An analysis of the 'right' to education in South Africa and the United States

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1 Introduction

In the winter of 1944, approximately five months before the Allied forces launched their invasion at Normandy, three-term United States President Franklin D Roosevelt delivered his annual State of the Union Address. Given the unparalleled instability wrought by World War II, Roosevelt's immediate focus was on the topic of national security, and in his speech that night to the American people, the President outlined his plan for 'lasting peace'.[1] Roosevelt's blueprint for the future, however, did not stress military strength or economic resiliency. Instead, Roosevelt spoke of a 'second bill of rights', which collectively would 'spell security' and move the country forward to 'new goals of human happiness and well-being'.[2] That evening, Roosevelt articulated eight 'second generation'[3] rights that would together establish an enduring foundation for the nation's future. Among these rights was 'the right to a good education'.[4]

According to the United Nations Educational, Scientific, and Cultural Organization (UNESCO), over 130 countries have formal constitutional provisions that guarantee their citizens a free and non-discriminatory education.[5] South Africa – a country that until recently seemed destined for violent revolution, but now

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[1]President Franklin D Roosevelt 1944 State of the Union Address (1944-01-11).
[2]*Ibid*.
[3]Czech lawyer Karel Vasak is often credited with developing the notion of 'generations' of human rights. See Porsdam *From civil to human rights: Dialogues on law and humanities in the United States* (2009) 94. As explained by Porsdam, 'The civil and political rights make up the first generation of human rights, while the economic, social and cultural rights make up the second generation'. Second generation rights are often termed 'positive rights' because they: ask the state to play a role in the life of the individual citizen and his/her family, to guarantee a minimum standard'.
[4]Roosevelt (n 1).
[5]See 'India joins list of 135 countries in making education a right' *The Hindu* (2010-04-02) available at http://www.thehindu.com/news/national/article365232.ece (accessed 2011-11-25).

represents a 'bright ray of hope … for all humankind'[6] – joined this list in 1996 with the adoption of its constitution, which holds that '[e]veryone has the right to a basic education'.[7] The United States, however, has shied away from this formalism, and has neither amended its Constitution nor interpreted its constitutional provisions in a manner that substantiates a national right to an education.[8]

This divergence is the subject of the current paper. Part I delves into the history behind South Africa's national right to an education, chronicling the country's ascension from oppressive colonialism to admirable progressivism. Part II turns to the United States, offering historical and legal contexts to explain the country's state-centric approach to education. Part III then briefly highlights some important differences between the two nations that may help explain their divergent policies. Finally, Part IV identifies provisions in the United States Constitution that could be commissioned to generate a national right to an education.

2 Education in South Africa

2.1 The rise and fall of apartheid

In the early twentieth century, South Africa's intermediary systems of government – known as provinces – were wholly responsible for the direction of educational policy. Though slavery had been outlawed in 1834, disparate treatment among the races remained, and segregated schoolhouses were arguably the defining aspects of provincial education. While white, Indian, coloured, and African children were all offered free education, education was compulsory for white children but not for African children.[9] In fact, less than one quarter of all African children were enrolled in formal education programmes, and those who did receive instruction were enrolled in church-affiliated, government-subsidised institutions.[10] This practice continued until the South African National Party came to power in 1948.[11]

The National Party had been a significant presence in South African coalition governments prior to 1948 – most notably under the leadership of Prime Minister JBM Hertzog, who granted the right to vote to white women in order to dilute the vote of coloureds – though it was not until the 1948 election cycle that a 'purified' sect of the National Party was able to wrest power away from the more 'conciliatory'

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[6] See De Blij *et al The world today: Concepts and regions in geography* (2010) 242.
[7] South African Constitution 1996 s 29.
[8] For a brief summary of the right to an education, see Vile *Encyclopedia of constitutional amendments, proposed amendments, and amending issues, 1789-2002* (2003) 153-154.
[9] See Sellers Diamond 'Constitutional comparisons and converging histories: Historical developments in equal educational opportunity under the Fourteenth Amendment of the United States Constitution and the new South African Constitution' (1999) 26 *Hastings Constitutional LQ* 853, 871.
[10] *Id* 151.
[11] Cross and Chisholm 'The roots of segregated schooling in twentieth-century South Africa' in Nkomo (ed) *Pedagogy of domination* (1990) 50-53.

United Party.[12] Fearing a society dominated by British traditions[13] and tainted by African influences,[14] White South Africans took their emerging sense of nationalism to the polls and elected the explicitly segregationist National Party. The party's ideology, known as apartheid – meaning 'separateness' in Afrikaans[15] – would come to define the legal and social cultures of South Africa for nearly 50 years.

Educational policy under apartheid was formulated so as to maintain and perpetuate racial inequality. Whereas contemporary disparities among racial groups in South Africa can sometimes be explained through race-neutral geographic or economic determinants, the National Party's education system unabashedly employed race-based classifications to produce a well-defined social hierarchy.[16] It is important to note that proponents of apartheid relied not on rationales espousing white supremacy or explanations lathered in vitriol to justify their programmes. Instead, the National Party pointed to the racialised workplaces of Europe and South Africa, and flavoured their arguments with notions of pragmatism. A powerful demonstration of this inconspicuous social engineering can be gleaned from a statement made by the Minister of Native Affairs during floor debates over the Bantu Education Act of 1953, an incendiary piece of legislation that denied black South Africans an education 'that would enable them to become more than hewers of wood and drawers of water'.[17]

> There is no place for [the Bantu] in the European community above the level of certain forms of labour ... for that reason it is of no avail for him to receive a training which has as its aim absorption in the European community ... Until now he has been subject to a school system which drew him away from his own country and misled him by showing him the green pastures of European society in which he is not allowed to graze.[18]

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[12]Newell Maynard Stultz writes that the United Party's philosophy was considered conciliatory because it 'relegated cultural distinctions among whites to a subordinate position and sought to harmonize and reconcile the different interests within the electorate'. Stultz *Afrikaner politics in South Africa, 1934-1948* (1974) 2.

