

# THE RIGHT TO EDUCATION AFTER *OBERGEFELL*

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## I. INTRODUCTION

For decades, education advocates across the country, reasonably reluctant to rely on the United States Constitution, have turned to their states' constitutions to assert a right to education. Success has been mixed,<sup>1</sup> and advocates have recently seen setbacks in some of the most promising state courts.

Take, for example, California. Though the state's supreme court has recognized education as a fundamental right since the early 1970s,<sup>2</sup> the court recently declined to review two lower court decisions that weakened the state's constitutional commitment to education.<sup>3</sup>

In the first case, *Campaign for Quality Education v. California* (hereinafter, "CQE"), plaintiffs argued there was a constitutional right to a public education of "some quality."<sup>4</sup> The court of appeal affirmed the suit's dismissal, finding no implied constitutional right to an education of "some quality" or to a minimum level of expenditures for education.<sup>5</sup> The court acknowledged that "there can be no doubt that the fundamental right to a public school education is firmly rooted in California law" and had "historically been accorded an ascendant position in this state."<sup>6</sup> Nonetheless, quoting a similar decision from the Illinois Supreme Court, the court of appeal determined that "the question of educational quality is inherently one of policy involving philosophical and practical considerations" and that "[s]olutions to problems of educational quality should emerge from a spirited dialogue between the people of the State and their elected representatives."<sup>7</sup> Thus, the court concluded, the state constitution did not protect the rights the plaintiffs asserted.<sup>8</sup>

Similarly, in *Vergara v. California*, the court of appeal reversed a trial court's ruling that state statutes on teacher tenure, retention, and dismissal were

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1. See, e.g., Daniel S. Greenspahn, *A Constitutional Right to Learn: The Uncertain Allure of Making a Federal Case out of Education*, 59 S.C.L. REV. 755, 762–64 (2008) (summarizing the waves of education litigation in state courts since *Brown I* and attributing successes in school funding cases to a shift away from equity-based claims towards adequacy claims).

2. See *Serrano v. Priest*, 487 P.2d 1241, 1244 (Cal. 1971) (*Serrano I*); *Serrano v. Priest*, 557 P.2d 929, 951 (Cal. 1976) (*Serrano II*).

3. See *Campaign for Quality Educ. v. State*, 209 Cal. Rptr. 3d 888, 919 (2016), *review denied* (Aug. 22, 2016); *Vergara v. State*, 209 Cal. Rptr. 3d 532, 558 (2016), *as modified* (May 3, 2016), *review denied* (Aug. 22, 2016).

4. *Campaign for Quality Educ.*, 209 Cal. Rptr. 3d at 892.

5. *Id.* at 902. The court was asked to interpret two provisions of the state's constitution. See CAL. CONST. art. IX, § 1 ("A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement."); CAL. CONST. art. IX, § 5 ("The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established.").

6. *Campaign for Quality Educ.*, 209 Cal. Rptr. 3d at 895 (quoting *California Teachers Ass'n v. Hayes*, 7 Cal. Rptr. 2d 699 (1992)).

7. *Id.* at 899 (quoting *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178 (Ill. 1996)).

8. *Id.* at 902 ("When read singly or together, sections 1 and 5 of article IX evince no constitutional mandate to an education of a particular standard of achievement or impose on the Legislature an affirmative duty to provide for a particular level of education expenditures.").

unconstitutional for violating the California Constitution's equal protection provisions.<sup>9</sup> The trial court found the challenged statutes created an unreasonable risk that all students, and especially minority and low-income students, would have a grossly ineffective teacher.<sup>10</sup> But the court of appeal disagreed with the trial court's analysis, first explaining that an "unlucky subset" of all students was not a sufficiently identifiable group to support an equal protection claim.<sup>11</sup> As to plaintiffs' other "suspect status" theory, the appellate court agreed with plaintiffs that the evidence presented at trial revealed "deplorable staffing decisions . . . that have a deleterious impact on poor and minority students," but found plaintiffs could not sustain their facial attack because "[t]he evidence did not show that the challenged statutes inevitably cause this impact."<sup>12</sup>

The California Supreme Court's decisions to decline to review *CQE* and *Vergara* have deflated advocates across the country.<sup>13</sup> After *Vergara*'s initial success at the trial court level, for example, education advocates filed similar cases challenging teacher tenure, retention, and dismissal in several other state courts.<sup>14</sup> Now defendants in each of those cases can invoke bad precedent from California.<sup>15</sup>

With this discouraging state context, it may be time for advocates to revisit the right to education under the United States Constitution. Although numerous scholars have argued for a right to education under the U.S. Constitution,<sup>16</sup> the Supreme

9. *Vergara v. State*, 209 Cal. Rptr. 3d 532, 538 (2016).

10. *Id.* at 548.

11. *Id.* at 553–55.

12. *Id.* at 557.

13. See *Campaign for Quality Educ.*, 209 Cal. Rptr. 3d at 892; *Vergara*, 209 Cal. Rptr. 3d at 558.

In both cases, Justices Liu and Cuéllar wrote vigorous dissents to the decision to deny review.

14. See *H.G. v. New Jersey*, No. L-2170-16 (N.J. Super. Ct., Mercer Cty. May 4, 2017) (dismissing challenge to state's "last in, first out" policy for reducing teaching staff), *aff'd sub nom.* *H.G. v. Harrington*, No. A-4546-16T4, 2018 WL 3130994 (N.J. Super. Ct. App. Div. June 27, 2018), *cert. denied*, 236 N.J. 114 (2018); *Forslund v. Minnesota*, No. 62-CV-16-2161, 2016 WL 8578375 (Minn. Dist. Ct., 2d Jud. Dist. Oct. 26, 2016) (dismissing challenge to state laws and policies that prevent the removal of ineffective teachers), *aff'd*, No. A17-0033, 2019 WL 272931 (Minn. Ct. App. Jan. 22, 2019); *Davids v. State*, 74 N.Y.S.3d 288 (N.Y. App. Div. 2018), *aff'g* 2015 WL 7008097 (N.Y. Sup. Ct. 2015) (affirming trial courts' denials of defendants' motions to dismiss plaintiffs' challenge to state laws and policies preventing the removal of ineffective teachers in consolidated appeal); see also *Martinez v. Malloy*, No. 3:16-cv-01439, 2018 WL 5993924 (D.C. Conn. Sept. 28, 2018) (dismissing all but one claim in challenge to state laws and policies that limit minimally adequate public school choices for low-income and minority students).

