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The Role of American Individualism in the Current State of Public Schools

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**Introduction**

It is an undisputed fact of life that the children of today will be the leaders of tomorrow, this is not an abstract construct, but a fact of life. So if our children are to lead in the future, and in order to lead, they would need to learn the trade of leadership, how is it then, that we cannot afford them the necessary tools to learn? Or should I be asking how it is that we are comfortable depriving some children the necessary tools to learn, when we know for a fact that these tools are indispensable to their role as future leaders? Or is it in fact true that we don’t want these particular children to become future leaders? Born and raised as I was, in a developing country, I was quite elated to find that I would be coming to complete my studies in the United States. In fact, in one of my personal statements for admission to school, I specifically said that I came to the U.S. so that I could compete on a level-playing ground with others, and not be worried about their wealth or influence paving the way for them, as it did in my home country. It is quite ironic then that what I was running away from was waiting for me right here in the developed world. This paper will posit that American individualism, coupled with its historical and modern-day racism, has bred a nation of indifferent people, who hide behind the rhetoric of private choice to justify blatant educational inequities, most notably exemplified in judicial decisions on public education and legislative actions in this regard.

In exploring this extreme of American individualism, this paper will be narrowed to focus on elementary and secondary education and cases that deal directly with funding them. The first part of this paper will discuss the inequities that existed, and those that continue to exist in American public education funding, with specific emphasis on Illinois; taking the position that while things may have changed, things essentially still remain the same. The second part will discuss the concept of judicial blindfold, i.e. how the United States Supreme Court, or to be fair, the prevailing majority, has closed its eyes to the immense damage that individual private choice is causing to the collective. This part will also examine how the Illinois Supreme Court has followed in the footsteps of the U.S. Supreme
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Court, as well as how the legislatures of several states have responded to the issue of educational inequality. The third part will explore the role American individualism plays in the current state of things suggesting that it serves to justify willful blindness and willful indifference to blatant educational inequities, and that a cultural shift is necessary if there is to be any change in the future. The paper further proposes that a possible means by which such a shift may be accomplished is by understanding the inherent correlation between education and the liberty to participate in a democratic government, which is best seen through Justice Kennedy’s libertarian principles. The paper ends with responses to anticipated originalist critique that this characterization of education was not anticipated by the founders, by pointing to research that show that the founders did in fact regard education as necessary for the realization of a free and democratic government.

Part I – A Look at the State of Public Schools in America; Then and Now

Illinois

A good place to start this would be to take a look at Jonathan Kozol’s *Savage Inequalities, Children in America’s Schools*,¹ and its detailed recounting of what public schools in the poor parts of Illinois were like in the late 1980's. In the first two chapters, Kozol examines schools in East St. Louis and Chicago, which are attended by predominantly black and Hispanic children.² He states that the problems were systemic, because the number of teachers over 60 years of age was twice that of teachers under 30, as the salary scale was too low to entice youthful teachers to the system.³ This in turn led the city to rely on low-paid substitutes, who represented more than a quarter of the teaching force, and who may or may not show up on a given day.⁴ Further, the shortage of teachers was paralleled by a shortage of supplies; for example, there were no beakers, water, or Bunsen burners for a chemistry class to use and instead they substituted with popcorn popper and plastic

² Id.
³ Id. at 52
⁴ Id.
soda bottles to make laboratory dishes.\textsuperscript{5} Children were taught from 15-year old textbooks, there was no gym, no library, there were only two working bathrooms for 700 children, and it lacked soap, paper towels or toilet paper.\textsuperscript{6} Affluent suburban schools however, having, not surprisingly, only 1.3\% black children in attendance,\textsuperscript{7} had superior labs and up-to-date technology, multiple gyms, fencing and wrestling rooms, studios for dance instruction, etc.\textsuperscript{8}

Moreover, the parents of these suburban districts consistently voted against redistribution of school funding to the poorer districts;\textsuperscript{9} and suburban legislators, when opposing funding to these schools, would say that they could not keep throwing money into a black hole.\textsuperscript{10} As of 1989, any high school class in Chicago received approximately $90,000 less each year than what was received by affluent suburban public high schools\textsuperscript{11} — one can only imagine how much that is in today's dollars. Kozol further noted that this enormous disparity can be explained, at least in part, by the arcane machinery which Illinois employs to fund public education, i.e. property taxes.\textsuperscript{12} Property taxes are offset by federal and state contributions, but none are sufficient to make up for the local wealth disparities between the city and the suburbs; the former also having to divert taxes to meet non-school costs that the latter does not face, e.g. police expenditures because of high crime rates, fire department costs because of sub-standard housing.\textsuperscript{13} According to Kozol, total yearly spending, when all the different sources of funding had been added together, ranged from $2,100 on a child in the poorest district to over $10,000 on a child in the richest.\textsuperscript{14} Kozol estimated that nearly half of the kindergarten children in Chicago public schools would exit school as marginal illiterates seeing as

\textsuperscript{5} Kozol, supra note 1, at 52  
\textsuperscript{6} Id. at 63  
\textsuperscript{7} Id. at 66  
\textsuperscript{8} Id. at 65  
\textsuperscript{9} Id. at 67  
\textsuperscript{10} Id. at 53  
\textsuperscript{11} Id. at 54  
\textsuperscript{12} Id.  
\textsuperscript{13} Id. at 56  
\textsuperscript{14} Id. at 57
citywide, 27% of high school graduates read at the 8th grade level or below, when many of the children who attended affluent suburban schools read at the level of seniors in the best Chicago high schools by the time they were in seventh grade.

