and the Right to Education," *Northwestern University Law Review* 116, no. 4 (January 16, 2022): 1075.
[73] Ibid., 1076.

During Reconstruction, there were several government efforts that were designed to expand educational access given the role of anti-literacy laws in oppressing formerly enslaved people. These government programs included the Freedmen's Bureau and the requirement of Southern state constitutions to include provisions for educational access prior to being readmitted into the Union. These historical developments suggest a connection between emancipation and education. First, historical analysis of the Freedmen's Bureau suggests that education of formerly enslaved people was a top priority during Reconstruction. One of the central services that the Freedmen's Bureau provided was access to education. General Oliver Howards, the Bureau Director, wrote: "From the first I have devoted more attention to [the education of the freedmen] than to any other branch of my work."[74]

Furthermore, Howard writes, "education underlies every hope of success for the freedman…Through education…the fearful prejudice and hostility against the blacks can be overcome. They themselves will be able to demand and receive both privileges and rights that we now have difficulty to guarantee."[75] The Freedmen's Bureau was primarily invested in granting access to education as it consumed more than two-thirds of the Bureau's budget.[76] The impact of the Freedmen's Bureau cannot be overstated. By 1870, the Bureau managed to educate 200,000 students with a teaching staff of 9,000 in only 4,000 schools and when the Bureau ended in 1876,

[74] Black (2022): 1050: "Letter from General O. Howard, supra note 95, at 177. The solution to our "delicate social dilemma," wrote the North Carolina superintendent, was to "[s]end out teachers ..... in the track of every conquering army. Let them swarm over the savannahs of the South." Negro Affairs in North Carolina, 1 FREEDMEN'S REC. 141, 144 (1865)."

[75] Ibid. "Letter from General O. Howard, supra note 95, at 177. The solution to our "delicate social dilemma," wrote the North Carolina superintendent, was to "[s]end out teachers ..... in the track of every conquering army. Let them swarm over the savannahs of the South." Negro Affairs in North Carolina, 1 FREEDMEN'S REC. 141, 144 (1865)."

[76] Ibid, quoted from Eric Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 VA. L. REV. 753, 780–81 (1985); see also PAUL SKEELS PEIRCE, THE FREEDMEN'S BUREAU: A CHAPTER IN THE HISTORY OF RECONSTRUCTION 76–77 (1904) (discussing the multiple ways in which the funds were raised for and expended on education, including through discretionary acts of the Bureau)."

about 40% of students of color were attending school.[77] Additionally, HBCUs (historically Black colleges and universities) were established as a result of the Freedmen's Bureau's effort to expand educational opportunities for formerly enslaved people and descendants of chattel slavery.[78] Perhaps, the influence of the Freedmen's Bureau is best summarized by Civil Rights leader and activist, Luther P Jackson:

> By penetrating almost every county or district in the State, the schools served to awaken the Negroes to the need of education and to demonstrate to all persons that it was practicable to educate them; it led up to the establishment of the public schools and left for this system material equipment in the form of school buildings and furniture; and, greatest of all, the combined efforts of the Freedmen's Bureau and the societies left the State with institutions of higher grade the principal source of teachers for the common schools.[79]

Furthermore, following the end of the Civil War and the passage of the Reconstruction Amendments, Congress took numerous steps to expand education in other states, demonstrating a widely held belief that access to education was an emancipatory endeavor which maintained that the government provide substantive rights to formerly enslaved peoples. Congress established a federal Department of Education[80] and required that all states include a constitutional provision that requires education in their state constitution pursuant to the Reconstruction Act of 1867. Section 6 of the Act held:

> And be it further enacted, That, until the people of said rebel States shall be by law admitted to representation in the Congress of the United States, any civil governments which may exist therein shall

[77]Alan Brinkley, in *American History: Connecting with the Past*, vol. 2, 2015, 409.
[78] Kisha Daniels, Kianda S. Hicks, and Miya T. Plummer, "Historically Black Colleges and Universities: A History of Community Engagement," in *The Cambridge Handbook of Service Learning and Community Engagement*, ed. Corey Dolgon, Tania D. Mitchell, and Timothy K. Eatman, Cambridge Handbooks in Psychology (Cambridge: Cambridge University Press, 2017), 64–70.
[79] Luther P. Jackson, "The Educational Efforts of the Freedmen's Bureau and Freedmen's Aid Societies in South Carolina, 1862-1872," *The Journal of Negro History* 8, no. 1 (1923): 40.
[80] Black, (2022): 1053 citing, "An Act to Establish a Department of Education, ch. 158, 14 Stat. 434, 434 (1867).

> be deemed provisional only, and in all respects subject to the paramount authority of the United States at any time to abolish, modify, control, or supersede the same; and in all elections to any office under such provisional governments all persons shall be entitled to vote, and none others, who are entitled to vote, under the provisions of the fifth section of this act; and no persons shall be eligible to any office under any such provisional government who would be disqualified from holding office under the provisions of the third article of said constitutional amendment.[81]

As Derek Black notes, "The state response to Congress's readmission demands was emphatic. Before the Reconstruction Act of 1867, a few Southern state constitutions made reference to education, but they did not mandate the creation of a statewide education system. Within three years of the Act, all ten remaining Confederate states had adopted affirmative education clauses in their constitutions, often quite detailed in structure."[82] These constitutional amendments, while limited to state governments, demonstrated a commitment to educational access in an attempt to prohibit further "badges and inferiorities" of slavery that included, but were not limited to, deprivation of access to education.

In sum, the Thirteenth Amendment is neither event nor historically bound to the circumstances in which these amendments were produced. In other words, the Thirteenth Amendment is not restricted to the abolition of slavery as a particular historical moment. By contrast, I argue that the Thirteenth Amendments has far reaching implications that have been underdeveloped and incorrectly interpreted by United States Supreme Court jurisprudence. Several scholars noted the potential of the Fourteenth Amendment for a right to education. However, to the extent of my knowledge, I offer the first interpretation that the Thirteenth

[81] United States Statutes at Large, XIV, 428-29; XV, 2-4, 14-16, 41.
[82] Black (2022) 1054, citing "See ALA. CONST. of 1868, art. XI, § 6; ARK. CONST. of 1868, art. IX, § 1; FLA. CONST. of 1868, art. VIII, § 1; GA. CONST. of 1868, art. VI, § 1; LA. CONST. of 1868, tit. VII, art. 135; MISS. CONST. of 1868, art. VIII, § 1; N.C. CONST. of 1868, art. IX, § 2; S.C. CONST. of 1868, art. X, § 3; TEX. CONST. of 1869, art. IX, § 1; VA. CONST. of 1870, art. VIII."

Amendment should be read to strengthen the argument for a fundamental right to equal educational opportunities. This strategy is advantageous because it avoids the controversial jurisprudence concerning Equal Protection and Due Process, maintains stare decisis,[83] avoids the exclusionary boundaries of the Citizenship Clause, and builds upon the blueprints developed in *Jones.*

Conclusion

In this chapter, I moved from discussing the range of ways legal scholars have conceptualized a right to education as falling within the Fourteenth Amendment toward opening a conversation about the emancipatory implications of the Thirteenth Amendment. In order to properly contextualize this discussion, I provided a brief overview of the Post-Reconstruction Court's narrow interpretation of the Thirteenth Amendment in *Slaughterhouse* and *Civil Rights Cases*, which I concluded were implicated in maintaining White Supremacy. To make this argument I summarized congressional history concerning the ratification of the Thirteenth Amendment and explored the intentions of the Radical Republicans in the drafting of the amendment to extend beyond the legal abolition of chattel slavery. I then evaluated contemporary legal analysis and scholarship that has pointed to the Thirteenth Amendment's prohibition on human trafficking, child abuse, discriminatory labor laws for undocumented individuals, and restrictions on access to abortion care. Based on this contemporary analysis, I offered another lens through which the Thirteenth Amendment can be interpreted: education.

To this extent, I proposed that the Thirteenth Amendment can be interpreted to be an emancipatory Amendment that is not bound or limited by application to a particular historical

[83] Meaning "to stand by things decided." This is a legal principle instructing Courts to stand by previous decisions to maintain institutional legitimacy.

moment; it is not limited as only abolishing the legal and constitutional existence of slavery. Therefore, the Thirteenth Amendment can be read as providing a right to education in pursuit of broader emancipatory goals. Education is directly tied with emancipation given the extensive history that situates the deprivation of education as a key component of chattel slavery and subsequently, the expansion of educational access in the South during Reconstruction. Thus, I situate infringements on access to education as a relic of slavery and an instrument of white supremacy.

The constitutional pathway that I propose in this chapter offers several distinct advantages by 1) avoiding the legal complexities of the Equal Protection Clause that are evident in the Roberts Court's narrow readings of this Clause, 2) avoiding the problematic legacy of the Due Process Clause, including but not limited to accusations of activism in the context of the substantive due process doctrine, 3) avoiding the exclusionary protections of the Citizenship Clause and 4) maintaining stare decisis. In other words, my reading of the Thirteenth Amendment remains wholly in line with existing precedent of the Court. This chapter concludes Part 1, which was dedicated to developing a normative constitutional argument that education is a fundamental right, which flows from the Thirteenth Amendment.

In the following chapters, I examine this fundamental rights framework as it relates to education law, specifically the Individuals with Education Act (also known as the IDEA) and examine how the notion of a right to education either aligns or misaligns with the legislative and litigative history of special education laws for students with disabilities. *Put differently, if we accept that education is a constitutionally guaranteed right, how does that change our understanding of how the IDEA should be read and what it must provide? How might a Thirteenth Amendment framework I suggest inform, or possibly alter, special education law?*

Chapter 3: The Federal Government and Public Education

The notion of a right to education, whether fundamental or not, would suggest that the federal government, particularly the legislative branch, is empowered to pass laws that would inform, develop, and actualize such a right. While the Constitution has remained silent on the role of the federal government in materializing a right to education, historical records suggest that Congress has adopted a robust and expansive approach to governing public education since the founding of the Republic. This chapter provides a timeline of the federal government's role involvement in public education policy, situating the development of Individuals with Disabilities Education Act (herein referred to as IDEA) within a broader historical context. In Part I, I place the IDEA in a broader context of four distinct historical periods that introduce how the federal government has been involved in providing access to public education. Next, in Part II, I examine the constitutional dialogues between Congress and the federal courts regarding educational access, and the factors leading to Congressional involvement in the passage of IDEA.[1] Additionally, I provide an overview for the legislative process of the IDEA, suggesting that this law was a largely bipartisan effort, and establish the context of the legislation itself and how it has developed over time.

[1] Constitutional dialogues is a theoretical approach coined by Louis Fischer to explain how the three branches of government engage in inter branch dialogue on constitutional issues. See Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (Princeton University Press, 1988). Fischer notes, "The purpose of this book is to show that constitutional law is not a monopoly of the judiciary. It is a process in which all three branches converge and interact with their separate interpretations. Important contributions also come from the states and the general public."

Evolving Role of the Federal Government's Involvement in Public Education

The federal government's role in public education can be challenging to define. There are periods of United States educational history where the federal government has used expansive authority to invest, regulate, and govern education for the purposes of promoting equity and advancing national education standards. Conversely, there are also periods in which this authority has receded, thereby minimizing the ability of the federal government to interfere in public education and delegating authority to state and local governments. The goals for public education are constantly evolving to meet the technological, economic, and social needs of the nation. When the purpose of education is redefined, as it so often is throughout educational history, so is the role of the federal government in executing this vision.

To understand the dynamic relationship between the federal government and public education, it is necessary to examine at least some of this history. In this chapter, I present a timeline tracing the origins of federal government involvement in public education. While the federal government could be argued to be involved in education from the nation's founding, given some provisions of the Northwest Ordinance of 1787, which will be discussed later in the chapter, the federal government's involvement in education developed during the late nineteenth century. This chapter explores federal involvement in education from that point up to federal efforts to improve public education under the Bush and Obama administrations. In so doing, this chapter contextualizes IDEA, which will become the focus in later chapters. For the purpose of this chapter, however, I organize the history into four important periods.[2]

[2] It is important to note that this chapter features a brief and streamlined summary of the educational history of the federal government's involvement in public education. To best synthesize this material, I have selected case studies within each period to highlight federal activity in the realm of public education.

First, I examine the Pre-Progressive (1880-1890) era as the first critical time frame of federal government involvement in education. Next, I transition to the Progressive Era (1897-1920) and outline how Progressive ideology informed national education policy. Then, I move to the third time period, which I refer to as the era of Access and Inclusion (1954-1979). This period represented a fundamental shift in the way that the federal government was mobilized for the purposes of ensuring access to education in an increasingly decentralized and racialized education system. This discussion is important because it situates the creation of IDEA within a period of expansive federal government regulation of public education. Last, I examine what I refer to as the Standards and Accountability Era (1980-present), which demonstrates a departure from the previous era, in which education served as a mechanism for social equality, to instead, prioritize educational accountability among the states to compete for international prestige and recognition. Within these four periods, the role of the federal government in public education is contingent upon various stakeholders who inform the purpose of education - thus accounting for how the role of federal government in public education changes over time.

Table 2: Federal Involvement in Education Over Time

Historical Period	**Pre Progressive** (1880-1890)	**Progressive** (1897-1920)	**Access and Inclusion** (1954-1979)	**Standards and Accountability** (1980-present)
Role of Government in Education	Radical ideas about expansion and the development of a national education system. For example: The Hoar Bill (1870-1871) and the Blair Bill (1882-1880).	First expansive understanding of the role of the federal government. For example, see the Smith-Hughes Act (1917) as a piece of legislation that transformed the relationship of the federal government in education.	Peak expansion of federal government involvement in public education. Notable moments in this era include *Brown v. Board* (1954) and the creation of the Department of Education in 1979.	President Reagan in the early '80s tried to abolish the DOE. When Bush entered office, the role of the government in education was expanded to advance Republican goals - particularly No Child Left Behind.
Purpose of Education	To prepare citizens to participate in civil society.	To sustain the economy and increase efficiency.	Educational inequality was linked to racial discrimination and poverty. The equalizing mission of education was, in part, motivated by Cold War Politics.	To compete with international competitors and regain prestige after *A Nation at Risk* report, which had situated the United States as falling behind educationally.

At the center of the tension between federal and state involvement in education is the balance of powers inherent in federalism. Advancing the goals of education is in the national interest. However, in the Constitution there are two seemingly mutually exclusive provisions that empower both the federal and state governments to govern education. Under Article 1, Section 8 of the Constitution, Congress is given the power to provide for the general welfare of the country by means of whatever is necessary and proper.[3] It has been argued by scholars that "under this

[3] The necessary and proper clause is an important constitutional provision in the discussion of federalism. In *McCulloch v. Maryland*, 17 U.S. 316 (1819) the Supreme Court concluded that the necessary and proper clause, which relates to the provisions listed in Article 1, Section 8, empowers Congress to act outside the boundaries of the

general welfare clause that the federal government has assumed the power to initiate educational activities in its own right and to participate jointly with states, agencies, and individuals in educational activities."[4] Conversely, the Constitution also speaks to the right of state governments to govern public education. The Tenth Amendment explicitly grants rights not delegated to the United States by the Constitution and not prohibited by the States, are reserved to the States. This is why, as explored in Chapter 1, state constitutions have an explicit guarantee of a right to education, unlike the United States Constitution.[5] While education has traditionally been understood to operate within the purview of states, perhaps a lesser-known history highlights federal involvement in education for hundreds of years - dating back to the conception of the Constitution. In the following sections, I demonstrate how federal involvement in education has shifted over time with periods of rapid expansion and subsequent retraction.

Pre-Progressivism: Failed Efforts to Establish National Education (1870-1890)

The earliest indication of federal government involvement in public education can be detected in the Northwest Ordinance of 1787, which required states in the old Northwest Territory to set aside land and to use the proceeds for common schools.[6] Nevertheless, many scholars contend that the first significant federal involvement in education can be traced to the Progressive Era, with the development of the American Education Research Association

---

Constitution's explicit powers. Therefore, the power to govern education is an unenumerated power that flows from the power to provide for the country's general welfare.

[4] Carolyn Jefferson-Jenkins and Margaret Hawkins Hill, "Role Of Federal Government In Public Education: Historical Perspectives | League of Women Voters," June 22, 2011.

[5] As explained in Chapter 1, citing the work of Cass Sunstein, the federal Constitution provides procedural rights, whereas state governments provide substantive rights. This explains why the federal government is absent on a constitutionally protected right to education, while the right to education is enshrined in many state constitutions. See Cass Sunstein, "Why Does the American Constitution Lack Social and Economic Guarantees?" *University of Chicago Public Law & Legal Theory, Working Paper*, no. 36 (January 2003): 1–19. See Chapter 1, pages 2-8 for analysis of substantive and procedural rights.

[6] Northwest Ordinance of 1787 Article 3: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the *means of education* shall forever be encouraged" (emphasis added).

(AERA). However, this conclusion has been met with some skepticism, with some scholars suggesting that the Progressive Era movement and nationalization of education can only be understood within the "major but ultimately failed effort of the 1870s and 1880s to establish a national education system in the United States."[7] In 1949, Gordon C Lee published *The Struggle for Federal Aid, First Phase: A History of the Attempts to Obtain Federal Aid for the Commons Schools, 1870-1890*, detailing the pre-Progressive efforts to develop expansive federal roles within public education. The purpose of Lee's study was to analyze and review 20 bills that were introduced to Congress with the aim of providing general federal aid for common schools between 1870 and 1890. While these bills were largely unsuccessful, they set the stage for Progressive education reform. In the following sections, I synthesize Lee's discussion of two formative bills, yet ultimately unsuccessful bills: The Hoar Bill (1870-1871) and the Blair Bill (1882-1880).

The Hoar Bill to Establish a National System of Education (1870-1871)

As previously discussed in Chapter 1, a condition upon reentry into the Union following the Civil War was an explicit guarantee of education in state constitutions. On February 25, 1870 as the formerly seceded states were readmitted into the Union – and the Freedmen's Bureau funding was beginning to run out of money – the Hoar Bill was introduced to, "enforce the education provisions that had been written into the new Southern constitutions and to establish the kind of educational oversight and support provided by the Freedmen's Bureau on a more permanent basis."[8] Furthermore, under this bill, each state would be required to "provide for all the children within its borders, between the ages of six and eighteen years, suitable instruction in

[7] Nancy Beadie, "The Federal Role in Education and the Rise of Social Science Research: Historical and Comparative Perspectives," *Review of Research in Education* 40, no. 1 (March 1, 2016): 2.
[8] Ibid., 8.

reading, writing, orthography, arithmetic, geography, and the history of the United States."[9] George Hoar, a Massachusetts Republican representative, introduced the bill noting that the legislation "for the first time sought to compel by national authority the establishment of a thorough and efficient system of public instruction throughout the whole country."[10] Representative Hoar advocated that that education ought to be provided by the federal government because it is a condition of citizenship that has implications for voting.[11] Hoar argued in support of the constitutional authority for a substantial role of the federal government in public education under the Reconstruction Amendments:

> The Constitution, as now completed, provides that every person born or naturalized in the United States shall be a citizen thereof, and that the right of any citizen to vote shall not be abridged by reason of race, color, or previous servitude. By the system thus established all national questions are to be decided in the last resort by the opinion of the majority of the voters.... The vote of the humblest black man in Arkansas affects the value of the iron furnace in Pennsylvania, the wheat farm in Iowa, or the factory in Maine as much as does the vote of its owner.[12]

As Edgar W. Knight, an education scholar who reviewed Lee's original work a few years after its publication notes, "The Hoar Bill was perhaps the only significant attempt to impose by law a nationally controlled system of education in the states and localities, an attempt which is believed to have grown largely out of conditions in the southern states after 1865."[13] The bill ultimately did not pass, and it received criticism from educators worried about how the bill

[9] H.R. 1326,41st Cong. ? 19 (3d Sess. 1871) (amended bill) (emphasis omitted).
[10] Cong. Globe, 41st Cong., 2d Sess. app. at 478 (1870) (statement of Rep. Hoar); see H.R.
[11] Note this argument was covered in Chapter 1. I take particular issue with this constitutional interpretation because it is potentially exclusionary for undocumented individuals.
[12] See Cong. Globe, 41st Cong., 2d Sess. app. at 478 (1870) (statement of Rep. Hoar).
[13] Edgar W. Knight, review of *Review of The Struggle for Federal Aid. First Phase: A History of the Attempts to Obtain Federal Aid for the Common Schools, 1870-1890. Contributions to Education.*, by Gordon Canfield Lee, *The Journal of Southern History* 16, no. 3 (1950): 365.

would weaken state and local authority on education.[14] However, further investigation, "portrayed prevailing popular and professional sentiment as favoring (continued) aid for Southern education in the manner of the Freedmen's Bureau but rejecting general federal authority over education as inimical to republican principles."[15] Put differently, while the Hoar Bill did not pass, its introduction to Congress and its defense by members of Congress suggest that in the pre-Progressive era there was an emerging understanding, and perhaps even an embrace, of a necessary role of the federal government in public education.[16]

The Blair Bill and Federal Funds for Public Education (1882-1890)

The Blair Bill was first introduced in December of 1881 to aid in the establishment and support of common schools by providing gradual federal assistance over a 10-year period. The bill "introduced the idea of granting federal aid to the states in the form of direct appropriations from the national treasury."[17] More specifically, the bill proposed a distribution of funds based on the illiteracy rate in each state in an attempt to increase funds in areas of high illiteracy. The bill is, however, most significant, as scholars argue, because it "further developed the notion of state and local administration of public schools within a framework of conditions of federal aid."[18] Republican Senator and sponsor of the bill, Henry W. Blair of New Hampshire, argued that it was the responsibility of the federal government to help individuals self-actualize their

[14] Beadie (2016): 9.
[15] Ibid.
[16] Despite the fact that the bill ultimately did not pass in Congress, it garnered a few supporters. In the Congressional record, there are three key speeches in support of the bill, other than Hoar's, appear at CONG. GLOBE, 41st Cong., 3d Sess. app. 100 (1871) (Rep. Arnell); id. at 1072 (Rep. Clark); id. at 1243 (Rep. Lawrence); id. at 1375 (Rep. Townsend); id. app. at 189 (Rep. Prosser).
[17] Goodwin Liu, "Education, Equality, and National Citizenship," *The Yale Law Journal* 116, no. 2 (2006): 386.
[18] See Liu (2006): 387. This precedent is very important because this would later become the grounding for conditional federal aid for the civil rights acts, which helped with desegregation during the Era of Access and Inclusion (1954-1979).

responsibilities as citizens by expanding access to education. Senator Blair stated on the congressional floor:

> Our leading proposition is that the General Government possesses the power and has imposed upon itself the duty of educating the people of the United States whenever for any cause those people are deficient in that degree of education which is essential to the discharge of their duties as citizens either of the United States or of the several States wherein, they chance to reside.[19]

By invoking similar language about the role of the federal government in promoting education that Representative Hoar had used to promote the earlier Hoar Bill, "the Blair bill won impressive backing in the Senate from a bipartisan, geographically diverse coalition."[20] Furthermore, In presenting his bill, Blair "had amassed dozens of letters, testimony, and memorials from school superintendents, education experts, and influential leaders in the North and South urging the establishment of national aid to education."[21] The bill was particularly popular in the South and among Southern educational leaders. The bill also reached support from the newly founded National Education Association and numerous southern teachers' associations, which passed resolutions in favor of the Blair bill and sent petitions to Congress. Despite this bipartisan support, the Blair bill did not pass. The Hoar and Blair Bill are important legislative initiatives to consider when delving into the history of the federal government and education. While these pieces of legislation did not pass, they "sought to strengthen the ideal of nationhood arising from the creation of a new polity composed of citizens of the United States… In seeking to extend educational opportunity for all children, leading proponents of federal aid understood

[19] "S. Rep. No. 48-101, reprinted in 17 Cong. Rec. at 12" Cited from Liu (2006): 389.
[20] Liu (2006): 393.
[21] Ibid.

the measures as an exercise of Congress' power and duty to enforce and give substance to the guarantee of American citizenship."[22]

While the United States tried and failed to nationalize commitments to public education, between roughly 1870 and 1890, other emerging western European democracies were adopting a nationalized approach to education. In contrast to many other nations at this time," the United States administered virtually every aspect of curriculum policy, accreditation, certification, and hiring at the state and local levels, rather than national."[23] Some scholars have speculated that American congressmen were "conscious of these contemporary developments in other countries and invoked concern about the competitive advantage that such systems conferred on those nations when promoting the development of a national education system in the United States."[24] Regardless of the motivation, however, the pre-Progressive era is significant because it contextualizes the efforts of the later Progressive movement and demonstrates an early interaction between the federal government and public education - that lays the foundation for education reform during the Progressive Era.

Progressivism: Federal Interest and Activism Governing Education Policy (1897-1920)

As a response to the failed efforts to nationalize education, the Progressive movement (1897-1920) sparked a time of rapid development and reform in education. A critical part of the movement was a redefinition of the purpose of education. Instead of framing education as a means to activate citizenship, the goal was "to see education as a part of a larger social process and to shape educational policy accordingly; and to see education in general and schooling in

[22] Ibid., 394.
[23] Beadie (2016): 4.
[24] Ibid., 5.

particular as engines for reforming American society."[25] These sentiments were reflected in the writings of Progressive thinkers such as John Dewey (1859-1952), who defined education as a social process and advised that "education has no end beyond itself. It should not be preparation solely for the future, but rather living every stage of present development."[26] As Dewey wrote in *Education and Democracy:*

> Hence one of the weightiest problems with which the philosophy of education has to cope is the method of keeping a proper balance between the informal and the formal, the incidental and the intentional, modes of education. When the acquiring of information and of technical intellectual skill do not influence the formation of a social disposition, ordinary vital experience fails to gain in meaning, while schooling, in so far, creates only "sharps" in learning—that is, egoistic specialists. To avoid a split between what men consciously know because they are aware of having learned it by a specific job of learning, and what they unconsciously know because they have absorbed it in the formation of their characters by intercourse with others, becomes an increasingly delicate task with every development of special schooling.[27]

I provide these ideas from John Dewey not to discuss the Progressive philosophy on education, but rather to represent larger themes of how the role of education in the United States was changing during from the Pre-Progressive to the Progressive era. The Progressive movement marked a time in which the federal government was providing more aid to public education - situating itself as an agent of change in education policy. To highlight these efforts, in this section, I will be looking at the development of the Smith Hughes Act (1917) as a case study of the increasing role of the federal government in regulating public education during the Progressive Era.

---

[25] Robert L. Church, "Educational Psychology and Social Reform in the Progressive Era," *History of Education Quarterly* 11, no. 4 (1971): 390.
[26] Phyllis Sullivan, "John Dewey's Philosophy of Education," *The High School Journal* 49, no. 8 (1966): 391–97.
[27] John Dewey, "Education as Necessity of Life," in *Democracy and Education*, 1916, 13.

The Vocational Education Act, commonly known as the Smith-Hughes Act, was signed into law by President Woodrow Wilson on February 23, 1917. The law authorized the federal government to reimburse states for expenses incurred to maintain vocational education programs in agriculture, home economics, and trades and industry. The bill also stipulated that states would be aided by the federal government in training teachers in these given specialties. The programs offered a series of conditions to secure federal funding: individual state plans had to be submitted for approval by the national government, all funds had to be used for public education, and all necessary equipment would be supplied by the state or local government. To accommodate these conditions, the Federal Board of Vocational Education (1917-1946) was developed to ensure state cooperation. The support, and eventual passage of the bill, suggested that there was increasing support for federal regulation to support national education goals: to prepare citizens for the workforce and to effectively participate in the economy. As noted by journalists at the time, "the change of sentiment betokened by the passage of the Smith-Hughes act is presumably a part of the general awakening of interest in 'efficiency' and 'preparedness' which has recently been witnessed in our country, and which goes so far toward compensating use for the present and prospective evils of the World War."[28]

Perhaps what is most significant about the passage of the Smith-Hughes Act is the diverse coalition of labor unions and interest organizations that aided in the development and passage of the bill, including the National Education Association, American Federation of Labor, American Home Economic Association, and the U.S. Chamber of Commerce.[29] The Chamber of Commerce had significant interest in enhancing industrial efficiency, and argued financing

[28] "The Smith-Hughes Act for Vocational Education," *Scientific American* 117, no. 8 (1917): 130.
[29] John Hillison, "The Coalition That Supported the Smith-Hughes Act or a Case for Strange Bedfellows," *Journal of Vocational and Technical Education* 11, no. 2 (1995): 4–11.

vocational training was considered to be a way to strengthen the national economy. The Chamber held meetings in which members discussed and voted on federal aid in the establishment of vocational schools. In 1913, during its first annual meeting, resolutions were adopted endorsing federal aid in vocational education.[30] Later in 1916, a year before the passage of the Smith-Hughes Act, the Chamber conducted a survey among its diverse membership to examine the role of the federal government in aiding vocational education and training. An example of the survey question offered was: "The committee recommends liberal Federal appropriations for promotion of vocational education in the United States."[31] The committee found that more than two-third of members voted in favor of federal aid for vocational training in public schools.[32]

It must also be noted that educational policy at this time was beginning to divide between the political parties. Within this coalition for federal aid of vocational programing, the Democratic Party and Progressive Party were supporters of the Smith-Hughes Act and larger federal funding in education. The Democratic Party had expressed an explicit commitment to federal funding in public education during the 1912 and 1916 conventions.[33] The Progressive Party, and its champion President Teddy Roosevelt, also joined the coalition in support of vocational education. The two political parties set an early precedent for how educational policy, and subsequently the role of the federal government in providing educational services, would later be split among ideological lines and party affiliation.

The Smith-Hughes Act was indicative of a larger movement in which the federal government was playing an increasingly influential role in regulating the behavior of public schools. As scholars note, "From 1900 to 1917 a great deal of activity occurred with reference to

[30] John Hillison (1995).
[31] Ibid.
[32] Ibid.
[33] Ibid.

Federal vocational legislation. More than 30 bills introduced in Congress had implications for vocational education."[34] Importantly, the bill also mandated the cooperation between federal and state governments as a prerequisite for governance. As President Lydon B. Johnson expressed this during the 50th Anniversary of the Smith-Hughes Act. "One of the most important accomplishments of the Smith-Hughes Act was the establishment of cooperative activities between the federal government and the states. Financial support is provided to our country's most worthwhile endeavor, the education and development of its youth."[35] This strategy would prove especially effective during the later educational periods, in which conditional federal funding and cooperation between state and federal governments would prove necessary for desegregation. The Progressive Era and its commitment to education reform is essential in contextualizing federal involvement in public education. This discussion lays the foundation for federal intervention and involvement in educational projects during the mid to late twentieth century, during a period I refer to as the era of Access and Inclusion.

Access and Inclusion: Education as a Means to Achieve Equality (1954-1979)

The Civil Rights movement marked a time of rapid expansion in the federal government's role in ensuring access to education. In 1954, when segregation in public schooling was found to be unconstitutional in *Brown v. Board of Education* (1954),[36] there was resistance from states to integrate schools.[37] The Court could not enforce its ruling, which presented the federal government with a choice: to continue to let the states resist the ruling of the Court or to

[34] Ibid.
[35] *Statement by the President on the 50th Anniversary of the Smith-Hughes Vocational Education Act*, February 1967.
[36] *Brown v. Board of Education of Topeka, Kansas* 347 U.S. 483 (1954).
[37] The federal government expanded into educational matters from the late 1940s through the 1970s as part of the broader cold-war defensive strategy against the Soviet Union. The *Brown* decision, as Mary Dudziak argues, was at least, in part, influenced by Cold-War strategy to gain international acclaim and support. See: Dudziak, Mary L. "Brown as a Cold War Case." *The Journal of American History* 91, no. 1 (2004): 32–42.

enforce the Court's mandate with federal intervention. In this section, I demonstrate how Title VI of the Civil Rights Act of 1964 and Elementary and Secondary Education Act (ESEA) of 1965 were federal responses to the resistance of *Brown* that reflected an evolving purpose of education in American society: education as a mechanism to fight poverty and racism.

Prior to the Civil Rights movement, education was "never more than a marginal concern during the 1930s. Nor was the connection between race and poverty, education, and economic opportunity a major topic of debate and discussion among policy makers."[38] This shift had changed by 1954 in which education was considered to be a method to eradicate poverty and promote social equality. For example, *The Annual Report of the Council of Economic Advisors,* published under the Johnson Administration, situated education as a mechanism for sustaining the economy and eliminating racial discrimination. The report notes:

> If children of poor families can be given skills and motivation, they will not become poor adults. Too many young people are today condemned to grossly inadequate schools and instruction. Many communities lack resources for developing adequate schools or attracting teachers of high quality. Other communities concentrate their resources in the higher income areas, providing inadequate educational opportunities to those at the bottom of the economic ladder. Effective education for children of poor families must be tailored to their special needs; and such education is more costly and surely more difficult than for children from homes that are economically and socially more secure. The school must play a larger role in the development of poor youngsters if they are to have, in fact, 'equal opportunity.'[39]

For perhaps the first time in educational history, the connection between education, race, and class was identified. As scholars note, "For the most part, the report attributed poverty to racial discrimination, regional unemployment, low wages, and inadequate transfer payments, and

[38] Harvey Kantor and Robert Lowe, "Class, Race, and the Emergence of Federal Education Policy: From the New Deal to the Great Society," *Educational Researcher* 24, no. 3 (1995): 6.
[39] *The Annual Report of the Council of Economic Advisors,* 75.

it recognized that, although rising productivity had reduced the number of Americans living below the poverty line, 'in the future economic growth alone will provide relatively fewer escapes from poverty."[40] Thus, the identification of educational opportunity as a means to advance President Johnson's "War on Poverty"[41] opened a pathway for the expansion of federal activity within education.

Despite these evolving notions about the changing role of education in American society, the *Brown* decision and its implementation of "all deliberate speed"[42] had been stymied by the resistance from Southern States. Immediately following the decision, in 1956, 26 of the 138 southern members of Congress signed the Southern Manifesto, which expressed outrage at the Supreme Court's decision in *Brown*. The Manifesto states, in part:

> We regard the decisions of the Supreme Court in the school cases as a clear abuse of judicial power. It climaxes a trend in the Federal Judiciary undertaking to legislate, in derogation of the authority of Congress, and to encroach upon the reserved rights of the States and the people...The original Constitution does not mention education. Neither does the 14th Amendment nor any other amendment. The debates preceding the submission of the 14th Amendment clearly show that there was no intent that it should affect the system of education maintained by the States.[43]

---

[40] Kantor and Lowe (1995): 7.

[41] In President Johnson's State of the Union Address in January of 1964, he asked Congress to declare an "unconditional war on poverty" to "not only relieve the symptom of poverty, but to cure it, and above all, to prevent it." The U.S. Council of Economic Affairs, 50 years after the War on Poverty, wrote; "The War on Poverty ushered a new era of Federal Government leadership in providing income and nutrition support, *access to education*, skills training, health insurance, and a myriad of other services to low-income Americans." See United States: Executive Office of the President: Council of Economic Advisers and United States Barack H. Obama, "THE WAR ON POVERTY 50 YEARS LATER: A PROGRESS REPORT. Chapter 6," *Economic Report of the President (2014)*, March 10, 2014, 221 (emphasis added).

[42] A year following the *Brown* decision, the Court remanded the decision to be implemented with "all deliberate speed." However, for many students' integration was not immediately actualized given the ambiguity of the Court's instructions. As Julian Bond writes, "For the first ten years after 1954, the emphasis was more on 'deliberate' than on 'speed.' The focus was on dismantling the dual school systems in the South, the products of de jure segregation, and in southern accents, all deliberate speed meant any considerable delay. Actual integration was more a legal fiction than fact." See Julian Bond, "With All Deliberate Speed: Brown v. Board of Education The Addison C. Harris Lecture," *Indiana Law Journal* 90, no. 4 (2015): 1676.

[43] The Southern Manifesto was a direct response to the *Brown* ruling which rejected the Court's affirmation that segregation was unconstitutional. The resolution was supported by 19 Senators and 77 Members of the House of Representatives. The entire House delegations of Alabama, Arkansas, Georgia, Louisiana, Mississippi, South

The Southern Manifesto and its supporters proved defiant, as many Southern states refused to integrate Black students in mainstream schools.[44] Many state politicians and government officials openly announced their disapproval of the Court's decision and defiance of the ruling. Perhaps this attitude is best encapsulated by Alabama Governor George Wallace's inaugural address in 1963:

> Today I have stood, where once Jefferson Davis stood, and took an oath to my people. It is very appropriate then that from this Cradle of the Confederacy, this very Heart of the Great Anglo-Saxon Southland, that today we sound the drum for freedom as have our generations of forebears before us done, time and time again through history. Let us rise to the call of freedom- loving blood that is in us and send our answer to the tyranny that clanks its chains upon the South. In the name of the greatest people that have ever trod this earth, I draw the line in the dust and toss the gauntlet before the feet of tyranny . . . and I say . . . segregation today . . . segregation tomorrow . . . segregation forever.[45]

In response to the growing dismissal of *Brown* and increasing racial tensions in schools, Congress passed the Civil Rights Act of 1964. This law has many important provisions that are helpful to understand within the context of the Civil Rights Movement. However, for the purposes of this discussion, I limit my analysis to Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race in programs or activities receiving federal assistance. The bill was signed into law on July 2, 1964, by President Johnson by an overwhelming majority in both the House (290-130) and the Senate (73-27). Title VI states:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Carolina, and Virginia signed. Both senators from Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia signed.