[13]After World War II, 'most Afrikaners believed that the choice in South African politics was between a British South Africa and an Afrikaner South Africa' *id* 158.

[14]See Mason *A traveller's history of South Africa* (2004) 192 'the National Party candidate campaigned on a ticket that promised to stem the breakdown of segregation, curb African migration to urban areas via the stringent imposition of pass controls, and attack the rising tide of black militancy and trade union activity'.

[15]See Fluehr-Lobban *Race and racism* (2006) 224.

[16]Indeed, Prof Edgar Brookes has described the product of such a 'unique system'. It is 'the only education system in the world designed to restrict the productivity of its pupils in the national economy to lowly and subservient tasks, to render them non-competitive in the economy, to fix them mentally in a tribal world, and to teach them in Dr Verwoerd's phrase that "equality is not for them"'. Brookes *Apartheid: A documentary study of modern South Africa* (1968) 60.

[17]Andrews 'Perspectives on Brown: The South African experience' (2005) 49 *NY Law Sch LR* 1155, 1156.

[18]Meer 'Education in a multi-racial South Africa' (1974) available at http://www.disa.ukzn.ac.za /webpages/DC/resep74.3/resep74.3.pdf (accessed 2011-11-25).

Though segregationist legislation was certainly not confined to education,[19] it did produce some of apartheid's most visible disparities. Educational policy under apartheid essentially divided South Africans into four racially-segregated education systems, one each for Whites, Indians, Coloureds,[20] and Africans.[21] The white system had well-resourced and globally competitive programmes, while the other three systems were notoriously underfunded.[22] Parallel systems existed at all levels of education, from primary school to college, and the Eurocentric curriculum crafted by the National Party reinforced the perceived supremacy of the English and Afrikaans languages.[23]

By the 1990s, the National Party's apartheid regime began to crumble under the weight of increasing domestic unrest and foreign influence.[24] As one of the primary battlefronts for an emerging African political class, education was one of the first pillars to fall. By 1992, a full-scale plan to de-racialise South Africa's education systems had been outlined, and non-white pupils had been enrolled in traditionally white public and private schools.[25]

Finally, in April of 1994, after years of negotiations between black African leaders and the apartheid government, the National Party made its final preparations for transference of power. On the eve of the first truly democratic election in the country's history, the 'old flag' of South Africa was lowered, and replaced by a new rainbow flag that represented a cosmopolitan and inclusive South Africa.[26] Over the next three days, the African National Congress, led by Nelson Mandela, garnered over 62% of the vote[27] and won majorities in seven of the nine new provincial legislatures.[28] Two years later, the South African government would unveil the most transformative constitutional structure in modern history.

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[19] Eg, the Population Registration Act catalogued the entire South African population according to race and ancestry, the Group Areas Act segregated residential areas, and the Prohibition on Mixed Marriages Act prohibited the marriage of white and black South Africans. See Andrews (n 17) 1155 n 3.

[20] The term 'coloureds' denotes people of mixed ancestry.

[21] See Zajda *Globalization, education, and social justice* (2010) 38.

[22] *Ibid* ('White education was funded at average levels of 18:1 compared to African education').

[23] *Ibid*.

[24] Indeed, the oppression of apartheid in South Africa was 'featured high on the agenda of almost every international agency or forum'. Johnson and Schlemmer *Launching democracy in South Africa* (1996) 1.

[25] Zajda (n 21) 38-39.

[26] Mason and Mason *Development and disorder: A history of the third world since 1945* (1997) 245.

[27] *Ibid*.

[28] Pottie 'The first five years of Provincial Government' in *Election '99 South Africa* (1999) 16.

2.2 *Text of chapter 2 section 29 of the Constitution of South Africa*

The authors of the South African Constitution contextualised the right to an education among other socioeconomic rights, such as housing and health.[29] In its ratified form, chapter 2 section 29 of the South African Constitution reads:

> 1 Everyone has the right
> (a) to a basic education, including adult basic education; and
> (c) to further education, which the state, through reasonable measures, must make progressively available and accessible.
> 2 Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable.[30] In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account
> (a) equity;
> (b) practicability; and
> (c) the need to redress the results of past racially discriminatory laws and practices.
> 3 Everyone has the right to establish and maintain, at their own expense, independent educational institutions that
> (a) do not discriminate on the basis of race;
> (b) are registered with the state; and
> (c) maintain standards that are not inferior to standards at comparable public educational institutions.
> 4 Subsection (3) does not preclude state subsidies for independent educational institutions.[31]

2.3 *Reform and uncertainty*

In the hopeful years that followed the 1994 elections, the South African education system welcomed great achievements and experienced great difficulties. Most importantly, the formalism of racially-structured educational facilities had been dismantled and outlawed. African enrollment rates rose at all levels of education.[32] In addition, though decentralisation produced a 'complex mosaic of local-level outcomes

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[29] Andrews (n 17) 1170.

[30] 'In June 1976, students in the black township of Soweto just outside of Johannesburg commenced a strike to protest the teaching of Afrikaans in schools – a compulsory requirement for matriculation. The rioting soon spread from Soweto to other towns on the Witwatersrand, Pretoria, to Durban and Cape Town, and developed into the largest outbreak of violence South Africa had experienced. The police used brutal force to quell the riots and several students died in the protests'. Andrews (n 17) 1169 n 78.

[31] South African Constitution 1996 s 29.

[32] Zajda (n 21) 39.

in schools and communities', some schools were completely integrated as a result.[33] Given the racial makeup of the South African populace the vast majority of school age students are black.[34] Desegregation, hence, suggests that formerly all-white schools will be open to other students, not that total integration would occur.