While it is safe that things have changed since Kozol wrote this book, it is also quite true that nothing has really changed at all. In Illinois today, a majority of the state’s worst schools are predominantly African-American, so a black student is 40 times more likely to attend a failing school than a white student. More to the point, two-thirds of Illinois schools are 80-100% single race, much like it was in Kozol’s book. This is due to Illinois’ continued overreliance on local property taxes to fund its schools, after it has been shown to be the root cause of the drastic educational disparities that is the state of Illinois public schools today. Even though the Illinois Constitution makes it the primary responsibility of the state to finance public education, the state pays only 36% of school expenses, which means school districts have to make up a substantial part of the difference. And since these districts are essentially segregated, with a majority of the white population living in affluent suburbs, the schools represented are just as segregated. A recent study by the Civil Rights Project at Harvard University ranked Illinois as a whole among the top four segregated states in the nation for black students. The state has recently dropped to 47th position for funding its public schools. In a 2010 report prepared for Forbes, Illinois received a grade "F" in

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15 Kozol, supra note 1, at 58
16 Id. at 65
18 Id.
19 Kozol, supra note 1.
20 Guzman, supra note 17, at 157
21 Id.
22 See Id. at 163
23 Id.
24 Id. at 154
funding fairness, one of only three states to receive this failing grade.\footnote{Damisch, supra note 25.}

Reading levels today are hardly any better than they were at the time of Kozol’s book, best illustrated by the enormous disparity between two neighboring schools in Illinois – Aurora and Naperville.\footnote{Guzman, supra note 17, at 160} In Aurora, where 90% of the students are black and Hispanic,\footnote{Id. at 157} fewer than 29% of its high school students meet the reading standards, while over 70% of the students meet or exceed the reading standards in Naperville’s predominantly white schools.\footnote{Id. at 160} Teachers in districts like the latter are paid 20% higher salaries, providing substantial incentives for the best teachers to move to those districts\footnote{Id.} – once again, much the same situation described by Kozol.\footnote{Kozol, supra note 1} Per-pupil expenditure in predominantly minority districts is approximately half of that of predominantly white districts.\footnote{Guzman, supra note 17, at 162} For example, Northbrook School District, 97% white and Asian, spends over $15,000 on each student, while Dolton School District, 97.6% African-American, spends around $7,000 on each student.\footnote{Id.} So while each school nowadays possesses more than two working toilets, and maybe a few working Bunsen burners, it is apparent that equality in public education is still far out of reach of the Illinois populace, i.e. things remain essentially the same as they were.

\textbf{New Jersey}

Kozol’s description of the public schools in Camden, East Orange, and Jersey City, was very similar to that of Illinois.\footnote{Kozol, supra note 1, at 133} The level of mathematical and reading capacity of districts inhabited by blacks and other minorities was at its lowest, the school buildings were dilapidated, the children had
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no laboratory equipment to work with,\textsuperscript{35} no working fire alarms,\textsuperscript{36} per pupil expenditure was half of what was spent at neighboring suburban schools, teacher salaries were too low – some having to work two jobs in order to make rent, no available textbooks for half of the students, etc.\textsuperscript{37} Even more distressing was that all of these were happening a mere seven-minute ride away from suburban schools with 14 different AP courses, athletic programs that offered fencing, golf, and ice hockey, music rooms and multiple music teachers, and substantially more per-pupil expenditure.\textsuperscript{38} These disparities were also due to the funding mechanism employed, which was essentially the same as Illinois’ – local property taxes accounted for 67\% of school expenses, the state of New Jersey contributed 28\%, and federal aid was 5\%.\textsuperscript{39} Hardly has any change in circumstances occurred in present day New Jersey, but the state has just recently signed into law the Urban Hope Act,\textsuperscript{40} which allows for up to four new public schools in poor minority districts.\textsuperscript{41} These schools will be run by nonprofits appointed by local school boards.\textsuperscript{42} How effective this new reform will be is already being debated by many, and no sooner had it been signed into law when proposals were presented before the Senate Budget Committee on changing the school funding formula, which would serve to further reduce the amount of money poor districts get.\textsuperscript{43}

**New York**

Once again, Kozol paints a very distressing picture of state of public schools in the poor

\textsuperscript{35} Kozol, supra note 1, at 139
\textsuperscript{36} Id. at 140
\textsuperscript{37} Id. at 141
\textsuperscript{38} Id. at 157
\textsuperscript{39} Robinson v. Cahill, 303 A.2d 273 (N.J. 1973)
\textsuperscript{40} Urban Hope Act, 18A:36C 1-13
\textsuperscript{42} Id.
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districts – this time New York City.\textsuperscript{44} Average per-pupil expenditure in predominantly minority districts was $5,500, while neighboring suburban districts spent above $11,000 per pupil, with some spending as high as $15,000\textsuperscript{45}. The schools attended by black children were over-crowded,\textsuperscript{46} textbooks were scarce,\textsuperscript{47} no playground for the elementary children, library was barely equipped (held merely 700 books), school buildings were in dire shape, and the schools lacked sufficient teachers.\textsuperscript{48} Compared to this were affluent white suburban schools, with playgrounds for children that was equipped with jungle gym, slides, and several climbing toys, classrooms fitted with equipment, libraries holding almost 8,000 books, and curriculum being significantly advanced.\textsuperscript{49} As recently as 2007, New York State’s contribution to public school was 45.4\%\textsuperscript{50} – significantly higher than Illinois State’s contribution, and yet hardly making any difference. Local governments contributed 48.7\% of the total, and 5.9\% came from federal sources.\textsuperscript{51} Also in 2007, in response to multiple litigations, the state passed the Education Budget and Reform Act of 2007 that doled out more aid to public schools in poorer districts.\textsuperscript{52} For the period of 2007-2009, the aid did in fact help schools provide more help to struggling students, reduce class sizes, and expand programs that made school more engaging for students.\textsuperscript{53} But due to budget crisis, these funds were frozen and the governor has even proposed a cut of $1.4 billion in education funding, bringing poor public schools right back to where they started.\textsuperscript{54} The funding is supposed to resume in 2011-2012 school year.\textsuperscript{55}

\textsuperscript{44} Kozol, supra note 1, at 83
\textsuperscript{45} Kozol, supra note 1, at 83-84
\textsuperscript{46} Id. at 85
\textsuperscript{47} Id. at 86
\textsuperscript{48} Id. at 90
\textsuperscript{49} Id. at 92-6
\textsuperscript{51} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
Texas