[44] It is essential to note that resistance to racial integration in school following Brown was prevalent throughout the country - not just in the South. See James Sullivan and 2023, "'The Busing Battleground' Revisits a Painful Chapter in Boston's History, One That Still Reverberates - The Boston Globe," BostonGlobe.com, 2023; William E. Farrell, "School Integration Resisted in Cities of North," *The New York Times*, May 13, 1974.

[45] The Inaugural Address of Governor George C. Wallace, January 14, 1963.

Title VI provided the U.S. attorney general the opportunity to initiate lawsuits to compel desegregation in local districts and allowed the Department of Health, Education, and Welfare[46] to collect data on school employment based on race to evaluate desegregation efforts.[47] The implications of Title VI were critical to improving educational opportunities for students of color. Student performance on the National Assessment of Education Progress increased in the subject of science, math, and reading, with the performance gap between white and Black students narrowing since the 1970s.[48] The dropout rate of Black students had declined from 20.5% in 1976 to 13% in 1996[49] and there was an increase of 75% of Black students receiving a bachelor's degree in engineering between 1981 to 1996.[50] These statistics are not provided to suggest that Title VI of the Civil Rights Act solved racial inequality in education, but rather to suggest that federal intervention - particularly the threat of withholding federal funds from schools that engaged in racially discriminatory behavior - influenced reluctant state actors to abide by the *Brown* decision. In this way, the federal government's regulatory power in education had expanded, from the Progressive Era, to safeguard educational rights and freedoms.

The Elementary and Secondary Education Act (ESEA) of 1965 was another notable expansion of the federal government's authority in regulating education. However, legal scholars suggest that Title VI provided the framework and precedent for future expansion of federal regulation in education - namely in the case of ESEA. As noted by jurists, "It is a fair assumption

---

[46] The Department of Health, Education, and Welfare was a cabinet agency from 1953 to 1979. The Department was eventually separated into the Department of Education and the Department of Health and Human Services in 1979.
[47] Frank Brown, "The First Serious Implementation of Brown: The 1964 Civil Rights Act and Beyond," *The Journal of Negro Education* 73, no. 3 (2004): 182–90; Frankenberg, Erica, and Kendra Taylor. "ESEA and the Civil Rights Act: An Interbranch Approach to Furthering Desegregation." *RSF: The Russell Sage Foundation Journal of the Social Sciences* 1, no. 3 (2015): 32–49.
[48] *NAEP 1996 Trends in Academic Progress*, pages V, XIV, and XV.
[49] *Dropout Rates in the United States:* 1996, table A23, page 58.
[50] *Digest of Education Statistics*, 1985-86 edition, table 116, page 134; and *Degrees and Other Awards Conferred by Degree- Granting Institutions: 1995-96*, table 4b, page 15.

that Congress would not have taken this step [passing ESEA] had Title VI not established the principle that schools receiving federal assistance must meet uniform national standards for desegregation."[51]

ESEA provided federal assistance to disadvantaged and low-income students under Title 1[52] and provided programs for teachers, principals, and school administrators; programs to support English language acquisition; after-school instruction and care; programs to support rural education; and programs to support Indigenous education. These programs were conditioned on the compliance of national standards of anti-discrimination in schools. As scholars, Frankenberg and Taylor, suggest these educational goals were in pursuit of larger goals to eradicate poverty and racism: "ESEA was part of Johnson's broader Great Society. The Great Society, with an ambitious goal to cure and prevent poverty, contained a variety of legislative initiatives to improve the education, health, and job skills for low-income individuals."[53]

ESEA proved to effectively motivate compliant state behavior given the massive increase in educational funds, which went from $176 million in 1964 to $590 million in 1966.[54] Many districts and states that had previously resisted integration were at the mercy of federal aid that was too lucrative to ignore. Consequently, the occurrence of noncompliance, as reported by the Department of Health, Education, and Welfare (HEW) decreased significantly within the first

[51] *US v. Jefferson Co. Bd. of Education*, 372. F. 836 (5th Circuit, 1966), 851). Cited from Erica Frankenberg and Kendra Taylor, "ESEA and the Civil Rights Act: An Interbranch Approach to Furthering Desegregation," *RSF: The Russell Sage Foundation Journal of the Social Sciences* 1, no. 3 (2015): 32–49.
[52] Title I, according to the Congressional Research Service, "authorizes aid to local educational agencies (LEAs) for the education of disadvantaged children. Title I grants provide supplementary educational and related services to low-achieving and other students attending elementary and secondary schools with relatively high concentrations of children from low-income families. The Title I program is the larger grant program authorized under the ESEA and is funded at $18.4 billion for FY2023." Skinner, Rebecca R. and Sorenson, Isobel. (2023, September 19). *ESEA Title I-A Formulas: A Primer.* (CRS Report No. R47702).
[53] Erica Frankenberg and Kendra Taylor, "ESEA and the Civil Rights Act: An Interbranch Approach to Furthering Desegregation," *RSF: The Russell Sage Foundation Journal of the Social Sciences* 1, no. 3 (2015): 36.
[54] Ibid., 37.

few years of ESEA's passage.[55] For example, a study analyzing rates of desegregation in 1300 school districts in Southern states, it was determined that desegregation was improving under HEW enforcement and oversight.[56] The pace of desegregation with federal oversight and regulation had quickened the pace of "all deliberate speed" that was instructed in *Brown.*

The expansion of the federal government in securing the education rights of students of color during the Civil Rights movement is a critical moment in the evolving relationship between the federal government and public education. Title VI of the Civil Rights Act and ESEA were transformative pieces of legislation that reconceptualized the role of the federal government in ensuring equitable access to education. It was during this time, in 1979, that the Department of Education was established - signaling an expansion of bureaucratic agencies to execute federal initiatives.[57] While the federal government has been implicated in education since the beginning of the country's conception, as expressed earlier in this chapter, the role of the federal government in education was amplified - and may have even reached its peak - during the mid to late twentieth century. These dynamics and the expansion of the federal government would shift during the late twentieth century and early twenty-first century under conservative leadership - which aimed to limit the power of the federal government to influence the operation of public schools and return educational authority to state and local governments.

[55] Ibid.
[56] Giles, Michael W. 1975. "H.E.W. Versus the Federal Courts: A Comparison of School Desegregation Enforcement." American Politics Research 3(1): 81–90.
[57] The Department of Education was signed by Carter; previously understood as HEW (Health, Education, and Welfare).

Standards and Results: Efforts to Deemphasize the Federal Government's Capacity to Govern Public Education (1980 - Present)

After what scholars have suggested was the most extensive period of federal government involvement in education, a countermovement to take back this power to the state and local governments took shape during the Reagan presidency. President Reagan campaigned on eliminating the Department of Education as part of a larger ideological vision to weaken big government and return power to the states.[58] This position was inspired by the belief that government intervention in education was contributing to American education falling behind international competitors. Once again, the idea of education's purpose was shifting. While education had previously been viewed as a tool to fight racism and poverty during a period of Access and Inclusion, the role of education shifted to be viewed as a mechanism to promote American influence by imposing strict systems of accountability. In this section, I briefly chronicle the developments in national education policy beginning in the 1980s under President Reagan by outlining efforts to weaken the DOE and examine the publication of *A Nation at Risk,* which influenced future legislation such as No Child Left Behind (2001).

Conservative Backlash to Expansive Federal Government Involvement in Education

The Department of Education was established in 1979 and signed into law under President Jimmy Carter.[59] The law officially took effect in 1980, when President Reagan entered

[58] In Ronald Reagan's Inaugural Address in January of 1981 he stated, "In this present crisis, government is not the solution to our problem, government is the problem." From time to time we've been tempted to believe that society has become too complex to be managed by self-rule, that government by an elite group is superior to government for, by, and of the people." Reagan's emphasis on self-rule and limited federal government intervention became a focal point of his Presidency - transitioning a departure from the expansive governmental authority that was exercised during President Johnson and the New Deal. Reagan's decentralized approach to governance had severe implications for federal education policy. See Cook, Daniel M., and Andrew J. Polsky. "Political time reconsidered: Unbuilding and rebuilding the state under the Reagan administration." American Politics Research 33, no. 4 (2005): 577-605.

[59] President Carter created the Department of Education, which was once the Department of Health, Education, and Welfare, in 1980.

the White House. Reagan, who publicly characterized the emergence of the DOE as "Jimmy Carter's new bureaucratic boondoggle,"[60] had campaigned on the promise of abolishing the department. Reagan's declared battle with the Department of Education was a significant aspect of a much larger war against the increased role of the federal government. These attitudes towards the DOE and fear of expansion of the federal government were clearly articulated in Reagan's addresses to the nation. During his 1982 State of the Union address to Congress, he said, "The budget plan I submitted to you on February 8th will realize major savings by dismantling the Departments of Energy and Education and by eliminating ineffective subsidies for business."[61] Former President Reagan did not necessarily believe that solving problems in education were unimportant, but, instead, concluded that the federal government should not be part of the solution. As President Reagan stated, "Better education doesn't mean a bigger Department of Education. In fact that department should be abolished."[62] These principles and concerns were at the forefront of Reagan's education policy, which David Clark and Mary Anne Aminot have coined the "5Ds."[63]

Reagan's targeted efforts to limit the power of the department to act, were known as the five Ds. The first D stands for *diminution*, which was the priority of the Reagan administration to limit federal expenditures in education. Next was *deregulation* and the reduction of federal monitoring. This strategy had dire implications for the enforcement of civil rights in schools, particularly regarding the controversy of busing and desegregation. The next strategy was

---

[60] When the Department of Education was established in May of 1980, President Reagan stated, "At 11:01 a.m. Eastern Standard Time on Sunday, President Jimmy Carter's new bureaucratic boondoggle was born: the Department of Education. … Welfare and education are two functions that should be primarily carried out at the state and local levels."
[61] *State of the Union Address*, 1982.
[62] *Radio Address to the Nation on Education*, 1983.
[63] David L. Clark and Mary Anne Amiot, "The Impact of the Reagan Administration on Federal Education Policy," *The Phi Delta Kappan* 63, no. 4 (1981): 258–62.

decentralization. As Clark and Aminot note, "the Reagan administration believed that a major cause of the ills of U.S. education is the intrusion of the federal government into what should be a state and local responsibility. This argument rests on the constitutional rights of the states in education and the notion that more proximate control will result in better educational choices, increased responsiveness to local needs, and more effective use of local resources."[64] The fourth "D" stood for *disestablishment*, which referred to the abolishment of the DOE, which was ultimately proved to be untenable given bipartisan support for the organization. All of these strategies contributed to the final "D" which stood for *de-emphasis*. By diminishing the funds of federal education programs, deregulating and decentralizing federal oversight, and delegitimizing the establishment of the DOE, Reagan effectively deemphasized the role of the federal government in public education.

A Nation at Risk and the Shifting Role of Education

In April of 1983 the National Commission on Excellence in Education published a report called *A Nation at Risk: The Imperative for Educational Reform,* which served as an open letter to the American public. The contents of this report advanced President Reagan's politicized ideas about how the federal government involvement in education had weakened the nation's education system and advised that heightened standards and systems of accountability were necessary to maintain international standing and compete with global competition. The report, published during the Cold War, had subtle implications that American education needed to improve for the United States to win "the minds and hearts" of the third world.[65] As the report notes:

[64] Ibid., 258.

[65] The Cold War imperative was largely centered on winning over the "hearts and minds" of people from the Third World. Both the United States and Soviet leaders fought a cultural war to "win over" the Third World. As President Reagan stated, in a remark at the Annual Washington Conference of the American Legion in 1983, "The American

> The time is long past when America's destiny was assured simply by an abundance of natural resources and inexhaustible human enthusiasm, and by our relative isolation from the malignant problems of older civilizations. The world is indeed one global village. We live among determined, well-educated, and strongly motivated competitors. We compete with them for international standing and markets, not only with products but with the ideas of our laboratories and neighborhood workshops. America's position in the world may once have been reasonably secure with only a few exceptionally well-trained men and women. It is no longer.[66]

Furthermore, the report warns:

> If only to keep and improve on the slim competitive edge we still retain in world markets, we must dedicate ourselves to the reform of our educational system for the benefit of all - old and young alike, affluent and poor, majority and minority. Learning is the indispensable investment required for success in the information age we are entering.[67]

The report makes several recommendations, including for the enhancements of course content, increased standards and expectations, extension of the school day, and advanced preparation of teachers and leadership. An implied recommendation from this report, however, was that the federal government is responsible for the downfall of American education. As Reagan stated in an address to the nation following the publication of *A Nation at Risk:*

> Well, the government seems to forget that education begins in the home, where it's a parental right and responsibility. Both our private and public schools exist to aid your families in the instruction of your child. For too many years, people here in Washington acted like your families' wishes were only getting in the way. We've seen that the "Washington knows best' attitude was wrought.[68]

---

dream lives - not only in the hearts and minds of our own countrymen but in the hearts and minds of millions of the world's person in both free and oppressed societies who look to us for leadership. As long as that dream lives, as long as we continue to defend it, America has a future, and all mankind has reason to hope." See for further exploration: Kenneth A. Osgood, "Hearts and Minds: The Unconventional Cold War," *Journal of Cold War Studies* 4, no. 2 (2002): 85–107.

[66] A Nation at Risk: The Imperative for Educational Reform, April 1983, 10.

[67] Ibid.

[68] *Radio Address to the Nation on Education*, 1983.

Impact of A Nation at Risk and Setting the Stage for No Child Left Behind

The publication of *A Nation at Risk* provides the necessary context for the emphasis on testing as a means of accountability that proliferated during the early twenty-first century. This development is significant because the focus on schooling transitioned from equality to results. As Brent Edwards and David DeMatthews note, "while the first wave was about education quality (and particularly the gap between black and white students) as well as empowerment and equality, the second wave ultimately tended to reflect, at least on a discursive level, the larger foci of education reform - student achievement, accountability, and efficiency."[69] The priority on standards and accountability, as suggested in *A Nation at Risk* culminated in No Child Left Behind (NCLB) in 2001.

NCLB was signed into law by President Bush on January 8 of 2002 with an overwhelming majority in both chambers of Congress (87-10 in the Senate and 381-41 in the House). A critical component of NCLB was accountability. Under NCLB, every state was required to set standards for grade level achievement and develop a system to measure the progress of all students for meeting those grade level standards. States had to develop adequate yearly progress (AYP) culminating in 100% proficiency by a 10-year period. Failure to achieve these standards, resulted in public schools transitioning into a charter school, replacing all or most of the school staff, or to turn operations to the state or a private company.[70] NCLB did not minimize federal intervention in public education, but rather expanded it. Unlike Reagan, President Bush advocated for the expansion of federal intervention in public education by co-opting the bureaucracy to advance the Republican agenda. As Lorraine McDonnel notes,

[69] D. Brent Edwards Jr and David DeMatthews, "Historical Trends in Educational Decentralization in the United States and Developing Countries: A Periodization and Comparison in the Post-WWII Context," *Education Policy Analysis Archives* 22 (June 9, 2014), 9.
[70] P.L 107-110.

"although NCLB expanded federal regulation, this newest version reflects an evolution of the federal role rather than a radical redefinition, with NCLB's design only possible because of profound changes in the state role over the past 20 years."[71] This is significant because the purpose of federal government intervention in public schools was no longer merely evolving. The purpose of federal intervention had changed from an expansive way to compel state compliance with civil rights standards during the Access and Inclusion era, to, instead a way to demand academic performance and punish states that did not perform. As President Bush stated following the passage of NCLB:

> "Government cannot solve every problem, but it can encourage people and communities to help themselves and to help one another. Often the truest kind of compassion is to help citizens build lives of their own. I call my philosophy and approach 'compassionate conservatism.' It is compassionate to actively help our fellow citizens in need. It is conservative to insist on responsibility and results.[72]

Thus, what is significant about NCLB is that President Bush was able to utilize federal government oversight and regulation while claiming to enhance the roles of state and local governments to develop their own standards and systems of accountability. It is essentially the same playbook that more liberal Presidencies, like Johnson used during the War on Poverty, but in the pursuit of different seemingly more conservative objectives. President Bush's federal education spending during NCLB was the largest under any presidency since President Johnson. The Department of Education had grown 69.6 percent between 2002 and 2004 from $46,282 million in FY2002 to 60,600 million in FY2004.[73] This approach of the "compassionate

[71] Lorraine M. McDonnell, "No Child Left Behind and the Federal Role in Education: Evolution or Revolution?," *Peabody Journal of Education* 80, no. 2 (2005): 19–38.
[72] President Promotes Compassionate Conservatism Speech, 2002.
[73] Veronique de Rugy and Marie Gryphon, "Elimination Lost: What Happened to Abolishing the Department of Education?," Cato Institute, February 11, 2004.

conservative" is what distinguishes President Bush from his other contemporaries, notably Reagan who advocated for minimal federal involvement and spending.[74] However, NCLB ultimately proved to have a complicated legacy with several scholars and experts in the field of education suggesting that the law was ultimately counterproductive and contributed to the deepening divide of the performance gap, placed too strong an emphasis on high stakes testing, promoted the privatization of schools, and punished underperforming schools who were in the most need of federal funds.[75] Needless to say, the bill failed to pass when it was put for reauthorization in 2007. Since the Bush administration, there have been many attempts to develop education reform policies. Most notably, is *Every Student Succeeds Act* signed under President Obama signed in December of 2015, which reauthorized the ESEA and has been met with mixed results.[76]

[74] The philosophy of the compassionate conservative was an attempt to reframe the dichotomy between big government versus indifferent government. As President Bush stated, "I call my philosophy and approach compassionate conservatism. It is compassionate to actively help our fellow citizens in need. It is conservative to insist on responsibility and results. And with this hopeful approach, we will made a real difference in people's lives."

[75] While the legacy of No Child Left Behind is outside of the scope of my thesis, many scholars have criticized the law as having unintentional consequences for teachers and students alike despite its altruistic intentions. See Thomas Rentschler, "No Child Left Behind: Admirable Goals, Disastrous Outcomes," *Widener Law Review* 12, no. 2 (2006 2005): 637–64; Rochelle L. Rowley and David W. Wright, "No 'White' Child Left Behind: The Academic Achievement Gap between Black and White Students," *The Journal of Negro Education* 80, no. 2 (2011): 93–107; Lois Harrison-Jones, "No Child Left Behind and Implications for Black Students," *The Journal of Negro Education* 76, no. 3 (2007): 346–56; Thomas S. Dee and Brian Jacob, "The Impact of No Child Left Behind on Student Achievement," *Journal of Policy Analysis and Management* 30, no. 3 (2011): 418–46; Jason A. Grissom, Sean Nicholson-Crotty, and James R. Harrington, "Estimating the Effects of No Child Left Behind on Teachers' Work Environments and Job Attitudes," *Educational Evaluation and Policy Analysis* 36, no. 4 (2014): 417–36; Donald C. Orlich, "No Child Left Behind: An Illogical Accountability Model," *The Clearing House* 78, no. 1 (2004): 6–11; David Karen, "No Child Left Behind? Sociology Ignored!," *Sociology of Education* 78, no. 2 (2005): 165–69; James Ryan, "The Perverse Incentives of the No Child Left Behind Act," *New York University Law Review* 79 (December 9, 2003), 932-89.

[76] Similarly, while the impact of ESSA is beyond the scope of my thesis, several scholars have considered the legitimacy of the law and how it has impacted educational performance and accountability. See Laura Adler-Greene, "Every Student Succeeds Act: Are Schools Making Sure Every Student Succeeds?," *Touro Law Review* 35, no. 1 (January 1, 2019), 11-23; Souhila El Moussaoui, "The Every Student Succeeds Act and Its Impact on Vulnerable Children Chalk Talks," *Journal of Law & Education* 46, no. 3 (2017): 407–14; Derek W. Black, "Abandoning the Federal Role in Education: The Every Student Succeeds Act," *California Law Review* 105, no. 5 (2017): 1309–74.

Within the last fifty years, the role of the federal government in public education has shifted considerably. Transitioning from a period of enhanced federal authority to govern education in the fifties and sixties, this movement was stymied under the Reagan administration and rise of the conservative legal movement. Not only had the role of the federal government in education changed, but the purpose of education itself was evolving - particularly in the wake of *A Nation at Risk* and the Cold War. These fears and anxieties of falling behind were foundational to the development of NCLB, which is one of the most significant pieces of education reform within this last century. Despite the initial promise of NCLB and its bipartisan support, the law eventually proved to be ineffective and worsened inequalities in education that predated the law. The role of the federal government in education continues to change, however it seems as though the federal government will continue to play a role in the development of education policy - however it remains unclear to what extent.

As stated in the beginning of this chapter, the relationship between the federal government and public education has shifted throughout the nation's history. The purpose of this chapter was not so much to provide a comprehensive history of federal education policy, but rather to demonstrate that within these four time periods there is a contested balance between federal and state power in regulating public education. In the Pre Progressive and Progressive era there were indications of emerging federal power to regulate education that reached its apex during the era of Access and Inclusion. This federal power continued during the era of Standards and Accountability, but for different reasons. Additionally, the role of education within these "eras" also continued to evolve. The role of education had been understood during the Pre-Progressive era to be a means in which to actualize citizenship; During the Progressive era education was viewed to be a way to increase efficiency and productivity; Education was later

viewed as a tool to fight social inequality during the period I term the era of "Access and Inclusion"; and lastly, the purpose of education, once again shifted within the last fifty years to understand education as a principle means of competing internationally and strengthening the United States as a international leader.

The history of the federal government and public education is quite complicated, with its origins dating back to when the Constitution was written. Within each era there is a distinct attitude towards the role of government in public education, largely dependent on political, social, and economic context, and there is also an evolving purpose of education that is unique to that specific time period.[77] Understanding this history and the ways in which this relationship between the federal government and public education has shifted is essential as I situate the development of the Individuals with Disabilities Act (IDEA) as a key piece of legislation created within the era of Access and Inclusion in which there was an embrace of federal government involvement in education to promote the goals of education - which was designed to promote social equality.

The Why, How, and What of IDEA

The era of Access and Inclusion, in which I situate IDEA, was developed based upon the rulings of equal access in *Brown.* Thus, *Brown* not only had significant implications for students of color accessing education, but also developed a far-reaching precedent that any segregation in educational settings was discriminatory - particularly for students with disabilities.[78] *Brown* was critical in laying the groundwork for disability advocacy and the implementation of special education services in public schools. As Mitchell Yell accounts, "one of the first persons to

[77] See Table 1.
[78] Mitchell Yell, "Brown v. Board of Education and the Development of Special Education," *Intervention in School and Clinic* 57, no. 3 (January 1, 2022): 198–200.

comment on the applicability of the *Brown* ruling to persons with disabilities was Dr. Gunnar Dybwad, the executive director of the National Association of Parents and Friends of Mentally Retarded Children (now the Arc). Dr. Dybwad believed that the Brown ruling had great implications for families and their children with disabilities because these children often had no access to public education."[79] The ruling in *Brown* was foundational to future arguments for a right to education for students with disabilities.

The "Why": The Inception of the IDEA

IDEA was passed during an era of Access and Inclusion, where education was equalized to eliminate social inequalities as part of a larger war on poverty. Originally known as the Education for All Handicapped Children Act, IDEA is perhaps the most important piece of legislation governing special education to date by ensuring that all students receive *free, appropriate and public education* (hereby referred to as "FAPE"). In addition to understanding the content of the legislation itself, it is also important to understand its context - social, economic, political factors concerning its passage. By the 1970s, there was institutional pressure contributing to the growing demand for legal protections of students. As Tina Itkonen, a scholar of Special Education policy and politics, observed, "The 1970s was an era in which Congress began to emerge as an institution initiating substantial amounts of social policy."[80] In the years leading up to 1975, there were several social-reform legislative initiatives that passed including the Occupational and Health Act of 1970, Child Development Act of 1972, and perhaps, most notably, Section 504 of the Rehabilitation Act of 1973.[81]

---

[79] Gilhool, T. K. (2011). Visionary voices, Leaders, lessons, and legacy: An interview with Thomas K. Gilhool. Institute on Disabilities at Temple University. Cited from Yell (2022): 199.

[80] Tina Itkonen, "PL 94-142: Policy, Evolution, and Landscape Shift," *Issues in Teacher Education* 16, no. 2 (2007): 9.

[81] It is necessary to note the distinction between Section 504 of the Rehabilitation Act of 1973 and the Individuals with Disabilities Education Act. Section 504 was a Civil Rights law prohibiting organizations and employers from

The factors affecting IDEA's passage cannot be reduced to a single motivation.[82] However, for the purposes of this section, I look at the judicial and political circumstances surrounding the passage of IDEA. I examine how the federal courts identification of a right to education for disabled children, in two seminal district court decisions, and congressional investigations into the perilous state of special education triggered legislative action and ultimately the passage of IDEA as Americans understand it today. In this discussion, I draw on the framework of Louis Fischer's constitutional dialogues to explain how the interaction between the three federal branches of government shape political action - in this case, the development of IDEA.[83] According to Fischer constitutional dialogues can be described as "a process in which all three branches converge and interact with their separate interpretations."[84] Based on this framework, I situate Congressional action to initiate IDEA legislation within a larger constitutional dialogue between the federal courts and their findings of a constitutional right to education for students with disabilities.

---

excluding or denying anyone with a disability that significantly limits a major life function. The definition of disability is broad under this law, and as a result, more disabilities are covered under this law than under IDEA. The Individuals with Disabilities Education Act (IDEA) originated from the Department of Education as a special education law that guaranteed "*free appropriate public education*" that addresses the individual needs of students with disabilities through high school. For a student to be eligible for special education, they must have a disability covered under IDEA that harms their educational programming. According to IDEA, students with disabilities eligible for special education must be provided services in the least restrictive environment. IDEA and 504 plans are both designed to address the individual needs of children with disabilities to make school accessible for all students. However, they are distinct from one another.

[82] As Erik Schickler notes in *Disjointed Pluralism: Institutional Innovation and the Development of the U.S. Congress*, congress does not pass legislation based on a collective motivation. Under Schickler's disjointed pluralism theory, "the dynamics of institutional development derive from the interactions and tensions among competing coalitions promoting several different interests. These interactions and tensions are played out when members of Congress adopt a single institutional change, and over time as legislative organization develops through the accumulation of innovations, each sought by a different coalition promoting a different interest."Within the context of the IDEA, there are a multitude of congressional interests and stakeholders who stand to benefit from the passage of the IDEA. Thus, determining a uniform congressional intent can become reductive as it fails to "help up understand both the adaptability and the frustrations that characterize congressional organization." See Eric Schickler, *Disjointed Pluralism: Institutional Innovation and the Development of the U.S. Congress* (Princeton University Press, 2001).

[83] Fisher, (1988).

[84] Ibid., 3.

There are two central court decisions that developed the framework for expanding access to education for students with disabilities. In 1972, in P*ennsylvania Association for Retarded Citizens (PARC) v. Commonwealth of Pennsylvania* (1972)[85] the United States District Court for the Eastern District of Pennsylvania struck down a Pennsylvania state statute which enabled schools to deny children access to education who did not reach the mental age of five, by the time they begin first grade. PARC represented fourteen families with children with intellectual disabilities who had been denied access to education, claiming that this exclusion was violative of their rights under the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment. The Court found in favor of PARC issuing a consent decree[86] on October 8, 1972, which required states to evaluate and place all students with intellectual disabilities in a publicly funded educational setting. The consent agreement stated:

> It is the Commonwealth's obligation to place each mentally retarded child in a *free, public program of education and training appropriate to the child's capacity*…..Placement in a regular school is preferable to placement in a special school class is preferable to placement in any other type of program of education and training.[87]

It is essential to note the language in this excerpt. The court finds the State in charge of providing "free, public programs of education and training appropriate to the child's capacity." This language is the foundation of what would later become the standard known as FAPE in IDEA. By looking back at these records, it is evident that Congress and the federal circuit courts are engaging in constitutional dialogue, in which they are embracing a reading of the constitution which provides certain educational rights to students with disabilities - namely FAPE.

---

[85] 334 F. Supp. 279 (E.D. PA 1972).
[86] According to the Legal Information Institution, a consent decree is a decree made by a judge with the consent of all parties. It is distinct from a judgment because it is a settlement agreement between parties that agreed to by the respective parties and is not appealable.
[87] 334 F.Supp. 1257, 1259 (E.D. Pa 1971) (emphasis added).

A similar case followed that same year in *Mills v. Board of Education*[88] in which the United States District Court for the District of Columbia held that children could not be denied educational access on the basis of disability. In the case, the District of Columbia school system argued that although the State conceded that it had a responsibility to educate all students, they simply could not afford to do so given limited financial resources to educate students with disabilities or other "exceptional" students. In the decision, however, the Court noted that school districts cannot claim insufficient funds as an excuse for depriving intellectually disabled children of education. The court decision read:

> If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system, then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia Public School System, whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the "exceptional" or handicapped child than on the normal child.[89]

The *Mills* decision established a standard that school districts could no longer cite insufficient funds as a justification for depriving students with disabilities appropriate public education. Following the decision, there were twenty-seven court cases that contributed to growing pressure for the emergence of a federal law guaranteeing public education for children with disabilities. By 1972 it had been established in the federal courts that States must provide students with disabilities with publicly funded and appropriate education.

In light of these litigative developments, Congressional hearings were held to evaluate the state of public special education in the United States. In the committee hearings, the Bureau of Education for the Handicapped reported that of the more than 8 million children in the United

[88] 348 F. Supp. 866 (D.D.C. 1972).
[89] 348 F. Supp. 866 (D.D.C. 1972): 871.

States who require special education services, only 3.9 million children are receiving an appropriate education, 1.75 million are receiving no educational services at all, and 2.5 million are receiving an inappropriate education.[90] These grim statistics were effectively utilized to push for a federal law governing federal assistance to publicly funded education for students with disabilities, which culminated in the Education for All Handicapped Children Act of 1975.[91] Congressional records reflected a growing anxiety among congressmen of the worsening state of special education and a desire for a federal solution. A Senate report stated:

> This Nation had long embraced a philosophy that the right to a free appropriate public education is basic to equal opportunity and is vital to secure the future and prosperity of our people. It is contradictory to that philosophy when that right is not assured equally to all groups of people within the Nation. Certainly the failure to provide a right to education to handicapped children cannot be allowed to continue. [92]

Another Senate report concluded:

> It is this Committee's belief that the Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity. It can no longer be the policy of the Government to merely establish an unenforceable goal requiring all children to be in school. S. 6 takes positive steps to ensure that the rights of children and their families are protected.[93]

It is also important to note that within the congressional debates was an ideological debate of fiscal responsibility for providing education to states' special education systems. As per the *Mills* decision, the courts had determined that states could no longer refuse to provide specialized services given a lack of funding. While this decision did not explicitly require the

[90] Congressional record, U. S. C. C. A. N. 1975 at page 1433
[91] P.L. 94-142.
[92] S.Rep. No 168, 94th Cong., 1st session (1975).
[93] S.Rep No. 186, 94th Cong, 1st Sess (1975).

federal government to take on this responsibility, many argued that the financial burdens should be absorbed by the federal government. As Senator Jeffords argued:

> Some people feel very strongly…that the burden ought to be where the educational burdens have been in the past, that is with the local and State governments. Others, and I fall in this category, believe that, because of the extreme burden placed upon the real estate taxes of this country which have been used fundamentally to provide education and because of the financial straits in which our States find themselves, it is essential that we change our federal priorities. New areas of education which must be funded, such as we have here, should be absorbed and taken up within the Federal priorities… An appropriate education has been mandated by the courts. This is not some new program springing out of the imagination or the desire of Congress, starting as something completely new.[94]

Based on these testimonies, it is evident that the federal court's evolving understanding of the educational rights of disabled students, and subsequent discovery of the pressing issue of access to education for disabled children, were the pressing concerns motivating the passage of the IDEA. John Brademas, an original sponsor of the Bill, testified before a Senate subcommittee hearing, nearly ten years after the law had been passed. In his testimony, Brandemas spoke of the law's intention, highlighting congress' awareness of the concerns about the worsening state of special education in the United States:

> As late as 1973, we heard testimony in committee that our educational system completely excluded 1.75 million handicapped children and provided inadequate educational services to 2.5 million others. We listened to horror stories form educators, state officials, parents, and representatives of handicapped groups who told us of handicapped children placed in schools but left to languish with help; of children allowed to stagnate in large, impersonal state institutions; of children simply left at home with no chance of an education at all… A second point, often forgotten in the debate over PL 94-142, is that by 1973 the Courts had decided that the opportunity for a handicapped child to receive a publicly supported education was grounded in the United States Constitution as a right - and that the states were under an

[94] Ibid.

> obligation to ensure that right. Even as we were writing that legislation that was to become P: 94-142, 40 cases had been filed in 26 states to ensure that this obligation was being fulfilled.[95]

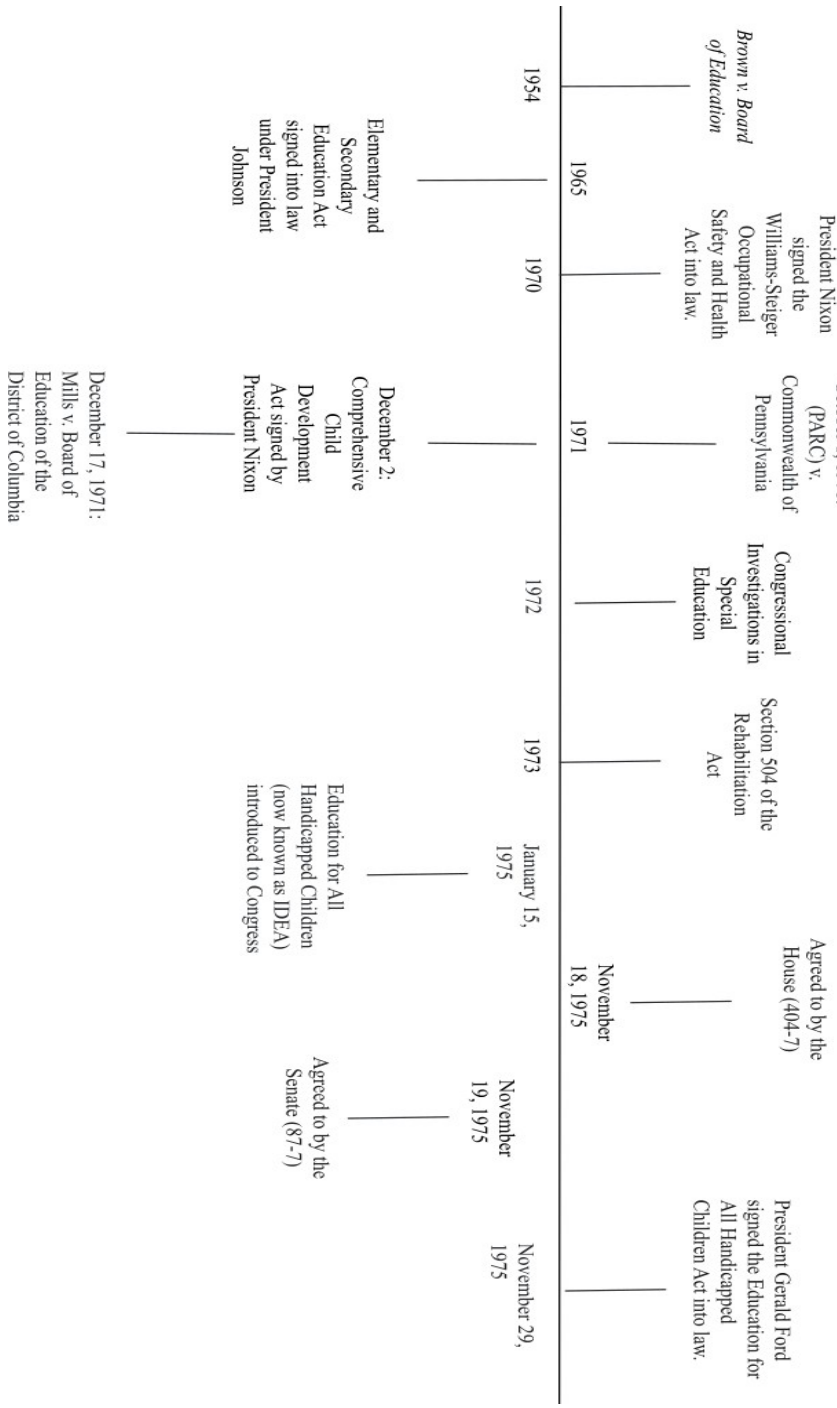
The Education for All Handicapped Children Act of 1975 fulfilled the Court's mandate in *Mills* by providing federal payments to states for the excess costs incurred for educating children with disabilities. As reflected in Senator Williams' statement: "It is hard to argue to the states that the Federal Government is serious about full educational opportunity for all handicapped children when we are not willing to invest money to make this goal a reality. If we are going to make a real commitment to full and appropriate services, and expect the states to carry through on this commitment, we will have to put our money where our mouth is."[96] In summation, the development of the Education for all Handicapped Children Act reflected a constitutional dialogue between Congress and the federal courts in a desire to address the educational needs for children with disabilities and spread awareness of the urgent need for reform in special education.