During the same time, however, some schools experienced little or no change.[35] It proved difficult for such radical reform to take shape across thousands of public schools. Teachers complained of friction between school administrators and government officials, low performing African schools lost many of their wealthier students to higher performing white schools, uncertainty over employment was pervasive among school staffs, the dominance of the English and Afrikaans languages continued, and racial disparities were in part replaced by economic disparities.[36] Indeed, according to Woolman and Fleisch, 'the vast majority of South African children do not acquire a meaningful basic education. They lack, in short, the minimum levels of literacy, numeracy and essential life skills necessary to do more than menial work in a complex society'.[37] It should be noted that while previous racially discriminatory policies continue to impact the absence of education among blacks in South Africa, current government fiscal policy tends to perpetuate this scheme.[38] User fees are applied to attend schools as are other fees for books, uniforms, and transportation. While such fees are not supported through such laws as those of the historical apartheid or the United States 'Jim Crow'[39] laws, the result is somewhat synonymous as impoverished South Africans, most of whom are black, cannot afford the fees to attend school. Moreover, additional fees can be charged by the schools or school organisations making them prohibitively expensive.

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[33] *Id* at 40. In the fiscal year 2009, South Africa spent 5.4% of its GDP and 16.9% of its total government expenditure on education. See UNESCO Institute for Statistics *Global education digest 2011* (2011) 234 available at http://www.uis.unesco.org/Library/Documents/global_education_digest_2011_en.pdf (accessed 2011-11-25). From 2005-2009 77% of South Africans made it to the last primary grade. See UNICEF *South Africa statistics* available at http://www.unicef.org/infobycountry/southafrica_statistics.html (accessed 2011-11-25).

[34] See *Report on the 2009/2010 annual surveys for ordinary schools, Department: Basic Education, Republic of South Africa.* According to this report whites make up only 3-4%of the school age children in South Africa; available at http://www.fedsas.org.za/downloads/12_37_53Annual%20Survey%202009%202010%20published%2011%20May%202012.pdf (accessed 2012-08-24).

[35] UNICEF *South African statistics* (n 33).

[36] *Id* 40-41.

[37] Woolman and Fleisch *The Constitution in the classroom: Law and education in South Africa 1994-1998* (2009) 113.

[38] Roithmayr 'Locked in inequality: The persistence of discrimination' (2003) 9 *Michigan J Race and Law* 31.

[39] 'Jim Crow' was a name attached to state and local laws from the 1870s through the 1950s denying African Americans rights that were by and large protected by the United States Constitution. See, eg, Woodward *The strange career of Jim Crow* (1966).

There is a difference in reporting about government support of the poorest schools in South Africa as regards the payment of fees. One source indicates that since 2006, 60% of the poorest schools are considered 'no fee' schools whereby such institutions received 100% government subsidy.[40] A policy brief, however, published in 2009, relates that only 40% or two/fifths of the poorest of schools were declared to be 'no fee' schools in 2007.[41] The latter report addressed the concern that while 'no fee' status provides greater access for the poorest of schoolchildren, 'they also sustain a class-differentiated two-tier education system'.[42] As a result, racial and class inequality in education persists.

2.4 The right to an education in the Constitutional Court

The highest court in South Africa – the Constitutional Court – has yet to attach much meaning to the aspirational language of chapter 2 section 29.[43] As Andrews observes, almost all of the education-related cases have raised questions 'not central to the content of the right to education'.[44] These cases include challenges to policies such as allowing non-South African citizens permanent employment in public schools[45] and the validity of government spending directed toward stimulating educational equity.[46] However, in 2009 the Constitutional Court did deliver a substantive education-related decision in *Mpumalanga Department of Education v Ermelo*.[47] Though the decision did not explore chapter 2 section 29 to any noteworthy extent, the Court's treatment of the section does offer insight into how the Court will approach future education cases.

Ermelo concerned the efforts of the black African community and the Department of Education to enroll black students coming from an overpopulated black African school in a majority-white, Afrikaans-language school, which asserted the rights of its students to receive an education in languages of their choice.[48] It was clear to all involved, however, that the language policy had in practice excluded students along racial lines.[49]

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[40] *Report on the 2009/2010 annual surveys for ordinary schools* (n 34).
[41] Consortium for Research on Education, Access, Transitions & Equity (CREATE) *'"No fee" schools in South Africa: Policy brief no 7* August (2009) available at http://www.create-rpc.org/pdf_documents/Policy_Brief_7.pdf (accessed 2012-08-07).
[42] *Id* 1.
[43] Most telling, perhaps, is the fact that the Court has yet to give meaning to the term 'basic education'. *See id* 127.
[44] Andrews (n 17) 1169.
[45] *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* 1997 ZACC 16 (CC) (South Africa).
[46] *Bel Porto School Governing Body v Premier of the Western Cape Province* 2002 ZACC 2 (CC) (South Africa).
[47] 2009 1 ZACC 32 (CC) (South Africa).
[48] Minow *In Brown's wake* (2010) 174.
[49] Indeed, as the Constitutional Court points out, '[The DOE] contend[s] that the core of the dispute is the appropriateness of the school's language policy which in effect has a disparate impact of

In its decision, the Constitutional Court first found that the provincial Department of Education, by dissolving Hoërskool Ermelo's governing body in order to forcefully change the school's language policy, had used unfair procedures in reaching its result.[50] Nevertheless, the Court instructed the school to 'reconsider' its Afrikaans-only language policy 'in light of the considerations set out in this judgment'.[51] In other words, because of the foreseeable influx of black students into the Hoërskool Ermelo community and the inevitability of future overcrowdings in neighbouring black schools, Hoërskool Ermelo was charged with revisiting its language policy so as to accommodate for prospective black students.[52]

As for chapter 2 section 29 of the South African Constitution, Chief Justice Moseneke provided little interpretation: '[S]ection 29(1) entrenches the right to basic education and a right to further education which, through reasonable measures, the state must make progressively accessible and available to everyone'.[53] Moseneke's recitation essentially mirrors the text of section 29(1): 'Everyone has the right (a) to a basic education, including adult basic education; and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible'.[54] Thus, advanced interpretations of South Africa's right to an education await further articulation.