15. In *Davids v. State*, for example, the intervenor-defendants New York State Union of Teachers ("NYSUT") repeatedly cited the appellate court's decision in *Vergara* for support. Reply Brief of Appellant NYSUT at 7, *Davids v. State*, N.Y.S.3d 288 (N.Y. App. Div. 2018), [http://edjustice.org/wp-content/uploads/2016/10/NYSUT-Reply-Brief\\_42724677\\_1.pdf](http://edjustice.org/wp-content/uploads/2016/10/NYSUT-Reply-Brief_42724677_1.pdf) [https://perma.cc/LGQ7-TNTB] ("Though a now unanimously-overruled trial court decision in *Vergara* precipitated the instant litigation, any discussion of the appellate court's decision in *Vergara* is conspicuously missing from the plaintiffs' briefs.") (citation omitted); *id.* at 20 ("In *Vergara*, the case that directly precipitated the current litigation, the [] court specifically rejected the claim that the challenged tenure and seniority laws 'inevitably' caused a constitutional violation . . .").

16. See Scott R. Bauries, *A Common Law Constitutionalism for the Right to Education*, 48 GA. L. REV. 949 (2014); Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 574 (1992); Sarah G. Boyce, *The Obsolescence of San Antonio v. Rodriguez in the Wake of the Federal*

Court's recent decision in *Obergefell v. Hodges* should give new life to those arguments that rely on liberty and equality.<sup>17</sup>

As this Article will show, *Obergefell* removes many of the most significant doctrinal barriers to recognizing education as a fundamental right under the Due Process and Equal Protection Clauses. Moreover, *Obergefell* prescribes an approach to the interpretation of substantive due process rights that could support more vigorous enforcement of this constitutional obligation. Although a growing body of work recognizes *Obergefell* as supportive of immigration, abortion, and other

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*Government's Quest to Leave No Child Behind*, 61 DUKE L.J. 1025 (2012); Cheryl S. Bratt, Bradley W. Moore & Colin W. Reingold, *N.O. Schools or No Schools? Absolute Deprivation of Educational Opportunity in Post-Katrina New Orleans as a Violation of a Fundamental Right to a Minimally Adequate Education*, 2 HARV. L. & POL'Y REV. 407 (2008); Matthew A. Brunell, *What Lawrence Brought for "Show and Tell": The Non-Fundamental Liberty Interest in a Minimally Adequate Education*, 25 B.C. THIRD WORLD L.J. 343 (2005); Julius Chambers, *Adequate Education for All: A Right, an Achievable Goal*, 22 HARV. C.R.-C.L. L. REV. 55, 68–72 (1987); Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 123 (2004); Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92 (2013); Lauren Nicole Gillespie, *The Fourth Wave of Education Finance Litigation: Pursuing a Federal Right to an Adequate Education*, 95 CORNELL L. REV. 989 (2010); Greenspahn, *supra* note 1; Angela Avis Holland, *Resolving the Dissonance of Rodriguez and the Right to Education: International Human Rights Instruments as a Source of Repose for the United States*, 41 VAND. J. TRANSNAT'L L. 229 (2008); Areto A. Imoukhuede, *Education Rights and the New Due Process*, 47 IND. L. REV. 467 (2014) [hereinafter Imoukhuede, *Education Rights*]; Areto A. Imoukhuede, *The Fifth Freedom: The Constitutional Duty to Provide Public Education*, 22 U. FLA. J.L. & PUB. POL'Y 45 (2011) [hereinafter Imoukhuede, *Fifth Freedom*]; Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 334 (2006); Penelope A. Preovolos, *Rodriguez Revisited: Federalism, Meaningful Access, and the Right to Adequate Education*, 20 SANTA CLARA L. REV. 75, 75–76 (1980); Kimberly Jenkins Robinson, *The Case for a Collaborative Enforcement Model for a Federal Right to Education*, 40 U.C. DAVIS L. REV. 1653, 1712–16 (2007); Michael Salerno, *Reading Is Fundamental: Why the No Child Left Behind Act Necessitates Recognition of a Fundamental Right to Education*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 509, 540 (2007); Stephen E. Spaulding, *Legislating Beyond an Educated Guess: The Growing Consensus Toward a Right to Education*, 28 B.C. THIRD WORLD L.J. 539 (2008); CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 13 (2004); *A Right to Learn?: Improving Educational Outcomes Through Substantive Due Process*, 120 HARV. L. REV. 1323, 1341–44 (2007). *But see* Taunya Lovell Banks, *The Unfinished Journey—Education, Equality, and Martin Luther King, Jr. Revisited*, 58 VILL. L. REV. 471, 483 (2013) (arguing advocates should focus on litigation under state constitutions).

17. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

rights,<sup>18</sup> few scholars have grappled with its effect on the right to education.<sup>19</sup> This Article aims to help education advocates identify the full panoply of opportunities *Obergefell* represents. Part II of this Article describes the key doctrinal barriers that *Obergefell* removes. Part III explains how each of those changes is significant to the fundamental right to education.