Much the same as the other states, Kozol’s book paints a miserable picture of the predominantly black and Hispanic school districts in Texas, e.g. San Antonio, Edgewood, etc.\textsuperscript{56} These districts had a per-pupil expenditure that ranged from $2,000 in the poor and predominantly minority districts to $19,000 in the rich and predominantly majority districts.\textsuperscript{57} 72\% of the children in the former districts read below grade level, classes were over-capacity, and teacher salaries were low in comparison to the latter districts, which had 88\% graduation rate, lower class sizes, and significantly more average pay for teachers.\textsuperscript{58} In recent years, Texas state sponsorship of public education has ranged from 43\% to 38\% and local property tax sponsorship has ranged from 57\% to 62\%,\textsuperscript{59} showing an increased reliance on property taxes. Recent years have brought on numerous attempts at reform, one of which was the Robin Hood program, which proposed to use funds from the state’s education foundation to make up the difference for a local district that is unable to generate the minimum prescribed funding amount through property taxes.\textsuperscript{60} Critics contend that this is not an effective equalization plan because it forces wealthy districts to send money to poorer districts without any impartial state oversight.\textsuperscript{61} It is ironic how these critics conveniently ignore the blatant inequality being endured by children, all in the name of rhetoric. All of the above accounts go to show that while things have changed, they yet remain the same.

The table below shows the average ranking of each state with regards to state sponsorship of education as opposed to local funding, as of 2008; number 1 representing the most sponsorship.\textsuperscript{62}

\textsuperscript{56} Kozol, supra note 1, at 206
\textsuperscript{57} Id. at 223
\textsuperscript{58} Id. at 224
\textsuperscript{60} Debra Ireland, Comment: The Price of Education: What Local Control is Costing American Children 6 Scholar 159, 176 (2003)
\textsuperscript{61} Id. at 176-77.
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Part II – Judicial Blindfold and Legislative Responses

Judicial Blindfold

Decisions by the United States Supreme Court, as well as other State Supreme Courts following suit, have either tip-toed around the issue of educational inequities or they have just totally ignored what was right in front of them. Below are direct quotes from a couple of Supreme Court cases that demonstrate this argument.
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U.S. Supreme Court

The Supreme Court first addressed segregation in *Plessy v. Ferguson*, which established into law the doctrine of separate but equal. This case was overruled in the landmark case, *Brown v. Board of Education* where the Court recognized the importance of educational equality and overruled the separate but equal doctrine established.

Education is perhaps the most important function of state and local governments. It is required in the performance of our most basic public responsibilities…it is the very foundation of good citizenship. 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 (emphasis added).

The Supreme Court however, sang a different tune approximately 20 years later in *San Antonio Indep. Sch. Dist. v. Rodriguez*, where plaintiffs challenged Texas’ system of funding education through local property taxes. The Court held that the poor were not a suspect class, and that education was not a fundamental right entitled to strict scrutiny review. The Court in so holding, questioned the assumption that poor people live in the poorest districts, using only one cited report from Connecticut, and ignoring overwhelming evidence tending to prove the exact opposite:

[Indeed, there is reason to believe that the poorest families are not necessarily clustered in the poorest property districts. A recent and exhaustive study of school districts in Connecticut concluded that "[i]t is clearly incorrect . . . to contend that the 'poor' live in 'poor' districts..."

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63 *Plessy v. Ferguson*, 163 U.S. 537 (1896)
65 *Brown*, 347 U.S. at 493.
66 *411 U.S. 1 (1973)*
68 Id. at 35
69 Id. at 22-3; See also Guzman, supra note 17, at 174 (noting the astounding nature of the majority’s sweeping generalization based on a single uncorroborated study from Connecticut.)
70 Kimberly Jenkins Robinson, *The Case for a Collaborative Enforcement Model for a Federal Right to Education*, 40 U.C. Davis L. Rev. 1653, 1655-56 (2007) (citing several studies which show that low income and minority school children attend inferior schools relative to their more affluent and white counterparts).
71 Rodriguez, 411 U.S. at 23.
This reasoning begs the question: “where exactly do the poor live?” The Court ignored the logical correlation of wealth and environment, i.e. a poor individual will not be able to afford living in a rich district, and will therefore, most likely, live in a poor district. Had the court considered this evidence, it would necessarily come to the conclusion that minority individuals are disproportionately poor; thus race becomes a factor, and strict scrutiny would be appropriate. The Court however, stated: “we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice.” This reasoning completely misses the point advocated by the plaintiffs; as noted by Justice Marshall in his dissent:

[the issue is neither provision of the most effective speech nor of the most informed vote...[but] one of discrimination that affects the quality of education which Texas has chosen to provide its children...]

The Court, according to Justice Marshall, ignored its earlier mandate in Brown that education must be made available on equal terms.

Nine years later in Plyler v. Doe, the Court invalidated a Texas law that purported to deny the right of education to children of illegal immigrants. While the Court was addressing a total deprivation of education here, the focus was on the effect the Texas law would have on these children; such as illiteracy rates, individual advancement, self-sufficiency, and the social, economic, intellectual, and psychological well-being of these children. But the same reasoning applies just as much to a system of education that produces essentially the same results but because of grossly unequal education brought about by unequal funding. As a result of this willful blindness on the part of the Supreme Court, the ball passes to the states.

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72 Robinson, supra note 69, at 1655; See also, Ryan, supra note 59, at 435
73 Rodriguez, 411 U.S. at 36.
74 Id. at 117
75 Id. at 117 (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).
77 Plyler, 457 U.S. at 222.
78 Guzman, supra note 17, at 176 – 177 (evidence showed that entire classes of children are functionally illiterate or more than 90% non-proficient).
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**Illinois State Supreme Court**

Following in the footsteps of the United States Supreme Court, the Illinois State Supreme Court held in *Edgar v. Committee for Educational Rights* that there was no constitutional guarantee of educational equality. In *Edgar*, plaintiffs challenged Illinois’ system of funding demonstrating that a system that relied so heavily on local property wealth did not do enough to fulfill its obligation under the Illinois Constitution. In holding for the state, the court examined the language of the Illinois constitution dealing with education:

> [a] fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities. The State shall provide for an efficient system of high quality public educational institutions and services. The State has the primary responsibility for financing the system of public education.