The "How": The Passage of IDEA

Passed merely ten months after its introduction into Congress, IDEA was a bipartisan effort that garnered widespread support. The bill was introduced into Congress on January 15 in 1975, sponsored by Senator Harrison Williams of New Jersey. The bill had many cosponsors, as depicted in Figure 3 - the majority of which identified as Democrats. The bill first passed by the House on November 18, 1975, by a vote of 404-7 and then passed the Senate in an 87-7 decision.

[95] Former Representative John Brademas, one of the original sponsors of P.L. 94-142 and currently president of New York University, testified before a Senate subcommittee at hearings marking the 10th anniversary of the law.
[96] Congressional Record, v. 118, May 16, 1972, p. 17478.

Figure 2: Timeline of the Passage of the Education for All Handicapped Children Act



The bill was signed into law by President Gerald Ford on November 29, 1975. At the time of its passage, the law was hailed as a triumph and extension of the civil rights movement. Senator Harrison A. Williams, the prime sponsor of the Senate said, "It is the most significant development in our national elementary and secondary education program since Title I was enacted 10 years ago."[97] Senator Robert T. Stafford, Republican of Vermont, went on record stating, "I think that today Congress makes a necessary statement of how we expect to treat our handicapped children," said Senator Robert T Stafford, Republican of Vermont. This is not only an act of law for quality education, but an act of love for our handicapped children."[98] Gene I. Maeroff at the New York Times coined the act, "a major educational breakthrough."[99] The bill was signed into law under President Ford on November 29, 1975, but not without some controversy.

On the day of the signing, President Ford expressed his reservations about the law stating, "Despite my strong support for full educational opportunities for our handicapped children, the funding levels proposed in this bill will simply not be possible if Federal expenditures are to be brought under control and a balanced budget achieved over the next few years."[100] Scholars suggest that President Ford felt, "the bill would be too expensive, would interfere with state responsibility, and would upset the balance of relationships between parents and local schools"[101] However, despite these reservations, President Ford ultimately signed the bill given its noble goals.

---

[97] Gene I. Maeroff Special To The New York Times, "Major Bill to Aid Handicapped Pupils Is Nearing Final Passage in Congress," *The New York Times*, November 6, 1975.
[98] Ibid.
[99] Ibid.
[100] President Gerald R. Ford's Statement on Signing the Education for All Handicapped Children Act of 1975, December 1975.
[101] Martin, Edwin W., Reed Martin, and Donna L. Terman. "The Legislative and LitigationHistory of Special Education." *The Future of Children* 6, no. 1 (1996): 25–39.

Table 3: Breakdown of Senate and House Co-Sponsorships of IDEA

Senate (29 Cosponsors - 22 Democrats, 7 Republicans)	**House (24 Cosponsors)**
Harrison Williams - Primary Sponsor (D); Lloyd, Bentsen (D, Texas); Joe, Biden (D, Delaware); Edward Brooke (R, Mass); Howard Cannon (D, NV); Lawton Chiles (D, FL); Richard Clark (D-IA); Alan Cranston (D-CA); John Culver (D-IA); Philip Hart (D-MI); William Hathway (D-ME); Ernest Hollings (D-SC); Hubert Humphrey (D-MN); Jacob Javits (R-NY); Edward Kennedy (D-MA); Warren Magnuson (D-WA); Gale McGee (D-WY); George McGovern (D-SD); Thomas McIntyre (D-NH); Lee Metcalf (D-MT); Walter, Mondale (D-MN); Frank Moss (D-UT); John Pastore (D-Ri); Claiborne Pell (D-RI); Charles Percy (R-IL); Jennings Randolph (D-WV); Richard Schwiker (R-PA); Robert Stafford (R, VT); Ted Stevens (R, AK); Robert Taft (R, OH).	John Brademas (D,I N, 3); Alphonzo Bell (R, CA, 28); Carl Dewey Perkins (D, KY, 7); Albert H Quie (R, MN, 1); Patsy T. Mink (D, HI, 2); Peter A. Peyser (R, NY, 23); Lloyd Meeds (D, WA, 2); James M. Jeffords (R, VT, At-Large); Shirley Chisholm (D, NY, 12); Larry Pressler (R, SD, 1); William Lehman (D, Fl, 13); Robert J Cornell (D, WI, 8); Edward Beard (D, RI, 2); Leo C. Zeferetti (D, NY, 15); George Miller (D, CA, 7); Tim L. Hall (D, IL, 15); William D Ford (D, MI, 15); Augustus F. Hawkins (D, CA, 21); Frank Jr. Thompson (D, NH,4); John H Dent (D, PA, 21); Mario Biaggi (D, NY, 10); James G O'Hara (D-MI-12); Ike Andrews (D-NC-4); Theodore M Risenhoover (D-OK-2); Paul Simon (D, Il, 24).

The "What": What IDEA Guarantees

The IDEA, as summarized by Congressional reports, "both authorizes federal funding for special education and related services and, for states that accept these funds, sets out principles under which special education and related services are to be provided."[102] There are four central components of this legislation: Part A provides general provisions involving the purposes of the act and related definitions; Part B contains provisions relating to the education of school-aged children and the state grants program for preschool children with disabilities (Section 619); Part C authorizes state grants for programs serving infants and toddlers with disabilities; and Part D contains the requirements for various national activities designed to

[102] Congressional Research Services. (2019). *The Individuals with Disabilities Education Act (IDEA) Funding: A Primer.* (CRS Report No. R44624).

improve the education of children with disabilities. For the purposes of my analysis, I will focus solely on Part B and its promise of free appropriate public education or FAPE. As outlined in the legislation, to ensure FAPE for all children there are certain guarantees including the development of Individualized Education Plans (IEPs) to develop goals and track student progress and procedural safeguards to protect the rights of students and their families. The most notable amendment to the Education for All Handicapped Children Act (IDEA) was in 1990, when the law was reauthorized, and its name changed to the Individuals with Disabilities Education Act. It has been reauthorized many times since 1990 to address contemporary needs, as detailed below.

Table 4: Timeline of IDEA Reauthorizations

Education for All Handicapped Children Act of 1975 (Public Law 94-142)	Guaranteed access to free, appropriate public education (FAPE) for all students with disabilities. The law also includes procedural protections for the rights of children with disabilities and their parents. These aims are achieved through financial incentives, in which public schools that receive federal funding must adhere to the protections and guidelines laid out in the Education for All Handicapped Children Act.
1986 Reauthorization (Public Law 99-457)	Reauthorized the discretionary programs included in the Act and stipulated that early intervention programs under the Act be provided to families of children with disabilities before they are enrolled in school.
1990 Reauthorization (Public Law 110-476)	Changed the law's name from Education for all Handicapped Children to the Individuals with Disabilities Education Act (IDEA). It also added autism spectrum disorder and traumatic brain injury as disability categories recognized under IDEA. Another key amendment was that this reauthorization included that individualized education plans (IEPs) include an individual transition plan (ITP) for students transitioning out of the public school system.
1997 Reauthorization (Public Law 105-17)	Expanded access to the general curriculum for students with disabilities; States were allowed to expand the definition of what constituted "developmental delay" to include students up to age 9; Formal process development for parents resolving disputes with schools and local educational agencies (LEAs).
2004 Reauthorization	Reauthorization aligned the IDEA with the requirements laid out in No Child Left Behind including raising standards for special education instructors and greater accountability and improved outcomes in standard tests.
Research-Based Interventions and Other New	Required schools to use research-based

Requirements (2006)	interventions for assisting students with disabilities or determining eligibility for special education services; Resolution provides regulatory requirements for mediation from the prior 2004 reauthorization.
Clarify and Strengthen Implementation and Administration of IDEA Programs (2008)	Regulated addressed: parental consent for special education services, non-attorney representation in due process hearings, allocation of fundings, efforts to employ individuals with disabilities, and state monitoring.
Clarify or Revise IDEA for Infants and Toddlers with Disabilities Programs (2011, 2013)	Both 2011 and 2013 programs included revisions to the provisions of IDEA that detail services for infants and toddlers with disabilities. The 2013 reauthorization includes more extensive language of the parental consent requirements and ensuring that parents are informed of all legal protections provided under the IDEA.
Maintain Fiscal Effort, Academic Achievement Standards/Alternative Assessment (2015)	Revisions revised provisions that required LEAs to maintain fiscal responsibility and removed states from their previously held authority to define learning standards and develop alternative assessment for students with disabilities.
Equity in IDEA (2016)	Revised regulations with the goal of promoting equity under the IDEA; establishes standard methodology states must employ to determine if its special education population is overrepresented by certain racial and ethnic categories; States must monitor disproportionate rates of policing and disciplinary actions of students with disabilities; Requires that LEA investigation instances of disproportionality in special education.

Conclusion

The IDEA is a pivotal piece of legislation for students with disabilities. Part I of this chapter provides the necessary historical context for the IDEA by creating four distinct historical periods that illustrate the tension between the federal government and public education. Within each time period, the relationship between the federal government and public education shifts to meet the evolving goals of education. After establishing these time periods in Part II of the chapter, I have looked extensively at the legislative history of the IDEA: including investigating Congressional intent to pass this legislation, evaluating the legislative process, and summarizing the content of the law itself. The historical summary outline suggests a long history of federal intervention in public education, which situates the IDEA as part of a broader commitment to provide equal educational access. Throughout the chapter, there are key moments in which the developments of IDEA suggest a constitutional dialogue between federal branches of government. A prime example of this dynamic occurs when Congress adopts the language of "free appropriate public education" that was developed in the *PARC* decision. In this way, Congress bilaterally responded to the emerging ideas from the federal judiciary about the rights of students with disabilities. This dynamic will become the focus of my next chapter in which I examine how the judicial response to the goals set out in IDEA in a seminal Supreme Court decision in 1982 known as *Board of Ed. of Hendrick Hudson Central School Dist., Westchester City. v. Rowley.*[103]

[103] 458 U.S. 176 (1982).

Chapter 4: Appropriate Education in Rowley

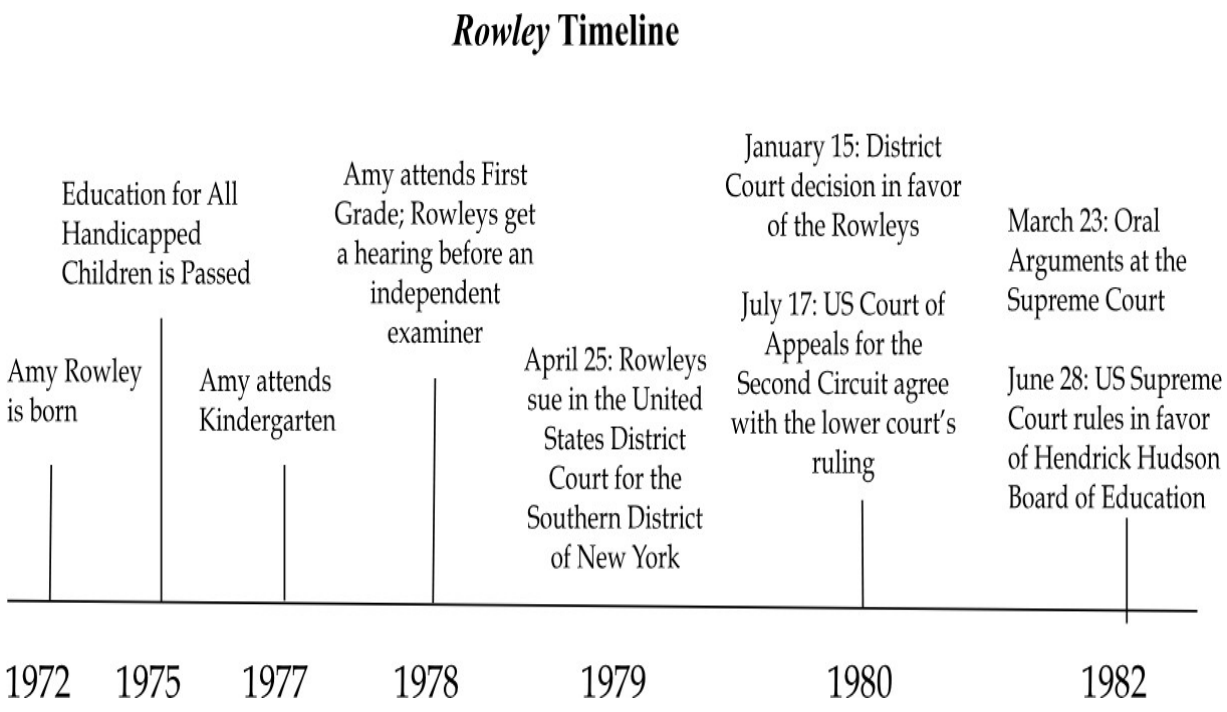
The central provision of the Education for All Handicapped Children Act (EHACA) is its guarantee of free appropriate public education (FAPE).[1] While the EHACA set the standard for educational programming for students with disabilities, the law failed to address what constituted "free appropriate public education." This language, particularly what appropriateness does or does not include, became the centerpiece of subsequent litigation. The Supreme Court first interpreted the meaning of FAPE in the case of *Board of Hendrick Hudson Central School District, Westchester City v. Rowley,* herein referred to as *Rowley.*[2] In this chapter, I begin by evaluating *Rowley*, including tracing the case from its inception through the district court to the appellate court, and ultimately up to the Supreme Court. In so doing, I provide a brief summation of the jurists' findings as it relates to their interpretations of what the EHACA compels. After this analysis, I explore the extant scholarship on the *Rowley* decision, which has critiqued the Court's decision as both ahistorical and inconsistent with the goals of the EHACA. Finally, I detail how the *Rowley's* precedential value has eroded over time as a result of 1) state litigation, 2) more extensive and clearer state educational standards, and 3) the 1997 amendments to federal EHACA, referred to at the time as the Individuals with Disabilities Education Act (IDEA).

Through this analysis, I ultimately contend that *Rowley* lays bare the meaning of FAPE within the EAHCA, particularly its appropriateness standard which hinges upon whether FAPE only requires minimally adequate education or whether it requires more substantial rights to equal educational access. The district and appellate courts in *Rowley* adopted an understanding of

[1] For the purposes of this chapter, I will be referring to the 1975 law as EAHCA instead of IDEA because *Rowley* took place in 1982 - before the law was renamed IDEA in 1997.
[2] 458 US 176 (1982).

FAPE that adopted the latter standard. The district and appellate court found EAHCA required states to provide enhanced education benefits that went above mere adequacy. By contrast, the Supreme Court concluded that FAPE required only a minimally beneficial education. Based on my analysis of the existing scholarship and the State Supreme Courts and Federal legislature's response to *Rowley*, it is evident that scholars and policymakers have overwhelmingly concluded that the U.S. Supreme Court incorrectly interpreted this congressional statute by setting the standard of FAPE too low. This low standard, so roundly rejected by legal scholars and state-level policymakers, is nevertheless a manifestation of the broader objective of the conservative legal movements to minimize the obligations of the federal government.

Figure 3: Timeline of Events in Rowley



Litigative History of Rowley

At issue in the *Rowley* case was the education of Amy Rowley, a highly intelligent and resourceful deaf student at Furnace Woods in Peekskill, New York during the 1980s.[3] Amy had minimal residual hearing and was an excellent lip reader. Prior to beginning her kindergarten year, Amy's parents, who are also deaf, met with school officials to develop an Individualized Educational Program (IEP) pursuant to the requirements of the EAHCA. The staff at Furnace Woods took significant measures to anticipate Amy's needs prior to her arrival. For example, the staff took classes in sign language interpretation and implemented a teletype machine to communicate with Amy's parents. School administrators determined that Amy remain in the general education kindergarten classroom, but that she should be provided with an FM transmitter.[4] Amy successfully completed her kindergarten year and had shown herself to be on pace with her non-disabled peers.

The following year, when Amy's team regrouped to renew her IEP program, there was a disagreement. The IEP proposed by the school district stipulated that Amy would continue to use the FM hearing aid, receive instruction from a tutor for the deaf for one hour each day, and receive instruction from a speech therapist for three hours each week. However, Amy's parents insisted on having a sign language interpreter present in the classroom. While Amy was an excellent lip reader, she was only able to access a certain amount of information by lipreading. Additionally, Amy's parents wanted her to learn sign language because she had been raised using the "total communication method," which is a range of communication methods including

[3] Dr. Amy Rowley, Ph.D. is the coordinator of the American Sign Language Program in Modern Languages and Literatures department at California State University, East Bay. She received her doctorate degree in Education and Second Language Acquisition at the University of Wisconsin - Milwaukee. She has published numerous articles related to discrimination in special education, particularly for deaf and hard of hearing students.
[4] An FM (frequency modulated) system helps to reduce background noise and improve clarity of sound for deaf and hard of hearing individuals.

mouthing words, amplification, signing, touching, and visual cues. Since "total communication had gained increasing acceptance among deaf educators since the release of studies indicating that deaf children raised in deaf households where total communication is used fare better academically and emotionally than other deaf children," Amy's parents wanted the school to provide her with a sign interpreter.[5]

The school district, however, refused to provide a sign language interpreter on the grounds that Amy did not need one, as she was doing well in school without one. In February of Amy's kindergarten year in 1977, a sign language interpreter, Jack Janik, was placed in Amy's class full-time for a two-week period. It was after this initial trial period that Janik concluded that Amy did not need his services. Janik's testimony became the basis for denying Amy a sign interpreter. This decision was reviewed and authorized by the school district Committee of the Handicapped. When the request for the interpreter was denied, the Rowleys sought a hearing before an independent examiner, who similarly concluded that the IEP was appropriate. This decision was later affirmed on appeal by the New York Commission of Education.

Decision of the United States District Court for the Southern District of New York

Following the decision from the New York Commission of Education, the Rowley's filed suit in the United States District Court. A hearing was held from September 26-28 of 1979 and on October 4 (1979), the Plaintiffs filed a motion for a preliminary injunction.[6] The parties stipulated that the hearing would take place of a trial. Judge Vincent I. Broderick signed an order on December 28, 1979, directing that a sign language interpreter be provided to Amy until the

[5] *Rowley v. Board of Education of Hendrick Hudson Central School District,* 484 F. Supp. 528 (Southern District of New York, 1980), 532.
[6] A preliminary injunction is defined by the Legal Information Institute as, "an injunction that may be granted before or during trial, with the goal of preserving the status quo before final judgment."

case was resolved. The decision was later finalized on January 15, 1980. The District Court Judge concluded that the Plaintiffs (the Rowleys) had established by a preponderance of the evidence that the EAHCA required that Amy be provided by a sign language interpreter to have access to an appropriate education.[7] In his decision Judge Broderick laid out what he found to be some troubling implications of the school district's decision to deny Amy a sign interpreter. Firstly, on the merits, he found that lipreading was a limited method of collecting information, particularly in an uncontrolled environment, such as a classroom. Therefore, a sign language interpreter would be appropriate to fully access the curriculum. As the Judge noted, "Amy is likely to hear a great deal less when there is noise in the classroom, when more than one person speaks at one time, when the backs of speakers are turned to her, or films are being shown."[8]

Furthermore, the Court contended that because Amy is so young, at the time of the litigation she was 5-7 years old, any missed instruction would have far reaching consequences.[9] In Judge Broderick's analysis, he characterized the testimony of Jack Janik, the sign language interpreter who decided that Amy did not need interpretation, as severely limited. To this end he noted, "It is clear from the report, however, and from a subsequent affidavit filed by Mr. Janik in connection with these proceedings, that his recommendation was strictly limited to the particular class for which he had rendered the service, and did not rule out the necessity of interpretation in other classes or in subsequent academic years."[10] Furthermore, Judge Broderick suggested that even if Amy did not need an interpreter for the particular class in which the interpreter was

[7] The preponderance of the evidence is a type of evidentiary standard for a burden of proof, especially invoked in civil cases. According to the Legal Information Institute, "under the preponderance of the evidence standard, the burden of proof is met when the party with the burden convinces the fact finder that there is a greater than 50% chance that the claim is true." This standard has been articulated in *Karch v. Karch,* 885 A.2d 535, with the Superior Court of Pennsylvania offering, "preponderance of the evidence is defined as the greater weight of the evidence., ie., to tip the scale slightly is the criteria or requirement for the preponderance of the evidence."
[8] *Rowley (*1980): 532.
[9] Ibid., 533.
[10] Ibid., 530.

present, that should not prevent her from having the opportunity to have an interpreter in another class or at another point in time.

The most significant aspect of Judge Broderick's opinion was his discussion on what might constitute appropriate education according to EAHCA. To begin this analysis, Broderick noted how appropriate can be interpreted to include a spectrum of standards: ranging from bare minimum, on one end, to impossible standards that require students to achieve maximal potential, on the other end. The standard that Judge Broderick adopted in this decision would, instead, "require that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children."[11] This standard was developed, "in keeping with the regulations, with the Equal Protection decisions which motivated the passage of the Act, and with common sense."[12]

Throughout this case, the conversation of appropriateness is complicated by Amy's intelligence and good grades. However, Judge Broderick explicitly stated that Amy's intelligence should not prevent her from accessing services that would be provided to disabled students that were failing. To this end, he wrote, "I find that the defendants' emphasis on her academic performance and the suggestion that only academic deficiencies would induce them to provide Amy with an interpreter are based on an erroneous understanding of the law; they ignore the importance of comparing her performance to that of non-handicapped students of similar intellectual caliber and comparable energy and initiative."[13] Whereas, "Amy's lack of understanding is inherent in her handicap and is precisely the kind of deficiency which the Act addresses in requiring that every handicapped child be given an appropriate education."[14]

[11] Ibid., 534.
[12] Ibid.
[13] Ibid.
[14] Ibid., 535.

The District Court decision offers the first understanding of the meaning of appropriateness as provided in EAHCA. While Judge Broderick conceded that the Act does not explicitly define FAPE, he suggested that its regulations in the Rehabilitation Act of 1973 offer a functional explanation citing Section 84.34:

> b) Appropriate education. (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are *designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met* and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 84.34, 84.35, and 84.36. 45 C.F.R. § 84.33(b) (emphasis supplied).

The standard the District Court developed raised the standard of appropriateness beyond adequacy, writing, "Since some handicapped children will undoubtedly have the intellectual ability to do better than merely progress from grade to grade, this standard requires something more than the 'adequate' education. On the other hand, since even the best public schools lack the resources to enable every child to achieve his full potential, the standard would not require them to go so far."[15] In this way, the District Court decision struck a functional balance between the two extremes of FAPE, by going beyond adequacy while also not creating impossible standards. Additionally, it is worth noting that Judge Broderick adopts a reading of appropriateness based on the framework of Equal Protection decisions which the law was built upon - referring to precedents of *Brown, PARC*, and *Mills*. This move is significant because it develops an understanding that EAHCA entitled disabled students not only to educational access, but more importantly, equal educational opportunity comparison to their nondisabled counterparts- a claim that would later be disputed in Justice Rehnquist's majority opinion when the case reached the Supreme Court.

[15] Ibid., 534.

Decision of United States Second Circuit Court of Appeals

The district court decision was affirmed on appeal at the Second Circuit Court in *Rowley ex rel. Rowley v. Board of Education*.[16] Hon. Dudely B Bonsal, Senior United States District Judge for the Southern District of New York, authored the majority opinion. In his discussion, he mirrored some of the concerns that Judge Broderick brought forth in the district court decision, including the importance of learning sign language for Amy as a way to communicate with her family and the limitations of lipreading as a sole means of interpretation in the classroom. However, the most substantial aspect of Bonsal's opinion rested on his discussion of the evidentiary burdens in IEP disputes. First, the decision focused on the evidentiary burden outlined in Section 1415(e)(2) of EAHCA, which stipulated:

> Any party aggrieved by the findings and decision made [in the administrative proceedings pursuit to 1415] shall have the right to bring a civil action with respect to the complain presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of the party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

The appellate Court concluded that the presentation of evidence provided at the district court satisfied this evidentiary burden of proof. As Bonsal noted, this burden of proof is a lower standard of review, which would suggest that the aggrieved party would be entitled to a favorable ruling, in so far as they provide substantial evidence to their defense. In other words, Bonsal found that the Rowleys did not need to meet a particularly high standard of evidence; rather, to be granted relief, they need only meet a minimal standard of proof. Bonsal suggested that Congress set this lower evidentiary threshold intentionally to provide the potential for maximum

[16] 632 F.2d 945 (2d Cir. 1980).

relief to families. To that end, in his discussion, Bonsal cited Congressional records that suggest that an earlier iteration of the EAHCA provided for, "the determination of the state agency would be conclusive in any court of the United States if supported by substantial evidence…"[17] This history is significant because it suggested that the lower burden of proof was an intentional decision by Congressional actors to expand opportunities for redress in IEP disputes. In this particular case, the majority was compelled by the evidence presented at the District Court that demonstrated that Amy was missing a substantial part of her instruction due to the limitations of lipreading. As the opinion noted, "The district court found, based on the evidence before it, including Amy's auditory speech discrimination tests, academic records, and observations of her in the classroom, that Amy misses a substantial part of what goes on in her classroom. The Court found that, while only 59% of what transpires is now accessible to Amy under her present individualized education program, with a sign language interpreter 100% would be accessible to her."[18] This presentation of evidence passed the evidentiary burden of proof beyond a preponderance of the evidence, which thus legitimizes the decision reached earlier at the District Court.

However, notably absent from this decision was any explanation of the meaning of FAPE, and the absence of such discussion, which forms the core of the district court's decision, can be legitimately interpreted as agreement with the lower court's approach. The decision merely pointed to Section 1401 (18) for guidance, which defines special education and related services as:

> special education and related services which (A) have been provided at public expense, under public supervision and direction,

[17] H.R. 7217, 94th Cong., 1st Sess., reprinted in H.R.Rep. No. 332, 94th Cong., 1st Sess. 56 (1975) Cited from *Rowley ex rel. Rowley v. Board of Education* 636 F.2d 948 (2d Cir. 1980).
[18] *Rowley* (1980): 953.

> and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

The Court was intentional in its decision to explicitly state that this judgment is subject to the particular facts and circumstances of the case. To this end, the opinion noted, "Our careful review of the record satisfies us that the district court's findings of fact are not clearly erroneous but are adequately supported by the evidence. We also agree with the district court's conclusions of law. Accordingly, we affirm substantially for the reasons set forth in Judge Broderick's well-reasoned opinions of January 15, 1980, adding only the following brief observations of our own — chiefly to focus upon certain critical evidence."[19] The circuit court intentionally provided language that situated the *Rowley* decision as an individual case that cannot extend to other cases involving FAPE disputes. This language around the *Rowley* discussion resurfaced in Rehnquist's majority opinion. In my review of the scholarship on *Rowley*, which I will explore in the next section, many scholars take issue with the Court's non-applicability language and limits on the precedential value of *Rowley*, both of which seem to suggest that the Court did not want to implicate themselves in politics of funding education for disabled children given an expansive understanding of FAPE.

Hon. Walter R. Manfield offered a comprehensive dissenting opinion, which would later serve as the basis of the *Rowley* majority opinion. Manfield's principal concern was that the district court and the circuit court's findings suggested a definition of FAPE that was incompatible with the Act itself and its Congressional history. He argued that the definition of FAPE provided by the majority was an impractical and unmanageable precedent for future IEP

[19] Ibid., 947.

disputes. To begin, he offered a logistical argument, finding the case history evidence to suggest that the school district made a good faith effort to ensure that Amy had available services. As Manfield wrote, "The record is clear beyond dispute that the school authorities, in their efforts to comply with applicable state and federal laws, have made Herculean efforts to provide Amy with an education suitable to, and compensating for, her hearing deficiency, and that their efforts have so far met with remarkable success."[20] Judge Manfield contended that the school district has done their duty in terms of providing services to Amy, which was evidenced by her successful performance in the classroom - rather than Amy's intellect and work ethic.

Furthermore, Manfield highlighted the school district's adherence to due process rules and regulations in its determination that Amy did not need a sign language interpreter in the classroom as an indication that FAPE had been upheld. Manfield pointed to the court report, which suggested the school district provided testimony that Amy was hesitant to engage with sign language instruction when the interpreter was placed in her classroom, writing, " To the same effect Amy's first grade teacher, Regina Gloverman, testified before the state hearing examiner that when Amy's tutor for the deaf, Susan Williams, used sign language to tell Amy what Mrs. Gloverman was saying in class, Amy looked to Mrs. Gloverman, who uses sign language in communicating with Amy, rather than to the sign language interpreter for what was being said."[21] Manfield noted that this behavior continued: "When Amy was subjected to a sign language interpretation test in her second grade classroom by Dr. Norman Doctor, who acted as the teacher with Edward Cortez as sign language interpreter, she looked to Dr. Doctor, asking

[20] Ibid., 950.
[21] Ibid.

him to repeat whatever she failed to understand, rather than to the sign language interpreter."[22]

As a result of these "failed attempts" to introduce sign language instruction to Amy:

> Susan Williams, the teacher of children with impaired hearing who was Amy's language tutor, testified on the basis of her working closely with Amy daily that a sign language interpreter would not make a significant difference in Amy's education but would, on the contrary, deter her interactions with her teacher and other children in the classroom. This testimony was corroborated by Ellen Garzione, a hearing therapist who worked with Amy three times a week for a half-hour each session, that a sign language interpreter would not be of any assistance to Amy, since she was achieving as well as, or better then, most other first graders.[23]

More substantively, however, Manfield argued that FAPE was explicitly defined in 20 U.S.C. § 1401(18).[24] He argued the EAHCA also provides language about special education in 20 U.S.C. § 1401(16)[25] and related services in 20 U.S.C. § 1401(17) both of which omit information about sign language interpretation for deaf students.[26] He criticized Judge Broderick's formulation of FAPE, arguing that if Congress had intended such an understanding the Act would have explicitly said so. Instead, as Manfield argued, congressional history suggested that FAPE was created with the intention of ensuring access to education for disabled students rather than equal educational opportunity. As Manfield argued, "Congress was simply

---

[22] Ibid.
[23] Ibid.
[24] "(18) The term `free appropriate public education' means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title."
[25] "(16) The term `special education' means specially designed instruction, at no cost to parents or guardians, to meet the *unique needs* of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." (Emphasis added).
[26] "(17) The term `related services' means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children."

concerned that handicapped children would become independent, productive citizens rather than that their potential be compared with those of non-handicapped students."[27]

This language in this dissent that highlights the distinction between equal opportunity and equal access is critical because it defines the underlying logics of competing interpretations of FAPE. Judge Broderick of the district court found FAPE to provide each handicapped child an opportunity to achieve their full potential commensurate with the opportunity provided to other children using an Equal Protection Clause framework. By contrast, Judge Manfield argued that the congressional history indicated that FAPE is limited to ensure equal access to education for disabled children. Manfield warned that adopting the district's interpretation of FAPE would have dangerous repercussions writing, "The district court's definition would compound this problem by requiring educators to subject all nonhandicapped children in the same school district, or at least in the same class, to a battery of tests in an effort to determine their potentials and their relative shortfalls as compared with that of the handicapped child. The process, while theoretically possible, obviously imposes an impossible burden."[28] While the Circuit Court of Appeals ruled in favor of the district court's findings that Amy Rowley had been denied FAPE, the dissenting opinion would later serve as the blueprint for what will become the Supreme Court opinion in *Rowley.*

Supreme Court of the United States Decision

The Supreme Court overturned the circuit court's ruling in a 6-3 ruling. The decision marked the first interpretation of the FAPE offered by the Supreme Court. In the Court's holding. The majority held the Act's requirement of FAPE was, "satisfied when the State provides

[27] *Rowley* (1980): 952.
[28] *Ibid.,* 953.

personalized instruction with sufficient support services to permit the handicapped child to *benefit educationally* from that instruction (emphasis added)."[29] This definition was supported by the Act, wrote Justice Rehnquist, because it contained, "no express substantive standard prescribing the level of education to be according to handicapped children."[30] To support this understanding, the Court turned to Congressional history, which suggested that, "Congress sought to make public education available to handicapped children, but did not intend to impose upon the States any greater substantive educational standard than is necessary to make such access to public education meaningful. The Act's intent was more to open the door of public education to handicapped children by means of specialized educational services than to guarantee any particular substantive level of education once inside."[31]

In his opinion for the Court, Justice Rehnquist began by raising what he considered to be the two central questions of this case: What is meant by the Act's requirement of a free appropriate public education?[32] What was the role of the state and federal courts in exercising the review granted by the law? In response to the second question, it was presumed by the lower Courts that because the Act does not define FAPE, the Courts are given jurisdiction. However, Justice Rehnquist took issue with this logic, concluding that, "We are loath to conclude that Congress failed to offer any assistance in defining the meaning of the principal substantive phrase used in the Act. It is beyond dispute that, contrary to the conclusions of the courts below, the Act does expressly define 'free appropriate public education."[33] To this end, Rehnquist

[29] Ibid., 177.
[30] Ibid.
[31] Ibid., 192.
[32] Rehnquist states, "We granted certiorari to review the lower courts' interpretation of the Act. 454 U. S.961 (1981). Such review requires us to consider two questions: What is meant by the Act's requirement of a "free appropriate public education"? And what is the role of state and federal courts in exercising the review granted by 20 U. S. C. §1415?" Rowley (1982): 186.
[33] Ibid., 176.

provided what he considered to be a definition of FAPE which, "consists of educational instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction."[34] In short, according to the majority under the EAHCA education merely needed to be available and accessible; there was no substantial goal above access.

To make this argument, Rehnquist relied on *Mills* and *PARC* as precedent, suggesting that because these two cases were primarily about the right to education for students with disabilities, and became the inspiration for the EAHCA, "the right of access to free public education enunciated by these cases is significantly different from any notion of absolute equality of opportunity regardless of capacity."[35] Therefore, "the requirement that states provide 'equal' educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons."[36] This move by Rehnquist is particularly interesting, considering that these cases, in addition to *Brown,* were cited as reasons for a finding in favor of an expansive understanding of FAPE. Furthermore, Rehnquist relied on *Rodriguez*, suggesting that the Fourteenth Amendment did not require schools to spend or provide equal resources, either monetary or otherwise, on children - in this case, for children with disabilities. In other words, the Fourteenth Amendment guarantees of Equal Protection and Due Process, at issue in *Rodriguez* and implicated in *Rowley*, merely provide a baseline value of adequacy that should not be comparable to other student achievement and access.

After Justice Rehnquist completed this discussion of FAPE as providing educational benefit rather than equal educational opportunity, he retreated by offering *Rowley* had minimal

[34] Ibid., 177.
[35] Ibid., 199.
[36] Ibid., 198.

precedential value, writing, "We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act. Because in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to that situation."[37] Once again, the Court, whether finding for the Plaintiff or Respondents, appeared reluctant to uniformly prescribe a standard of review that would apply in future cases. As I will explore in the next section, there are several hypotheses among scholars regarding the motivation for the Courts making this particular move. Nevertheless, it is compelling to consider why opposing jurists, at various levels of the judiciary, would include explicit language which essentially weakened their decision and interpretation of FAPE.

Justice Blackmun wrote a concurring decision in which he offered an alternative reading of the congressional history and goals of the EAHCA. To this end, he wrote," Congress stated that it intended to take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided *equal educational opportunity*."[38] Blackmun presented a contradictory interpretation of the EAHCA as a law that requires expansive government regulation and action - an idea that is supported by congressional history. Blackmun distinguishes himself from Rehnquist's decision, however, by evaluating FAPE through a different standard. Blackmun rejected Rehnquist's educational benefit standard. Instead, he concluded that "the question is whether Amy's program, *viewed as a whole,* offered her an opportunity to understand and participate in the classroom that was substantially equal to that

[37] Ibid., 202.
[38] S. Rep. No. 94-168, p. 9 (1975) (emphasis added). See also 20 U. S. C. §1412(2)(A)(i) (requiring States to establish plans with the "goal of providing full educational opportunity to all handicapped children") cited from Rowley (1982): 210.

given her non-handicapped classmates (emphasis added)."[39] Furthermore, he determined FAPE was "predicated on equal educational opportunity and equal access to the educational process, rather than upon Amy's achievement of any particular educational outcome."[40] It is because Amy received an education program that "offered her an educational opportunity substantially equal to that provided her non handicapped-classmates"[41] that Blackmun concluded FAPE was not denied. Thus, while Justice Blackmun reached the same conclusion as Justice Rehnquist, his distinct reasoning is significant because he embraced an equal opportunity approach, which is built upon in the dissent.