## II. FUNDAMENTAL RIGHTS AFTER *OBERGEFELL*

In *Obergefell*, the Supreme Court held, in a majority opinion authored by Justice Kennedy, that “the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.”<sup>20</sup> Commentators have recognized the case not only as “an important landmark,”<sup>21</sup> but also as a “game changer for substantive due process jurisprudence.”<sup>22</sup>

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18. See, e.g., Kevin Barry, *The Death Penalty & the Dignity Clauses*, 102 IOWA L. REV. 383 (2017) (right to be free from the death penalty); Elise C. Boddie, *The Indignities of Color Blindness*, 64 UCLA L. REV. DISCOURSE 64, 70 (2016) (right to have race considered as part of a college application); Courtney Megan Cahill, *Reproduction Reconceived*, 101 MINN. L. REV. 617, 671–72 (2016) (right to alternative reproduction); Erika Hanson, *Lighting the Way Towards Liberty: The Right to Abortion After Obergefell and Whole Woman’s Health*, 45 HASTINGS CONST. L.Q. 93, 94–95 (2017) (right to abortion); Geoffrey Heeren, *The Immigrant Right to Work*, 31 GEO. IMMIGR. L.J. 243, 285 (2017) (right to work for immigrants); Jessica Knouse, *Mandatory Ultrasounds and the Precession of Simulacra*, 54 SAN DIEGO L. REV. 117, 138–39 (2017) (right to be free from mandatory ultrasounds); Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 FORDHAM L. REV. 1509 (2016) (right to not marry); Richard S. Myers, *Obergefell and the Future of Substantive Due Process*, 14 AVE MARIA L. REV. 54, 65–69 (2016) (right to assisted suicide). *But see* Mark P. Strasser, *Obergefell’s Legacy*, 24 DUKE J. GENDER L. & POL’Y 61, 61 (2016) (“*Obergefell* is so open-ended that it could provide the basis for restricting or expanding equal protection and due process guarantees.”).

19. I am aware of two articles that examine the right to education after *Obergefell*. Malhar Shah picks up on one important feature of *Obergefell* that I discuss below. See Malhar Shah, *The Fundamental Right to Literacy: Relitigating the Fundamental Right to Education after Rodriguez and Plyler*, 73 NAT’L LAW. GUILD REV. 129, 147–53 (2016) (arguing for a right to acquire basic literacy skills under *Obergefell*’s “equal dignity” doctrine). But Shah also assumes that many of the doctrinal barriers to recognizing education as fundamental persist. *Id.* at 130–40 (arguing a right to acquire basic literacy skills satisfies the two-prong requirements of *Washington v. Glucksberg*). As discussed below, I disagree with that assumption and argue that *Glucksberg* no longer applies. See *infra*, Part II. Similarly, Joshua Weishart recognizes that the fusion of equal protection and due process may support a constitutional right to education, but seems skeptical that *Obergefell* will lead to this. Joshua E. Weishart, *Reconstituting the Right to Education*, 67 ALA. L. REV. 915, 922 (2016) (“Conjoined, the egalitarian principles of equal protection and the substantive demands of due process might overcome the[] flaws [of either doctrine standing alone], but exactly how they can be integrated remains unclear, even after the Court’s recent application in *Obergefell v. Hodges*.”). For the reasons discussed below, I remain more optimistic than both authors about *Obergefell*’s promise.

20. *Obergefell*, 135 S. Ct. at 2604.

21. Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 17 (2015).

22. Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 148 (2015) [hereinafter Yoshino, *A New Birth of Freedom?*] (“Where *Loving* emphasized equality over

*Obergefell* is significant to advocates of a fundamental right to education for four principal reasons. First, *Obergefell* rejects the strictures of *Washington v. Glucksberg*, which generally inhibits the judicial recognition of fundamental rights. Second, *Obergefell* replaces *Glucksberg* with a more flexible approach to recognizing fundamental rights. Third, *Obergefell* winds together principles of substantive due process and equality. Finally, *Obergefell* moves past the positive/negative rights distinction that has been used against advocates of the fundamental right to education.

#### A. Rejecting *Glucksberg*

*Obergefell* is significant first because it rejects the formulaic role for tradition and history associated with *Washington v. Glucksberg*.<sup>23</sup> In *Glucksberg*, the Court considered whether the state of Washington's law banning physician-assisted suicide violated Due Process.<sup>24</sup> The Court applied a mechanistic two-step inquiry to conclude that it did not.<sup>25</sup>

In the first step, the Court developed a "careful description" of the right at issue.<sup>26</sup> Applying this specificity requirement, the *Glucksberg* Court rejected open-ended descriptions of the right at issue, such as the "liberty to choose how to die," or the "right to choose a humane, dignified death,"<sup>27</sup> in favor of the right "to commit suicide which itself includes a right to assistance in doing so."<sup>28</sup>

In the second step, the Court asked whether the carefully described right was "'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"<sup>29</sup> These requirements were conjunctive under *Glucksberg*, making the tradition inquiry unavoidable.<sup>30</sup> After narrowly describing the right at stake in step one, the *Glucksberg* Court found a "consistent and almost universal tradition" that had long rejected that right.<sup>31</sup>

*Obergefell* plainly rejects both of *Glucksberg*'s two steps. Justice Kennedy criticized the "careful description" requirement, deeming it "inconsistent" with the

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liberty, *Obergefell* made liberty the figure and equality the ground. *Obergefell* also placed a far stronger emphasis on the intertwined nature of liberty and equality.").

23. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

24. *Id.* at 705–06.

25. *Id.* at 721–22, 735.

26. *Id.* at 721 ("[W]e have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest.") (first citing *Reno v. Flores*, 507 U.S. 292, 302 (1993); then citing *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992); and then citing *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 277–278 (1990)).

27. *Id.* at 722.

28. *Id.* at 723.

29. *Id.* at 720–21 (citations omitted) (first quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion); and then quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)).