The majority noted that the language of the constitution merely states that it was the “goal” of the state to provide the best possible education and that such language did not equate to a constitutional guarantee of educational equality. It is interesting how the court conveniently forgot the word right before “goal,” i.e. “fundamental.” If educational development is a *fundamental goal*, then it is not just something a state may do with as it pleases, but something that must be achieved. Seeing as several minority children are lacking in said educational development, the state has necessarily not fulfilled its obligation under the constitution. Furthermore, educational development as fundamental goal in essence raises the status of education to that of a fundamental right, as it signifies an ultimate achievement. Several other states have found that education is in fact a fundamental right, based on even less stringent language in their respective constitutions.

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80 *Edgar*, 672 N.E.2d at 1182
81 Ill. Const. art X, §1
82 *Edgar*, 672 N.E.2d at 1187
83 See Guzman, supra note 77.
84 See, e.g., N.H. Const. pt. II, art. 83 (The New Hampshire Supreme Court in *Claremont Sch. Dist. v. Governor*, 142 N.H. 462, 473, stated: “first and foremost is the fact that our State Constitution specifically charges the legislature with the duty to provide public education. This fact alone is sufficient in our view to accord fundamental right status to the beneficiaries of the duty”).
The court next holds that the “high quality” language used in the Illinois constitution does not provide a principled basis for a judicial definition. The court goes so far as to say that defining high quality education was not a judicial function. Well it behooves me to point out, as dissenting Justice Freeman did, that interpretation of the law is the job of the judiciary. And if the court needs help understanding what high quality is, one can at least safely assume that the framers anticipated a kind of education that is better than that offered in developing countries. To offer a reference that might put this into context, I will describe my own personal experience upon arriving in America, and joining the 11th grade class at Thornridge High School, located in Dolton School District, one of the predominantly black districts mentioned in the previous section. What I discovered was that everything the 11th graders were just learning, I had already been taught in my secondary school in Nigeria two to three years prior. In fact, when the teachers would ask questions, I would be the only person who knew the answer; it got to a point where I just stopped volunteering, and my teachers would only ask me to answer the question as a last resort. I couldn’t believe how easy high school was in the almighty United States; little did I know that high school was easy because the particular one I was attending was only one of many suffering the unfortunate consequences of a having willfully blind judiciary. Ignoring overwhelming evidence of the enormous disparity in educational funding in Illinois, especially since Illinois has been considered one of the four worst states in this regard, and similarly ignoring the correlation between more educational resources and more educational achievement, the Illinois Supreme Court leaves it to the Illinois legislature to determine

85 Edgar, 672 N.E.2d at 1191
86 Id. at 1193
87 Id. at 1207 (Freeman, J., concurring in part and dissenting in part)
88 See Guzman, supra note 17, at 162
89 See Edgar, 672 N.E.2d at 1191-93
90 See Guzman, supra note 17, at 178
91 Damisch, supra note 25.
92 Kozol, supra note 1.
what high quality education means.\textsuperscript{93}

Since education has been placed within the purview of the states, each state has defined its duty differently. Below is a table showing the constitutional language used by several states to provide for education:

<table>
<thead>
<tr>
<th>State</th>
<th>Constitutional Language</th>
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<tbody>
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<td>Alabama</td>
<td>Establishment and operation of schools</td>
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<tr>
<td>Alaska</td>
<td>System of public schools open to all children of the State</td>
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<td>Arizona</td>
<td>General and uniform public school system</td>
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<td>Arkansas</td>
<td>General, suitable, and efficient system of free public schools</td>
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<tr>
<td>California</td>
<td>System of common schools by which a free school shall be kept up and supported</td>
</tr>
<tr>
<td>Colorado</td>
<td>Thorough and uniform system of free public schools throughout the state</td>
</tr>
<tr>
<td>Connecticut</td>
<td>There shall always be free public elementary and secondary schools in the state</td>
</tr>
<tr>
<td>Delaware</td>
<td>General and efficient system of free public schools</td>
</tr>
<tr>
<td>Florida</td>
<td>Uniform, efficient, safe, secure, and high quality system of free public schools</td>
</tr>
<tr>
<td>Georgia</td>
<td>Adequate public education for the citizens</td>
</tr>
<tr>
<td>Hawaii</td>
<td>System of public schools free from sectarian control</td>
</tr>
<tr>
<td>Idaho</td>
<td>General, uniform, and thorough system of public, free common schools.</td>
</tr>
<tr>
<td>Illinois</td>
<td>Efficient system of high quality public educational institutions and services</td>
</tr>
<tr>
<td>Indiana</td>
<td>A general and uniform system of common schools</td>
</tr>
<tr>
<td>Kansas</td>
<td>Intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools</td>
</tr>
<tr>
<td>Kentucky</td>
<td>Efficient system of common schools throughout the State.</td>
</tr>
<tr>
<td>Louisiana</td>
<td>Provide for the education of the people of the state and shall establish and maintain a public educational system.</td>
</tr>
<tr>
<td>Maine</td>
<td>Suitable provision, at their...expense, for the support and maintenance of public schools</td>
</tr>
<tr>
<td>Maryland</td>
<td>Thorough and efficient system of free public schools</td>
</tr>
<tr>
<td>Michigan</td>
<td>System of free public elementary and secondary schools as defined by law</td>
</tr>
</tbody>
</table>