Justice White, wrote the dissenting opinion, with Justice Brennan and Marshall joining. In his opinion, Justice White took issue with the Court's accounting of congressional intent and interpretation of FAPE as limited to educational access. As White notes, while the Act does not "contain a substantive standard beyond requiring that the education offered must be 'appropriate,"[42] the congressional history suggested that FAPE ought to be interpreted expansively. To support this claim, Justice White cited Senator Stafford, one of the sponsors of the Act, who stated: "We can all agree that education [given a handicapped child] should be equivalent, at least, to the one those children who are not handicapped receive."[43] Additionally, according to the Senate Report the Act does, "guarantee that handicapped children are provided *equal* educational opportunity."[44] Given this understanding, "the legislative history directly supports the conclusion that the Act intends to give handicapped children an educational

[39] *Ibid.,* 211.
[40] *Ibid.*
[41] *Ibid.*
[42] *Ibid.,* 213.
[43] See 121 Cong. Rec. 19483. Cited from *Rowley* (1982): 214.
[44] See S. Rep. No. 94-168, p. 9 (1975). Cited from *Rowley* (1982): 214.

opportunity commensurate with that given to other children," a standard which was embraced in the district and circuit court opinions.[45]

The dissent cautioned against the Majority's rationale as severely limited to the requirements provided under IDEA. This dissent noted that by embracing an educational benefit theory, it would be sufficient under FAPE to place a teacher with a loud voice in Amy's classroom to accommodate her disability.[46] Instead, the dissent suggested that, "the basic floor of opportunity is instead, as the courts below recognized, intended to eliminate the effects of the handicap, at least to the extent that the child will be given an equal opportunity to learn if that is reasonably possible."[47] The dissenting opinion concluded that because Amy Rowley could not comprehend everything that occurred in the classroom, given her disability, she was not given an equal opportunity to learn - even if she is making passing grades. In the *Rowley* decision, there seems to be disagreement, even among those in the majority, on what FAPE requires and how it should be implemented.[48] In the years since the decision was announced in May of 1982, there continues to be disagreement with the Majority's articulation of appropriateness under FAPE,

[45] Cited from *Rowley* (1982): 214 (emphasis added).
[46] The dissent suggested, "It would apparently satisfy the Court's standard of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child, for a deaf child such as Amy to be given a teacher with a loud voice, for she would benefit from that service" *Rowley* (1982): 215.
[47] *Rowley* (1982): 215.
[48] For example, *Rowley* does not have a universal reasoning for the Court's holding that FAPE was upheld. In dissent, Justice Blackmun explicitly states that he reads the legislative history and goals of the Education of the Handicapped Act differently from the majority. Blackmun suggests, "the question is whether Amy's program *viewed as a whole,* offered her an opportunity to understand and participate in the classroom that was substantially equal to that given her nonhandicapped classmates." Furthermore, Justice Blackmun argues, "This is a standard predicated on equal educational opportunity and access to the educational process, rather than upon Amy's achievement of any particular educational outcome." Thus, for the majority, Amy's successful academic performance is evidence that FAPE was upheld, whereas for Blackmun, the program, viewed as a whole, suggests that FAPE was upheld. To this point, Blackmun criticizes the lower courts, suggesting they "paid too little attention to whether, on the entire record, respondent's indicial education program offered her an educational opportunity substantially equal to that provided her nonhandicapped children mates."

building upon some of the theoretical and constitutional arguments established in the district and circuit courts and, again, in Justice White's dissenting opinion.

Scholarly Reaction to Rowley

The vast majority of scholarship on *Rowley* is highly critical of the decision. Constitutional scholars and special education activists contended that the Court majority misconstrued the congressional intent of EAHCA - as prioritizing equal access over equal opportunity - therefore The Court misidentified what the Act provides. Additionally, many scholars have emphasized that the Court's narrow interpretation of appropriate education in *Rowley* must be contextualized its corresponding conservative legal, social, and political climate. Put differently, the timing of the *Rowley* decision aligned with the Reagan Administration's efforts to decentralize and privatize education and minimize the capacity of the federal government to intervene in what was a sector of state and local governance. As Cook and Polsky have argued: "At all levels of government today, education policy is dominated by variations of Reagan's privatization proposals."[49]

The primary concern regarding Rehnquist's opinion is his accounting of the congressional history and intention of the EAHCA. While Justice Rehnquist accurately noted that *PARC* and *Mills* were two cases that inspired the development of the EAHCA, many scholars have noted that Rehnquist mischaracterized the cases to suggest that EAHCA provides for a minimal standard of educational benefit, rather than a specific right to a substantive level of education. To this point, many scholars have argued that "*PARC* and *Mills* went beyond the principle of access."[50] Firstly, while *PARC* held that students with disabilities could not be denied

[49] Cook, D. M., & Polsky, A. J. (2005). Political Time Reconsidered: Unbuilding and Rebuilding the State Under the Reagan Administration. American Politics Research, 33(4), 601.
[50] Karl Boettner, "Attack on the EHA: The Education for All Handicapped Children Act After Board of Education v. Rowley" *Seattle University Law Review* 7, no. 1 (January 1, 1983): 9.

access to public education, it also mandated that there were certain substantive rights that students are provided. The *PARC* decision held that students with disabilities, "should receive an annual written statement of educational strategy and an annual evaluation of that strategy," and that review of a handicapped child's educational program must include notice to the parents, an opportunity for them to be heard, and other procedural safeguards."[51] Similarly, *Mills* held that denying handicapped children "not just an equal publicly supported education but all publicly supported education, while providing such education to other children, violates the due process clause."[52] Upon further review, these cases seem to suggest that students with disabilities have educational rights beyond mere access. The relevant litigative history would thus suggest that the EAHCA guarantees more than mere access to education for students with disabilities - a finding that delegitimizes Rehnquist's conclusion.

Additionally, many scholars have challenged Justice Rehnquist's interpretation of the congressional intent behind the EAHCA as ahistorical and inconsistent with the original goals of the law. Writing for the majority, Justice Rehnquist pointed to the statements of members of Congress to suggest that the intention behind the EAHCA was to introduce students with disabilities into school.[53] However, as Karl Boettner offers, "...analysis of other statements by these representatives indicates their intent to provide an equal educational opportunity, not just equal access for handicapped children."[54] In his analysis, Boettner provided several statements

[51] Boettner (1983):192.
[52] *Mills* (1972): 875.
[53] Rehnquist cites remarks of Senator Williams, "While much progress has been made in the last few years, we can take no solace in that progress until all handicapped children are, in fact, receiving an education. The most recent statistics provided by the Bureau of Education for the Handicapped estimate that.... 1.75 million handicapped children do not receive any educational services, and 2.5 million handicapped children are not receiving an appropriate education." 121 Cong. Rec. 19486 (1975). Cited on Rowley (1982): 191. This quotation suggests that the primary purpose of EAHCA is to get disabled students into school, which suggests that equality of access is not the goal of the Act.
[54] Boettner (1983): 12.

from members of congress who developed EAHCA. These statements suggest that the law was passed with the intention that it would be interpreted to provide education to students with disabilities on an equal basis to their non-disabled peers.[55] Furthermore, Boetther concludes, "a study of the entire legislative history, however, suggests that Congress contemplated substantially more than getting handicapped children to school."[56] Instead of the narrow interpretation of FAPE, as set forth by the majority, "The Act attempts to equalize the opportunities of handicapped children with those received by nonhandicapped children, not to guarantee that they will perform at any particular level."[57] Therefore, in straying from Congress intended access to equal educational opportunities the Court, "significantly undercuts the meaning of a free appropriate public education."[58] The underlying causes for the Court's inapt reading of the Congressional record may have been influenced by external factors.

Bonnie Poitras Tucker, a leading scholar in disability law, has suggested that, "the obvious rationale for the Court's blatant disregard of Congressional intent was its unspoken fear that a contrary result would have opened the floodgates by allowing every seriously handicapped child in the nation to receive full-time individualized educational assistance where needed."[59] So, put differently, if the Court had ruled in Rowley's favor, there would be nothing to prevent similarly situated disabled students from being entitled to educational services. That sentiment is

---

[55] For example, Congresswoman Mink explicitly states, "The bill seeks to achieve the goal of equal educational opportunity for all handicapped children."121 CONG. REC. 37031 (1975). Similarly, Senator Williams, Chairman of the Senate Labor and Public Welfare Committee, stated the EAHCA would effectively secure, "the promise of the Constitution that there shall be equality of education for all people, and that handicapped children no longer will be left out." 121 CONG. REc. 37,413 (1975). Senator Humphrey believed the EHA was an opportunity to remedy, "the violation of [handicapped] children's right to an equal and free education." These are some of many public statements in the congressional record, which demonstrate that the EHA was passed with the intention of providing equal educational access - not merely physical access alone.

[56] Boettner (1983): 14.

[57] Lori Wenderoff, "Board of Education v. Rowley: Are Handicapped Children Entitled to Equal Education Opportunities," *California Western Law Review* 20, no. 1 (October 1, 1983), 21.

[58] Boettner (1983): 18.

[59] Bonnie Poitras Tucker, "Board of Education of the Hendrick Hudson Central School District v. Rowley: Utter Chaos," *Journal of Law & Education* 12, no. 2 (1983): 235.

echoed by Elena M. Gallegos when she suggested, "Perhaps uppermost in the Court's mind, was the enormous financial burden that would accompany a potential-maximizing standard."[60]

When *Rowley* was decided, Congress was contributing $1 billion per year in EAHCA funds to serve the over 4 million disabled students, which was short of the $9 billion per year which was required to educate all disabled students.[61] While EAHCA supplied part of the cost of educating disabled children, the additional fees would fall on the State and local governments. In the *Rowley* case, it would cost $14,000 per year for a full-time interpreter for Amy Rowley - a fee that Amy's parents could not afford and would thus fall on local and state municipalities.[62] Not only are special education services expensive, but *Rowley* was decided in the midst of a recession.[63] These economic conditions arguably influenced the decision in *Rowley*, as Laura Gangemi writes, "The Supreme Court, undoubtedly aware of these circumstances, was reluctant to take the liberal step of providing handicapped children with an educational opportunity commensurate with that of nonhandicapped children. Instead, the Court returned a substantial amount of the responsibility for educating the handicapped to the states."[64]

The financial implications of the *Rowley* decision aligns with the political objectives of the Reagan Administration to decentralize federal education, as outlined in Chapter 3.[65] Prior to

---

[60] Elena M. Gallegos, "Beyond Board of Education v. Rowley: Educational Benefit for the Handicapped?," *American Journal of Education* 97, no. 3 (1989): 264.
[61] Barbara D. McGarry, "The Rowley Decision: How the Supreme Court Views the Education of Handicapped Children," *Journal of Visual Impairment & Blindness* 76, no. 8 (October 1, 1982): 322.
[62] Ibid.
[63] By 1982, the unemployment rate reached 10.8 percent, which was higher than any time in post-World War II history. See Urquhart A Michael; Hewson, Marillyn, "Unemployment Continued to Rise in 1982 as Recession Deepened: Monthly Labor Review: U.S. Bureau of Labor Statistics."
[64] Laura Gangemi, "After Rowley: The Handicapped Child's Right to an Appropriate Education," *University of Miami Law Review* 38, no. 2 (January 1, 1984): 357.
[65] It is noteworthy that President Reagan appointed Justice William Rehnquist and Sandra Day O'Connor to the Supreme Court (Rehnquist was appointed in 1971 and Sandra Day O'Connor in 1981 - one year before the *Rowley* decision). Rehnquist and O'Connor favored the Hendrick Hudson School District, with Rehnquist writing the majority opinion. Significant literature explores how Supreme Court Justices vote in alignment with the Presidents who appoint them. See Whitmeyer, Joseph M. "Presidential Power over Supreme Court Decisions." *Public Choice* 127, no. 1/2 (2006): 97–121.

the *Rowley* decision, the Reagan administration had ordered the Office of Special Education and Rehabilitation Services (OSERS) to consider more restrictive definitions of FAPE.[66] The Supreme Court was likely aware of not only the financial implications that *Rowley* could potentially unearth, but was responsive to Reagan's attempts to deregulate federal intervention in public schools by applying a narrow interpretation of FAPE. As Gangemi notes, *"*the Court, faced with the challenge of interpreting the Act for the first time, displayed its conservative nature and refused to substitute its own ideals and values for those of the legislature and the administrative boards by narrowly defining the Act's provision of a 'free appropriate public education."[67] In light of this historical context, it appears evident that the rights of disabled students in the courts were, "caught in the middle of a political struggle between the executive and the legislative branches."[68]

The Court's financial concerns in the *Rowley* decision are incompatible with expansive understanding of educational rights - a trend which was also evident in *Rodriguez.* To this effect, Boettner writes, "the Court in *Rowley* may have thought, as it stated in *Rodriguez*, that affirmance would have meant infringement by Congress and the courts on decision making in the areas of educational policy and local fiscal policy which were matters best left to the States and school districts."[69] Furthermore, "if these were the actual, unarticulated reasons for rejection of the equal educational opportunity standard, the Court baldly engaged in public policy making.

---

[66] "In 1981, the Administration ordered the Office of Special Education and Rehabilitation Services (OSERS) to review the provisions of the ACHA. OSERS was directed to accomplish four goals: 1) minimize unnecessary regulations in special education; 2) reduce unnecessary paperwork burdens on states and localities; 3) relieved fiscal pressures by applying a cost-benefit analysis of the substantive provisions of the EAHCA; and 4) protect the rights of the handicapped by affording them an equal education opportunity. The Reagan Administration also ordered OSERS to consider more restrictive definitions of a 'free appropriate public education." Gangemi (1984): 354, citing EHLR Special Report, OSE Regulation Review, [1980-81 Decisions] EDUc. HANDICAPPED L. REP. (CRR) at AC189 (Oct. 2, 1981).
[67] Gangemi (1984): 356.
[68] Ibid., 355.
[69] Boettner (1983): 198.

These functions are better left to the legislative judgment of Congress."[70] In *Rowley* there is an underlying theory that the decision is, at the very least, motivated by an unwillingness to disrupt the financial systems underlying public education - at the expense of equal educational opportunities for disabled children. However, as Barlett argues, "...cost considerations should not prevail to deny a handicapped children an education program that is comparable in quality to that provided to nonhandicapped children."[71] The Court's adherence to Reaganite politics and efforts to decentralize federal education are indicative of a larger conservative legal movement that, "... speak more to curb state power, responsibility, and accountability than to the need to describe and assess the realities of inequality and inequity."[72] In sum, Justice Rehnquist made two key missteps in his analysis. First, he misrepresented the precedential value of *PARC* and *Mills* to suggest an interpretation of FAPE which provided minimal benefits. Second, the decision provided an incomplete account of the congressional history, which functioned to distort the true intention of the law.

Justice Rehnquist adopted a similar judgment in which he offers that FAPE "consists of educational instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction." Ironically, in an attempt to define FAPE, the Court curated a definition that elicited more questions than answers. Put differently, "While the Court did provide that handicapped children were entitled to 'meaningful' instruction which would permit the child to benefit educationally

[70] Ibid.
[71] Katharine T. Bartlett, "The Role of Cost in Educational Decision Making for the Handicapped Child," *Law and Contemporary Problems* 48, no. 2 (1985): 16.
[72] Stephen M. Engel and Timothy S. Lyle, "Is Dignity a Dead End? Alternative Notions of Dignity and the Promise of Our Anti-Racist Constitution," in *Disrupting Dignity: Rethinking Power and Progress in LGBTQ Lives* (New York University Press, 2021), 273.

from such instruction, this term seems nebulous at best"[73] or as Justice White offers, "Meaningful is no more enlightening than appropriate."[74] This standard, which other scholars have coined the "some-benefit" standard, has proven unworkable. As Steven Robinson notes, "Although the majority opinion faults the equal educational opportunity and self-sufficiency standards as inadequate measures to determine whether an education is appropriate, the Court's 'some-benefit' standard is, in effect, a hollow euphemism."[75] Robinson goes on to explain that, "... without a guide other than the "some-benefit" standard, courts might interpret the standard literally, as they have the "some rational basis" test used in equal protection cases, where any law is constitution as long as it is narrowly tailored to achieve a legitimate government interest.[76]

The central problem that arises with this ambiguity is that, "The refusal of the Court to develop a test to determine whether a child is receiving sufficient educational benefits under the Act leads to speculation that the standard is no less manipulative than the statutory definition of 'appropriate."[77] Because the *Rowley* Court stated that it could find no requirement for a minimum substantive standard or for extending the reasoning of the "some benefit" test, it is conceivable that a court might find any benefit to be sufficient. "[78] Under this theory, FAPE would be achieved if Amy Rowley was placed in a classroom with a teacher with a loud voice. The "some-benefit" standard effectively weakens the educational impact of FAPE, by suggesting that EAHCA provides for some benefit rather than educational equality of opportunity. While it

[73] Lori Wenderoff, "Board of Education v. Rowley: Are Handicapped Children Entitled to Equal Education Opportunities," *California Western Law Review* 20, no. 1 (October 1, 1983), 145.
[74] Rowley (1982): 214 (White, J., dissenting).
[75] Steven Robinson, "Rowley: The Court's First Interpretation of the Education for All Handicapped Children Act of 1975," *Catholic University Law Review* 32, no. 4 (January 1, 1983): 963.
[76] Ibid., 961.
[77] Shawn Elizabeth Carroll, "Defining Appropriate Education for the Handicapped: The Rowley Decision Note," *Saint Louis University Law Journal* 27, no. 3 (1983): 704.
[78] Robinson (1983): 963.

is evident that Congress intended some flexibility in the application of the Act, "the possibility exists that the language of the Act could be manipulated to require a school district to provide more than was intended by Congress, or that a given handicapped child might be *given less* than Congress intended (emphasis added)."[79]

The response to the *Rowley* decision among scholars suggests an overwhelmingly negative appraisal of the majority's evaluation of FAPE under the EAHCA. Among the criticisms, the majority of scholars cite Rehnquist's selective interpretation of congressional history and intention regarding the motivation for the passage of the Act. Furthermore, many scholars have suggested that this approach was motivated by external political factors, including an economic recession and the rise of conservative political theory about minimizing the role of the federal government in public education as put forth by President Reagan. These implications of this decision have created an unworkable standard by which FAPE has been replaced by an equally ambiguous and flexible standard, which situates FAPE as merely providing "some benefit."

State-Level Response to Rowley

The public response to the *Rowley* decision was contentious, with several members of the disabled community devastated and fearful that the decision would destroy the integrity of the EAHCA. Nancy Rowley, the Plaintiff in *Rowley* and Amy's mother, responded to the decision in shock stating, "I'm very surprised. I can't believe it. This is a setback-way back - for deaf people and perhaps all the handicapped."[80] She went on record expressing her fear that this decision

[79] Carroll (1983): 706.
[80] Dena Kleiman, "Effect of Handicapped Ruling Unclear," *The New York Times*, June 29, 1982.

would set precedent for further erosion of the rights of the disabled, expressing, "Are they going to take away the Braille books for the blind and the ramps for people in wheelchairs?"[81]

While many members of the special education community were disappointed with the decision, they held hope because despite the adverse decision, the ruling still opened the pathway for FAPE to be left to interpretation. Donna Chitwood, the spokesperson for Gallaudet University, a university for deaf and hard of hearing students, stated after the decision, "We feared that the decision would be more negative than it is. It does not provide equal education, but it provides a meaningful education. It leaves the door open for interpreters in certain cases."[82] Similarly, Dr. Edward Martin, a former assistant secretary in the Department of Health, Education, and Welfare, who helped draft the EAHCA said of *Rowley*, "It's a difficult case. But 'free appropriateness' is the core and it's still in place."[83] *The New York Times* reported, "Some advocacy groups said yesterday they were disappointed and were convinced that the school district would not feel less obligated to provide special services. At the same time, they said they were relieved that the decision did not appear to seriously weaken the right of handicapped youngsters to an 'appropriate' public education."[84] Thus, while the *Rowley* decision issued a ruling that many found to be inconsistent with EAHCA, the language in the opinion preserves the guarantee of FAPE by refusing both to define appropriateness and to clarify what the Majority considers educational benefit. These moves ironically opened the door to state governments creating expansive interpretations of FAPE.

The impact of *Rowley* and its minimal benefit standard has been less devastating to the educational rights of disabled students precisely because of the Supreme Court majority's

[81] Ibid.
[82] Ibid.
[83] Ibid.
[84] Ibid.

unwillingness to define more clearly the parameters of appropriateness and because what interpretation they did provide, namely as a minimal educational access standard, could be read a as a mere baseline; in other words, states could go above it. As such the implications of *Rowley* weakened over time through state-level developments subsequent to the decision.

In this section, I explore how the standard put forth in *Rowley* has eroded given state litigation that has articulated more extensive state educational standards beyond "some educational benefit" and the 1997 amendments to IDEA - which appear to be a direct response to *Rowley* by clearly defining a more expansive definition of appropriate education under FAPE.[85] The ambiguity of the language in *Rowley* had the unintended effect of opening up interpretation for appropriateness under FAPE, which created a situation in which State courts offered a more expansive definition of appropriate education. As argued by critics of the decision, "*Rowley* represents a notably narrow decision and that ambiguity and latency in the opinion provide room for rigor in the substantive interpretation of 'appropriate education."[86] When the *Rowley* decision was decided, it provided very little instruction for the judges and policymakers on how to interpret both FAPE and implement the "some-benefit standard." Consequently, it was originally feared that this "lack of substantive standards for FAPE lowered expectations and facilitated a minimalist view of the substantive education that students with disabilities are entitled to receive."[87] However, because, "the *Rowley* court implicitly and explicitly left several hooks on which to hang such a factual distinction, and thus to climb beyond and above its confines," the impact of *Rowley* decision was softened by its own ambiguity. Thus, "Rowley invites immediate

[85] In doing so, I adopt Scott F. Johnson's framework and findings to argue that Rowley's ambiguous language has deteriorated the decision over time. See Scott F. Johnson, "Reexaming Rowley: A New Focus in Special Education Law," *Brigham Young University Education and Law Journal*, 2003.
[86] Zirkel (1983): 469.
[87] Johnson (2003): 566.

experimentation and variation at the state level, based primarily on state special education statutes. It also allows eventual expansion and consolidation at the federal level by legislative, administrative, or judicial action."[88] In this way, "the substantive component of the majority decision lies there half-hidden in the answers to both appropriateness and judicial review issues, waiting to be uncovered by hearing officers and judges who wish to look beyond the dark surface for the proverbial diamonds in the rough."[89] Put differently, the ambiguity of the *Rowley* decision left the State courts in a position to interpret the standard of "some benefit" in an expansive way, arguably in a way that was unintended by the Majority.

Rowley held that FAPE was maintained as long as it provided some educational benefit to students met state standards. Many states responded to this decision by developing standards that required higher levels of educational accountability and access under their respective state constitutions. As Scott Johnson notes, "An adequate education under state constitutional law requires the state to provide its students with educational services targeted toward the acquisition of sufficient skills to be successful in society."[90] In other words, "the high expectations in state education standards are at odds with the core holding in *Rowley*, which stated that the school districts need only meet the minimalist 'some educational benefit' standard."[91] This circumstance presented yet another example of constitutional dialogues that were taking place vertically between the state and federal governments. By setting such a low standard at the federal constitutional level, the Supreme Court compelled some states to raise what they considered the minimal threshold for accessible education. Yet, educational opportunities for individuals with

[88] Zirkel (1983): 497.
[89] Ibid., 485.
[90] Johnson (2003): 567.
[91] Ibid., 575.

disabilities varied by state, and thus, did not reach the uniform guarantees of equal access that the *Rowley* district and circuit decisions would have required.

To illustrate this dynamic I present two examples of state supreme courts that have elevated the required standards of equal educational opportunity under their respective state constitutions. These cases suggest that *Rowley's* minimal benefit standard is in conflict with state constitutions' expansive education rights and opportunities (and potentially in conflict with a 13th Amendment emancipatory guarantee of education as suggested in Chapter 2 and as further defended in Chapter 5). In sum, these courts hold that a minimally adequate education, as put forth by *Rowley,* is not an appropriate education.

In *Rose v. Council for Better Education*[92] the Supreme Court of Kentucky determined that the education system was in violation of its state constitution. The Council for Better Education, a nonprofit organization, had over sixty local school districts in the State sign on as Plaintiffs. Under Section 183 of the Kentucky State Constitution, the state provided for "an efficient system of common schools throughout the state." The Council for Better Education alleged that the school-finance laws in the State provided for inadequate funding between school districts, contributing to unequal education outcomes for students dependent on where they went to school. In the decision, the Supreme Court ruled in favor of the Plaintiffs stating:

> When we apply the constitutional requirement of Section 183 to that evidence, it is crystal clear that the General Assembly has fallen short of its duty to enact legislation to provide for an efficient system of common schools throughout the state. In a word, the present system of common schools in Kentucky is not an 'efficient' one in our view of the clear mandate of Section 183. The common school system in Kentucky is constitutionally deficient.[93]

[92] 790 S.W.2d (1989).
[93] *Rose* (1989): 790.

Furthermore, the Court provided that there were certain educational standards that school districts were required to provide. The schools in the State of Kentucky were obligated to provide every child with:

> i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization.
>
> (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices.
>
> (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation.
>
> (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness.
>
> (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage.
>
> (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and
>
> (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.[94]

The Court's decision in *Rose* elevated a standard of education put forth by the state constitution to include certain substantive educational rights, which reflected modern considerations for students above merely educational benefit - including the ability to participate in the workforce and make informed choices to hold political agency. Therefore, if FAPE must adhere to state standards," some educational benefit" is not aligned with the expansive understanding of efficient education as set forth in the Kentucky state constitution. It is also worth considering that the educational standards that the Court identified, provide resources for

[94] Ibid., 816. Cited from Johnson (2003): 571.

students to engage in equal opportunities outside of the school environment. In other words, the State court is identifying the role that education plays in providing career and vocational opportunities - which must be available on equal terms.

Similarly, in *Claremont School District v. Governor of New Hampshire*[95] the Claremont School district (Plaintiff) sued the Governor of New Hampshire (Defendant), alleging that the State's public education funding system violated the state constitution. The Supreme Court of New Hampshire ruled in favor of the school district. In the decision, the Court adopted a framework of a "fundamental right to a State funded constitutionally adequate public education." As the Court noted, this right provided for more than a minimal educational benefit, writing:

> Given the complexities of our society today, the State's constitutional duty extends beyond mere reading, writing, and arithmetic. It also includes broad educational opportunities needed in today's society to prepare citizens for their role as participants and as potential competitors in today's marketplace of ideas. A constitutionally adequate public education is not a static concept removed from the demands of an evolving world. It is not the needs of the few but the critical requirements of the many that it must address. Mere competence in the basics-reading, writing, and arithmetic-is insufficient in the waning days of the twentieth century to ensure that this State's public school students are fully integrated into the world around them. A broad exposure to the social, economic, scientific, technological, and political realities of today's society is essential for our students to compete, contribute, and flourish in the twenty-first century.[96]

The Court relied on the criteria in *Rose,* offering, "We look to the seven criteria articulated by the Supreme Court of Kentucky as establishing general, aspirational guidelines for defining educational adequacy." *Rose* and *Claremont* are two seminal cases which explored how state courts have expanded upon the minimal educational benefit, as outlined in *Rowley,* to

[95] 142 N.H. 462, 703 A.2d 1353 (1997).
[96] *Claremont* (1997): 1359. Cited from Johnson (2003): 571-572.

incorporate substantive educational rights. In this discussion, it is important to note the timing of these decisions. Nearly five years after *Rowley*, the Supreme Court of Kentucky issued a ruling in *Rose,* and less than a decade later, the Supreme Court of New Hampshire relied on the framework of *Rose* in the *Claremont* decision. The particular timing of these cases would suggest that these courts are potentially engaged in a constitutional dialogue with the *Rowley* decision. Therefore, "when states properly incorporate these constitutional requirements into the IDEA's definition of FAPE, students with educational disabilities become entitled to more than just a basic floor of opportunity or some educational benefit. They are entitled to receive an education enabling meaningful participation in a democratic society, as well as competition for post-secondary education and employment opportunities."[97]

Beyond state response to the ambiguity of Rowley, which provided opportunity paradoxically to elevate support for educational opportunity for disabled students, the legitimacy and potential un-doing of *Rowley* was further weakened by the 1997 reauthorization amendments to the IDEA. These amendments emphasized that students with disabilities must be provided with the same quality educational services provided to their non-disabled counterparts - in an attempt to settle the question of congressional intent raised in *Rowley.* The 1997 Amendments contained a series of congressional findings in Section 601, which suggested that FAPE must be interpreted to include a higher expectation for students with disabilities and, subsequently, that it is the responsibility of the federal government to maintain that these students are given equal educational opportunities. While the Act had opened opportunities for many disabled students to have access to schooling, "the implementation of this Act has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and

[97] Johnson (2003): 572.

learning for children with disabilities."[98] The report goes on to suggest, "Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible."[99] The language in the Act suggested EAHCA, at this time known as IDEA, had been limited because FAPE was interpreted in a way that limited the expectations for disabled students.

To this extent the Act reflected on the role of Congress in enforcing equal educational opportunities. Congressional activity indicated that disability was becoming part of a national conversation on inclusion. The congressional findings stated, "Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of *ensuring equality of opportunity,* full participation, independent living, and economic self-sufficiency for individuals with disabilities."[100] It is precisely because the education of disabled children is a national policy concern that, "the federal government must be responsive to the growing needs of an increasingly more diverse society…A more equitable allocation of resources is essential for the Federal government to meet its responsibility to provide an *equal educational opportunity* for *all* individuals (emphasis added)."[101]The Act itself aimed to improve results for children with disabilities and their families by emphasizing equal access to the general education curriculum and requiring parents be given the opportunity to resolve disputes with school administrators and local educational agencies (LEAs) through a

[98] Section 1400 (c) (4).
[99] Section 1400 (c) (5).
[100] Section 1400 (c) (1).(emphasis added).
[101] Section 1400 (c) (10) (A); Section 1400 (c) (7)

series of procedural guidelines. Furthermore, "the amendments show Congress' conscious decision to incorporate state educational standards into special educational programming for students. The statute now explicitly mandates that states establish performance goals for children with disabilities that are consistent with other goals and standards set for all children."[102]

Not only were state educational standards for disabled students elevated beyond the "some benefit standard," but they are also crafted with the intention that they are consistent with, and in relation to, the educational standards for non-disabled students. Thus, the 1997 amendments suggest that FAPE is inherently concerned with maintaining educational standards for disabled students that are commensurate with their non-disabled peers, as articulated in the district and appellate courts. In this way, "the amendments to the IDEA mark a significant change of direction from the Court's decision in *Rowley*. The Amendments establish high expectations for children with disabilities to achieve real educational results."[103] It is essential to note that the 1997 amendments do not require that students with disabilities maximize their learning potential, but rather to ensure that they are given equal educational opportunities to become on-pace, or even more advanced, than their non-disabled counterparts.

The response to the *Rowley* decision by the State Courts and federal legislature seems to indicate that these governmental bodies are responding to the Supreme Court, expressing their contempt for the decision and Court's interpretation of FAPE by elevating state standards of education and explicitly articulating the federal government's responsibility to ensure equal educational opportunity. This dynamic, once again, highlights the notion of constitutional dialogues and interactions among governmental bodies. While the Supreme Court ultimately

[102] Johnson (2003): 578.
[103] Ibid.

endorsed the some benefit standard, this decision's influence was eroded over time given the State courts and federal legislature's response to the decision. Since *Rowley*, there have been a select number of cases to reach the Supreme Court that have considered procedural fairness required by IDEA, not necessarily substantive issues of FAPE, which situate *Rowley* as standing law.[104]

Conclusion

In this chapter, I laid the foundation to evaluate how a right to education that follows from the Constitution itself might influence educational access and opportunity for disabled students. I did so first by establishing the litigative history of the *Rowley* case, beginning with the

[104] Eight cases involving IDEA have reached the Supreme Court. However, these cases address procedural guidelines and requirements under IDEA and do not seem to touch the substantive issues discussed in *Rowley.* These issues, instead, are grounded in the procedural requirements embedded in resolving disputes between parents of children with disabilities receiving special education services and school districts. Only three years after the decision in *Rowley,* the Court took on another case involving an IDEA interpretation. In *Irving Independent School District v. Amber Tatro,* 468 U.S. 883 (1984), the Court found that Amber Tatro, a three-half-year-old girl with spina bifida, could be provided a necessary service (clean intermittent catheterization) under the 'related service' provided by the EAHCA (now known as IDEA) because it was required for her to benefit from special education. The Court determined, however, that the Tatros were not entitled to relief, in the form of funds for attorney fees, under the Rehabilitation Act because relief was available under the EAHCA in *Burlington, Sch. Committee v. Mass. Bd. of Ed.,* 471 U. S. 359 (1985), the Court ruled that the EAHCA allowed for reimbursement for private school tuition and transportation of students with disabilities who were placed in alternative educational settings in situations contingent situations in which public school options are deemed inappropriate for the needs of a child. The Court also held that parents who reject a child's placement in a public school and find alternative schooling are responsible for funding but may be reimbursed if the placement is deemed appropriate. In *Honig v. Doe*, 484 U.S. 305 (1988), the Court found that a claim brought under the EAHCA is considered moot if the claimant is over the age of 2021 and the "stay-put" provision of the EAHCA would prevent a school district from indefinitely suspending a student whose disability manifested in conduct that endangered the student and others. The Court held that parents have the right to withdraw their child from a public school setting and enroll them in an alternative school that provides an education best suited to a student's needs in *Florence County School District Four v. Shannon Carter*, 510 U.S. 7 (1993).*)Shaffer ex rel. Shaffer v. Weast*, 546 U.S. 49 (2005) involved the burden of proof in IEP disputes, with the Court holding that the party bringing the suit bears the burden of proof, irrespective of whether that party is the parents of the school system. In a similar case, the Court ruled that IDEA does not permit parents to recover fees needed to produce evidence during legal action against school districts in *Arlington v. Murphy*, 548 U.S. 281 (2006). In 2007, the Court held in *Jacob Winkelman v. Parma City School District*, 550 U.S. 516 (2007) that a lawsuit under the IDEA may be a non-lawyer parent of a student with a disability arguing in federal court "pro se" or on behalf of a child. In *Fry v. Napoleon Community Schools,* 580 U.S. __ (2017) held that the IDEA's requirement that plaintiffs exhaust administrative remedies before suing under the Americans with Disabilities Act and the Rehabilitation Act only extends to individuals seeking relief for denying FAPE. Most recently, in 2023, in *Perez v. Sturgis Public Schools, et al.* 598 U.S. _ (2023) concluded that an Americans with Disabilities (ADA) lawsuit seeking relief may proceed without exhausting all administrative proceedings of the IDEA because the remedy is not provided under IDEA.

district court and following the case all the way to the Supreme Court. In this analysis, I positioned the *Rowley* decision as answering a fundamental question: does FAPE require minimal educational access or equitable educational opportunity? The Supreme Court, in 1982, affirmed the former. Secondly, I detailed a scholarly critique of *Rowley,* the vast majority of which considers the Court's interpretation of FAPE. Last, I explore evidence that the legitimacy and narrow implications of the *Rowley* decision have been compromised by the actions of the State Supreme Courts and federal legislature - both of which aimed to provide a more expansive interpretation of FAPE which would allow for equal educational opportunities. In so doing, I have also highlighted the importance of considering unanticipated consequences of politico-legal actions while also highlighting how educational guarantees remain differentially accessible in the U.S. federalist system. At stake, ultimately, is whether the Constitution provides for a guaranteed right to education; if it does, then the variation due to federalism cannot suffice.

The unintended consequences of the *Rowley* decision provide a multidimensional analysis within a larger conversation of constitutional dialogues. The responses of the state governments to the *Rowley* decision, in which states elevate educational standards required under FAPE, would suggest a vertical dynamic of statutory dialogue - in which the federal and state governments engage in constitutional interpretation of congressional statutes in addition to the three branches of federal government. Furthermore, this discussion highlights the variation and fragmentation of federalism. After *Rowley,* states developed varying standards of educational expectations and rights. Thus, the access to educational opportunity, particularly for students with disabilities, was dependent on the state in which they resided. The difference in educational requirements between states would highlight the need for a federal standard for a baseline of educational access and opportunity, as I will further develop in Chapter 5. Lastly, the irony of

Rowley and its counterproductive legacy highlight the need to consider the role of unanticipated effects in making sense of political decisions and legal outcomes.