30. Yoshino, *A New Birth of Freedom?*, *supra* note 22, at 152.

31. *Glucksberg*, 521 U.S. at 723.

approach the Court had used in discussing other fundamental rights.<sup>32</sup> Accordingly, rather than evaluating a “right to same-sex marriage,” Justice Kennedy instead focused on the more general “right to marry in its comprehensive sense.”<sup>33</sup> In the words of Chief Justice Roberts in his dissent, the majority “jettison[ed] the ‘careful’ approach” under *Glucksberg*.<sup>34</sup>

The *Obergefell* Court also articulated a flexible approach to tradition that is fundamentally at odds with *Glucksberg*’s second step. Although both cases start with history,<sup>35</sup> *Obergefell* recognizes that “rights come not from ancient sources alone”<sup>36</sup> and that “[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries.”<sup>37</sup> Flexibly drawing on various historical sources and authorities, Justice Kennedy distilled four principles underlying why marriage is fundamental, as discussed further below.<sup>38</sup>

Though *Obergefell* did not expressly overrule *Glucksberg*, there is little doubt that it rests on fragile ground. Chief Justice Roberts’ dissent asserts that the majority “effectively overrule[d]” *Glucksberg*.<sup>39</sup> Commentators agree.<sup>40</sup> For example, Kenji Yoshino argues “it will be much harder to invoke *Glucksberg* as binding precedent” in the future and predicts the Court may be “taking the familiar step of isolating a precedent before overruling it altogether.”<sup>41</sup> Similarly, Richard Myers predicts the Court will eventually overrule *Glucksberg*’s specific holding and invalidate laws banning assisted suicide.<sup>42</sup>

In short, for advocates of greater constitutional rights, *Glucksberg* is unlikely to stand in the way.<sup>43</sup>

32. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

33. *Id.*

34. *Id.* at 2620–21 (Roberts, C.J., dissenting).

35. Compare *id.* at 2593 (majority opinion) (“Before addressing the principles and precedents that govern these cases, it is appropriate to note the history of the subject now before the Court.”), with *Glucksberg*, 521 U.S. at 710 (“We begin, as we do in all due process cases, by examining our Nation’s history, legal traditions, and practices.”).

36. *Obergefell*, 135 S. Ct. at 2602.

37. *Id.* at 2598.

38. See discussion *infra* Section II.B.

39. *Obergefell*, 135 S. Ct. at 2621 (Roberts, C.J., dissenting).

40. See, e.g., Tribe, *supra* note 21, at 16 (“*Obergefell* has definitively replaced *Washington v. Glucksberg*’s wooden three-prong test focused on tradition, specificity, and negativity with the more holistic inquiry of Justice Harlan’s justly famous 1961 dissent in *Poe v. Ullman*.”).

41. Yoshino, *A New Birth of Freedom?*, *supra* note 22, at 162, 165.

42. Myers, *supra* note 18, at 68.

43. But see Katherine Watson, *When Substantive Due Process Meets Equal Protection: Reconciling Obergefell and Glucksberg*, 21 LEWIS & CLARK L. REV. 245, 247 (2017) (arguing the cases can be reconciled if “*Obergefell* represents the more expansive approach that is warranted when the rights of discrete and insular minorities are implicated,” and “*Glucksberg* represents the more circumscribed approach that should be used when equal protection and due process concerns do not converge”).

### B. Applying the “Reasoned Judgment” Approach

*Obergefell* is also significant because of the mode of analysis it applied to replace *Glucksberg*. Rather than defining a right and then mechanically deciding whether that right was “deeply rooted” in the nation’s history under *Glucksberg*, Justice Kennedy invoked Justice Harlan’s famous dissent in *Poe v. Ullman* to emphasize that the Court’s inquiry should not be “reduced to any formula.”<sup>44</sup>

In *Poe*, the Court was asked to consider the constitutionality, under the Fourteenth Amendment, of a Connecticut law prohibiting the use of contraceptive devices and the provision of medical advice regarding such devices.<sup>45</sup> The Court avoided the merits question, as five justices agreed the case was non-justiciable.<sup>46</sup> In a lengthy dissent, Justice Harlan disagreed that the issue was non-justiciable, addressed the merits question, and concluded that Connecticut’s law violated the Due Process Clause.<sup>47</sup> In so concluding, Justice Harlan wrote that “[d]ue process has not been reduced to any formula; its content cannot be determined by reference to any code.”<sup>48</sup> Instead, through the course of the Court’s decisions the doctrine strikes a balance “between . . . liberty and the demands of an organized society.”<sup>49</sup> As Harlan wrote:

The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.<sup>50</sup>

Justice Harlan’s approach conveys a “common law spirit” and has several features.<sup>51</sup> The approach treats the Constitution as a “basic charter” of our society,<sup>52</sup> a phrase that Justice Kennedy uses twice in *Obergefell*,<sup>53</sup> and interprets the broad language of the Constitution as giving license to adaptation.<sup>54</sup> As Justice Kennedy writes, the interpretative process of deciphering a new fundamental right is “guided

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44. *Obergefell*, 135 S. Ct. at 2598 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

45. *Poe*, 367 U.S. at 498.

46. *Id.* at 501–09 (plurality opinion) (Frankfurter, J.); *id.* at 509 (Brennan, J., concurring).

47. *Id.* at 522–24, 539 (Harlan, J., dissenting).

48. *Id.* at 542.

49. *Id.*

50. *Id.*

51. Tribe, *supra* note 21, at 17.

52. *Poe*, 367 U.S. at 540 (Harlan, J., dissenting).

53. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602, 2605 (2015).

54. *Poe*, 367 U.S. at 540 (Harlan, J., dissenting) (describing the Constitution as “setting out in spare but meaningful terms the principles of government”).

by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements.”<sup>55</sup> Although that process is grounded in history and reason, it is an ongoing one: “Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed.”<sup>56</sup> That process can also change course:

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.<sup>57</sup>

This process thus allows the Court to identify previously-unrecognized rights.<sup>58</sup> So it is without any note of irony that Justice Kennedy, in an opinion upholding the right to same-sex marriage, favorably cites Justice Harlan’s *Poe* dissent, which distinguished the constitutional right to contraceptives—what Harlan considered an essential feature of marriage—from the right to be free from punishment for gay conduct.<sup>59</sup>

Applying the common law approach from *Poe*, Justice Kennedy examines the Court’s precedents and identifies four “principles and traditions” that suggest that “the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.”<sup>60</sup> First, marriage enables individual autonomy.<sup>61</sup> Second, the

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55. *Obergefell*, 135 S. Ct. at 2598.

56. *Poe*, 367 U.S. at 544 (Harlan, J., dissenting).

57. *Obergefell*, 135 S. Ct. at 2598.