Altogether, South Africa's education system has changed dramatically, and chapter 2 section 29 is a vibrant medium for future reform. In 2011, the US Department of State captured the evolving nature of education in South Africa:

> Education is in transition. Under the apartheid system schools were segregated, and the quantity and quality of education varied significantly across racial groups. The laws governing this segregation have been abolished. The long and arduous process of restructuring the country's educational system is ongoing. The challenge is to create a single, nondiscriminatory, nonracial system that offers the same standards of education to all people.[55]

3 Education in the United States

In the early days of American society, primary education was mostly provided by individual families, religious institutions, religiously-related institutions, or local government.[56] Today, every state constitution in the nation contains language that

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excluding learners who choose to be taught in English. On the facts of this case, these are exclusively black learners'. *Ermelo* 1 ZACC para 38.

[50]See *Ermelo* 1ZACC para 77.

[51]*Id* para 98.

[52]See Minow (n 48) 174.

[53]*Ermelo* 1 ZACC para 47.

[54]South African Constitution 1996 ch 2 s 29(1).

[55]US Department of State 'South Africa' available at http://www.state.gov/r/pa/ei/bgn/2898.htm (accessed 2011-11-10).

[56]Draper 'Educational organization and administration' in *Education in the United States* (1910) 19.

requires its legislature to provide a system of public schools.[57] Yet regardless of this comprehensive framework, the quality of education in America varies widely, both within states and among states. This disparity is, in part, a product of the country's unfortunate struggle with racial inequality.[58]

3.1 A history defined by difference

Access to education in the United States was not always drawn along racial lines. It was not until the mid-1600s that Americans began to be categorised according to skin color. With this racialisation came the establishment of a black slave caste. Slavery was present but comparatively sparse in the American North, but it served as the bedrock of the American South's economy. Blacks in some northern states were able to acquire formal educations, but because blacks in the southern slave states were considered property, they could not look to their state governments for any civil rights, including education. This racially-structured societal system existed until the conclusion of the American Civil War in 1865, when the national congress abolished slavery and engaged in affirmative steps toward ameliorating the status of southern blacks through the efforts of Reconstruction.

Though education was not a major focus during Reconstruction, the federal government did create a system of schools for blacks in the former slave states through the Freedmen's Bureau.[59] Unfortunately, progress made through these endeavours was halted when Reconstruction was abruptly abandoned as part of a political compromise in 1877. The obligation to provide an education to newly freed blacks was again left to the individual states, and because administrators of the former slave states did not want to provide state-funded education to black citizens, these states refrained from establishing a right to an education.

3.2 Confirming state autonomy

As time passed from the Era of Reconstruction, northern states began to amend their state constitutions to include the affirmative responsibility of providing at least some education to its citizens.[60] Not surprisingly, the former slave states were recalcitrant in this effort. Over time, the southern states did adopt public education systems, but they were segregated along racial lines. These newly formed, separate black schools, though presented as 'equal' to their white counterparts, were unmistakably inferior to white schools.[61] In 1896, the US

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[57] See Cover 'Is "adequacy" a more "political question" than "equality"?: The effect of standards-based education on judicial standards for education finance' (2002) 11 *Cornell JL & Pub Pol'y* 403, 404.
[58] See generally Moses *Embracing race: Why we need race-conscious education policy* (2002).
[59] Hartman, Mersky and Tate *Landmark Supreme Court cases* (2004) 35.
[60] See generally Tarr and Williams *State constitutions for the twenty-first century: The agenda of state constitutional reform* (2006) 243-45. Some states, such as Georgia and Pennsylvania, had formalised a right to an education in their founding constitutions. See *id* 243.
[61] *Ibid*. 'In 1910, expenditures per pupil for black schools averaged less than a third of those spent on white pupils'.

Supreme Court legitimised this 'separate but equal' educational structure in its now infamous decision *Plessy v Ferguson*.[62]

With *Plessy* providing a constitutional footing for upholding discriminatory state laws, the Supreme Court went on to permit segregation in all public school systems in 1899, unanimously holding that education was a province of the state government and that federal regulation of state educational programmes could not be justified.[63] The Court's strict enforcement of state autonomy was echoed nine years later in *Berea College v Kentucky*, wherein the Court allowed a state to require segregation in private educational institutions.[64] Diamond notes that unlike the South African judiciary, which never attempted to 'espous[e] "equal" educational opportunity for black children', the Supreme Court chose to make such 'deceptive promises' through its 'separate but equal' doctrine.[65]

Thus, by the end of the first third of the 20th century, control over education had been firmly vested in the individual states. And with the blessings of the Supreme Court in *Plessy* and *Cummings*, state governments were doctrinally entitled to segregate their public schools.

3.3 Enforcing 'but equal'

The strength of the southern states' devotion to 'equal' education was questioned aggressively by the newly formed National Association for the Advancement of Colored People (NAACP) in the 1930s, which began holding states accountable to *Plessy*'s obligation to provide 'equal' educational facilities. At first, the NAACP argued in support of a doctrine of 'absolute equality', where public school systems would be charged with providing truly equal black school systems. However, this approach proved to be a slow and arduous means of effectuating educational equality: challengers would be faced with proving, in each case, that the separate educational system offered to blacks was inferior to that provided to whites.[66] Even if viable cases demonstrating inequality could be established, inequalities were present in thousands of school districts across America. The practical obstacles to enforcing 'but equal' across all of them were insurmountable. 'Without a direct reversal of the *Plessy* doctrine', a ruling that held that separate is in and of itself inherently unequal, 'it would take generations to equalise the thousands of school districts in the South'.[67]

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[62] *Plessy v Ferguson* 163 US 537 (1896) state laws requiring racial segregation in private businesses did not violate the Equal Protection Clause of the Fourteenth Amendment.
[63] *Cummings v Richmond County Board of Education* 175 US 528 (1899).
[64] 211 US 45 (1908).
[65] See Diamond (n 9) 871.
[66] Hartman (n 59) 36.
[67] *Ibid*.