Furthermore, I have suggested that the *Rowley* decision must be interpreted within its broader socio-political context. In this light, the *Rowley* decision can be considered an early manifestation of the conservative legal movement's ideological battle to restore power to state and local governments. At the time of the decision, President Reagan was fighting a publicized battle against the expansion of federal education, most notably his efforts to destroy the Department of Education. Additionally, I suggested, there were subtle implications that the financial implications motivated jurists to deny Amy Rowley a sign language interpreter in *Rowley.* This conclusion suggests the Justices were engaging in policy making rather than judicial review that was perhaps motivated, in part, by the economic circumstances, and policies, of the Reagan administration.

After the *Rowley* case, there was widespread criticism and condemnation of the decision - as both inconsistent with the goals of the IDEA and the notions of equality of opportunity under the Constitution. Many scholars have put forth a constitutional argument that FAPE should be interpreted through a Fourteenth Amendment Equal Protection framework. If it were, then the subsequent state-level response to *Rowley* and the state-level variation in educational access would be unnecessary. And, indeed, in dissent, the Supreme Court highlighted that Amy Rowley should be given an equal opportunity to engage in her studies compared to her non-disabled peers. While I agree with the conclusion reached that Amy Rowley was denied FAPE, I disagree with the rationale that such a right would flow from an Equal Protection framework, for reasons explored in Chapter 1, which situate the Equal Protection Clause as historically ineffective and unconvinced used to advance equal rights claims. Instead, I offer an alternative constitutional

pathway that explores an emancipatory guarantee to education for students with disabilities that follow from the Thirteenth Amendment. Put differently, does the Thirteenth Amendment provide the constitutional rationale for a right to education that would guarantee the FAPE interpretation initially supported by the district and appellate rulings?

Chapter 5: Building a Reversal of Rowley Using the Thirteenth Amendment

In Chapter Two, I contended that a fundamental non textual right to education follows from the Thirteenth Amendment if that Amendment is properly understood as an emancipatory guarantee. While a range of other scholars have focused on a right to education that flows from distinct clauses within the Fourteenth Amendment – namely the Equal Protection, Due Process, and Citizenship Clause – this approach has proven insufficient to achieve a constitutionally-guaranteed right to education thus far. In addition, the current Court has appeared, in recent years, unwilling to read the Fourteenth Amendment in the way that constitutional scholars and education rights advocates have suggested.[1]

While a reading of the Thirteenth Amendment, as a repository of non-textual fundamental rights if that Amendment is read not narrowly as an abolition claim but instead expansively as an emancipatory promise, may seem implausible – considering the conservative contemporary Court would unlikely reach for an even more creative reading of the Constitution – it is necessary to remember that this reading aligns with evidence of historical intention and Court precedent. Furthermore, legal scholars have already pointed to this possibility and examined implications for Thirteenth amendment rights claims. Indeed, it is also necessary to remember that a narrow reading of the Thirteenth Amendment's requirements may reflect the racism of the immediate post-Reconstruction period which effectively maintained, if not deepened, the institutionalized White Supremacy that the Amendments were meant to confront. In short, if it is true that, "the Thirteenth and Fourteenth Amendments were both, early in their judicial

[1] Engel, Stephen M. "Dynamics of Constitutional Development and the Conservative Potential of US Supreme Court Gay Rights Jurisprudence, or Why Neil Gorsuch May Stop Worrying and Learn to Love Same-Sex Marriage." *Const. Stud.* 3 (2018).

renderings, warped by commitments to racism or white supremacy" and that "the legacy of that adherence to inequality has marred our contemporary readings" of what either Amendment compels, the it is necessary to re-evaluate the relevant cases with a new lens, with the more expansive lens that is offered in Chapter Two.[2]

This chapter undertakes this analysis. It builds on that claim to a non-textual right to education by addressing the following questions: How would *Rowley* be affected if a right to education was constitutionally guaranteed? In other words, would there be a guarantee of access to equitable educational opportunities for students with disabilities if education was properly understood as a constitutionally guaranteed non-textual right or even a non-textual fundamental right following from Thirteenth Amendments?[3] The goal of this chapter, therefore, is to take the fundamental rights framework laid out in Part 1 and apply it to the question of whether, how, and to what extent education for students with disabilities must be made available on equal terms.

The chapter presents two distinct analyses that would render the decision reached in *Rowley* as incompatible with the Thirteenth Amendment. First, building on arguments developed in Part 1, I suggest an emancipatory understanding of the Thirteenth Amendment speaks to a fundamental right to education, which would consequently raise the level of judicial scrutiny

---

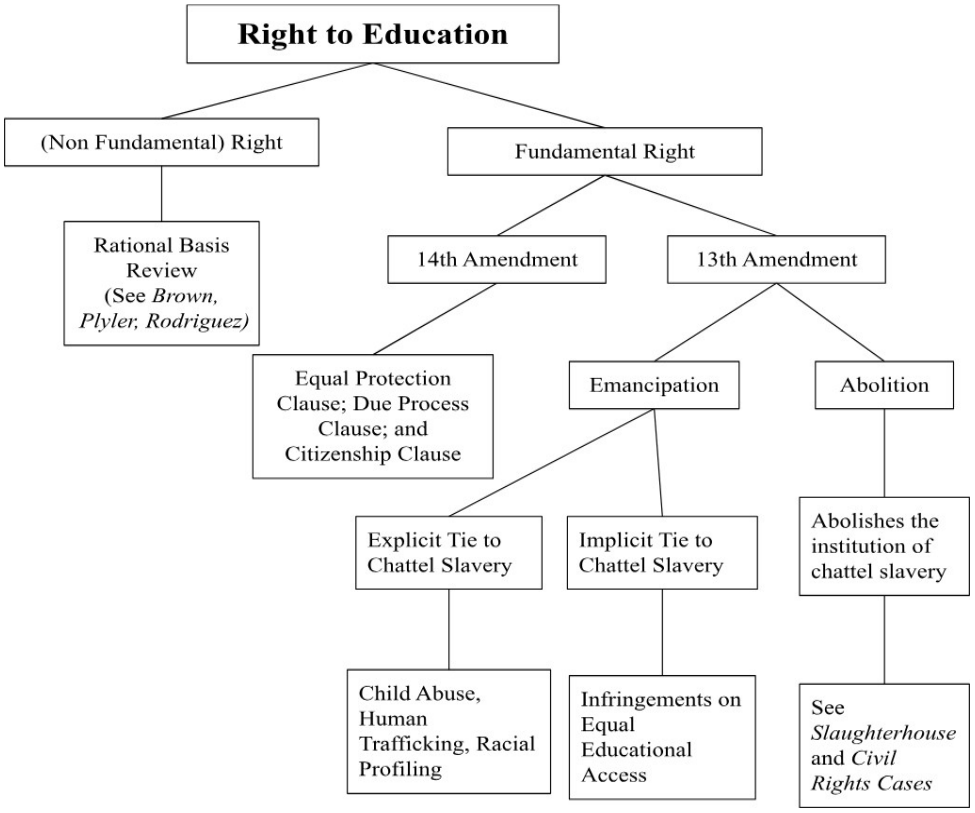
[2] Stephen M. Engel and Timothy S. Lyle, "Is Dignity a Dead End? Alternative Notions of Dignity and the Promise of Our Anti-Racist Constitution," in *Disrupting Dignity: Rethinking Power and Progress in LGBTQ Lives* (New York University Press, 2021), 283.

[3] As explained in Chapter 2, a fundamental right is a right that is deeply rooted in the history and tradition of the United States and is necessary for the maintenance of ordered liberty, as originally articulated in *Washington v. Glucksberg*, 521 U.S. 720-721 (1997). Thus, any deprivation or infringement upon such a right is subjected to strict scrutiny which holds that a law is constitutional insofar as it is narrowly tailored to achieve a compelling government interest. Whereas, a (non-fundamental) right, according to the Legal Information Institute, is defined as a power or privilege held by the general public as a result of a constitution, statute, regulation, judicial precedent, or other type of law. A non-fundamental right may be reviewed with either intermediate scrutiny, which holds that a law is constitutional as long as it is substantially related to achieve an important government interest, or rational basis review, the lowest level of judicial scrutiny which situates a law is constitutional so long as it is rationally-related to achieving a legitimate government interest. Although rational basis review is the lowest tier of scrutiny, many laws fail to pass this threshold. The Supreme Court has utilized rational basis review to strike down state laws that gave men preferential treatment in *Reed v. Reed* 404 US 71 (1971) and to overrule state constitutions which excluded legal protections to queer individuals in *Romer v. Evans,* 517 US 620 (1996).

applied in *Rowley*. Doing so, would increase the skepticism of the state's treatment of Amy Rowley and likely lead to a finding that the state's actions were insufficient and unconstitutional. Second, even if one does not find this particular argument compelling, I provide a holistic understanding of the Thirteenth Amendment, which draws attention to its prohibition against "badges and incidents of slavery." This reading is inconsistent with the decision of *Rowley* because the Thirteenth Amendment holds tremendous capacity to remedy contemporary relics of slavery which impose "badges of inferiority" upon marginalized groups - including persons with disabilities.[4]

[4] Notably, a finding of *Rowley* grounded in an expansive reading of the Thirteenth Amendment avoids the legal complexities of tiers scrutiny. In this sense, my application of the Thirteenth Amendment would be akin to how the amendment was put forth in *Jones.* In which the Court concluded that racial discrimination was a badge of inferiority, which the Thirteenth Amendment prohibited without grounding its analysis in scrutiny doctrines or identifying a suspect class or classification. Similarly in *Yick Wo v. Hopkins* 118 U.S. 356 (1886)*,* the Fourteenth Amendment's Equal Protection Clause was invoked to strike down a city ordinance which, although facially neutral, had implications on account of race. The Court did not implicate the decision with either scrutiny analysis nor discussion of suspect class or classification. The Court, instead, offered, "if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Figure 4: Right to Education Decision Tree



The first possibility ensures that there is a right, if not a fundamental right, to education for all that follows from the Thirteenth Amendment. The second highlights the Thirteenth Amendment can respond to marginalized groups without a history of slavery in the United States, including people with disabilities, and thereby provide a metric to evaluate federal, and potentially state action toward people with disabilities without having to invoke scrutiny doctrine per se, something that the contemporary Court seems increasingly unwilling to do. In my discussion, I highlight two cases that address the Thirteenth Amendment's application to disability discrimination in *Keithly v. University of Texas Southwestern Medical Center*[5] and

[5] Civil Action No. 3:03-CV-0452-L (N.D. Tex. Nov. 18, 2003).

speak to the status of disabled people as a protected class in *City of Cleburne, Texas v. Cleburne Living Center, Inc.*[6] While the first decision rejects the premise of viewing discrimination against persons with disabilities as a violation of the Thirteenth Amendment's prohibition on "badges and incidents" of slavery and the second decision rejects the characterization of persons with disabilities as a suspect class, even though the decision validated the disability claim at issue, and thus both would seem to challenge the arguments I lay out both in this chapter and in Chapter Two, I contend that these ruling are bound by deeply-problematic generations of precedent. That precedent perpetuates the overly narrow reading of the Thirteenth Amendment, which maintained white supremacy ideology and fears of racial integration at the turn of the nineteenth century.

In other words, although the Court is bound by precedent in a common law society, the original decisions that limited the application of the Thirteenth Amendment, that I highlighted in Chapter 2, have led the Court to reproduce the same errors. By deliberately recognizing this cramped reading, I take seriously the question posed by constitutional scholar Stephen M. Engel and critical race scholar Timothy Lyle when they ask, "If limits to equal treatment follow from a judicially imposed tradition of white supremacy antithetical to the aspirations of the Reconstruction Amendments, then why should we maintain these interpretations?"[7] Instead, the structure and the tenor of the Constitution is toward expanding rights, and a proper reading of the Thirteenth Amendment would lead in that direction for people with disabilities.

[6] 73 U.S. 432.
[7] Stephen M. Engel (2021): 296.

Education is a Non-Textual Fundamental Right that Flows From an Emancipatory Understanding of the Thirteenth Amendment

Part I of this thesis summarized the scholarly debate on which, if any, constitutional text speaks to a fundamental right to education. Extant literature has discussed the effectiveness of the commonly cited Fourteenth Amendment - particularly the Equal Protection, Due Process, and Citizenship Clause. Yet, each of these pathways is wrought with problems. Indeed, in *Rodriguez,* the Court explicitly rejected a fundamental right to education said to follow from the text and history of the Equal Protection Clause.[8] Several scholars criticized the ruling as wholly inconsistent with the aims of the amendment, which was intended to eradicate class-based legislation, and at issue in *Rodriguez* was whether poorer children were denied equal educational access and opportunity given how public education is funded through local property taxes.[9] Conversely, other scholars, such as Thomas Walsh and Derek Black, have argued that the overused Equal Protection doctrine's relational element, namely that equal protection requires comparison of classes of people whereas a Due Process claim might only require identification of the right to all persons, confuses the nature of the right at stake.[10] In Chapter 1, I ultimately conclude that *Rodriguez* situates the Equal Protection Clause in a powerless position to vitalize a fundamental right to education.

[8] The Court was unmoved by the Appellees' claim that the Fourteenth Amendment's Equal Protection Clause was sufficient constitutional justification to identify a fundamental right to education. To this extent the Court concluded, "...the importance of a service performed by the States does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause." A full discussion of the Rodriguez decision, and its discussion of the Equal Protection Clause, can be found in Chapter 1, pages 10-14.
[9] See Carl F Noll, "San Antonio Independent School District v. Rodriguez: A Retreat from Equal Protection," *Cleveland State Law Review* 22, no. 585 (1973): 585–600; Timothy Lynch, "Education as a Fundamental Right: Challenging the Supreme Court's Jurisprudence," *Hofstra Law Review* 26, no. 4 (January 1, 1998): 1-39.
[10] See Thomas J. Walsh, "Education as a Fundamental Right Under the United States Constitution," *Willamette Law Review* 29, no. 2 (1993): 279–96; Black, Derek. 2022. "Freedom, Democracy, and the Right to Education." *Northwestern University Law Review* 116(4): 1081-1082.

The Due Process Clause has historically been understood as a repository of non-textual fundamental rights.[11] Thomas Walsh, for example, suggests that a right to education, similar to the right to privacy, can be obtained through a penumbral framework or that it follows from the implications of multiple constitutional rights including due process guarantees.[12] In essence, Walsh concludes the right to education is inherent in other explicit or textual rights.[13] However, scholars such as Akhil Reed Amar, have cautioned against leaning into the Due Process Clause to provide non textual fundamental rights given its racist history and the Court's concerns of institutional legitimacy.[14]

Amar, as well as Derek Black, turns to the lesser utilized clause of the Fourteenth Amendment: the Citizenship clause. Black contends that a key component to maintaining chattel slavery and white supremacy in the Antebellum South was the criminalization and deprivation of education. Thus, to be emancipated from slavery and into citizenship would require educational

---

[11] In Chapter 1, I cite *Griswold* and *Loving* as two important precedents in which non textual rights to privacy (which has been subsequently restricted in *Dobbs v. Jackson Women's Health Organization* 597 US _ (2022)) and marriage are identified. It is important to recognize that viewing the Due Process clause as a repository of non-textual fundamental rights is controversial for numerous reasons. First, it may be that such a repository may follow from either the Ninth Amendment (see *Griswold)* or from the Fourteenth Amendment's privileges and immunities clause. The latter claim was rejected by the Court majority in the Slaughterhouse Cases of 1873 since it might provide the Court with far too much power: such a reading would "constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment .....[The effect of] so great a departure from the structure and spirit of our institutions ..... is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character." In short, such a reading would enable a kind of judicial activism. Yet, this same critique has been lodged against the due process reading of fundamental rights. Indeed, Justice Clarence Thomas attempted to revive a reading of privileges and immunities in *McDonald v. Chicago*: "cannot agree that it is enforceable against the States through a clause that speaks only to "process." Instead, the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause."

[12] In *Griswold,* Justice Douglas writing for the Majority, situates the right to privacy as an implied fundamental right which stems from the first, third, fourth, five, and ninth amendments. Justice Douglas concludes that the aforementioned textual rights provided a broader understanding of privacy - which could be applied to contraception. For further discussion on the penumbra framework, as developed in *Griswold* see Pg 481-486.

[13] See Walsh (1993): 296.

[14] As explored in Chapter 1, the Due Process Clause has been utilized to identify a fundamental right to enslave African Americans in *Dred Scott,* which legitimized and upheld the institution of slavery, and the right to contract in *Lochner,* which contributed to exploitative labor practices in the twentieth century.

access.[15] Amar adopts a different track and suggests that citizenship status provides a guarantee of certain substantive rights - which could potentially include educational access.[16] Yet, focusing on citizenship, which is the focus of the Fourteenth Amendment's Citizenship Clause and Privileges and Immunities Clause, rather than personhood, which is the focus of the Fourteenth Amendment's Due Process and Equal Protection Clauses, introduces limitations that might otherwise be avoided. Leaning into citizenship as a prerequisite for educational access and opportunity could be used as a justification to exclude undocumented students from achieving educational access. Furthermore, this approach would run afoul to the precedent set in *Plyler*, which determined that undocumented children cannot be denied access to education. In summation, all of these distinct constitutional claims to a fundamental right to education are lacking in different ways. Consequently, I turned to the Thirteenth Amendment as an underutilized, and more promising, strategy.

Chapter 2 offered an emancipatory reading of the Thirteenth Amendment, which is distinct from the narrower reading of the Amendment as requiring abolition. The broader reading would provide for a fundamental right to education. The Thirteenth Amendment has historically been interpreted in such a way that was inconsistent with the original intention behind the Amendment, which had the impact of upholding and maintaining systems and institutions of White Supremacy in the aftermath of the Civil War.[17] Indeed, *Jones v. Alfred Mayer* provides

[15] See Derek Black (2022): 1031–98.
[16] See Akhil Reed Amar, "Intratextualism," *Harvard Law Review* 112, no. 4 (1999 1998): 747–827.
[17] In my Chapter 1 analysis, I specifically criticize the decisions reached in *Slaughterhouse* and the C*ivil Rights Cases* of 1883. I put forth the question in Chapter 2 (pg 7), "To what extent was the Court's decision to favor a restrictive reading of the Thirteenth Amendment influenced by the blatant racism and fear of integration at the time in which these cases were decided?," suggesting that the narrow interpretation of the Thirteenth Amendment was a racially-motivated judicial reading. I will explore in the second half of this chapter how the contemporary Court's had recommitted the same error of narrowly interpreting the Thirteenth Amendment because of a desire to maintain precedent. However, I suggest that the Court's insistence on a precedent, which was motivated by White supremacy and fears of racial integration, is deeply problematic.

precedential support for this theory and taps into the underutilized power of the Thirteenth Amendment. This case provided an emancipatory framework for the Thirteenth Amendment and was later cited in other cases that struck down private acts of discrimination as creating "badge of inferiority" which the Thirteenth Amendment bars.[18] As contemporary scholarship suggests, the Thirteenth Amendment bars modern forms of slavery, including human trafficking and child abuse, but also extends to less explicit conditions of slavery, including abortion restriction and, as I suggest, a denial or restriction of equal educational opportunity. This history, precedent, and scholarship provide the foundation for my ultimate thesis: the Thirteenth Amendment's emancipatory guarantee provides a fundamental right to education, which would heighten judicial scrutiny to strike down actions that limit or restrict access to equal educational opportunities, particularly as it relates to students with disabilities - insofar as it is narrowly tailored to achieve a compelling governmental interest.

As I have laid out, there are a series of pathways one could take to conclude that education is a fundamental right. While I have contended that the Thirteenth Amendment provides a distinct remedy, there remain legitimate and valid arguments to suggest that such a right may also flow from the Fourteenth Amendment, whether that be in the Equal Protection Clause, Due Process Clause, or Citizenship Clause. *Irrespective of which constitutional pathway one chooses to proceed with, if education is a fundamental right,* Rowley *cannot stand***.** If education were considered a non-textual fundamental right, it would follow that federal regulation of the right would be subject to the highest form of judicial skepticism or scrutiny. That right may follow from either the Due Process Clause as outlined by other scholars and

[18] The two cases I examined in this section were *Tillman v. Wheaton-Haven Recreation Association* and *Runyon v. McCrary.* In both these cases, the Court held that private acts of racial discrimination were prohibited under the Thirteenth Amendment because the discrimination created "badges of inferiority." See pages 13-15 of Chapter 2.

discussed in Chapter 1 or it may follow from the Thirteenth Amendment's guarantee of emancipation as I have suggested in Chapter Two. And, it may also follow that a similar level of scrutiny would be applied to a state law should the right be incorporated to apply against the states through the Fourteenth Amendment's due process clause.[19] Thus, any federal or state legislation that places an infringement on educational access – viewed as a fundamental right – would have to survive strict scrutiny.[20]

While the Court does not explicitly state any scrutiny standard in *Rowley,* many scholars have likened the "some benefit" standard to the lowest level of judicial scrutiny known as rational basis review.[21] As applied in *Rowley*, the Court allows state/local (in)action insofar as it is, "designed to meet the unique needs of the handicapped child, supported by such services as

[19] Incorporation doctrine holds that portions of the Bill of Rights are applicable to the State governments. The Court first identified the capacity of the Bill of Rights to extend to State governments in *Chicago, Burlington, and Quincy Railroad Company v. City of Chicago 166* U.S. 226 (1897) when the Court ruled the Takings Clause of the Fifth Amendment extended to the State government as much as it did the federal government. This precedent was expanded upon in *Gitlow v. New York* 268 U.S. 652 (1925) when the Court ruled the First Amendment freedom of speech was incorporated to apply to the states. Similarly, in *Cantwell v Connecticut*, 310 U.S. 296 (1940) the Court found that the Fourteenth Amendment made the First Amendment's right to freedom of religion (including its free exercise and non-establishment principles) applicable to states. In the twentieth century, incorporation was activated to generate more protections and establish a ground floor level of rights. In a sense, the Bill of Rights and the freedoms these rights protected were legitimated to be an impediment to both State and federal abuse of power. However, in the twenty-first century, incorporation served a different purpose: to incorporate the second amendment to state governments, which has had the effect of limiting state action to pass gun control legislation. In *District of Columbia v. Heller* 554 U.S. 570 (2008) the Court ruled the provisions of a D.C. gun control code was violative of the Second Amendment. This issue was further complicated in *McDonald v. City of Chicago* 561 U.S. 742 (2010) in which the Court, relying on *Heller,* concluded that the Second Amendment is incorporated to apply to states.

[20] The *Loving* decision is a relevant example of an identified fundamental right, the right to marry, which is held to strict scrutiny. In the decision, the majority concludes, "The right to marry is a fundamental right protected by the Fourteenth Amendment. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival… Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual, and cannot be infringed by the State." The Court suggests that while marriage is a fundamental right, it can still be infringed upon, according to the strict scrutiny doctrine, insofar as it is narrowly tailored to achieve a compelling government interest. However, the Court concludes that there is no evidence which would suggest the anti-miscegenation law provides a compelling state objective. To this extent, the Court writes: "The state has no legitimate purpose for imposing this ban. There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy." The application of strict scrutiny is not to suggest that a right remains impassable from restriction, but rather heights the level of review in which infringements are judged.

[21] Steven Robinson (1983): 961.

are necessary to permit the child to benefit from the instruction."[22] This standard developed by Rehnquist mirrors the language of rational basis review, which holds a law constitutional insofar as it is rationally related to a legitimate government interest. By contrast, a fundamental right to education requires strict scrutiny, which would deem that any infringement of access to equal educational opportunity must be narrowly tailored to achieve a compelling government interest otherwise it would be unconstitutional. Put differently, any infringement of educational opportunity must be interpreted with ultimate skepticism and face a higher threshold of judicial review.

In the case of Amy Rowley, the district's decision - in the form of not providing her with a sign interpretation - can be considered an infringement on her access to equal educational opportunity commensurate with that of her peers. Therefore, if the right to education was fundamental, then the Court would have to find that the school district's decision was narrowly tailored to achieve a compelling government interest. This is not to suggest that any limitation or restriction on educational access would be unconstitutional if education was a fundamental right, but rather to suggest that given how education is deeply rooted in the history and tradition of the United States and necessary for the maintenance of ordered liberty – the two elements of any fundamental right – any infringement would be judged with the highest degree of judicial scrutiny. Based on my analysis in Chapter 4, I would suggest that the obvious, yet unstated, "compelling interest" of the State would be to reduce cost for special education accommodations.[23] Under strict scrutiny, this argument would not suffice because saving costs is not a compelling enough reason to infringe on a fundamental right.

---

[22] *Rowley* (1982): 188-189.

[23] In Chapter 4, in my analysis of scholarly responses to *Rowley,* I present evidence which suggests that *Rowley* was, at least in part, motivated by financial concerns overpaying for special education services. See pages 21-24 of Chapter 4.

The arguments I laid out in Part 1, establishing a fundamental right to education, were meant to provide a constitutional defense against the ruling in *Rowley* - beyond its ahistorical and narrow interpretation of the EAHCA. While I explicitly adopt the Thirteenth Amendment as the most efficient constitutional pathway to arrive at a fundamental right, the other pathways still provide merit. Regardless of whether one is more convinced by the Thirteenth Amendment, Equal Protection, Citizenship, or Due Process Clause to argue a fundamental right to education, the outcome of *Rowley* would be the same: because education is a fundamental right, which elevates the level of judicial scrutiny, and there is no compelling state interest to infringe upon such a right, *Rowley* must be overridden.

Activating the 13th Amendment to Advance a Reversal of Rowley: An Emancipatory Reading of the Thirteenth Amendment and Redefining "Badges and Incidents of Slavery" to Address Infringements on Equal Educational Access

A fundamental rights analysis has been cited in the literature to protect the educational rights of students. While I contend that the Thirteenth Amendment can be read in a legitimate way to provide for that right, I also suggest the Thirteenth Amendment might also provide protection not simply for education for all but to protect against discrimination in educational access and opportunity for people with disabilities. Thus, a clear understanding of the potential application of the Thirteenth Amendment also requires a distinct outcome than what the Supreme Court offers in *Rowley.* Put differently, an expansive understanding Thirteenth Amendment, not including a fundamental right or tiers of scrutiny analysis, suggests that *Rowley* has run afoul to the constitution. This approach would mirror the strategy the Court adopted in *Jones,* in which the Court avoided the complicated analysis of tiers of scrutiny and refrained from adopting non textual fundamental rights. This analysis involves an emancipatory reading of the Thirteenth Amendment that focuses on the ban on "badges and incidents" of slavery to address modern

systems of oppression that would otherwise suggest an unacceptable notion of inferiority contrary to guarantees of equality.

To emancipate means to set free. Based on this definition, emancipation equates to freedom.[24] The necessary follow up, but seldom discussed, question is: *What does emancipation (or freedom) mean or require?* Put differently, *how do we actualize the goals of emancipation and freedom set out in the Thirteenth Amendment?* To begin to address this question, it is necessary to consider the historical link between slavery and denial of educational access. As outlined in Chapter 2, a central condition of enslavement was the deprivation and criminalization of any education. It is in this context that any restriction of education should be viewed with a degree of skepticism and heightened standard of review. More importantly, however, to engage in this conversation, it is necessary to define "badges of inferiority," which the Thirteenth Amendment prohibits as illustrated by *Jones v. Alfred Mayer.* What constitutes a "badge of inferiority"? And, perhaps most importantly, is this determination historically bound to the "badges of inferiority" that were directly tied to chattel slavery?

In this scholarly conversation there are two distinct approaches regarding the application of "badges and incidents of slavery" to address modern forms of oppression and discrimination. Many scholars have built upon the precedent established in *Jones* to suggest that any instances of racial discrimination, either public or private, create a "badge of inferiority" which the Thirteenth Amendment prohibits and must be appropriately legislated under Section 2. Based on this approach, the "badges of inferiority" are bound to the historical contexts in which the Thirteenth Amendment was developed: addressing racial animosity and combating white supremacy.[25] By

[24] I use these two terms interchangeably throughout my analysis.
[25] See Jennifer McAward, "Defining the Badges and Incidents of Slavery," *Notre Dame Law School Scholarship*, January 1, 2012; William Carter, "A Thirteenth Amendment Framework for Combating Racial Profiling," *Harvard*

contrast, several scholars have extended this theory further, suggesting that "badges of inferiority" can extend *all* marginalized groups, not necessarily limited to race. This broader application is based on this understanding that the Thirteenth Amendment can be expansively interpreted to speak to protections against child abuse, restrictions on abortion access, hate speech, homophobic and transphobic legislation, and, as I ultimately offer, restrictions on access to equal educational opportunity - particularly concerning students with disabilities.[26]

The *Jones* decision, while not explicitly defining what is meant by "badges of inferiority," suggested that Thirteenth Amendment's prohibition on slavery extended beyond the limits of the chattel slavery that existed prior to 1866. The Court reasoned that private act of racial discrimination, such as the denial of a property contract at issue in this particular case, were a relic of slavery which produced a "badge of inferiority." This approach was affirmed in other decisions, in which private acts of racial discrimination were held to be in violation of the Thirteenth Amendment, empowering Congress to pass appropriate legislation to enforce these aims.[27] Thus, "badges of inferiority" were expanded upon to include instances of racial animosity that were not explicitly bound to chattel slavery.

Jennifer McAward suggests that "badges of inferiority" can be defined as "public of widespread private conduct that targets a group on the basis of race or previous condition of

---

Civil Rights-Civil Liberties Law Review 17 (January 1, 2004): 1-39. Both articles highlight the capacity of the Thirteenth Amendment, under Section 2, to develop legislation that combats race discrimination and racial profiling.

[26] See Akhil Reed Amar and Daniel Widawsky, "Child Abuse As Slavery: A Thirteenth Amendment Response to DeShaney Commentary," *Harvard Law Review* 105, no. 6 (1992 1991): 1359–85; Andrew Koppelman, "Forced Labor, Revisited: The Thirteenth Amendment and Abortion," *Faculty Working Papers*, January 1, 2010; Alexander Tsesis, "Confederate Monuments as Badges of Slavery," SSRN Scholarly Paper (Rochester, NY, March 2, 2020); Stephen M. Engel and Timothy S. Lyle, "Is Dignity a Dead End? Alternative Notions of Dignity and the Promise of Our Anti-Racist Constitution," in *Disrupting Dignity: Rethinking Power and Progress in LGBTQ Lives* (New York University Press, 2021).

[27] *Tillman v. Wheaton-Haven Recreation Association* and *Runyon v. McCrary.* In both these cases, the Court held that private acts of racial discrimination were prohibited under the Thirteenth Amendment because the discrimination created "badges of inferiority." See pages 13-15 of Chapter 2.

servitude, that mimics the law of slavery, and that poses a substantial risk that the members of the targeted population will be returned to de facto slavery or otherwise denied the ability to participate in the basic transactions of civil society."[28] Indeed, as detailed below, many scholars have adopted this definition, suggesting that the Thirteenth Amendment can be empowered to combat racial prejudice and have extended the analysis such that the Amendment combats racial profiling, bars hate speech, and compels the dismantling of Confederate statues.

William Carter argues that racial profiling can be understood as a relic of slavery, thus, institutionalized practices and systems that determine criminal activity on the basis of race are unconstitutional and violative of the Thirteenth Amendment. Carter is careful not to equate the harms of racial profiling with chattel slavery, but instead offers, "the widespread stigmatization of African Americans as predisposed towards criminality is a lingering vestige of the slave system and is therefore outlawed by the Thirteenth Amendment."[29] Carter further elaborates on the connection between racial profiling and slavery, writing, "Racial profiling is best understood as a current manifestation of the historical stigma of blackness as an indicator of criminal tendencies. This stereotype arose out of, and was essential to, slavery in the United States."[30] Carter, basing his analysis on the legislative history of the Thirteenth Amendment and the precedent established in *Jones* concludes, "The Thirteenth Amendment…remains a viable and powerful remedy for racial profiling. The Thirteenth Amendment's promise was to eliminate all of slavery's lingering vestiges, not just to end the institution of chattel slavery."[31]

Additionally, Akhil Reed Amar elaborates upon a reading Thirteenth Amendment that informs modern applications. Most significantly, in this article, Amar suggests that the Thirteenth

[28] McAward (2012): 606.
[29] Carter (2004): 6.
[30] Ibid., 5
[31] Ibid., 78.

Amendment should have been utilized in a racial hate speech case, known as *R.A.V v. City of St. Paul.*[32] The case involved the actions of several teenagers who burned a cross on a black family's lawn. In a unanimous decision, the Court ruled that a local ordinance, which prohibited the display of a symbol which "aroused anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender," was unconstitutional. Justice Scalia, writing for the majority, stated, "The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects."[33] Amar writes in direct response to this decision, offering that the Court's emphasis on issues of Freedom of Speech was misplaced, writing, "I suggest that rather than just focus on this event as 'freedom of speech,' we must also ask whether it might make as much or more sense to see this burning cross in the dead of the night as a "badge of servitude" that may be lawfully prohibited under Section 2 of the Thirteenth Amendment."[34]According to Amar, the Court missed a significant opportunity to elevate the relationship between the Thirteenth Amendment's ban on "badges of inferiority" and the use of racially-motivated hate speech.

Alexander Tsesis provides a compelling argument on the connection between the public display of Confederate Statutes and "badges of inferiority" for Black Americans. Tsesis offers that individuals looking to remove Confederate statues can, "look to the Thirteenth Amendment as a source of affirmative defense against states seeking to bar their removal" given the explicit tie between Confederate statutes and the legacy of slavery and white supremacy.[35] Furthermore, Tsesis suggests, "The Amendment's framers affixed the second clause of the Amendment as a legislative tool for battling state prejudices and giving practical effect to abolitionist ideals.

[32] 505 US 277 (1992).
[33] Ibid., 391.
[34] Akhil Amar, "Remember the Thirteenth," *Faculty Scholarship Series*, January 1, 1993, 407.
[35] Tsesis (2020): 15.

Furthermore, the Thirteenth Amendment admits to regulating private actions, "such as carrying supremacist symbols at ethnocentric demonstrations that call for public intolerance, violence, and other racial oppressions."[36] Tsesis, writing in response to the 2017 Unite the Right March in Charlottesville,[37] argues that the Thirteenth Amendment's ban on "badges of inferiority" extends to modern forms of racial oppression, including publicly honors symbols of White Supremacy and the Lost Cause.[38]

These three examples activate the Thirteenth Amendment to remedy modern forms of racial discrimination that are wholly aligned with the arguments I developed in Chapter 2, which speak to an emancipatory reading of the Thirteenth Amendment that is not historically bound to the abolition of race-based chattel slavery. Indeed, the Supreme Court recognized as early as 1873 that the Thirteenth Amendment was not limited to the abolition of chattel enslavement of people of African descent. In the *Slaughterhouse Cases*, the majority clearly stated:

> We do not say that no one else but the negro can share in this provision… Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if *other rights* are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent.[39]

---

[36] Tsesis (2020): 14.
[37] The 2017 Unite the Right Rally was a White Supremacist and Neo-Nazi demonstration in Charlottesville, Virginia from August 11-12 of 2017. Among the organizer's stated goals was their opposition to a proposed removal of a statue of General Robert E. Lee. See Jacey Fortin, "The Statue at the Center of Charlottesville's Storm," *The New York Times*, August 13, 2017, sec. U.S.
[38] The Lost Cause was a romantic revitalization of the old ways of the Antebellum South. It was able to mobilize support by controlling the history of the Civil War and its aftermath in a way favorable to White Supremacy. See David W. Blight, *Race and Reunion: The Civil War in American Memory* (Harvard University Press, 2001).
[39] *Slaughterhouse* (1873): 72 (emphasis added).

Thus, while the Court acknowledged that the motivating concern of the Thirteenth Amendment was to eliminate the badges of inferiority embedded in a racialized system of slavery and that this guarantee can and should be extended to address modern forms of racial violence, it also does not follow that McAward's definition of "badges of inferiority" should be exclusive to forms of racial discrimination. Indeed, a more expansive interpretation of "badges of inferiority" could include discrimination against other marginalized groups that have experienced discrimination and stigmatization, and the *Slaughterhouse* majority recognizes this by reference to other rights that may be protected within the capacity of either or both of the Thirteenth and Fourteenth Amendments.[40] This possibility points to the precise expansive understanding advocated here, and, as I offer, this approach provides a way for scholars to incorporate an intersectional analysis of discrimination or a discriminatory action that exists at the convergence of different marginalized identities.[41]

Several scholars have built upon this foundational literature to suggest the Thirteenth Amendment, which serves as a remedy for contemporary forms of racial violence, ought to

[40] In the Court's discussion of the application of Thirteenth Amendment, the Court concludes the Thirteenth Amendment should not be read expansively. To this end, the Court notes, "Still it is evident that the language of the amendment is *not used in a restrictive sense*. It is not confined to African slavery alone. It is general and universal in its application. Slavery of white men as well as of black men is prohibited, and not merely slavery in the strict sense of the term, but involuntary servitude in every form" (emphasis added). Furthermore, the Court goes on to suggest the meaning of the abolition of slavery and involuntary servitude which was, "intended to make everyone born in this country a freedman, and as such to give him the right to pursue the ordinary advocations of life without other restraint than such as affects all others, and to enjoy equally with them the fruits of his labor." While the Court was primarily considered with labor, this argument can be expanded to apply to the contexts of education - which is an advocation of life which must be made available on equal terms.