58. See Tribe, *supra* note 21, at 27 (“A too-rarely noted aspect of Justice Kennedy’s opinions in this realm, beginning in *Romer* and *Lawrence* and culminating in *Obergefell*, is the belief that the Constitution is written and designed to shed light on society’s evolving experience, framing windows through which to view and assess that experience, and to thereby educate us in how we might proceed to form an ever more perfect union. It does so in part by opening with a conspicuously aspirational preamble, in part by deliberately casting some of the rights it protects and principles it embodies at a high level of abstraction and generality, and in part by manifestly leaving spaces and silences between the specific guarantees it enumerates, expressly instructing that the text’s failure to enumerate a particular right may not be ‘construed to deny or disparage’ that right’s existence.”) (citing U.S. CONST. amend. IX).

59. 367 U.S. at 553 (Harlan, J., dissenting) (“Adultery, homosexuality and the like are sexual intimacies which the State forbids altogether, but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected.”).

60. *Obergefell*, 135 S. Ct. at 2599.

61. *Id.*

right to marry uniquely supports a two-person union, an exceptional and intimate association that impacts basic human relationships.<sup>62</sup> Third, marriage safeguards children and families, and so draws from related rights of childrearing, procreation, and education.<sup>63</sup> Fourth, marriage is a “keystone of our social order.”<sup>64</sup> Based on these principles, the Court concluded that the right to marry is fundamental, inherent in the liberty of the person, and a right that could no longer be denied to same-sex couples.<sup>65</sup>

### C. *Winding Together Liberty and Equality*

Not only did *Obergefell* dispose of the strictures of *Glucksberg*, but it also offered a vision for interpreting “liberty” that pulls together notions separately associated with the Due Process and the Equal Protection Clauses. On the one hand, the right to marry considered in *Obergefell* is a universal one, part of any individual’s right to liberty. On the other, the Court extends that right to same-sex couples, in part, due to the “stigma,”<sup>66</sup> “disrespect,” and “subordinat[ion]”<sup>67</sup> suffered by that group under the laws at issue. As Justice Kennedy writes:

The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. This interrelation of the two principles furthers our understanding of what freedom is and must become.<sup>68</sup>

Though the Court selected Due Process as the grounds for its decision,<sup>69</sup> it also recognized the Equal Protection Clause as independently supporting its

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62. *Id.*

63. *Id.* at 2600.

64. *Id.* at 2601.

65. *Id.* at 2604.

66. *Id.* at 2602.

67. *Id.* at 2604.

68. *Id.* at 2602–03 (citations omitted).

69. *Id.* at 2603 (“In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right.”).

conclusion.<sup>70</sup> In the words of Laurence Tribe, “*Obergefell*’s chief jurisprudential achievement is to have tightly wound the double helix of Due Process and Equal Protection,”<sup>71</sup> fusing together these independent constitutional principles.

Commentators have developed different names for this fusion. Yoshino calls it “antisubordination liberty,” emphasizing the anti-caste theme of cases like *Obergefell* and *Lawrence*, and citing the Court’s language in *VMI* that “the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded.”<sup>72</sup> In contrast, Tribe calls this fusion “equal dignity,” which embraces an anti-caste theme but provides an “even more capacious frame for evaluating future fundamental rights claims” under the dignity heading.<sup>73</sup> Name notwithstanding, this fusion aligns with Pamela Karlan’s observation, made years before *Obergefell*, regarding the overlapping effect of due process and equal protection.<sup>74</sup> As she explains, “sometimes looking at an issue stereoscopically—through the lenses of both the due process clause and the equal protection clause—can have synergistic effects, producing results that neither clause might reach by itself.”<sup>75</sup> *Obergefell* finally identifies “[t]he synergy between the two protections.”<sup>76</sup>

#### D. Ignoring the Positive-Negative Rights Distinction

*Obergefell* may prove to be just as important for its recognition of a positive right. The right to marriage is not merely a right to be free from government action, but also an entitlement to compel a specific government action: the recognition of a marriage along with all of the legal benefits and burdens that flow from that recognition. This right differs in kind from those recognized in several of the privacy cases upon which the Court in *Obergefell* relied, such as *Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Lawrence*.<sup>77</sup> Each of those cases involved state prohibitions—forbidding the use of contraceptives, the distribution of contraceptives, or “homosexual conduct,” respectively—for which claimants asked

70. *Id.* at 2602 (“The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment’s guarantee of the equal protection of the laws.”).

71. Tribe, *supra* note 21, at 17.

72. Yoshino, *A New Birth of Freedom?*, *supra* note 22, at 174 (quoting *United States v. Virginia*, 518 U.S. 515, 557 (1996)); see also Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 749–50 (2011).

73. Tribe, *supra* note 21, at 17, 20.

74. Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473, 474 (2002) [hereinafter Karlan, *Equal Protection*]; see also Pamela S. Karlan, *Foreword: Loving Lawrence*, 102 Mich. L. Rev. 1447, 1463 (2004) (arguing *Lawrence* “implicitly took the same ‘stereoscopic’ approach” as *Loving*, and that both cases recognize how Due Process and Equal Protection can operate in tandem).

75. Karlan, *Equal Protection*, *supra* note 74, at 474.

76. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015).

77. *Id.* at 2597–98.

only that the government get out of the way.<sup>78</sup> But in *Obergefell*, the Court went a step further, requiring the government to take affirmative steps to protect the liberty of same-sex couples by recognizing their marriage.<sup>79</sup>

The *Obergefell* dissents emphasize the significance of the Court's recognition of a positive right.<sup>80</sup> Chief Justice Roberts argues that the privacy cases are not relevant because "petitioners do not seek privacy" but instead "seek public recognition of their relationships, along with corresponding government benefits."<sup>81</sup> As he explains, "[o]ur cases have consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State."<sup>82</sup> Justice Thomas, in a separate dissent, similarly argues that the Framers' understanding was that liberty embraces only freedom from government action.<sup>83</sup> "In the American legal tradition," Justice Thomas writes, "liberty has long been understood as individual freedom from governmental action, not as a right to a particular governmental entitlement."<sup>84</sup>

In response, Justice Kennedy explains that a notion of liberty that was so cramped as to protect only "negative" liberties would not fulfill the Constitution's promise: "[W]hile *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty."<sup>85</sup> Thus, whether a right is construed as "positive," "negative," or some mixture of the two was not dispositive.