3.4 *Supreme Court jurisprudence: From* Brown *to* Rodriguez *and beyond*

3.4.1 *Brown v Board of Education*

The NAACP's legal efforts culminated in 1954 with the Supreme Court case *Brown v Board of Education of Topeka*.[68] Prior to *Brown*, the Supreme Court had said very little about constitutional rights in the education context.[69] Importantly, the NAACP's primary goal was not to establish a formal, national right to an education under the United States Constitution. Instead, the organisation hoped that the Court would declare 'separate but equal' unconstitutional, thus invalidating every segregated public school system across the American South.[70] And in perhaps the most well-known Supreme Court opinion ever written, a unanimous Court did this and more. In speaking about the value of public education, the Court stated:

> 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. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[71]

Thus the Court in *Brown* overturned 'separate but equal', and established the critical importance of an education in American society. Some scholars assert that an even more robust conception of education – one that would have firmly established it as a fundamental right – was on the verge of being established in *Bolling v Sharpe*,[72] decided the same day as *Brown*. Balkin and Balkin relate that 'Chief Justice Warren came close to holding that education was a fundamental liberty under the Due Process Clause, but he left this language out at the urging of Hugo Black in order to ensure a unanimous decision'.[73]

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[68]347 US 483 (1954).
[69]Eg, *Meyer v Nebraska* 262 US 390 (1923) recognised the right of a school to teach a foreign language, and *Pierce v Society of Sisters* 268 US 510 (1925) recognised the right of parents to send their children to parochial schools.
[70]See Andrews (n 17) 1165.
[71]*Brown v Board of Education* 347 US 483, 493 (1954).
[72]347 US 497 (1954) racial segregation in the public schools of the District of Columbia is a denial of due process of law as guaranteed by the Fifth Amendment.
[73]Balkin and Balkin *What Brown v Board of Education should have said: The nation's top legal experts rewrite America's landmark civil rights decision* (2002) 58.

3.4.2 *San Antonio Independent School District v Rodriguez*

Brown's informal and ambiguous pronouncement of a national right to an education was revisited some 19 years later in *San Antonio Independent School District v Rodriguez*.[74] In *Rodriguez*, the Court was asked to determine the constitutionality of Texas's public education financing scheme, which was overwhelmed with distressing disparities among its school districts.[75] The Court reasoned that because Texas's scheme did not burden a fundamental right or a suspect class, it was permissible under the Fourteenth Amendment.[76]

The Court's handling of *Rodriguez* is more easily understood when contextualised by the Court's usual approach to socioeconomic rights. In *Lindsey v Normet*, a case decided the year before *Rodriguez* that focused on the socioeconomic right of housing, the Court wrote that '[T]he Constitution does not provide judicial remedies for every social and economic ill'.[77] Such a statement would prove to be an understatement. In *Dandridge v Williams*, decided three years before *Rodriguez*, the Court held that it was not a violation of the Equal Protection Clause of the Fourteenth Amendment for a state to impose a $250 welfare cap on families, regardless of family size.[78] In both cases, endangered socioeconomic rights failed to trigger heightened scrutiny from the Court.[79]

Perhaps most importantly, the *Rodriguez* Court addressed *Brown*'s insinuation that education was a fundamental right: '[T]he importance of a service performed by the State', the Court wrote, 'does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause'.[80] In this regard, the Court shortchanged the transformative language of *Brown* and avoided any substantive discussion of the value of education relative to other established 'fundamental' rights.

3.4.3 Reflections on *Rodriguez*

The Supreme Court's palpable hesitancy to pronounce education as a fundamental right in *Brown*, and its delineation of education as a sub-fundamental right in *Rodriguez*, can most likely be explained by the Court's adherence to a rather absolutist conception of the separation of powers doctrine. According to Kende, the Court's jurisprudence suggests that it is guided by three principles.[81]

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[74]411 US 1 (1973).
[75]*Id* 54-55.
[76]*Id* 28, 38. The challenge was brought under the Equal Protection and Due Process clauses of the Fourteenth Amendment.
[77]405 US 56, 73-74 (1972).
[78]397 US 471, 474-75, 486 (1970).
[79]Presumably, any state law that restricts a fundamental right would be subject to strict judicial scrutiny, the highest standard of judicial review.
[80]*Rodriguez* 30.
[81]See Kende *Constitutional rights in two worlds* (2009) 277-282.

First, that 'legislatures, not courts, should make socioeconomic funding allocations'.[82] Second, that 'the judiciary lacks the competence to make such decisions',[83] and third, that 'separation of powers problems are minimised if the Constitution encompasses negative rights'.[84]

The opinion in *Rodriguez* made explicit use of these first two principles, and intimated the third. First, the Court wrote that it did not have the 'authority' to interfere with the school funding scheme because doing so would effectively make the Court a 'super-legislature'.[85] According to the Court, local school administrators should have the power to govern their own districts.[86] It is worth noting here that South Africa's Constitutional Court would most likely reach a markedly different result in this regard.[87]

The *Rodriguez* Court further distanced itself from an obligation to intervene by relying on the 'competence' rationale; that is, that the judiciary lacks the 'competence', 'expertise', and 'familiarity' to resolve Texas's funding dilemma.[88] Through this less doctrinal, more practical approach, the Court again delegated power to the state government. This deference to local control – especially in light of the gross inequalities at hand – was the opposite of what the *Ermelo* court held. Even though the provincial Department of Education had violated procedural requirements for changing Hoërskool Ermelo's language policy, the fact that many black African students were to be deprived of an education meant that *something* had to be done, regardless of the relative competency of the Constitutional Court.[89] As Kende points out, the Supreme Court in *Rodriguez* could have overcome concerns over authority and competence by 'rul[ing] against the Texas financing scheme, but leav[ing] the state to devise an equitable alternative, subject to Court guidelines'.[90] The Court opted, however, to stay its hand. Lastly, though the *Rodriguez* Court did not voice concern over the perceived perils of enforcing a negative right, Supreme Court case law demonstrates that the Court has a time-honoured practice of enforcing negative