[41] Intersectionality is a term coined by legal scholar Kimberlee Crenshaw in the early 1990s. The term was created as a response to account for intragroup differences in the feminist and anti-racist liberation movements that had situated the experiences of women of color on the margins by centering White women in the feminist movement and Black men in the fight for Black liberation. Crenshaw defines intersectionality as, "... a metaphor for understanding the ways that multiple forms of inequality or disadvantage sometimes compound themselves and create obstacles that often are not understood among conventional ways of thinking." See Kimberlee Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," *University of Chicago Legal Forum* 1989, no. 1 (December 7, 2015), 149. Disability can also be understood by adopting an intersectional analysis. See Mary Wickenden, "Disability and Other Identities? —How Do They Intersect?," *Frontiers in Rehabilitation Sciences* 4 (August 10, 2023).

expand to other areas of marginalization. In other words, while scholars agree that the Thirteenth Amendment ought to be invoked to combat institutionalized practices of racism and white supremacy in a racialized society, the meaning of Thirteenth Amendment speaks to all systems of oppression and domination - irrespective of its explicit tie to chattel slavery. Additionally, I suggest that this interpretation of the Thirteenth Amendment's expansive powers is advantageous because it recognizes intersectional forms of discrimination, which may include but are not necessarily limited to race and racism.[42] I offer that this insight is especially relevant in the context of special education, in which students of color are disproportionately identified as having a disability and experience restriction to educational access on the basis of *both* disability and race.[43]

It ought to be explicitly stated that expanding the scope of the Thirteenth Amendment to include non-racial forms of oppression is in no way an attempt to delegitimize or minimize the atrocities enslaved individuals experienced during slavery. Scholars on either side of the argument, including those who contend the Thirteenth Amendment should be invoked to combat other oppressive systems and those who believe that the Amendment should be used to combat specifically race-related issues, can agree that the underlying motivation for the Thirteenth Amendment was to address the urgent need to abolish the abhorrent system of chattel slavery,

---

[42] Crenshaw applied this intersectional lens to explain violence against women of color. See Kimberlee Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color," *Stanford Law Review* 43, no. 6 (1991): 1241–99. The purpose of the article, according to Crenshaw was, "to advance the telling of that location by exploring the race and gender dimensions of violence against women of color" (1242). Crenshaw highlights that women of color exist at the intersection of many marginalized identities not limited to race or gender. To this extent she writes, "The fact that minority women suffer from the effects of multiple subordination, coupled with institutional expectations based on inappropriate non intersectional contexts, shapes and ultimately limits the opportunities for meaningful intervention on their behalf."

[43] I intend to argue that students of color are disproportionately identified as having a disability and in need of special education services. This overidentification is likely attributed to implicit biases of evaluators. As an effect, disabled students of color experience restrictions to access to education that are both attributed to discrimination on the basis of race and disability. See Beth A Ferri and David J. Connor, "Special Education and the Subverting of Brown," *Journal of Gender, Race & Justice* 8, no. 1 (2005 2004): 57–74.

which directly impacted Black Americans. As Nicolas Serafin offers, "No plausible approach to the badges metaphor—or to the Thirteenth Amendment more broadly—can overlook the centrality of African American subjugation to American chattel slavery and to the badges thereof. On the other hand, the Thirteenth Amendment was written in race-neutral terms, and subsequent court precedent has confirmed that the Thirteenth Amendment extends to other racial groups."[44]

An expansive understanding of the Thirteenth Amendment's power hinges on a broader understanding and definition of the institution of slavery. While many scholars have suggested, and rightly so, that the peculiar institution developed a system of mass exploitation of Black bodies, it is essential to note that a central condition of enslavement was the social and political disenfranchisement of Black Americans. The first, and perhaps most illuminating, articulation of the Thirteenth Amendment's capacity to address social stigma, ironically, can be traced back to Justice Taney's opinion in *Dred Scott.* In this case Justice Taney denied Dred Scott citizenship on the basis that enslaved individuals were incapable of citizenship because they were an inferior race.[45] As Jack Balkin observes, Justice Taney, in his opinion, alludes to the institutionalized structures of racial hierarchy.[46] The internalized racist belief that Black people were inferior was built into the structure of society, "It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as public concern, without doubting for a movement the correctness of this opinion."[47] As Jack

[44] Nicholas Serafin, "Redefining the Badges of Slavery," *University of Richmond Law Review* 56, no. 4 (May 1, 2022): 1301.
[45] Justice Taney stated in *Dred Scott*, "They (African Americans) had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferiority, that they had no rights which the white man was bound to response; and that the negro might justly and lawfully be reduce to slavery for his benefit" (407).
[46] Jack M. Balkin, "The Reconstruction Power," Rochester, NY, February 24, 2010), 1817.
[47] *Dred Scott* (1857): 407.

Balkin suggests, “Slavery was not just legal ownership of people; it was an entire system of conventions, understandings, practices, and institutions that conferred power and social status and maintained economic and social dependency.”[48] Therefore, “...the badges metaphors, call on Congress and the public to eradicate the lingering traces of group stigma, in whatever form they are found.”[49] Put differently,

> To enforce the Thirteenth Amendment, Congress must disestablish all the institutions, practices, and customs associated with slavery and make sure they can never rise up again. This means that Congress has the power to dismantle the interlocking social structures and status-enforcing practices that were identified with slavery or that rationalized and perpetuated it. The way this insight is usually expressed is that Congress has the power to identify and eliminate the "badges and incidents of slavery."[50]

The most relevant case in which the Court addressed the issue of the Thirteenth Amendment’s applicability to non-racial minorities was in *United States v. Nelson*.[51] In the case, Lemrick Nelson and Charles Price appealed their convictions under 18 U.S.C. § 245(b)(2)(B)[52] for “willfully injuring, intimidating, and interfering with Yankel Rosenbaum (“Rosenbaum”), by force and threat of force, because of Rosenbaum’s Jewish religion and because Rosenhaum was enjoying use of a Brooklyn city street.”[53] By way of background, on August 19, 1991, Rosenbaum had driven a taxi which struck two Black children in the Crown Heights area of Brooklyn. When the ambulance arrived at the scene, the paramedics came from a Jewish hospital and treated the injured driver first. Eventually, two NYC ambulances came and gave assistance

[48] Balkin (2010): 1817.
[49] Nicholas Serafin, “Redefining the Badges of Slavery,” *University of Richmond Law Review* 56, no. 4 (May 1, 2022): 1337.
[50] Balkin (2010): 1817.
[51] 277 F.3d 164 (2d Cir. 2002).
[52] Title 18, Section 245 (b) (2) (B) of the United States Code makes it a federal crime for a person (even if acting in purely private capacity) to injure someone else because of the victim’s race or religion and because the victims was enjoying a public facility provided by any State or local government.
[53] Nelson (2002): 168.

to the two injured children, but it was too late - one of the children died. This unequal response in medical attention prompted a large protest. Charles Price is quoted as saying, "We can't take this anymore. They're killing our children. The Jews get everything they want. The police are protecting them."[54] Rosenbaum tried to escape the swarm of protests but eventually was taken down by the crowd. According to Court records, "A group of between ten and fifteen people, including Nelson, then began beating him, knocking him to the ground, and striking him repeatedly."[55] Rosenbaum eventually died from the injuries he sustained during the fight.

Nelson, who was caught by the police with a bloody knife in his possession. Testing done later revealed that the blood on the knife found on Nelson matched the DNA of Rosenbaum. Nelson was charged with violating 18 USC § 245, which, in part, states:

> Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimates or interferes with, or attempts to injure, intimate, or interfere with -….
>
> (2) any person because of his race, color, religion or national origins and because he is or has been….
>
> (B) participating in or enjoying any benefit, service, privilege, program, facility or activity or activity provided or administered by any State or subdivision thereof; …
>
> shall be fined under this title, or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire shall be fined under this title, or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.

[54] Ibid., 170. Cited from Tr. 1369.
[55] Ibid.

Price was charged both with violating § 245(b)(2)(B) directly and with aiding and abetting Nelson's violation of § 245(b)(2)(B), in violation of 18 U.S.C. § 2. The federal indictment against the defendants held that:

> by force and threat of force did willfully injure, intimidate and interfere with, and attempt to injure, intimidate and interfere with, Yankel Rosenbaum, an Orthodox Jew, because of his religion and because he was enjoying facilities provided and administered by a subdivision of the State of New York, namely, the public streets provided and administered by the City of New York, and bodily injury to and the death of Yankel Rosenbaum did result.[56]

The defendants make a series of arguments; however I limit my analysis to what I find to be the most relevant argument. The defendants claim that §245(b)(2)(B) represents an improper use of Congress beyond that extends the constitutional role of Congress. Thus, the central question becomes, what constitutional provision empowered Congress to pass § 245(b)(2)(B). The Court addresses this exact question by providing an expanded scope of the Thirteenth Amendment. Furthermore, the Court concluded that the Thirteenth Amendment was relevant in this federal legislation because it extended private acts of discrimination, unlike the Fourteenth Amendment.[57] More significantly, however, in the decision, the majority engaged in an expansive reading of the Thirteenth Amendment, as extending to non-racial minorities without a history of slavery in the United States. To this extent, the Court found, "The text of the Amendment nowhere identifies or otherwise singles out those who servitude the Amendment had specifically been enacted to address."[58]

---

[56] Ibid. 171.
[57] The Court explicitly states, "The fact that § 245(b)(2)(B) is applied in this case to reach purely private conduct therefore does not - regardless of what might be the rule in the context of the Fourteenth Amendment - present any obstacle to that statute's being upheld as a proper exercise of Congress's power under the Thirteenth Amendment." See Nelson (2002): 175.
[58] Ibid., 176.

The Court goes on to elaborate on the applicability of the Thirteenth Amendment in non-racialized contexts, writing that the Thirteenth Amendment according to *Hodges v. United States*,[59] "is the denunciation of a condition, and not a declaration in favor of a particular people. It reaches every race and every individual, and if in any respect it commits one race to the nation, it commits every race and every individual thereof. Slavery or involuntary servitude of the Chinese, of the Italian, of the Anglo-Saxon, are as much within its compass as slavery or involuntary servitude of the African."[60] Additionally, the Court leaned into the dissenting opinions from former precedent, in particular looking at the *Civil Rights Cases,* in which Justice Harlan, in dissent, offered, "The terms of the Thirteenth Amendment are absolute and universal. They embrace every race which then was, or might thereafter be, within the United States."[61] Therefore, given these precedents, the Court finds, "Certainly there is nothing in the conceptual or linguistic structure of the prohibition of 'slavery' and 'involuntary servitude' — which appears in the Thirteenth Amendment, it is worth noting once again, unadorned by the adjective 'racial' — that limits the banning of these evils only when they are imposed along racial lines."[62]

Given this expansive approach to the Thirteenth Amendment, which empowers Congress to enforce Section 1 through appropriate measures, the Court concludes that 18 U.S.C. § 245(b)(2)(B) is a constitutional exercise of Congress's power under the Thirteenth Amendment. In other words, "...Congress, through its enforcement power under Section Two of the Thirteenth Amendment, is empowered to control conduct that doesn't come close to violating Section One

[59] 203 U.S. 1 (1906)
[60] *Hodges (*1906): 16-17.
[61] Ibid., 33.
[62] Ibid., 179.

directly…"[63] While the Thirteenth Amendment prohibits "badges and incidents of slavery," Congress is responsible for enforcing the goals of Section 1, as they extend to a more modern context. *Nelson* marks the expansion of the Thirteenth Amendment's to extend to minority groups without a history of slavery in the United States. In this particular case, a federal hate crime legislation, was upheld by a broader interpretation of the Thirteenth Amendment, which informs all systems of oppression - including, but not necessarily limited, to race.

The extant scholarship illustrates a disagreement on whether the Thirteenth Amendment's bar upon "badges of inferiority" is required to directly relate to the legacy of chattel slavery or whether it may extend more expansively to others that are stigmatized or suffer discrimination in ways that do not result from systemic racial oppression. For reasons discussed above, I find the latter arguments compelling. However, I would offer that there is a significant gap in the scholarship that must be addressed. While many scholars have hypothesized how an expansive understanding of the Thirteenth Amendment could potentially address societal stigma for women,[64] LGBTQ+,[65] and victims of abuse,[66] there seems to be no such analysis for how the Thirteenth Amendment's elimination of "badges of inferiority" would liberate people with disabilities. If we accept the theories put forth by Balkin and Serafin, about the expansive meaning of the Thirteenth Amendment, then it would be sufficient to apply the same logic to persons with disabilities.[67]

---

[63] *Ibid.,* 184.
[64] See Andrew Koppelman, "Forced Labor, Revisited: The Thirteenth Amendment and Abortion," *Faculty Working Papers*, January 1, 2010.
[65] Engel and Lyle (2021).
[66] *DeShaney v. Winnebago County Department of Social Services*, 489 US 189 (1989).
[67] While it is beyond the scope of my thesis to discuss the historic stigma, discrimination, and violence people with disabilities have endured, many articles further investigate this end. For articles that discuss the inhibited rights of disabled people see: Elizabeth S. Scott, "Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy," *Duke Law Journal* 1986, no. 5 (1986): 806–65; Patricia Peppin, "Justice and Care: Mental Disability and Sterilization Decisions," *Canadian Human Rights Yearbook* 1989–1990 (1990 1989): 65–112; Deborah Hardin Ross, "Sterilization of the Developmentally Disabled: Shedding Some Myth-Conceptions

An investigation into the dynamic between the Thirteenth Amendment and the disabled community is especially important considering how many students with disabilities exist at the intersection of both race and disability discrimination. Students of color are disproportionately identified as having disabilities compared to their White counterparts.[68] While the reason for this particular trend is beyond the scope of this thesis, it is important to explore how these marginalized identities can contribute to stigmatization and denial of participation in social, educational, and political life - which were instrumental in maintaining and upholding systems of White Supremacy. Thus, disabled students of color experience "badges of inferiority" intersectionality: both on the basis of race *and* disability. There are a multitude of other identities that disabled students of color may hold that have implications for participation in social and political life. I would offer that the McAward's definition of "badges of inferiority"[69] is limited insofar as it fails to address the intersection between racism and other forms of discrimination. By looking at systems of oppression, in addition to, but not limited to race/racism, the understanding of stigma takes on an intersectional approach.[70]

Comment," *Florida State University Law Review* 9, no. 4 (1981): 599–644; William A. Krais, "Incompetent Developmentally Disabled Person's Right to Self-Determination: Right-to-Die, Sterilization and Institutionalization Notes and Comments," *American Journal of Law & Medicine* 15, no. 2 & 3 (1989): 333–62, among many others.

[68] In the article Connor and Ferri examine how special education functions as an additional barrier to students of color who have been identified as having a disability. To this end the authors write, "We examined the growth of special education as a response to Brown, highlighting the increase of subjective categories such as mental retardation, emotional disturbance, and learning disability that have resulted in an overrepresentation of African American students (and other children of color) in segregated programs and classrooms … We illustrated methods and tactics that have been used to prevent the full integration of African American students and children with disabilities, concluding that they were not separate and distinct issues, but rather part of the same discourse on understanding and accepting human difference in the classroom." See David J. Connor and Beth A. Ferri, "Integration and Inclusion: A Troubling Nexus: Race, Disability, and Special Education," *The Journal of African American History* 90, no. 1/2 (2005): 123.

[69] McAward defines badges of inferiority as, "public of widespread private conduct that targets a group on the basis of race or previous condition of servitude, that mimics the law of slavery, and that poses a substantial risk that the members of the targeted population will be returned to de facto slavery or otherwise denied the ability to participate in the basic transactions of civil society." McAward (2012): 606.

[70] See Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color," *Stanford Law Review* 43, no. 6 (1991): 1241–99.

Disability as a Protected Class: Reviewing the Cleburne Decision

In this analysis I look at two cases, both of which inform the status of disabled people in contemporary legal theory. These cases illustrate how people with disabilities have been denied protected class status and narrowed the applicability of the Thirteenth Amendment to extend to people with disabilities. The first is *City of Cleburne, Texas v. Cleburne Living Center, Inc.*[71] In this case, the Court overrode an Appellate Court's decision to grant people with disabilities the status of a quasi-suspect class.[72] Yet despite the Court's unwillingness to raise the level of judicial scrutiny when addressing laws that impact people with disabilities, the Court unanimously rejected the state law under rational basis review. Thus, the Court determined that the rational relationship test for legislative action provided protection against forms of invidious discrimination. To this extent the Court writes, "Concluding that no fundamental right was implicated, and that mental retardation was neither a suspect nor a quasi-suspect classification, the court employed the minimum level of judicial scrutiny applicable to equal protection claims."[73]

The Court's discussion of why it did not provide disabled people quasi-suspect class analysis highlighted four distinct reasons. First, it suggested that the State has a legitimate

[71] 473 US 432 (1985): In 1980, Cleburne Living Center, Inc. submitted a permit application for a home for people with intellectual disabilities. The city council voted to deny the use of the permit. In an unanimous finding, the Court held that the denial of a permit was premised on an "irrational prejudice against the mentally retarded" and violated the Equal Protection Clause.

[72] Quasi-suspect class is a form of suspect classification, in which the level of scrutiny exercises by the Court is enhanced beyond rational basis review but lower than strict scrutiny - generally held to intermediate scrutiny - which states a law is constitutional if it is substantially related to achieve an important government interest. It is distinct from a suspect class. Women have an identified history of discrimination and political powerlessness, as well as an immutability or trait and irrelevance to government objectives. However, women are not a "discrete and insular" minority as originally theorized in Footnote 4 of *Carolene Products*. *Craig v. Boren* (1976) is a seminal case which identifies gender as a quasi-suspect class using intermediate scrutiny. In this case, the Court determined that an Oklahoma law which discriminated on the basis of sex was not substantially related to the interests of the government. The Court reasoned that a sex-based classification that rested on sex stereotyping is presumptively unconstitutional because stereotypes inhibit equal opportunity. The application of quasi-suspect class status as extended to gender is developed in *Mississippi University of Women v. Hogan* (1982) and *United States v. Virginia Military Institute* (1996).

[73] *Cleburne* (1985): 473.

interest in legislating people with intellectual disabilities, writing, "... it is undeniable, and it is not argued otherwise here, that those who are mentally retarded have a reduced ability to cope with and function in the everyday world. Nor are they all cut from the same pattern: as the testimony in this record indicates, they range from those whose disability is not immediately evident to those who must be constantly cared for. They are thus different, *immutably* so, in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one. (emphasis added)"[74] Expanding on this argument, the Court was convinced that the current protection against disability discrimination was sufficient and did not meet the bar of ongoing legacy of discrimination, suggesting, "...the distinctive legislative response, both national and state, to the plight of those who are mentally retarded demonstrates not only that they have unique problems, but also that the lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary."[75]

Third, the Court concluded that people with disabilities are not a quasi-suspect class because they have some political power. To this effect, the court finds, "...the legislative response, which could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers."[76] Last, the Court suggested that because there are so many disabilities "it would be difficult to find a principled way to distinguished a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some

[74] *Cleburne* (1985): 442.
[75] Ibid., 432.
[76] Ibid.

degree of prejudice from at least part of the public at large."[77] In other words, the class of people affected was so large and variegated that it could not be considered a class itself.

While the Court's ultimate finding of discrimination is laudable and justified, the arguments against application of higher judicial scrutiny ought to be critiqued. My concern mainly lies with the majority's analysis of their reasons for denying people with disabilities protected class status, which I find to be grounded in ableism. According to the Court's own standards there are four distinct characteristics that constitute a suspected class: history of political powerlessness, history of discrimination, immutability of trait, and irrelevance of trait to government interest. First, the Court concludes that because *Cleburne* reached the attention of the Supreme Court it negates the claim that people with disabilities have a history of political powerlessness.[78] This finding neglects to consider the history of political powerlessness that people with disabilities have endured and the glaring lack of representation for people with disabilities in government.

Second, the Court finds that because Congress has developed anti-discrimination laws that protect people with disabilities, there is no need to constitute disabled people as a suspect class. This logic is flawed. Race is considered a suspect class and there are plenty of federal statutes that protect racial discrimination.[79] Subsequently, sex is considered a quasi-suspect class,

---

[77] Ibid.

[78] This is reminiscent of a claim that Justice Scalia made in his dissenting opinion in *Romer v. Evans,* in which he argued that gay people cannot constitute a suspect class because they do not experience political powerlessness. To this extent, Scalia, writes, "The problem (a problem, that is, for those who wish to retain social disapprobation of homosexuality) is that, because those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, have high disposable income, and, of course, care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and power to achieving not merely a grudging social toleration, but ful social acceptance, of homosexuality." (645-646). Scalia essentially adopts an argument that two men would produce the most income, given the gender wage gap, and they have more income than lesbian or heterosexual couples. Scalia's argument, however, is severely limited because he fails to acknowledge the history of discrimination and legislative initiatives that have criminalized same sex intimacy and limited the rights of queer couples to marry.

[79] Footnote 4 of *United States v. Carolene Products Company* (1938) provides the foundation on which the suspect class rests. The footnote reads, "...whether prejudice against discrete and insular minorities may be a special

and there are federal statutes that protect against sex discrimination.[80] The mere presence of anti-discrimination laws on the basis of disability is not sufficient reason to exclude disabled people from class protection status when other protected class groups have anti-discrimination legislation. Furthermore, the Court's claim is problematic because it suggests that if one branch of government has protections for a class of people, the other branch is relieved of any responsibility to provide further protection. The Court's finding also suggests that disability discrimination has been "fixed" by anti-discrimination legislation without considering the legacies of institutional and structural ableism that have impacted people with disabilities.

The third characteristic of a suspect class is immutability of trait. The Court suggests that because disability is such a wide spectrum it is not feasible to distinguish a variety of groups from others. To the Court's fairness, this is true. Disability is a spectrum, with needs ranging from high support to low support. To this extent, disabilities are not always visible. However, I reject the Court's conclusion that for disability to be considered a suspect class we must categorize disability by "severity" or "need." All people with disabilities, to varying degrees, have similar experiences of political powerlessness and discrimination. There is no need to negotiate the "most disabled" as solely deserving protection from discrimination.

---

condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry" (153). Put differently, the footnote suggests that when the political process is defective, meaning that certain groups are not represented, it is the judiciary's responsibility to evaluate the appropriate level of scrutiny that must be exercised. In *Korematsu v. United States* (1944) the Court identifies that laws which make racial classifications should be considered suspect and the courts must apply the highest degree of scrutiny. In the case of Korematsu, the Court ultimately concluded Executive Order 9066, which placed Japanese Americans in internment camps, was constitutional and survived strict scrutiny because the Court did not want to challenge military authority during wartime. To highlight this sentiment, the Court forewarns, "It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately *suspec*t. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racism antagonism never can" (216). In *Korematsu,* Executive 9066 makes a racial classification that ultimately survives strict scrutiny analysis.

[80] As articulated in footnote 64, women have been identified as a quasi-suspect class. See *Craig v. Boren* (1976); *Mississippi University of Women v. Hogan* (1982); *United States v. Virginia Military Institute* (1996).

Finally, irrelevance of trait to government interest is the last characteristic of a suspect class. The Court concludes that because people with intellectual disabilities have "a reduced capacity to engage" in society, the government has a legitimate interest in legislating people with disabilities. I would push back on this ableist view that people with disabilities are a unique class that the government has a legitimate interest in regulating. *Why would the government have any more of a right to regulate a person with an intellectual disability than a neurotypical or able-bodied person?* The United States government has a horrific history legislating and regulating the bodies, minds, and reproductive rights of people with disabilities.[81] Any claim of a vested government interest in regulating the autonomy and rights of people with disabilities should be viewed with caution and skepticism. Based on the Court's own metrics, people with disabilities would constitute a suspect class, or at the very least, a quasi-suspect class. In summation, while I concur with the Court's finding in *Cleburne,* I remain hostile to the Court's rationale for denying people with disabilities protected class status.

The Thirteenth Amendment as Addressed in Keithly v. University of Texas Southwestern Medical Center

Keithly v. University of Texas Southwestern Medical Center invoked the precise arguments I have developed in this thesis, namely whether: the Thirteenth Amendment ought to be invoked to prevent badges of inferiority - which are applicable to disability discrimination.[82] In this case,

[81] The capacity of the government to interfere with the reproductive freedoms of individuals with disabilities was codified in *Buck v. Bell,* 274 U.S. 200 (1927) in which the Court upheld a Virginia statute which allowed for the sterilization of individuals with disabilities who had been institutionalized. Justice Holmes writing for the majority stated, "We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being offspring with incompetence. It is better for the world if, instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind" (273). The American eugenics movement, which specifically targeted people with disabilities as "unfit" for society and procreation, inspired Nazi ideology. See Paul A. Lombardo, "The American Breed: Nazi Eugenics and the Origins of the Pioneer Fund Symposium on Manufactured Humanity - Commentary," *Albany Law Review* 65, no. 3 (2002 2001): 743–830.
[82] Civil Action No. 3:03-CV-0452-L (N.D. Tex. Nov. 18, 2003)

Mark D. Keithly ("Keithly") filed suit against his former employer, University of Texas Southwestern Medical Center ("UTSMC") for wrongful termination pursuant to Title I and II of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, and the Texas Commission of Human Rights.[83] Keithly, "contended that Congress abrogate state immunity from ADA claims because it enacted the ADA pursuant to Section Two of the Thirteenth Amendment."[84] Furthermore, Keithly argues that, "unjust employment practices and invidious, class-based discrimination are both 'badges and incidents' of slavery and involuntary servitude."[85]

The United States District Court was unmoved by these arguments. The Court concluded that the ADA was not enacted under the Thirteenth Amendment but can be traced to the Fourteenth Amendment and the Commerce Clause.[86] *Nelson* would seem to suggest that the Thirteenth Amendment ought to be applied more broadly, as its protections were offered to Rosenbaum, who belonged to a minority group without a history of enslavement in the United States. Keithly cited *Nelson* as precedent for a wider application of the Thirteenth Amendment to apply to people with disabilities, however, the Court was also unmoved by this analogy, writing:

> ..the cases cited by Keithly unanimously analyze racial discrimination, not disability discrimination…Although Keithy cited Nelson to illustrate an expansion of Congress's Thirteenth Amendment power, Nelson is distinguished from the instant case in two ways. First, the statute at issue in Nelson was a federal criminal statute passed pursuant to the Thirteenth Amendment… Second, the Nelson court analyzed the criminal statute at issue in the framework of racial discrimination. The Court reasoned that

[83] As a way of background, Keithly asserted that he was discriminated against on the basis of disability. When Keithly was training to be a police officer at UTSMC, he refused to be sprayed in the face with pepper spray as part of his training. Keithly refused on the advice of his doctor because he suffers from chronic rhinosinusitis, nasal polyposis, and allergic rhinitis. Keithly contends that because he declined to complete this portion of his training, due to his disability, he was terminated.
[84] *Keithly* (2003): 7.
[85] Ibid.
[86] Ibid.

> race as used in Thirteenth Amendment jurisprudence is a term of art, whose meaning is not limited by today's usage.

While *Nelson* seems to offer a promising expansive interpretation of the Thirteenth Amendment to extend to persons with disabilities, *Keithly* ultimately seems to slow down any momentum for a radical transformation in how the Courts understand and protect people with disabilities.

Why is the Court Adopting a Narrow Interpretation of the Thirteenth Amendment for People with Disabilities? Precedent as Path Dependent.

In our common law constitutional system, we rely on precedent to maintain institutional legitimacy. However, such a system, to provide consistency in constitutional interpretation creates a kind of path dependency that makes it difficult to recognize much less remedy that narrow interpretations of past rulings.[87] However in doing so, the Courts are bound to repeat the mistakes of the past. As I explained in Chapter 2, the restrictive reading of the Thirteenth Amendment in early cases, such as *Slaughterhouse* but even more so the *Civil Rights Cases of 1883,* were implicated by white supremacist ideology and late nineteenth and early twentieth century fears of racial integration.[88] The Courts have relied on these racialized precedents which adopt a narrow reading of the Thirteenth Amendment, which has the effect of reproducing the same forms of institutional and structural racism that the Thirteenth Amendment was originally designed to eradicate. We cannot - and should not - separate the narrow reading of the Thirteenth Amendment from its relationship as an instrument to maintain White Supremacy in a post-Civil War America. The emancipatory amendment that banned slavery and its incidents is still bound

[87] Path dependence, "highlights how particular actions are often explained larger by their place in a larger sequence. Random choices or decisions between available alternatives made at one moment in time typically limit or change the alternatives that may be selected at later moments in time" (54). See The Supreme Court and American Political Development (Edited by Ronald Kahn and Ken I Kerish). Cited from Paul Pierson, "Not Just What, but When: Timing and Sequence in Political Processes, "Studies in American political Development 14 (2000): 72

[88] See Chapter 2, pages 2-7 for review on Post-Reconstruction Court's narrow interpretation of the Thirteenth Amendment.

by white supremacy and, thus, the implications of the Thirteenth Amendment have never been fully realized. While I acknowledge the precedent which suggests the Thirteenth Amendment does not extend to people with disabilities, I suggest that the mistakes of the past ought to be remedies and the Thirteenth Amendment ought to be free.

Unshackling the Thirteenth Amendment in Rowley

The emancipatory power of the Thirteenth Amendment which situates the role of education as a fundamental and prevents "badges of incidents of inferiority," renders *Rowley* constitutionally inapt. As I explained earlier in the chapter, education can be considered a fundamental right through an expansive reading of the Thirteenth Amendment. However, I would like to expand upon how a Thirteenth Amendment's prohibition of "badges and incidents of inferiority" is applicable to Amy Rowley. By denying Amy Rowley a sign language interpreter and thus denying her equal educational opportunity commensurate with that of her nondisabled peers is to place Amy with a badge of inferiority given the foundational role that education places in our social, economic, and political lives.

Figure 5: Thirteenth Amendment Taxonomy

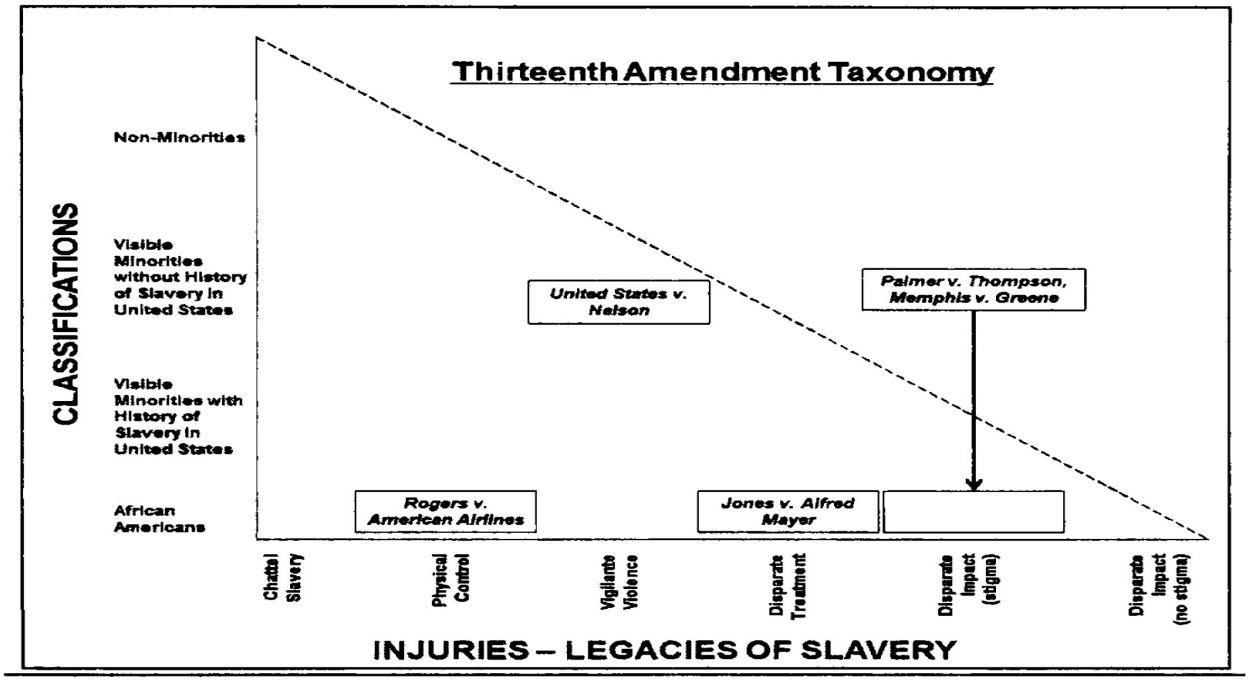


Figure 5 is adapted from William Carter's, "The Promises of Freedom: The Contemporary Relevance of the Thirteenth Amendment" to illustrate the Thirteenth Amendment application to *Rowley*.[89] The X-axis of this graph presents the legacies of slavery ranging from the bonds of chattel slavery through disparate impact ((no) stigma)). This range of the axis represents the variety of ways in which racism and legacies of slavery appear in the very clear instance of enslavement to the less explicit forms of racism such as disparate impact. Conversely, the Y-axis consists of classifications of which the Thirteenth Amendment applies. For example, the Thirteenth Amendment has been interpreted to extend African Americans for all types of injuries that result from the legacy of slavery. The application of the Thirteenth Amendment has

[89] William Carter, "The Promises of Freedom: The Contemporary Relevance of the Thirteenth Amendment," *Temple Law Review* 85 (January 1, 2013): 871. Supra footnote 15: "This sort of visual representation is owed to Professor Darrel Miller, who suggested it after I originally articulated their interpretative approach at a conference."

fewer clear guidelines as it extends to visible minorities with and without a history of slavery in the United States and non-minorities. The slanted line suggests the current judicial approach/limitations to expanding this application.

To situate Amy Rowley within this taxonomy, it is necessary to first distinguish where the case fits along its respective X and Y axis. Amy Rowley's deprivation of equal educational opportunity implies a badge of inferiority. Amy's injury ought to be placed anywhere under disparate treatment. There is no evidence to suggest that the district's decision placed Amy in a situation where she experienced vigilante violence, physical control, or enslavement. Amy experienced disparate treatment, rather than disparate impact, because she succeeded in school and remains on-track with her peers *despite* the lack of equal access provided to her. Put differently, the impact, in this case her academic results, remain on par with her classmates despite the disparate treatment.

Next, it is important to distinguish where Amy fits along the Y-axis. Amy Rowley has a disability, which for reasons I've previously laid out ought to be provided a protective class status. However, even if one does not agree that disability is a protected class, it is undeniable that disabled people are a minority. Thus, Amy Rowley is best situated as a visible minority without a history of slavery in the United States as a classification.

This exercise prompts an important question: how might the Thirteenth Amendment be applied if Amy Rowley were a black girl? In other words, can scholars use the Thirteenth Amendment Taxonomy to understand "badges of inferiority" intersectionality? I offer that by expanding understanding of injuries and legacies of slavery, jurists can begin to look at the Thirteenth Amendment's emancipatory guarantees to apply intersectionality. Thus, if Amy Rowley were a black girl, the Thirteenth Amendment would protect her as a visible minority

without history of slavery in the United States, given her disability, a visible minority with a history of Slavery in the United States, as a Black girl, and as an African American. This exercise suggests that a more expansive approach to understanding the Thirteenth Amendment would provide for an intersectional approach to discrimination law.

The revolutionary potential of the Thirteenth Amendment remains untapped. It is the goal and purpose of this thesis project to spark dialogue about the emancipation of the Thirteenth Amendment to address forms of discrimination, in this case discrimination in education. While I strongly believe in the expansive power of the Thirteenth Amendment, I must acknowledge that this approach must be used in caution. As William Carter offers, "If the Thirteenth Amendment is to realistically mean anything, however, it cannot mean everything."[90] Carter suggests that while the Thirteenth Amendment should be invoked to inform a broader understanding of rights, lawyers and jurists must be careful how they utilize the amendment. If the Thirteenth Amendment was to be invoked for illegitimate purposes, those of which are not rationally related to the institution of slavery or badges of inferiority, the Amendment would lose its power. As Carter writes:

> While I believe the Thirteenth Amendment does have a broader reach than simply ending the property relationship between master and slave as it existed in the Nineteenth Century, I also believe that it would do a profound disservice to the legacy of those who suffered under slavery and those who strove to end it if we detach the Thirteenth Amendment from the historical experience of American slavery. I believe that there is much work to be done by the Amendment's proscription of the badges and incidents of slavery, but I believe that we must also keep that work focused on the legacies of that institution.[91]

[90] Carter (2007): 1378.
[91] Carter (2013): 12.