### III. THE RIGHT TO EDUCATION AFTER *OBERGEFELL*

Each of these developments is critical to the right to education. Below, I explain why and address each development in turn.

#### A. *The Right to Education under Glucksberg*

Though the Supreme Court has not considered the right to education since *Glucksberg*, that case clearly created a formidable obstacle.

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78. See *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Lawrence v. Texas*, 539 U.S. 558 (2003).

79. *Obergefell*, 135 S. Ct. at 2604 ("These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.").

80. See also SUNSTEIN, *supra* note 16, at 105–08 (evaluating four possible explanations for why the recognition of positive constitutional rights has not occurred in America).

81. *Obergefell*, 135 S. Ct. at 2620 (Roberts, C.J., dissenting).

82. *Id.*

83. *Id.* at 2631 (Thomas, J., dissenting).

84. *Id.* at 2634.

85. *Id.* at 2600 (majority opinion).

Initially, since long before *Glucksberg*, proponents for a constitutional right to education have had to overcome *San Antonio Ind. Sch. Dist. v. Rodriguez*, the Court's 1973 decision declining to recognize education as a fundamental right.<sup>86</sup> *Rodriguez* did not articulate a helpful test to determine whether a right is fundamental, vaguely explaining that "the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution."<sup>87</sup> The Court did emphasize that "the importance of a service performed by the State does not determine whether it must be regarded as fundamental."<sup>88</sup> The Court also contrasted the right to interstate travel, which had long been recognized as a constitutional right, with the right to education, which had not.<sup>89</sup>

*Rodriguez* did not definitively settle the question of whether education is a fundamental right,<sup>90</sup> but education advocates have had a harder time asserting such a right since *Glucksberg*. That is because the right to education may not be "deeply rooted in this Nation's history and tradition" in the same way as other recognized rights, an observation underlying the Court's decision in *Rodriguez*.<sup>91</sup>

Advocates have certainly tried to argue that the right to education survives *Glucksberg*. Many emphasize the tradition and history of public education in the United States,<sup>92</sup> citing the compulsory education laws widespread across the country since the nineteenth century.<sup>93</sup> Others note that, at the time of the Fourteenth Amendment's passage, nearly every state in the Union imposed a constitutional duty on state governments to provide a public-school education.<sup>94</sup> Still others have tried

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86. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

87. *Id.* at 33–34.

88. *Id.* at 30.

89. *Id.* at 32 (citing *Shapiro v. Thompson*, 394 U.S. 618 (1969)).

90. See *Papasan v. Allain*, 478 U.S. 265, 285–86 (1986) ("As *Rodriguez* and *Plyler* indicate, this Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review. Nor does this case require resolution of these issues.").

91. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

92. See, e.g., Emily Barbour, *Separate and Invisible: Alternative Education Programs and Our Educational Rights*, 50 B.C. L. REV. 197, 225 (2009) ("A child's interest in attending a school that provides a minimally adequate education . . . is fundamental based on our tradition and history, and it is necessary to the concept of 'ordered liberty.'"); Bitensky, *supra* note 16, at 586 ("[T]here is overwhelming evidence of American history and traditions which are specifically protective of children's interest in education."); Nicholas A. Palumbo, *Protecting Access to Extracurricular Activities: The Need to Recognize a Fundamental Right to a Minimally Adequate Education*, 2004 B.Y.U. EDUC. & L.J. 393, 411–13 (2004) (arguing the Court may find a fundamental right to a minimally adequate education using a historical approach). See generally Brunell, *supra* note 16; Friedman & Solow, *supra* note 16 (arguing that recognition of a fundamental right to education would be consistent with substantive due process cases like *Glucksberg*).

93. See, e.g., Peter S. Smith, *Addressing the Plight of Inner-City Schools: The Federal Right to Education After Kadrmas v. Dickinson Public Schools*, 18 WHITTIER L. REV. 825, 850 (1997).

94. See Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History*

to ignore *Glucksberg*'s strictures, focusing instead on broad *dicta* from *Glucksberg* that supports an evolving due process doctrine.<sup>95</sup> Finally, many have sought to avoid *Glucksberg* altogether, seeking some other constitutional basis for a right to education.<sup>96</sup>

After *Obergefell*, education advocates need neither satisfy nor circumvent *Glucksberg*. Instead, as discussed next, advocates can rely on the “reasoned judgment” approach to assert the recognition of a right to education.

### B. Applying the “Reasoned Judgment” Approach to Education

Just as *Obergefell* identified four principles and traditions that support recognizing marriage as a fundamental right, application of a similar analysis would find principles that support recognizing education as a fundamental right as well. Nothing from *Obergefell* suggests the principles must be the same.<sup>97</sup> Nonetheless, as explained further below, some of those principles that support a right to education mirror those that support the right to marriage, while others are distinct from the principles *Obergefell* identified. My purpose here is to outline the general contours of principles relevant to the right to education, and flag cases relevant to each principle, while acknowledging that other articles will more thoroughly address these principles.

First, education preserves the autonomy of children and parents. The Court recognized as much in two early cases, *Meyer v. Nebraska*<sup>98</sup> and *Pierce v. Society of Sisters*.<sup>99</sup> In *Meyer*, the Court reversed a school teacher's conviction under a state law that prohibited him from teaching German to his students. Recognizing the “supreme importance” of education, the Court explained that the liberty protected by the Due Process Clause must include a person's right to “establish a home and bring up children” and to “acquire useful knowledge.”<sup>100</sup> Two years later, the *Pierce* Court similarly struck a state law that required parents to send their children to public schools, finding that the law “unreasonably interferes with the liberty of parents and

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*and Tradition?*, 87 TEX. L. REV. 7, 108 (2008) (“Thirty-seven states in 1868 recognized a fundamental state constitutional duty to provide a public-school education as a matter of their formal, positive state constitutional law. . . . A right to a public-school education is thus arguably deeply rooted in American history and tradition and is implicit in the concept of ordered liberty.”).