\textsuperscript{93} Edgar, 672 N.E.2d at 1193
<table>
<thead>
<tr>
<th>State</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minnesota</td>
<td>A general and uniform system of public schools…[and] a thorough and efficient system of public schools throughout the state.</td>
</tr>
<tr>
<td>Mississippi</td>
<td>Provide for the establishment, maintenance, and support of free public schools.</td>
</tr>
<tr>
<td>Missouri</td>
<td>Free public schools for the gratuitous instruction of all persons in this state.</td>
</tr>
<tr>
<td>Montana</td>
<td>System of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person.</td>
</tr>
<tr>
<td>Nebraska</td>
<td>Free instruction in the common schools of this state.</td>
</tr>
<tr>
<td>New Mexico</td>
<td>A uniform system of free public schools.</td>
</tr>
<tr>
<td>Nevada</td>
<td>Uniform system of common schools.</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>Cherish the interest of literature and the sciences, and all seminaries and public schools.</td>
</tr>
<tr>
<td>New Jersey</td>
<td>Thorough and efficient system of free public schools.</td>
</tr>
<tr>
<td>New York</td>
<td>System of free common schools wherein all the children may be educated.</td>
</tr>
<tr>
<td>North Carolina</td>
<td>A general and uniform system of free public schools.</td>
</tr>
<tr>
<td>North Dakota</td>
<td>System of public schools free from sectarian control.</td>
</tr>
<tr>
<td>Ohio</td>
<td>Provision shall be made by law for the organization, administration and control of the public school system of the state.</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>System of free public schools wherein all the children of the State may be educated.</td>
</tr>
<tr>
<td>Oregon</td>
<td>Uniform and general system of Common schools.</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Thorough and efficient system of public education.</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>Promote public schools…and adopt all means… deem[ed] necessary and proper to secure to the people the advantages and opportunities of education</td>
</tr>
<tr>
<td>South Carolina</td>
<td>System of free public schools.</td>
</tr>
<tr>
<td>South Dakota</td>
<td>A general and uniform system of public schools.</td>
</tr>
<tr>
<td>Tennessee</td>
<td>Maintenance, support and eligibility standards of a system of free public schools.</td>
</tr>
<tr>
<td>Texas</td>
<td>Efficient system of public free schools.</td>
</tr>
<tr>
<td>Utah</td>
<td>A public education system, which shall be open to all children of the state.</td>
</tr>
<tr>
<td>Virginia</td>
<td>System of free public elementary and secondary schools for all children of school age…and shall seek to ensure that an educational program of high quality is established and continually maintained.</td>
</tr>
</tbody>
</table>
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<table>
<thead>
<tr>
<th>State</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Washington</td>
<td>General and uniform system of public schools</td>
</tr>
<tr>
<td>West Virginia</td>
<td>Thorough and efficient system of free schools</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Establishment of district schools, which shall be as nearly uniform as practicable</td>
</tr>
<tr>
<td>Wyoming</td>
<td>Complete and uniform system of public instruction</td>
</tr>
</tbody>
</table>

Legislative Responses

**Illinois**

Since the United States Supreme Court had already determined that education was not a fundamental right, legislative responses have varied depending on the state one is in. In Illinois for example, the legislature has continued with its over-reliance on property taxes, having no reason to change it, despite enormous evidence showing how this system is perpetuating the same evil that the Brown court sought to extinguish. This is hardly surprising especially after the Illinois Supreme Court found no constitutional guarantee of educational equality in the Illinois Constitution. The state system uses a foundational formula to determine how much the state's contribution will be to each district. This amount was arbitrarily set to begin with, and it represents what the legislature believes affords a child "high quality education." So far, it has proven insufficient in supplying black and other minority children adequate education, let alone high quality education.

**New Jersey**

Unlike the Illinois Supreme Court, New Jersey’s Supreme Court held in Robinson v. Cahill that the means of funding used the New Jersey legislature violated the state’s constitutional guarantee of

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94 Rodriguez, 411 U.S. at 35  
95 Guzman, supra note 17, at 149  
96 Id.  
97 Edgar, 672 N.E.2d at 1187  
98 Eckrich, Public School Funding in Illinois, EAF 228 (2006)  
99 Id.  
100 Ill. Const. art X, §1
a “thorough and efficient” education. The New Jersey legislature refused to comply with the court’s order and did not comply until the court, after numerous litigations on the issue, closed the schools. In so complying, the legislature passed a law, the Public School Education Act of 1975, which was challenged in another series of litigations, Abbott v. Burke, arguing that the Act did not sufficiently ameliorate the disparities between poor and wealthy districts. The legislature’s attempt to obey the court’s ruling to equalize funding and also respond to widespread opposition from wealthy districts as to its plans, resulted in Abbott case returning to the state Supreme Court twelve times. In its twelfth decision on the issue, the court approved various additional programs for the Abbott districts and it looks like the legislature is complying with these orders for now. The passing of the Urban Hope Act discussed in the previous section, is another step the New Jersey legislature has taken to equalize public school funding across districts, but it is yet to be determined how effective this will be.

**Kentucky**

Other legislatures haven’t been so recalcitrant; Kentucky legislature, for example, enacted a sweeping and thorough reform package after state Supreme Court held the state’s entire system of funding to be unconstitutional. The package, known as Kentucky Education Reform Act both increased expenditures overall and reduced disparities in spending. State funding increased by 34%, and the range between high and low spending districts reduced by 27%. This Act has been

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101 Robinson v. Cahill, 303 A.2d 273 (N.J. 1973)
102 Robinson v. Cahill, 360 A.2d 400 (N.J. 1976)
105 Id.
106 Urban Hope Act, 18A:36C 1-13
108 See Ryan, supra note 59, at 466
109 Id.
hailed as “the nation’s most comprehensive experiment in educational reform.” It should be noted however, that the plaintiffs who brought the suit that engendered this reform were from predominantly white rural districts. One may think that it is far-reaching to say that predominantly black districts have not been as successful when they bring similar litigation, but the proof is in the numbers.

Vermont

In Vermont, the state Supreme Court held that the disparities created by state reliance on local property taxes deprived children of their constitutional right to equal educational opportunities. The state legislature, a mere four months later, enacted a bill that created a new statewide property tax reserved for schools, and it also provided a funding mechanism that required property-wealthy districts to share locally generated funds with other districts. Not surprisingly, this is engendered widespread debate and opposition from those wealthy districts who have to share. In general, legislative response to the issue of inequitable educational funding has been characterized as a “foot-dragging, half-hearted, two-faced effort, accompanied by much hemming and hawing, whimpering and whining, and winking and nodding,” all of which can be seen in the legislature’s and public’s open and fierce opposition to diverting resources to much needed districts attended by primarily minority children.