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[82] *Id* 277.
[83] See also *id* 279-80.
[84] *Id* 277.
[85] *Rodriguez* 411 US 31.
[86] *Id* 40-41.
[87] As Kende points out, 'The South African cases … demonstrate that the judiciary can enforce socioeconomic rights without intruding into quintessentially legislative or executive functions'. See (n 81) 278.
[88] *Rodriguez* 411 US 31, 41.
[89] *Ermelo* 1 ZACC para 98.
[90] Kende *supra* (n 81) 282. Similarly, in *Dandridge* the Court 'could have ordered the government to develop a more equitable funding rule that took into account family size' *ibid*.

rights, including the integration of public schools,[91] the right to privacy,[92] and the personal right to bear arms,[93] among others.[94]

4 Explanations

Today, though the United States devotes considerable national resources to education,[95] and demonstrates strong leadership in educational adequacy,[96] and even though political leaders at the national level have introduced the idea,[97] it still remains one of the very few highly-developed countries in the world without a national right to an education. South Africa, however, managed to lock this guarantee into its own Constitution over fifteen years ago. Marger's comparative analysis of the US and South Africa provides some insights that help to explain this divergence.[98]

4.1 Four key differences between South African and American society

1 *Vast differences in racial composition* – Whites in South Africa have always made up a small numerical minority of the population, yet blacks in the United States have always constituted a numerical minority of the population.
2 *Wider discrepancies between social and economic statuses* – Whites in South Africa have always held extremely disproportionate social and economic power, whereas this discrepancy is not as large in the US.

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[91] *Brown v Board of Education* 347 US 483 (1954); see also *Cooper v Aaron* 358 US 1 (1958) Fourteenth Amendment mandated that black students be given equal rights under the law, regardless of concerns over maintaining law and order.
[92] *Griswold v Connecticut* 381 US 479 (1965) state law prohibiting the use of contraceptives violated the Constitution's right to marital privacy; *Roe v Wade* 410 US 113 (1973) state law making it a crime to assist a woman to get an abortion violated the Constitution's right to privacy.
[93] *District of Columbia v Heller* 554 US 570 (2008) Second Amendment to the U.S. Constitution protects an individual's right to possess a firearm unconnected with service in a militia, and to use that firearm for traditionally lawful purposes.
[94] Eg, Kende references *Brown v Board of Education II* 349 US 294 (1955) as a decision enforcing a negative right. See Kende (n 81) 281.
[95] For fiscal year 2009, the United States spent 5.5% of its Gross Domestic Product on education, and devoted 13.8% of its total government expenditures to education. See UNESCO (n 33) 232.
[96] 95% of American children survive to the last primary grade. See UNICEF *United States statistics* available at: http://www.unicef.org/infobycountry/usa_statistics.html (accessed 2011-11-25).
[97] US Congressman Jesse Jackson Jr proposed an amendment to the Constitution in 2001 providing that '[a]ll citizens of the United States shall enjoy the right to a public education of equal high quality'. See Vile (n 8) 154. Also, in 2009, Newt Gingrich – a leading Republican and former Speaker of the House of Representatives in the US Congress – met in the Oval Office with President Barack Obama and Reverend Al Sharpton (both Democrats) and proclaimed that 'education should be the first civil right of the 21st century'. Milbank 'Why Newt Gingrich won't last' *The Washington Post* (2011-11-15) available at http://www.washingtonpost.com/opinions/why-newt-gingrich-wont-last/2011/11/15/gIQAmTNcPN_story.html?hpid=z3 (accessed 2011-11-25).
[98] See Marger *Race and ethnic relations: American and global perspectives* (2011) 394.

3 *South African blacks have far greater political power than American blacks* – Whereas the black trade unions[99] and student populations[100] were able to amass considerable power in South Africa, black Americans, even when organised, wield far less political power than white Americans.
4 *The United States has a greater number of distinct ethnic groups than South Africa* –
5 Though South Africa's population is 'one of the most complex and diverse',[101] the US is 'perhaps *the* most racially and ethnically diverse country in the world'.[102] This high level of diversity in the US leads to problems in organising, building political capital, and competing fruitfully with other ethnicities.[103]

5 Vehicles for change

While socioeconomic and demographic realities may hinder the development of a national right to an education in the US, viable legal avenues for fashioning such a right do exist. The Supreme Court is certainly not empty-handed when it comes to constitutional texts capable of igniting and sustaining an American right to an equal education. *Brown v Board of Education* is the clearest example of this potential. And as Andrews points out, it was not for a lack of constitutional undergirding that the *Brown* court did not assert a national right to education:

> In short, *Brown* was decided amidst American reluctance and international ambivalence about the immorality of racism. This was not the case in South Africa in 1994. The new non-racial constitution emerged in an environment shorn of national reluctance and international ambivalence about the need to eradicate racism in all its manifestations.[104]

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[99]See King *Domestic service in post-apartheid South Africa: Deference and disdain* (2007) 85.
[100]The students who organised the 1976 Soweto strike against the Bantu Education Act had 'persuasive power' as '52% of people in Soweto were under 25 and 63% under 30'. South African Democracy Education Trust *The road to democracy in South Africa, 1970-1980* (2004) 350.
[101]Mwakikagile *South Africa as a multi-ethnic society* (2010) 136. About 31 million of South Africa's 45 million people are black Africans, and though this population is extremely diverse in some regards, it can nonetheless be divided into four major ethnic groups. See also Hickey *The handbook of language contact* (2010) describing South Africa as 'ethnically complex'.
[102]Tischler *Introduction to sociology* (2010) 233 (emphasis added). See also Marger *Race and ethnic relations: American and global perspectives* (2011) 5 placing the United States at the top of countries with 'high' diversity. Indeed, at least sixteen distinct ancestry groups, from African-Americans to Germans, Mexicans to Italians, made up at least 1% of the population in 2000. See Mongabay.com 'Largest ethnic/racial groups in the US' available at http://names.mongabay.com /ancestry/ancestry-population.html (accessed 2011-11-25). What is more, nearly 30 different ancestry groups could claim half of one percent of the population. *Id*.
[103]It should not be forgotten that in South Africa the black African ethnic identity was in part defined and reinforced by the racialisation that occurred under the apartheid government. This crude simplification in effect consolidated an extremely diverse range of black African ethnicities into a caste of similarly motivated people.
[104]Andrews (n 17) 1154.