95. See Friedman & Solow, *supra* note 16, at 108 (“[A]ll nine Justices—of various ideological stripes—explicitly recognized the evolutionary nature of due process and its inclusion of unenumerated rights.”).

96. See, e.g., Liu, *supra* note 16 (arguing the Fourteenth Amendment's Citizenship Clause supports a constitutional right to education).

97. See, e.g., Juliana v. United States, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016) (recognizing a fundamental due process right to a climate system capable of sustaining human life based only on the principle that such a right was “fundamental to a free and ordered society”), *motion to certify appeal denied*, No. 6:15-CV-01517-TC, 2017 WL 2483705 (D. Or. June 8, 2017).

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

99. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

100. *Meyer*, 262 U.S. at 399, 400.

guardians to direct the upbringing and education of children.”<sup>101</sup> The Court wrote of a “fundamental theory of liberty,” which “excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only.”<sup>102</sup> Together, these cases not only form the doctrinal foundation for a constitutional right to education,<sup>103</sup> but they emphasize the basic autonomy that right supports.

Second, education helps fulfill the Constitution’s anti-caste promise. Again, two cases provide the most forceful support. In *Brown v. Board of Education*, the Court famously held that education must be made available to all on equal terms regardless of race and that separate educations were “inherently unequal.”<sup>104</sup> Writing for a unanimous Court, Chief Justice Warren criticized the “separate but equal” system for causing black students to have “a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>105</sup> Similarly, in *Plyler v. Doe*, the Court declared unconstitutional a Texas law that effectively excluded undocumented immigrants from the state’s public schools.<sup>106</sup> The Court found the state law “raise[d] the specter of a permanent caste of undocumented resident aliens” and that the “existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.”<sup>107</sup> Taken together, *Brown* and *Plyler* strongly support the principle that education is necessary to fulfill the Constitution’s anti-caste promise.

Third, education is necessary to protect other fundamental rights. Remarkably, this argument is made possible by *Rodriguez*, which assumed for the sake of argument<sup>108</sup> that some quantum of education could be constitutionally protected as preservative of the right to speech and the right to vote.<sup>109</sup> The Court’s assumption was so significant that one commentator even dubbed the Court’s dicta the “unheld holding” of *Rodriguez*.<sup>110</sup> Recognizing the point three years later, in *Papasan v.*

101. *Pierce*, 268 U.S. at 534–35.

102. *Id.* at 535.

103. Bitensky, *supra* note 16, at 563–64.

104. *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) (“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”).

105. *Id.* at 494.

106. *Plyler v. Doe*, 457 U.S. 202 (1982).

107. *Id.* at 218–19.

108. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36–37 (1973) (“Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditures in Texas provide an education that falls short.”); *see also* Timothy D. Lynch, *Education as a Fundamental Right: Challenging the Supreme Court’s Jurisprudence*, 26 *HOFSTRA L. REV.* 953, 995–96 (1998) (criticizing *Rodriguez* for undervaluing the “disparaging effects” of an inadequate education on the right to vote).

109. *Rodriguez*, 411 U.S. at 35–36.

110. Preovolos, *supra* note 16, at 75, 89, 95, 98–99.

Allain the Court acknowledged that *Rodriguez* had “not yet definitively settled the question[] whether a minimally adequate education is a fundamental right.”<sup>111</sup>

Finally, education is a keystone of our social order. The Court’s prior decisions over the last century are rife with language recognizing the exceptional importance of education. Nearly one hundred years ago, the Court recognized in *Meyer* that the “American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance.”<sup>112</sup> In *Brown*, the Court deemed education as “perhaps the most important function of state and local governments” and questioned whether “any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”<sup>113</sup> Similarly, in *Plyler*, the Court concluded that “education has a fundamental role in maintaining the fabric of our society.”<sup>114</sup> Even *Rodriguez* recognized an “abiding respect for the vital role of education in a free society” and accepted the lower court’s conclusion that “the grave significance of education both to the individual and to our society” cannot be doubted.<sup>115</sup> Looking at these cases, there is no doubt that education is not just “some governmental ‘benefit,’”<sup>116</sup> but instead a keystone of our social order.

Thus, applying the “reasoned judgment” approach to education could distill principles that support recognizing education as fundamental.

### C. Liberty and Equality in Education

The right to education fits perfectly within *Obergefell*’s liberty-equality framework.<sup>117</sup> An adequate education facilitates the exercise of liberty, because it provides children with greater autonomy and life choices, and prepares citizens to participate effectively and intelligently in our open political system.<sup>118</sup> Education is also closely tied to the Constitution’s promise of equality, because it enables all students, regardless of race or immigration status, to compete in an increasingly globalized and competitive society.<sup>119</sup> In addition, the right to education can draw

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111. *Papasan v. Allain*, 478 U.S. 265, 285 (1986).

112. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923); *see also* *Interstate Consol. St. Ry. Co. v. Massachusetts*, 207 U.S. 79, 87 (“Education is one of the purposes for which what is called the police power may be exercised. Massachusetts always has recognized it as one of the first objects of public care.”) (citation omitted).

113. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

114. *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

115. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973).

116. *Plyler*, 457 U.S. at 221.

117. *See, e.g.*, William S. Koski & Rob Reich, *When “Adequate” Isn’t: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 590 (2006) (describing adequacy and equality arguments in education policy).

118. *See, e.g.*, Imoukhuede, *Education Rights*, *supra* note 16, at 467 (arguing for “a human dignity-based, due process clause analysis to recognize the fundamental duty of government to provide high quality, public education”).

119. *See, e.g.*, Koski & Reich, *supra* note 117, at 590 (endorsing equality over adequacy as the paradigm to guide reform in education); Robinson, *supra* note 16, at 1713–14 (“[P]roviding a federal right to education on the basis of equal opportunity would remedy the fundamental unfairness of the

directly from Supreme Court cases applying the Due Process Clause, such as *Meyer* and *Pierce*, and the Equal Protection Clause, such as *Brown* and *Plyler*.