110 See Ryan, supra note 59, at 466.
111 Id.
112 See Ryan, supra note 59, at 457-71 (detailing evidence tending to show that legislative responses to court orders when minority districts win are more obstinate than when non-minority districts with similar challenges win).
113 See Brigham v. State, 692 A.2d 384 (Vt. 1994)
114 Ryan, supra note 58, at 467- 68
115 Id.
117 See Ryan, supra note 59, at 471
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Part III – The Need for a Cultural Shift

The Role of American Individualism in the Current State of American Public Schools

In an earlier piece I had written for a comparative law class, I discussed the beauty of American Individualism, which is most notable in how the Court stands up for the rights of the minority by recognizing some rights to be implicit in the Constitution, such as right to privacy\(^\text{118}\) and the right to raise one’s children as one sees fit.\(^\text{119}\) I was however, quite careful to point out that the American culture which elevates the individual over the collective may not always allow for societal harmony. This concept was eloquently described by Alexis Henri de Tocqueville in his book *Democracy in America* when he said that American individualism is

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[a] \text{ mature and calm feeling, which disposes each member of the community to sever himself from...his fellow creatures, to draw apart with his family and friends, so that after he has formed a little circle of his own, he willingly leaves society at large to itself.}\(^\text{120}\)
\]

This construct is no more apparent than in the discourse surrounding the funding of public schools in America today. As I noted in my class paper, the beauty of collectivism is the willingness to let go of one’s individual needs for the collective so that societal harmony may prevail. This is what seems to be lacking in the American culture; the white majority, who have managed to amass wealth, have severed themselves from their fellow creatures, drawn apart with their families, leaving the rest of society at large to itself.\(^\text{121}\) The best example of this is the current divide operating in Illinois public schools today.\(^\text{122}\) It seems that the extreme of American individualism comes to fore when race is involved, as there seems to be a lack of better explanation for the majority’s open and fierce rejection of attempts to equalize funding for all public schools,\(^\text{123}\) especially since this will go a long way in improving the quality of education that minority children get. As earlier noted, attempts at

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\(^{118}\) See Lawrence v. Texas, 539 U.S. 558 (2003).


\(^{121}\) See Tocqueville, supra note 118, at 118.

\(^{122}\) See Guzman, supra note 17, at 149 (noting that Illinois is one of the most segregated states in the nation).

\(^{123}\) See Ryan, supra note 59, at 471
reform have either been met with a blind judiciary or legislative recalcitrance, and even when the legislature makes any kind of change that might benefit predominantly black or Hispanic school districts, there is public outrage and outcry at the taking of wealth from those who have it, who just happen to predominantly white.

W.E.B. Du Bois’ characterization of the white identity in his book, *Souls of White Folk* over a hundred years ago, rings even truer today in light of the continuing battle over educational equality:

Being white means…having the power to reduce some realities to abstractions; to reduce some lives to statistics; to reduce some communities to worlds that are pervasively “different” and that intrude on “our” world only to the extent that they are at times geographically, or politically, proximate to our destinations. It means having the power to isolate and ignore…”

This is an unnervingly accurate description of the responses not just from the judiciary and the legislature, but the majority populace as well, or how else does one explain this obstinate reaction to equalizing education? Of course many will take offense at the suggestion that they are racist or possess any kind of racial hostility, but willful indifference is just as destructive. When we blur inequities by spouting the rhetoric of private choice, and we hide behind the notion that racism no longer exists, we placate ourselves with the idea that we have nothing against blacks, Hispanics, or other minorities, and we believe our individual choices are not made with the intention to hurt anyone, and that every individual must look out for himself in this capitalist world; we thus, shroud our minds in the cloak of racial goodwill and completely ignore the reality right in front of us. But as Sharon Elizabeth Rush noted in her article, racial goodwill is not enough. According to her, many whites of goodwill have conflated the apparent absence of intentional racism with the existence of

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124 See Edgar, supra note 78.
125 See Ryan, supra note 59, at 456
126 See Id. at 467-68
128 See Hayman and Levit, supra note 114, at 674
129 See Sharon Elizabeth Rush, Sharing Space: Why Racial Goodwill Isn’t Enough, 32 Conn. L. Rev. 1 (1999) (discussing the identity of White people of good will who advocate for color-blindness and reject affirmative action because in their view racial equality already exists.)
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racial equality in American society. They have transformed from active civil rights advocates who thought they did a lot of good, to passive people of goodwill who think they do no harm. Yet current sociological studies report that 95% of top positions in major economic, political, and educational organizations are held by white men; white Americans average approximately double the income that black Americans make, and are two times more likely to live in a family with income exceeding $50,000. And in line with the focus of this paper, public schools remain largely involuntarily segregated and the society remains largely divided along color lines.

This extreme of American individualism strains discussions on race; in fact, research suggests that the ethic of individualism seems positively correlated with negative racial attitudes and behavior, including a failure of interracial empathy and a tendency to discount the effects of racial discrimination.

This explains the unending battle that surrounds the creation of equal educational opportunities for children of color in America today. The notion that the current state of things is no one’s fault and instead has to do with private choices is contradicted both by the history of American racism, and its present-day reality. The truth is that public schools in America are as they are today because of historical racial prejudice, coupled with modern day willful indifference, which is fostered by the canon of colorblindness and the ethos of individual choice, all serving to preserve racial hierarchy, just as if it was mandated by law. The evidence is abundant that inadequate funding results in inadequate education and inadequate education cannot rightly position our children where they need to be. So as things stand in public school education of blacks and other minority children in

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130 See Rush, supra note 129, at 19.
131 Id.
133 See Hayman and Levit, supra note 114, at 628.
134 See Rush, supra 129, at 21.
135 See Hayman and Levit, supra note 114, at 671; See also Paul M. Sniderman & Michael G. Hagen, Race & Inequality: A Study in American Values 112 (1985).
136 See Hayman and Levit, supra note 114, at 674
137 See Id.
138 See, e.g., Kozol, supra note 1.
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America, they are being educated just enough for them to remain in the same social status they’ve always disproportionately been in, i.e. low-paying, non-professional jobs. All of which is awfully reminiscent of the time in American history when the consensus was that the

Negro must be educated to be the best possible Negro and not a bad imitation of white man…what he needs is to be taught and shown that labor is his salvation, not books. The state appropriation is intended to encourage that teaching.