I agree with Carter that it would be a great misstep to detach the Thirteenth Amendment from experiences of American slavery. In the case of Amy Rowley, I offer that given the foundation of education as a cornerstone of American life, which was wielded as an instrument of maintaining White Supremacy in the Antebellum South, education ought to be considered a fundamental right. Even if a fundamental right to education is not embraced, by denying Amy Rowley an equal educational opportunity she has received disparate treatment which has marked her with a badge of inferiority and stigmatized her classmates. Thus, while Amy Rowley does not have an explicit tie to racialized slavery that was practiced in the United States, she has experienced one of its central tenets: deprivation of equal educational opportunity, which has stigmatized Amy with a badge of inferiority.

Conclusion

In this chapter, I provided constitutional pathways for a reversal of *Rowley* that leans into the emancipatory guarantee of the Thirteenth Amendment. The first pathway I laid out was a fundamental right to education based on the arguments I developed in Chapter 2. I contend that if education is a fundamental right, then the level of judicial review exercised in *Rowley* must be raised, which would likely render the regulations discussed in *Rowley* unconstitutional. Additionally, I provided a constitutional pathway based on the Thirteenth Amendment that does not consider a fundamental right to education. In my analysis I suggested that the emancipatory guarantees under the Thirteenth Amendment can be extended to other non-racial minority groups. By relying upon *Nelson,* I highlighted the power of the Thirteenth Amendment to extend to minority groups that are not tied to racial minorities with a history of enslavement. I then transitioned to discuss the capacity of the Thirteenth Amendment to provide protections to people with disabilities. In my analysis of *Keithly,* I highlighted the Court's unwillingness to apply the

Thirteenth Amendment to people with disabilities and in *Cleburne* I demonstrated that the Court has been unwilling to identify people with disabilities as a suspect class. These cases analyses, particularly *Keithly*, identify that the Thirteenth Amendment's narrow application originates from its earlier and heavily racialized rulings in *Slaughterhouse* and *Civil Rights Cases.*

Rather than continue to build on the mistakes of the past, which ignore congressional intent – as discussed in Chapter Two – behind the amendment, the emancipatory power of the Thirteenth Amendment should be fully recognized and embraced by the Courts. In my attempt to reconsider *Rowley*, I situate Amy Rowley within a Thirteenth Amendment Taxonomy as provided by William Carter. That analysis demonstrates how a member of a visible minority without history of slavery in the United States, who has experienced disparate treatment, is entitled to a remedy under the Thirteenth Amendment. In this analysis, I highlight the problematic nature of the taxonomy structure, which assumes that individuals experience one marginalized identity or one incident of slavery. In short, the taxonomy itself may inhibit an intersectional analysis but it need not. I propose that an expansive understanding of the Thirteenth Amendment may allow scholars to address badges of inferiority through an intersectional lens.

In summation, I have provided a defense of why I believe *Rowley* must be overruled by adopting an expansive and intersectional understanding of the Thirteenth Amendment. I do agree with William Carter, however, that for the Thirteenth Amendment to be impactful, its use must be limited to instances that have a rational relationship to the history of chattel slavery. In the case of Amy Rowley, I situate her denial of equal educational access to a central element of chattel slavery, which was the deprivation, and criminalization, of educational access for enslaved individuals. While Amy was not penalized from receiving education nor was, she

deprived of education altogether, there is no justification for providing Amy with any less educational opportunities than her non-disabled peers. Section 2 of the Thirteenth Amendment empowers Congress to pass legislation that prevents and works to abolish any educational structures which function to limit or interfere with the rights of students to access equal educational opportunity.

Conclusion

The United States Constitution does not explicitly include a right to education; however, nothing within the Constitution prevents it from being read as providing such a right. Indeed, the identification of non-textual rights is an established practice. Given the position of education as an institution that is both deeply embedded in the history and tradition of the country and is necessary to the maintenance of ordered liberty – the two characteristics that are necessary for a non-textual fundamental right to be identified – education can legitimately be understood as a fundamental right that follows from the Constitution.[1] Nevertheless, the Supreme Court in *San Antonio Independent School District* v. *Rodriguez* (1973) explicitly rejected an opportunity to recognize education as a right that followed the Equal Protection Clause.[2]

This thesis has explored an alternative constitutional pathway through which to identify a right to education that moves beyond the oft-cited reliance upon the Fourteenth Amendment's Equal Protection, Due Process, and/or Citizenship Clauses. As discussed in Chapter One, each of these pathways have proven to either create a range of complications such that not all persons would have access to an educational right or have simply been refused by the Court itself. But, moving beyond the Fourteenth Amendment as the primary repository of equal rights is necessary given the tenor of the current Roberts Court. In other words, exploration of alternative constitutional pathways to rights recognition is a particularly important exercise given the

[1] See *Washington v. Glucksberg*, 521 U.S. 720-721 (1997): "Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," id., at 503' (plurality opinion); Snyder v. Massachusetts, 291 U. S. 97, 105 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," Palko v. Connecticut, 302 U. S. 319, 325, 326 (1937)."

[2] *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973)

Court's demonstrated antipathy toward non-textual rights. As one legal scholar recently pointed out in reference to how *Dobbs v. Jackson's Women's Health Organization* (2023) overturned *Roe v. Wade* (1973) *and Planned Parenthood v. Casey* (1992) and thereby eliminated a previously recognized non-textual or non-enumerated right to abortion access that fell within the previously recognized non-textual right to privacy.[3] As Vincent Samar observes:

> the Court may be moving toward eliminating all non-enumerated fundamental rights, except for those that are deeply rooted in the Nation's longstanding history and tradition while, on the other hand, it may suggest only that the Court might be just opening the door to overruling specific non-enumerated rights it no longer agrees with by claiming such rights to lack any real foundation in the Nation's history and tradition. Either way, many recognized, non-enumerated human rights beyond abortion that are essential to individual autonomy and human dignity but were not recognized early in the Nation's history and tradition are now in grave jeopardy.[4]

In short, to preserve the viability of non-textual or non-enumerated rights as following from the Constitution – something the Ninth Amendment would, by its wording, seem to guarantee – other constitutional pathways to secure individual autonomy and dignity, namely qualities that educational access and opportunity provide and enhance, should be identified.[5]

---

[3] *Dobbs v. Jackson Women's Health Organization,* 597 U.S. __ (2022); *Roe v. Wade,* 410 U.S. 113 (1973); *Planned Parenthood v. Casey,* 505 U.S. 833 (1992).

[4] Vincent J. Samar, "Limiting Fundamental Rights to Only Those Founded upon Long Standing History and Tradition Undermines the Court's Legitimacy and Disavows Individual Human Dignity," *Connecticut Public Interest Law Journal* 22, no. 2 (Spring/Summer 2023): 2. See *Roe v. Wade*, 410 U.S. 113 (1973) and *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022)

[5] Justice Scalia acknowledged that Ninth Amendment did permit non-textual rights to exist, but he limited these to so-called natural rights so as to guard against judicial activism understood as judges declaring rights to exist if those rights accord with their personal political or legal values:

> I do not deny or disparage the existence of other rights in the sense of natural rights. That's what the framers meant by that. Just because we've listed some rights of the people here doesn't mean that we don't believe that people have other rights. And if you try to take them away, we will revolt. And a revolt will be justified. It was the framers' expression of their belief in natural law. But they did not put it in the charge of the courts to enforce… Look, when I was in law school, if you had asked me what the Ninth Amendment was and my life depended upon it, I would be dead! Nobody ever used the Ninth Amendment for anything. Now, since those who have been using substantive due process have finally acknowledged that it's a contradiction in terms, it's silliness, it's converting a procedural guarantee into a substantive guarantee, they abandon that and they want to jump over to various other devices to enable the courts to do what the courts would like to do. One of those devices is the Ninth Amendment. But that's not what the framers meant by

This thesis has argued that one possible pathway would rely upon the Thirteenth Amendment as a promising repository of rights, which the Supreme Court had severely limited and problematically constrained during its first opportunities to interpret its meaning and implications in the 1870s and 1880s, and that early narrowing has had long lasting effect. And, while there was perhaps an expansive reading of the Thirteenth Amendment's guarantees offered by the Warren Court in the *Jones v. Alfred Mayer Co*. decision in 1968, no subsequent decision has built upon that foundation. Indeed, constitutional scholar Alexander Tsesis refers to that decision as reading the Amendment to offer "a broad protection of civil liberties" and that "the case gave civil rights advocates new opportunities to further the broad aims of abolition." Tsesis characterizes that decision as "a critical case defining Congress's power to pass laws that protect liberties and prohibit discrimination. Although little used, *Jones* is, in some ways, as revolutionary for Thirteenth Amendment reform as *Brown v. Board of Education* was to the application of the Equal Protection Clause of the Fourteenth Amendment."[6]

For all its underuse, the Warren Court's interpretation of the Thirteenth Amendment in *Jones* appears aligned with the historical record of the purpose of the Amendment. Indeed, the congressional history over the debate about the Thirteenth Amendment revealed that the framers of this Amendment intended for the law to be applied expansively to prevent any badges or incidents of slavery and remedy systems of oppression and domination. Based on this

---

> it. All they meant by it was: I do not deny or disparage the right to abortion, for example. I know that it's not one of the rights protected by the Bill of Rights but I don't deny or disparage it. If people want to argue there is a natural right of a woman to have an abortion, that's fine. The mere fact that its [sic] not included in the Bill of Rights doesn't mean that it doesn't exist. But just don't ask me to enforce it.

Don Franzen, "Reading the Text: An Interview with Justice Antonin Scalia of the U.S. Supreme Court," *Los Angeles Review of Books*, October 1, 2012. https://lareviewofbooks.org/article/reading-the-text-an-interview-with-justice-antonin-scalia-of-the-u-s-supreme-court/ (last accessed 29 March 2024.

[6] Alexander Tsesis, *The Thirteenth Amendment and American Freedom: A Legal History* (New York: NYU Press, 2004), 82.

understanding of the emancipatory guarantees of the Amendment, Chapter Two explored how the Thirteenth Amendment can be activated to identify a non-textual right to education.

An identified right to education would have implications for *all* students, especially students with disabilities. The IDEA, which I situate as one of the most important pieces of special education legislation and which is discussed in Chapter 3, was crafted during what I term a period of Access and Inclusion - a time in which the federal government was committed to ensuring that educational access was made available. This law's provision of FAPE was interpreted to provide minimal educational benefit to students in *Board of Education v. Rowley* (1982).[7] This decision was not only ahistorical and incompatible with the Congressional record about the legislation but would ultimately be unsupportable if education was considered a fundamental right. Therefore, *Rowley* is not only unsatisfactory insofar as it neglects to evaluate congressional history holistically but also because it is inconsistent with an emancipatory reading of the Thirteenth Amendment to advance a fundamental right to education, which has implications for equal educational access for students with disabilities under the IDEA.

Three themes drawn out in this thesis bear further consideration: 1) the competing thresholds of adequacy versus equality as a requirement for educational provision, 2) constitutional dialogues or the process of communication and back and forth between legislatures and courts, and 3) path dependency of precedent, or how prior decisions constrain the possibilities of future interpretation in a common law constitutional system such as the United States. First, a fundamental right to education evokes significant questions not only about the function of education in a pluralist democracy but also about the extent to which such a right must be provided. A consistent tension throughout this thesis project, which I ultimately attempt

[7] *Board of Education, Hendrick Hudson Central School District. v. Rowley*, 458 U.S. 176 (1982)

to resolve in Chapter 5, is the balance between whether adequate or equal education must be provided. Educational rights supporters diverge on whether a right to education would provide adequacy or equality. The decisions of *Rodriguez* and *Rowley* embrace an adequacy approach to education. In *Rodriguez*, the Court upheld an unequal funding system that disproportionately impacted poorer school districts. In essence, the Court maintained that although there was a discrepancy in school funding, which negatively impacted low-income students, education was still being provided at an adequate or appropriate level, which superseded the desire for educational equality. Similarly, in *Rowley,* the Court held that Amy Rowley was not entitled to a sign language interpreter under FAPE because she was otherwise doing well in school. Put differently, Amy Rowley was receiving adequate education, which bars her from fully accessing the resources she would need to access equal educational opportunities commensurate with her nondisabled peers. These arguments used in *Rodriguez* and *Rowley*, which situate educational rights as primarily about adequacy as opposed to equality, have deeply problematic origins and implications.

In 1954, when school segregation was struck down by the Supreme Court, the Appellees (Board of Education of Topeka, Kansas) argued that school segregation was not unconstitutional because it did not entirely deny educational access to Black children. They argued that Black students were still guaranteed access to adequate schooling, albeit not fully commensurate to that of their White counterparts. This racist argument, once used to justify racial segregation, has been co-opted to justify the lack of resourcing for students with disabilities. As I highlight in Chapter 5, the Court's finding that denying Amy Rowley a sign language interpreter upholds FAPE suggests an implication that disabled people are only deserving of adequate or minimally beneficial accommodations - as opposed to equalizing ones. While Justice Rehnquist and the

Court never outright say why they are reluctant to provide Amy Rowley with an equal educational opportunity, the decision appears rooted in a problematic ableism that is not altogether distinct from the racism articulated by the Board of Education of Topeka. To be more direct, the Court did not want to expunge its resources on Amy Rowley and other disabled students, who were not believed to live fulfilling and successful lives - similarly to how segregationists did not believe that Black children were not intellectually gifted enough to attend White schools. By denying Amy a sign language interpreter in *Rowley*, the Court ensured that Amy would, at most, remain on pace with her nondisabled peers. More importantly, however, the Court suggested that Amy could never be elevated beyond her peers - at most, all she could ever be, according to the Court, was adequate.

Collective expectations for the social and academic success of students with disabilities are severely limited.[8] Thus, if students with disabilities are adequate or doing "good enough," there is no reason to provide more accommodations - even if they are not gaining equal access to the curriculum. In this way, the rational benefit standard serves as a justification for continuing to deny students with disabilities access to FAPE. The way the Courts have interpreted FAPE, as exemplified in *Rowley,* indicates that appropriateness has become the ceiling of rights provided to students with disabilities rather than the floor. Put differently, FAPE should not be read to justify merely adequate accommodations for students with disabilities, who are otherwise being denied access to equal educational opportunity: adequacy is the floor, not the ceiling.

[8] For relevant literature see Hester de Boer, Anneke C. Timmermans, and Margaret P. C. van der Werf, "The Effects of Teacher Expectation Interventions on Teachers' Expectations and Student Achievement: Narrative Review and Meta-Analysis," *Educational Research and Evaluation* 24, no. 3–5 (April 3, 2018): 180–200; Özge Aydin and Ahmet Ok, "A Systematic Review on Teacher's Expectations and Classroom Behaviors," *International Journal of Curriculum and Instructional Studies* 12, no. 1 (2022): 247–74.

Amy Rowley, the talented and hard-working student who was denied a sign language interpreter at a young age and became the face of a disability rights movement, grew up to become a Ph.D. and Professor of American Sign Language at California State at East Bay. Amy succeeded because of her work ethic and efforts despite the lack of equal access she received. While Amy's story is a success and inspiration, thousands of other students in similar circumstances could not take full advantage of their education. This is not to suggest that all students with disabilities must go on to become Ph.D. and receive the highest levels of education as an indication of success, but rather to demonstrate that infringements on access to equal educational opportunities discourage students, particularly students with disabilities, from seeking additional educational opportunities and schooling. Amy Rowley is an anomaly. Her story is one of unwavering resilience in the face of immovable barriers. However, nothing within the Constitution or the governmental bodies interprets the document that requires future generations to face the same fate.

Secondly, constitutional dialogues, including inter branch dialogues among the three federal branches of government and between federal and state governments, is another important takeaway from this thesis project, particularly as explored in Part II. My finding that *Rowley* should be overruled because it is ahistorical and inconsistent with the intention of the original EAHCA is, at least in part, based on the constitutional dialogues between the various governmental bodies before and after the decision. As explored in Chapter 3, the language of FAPE, as articulated in EACHA, built upon the language used in the *PARC* consent agreement, which stipulated: "It is the Commonwealth's obligation to place each … child in a *free, public program of education and training appropriate to the child's capacity*."[9] This adoption of

[9] 334 F.Supp. 1257, 1259 (E.D. Pa 1971) (emphasis added).

language by Congress suggests that the drafters of the EACHA were attentive to the Federal Court's acknowledgment of the evolving rights of students with disabilities in *PARC* and *Mills.* By addressing the constitutional dialogues before the *Rowley* decision, these developments contextualize Congress' appropriation of FAPE as situated with a broader moment of expansive judicial understanding of the rights of students with disabilities.

Similarly, as explored in Chapter 4, these constitutional dialogues continued after the *Rowley* decision. Looking at the *Rowley* decision in its relationship to subsequent state Supreme Court and federal legislative action, it is apparent that various state actors universally rejected this decision. As I outline in Chapter 4, the New Hampshire and Kentucky State Supreme Courts responded to the *Rowley* decision by elevating state constitutional standards for education, raising the appropriateness level under *Rowley.* In Chapter 4, I also identified how the 1997 reauthorizations of IDEA directly responded to the *Rowley* decision as the law attempted to ensure that students with disabilities were given equal educational opportunities compared to their nondisabled counterparts. These constitutional dialogues as various stages of government - interbranch at the federal level or between state and federal governments - suggest that scholars and jurists should look to these dialogues to inform current and future judicial decisions.

In *Rowley,* the Court missed an opportunity to evaluate the constitutional dialogues between the federal district courts (in *PARC* and *Mills)* and Congress to inform their evaluation of FAPE. Similarly, the constitutional dialogues after *Rowley* indicate that the State Supreme Courts (New Hampshire and Kentucky) and Congress disagreed with or, at the very least, adopted an alternative reading of FAPE as put forth by the Court. Therefore, I suggest the Court should look not only to the language of FAPE within the IDEA but also the constitutional

dialogues devoted to unpacking this phrase to conclude that FAPE was ultimately denied in *Rowley.*

The last conceptual takeaway from this thesis is the path-dependent nature of legal precedent. As explored extensively in Chapter 5, the United States exists in a common law constitution, and precedent exists as a stabilizing anchor in the judicial process. Nevertheless, as I unearth, this tradition may have problematic implications when considering the Court's early absorption of racism and white supremacy into its rulings - particularly in its rulings that narrowed the application of the Thirteenth Amendment as an abolitionist amendment rather than emancipation. Under this system, jurists and scholars are confined to the interpretations under *Slaughterhouse* and *Civil Rights Cases* to interpret the emancipatory power of the Thirteenth Amendment. While these cases should not altogether be disregarded, I offer, instead, that these cases are limited as they are implicated in white supremacist ideology and concerns of racial integration. Therefore, the Court's reliance on these precedents continues to support and maintain institutional practices of racism and white supremacy. In this way, the Supreme Court recommits to the same original sin of narrowly construing the implications of the Thirteenth Amendment committed in *Slaughterhouse* and *the Civil Rights Cases.* In other words, if precedent commits us to maintain a reading of our Constitution that is so implicated in white supremacist aspirations, does not the fuller theory, structure, and ethos of the Thirteenth Amendment require us to consider the limits of these precedents and thus break off the path to build something new?

Beyond its conceptual takeaways, this thesis project's ultimate purpose is threefold. First, the project presents a compelling thought experiment in constitutional law. My goal was to understand the different readings of the Constitution and engage in what the Constitution requires. The Constitution is a values-based document, yet the value I seek to identify, education,

remains absent. Finding a right to education in the Constitution is a worthy endeavor because the Constitution has traditionally been the avenue through which rights are granted and recognized and has subsequently provided the framework for policy and legal discussion. An identified right to education that flows through the Thirteenth Amendment would provide the basis for future education policy discussions.

Second, this endeavor attempted to reconceptualize how to read the Constitution – both in terms of which rights the Constitution provides and the federal government's responsibilities to provide these rights. As explored earlier in Chapter 1, the Constitution is primarily understood as a negative and procedural rights document. My objective to identify a right to education obfuscated the dichotomy between procedural and substantive rights, situating education as having both procedural and substantive components. By leaning into the Reconstruction Amendments, particularly the Thirteenth Amendment, as a repository for a right to education, I reconceptualize how to read these amendments as a future site for identifying other rights. Many constitutional scholars have suggested that the Reconstruction Amendments are a second founding of the Constitution that recharged the tenor and transformed the federal government's responsibilities. I join this conversation by suggesting that the Thirteenth Amendment, as part of the larger Reconstruction Amendments, implies a federal responsibility to protect nontextual fundamental rights that serve in the process of emancipation - namely, the right to education.

Lastly, the heart of this project is rooted in the implications of the Thirteenth Amendment if it is interpreted as an emancipatory amendment (as opposed to an abolition amendment) to identify rights. To identify a right to education, I look beyond the traditionally used Fourteenth Amendment Equal Protection, Due Process, and Citizenship Clauses. Instead, I argue that such a right can be derived from an emancipatory reading of the Thirteenth Amendment. This particular

argument is not entirely intuitive, especially considering how the Thirteenth Amendment has been solely understood by its aim to abolish slavery. However, by grounding my theory in the work of other constitutional scholars, I suggest that the deprivation of equal educational access is a relic of chattel slavery, which the Thirteenth Amendment prohibits. These findings draw on the work of numerous other scholars who have suggested that the Thirteenth Amendment addresses various forms of oppression, domination, and discrimination that are not explicitly implicated by chattel slavery. I affirm the claim made by others that an expansive reading of the Thirteenth Amendment was adopted in *Jones* but has never been fully revisited. While I situate education as a fundamental right that flows from the emancipatory promises of the Thirteenth Amendment, in Chapter 5, I go as far to say that even if the Court is unwilling to engage in fundamental right analysis, the *Rowley* decision must be overturned by engaging the Thirteenth Amendment's ban of badges and incidents of inferiority. Amy Rowley's deprivation of equal educational access is a badge of inferiority that once operated as an instrument of white supremacy and chattel slavery. Furthermore, I suggest that by expanding the scope of badges and incidents of inferiority to expand beyond the direct descendants of chattel slavery, jurists and scholars may be able to address discrimination and state-sanctioned violence through an intersectional lens.

My understanding of the Thirteenth Amendment and its implications for a fundamental right to education are quite expansive. Although my reading builds on the foundations of *Jones* and on work by scholars who embrace an empowered Thirteenth Amendment, other scholars who are opposed to such a reading of the Thirteenth Amendment given its implications for challenging or otherwise limiting federalism.[10] Jennifer McAward, for example, has voiced her

[10] For scholars that embrace a kind of "Thirteenth Amendment Optimism," see Jamal Greene, "Thirteenth Amendment Optimism," *Colum. L. Rev.* 112 (January 1, 2012); William Carter, "Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery," *UC Davis Law Review* 40 (January 1, 2007); Nicholas Serafin, "Redefining the Badges of Slavery," *University of Richmond Law Review* 56, no. 4 (May 1, 2022): 1291–

concerns of an expansive interpretation of the Thirteenth Amendment as too radical, a disruption to the federalist structure of the United States, and gives Congress an unlimited amount of power.[11]

McAward's argues that under an expansive reading of the Thirteenth Amendment, "Congress could then use Section 2 to regulate virtually any discriminatory act committed against any subset of the population. Such a construction would render the Fourteenth Amendment enforcement power superfluous and would raise federalism concerns by permitting Congress to regulate conduct generally thought to be subject to state police power."[12] In other words, she contends that turning to the Thirteenth Amendment as a repository of equal rights functionally eliminates the purpose of the Fourteenth Amendment. But, it is important to recognize that the Supreme Court has, in recent years, already severely limited the reach of the Fourteenth Amendment's equal protection guarantees by reading the Amendment via an anti-classification lens rather than a more expansive – and perhaps historically appropriate – anti-

1338; Akhil Reed Amar, "Remember the Thirteenth.," 1993; William Carter, "The Promises of Freedom: The Contemporary Relevance of the Thirteenth Amendment," *Temple Law Review* 85 (January 1, 2013); G. Sidney Buchanan, "The Quest for Freedom: A Legal History of the Thirteenth Amendment," *Houston Law Review* 13, no. 1 (1976 1975): 63–83; Maria Linda Ontiveros and Joshua R. Drexler, "The Thirteenth Amendment and Access to Education for Children of Undocumented Workers: A New Look at Plyler v. Doe," SSRN Scholarly Paper (Rochester, NY, 2007); Larry Pittman, "The Thirteenth Amendment and Equal Protection: A Structural Interpretation to 'Free' the Amendment," *William & Mary Journal of Race, Gender, and Social Justice* 27, no. 2 (May 12, 2021); Brence Pernell, "The Thirteenth Amendment and Equal Educational Opportunity," SSRN Scholarly Paper (Rochester, NY, August 16, 2020); William Carter, "A Thirteenth Amendment Framework for Combating Racial Profiling," *Harvard Civil Rights-Civil Liberties Law Review* 17 (January 1, 2004); Alexander Tsesis, "Confederate Monuments as Badges of Slavery," SSRN Scholarly Paper (Rochester, NY, March 2, 2020); Stephen M. Engel and Timothy S. Lyle, "Is Dignity a Dead End? Alternative Notions of Dignity and the Promise of Our Anti-Racist Constitution," in *Disrupting Dignity: Rethinking Power and Progress in LGBTQ Lives* (New York University Press, 2021); Baher Azmy, "Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda," *Fordham Law Review* 71, no. 3 (2003 2002): 981–1062.

[11] Jennifer Mason McAward, "McCulloch and the Thirteenth Amendment," *Journal Articles*, January 1, 2013.

[12] Cf. Balkin, supra note 6, at 1820 ('just as the denial of equal civil rights was a badge and incident of slavery [redressable under Section 2 of the Thirteenth Amendment], the enjoyment of equal civil rights was a badge and incident of citizenship [enforceable under Section 5 of the Fourteenth Amendment]."). Cited from McAward (2013):1802.

subordination imperative.[13] It is within this context of the Court's limitation of the Fourteenth Amendment that I, and other scholars, have turned to alternative constitutional pathways: namely the Thirteenth Amendment. Since the power of the Fourteenth Amendment has been restricted by the Rehnquist and Roberts Courts, the Thirteenth Amendment has emerged, among scholars, as a repository of rights and avenue for addressing discrimination.[14] Thus, McAward's concerns about the weakening of the Fourteenth Amendment fails to recognize that this Amendment has already been limited by Court insofar as it has been rendered less effective as a counter to unconstitutional subordination.

Additionally, McAward's concern of an expansive reading of the Thirteenth Amendment is rooted in concerns about the balance of federalism. She suggests that such an approach would severely limit the power of state governments, shifting the balance of power too far towards the federal government. The Constitution contains many provisions that exist in tension with one another - some of which were amended hundreds of years after the original constitution was written. For example, the Reconstruction authority of the Thirteenth Amendment seems to exist in tension with the Tenth Amendment. The question then becomes *how can we read the constitution in light of its new amendments?* Put differently, *how does the history of the*

[13] See generally Reva B. Siegel, "Equality talk: Antisubordination and anticlassification values in constitutional struggles over Brown." *Harvard Law Review.* 117 (2003). See Introduction and Chapter 1 discussion on the limitations of the Fourteenth Amendment's Equal Protection, Due Process, and Citizenship Clause as a means to access equal rights. As extensively explored in the introduction, the Court has adopted an anticlassification or colorblind reading of the Constitution which limits the capacity of the Fourteenth Amendment to address forms of historic discrimination. For cases of such an approach see: *City of Richmond v. J.A. Croson Company* 488 U.S. 469 (1989); *Regents of the University of California v. Bakke*, 438 U.S. 365 (1978); *Parents Involved in Community Schools v. Seattle School District No. 1* 551 U.S. 701 (2007); *Students for Fair Admissions v. Harvard*, 600 U.S. _ 2023.

[14] See Jamal Greene, "Thirteenth Amendment Optimism," Columbia Law Review 112, no. 7 (November 2012): 1733-1768 and Jack M. Balkin; Sanford Levinson, "The Dangerous Thirteenth Amendment," Columbia Law Review 112, no. 7 (November 2012): 1459-1500 and the entirety of Columbia Law Review 112, no. 7 (November 2012)

Reconstruction Amendments change or inform our understanding of the Constitution as a collective document?

The Reconstruction Amendments represent a significant transition in the Constitution, which many scholars have equated to a second founding of the United States. As historian, Eric Foner, notes:

> ...the Reconstruction amendments greatly enhanced the power of the federal government, transferring much of the authority to define citizen's rights from the states to the nation. They forged a new constitutional relationship between individual Americans and the national state and were critical in creating the first biracial democracy, in which people only a few years removed from slavery exercised significant political power. All three amendments end with a clause empowering Congress to enforce their provisions, guaranteeing that Reconstruction would be an ongoing process, not a single moment in time. This is itself a significant innovation. The Bill of Rights said nothing about how the liberties it enumerated would be implemented and protected. Introducing into the Constitution the words "equal protection of law" and "the right to vote" (along with teh qualifying "male," to the outrage of the era's women's rights activists), the amendment both reflected and reinforced a new era of individual rights consciousness among Americans of all races and backgrounds. So profound were the changes that the amendments should be seen not simply as an alteration of an existing structure but as a "second founding," a "constitutional revolution," in the words of Republican leader Carl Schurz, that created a fundamentally new document with a new definition of both the status of blacks and the rights of all Americans.[15]

The Reconstruction Amendments are distinct in two distinct ways: they speak to the rights of *persons* rather than states and the amendments also seek to limit the power of *state governments* rather than the federal government. These distinctions are important because they represent the ideals of a new foundation, which expanded the categories of inclusion of inalienable rights and fundamentally shifted the purpose of federal government power: as a

[15] Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* (New York: W.W. Norton & Company, 2019) (preface).

check against tyrannical state governments. Therefore, if the Constitution can be understood as containing pre and post-Civil War components, *why should jurists and scholars favor, or rely more heavily on, the pre-Civil War constitution if the post war Amendments hold truer to the spirit of the Constitution?*

Lastly, McAward's concern for an expanded view of the Thirteenth Amendment is the ambiguity of the "badges and incidents of slavery" and which governmental body is responsible for making such a determination. To this extent she writes:

> Ultimately, the true *McCulloch* reading of the Thirteenth Amendment safeguards a role for meaningful judicial review of Section 2 legislation and provides discretion for Congress to regulate not only conduct directly tied to slavery and involuntary servitude themselves, but also to a limited subset of discriminatory conduct that threatens the reinvigoration of slavery or involuntary servitude…this view acknowledges the fundamental success of the Thirteenth Amendment and avoids the redundancy that would arise if Section 2 were viewed as a source of near-plenary power over all civil or human rights.[16]

Furthermore, McAward suggests that since the definition of "badges and incidents of slavery" cannot be easily defined, the interpretation of this phrase should be left to the Courts rather than Congress. She concludes "badges and incidents of slavery" is too vague to be determined by Congress and thus must be left to the discretion of the Courts writing, "Therein lies the risk of Jones. Giving Congress the power to adopt its own meaning of the badges and incidents of slavery essentially permits Congress to set the scope of its Section 2 power. Such a possibility emphasizes the importance of preserving a meaningful role for the judiciary in

[16] McAward (2013): 1773-1774. *Mcculloch* sets precedent for judicial review and expansive reading of necessary and proper clauses of Article 1, Section 8. Such a constitutional interpretation is analogous to Section 2 of the Thirteenth Amendment which states that Congress may enforce the Thirteenth Amendment (Section 1) by appropriate means. Appropriate and necessary and proper may be viewed as synonyms, leading many to wonder if *McCulloch* supports an expansive understanding of the Thirteenth Amendment.

defining the badges and incidents of slavery and, with it, determining the outer bounds of the Section 2 power."[17]

An expansive understanding of the Thirteenth Amendment does not suggest that the Courts should not rigorously examine the scope of the badges and incidents of slavery. As I mentioned in Chapter 5, while I embrace an expanded reading of the Thirteenth Amendment, such expansion should be met with a degree of skepticism or caution to preserve the integrity of the Amendment and honor the legacy of those who inspired it.[18] However, where McAward and Thirteenth Amendment optimists, such as myself, diverge is the capacity of the Courts to entertain a more liberal understanding of badges and incidents of slavery. An expansive approach to the Thirteenth Amendment does not suggest that the application of the Thirteenth Amendment knows no bounds, but rather it suggests that an understanding of the institution of slavery and its legacy should not be understood so narrowly.

An expansive interpretation of the Thirteenth Amendment to address contemporary forms of oppression and domination is indeed a radical constitutional approach that has garnered strong support and optimism from constitutional scholars - and also caution and apprehension from others. At the core of the debate represents two opposing understandings of what the Thirteenth Amendment represents: *can the Thirteenth Amendment be interpreted as anti-racist/elitist/ableist/classist document that has the power to address modern badges and incidents of slavery? Or is our understanding of the Thirteenth Amendment limited to merely ban the peculiar institution of chattel slavery?* Our understanding of the Thirteenth Amendment, as either expansive or limited, is indicative of our broader constitutional philosophies in which we

[17] McAward (2013): 1801-1802.
[18] As William Carter offers, "If the Thirteenth Amendment is to realistically mean anything, however, it cannot mean everything." See William Carter, "Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery," *UC Davis Law Review* 40 (January 1, 2007): 1378.

position the federal constitution as either a rights-enhancing document or one that limits the power of the federal government to acknowledge and enforce those rights.

Within this project, I limit the revolutionary potential of the Thirteenth Amendment to extend to the right to education as it applies to students with disabilities. This thesis project, however, could be extended to apply to other marginalized student groups within education, including but not limited to the rights of English Language Learners (ELL) students, women and girls in education, students of color, homeless or unhoused students, low-income, first-generation and LGBTQ+ students. Schools - ranging from elementary to college level - are quickly becoming battlegrounds for culture wars, with school boards implementing bans on Black hairstyles in schools, banning books that feature queer characters and eliminating the inclusion of gender identity in health class, and excluding transgender students from participating in youth athletics.[19] A Thirteenth Amendment approach to confronting these badges of inferiority may prove helpful in protecting and maintaining the rights of *all* students.

Additionally, this project could be used to rethink the funding and financing of a right to education.[20] It can arguably be concluded that the root of educational inequalities lies in its discriminatory funding system - which benefits wealthy communities and subsequently punishes poorer districts.[21] The school financing system, originally questioned in *Rodriguez,* could be overruled if a fundamental right to education was acknowledged. If so, this would have

[19] For example, Darryl George was suspended from Barber Hill High School, and spent the majority of his Junior year in suspension, for wearing his hair in locs. The School District holds that George's hair violates the district's dress code. George filed a lawsuit against the school district claiming that this action violates the CROWN (Creating a Respectful and Open World for Natural Hair) Act, which bans hairstyle discrimination. During February of 2024, a Texas judge ruled that the school district did not violate the CROWN Act. See Christine Hauser and Patrick McGee, "Black Student's Suspension Over Hairstyle Didn't Violate Law, Texas Judge Rules," *The New York Times*, February 22, 2024.
[20] For a historical review of how public schools are funded, see Mathew Gardner Kelly, Dividing the Public: School Finance and the Creation of Structural Inequity (Ithaca: Cornell University Press, 2024).
[21] See Angus McLeod, "The Roots of Inequality: Texas School Politics and the Leadup to Rodriguez." History of Education Quarterly 63, no. 4 (2023): 516-543.

implications for restructuring public education funding to address the needs of low-income communities more equitably. Furthermore, a fundamental right to education may have implications for accessible secondary education, specially making college education accessible. Thus, the Thirteenth Amendment can serve as a tool to address various forms of inequality within education.

More broadly, however, this thesis aims to engage in a larger conversation about the emancipatory power of the Thirteenth Amendment to address many forms of oppression and domination. Much scholarship and public attention has been given to how the Thirteenth Amendment, with its profoundly problematic, carve out where slavery or involuntary servitude is permitted as "punishment for crime whereof the party shall have been duly convicted." This thesis does not seek to shy away from the white supremacist implications of that language or the history of how that clause permitted racist systems of imprisonment that continue to this day. However, this thesis does seek to point out that the Thirteenth Amendment also has an immense power to challenge discrimination and promote emancipation. That potential has been inhibited by the precedents we accept – *Slaughterhouse* and the *1883 Civil Rights Cases*, for example – and those we choose to ignore, such as *Jones*. We choose not to recognize the Thirteenth Amendment's guarantees, and we can make a different choice. A revitalization of the Thirteenth Amendment is necessary to address the barriers to achieving an equitable and just democracy. Although the promises of the Thirteenth Amendment have been long delayed, nothing prevents the Court from finally acknowledging this Amendment's power and its former errors in judgment. A reading of *Rowley,* which activates the Thirteenth Amendment, cannot only liberate the minds and imaginations of *all* students to participate equally in their education but also serve as a future tool for addressing multiple forms of oppression and domination.

Bibliography

Adler-Greene, Laura. "Every Student Succeeds Act: Are Schools Making Sure Every Student Succeeds?" *Touro Law Review* 35, no. 1 (January 1, 2019).

Agnotology: The Making and Unmaking of Ignorance. Stanford: Stanford University Press, 2008.

Alan Brinkley. In *American History: Connecting with the Past*, 2:409, 2015.