Thus, *Obergefell*'s synthesis of liberty and equality invites greater recognition of the right to education.

#### D. Education as a Positive Right

As many scholars have recognized, perhaps the greatest obstacle to the right to education has been the belief that the Constitution protects negative but not positive rights.<sup>120</sup> The Court emphasized this point in *Rodriguez*, finding a “critical distinction” between the right to education asserted in that case and the right from government “‘depriv[ation],’ ‘infringe[ment],’ or ‘interfere[nce]’” previously recognized in other cases.<sup>121</sup>

Numerous scholars have considered whether *Obergefell*'s recognition of a positive right can be confined to the realm of marriage and intimacy. Kenji Yoshino, for example, noting the dual nature of marriage as both a positive and negative right, suggests *Obergefell* may represent a “one-off” regarding the positive-negative divide because the marriage right itself spans this divide.<sup>122</sup> Then again, he emphasizes, “Justice Kennedy’s opinion contains no such qualification.”<sup>123</sup> Other scholars are more pessimistic. Gregg Strauss, for example, describes marriage as a “power right,” which a person should be able to exercise without state interference and is unlike the right to education.<sup>124</sup>

Like the right to marriage, the right to education defies simple characterization; as the Supreme Court has recognized, education is not just “some governmental ‘benefit.’”<sup>125</sup> First, education is unique in that “[i]t is the only institution for which the government compels attendance of all of its citizens.”<sup>126</sup> In that respect, education may be a *sui generis* positive right. Second, the right to education may be unique in its ability to draw on myriad constitutional sources. As one illustration,

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current educational system that has hampered the ability of disadvantaged students to pursue higher education, professional jobs, and ultimately the American dream.”).

120. See, e.g., Thomas Walsh, *Education as a Fundamental Right Under the United States Constitution*, 29 WILLAMETTE L. REV. 279, 294 (1993) (describing the positive-negative rights distinction as the “most compelling” argument against recognizing a fundamental right to education); cf. Bitensky, *supra* note 16, at 579 (arguing for a right to education, explaining “[t]he plain words of the Constitution as well as the interpretation of those words by legal scholars seem to warrant the unorthodox but supportable conclusion that positive rights are neither alien nor antithetical to American constitutional law.”).

121. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 38 (1973) (first citing *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 536 (1942); then citing *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); and then citing *Dunn v. Blumstein*, 405 U.S. 330, 338–343 (1972)).

122. See Yoshino, *A New Birth of Freedom?*, *supra* note 22, at 165, 168–69; see also Tribe, *supra* note 21, at 30–31.

123. Yoshino, *A New Birth of Freedom?*, *supra* note 22, at 168–69.

124. Gregg Strauss, *The Positive Right to Marry*, 102 VA. L. REV. 1691, 1694 (2016).

125. *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

126. Greenspahn, *supra* note 1, at 771.

Susan Bitensky persuasively argues how an unremunerated positive right to education can arise “from the Free Speech Clause of the First Amendment, the Due Process Clause and the Privileges or Immunities Clause of the Fourteenth Amendment, and, indirectly, from the Constitution’s references to elections and voting.”<sup>127</sup> Indeed, the Supreme Court in *Rodriguez* assumed some quantum of education could be preservative of the right to speech and the right to vote.<sup>128</sup> Finally, education may be construed as a negative liberty rather than a positive right. Areto Imoukhuede makes this argument, citing the liberty that President Lyndon B. Johnson famously referred to as “the freedom from ignorance.”<sup>129</sup>

The point here is not that the right to education is equivalent to the right to marriage; rather, there may be ways in which education, like marriage, defies the clean positive-negative distinction for which the dissenters in *Obergefell* argued. As the above discussion suggests, *Obergefell* presents an opportunity for education advocates to assert that education is fundamental, even though it may be construed as a “positive” right.

#### IV. CONCLUSION

*Obergefell* presents advocates of a federal right to education with a new opportunity.<sup>130</sup> Not only did the *Obergefell* Court dispose of the restrictive features of the implied fundamental rights analysis from *Glucksberg*, but it also fully endorsed Justice Harlan’s common law approach from *Poe* as an alternative. Using that approach, advocates can point to at least four principles underlying the Court’s prior decisions on education to explain why education is fundamental. Additionally, as with marriage, the right to education implicates both liberty and equality, and may bridge the positive-negative rights divide. Thus, *Obergefell* presents several opportunities for educational advocates to argue that every child has a fundamental right to education under the U.S. Constitution.<sup>131</sup>

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127. Bitensky, *supra* note 16, at 625.

128. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35–36 (1973).

129. Imoukhuede, *Fifth Freedom*, *supra* note 16, at 46 (quoting President Lyndon B. Johnson, Special Message to the Congress on Education: The Fifth Freedom (Feb. 5, 1968) (Presidential Papers, 54)) (“The fifth freedom is freedom from ignorance. It means that every[one], everywhere, should be free to develop his [or her] talents to their full potential-unhampered by arbitrary barriers of race or birth or income.”) (alteration in original).

130. Whether that opportunity has changed along with the confirmation of Justice Kennedy’s replacement falls outside the scope of this article. *Cf.* Dahlia Lithwick & Mark Joseph Stern, *Brett Kavanaugh Is Cherry-Picking the Cases He Says Count as Precedent*, SLATE (Sept. 6, 2018), <https://slate.com/news-and-politics/2018/09/kavanaugh-confirmation-hearings-on-abortion-and-same-sex-marriage-hes-cherry-picking-precedent.html> [<https://perma.cc/CF72-XK57>] (explaining how, during confirmation hearings to the Supreme Court, Judge Kavanaugh seemed to ignore *Obergefell* when citing *Glucksberg* as providing the sole test for recognizing fundamental rights).

131. The Sixth Circuit may soon consider a related argument to a “right to literacy” in light of *Obergefell*. See *Gary B. v. Snyder*, 329 F. Supp. 3d 344 (E.D. Mich. 2018), *appeal filed*, No. 18-1855 (6th Cir. July 30, 2018).