A Collectivistic Approach as a Possible Solution

There is therefore, the need for a cultural shift; a recognition of the damage that willful indifference and willful blindness to reality is causing to minority children who are denied equal educational opportunities under the guise of private choice, racial goodwill, and American individualism. Knowing about racism is not enough; there must be deliberate steps taken by the individual to learn about practical, day-to-day effects of racism, and ways to remedy it so that the collective as a whole can be better off. So far, this paper may have created the impression that black and other minority children are the only ones that suffer from educational inequality, when in reality the whole collective suffers, because non-minority children are raised in the same mind-set as generations before them. They see the same things in present day that they are being taught as “history,” and most likely, if care is not taken, are going perpetuate the same evil when they do become leaders tomorrow. This becomes a never-ending cycle of events, a continuous battle, an ever-widening divide that just never seems to close up, and threatens eventually to rip America apart. It is a common saying where I come from that “united we stand, divided we fall;” it is very possible

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141 See Hayman and Levit, supra note 114, at 674
142 See Rush, supra note 127, at 30-31
143 See, e.g., Ryan, supra note 59, at 474 (where studies show that 82% of whites assumed school finance reform would benefit only minorities)
that the divide that continues to exist in America, if allowed to perpetuate itself, will in truth bring about the fall of the nation. It is not as if these problems are insurmountable, in fact, evidence suggests that racism, in whatever form it is characterized – hostility or indifference – can be unlearned;\(^{144}\) therefore, if it can be unlearned, it can be removed. Such a cultural shift as proposed by this paper will allow reforms to be more easily undertaken because everyone will want to do what is best for the collective – that is, equal opportunities for all children, whether black, Hispanic, Indian, Asian, white or otherwise.

**Justice Kennedy’s Libertarian Jurisprudence as a means of Achieving Collectivism**

Perhaps one way in which this cultural shift may be achieved is the same way cultural shifts have always been achieved, i.e., through the judiciary. A refusal on the part of the judiciary to be willfully blind to the reality of educational inequity is a giant step towards this goal, as demonstrated by other landmark decisions by the Supreme Court that have shaped this nation’s ideology in many respects.\(^ {145}\) The approach this paper advocates for requires a look at Justice Kennedy’s liberty opinions, specifically, the free speech opinions. This approach is relevant to this paper’s focus in the sense that the liberty to speak freely is meaningless if we don’t know what we’re talking about.\(^ {146}\) In fact, numerous state constitutions already recognize the correlation between education and the liberty to participate in our democratic government,\(^ {147}\) but as demonstrated above in parts I and II,

\(^ {144}\) See Hayman and Levit, supra note 114, at 670

\(^ {145}\) See, e.g., Brown, 347 U.S. 483 (1954); Lawrence, 539 U.S. 558 (2003); Meyer, 262 U.S. 390 (1923).


\(^ {147}\) See, e.g., Cal Const. Art. IX § 1 (provides that “a general diffusion of knowledge and intelligence [is] essential to the preservation of the rights and liberties of the people”); Tex. Const. Art. VII, § 1 (provides that “a general diffusion of knowledge [is] essential to the preservation of the rights and liberties of the people”); Ark. Const. Art. 14, § 1 (provides that “intelligence and virtue [are] the safeguards of liberty and the bulwark of a free and good government”); Mo. Const. Art. IX, § 1(a) (provides that “a general diffusion of knowledge and intelligence [is] essential to the preservation of the rights and liberties of the people”); Idaho Const. Art. IX, § 1 (provides that “the stability of a republican form of government depend[s] mainly upon the intelligence of the people”); N.D. Const. Art. VIII, § 1 (provides that “a high degree of intelligence…on the part of every voter in a government by the people [is] necessary in order to insure the continuance of that government and the prosperity and happiness of the people”); Ind. Const. Art. 8, § 1 (provides that
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cmp;children in predominantly minority districts are not getting the kind of education that will properly equip them to so participate.\textsuperscript{148} Minority children are at a disadvantage because they will be unable exercise the free speech rights guaranteed them under the Constitution of the United States if they don’t have the basic knowledge that is the duty of public education to provide.\textsuperscript{149} Just as a prior restraint operates to deprive the society of an uninhibited marketplace of ideas\textsuperscript{150} so also does an educational system that fails to provide adequate basic education that is necessary for an uninhibited marketplace of ideas. As such, there can be no true marketplace of ideas if a substantial number of people – in this case, minorities – lack the requisite tools to exercise their free speech right.

In examining Justice Kennedy’s emphasis on liberty, it should be noted that his position, is informed by the egalitarian philosophy found in writings of authors like John Stuart Mill.\textsuperscript{151} One such writing, expressing the importance of freedom of speech, states that: “freedom of opinion, and freedom of the expression of opinion, is necessary to the mental well-being of mankind (on which all their other well-being depends).”\textsuperscript{152} Justice Kennedy’s subscription to this ideology explains why his opinions in cases like, \textit{Citizens United v. Federal Election Commission},\textsuperscript{153} \textit{Simon & Schuster v. Crime Victims Board},\textsuperscript{154} \textit{Hill v. Colorado},\textsuperscript{155} demonstrate his stringent aversion to interference with a person’s

\textsuperscript{148} See Bitensky, supra note 145, at 550
\textsuperscript{149} See Id. at 552
\textsuperscript{152} Id. quoting J.S. Mill, ON LIBERTY (1859).
\textsuperscript{153} See Citizens United, 130 S.Ct. at 898-99 (where Justice Kennedy detailed the importance of speech in a democratic government, stating that “[s]peech is an essential mechanism of democracy…” and that “[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.”)
\textsuperscript{154} Simon & Schuster v. Crime Victims Board 502 U.S. 105, 123-25 (1991) (Justice Kennedy wrote a concurring opinion supporting the court’s striking down of a New York law designed to prevent criminals from profiting from the
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constitutional right to speak. In fact, apart from Justice Black, he is the most absolutist Justice on the Supreme Court bench.156 One of the elements of his libertarian jurisprudence is the humane element, which centers on remedies for the inability of a person to reach his or her own potential.157 Educational inequity presents precisely the problem that Justice Kennedy’s humane libertarian jurisprudence seeks to remedy – inability of a person to reach his or her own potential.158 That is, minority children cannot reach their own potential if they are deprived of the education they need to reach said potential. Indeed, the provision for education in Montana’s constitution specifically puts within the purview of public schools, the ability to help each person reach his or her full educational potential, also including in its provision, a guarantee of equal educational opportunity.159 Under this conception then, unequal educational opportunities brought about by disparate funding cannot provide children in minority districts with the tools they will need to reach their potential, since they will lack the information necessary to exercise their liberty to speak in the marketplace of ideas.