While the political and social realities of *Brown*'s time muffled its generative capacity, such 'reluctance' and 'international ambivalence' does not exist today. The Ninth Amendment and the explicitly transformative language of the Civil War Amendments provide four doctrinal vehicles that the Supreme Court could utilize in enunciating a positive right to education.

5.1 The 14th Amendment

The Fourteenth Amendment, introduced by a devoutly reform-minded sect of Republicans known as the Radical Republicans, is the most progressive amendment in the country's history. Passed in the shadow of a four year civil conflict that left an estimated 620,000 Americans dead,[105] section 1 of the amendment is the single most explicit legislative effort aimed at effecting substantive equality. Though interpreters of the 1868 amendment have yet to carry out the transformative purpose of the section, it nevertheless provides the most unassailable vehicle for asserting second generation rights, including the right to an education. Two mediums for reform are outlined in section 1: the Citizenship Clause and the Privileges or Immunities Clause.[106]

5.1.1 The Citizenship Clause

The Citizenship Clause of the Fourteenth Amendment was designed to rebut one holding of Chief Justice Roger Taney's majority opinion in *Dred Scott v Sandford*.[107] Delivered as an attempt to categorically resolve the debate over slavery that would engulf the United States in civil war only four years later, *Dred Scott* held in relevant part that because blacks had not been members of the American polity at the time of the Declaration of Independence and the ratification of the US Constitution, they were not US citizens and could never be US citizens.[108] This highly controversial decision was the intended target of the Citizenship Clause, which reads: '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'.[109]

Some legal scholars believe that this language could generate a right to an equal education. Judge Goodwin Liu, for example, has argued that 'existing interstate disparities in educational opportunity stand in tension with the

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[105]Mitchell *The American Civil War 1861-1865* (2001) 3.

[106]The third and final sentence of s 1 of the Fourteenth Amendment, known as the Equal Protection Clause, restricts state actions – not actions by the national government – and as such could not operate as a medium for establishing a national right to an education. See Balkin and Balkin (n 73) 61.

[107]60 US 393 (1857) persons of African descent cannot be, nor were ever intended to be, citizens under the US Constitution.

[108]*Id* 403, 419. Taney's contention that blacks had not been accepted members of American polities is patently false. See *id* 573 (Curtis J dissenting).

[109]US Constitution amend. XIV, § 1.

Fourteenth Amendment guarantee of a national citizenship and that ameliorating the disparities is a constitutional duty of the federal government'.[110] Essentially, to deny a person an education – an element of American life so fundamental to well-being and success – would effectively deny that person a place in the American citizenry. Put another way, a person cannot be considered a full citizen of the United States without an education. Thus, because the Citizenship Clause holds that 'all persons … are citizens', it can be deduced that all persons are guaranteed the ingredients of effective citizenship, including an education.

5.1.2 The Privileges or Immunities Clause

The Privileges or Immunities Clause has a short but highly controversial history. At least one researcher assumes the clause was probably included by the Radical Republicans as an attempt to nationalize the Bill of Rights.[111] That is to say that the federal government, through the clause, was attempting to force the states to respect the rights that the original Constitution had prohibited the federal government from abridging. 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States'.[112] But the first interpretation of these brief words, appearing in a court decision known as the *Slaughterhouse* cases,[113] is considered by some scholars to be the worst decision in Supreme Court history.

Slaughterhouse concerned a group of butchers who were driven out of business by a Louisiana slaughterhouse monopoly.[114] They turned to the courts, and asserted that the Privileges or Immunities Clause encapsulated a federal right to contract.[115] Thus the case asked the courts to articulate what was included in the 'privileges or immunities of citizens of the United States'. The Supreme Court's resulting treatment of the clause in *Slaughterhouse* has been described as 'gutted',[116] 'eviscerated',[117] 'destroyed',[118] and 'annihilated'.[119] Essentially, the Court distinguished between federal privileges and state privileges, and delegated the 'most meaningful benefits of citizenship' to the province of the states.[120] In the case the Court defined the substance of the federal 'privileges or immunities' as a

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[110]Liu 'Education, equality, and national citizenship' University of California at Berkeley Public Law Research Paper no 832604, 1.
[111]See Smith *Encyclopedia of African-American politics* (2003) 148.
[112]US Constitution amend XIV § 1.
[113]83 US 36 (1873) holding that the privileges or immunities of citizens of the United States do not include the right to operate slaughterhouses.
[114]Bolick *Leviathan: The growth of local government and the erosion of liberty* (2004) 44.
[115]*Ibid*.
[116]*Ibid*.
[117]Rosen *The Supreme Court: The personalities and rivalries that defined America* (2007) 95.
[118]Bogen *Privileges and immunities: A reference guide to the United States Constitution* (2003) 105.
[119]Black *A new birth of freedom: Human rights, named and unnamed* (1999) 76.
[120]Dickson *The Supreme Court in conference, 1940-1985: The private discussions behind nearly 300 Supreme Court decisions* (2001) 55.

meager selection of rights and privileges that were already established, such as habeas corpus and the right to use navigable waters.[121] This eliminated any hope that the clause might be used to promote a national standard of civil rights.[122] Thus as a whole, the Court effectively interpreted the clause to be a hollow, redundant, and utterly meaningless collection of words.[123]

The same optimism that accompanied the belief that the Privileges or Immunities Clause might have produced a national standard of civil rights could be applied to the belief that it might be able to produce a national standard of education. It is foreseeable that a reviewing court, in appreciation of its drafters' later efforts to produce a system of schools for newly freed slaves, could capitalize on this intent and breathe new life into the Clause. Originalists cannot ignore the context of the Clause: of the four constitutional provisions capable of producing and justifying the right to an education, the Privileges or Immunities Clause carries the most supportive original intent and transformative context. However, because the Clause has only been invoked once to strike down a state law,[124] it would require a dramatic invigoration of the Clause's intent to use it as a launching pad for a national right to an education.