Alexander, Larry. "Are Procedural Rights Derivative Substantive Rights?" *Law and Philosophy* 17, no. 1 (1998): 19–42.

Alexander Tsesis. *The Thirteenth Amendment and American Freedom*. New York: NYU Press, 2004.

Amar, Akhil. "Remember the Thirteenth." *Faculty Scholarship Series*, January 1, 1993.

Amar, Akhil Reed. "Intratextualism." *Harvard Law Review* 112, no. 4 (1999 1998): 747–827.

Amar, Akhil Reed, and Daniel Widawsky. "Child Abuse As Slavery: A Thirteenth Amendment Response to DeShaney Commentary." *Harvard Law Review* 105, no. 6 (1992): 1359–85.

Aron, Laudan, and Pamela Loprest. "Disability and the Education System." *The Future of Children* 22, no. 1 (2012): 97–122.

Aydin, Özge, and Ahmet Ok. "A Systematic Review on Teacher's Expectations and Classroom Behaviors." *International Journal of Curriculum and Instructional Studies* 12, no. 1 (2022): 247–74.

Azmy, Baher. "Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda." *Fordham Law Review* 71, no. 3 (2003 2002): 981–1062.

Balkin, Jack M. "The Constitution of Status." *The Yale Law Journal* 106, no. 8 (1997): 2313–74.

Balkin, Jack M. “The Reconstruction Power.” SSRN Scholarly Paper. Rochester, NY, February 24, 2010..

Balkin, Jack, and Reva Siegel. “The American Civil Rights Tradition: Anticlassification or Antisubordination?” *University of Miami Law Review* 58, no. 1 (October 1, 2003): 9.

Barber, Benjamin R. “Public Talk and Civic Action: Education for Participation in a Strong Democracy.” *Social Education* 53, no. 6 (1989): 355.

Bartlett, Katharine T. “The Role of Cost in Educational Decision Making for the Handicapped Child.” *Law and Contemporary Problems* 48, no. 2 (1985): 7–62.

Beadie, Nancy. “The Federal Role in Education and the Rise of Social Science Research: Historical and Comparative Perspectives.” *Review of Research in Education* 40, no. 1 (March 1, 2016): 1–37.

Black, Derek. “Freedom, Democracy, and the Right to Education.” *Northwestern University Law Review* 116, no. 4 (January 16, 2022): 1031–98.

Black, Derek W. “Abandoning the Federal Role in Education: The Every Student Succeeds Act.” *California Law Review* 105, no. 5 (2017): 1309–74.

Black, Derek W. “The Constitutional Compromise to Guarantee Education.” *Stanford Law Review* 70, no. 3 (2018): 735–837.

Black, Derek W. “The Fundamental Right to Education.” *Notre Dame Law Review* 94, no. 3 (2019): 1059–1114.

Blight, David W. *Race and Reunion: The Civil War in American Memory*. Harvard University Press, 2001.

Boer, Hester de, Anneke C. Timmermans, and Margaret P. C. van der Werf. “The Effects of Teacher Expectation Interventions on Teachers’ Expectations and Student Achievement: Narrative Review and Meta-Analysis.” *Educational Research and Evaluation* 24, no. 3–5 (April 3, 2018): 180–200.

Boettner, Karl. “Attack on the EHA: The Education for All Handicapped Children Act After Board of Education v. Rowley” *Seattle University Law Review* 7, no. 1 (January 1, 1983): 183.

Bond, Julian. “With All Deliberate Speed: Brown v. Board of Education.” *90 Indiana Law Journal 1671 (2015)* 90, no. 4 (October 1, 2015).

Bosniak, Linda. “Persons and Citizens in Constitutional Thought.” *International Journal of Constitutional Law* 8, no. 1 (January 1, 2010): 9–29.

Boyle, Joseph. R. Mary Weishaar. “Overview of Statutory Law: Individuals with Disabilities Education Act.” In *Special Education Law with Cases*, 1–23. Allyn and Bacon, n.d.

Brandwein, Pamela. *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth*. Durham, NC: Duke University Press, 1999.

Brandwein, Pamela. “Slavery as an Interpretive Issue in the 39th Reconstruction Congress: The Northern Democrats.” In *Reconstructing Reconstruction: The Supreme Court and the Production of Historical Truth*, 23–41. Durham, NC: Duke University Press, 1999.

Brown, Frank. “The First Serious Implementation of Brown: The 1964 Civil Rights Act and Beyond.” *The Journal of Negro Education* 73, no. 3 (2004): 182–90.

Buchanan, G. Sidney. “The Quest for Freedom: A Legal History of the Thirteenth Amendment.” *Houston Law Review* 13, no. 1 (1975): 63–83.

Carl F. Kaestle. “Federal Aid to Education Since World War II: Purposes and Politics.” *The Future of the Federal Role in Elementary and Secondary Education.* 16 (2001): 1–35.

Caroline A. Veniero. “Education’s Deep Roots: Historical Evidence for the Right to a Basic Minimum Education” 88, no. 4 (2021).

Carolyn Jefferson-Jenkins and Margaret Hawkins Hill. “Role Of Federal Government In Public Education: Historical Perspectives | League of Women Voters,” June 22, 2011.

Carroll, Shawn Elizabeth. “Defining Appropriate Education for the Handicapped: The Rowley Decision Note.” *Saint Louis University Law Journal* 27, no. 3 (1983): 685–706.

Carter, William. “Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery.” *UC Davis Law Review* 40 (January 1, 2007): 1311.

Carter, William. “Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery.” *UC Davis Law Review* 40 (January 1, 2007): 1311.

Carter, William. “The Promises of Freedom: The Contemporary Relevance of the Thirteenth Amendment.” *Temple Law Review* 85 (January 1, 2013): 867.

Cass R. Sunstein. “Social and Economic Rights? Lessons from South Africa.” *John M. Olin Program in Law and Economics, Working Paper*, no. 124 (2001): 1–14.

Church, Robert L. “Educational Psychology and Social Reform in the Progressive Era.” *History of Education Quarterly* 11, no. 4 (1971): 390–405.

Clark, David L., and Mary Anne Amiot. “The Impact of the Reagan Administration on Federal Education Policy.” *The Phi Delta Kappan* 63, no. 4 (1981): 258–62.

Coenen, Michael. “Combining Constitutional Clauses.” *University of Pennsylvania Law Review* 164, no. 5 (April 2016): 1067–1130.

Congressional Research Services. “Individuals with Disabilities Education Act (IDEA) Funding: A Primer,” 2019.

Connor, David J., and Beth A. Ferri. “Integration and Inclusion: A Troubling Nexus: Race, Disability, and Special Education.” *The Journal of African American History* 90, no. 1/2 (2005): 107–27.

“Constitution of the Republic of South Africa,” 1996.

“Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment,” n.d.

“Convention on the Rights of the Child on the Involvement of Children in Armed Conflict,” n.d.

Crenshaw, Kimberle. “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics.” *University of Chicago Legal Forum* 1989, no. 1 (December 7, 2015).

Crenshaw, Kimberle.“Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color.” *Stanford Law Review* 43, no. 6 (1991): 1241–99.

Cross, Christopher T. “The Shaping of Federal Education Policy over Time. The Progress of Education Reform. Volume 16, Number 2.” *Education Commission of the States*. Education Commission of the States, May 2015.

Cunningham, Dayna. “Who Are to Be the Electors? A Reflection on the History of Voter Registration in the United States.” *Yale Law & Policy Review*, October 16, 2015.

Daniel M. Cook and Andrew J. Polsky. “Political Time Reconsidered: Unbuilding and Rebuilding the State Under the Reagan Administration.” *American Politics Research* 33, no. 4 (2005): 577–605.

Daniels, Kisha, Kianda S. Hicks, and Miya T. Plummer. “Historically Black Colleges and Universities: A History of Community Engagement.” In *The Cambridge Handbook of Service Learning and Community Engagement*, edited by Corey Dolgon, Tania D.

Mitchell, and Timothy K. Eatman, 64–70. Cambridge Handbooks in Psychology. Cambridge: Cambridge University Press, 2017.

Dee, Thomas S., and Brian Jacob. "The Impact of No Child Left Behind on Student Achievement." *Journal of Policy Analysis and Management* 30, no. 3 (2011): 418–46.

Dena Kleiman. "Effect of Handicapped Ruling Unclear." *The New York Times*, June 29, 1982.

Dewey, John. *Democracy and Education*. Edited with an introduction by Nicholas Tampio. Columbia University Press, 2024.

Dudziak, Mary L. "Brown as a Cold War Case." *The Journal of American History* 91, no. 1 (2004): 32–42.

DuVernay, Ava and Moran, Jason. *13th*. USA, 2016.

Edwards Jr, D. Brent, and David DeMatthews. "Historical Trends in Educational Decentralization in the United States and Developing Countries: A Periodization and Comparison in the Post-WWII Context." *Education Policy Analysis Archives* 22 (June 9, 2014).

El Moussaoui, Souhila. "The Every Student Succeeds Act and Its Impact on Vulnerable Children Chalk Talks." *Journal of Law & Education* 46, no. 3 (2017): 407–14.

Elmore, Richard F., and Susan Fuhrman. "The National Interest and the Federal Role in Education." *Publius* 20, no. 3 (1990): 149–62.

Ely, John Hart. *Democracy and Distrust: A Theory of Judicial Review.* Harvard University Press, 1980.

Ely, John Hart. "Policing the Process of Representation: The Court as Referee." In *Democracy and Distrust: A Theory of Judicial Review*, 73–104. Harvard University Press, 1980.

Emily Zackin. "Chapter 3: Defining Positive Rights." In *Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights*, 36–47. Princeton University Press, 2013.

"Enforcing the Right to an 'Appropriate' Education: The Education for All Handicapped Children Act of 1975." *Harvard Law Review* 92, no. 5 (1979): 1103–27.

Eric Foner. *The Second Founding: How the Civil War and Reconstruction Remade the Constitution*. New York: W.W. Norton & Company, 2019.

Farrell, William E. “School Integration Resisted in Cities of North.” *The New York Times*, May 13, 1974, sec. Archives.

Ferri, Beth A, and David J. Connor. “Special Education and the Subverting of Brown.” *Journal of Gender, Race & Justice* 8, no. 1 (2005 2004): 57–74.

Fisher, Louis. *Constitutional Dialogues: Interpretation as Political Process*. Princeton University Press, 1988.

Foner, Eric. *Reconstruction: America’s Unfinished Revolution, 1863-1877*. 1st Perennial Library ed. The New American Nation Series. New York: Harper & Row, 1989.

Ford, Richard Thompson. “Why Civil Rights Lawsuits Are Becoming Irrelevant in the Fight for Social Justice (Excerpt).” In *Rights Gone Wrong: How Law Corrupts the Struggle for Equality*, 2011.

Franck, Matthew J. “What Happened to the Due Process Clause in the Dred Scott Case? The Continuing Confusion over ‘Substance’ versus ‘Process.’” *American Political Thought* 4, no. 1 (January 2015): 120–48.

Frank I. Michelman. “The Supreme Court, 1968 Term.” *Harvard Law Review* 83, no. 1 (1969): 7–282.

Frankenberg, Erica, and Kendra Taylor. “ESEA and the Civil Rights Act: An Interbranch Approach to Furthering Desegregation.” *RSF: The Russell Sage Foundation Journal of the Social Sciences* 1, no. 3 (2015): 32–49.

Franzen, Don. “Reading the Text: An Interview with Justice Antonin Scalia of the U.S. Supreme Court,” *Los Angeles Review of Books*, October 1, 2012.

Gallegos, Elena M. “Beyond Board of Education v. Rowley: Educational Benefit for the Handicapped?” *American Journal of Education* 97, no. 3 (1989): 258–88.

Giles, Micheal W. “H.E.W. Versus the Federal Courts: A Comparison of School Desegregation Enforcement.” *American Politics Quarterly* 3, no. 1 (January 1, 1975): 81–90.

Glensy, Rex. “The Use of International Law in U.S. Constitutional Adjudication.” *Emory International Law Review* 25, no. 1 (January 6, 2011): 197.

Going, Allen J. “The South and the Blair Education Bill.” *The Mississippi Valley Historical Review* 44, no. 2 (1957): 267–90.

Greene, Jamal. “Thirteenth Amendment Optimism.” *Colum. L. Rev.* 112 (January 1, 2012): 1733.

Greenhouse, Linda. *The New York Times*. “Schools Backed on Limiting Aid to Handicapped” June 29, 1982.

Grissom, Jason A., Sean Nicholson-Crotty, and James R. Harrington. “Estimating the Effects of No Child Left Behind on Teachers’ Work Environments and Job Attitudes.” *Educational Evaluation and Policy Analysis* 36, no. 4 (2014): 417–36.

Grothouse, Matthew. “Implicit in The Concept of Ordered Liberty: How Obergefell v. Hodges Illuminates the Modern Substantive Due Process Debate, 49 J. Marshall L. Rev. 1021 (2016).” *UIC Law Review* 49, no. 4 (January 1, 2016).

Hannah-Jones, Nikole. “The ‘Colorblindness’ Trap: How a Civil Rights Ideal Got Hijacked.” *The New York Times*, March 13, 2024, sec. Magazine.

Harrison-Jones, Lois. “No Child Left Behind and Implications for Black Students.” *The Journal of Negro Education* 76, no. 3 (2007): 346–56.

Hathaway, Oona A. “International Delegation and State Sovereignty.” *Law and Contemporary Problems* 71, no. 1 (2008): 115–49.

Hauser, Christine, and Patrick McGee. “Black Student’s Suspension Over Hairstyle Didn’t Violate Law, Texas Judge Rules.” *The New York Times*, February 22, 2024, sec. U.S.

Heymann, Jody, Amy Raub, and Adèle Cassola. “Constitutional Rights to Education and Their Relationship to National Policy and School Enrolment.” *International Journal of Educational Development* 39, no. 1 (November 2014): 121–31.

Hillison, John. “The Coalition That Supported the Smith-Hughes Act or a Case for Strange Bedfellows.” *Journal of Vocational and Technical Education* 11, no. 2 (1995): 4–11.

Hillison, John, and Gary Moore. “The Federal Board for Vocational Education: Its Composition, Controversies, and Contributions.” *Journal of Vocational and Technical Education* 10, no. 1 (1993): 21–29.

Hursh, David. “Exacerbating Inequality: The Failed Promise of the No Child Left Behind Act.” *Race Ethnicity and Education* 10, no. 3 (September 1, 2007): 295–308.

Hutchinson, Dennis. “Unanimity and Desegregation: Decision Making in the Supreme Court, 1948-1958.” *Georgetown Law Journal* 68 (January 1, 1980): 1.

“International Convention on the Elimination of All Forms of Racial Discrimination,” n.d.

"International Covenant on Civil and Political Rights," n.d.

Isabel Wilkerson. *Caste: The Origin of Our Discontents*. New York: Random House, 2020.

Itkonen, Tiina. "PL 94-142: Policy, Evolution, and Landscape Shift." *Issues in Teacher Education* 16, no. 2 (2007): 7–17.

Jackson, Luther P. "The Educational Efforts of the Freedmen's Bureau and Freedmen's Aid Societies in South Carolina, 1862-1872." *The Journal of Negro History* 8, no. 1 (1923): 1–40.

Kaestle, Carl F. "Public Education in the Old Northwest: 'Necessary to Good Government and the Happiness of Mankind.'" *Indiana Magazine of History* 84, no. 1 (1988): 60–74.

Kaestle, Carl, and Marshall Smith. "The Federal Role in Elementary and Secondary Education, 1940-1980." *Harvard Educational Review* 52, no. 4 (January 3, 2012): 384–408.

Kantor, Harvey, and Robert Lowe. "Class, Race, and the Emergence of Federal Education Policy: From the New Deal to the Great Society." *Educational Researcher* 24, no. 3 (1995): 4–21.

Karen, David. "No Child Left Behind? Sociology Ignored!" *Sociology of Education* 78, no. 2 (2005): 165–69.

Karst, Kenneth L. "Foreword: Equal Citizenship under the Fourteenth Amendment Supreme Court 1976 Term, The." *Harvard Law Review* 91, no. 1 (1978 1977): 1–68.

Knight, Edgar W. Review of *Review of The Struggle for Federal Aid. First Phase: A History of the Attempts to Obtain Federal Aid for the Common Schools, 1870-1890. Contributions to Education.*, by Gordon Canfield Lee. *The Journal of Southern History* 16, no. 3 (1950): 362–64.

Koppelman, Andrew. "Forced Labor, Revisited: The Thirteenth Amendment and Abortion." *Faculty Working Papers*, January 1, 2010.

Krais, William A. "Incompetent Developmentally Disabled Person's Right to Self-Determination: Right-to-Die, Sterilization and Institutionalization Notes and Comments." *American Journal of Law & Medicine* 15, no. 2 & 3 (1989): 333–62.

Kresl, Nicholas. "The Great (Un)Equalizer: Education as a Fundamental Right, 55 UIC L. Rev. 803." *UIC Law Review* 55, no. 4 (2022): 804–46.

Lederman, Shmuel. “Representative Democracy and Colonial Inspirations: The Case of John Stuart Mill.” *American Political Science Review* 116, no. 3 (August 2022): 927–39.

Library of Congress, Washington, D.C. 20540 USA. “Constitutional Right to an Education in Selected Countries.” Image. Accessed February 17, 2024.

Liu, Goodwin. “Education, Equality, and National Citizenship.” *The Yale Law Journal* 116, no. 2 (2006): 330–411.

Lombardo, Paul A. “The American Breed: Nazi Eugenics and the Origins of the Pioneer Fund Symposium on Manufactured Humanity - Commentary.” *Albany Law Review* 65, no. 3 (2002 2001): 743–830.

Lopez, Maria. “Reflections on Educating Latino and Latina Undocumented Children: Beyond Plyler v. Doe.” *Seton Hall Law Review* 35, no. 4 (January 1, 2005).

Luisa Blanchfield. “The United Nations Convention of the Rights of the Child.” Congressional Research Service, July 27, 2015.

Lynch, Timothy. “Education as a Fundamental Right: Challenging the Supreme Court’s Jurisprudence.” *Hofstra Law Review* 26, no. 4 (January 1, 1998): 39.

Main, Thomas O. “The Procedural Foundation of Substantive Law.” SSRN Scholarly Paper. Rochester, NY, July 14, 2009.

Martin, Edwin W., Reed Martin, and Donna L. Terman. “The Legislative and Litigation History of Special Education.” *The Future of Children* 6, no. 1 (1996): 25–39.

Mason McAward, Jennifer. “McCulloch and the Thirteenth Amendment.” *Journal Articles*, January 1, 2013.

Matthew Gardner Kelly. *Dividing the Public: School Finance and the Creation of Structural Inequity*. Ithaca: Cornell University Press, 2024.

McAward, Jennifer. “Defining the Badges and Incidents of Slavery.” *Notre Dame Law School Scholarship*, January 1, 2012.

McDonnell, Lorraine M. “No Child Left Behind and the Federal Role in Education: Evolution or Revolution?” *Peabody Journal of Education* 80, no. 2 (2005): 19–38.

McGarry, Barbara D. “The Rowley Decision: How the Supreme Court Views the Education of Handicapped Children.” *Journal of Visual Impairment & Blindness* 76, no. 8 (October 1, 1982): 322–24.

McGuinn, Patrick. “Schooling the State: ESEA and the Evolution of the U.S. Department of Education.” *RSF: The Russell Sage Foundation Journal of the Social Sciences* 1, no. 3 (2015): 77–94.

McLeod, Angus. “The Roots of Inequality: Texas School Politics and the Leadup to Rodriguez.” *History of Education Quarterly* 63 (November 15, 2023): 516–43.

M.E. Buck Dougherty III. “Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 2023 U.S. LEXIS 2791 (2023),” June 6, 2023.

Meredith, William J. F. “The Black Codes.” *Negro History Bulletin* 3, no. 5 (1940): 76–77.

Michelle Alexander. *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York: New York Press, 2010.

Nicole Lawler. “The Right to Education in the United States and Abroad: A Comparative Analysis of Constitutional Language and Academic Achievement.” *The Federal Lawyer*, 2018, 32–40.

Noll, Carl F. “San Antonio Independent School District v. Rodriguez: A Retreat from Equal Protection.” *Cleveland State Law Review* 22, no. 585 (1973): 585–600.

Nornes, Anna. “Education Is a Fundamental Right.” *Public Interest Law Reporter* 28, no. 1 (January 1, 2022): 74.

Ogletree, Charles. “The Legacy and Implications of San Antonio Independent School District v. Rodriguez.” *Richmond Journal of Law and the Public Interest* 17, no. 2 (2014): 515–48.

Ontiveros, Maria L. “Immigrant Workers’ Rights in a Post-Hoffman World - Organizing Around the Thirteenth Amendment Symposium: Supreme Court Review.” *Georgetown Immigration Law Journal* 18, no. 4 (2004 2003): 651–80.

Ontiveros, Maria Linda, and Joshua R. Drexler. “The Thirteenth Amendment and Access to Education for Children of Undocumented Workers: A New Look at Plyler v. Doe.” SSRN Scholarly Paper. Rochester, NY, 2007.

Orlich, Donald C. “No Child Left Behind: An Illogical Accountability Model.” *The Clearing House* 78, no. 1 (2004): 6–11.

Osgood, Kenneth A. “Hearts and Minds: The Unconventional Cold War.” *Journal of Cold War Studies* 4, no. 2 (2002): 85–107.

Paul Brest, Sam Levinson, Reva B. Siegal, Akhil Reed Amar, and Jack M. Balkin. *Processes of Constitutional Decision Making: Cases and Materials*. 7th ed. Wolters Kluwer, 2018.

Paul Pierson. "Introduction." In *Politics in Time: History, Institutions, and Social Analysis*, 1-16. Princeton University Press, 2004.

Peppin, Patricia. "Justice and Care: Mental Disability and Sterilization Decisions." *Canadian Human Rights Yearbook* 1989–1990 (1990 1989): 65–112.

Pernell, Brence. "The Thirteenth Amendment and Equal Educational Opportunity." SSRN Scholarly Paper. Rochester, NY, August 16, 2020.

Phillip Bobbit. "Chapter 3: The Modalities of Constitutional Argument." In *Constitutional Interpretation*, 11–22. Cambridge, MA: Blackwell Publishing, 1991.

Pierson, Paul. "Not Just What, but When: Timing and Sequence in Political Processes." *Studies in American Political Development* 14, no. 1 (April 2000): 72–92.

Pinto, Samantha. "After Choice, after Justice?: Race, Reproduction, and the Uncertain Futures of Feminist Political Desire." *The International Journal of Human Rights* 0, no. 0 (2023): 1–21.

Pittman, Larry. "The Thirteenth Amendment and Equal Protection: A Structural Interpretation to 'Free' the Amendment." *William & Mary Journal of Race, Gender, and Social Justice* 27, no. 2 (May 12, 2021): 461.

Quade, Charlene K. "A Crystal Clear Idea: The Court Confounds the Clarity of Rowley and Contorts Congressional Intent Current Public Law and Policy Issues." *Hamline Journal of Public Law & Policy* 23, no. 1 (2002 2001): 37–72.

Rentschler, Thomas. "No Child Left Behind: Admirable Goals, Disastrous Outcomes." *Widener Law Review* 12, no. 2 (2006 2005): 637–64.

Roberts, Dorothy. "Killing the Black Body: Race, Reproduction, and The Meaning of Liberty." *All Faculty Scholarship*, January 1, 1997.

Robinson, Steven. "Rowley: The Court's First Interpretation of the Education for All Handicapped Children Act of 1975." *Catholic University Law Review* 32, no. 4 (January 1, 1983): 941–64.

Ross, Deborah Hardin. "Sterilization of the Developmentally Disabled: Shedding Some Myth-Conceptions Comment." *Florida State University Law Review* 9, no. 4 (1981): 599–644.

Rowley, Rochelle L., and David W. Wright. “No ‘White’ Child Left Behind: The Academic Achievement Gap between Black and White Students.” *The Journal of Negro Education* 80, no. 2 (2011): 93–107.

Rutherglen, George. “State Action, Private Action, and the Thirteenth Amendment.” *Virginia Law Review* 94, no. 6 (2008): 1367–1406.

Rutherglen, George A. “The Badges and Incidents of Slavery and the Power of Congress to Enforce the Thirteenth Amendment.” Edited by Alexander Tsesis. *The Promises of Liberty*, December 31, 2010, 163–81.

Ryan, James. “The Perverse Incentives of the No Child Left Behind Act.” *New York University Law Review* 79 (December 9, 2003).

Ryan, James E. “The Perverse Incentives of the No Child Left Behind Act,” December 9, 2003.

Samar, Vincent. “Limiting Fundamental Rights to Only Those Founded Upon Long Standing History and Tradition Undermines the Court? Legitimacy and Disavows Individual Human Dignity?” *Connecticut Public Interest Law Review*, n.d.

Schickler, Eric. *Disjointed Pluralism: Institutional Innovation and the Development of the U.S. Congress*. Princeton University Press, 2001.

Schoettle, Ferdinand P. “The Equal Protection Clause in Public Education.” *Columbia Law Review* 71, no. 8 (1971): 1355–1419.

Scott, Elizabeth S. “Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy.” *Duke Law Journal* 1986, no. 5 (1986): 806–65.

Scott F. Johnson. “Reexamining Rowley: A New Focus in Special Education Law.” *Brigham Young University Education and Law Journal*, 2003.

Shaw, Matthew. “The Public Right to Education.” *University of Chicago Law Review* 89, no. 5 (September 1, 2022): 1179–1244.

Siegel, Reva B. “Equality Talk: Antisubordination and Anticlassification values in constitutional struggle over Brown.” *Harvard Law Review.* 117 (2003).

“South African Schools Act,” 1996.

Stephen Breyer. “Introduction.” In *The Court and the World: American Law and New Global Realities*, 7, 2015.

Stephen Engel. “Expanding Opportunity for All: Moving Past Zero-Sum Notions of Affirmative Action to Promote Both Freedom and Equality.” *The University of Tulsa Law Review* 53, no. 2 (2018): 241–46.

Stephen M. Engel. “Dynamics of Constitutional Development and the Conservative Potential of U.S. Supreme Court Gay Rights Jurisprudence, or Why Neil Gorsuch May Stop Worrying and Learn to Love Same-Sex Marriage,” no. Constitutional Studies 3 (2018): 1–40.

Stephen M. Engel and Timothy S. Lyle. “Is Dignity a Dead End? Alternative Notions of Dignity and the Promise of Our Anti-Racist Constitution.” In *Disrupting Dignity: Rethinking Power and Progress in LGBTQ Lives*, 263–98. New York University Press, 2021.

Stephens, David. “President Carter, the Congress, and NEA: Creating the Department of Education.” *Political Science Quarterly* 98, no. 4 (1983): 641–63.

Sullivan, James and 2023. “‘The Busing Battleground’ Revisits a Painful Chapter in Boston’s History, One That Still Reverberates - The Boston Globe.” BostonGlobe.com, 2023.

Sullivan, Phyllis. “John Dewey’s Philosophy of Education.” *The High School Journal* 49, no. 8 (1966): 391–97.

Sunstein, Cass. “Why Does the American Constitution Lack Social and Economic Guarantees?” *University of Chicago Public Law & Legal Theory, Working Paper*, no. 36 (January 2003): 1–19.

Sunstein, Cass. “Why Does the American Constitution Lack Social and Economic Guarantees?” *University of Chicago Public Law & Legal Theory, Working Paper*, no. 36 (January 2003): 1–19.

Sutton, Jeffrey S. “San Antonio Independent School District v. Rodriguez and Its Aftermath.” *Virginia Law Review* 94, no. 8 (2008): 1963–86.

The New York Times. “How Much for the Handicapped?” July 3, 1982.

“The Rights of the Child on the Sale of Children, Child Prostitution, and the Child Pornography.,” n.d.

“The Smith-Hughes Act for Vocational Education.” *Scientific American* 117, no. 8 (1917): 130–130.

Thomason, Kelly D. “The Costs of a ‘Free’ Education: The Impact of Schaffer v. Weast and Arlington v. Murphy on Litigation under the IDEA.” *Duke Law Journal* 57, no. 2 (2007): 457–86.

Times, Gene I. Maeroff Special To New York. “Major Bill to Aid Handicapped Pupils Is Nearing Final Passage in Congress.” *The New York Times*, November 6, 1975.

Tolley, Kim. *Slavery and the Origin of Georgia’s 1829 Anti-Literacy Act*, 2019.

Tribe, Laurence H. “The Puzzling Persistence of Process-Based Constitutional Theories.” *The Yale Law Journal* 89, no. 6 (1980): 1063–80.

Tsesis, Alexander. “Confederate Monuments as Badges of Slavery.” SSRN Scholarly Paper. Rochester, NY, March 2, 2020.

Tsesis, Alexander. “Interpreting the Thirteenth Amendment Symposium: The Second Founding.” *University of Pennsylvania Journal of Constitutional Law* 11, no. 5 (2009 2008): 1337–62.

Tucker, Bonnie Poitras. “Board of Education of the Hendrick Hudson Central School District v. Rowley: Utter Chaos.” *Journal of Law & Education* 12, no. 2 (1983): 235–46.

United Nations. “Convention on the Rights of Children,” November 20, 1989.

United Nations. “International Covenant on Economic, Social, and Cultural Rights,” December 16, 1966.

United States: Executive Office of the President: Council of Economic Advisers, and United States Barack H. Obama. “THE WAR ON POVERTY 50 YEARS LATER: A PROGRESS REPORT. Chapter 6.” *Economic Report of the President (2014)*, March 10, 2014.

A, Urquhart, Michael; Hewson,Marillyn. “Unemployment Continued to Rise in 1982 as Recession Deepened: Monthly Labor Review: U.S. Bureau of Labor Statistics.” Accessed March 26, 2024.

Veronique de Rugy and Marie Gryphon. “Elimination Lost: What Happened to Abolishing the Department of Education?” Cato Institute, February 11, 2004.

Walsh, Thomas J. “Education as a Fundamental Right Under the United States Constitution.” *Willamette Law Review* 29, no. 2 (1993): 279–96.

Webb, Hoyt. “The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law.” *University of Pennsylvania Journal of Constitutional*

Law 1, no. 2 (October 1, 1998): 205.

Weishart, Joshua E. “Reconstituting the Right to Education.” *Alabama Law Review* 67, no. 4 (July 2016): 915–78.

Wenderoff, Lori. “Board of Education v. Rowley: Are Handicapped Children Entitled to Equal Education Opportunities.” *California Western Law Review* 20, no. 1 (October 1, 1983).

Whitmeyer, Joseph M. “Presidential Power over Supreme Court Decisions.” *Public Choice* 127, no. 1–2 (April 2006): 97–121.

Wickenden, Mary. “Disability and Other Identities?—How Do They Intersect?” *Frontiers in Rehabilitation Sciences* 4 (August 10, 2023).

Yell, Mitchell. “Brown v. Board of Education and the Development of Special Education.” *Intervention in School and Clinic* 57, no. 3 (January 1, 2022): 198–200.

Yudof, Mark G. “Education for the Handicapped: Rowley in Perspective.” *American Journal of Education* 92, no. 2 (1984): 163–77.

Zirkel, Perry. “Building an Appropriate Education from Board of Education v. Rowley: Razing the Door and Raising the Floor.” *Maryland Law Review* 42, no. 3 (January 1, 1983): 466.

Cases

303 Creative LLC v. Elenis 600 U.S. 570 (2023)

Atkins v. Virginia 536 US 304 (2002).

Board of Education of the Hendrick Hudson Central School District v. Rowley 458 U.S. 176 (1982).

Bolling v. Sharpe, 347 U.S. 497 (1954).

Brown v. Board of Education of Topeka, 347 US 483 (1954).

Buck v. Bell, 274 U.S. 200 (1927).

Burlington, Sch. Committee v. Mass. Bd. of Ed., 471 U. S. 359 (1985).

Cantwell v Connecticut, 310 U.S. 296 (1940).

Chicago, Burlington, and Quincy Railroad Company v. City of Chicago, 166 U.S. 226 (1897).

City of Cleburne, Texas v. Cleburne Living Center, Inc 73 U.S. 432 (1985).

City of Richmond v. J.A. Croson Company, 488 U.S. 469 (1989).

Cook v. McKee, No. 20-2082 (1st Cir. 2022).

Craig v. Boren, 429 U.S. 190 (1976).

DeShaney v. Winnebago County Department of Social Services, 489 US 189 (1989).

District of Columbia v. Heller, 554 U.S. 570 (2008).

Dobbs v Jackson Women's Health Organization, 597 U.S. __ (2022).

Douglas v. California, 372 U.S. 353 (1963).

Dred Scott v. Sandford, 60 US 393 (1857).

Fischer v. University of Texas, 579 U.S. __ (2016).

Florence County School District Four v. Shannon Carter, 510 U.S. 7 (1993).

Foster v. Florida, 537 U.S. 990 (2002).

Fry v. Napoleon Community Schools, 580 U.S. _ (2017) .

Gary B v. Snyder, 329 F. Supp. 3d 244 (E.D. Mich. 2018).

Gitlow v. New York, 268 U.S. 652 (1925).

Goss v. Lopez, 419 U.S. 565 (1975).

Governing Body of the Juma Musjid Primary School & Others v Ahmed Asruff (2011).

Gratz v. Bollinger, 539 U.S. 244 (2003).

Griswold v. Connecticut, 381 US 479 (1965).

Hodges v. United States, 203 U.S. 1 (1906).

Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002).

Honig v. Doe, 484 U.S. 305 (1988).

Irving Independent School District v. Amber Tatro, 468 U.S. 883 (1984).

Jacob Winkelman v. Parma City School District, 550 U.S. 516 (2007).

Jones v. Alfred Mayer Company, 392 U.S. 409 (1968).

Karch v. Karch, 885 A.2d 535 (2005).

Keithly v. University of Texas Southwestern Medical Center Civil Action, No. 3:03-CV-0452-L (N.D. Tex. Nov. 18, 2003)

Kent v. United States, 383 U.S. 541 (1966).

Korematsu v. United States, 323 U.S. 214 (1944).

Lawrence v. Texas, 539 U.S. 558 (2003).

Lochner v. New York, 198 US 45 (1905).

Loving v. Virginia, 388 US 1 (1967).

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Mission, 584 U.S. __ (2018).

McCulloch v. Maryland, 17 U.S. 316 (1819).

McDonald v. City of Chicago, 561 U.S. 742 (2010).

Mills v. Board of Education, 348 F. Supp. 866 (D.D.C. 1972).

Miranda v. Arizona, 384 U.S. 436 (1966).

Mississippi University for Women v. Hogan, 458 U.S. 718 (1982).

Meyer v. State of Nebraska, 262 US 390 (1923).

Obergefell v. Hodges, 575 US _(2015).

Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007).

Pennsylvania Association for Retarded Citizens (PARC) v. Commonwealth of Pennsylvania, 334 F.Supp. 1257, 1259 (E.D. Pa 1971).

Perez v. Sturgis Public Schools, et al., 598 U.S. _ (2023).

Pierce v Society of Sisters, 268 U.S. 510 (1925)..

Planned Parenthood v. Casey, 505 U.S. 833 (1992).

Plessy v. Ferguson, 163 US 537 (1896).

Plyler v. Doe, 457 U.S. 202 (1982).

RAV v. City of St. Paul, 505 US 277 (1992).

Reed v. Reed, 404 U.S. 71 (1971).

Regents of the University of California v. Bakke, 438 U.S. 365 (1978).

Romer v. Evans, 517 U.S. 620 (1996).

Rose v. Council for Better Education, 790 S.W.2d (1989).

Rowley ex rel. Rowley v. Board of Education, 632 F.2d 945 (2d Cir. 1980).

Rowley v. Board of Education of Hendrick Hudson Central School District, 484 F. Supp. 528 (Southern District of New York, 1980).

Runyon v. McCrary, 427 U.S. 160 (1976).

San Antonio School District v. Rodriguez, 411 U.S. 1 (1973).

School District v. Governor of New Hampshire, 142 N.H. 462, 703 A.2d 1353 (1997).

Shaffer ex rel. Shaffer v. Weast, 546 U.S. 49 (2005).

Shapiro v. Thompson, 394 U.S. 618 (1969).

Slaughterhouse Cases, 83 US 36 (1873).

Students for Fair Admissions v. Harvard, 600 U.S. __ (2023).

The Civil Rights Cases of 1883, 109 US 3 (1883).

Tillman v. Wheaton-Haven Recreation Assn., Inc., 410 U.S. 431 (1973).

United States v. Carolene Products Company, 304 U.S. 144 (1938).

United States v. Nelson, 277 F.3d 164 (2d Cir. 2002).

United States v. Virginia, 518 U.S. 515 (1996).

United States v. Windsor, 570 U.S. 744 (2013).

United States v. Wong Kim Ark, 169 U.S. 649 (1898).

Washington v. Glucksberg, 521 U.S. 702 (1997).

Yick Wo v. Hopkins, 118 U.S. 356 (1886).