Moreover, the essence of a democratic system is the ability to critique one’s government,160 but that ability holds no weight if only some people can participate because they were fortunate enough to attend a well-funded school that prepared them for such an undertaking. In fact, this defeats the whole notion of a democratic system because it creates a situation where only the rich can speak in the marketplace – a result quite antithetical to the spirit of democracy. Thus, an

publication of memoirs about their crimes. According to him, It was “unnecessary and incorrect” to ask whether the challenged law was justified by any compelling state interest because “the sole question is, or ought to be, whether the restriction is in fact content based…and if the answer was “yes,” the law could not be constitutionally sustained.)

155 Hill v. Colorado 530 U.S. 703, (2000) (Justice Kennedy’s dissent from the majority’s upholding of a state law that banned sidewalk-counseling outside abortion clinics found a violation of the First Amendment because the law specifically targeted content-based speech, and this was relevant to his libertarian jurisprudence because providing women with the information on abortion “makes a fundamental contribution to their ability to responsibly exercise their liberty.”

Helen J. Knowles, The Tie Goes to Freedom: Justice Anthony M. Kennedy on Liberty, 74 (2009)).


157 See Knowles, supra note 152, at 42 (citing Hearings on the Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the judiciary, 100th Cong. 154 (1987)

158 See Id.

159 See Mont. Const., Art. X § 1

160 See Citizens United, supra note 151, at 899
educational funding mechanism that relies so heavily on where one lives, like the type employed in Illinois, places those children in affluent white suburbs in a better position to take intelligent part in the democratic system; leaving the rest with insufficient ability to reach their potential.\textsuperscript{161} This is a perfect illustration of a situation requiring Justice Kennedy’s libertarian jurisprudence, specifically, the humane elements of his philosophy.\textsuperscript{162} It may seem inconsistent that this paper advocates for a cultural shift to the collectivistic approach to education while arguing that the way to do this is to view education as attached to individual rights, but it is not inconsistent. Viewing education as having an inherent attachment to a liberty interest will allow the cultural shift, here advocated, a better chance of success; i.e., it will make accepting education as a collective duty easier to accept. Once we realize that equal education of every child is necessary for a better government, a better populace, a better democracy, in essence, a better collective, it will make a cultural shift in this regard less challenging.

The Originalist Response

Of course, there is the originalist argument that the founders of the Constitution did not construe education as having any liberty interest attached to it, but it would be wise to keep in mind, that the founders were \textit{themselves} educated. They were staunch supporters of education and liberty\textsuperscript{163}; it was the reason they fought the revolution in the first place. To argue that education was not anticipated by the founders as a liberty interest is to suggest that the founders could have achieved what they did without being educated. Indeed, “before the adoption of the Constitution, the Confederate Congress exercised the power to subsidize local public education, the effect of which

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\begin{itemize}
  \item \textsuperscript{161} See Knowles, supra note 156, at 42
  \item \textsuperscript{162} Id.
  \item \textsuperscript{163} See Bitensky, supra note 145, at 628
\end{itemize}
was the proliferation of schools;” demonstrating a high regard for education among the founders.\footnote{164} In fact,

historical research reveals that George Washington, James Madison, and Thomas Jefferson made the wide dissemination of education one of their foremost concerns, since they considered an educated populace essential to the survival and health of the fledgling republic.\footnote{165}

Among the three, Thomas Jefferson was more renowned for his love of education, and believed that a good and democratic government could only be maintained if there was pervasive access to education.\footnote{166} The notion that education should not be considered a liberty interest is also in conflict with state constitutional provisions for education, which starts off with language extolling the importance of education to a free people and a democratic government.\footnote{167} Since the educational background possessed by the founding fathers enabled them to establish the Constitution that governs our democratic system today; it would thus, be inconsistent to justify educational inequity, and by extension, inadequate education, under the premise that the founders did not anticipate it. The Court should therefore, view educational funding inequity, which results in inadequate education for minority children, as essentially working to prevent the training of future contributors to the marketplace of ideas. Such recognition of an inherent correlation between adequate education and the constitutional right to free speech will open up the Court to discussions of a joined liberty interest between the two, necessitating a finding that equal funding is essential for all school districts.

\footnote{164 Id. at 627} \footnote{165 See Id.; See also Frank Bourgin, The Great Challenge: The Myth of Laissez-Faire in the Early Republic 45, 127-37 (1989); Stephen W. Gard, San Antonio Independent School District v. Rodriguez: On our Way to Where? 8 Val. U. L. Rev. 1, 11-12 (1973).} \footnote{166 See Bitensky, supra note 145, at 628; See also Bourgin, supra note 164, at 133-34} \footnote{167 See note 145 supra}
CONCLUSION

The premise of this paper is simple – education needs to be viewed through a different lens from that which it has previously been viewed; by the judiciary, the legislature, and a majority of the populace in general. As soon as we can all recognize that inherent in the exercise of our free speech right is the need for education, and not just any kind of education, but high-quality education, we can begin to take a collectivistic approach to remedying the damage that private choice and individualism has wreaked on education. As earlier noted, there can be no true marketplace of ideas, where everyone, not just the rich, can contribute, if some people don’t know what to say because they have not been properly trained. Such a result makes our democratic ideal a failure, and our government a sham, because as I’m sure we can all agree, there is no freedom in a ship of fools. The cultural shift here proposed makes this result, at the very least, less likely.