5.2 The 13th Amendment

The Thirteenth Amendment was ratified with the explicit purpose of abolishing slavery. Its language indicates no ulterior motive: 'Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction'.[125] However, the Supreme Court has interpreted it somewhat broadly in the hope of giving substance and meaning to its intent. In *US v Stanley*, the Court was asked to review the constitutionality of the Civil Rights Act[126] as applied

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[121] *Slaughterhouse* 83 US 80.

[122] See Dickson (n 120) *id*.

[123] Some scholars argue that the drafters of the Fourteenth Amendment clearly wanted to nationalise the US Bill of Rights through the Privileges or Immunities Clause. See Smith (n 111). However, the *Slaughterhouse* majority 'rejected the argument that the clause incorporated the Bill of Rights'. *Id*.

[124] *Saenz v Roe* 526 US 489 (1999) state law requiring a person to have lived in a state for one year in order to obtain full welfare benefits violated the Privileges or Immunities Clause.

[125] US Constitution amend XIII, § 1.

[126] Section 1.

> That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land and water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

Section 2.

> That any person who shall violate the foregoing section by denying to any citizens, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall for every such offence forfeit and pay the sum of five

to five fact patterns where privately-operated accommodations had been denied to blacks.[127] In interpreting the second section of the amendment[128] – the section that gives Congress the power to enforce the amendment's prohibition of slavery – the Court stated that:

> [The Thirteenth Amendment] has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States; and it is assumed, that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.[129]

Educational inequality in the United States is no doubt traceable in part to funding schemes that were the product of a highly racialised society. In fact, a number of private and government-supported actions directly caused some of the inequalities that educational administrators face today, and these actions are well-documented. They include the use and approval of restrictive covenants that barred blacks from living in affluent white neighbourhoods; the practice of government underwriters to assess black homes at lower values; the practice of government redlining that ensured lower appreciation of black home values; and perhaps most telling, the denial of education for enslaved blacks, which was a 'signature feature of enslavement in the United States'.[130] Indeed, the Court in *Brown* summarised how, at the time of the passage of the Fourteenth Amendment, '[A]ny education of Negroes was forbidden by law in some states'.[131]

For these reasons, present-day inequalities in access to education and quality of education could be considered 'badges and incidents of slavery'. Congress could, in this regard, pass legislation aimed at 'abolishing' the residual effects of slavery. However, this interpretation would assumedly only authorise a national right that benefited the descendants of former slaves. This limitation could be overcome, however, if the Court were to regard all systems of education in America and their respective shortcomings as 'badges and incidents of slavery'.

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hundred dollars to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall also, for every such offence, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year.

[127] 109 US 3, 20 (1882). The claims were based on the denial of equal accommodations at two inns, two theatres, and a railroad company's train car. *Id* 3.

[128] Section 2.

> Congress shall have power to enforce this article by appropriate legislation'.
>
> US Constitution amend XIII § 2.

[129] *Id* 20.

[130] Perry, Moses and Wynne *Quality education as a constitutional right* (2010) 38.

[131] *Brown* 347 US 490.

5.3 The 9th Amendment

The Ninth Amendment states that 'The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people'.[132] If this language has any operative effect beyond articulating good faith efforts on the part of its drafters to mindfully restrain the reach of the federal government, then surely the remaining balance could substantiate a right to an education. Charles Black submits that the Ninth Amendment declares as a matter of law that 'some other rights are "retained by the people", and that these shall be treated as *on equal footing* with rights enumerated'.[133] In a more active sense, this means that a reviewing court could find that a government action – such as a state or national school financing scheme – violated a substantive right that exists *vis-à-vis* the Ninth Amendment.[134]

Of course, critics of such a carte blanche means of generating fundamental rights are justified in their dismay. But if the Ninth Amendment is to have any meaning, then there must be methods for determining what that meaning should be.[135] Black suggests that 'law may be generated by due attention to the sound requirements arising out of social or political structures and relations'.[136] No doubt this description could render the amendment a factory for endless fundamental rights. Yet according to Kende, one recent Supreme Court case suggests that the amendment should be interpreted as 'generally protecting individual unenumerated rights, which means that it could one day be viewed as protecting an individual's socioeconomic rights'.[137] And given the consistently critical importance of education and its present role as a fundamental element of our society, it would certainly have to be on any shortlist for Ninth Amendment animation.[138]

6 Conclusion

Ten years after President Roosevelt imagined a new promise in America's social contract, the US Supreme Court came within a breath of making it a reality. And after decades of harsh oppression, the people of South Africa finally won the power to write their own social contract. South Africa instilled their new Constitution with a formal right to an education, while the US has been reluctant to do so. Significant demographic and socioeconomic differences are helpful in explaining these divergent outcomes. Yet ultimately, if the Supreme Court did

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[132] US Constitution amend IX.
[133] Black (n 119) 13.
[134] See *ibid*.
[135] Importantly, as Black distinguishes, original intent should not be among these mechanisms because the 9th Amendment is forward-looking in nature. *See id* 14.
[136] *Id* 20.
[137] Kende (n 81) 283 n 255 commenting on *District of Columbia v Heller* 554 US 570 (2008).
[138] Indeed, most Americans believe that their children have a right to a good education. *Id* 283.

elect to formalise President Roosevelt's right to an education, it would have plenty of constitutional conduits through which to do so.

South Africa has achieved remarkable educational progress in the decades following the end of apartheid. Chapter 2 section 29 of the South African Constitution has certainly contributed toward this improvement. However, in future decisions, the Constitutional Court should be careful to avoid sanctioning fiscal policies that will eviscerate the 'right to education' contained in section 29 by effectively depriving many low-income Africans of an education. While apartheid has ended, regressive fiscal policies and failure to ensure a diverse mix of students may result in similar outcomes at educational institutions, not unlike the American experience. The Constitutional Court will undoubtedly play a large role in determining whether educational progress in South Africa stalls or continues.