

WHY A FUNDAMENTAL RIGHT TO A QUALITY EDUCATION IS NOT ENOUGH

by

James Wilson*

No one will doubt that the legislator should direct his attention above all to the education of youth; for the neglect of education does harm to the constitution. The citizen should be molded to suit the form of government under which he lives.¹

I. INTRODUCTION

This article relies upon the political and economic analysis of such great thinkers as Aristotle and Rousseau to understand and normatively evaluate constitutional caselaw in general and education cases in particular. The article's title contains its conclusion: a judicially created right to a quality education is a laudable, but possibly counterproductive and definitely insufficient condition, for creating a humane constitutional system. The rest of society needs to do far more to protect the average citizen and worker from the ever-ravenous ruling class. All the edification in the world will not mean much if there are only a few decent jobs available, jobs that promote human dignity, a decent family life, a satisfactory income, and a sustainable economy that does not wreck our biosphere.

Some progressives may initially bristle at the notion of applying economics to the Constitution and to constitutional law. After all, the emergence of the "law and economics" movement in the 1970s was symptomatic of the increasing ascendancy of the "rule of capital" over the "rule of law." Starting from Aristotle's common-sense

* Professor of Law, Cleveland-Marshall College of Law, Cleveland State University. B.A., Princeton University, 1969; J.D., University of Chicago School of Law, 1974. The author would like to thank Sheldon Gelman and Steve Lazarus for their reactions to this work. The Cleveland-Marshall Fund also provided assistance.

assumption that “The usefulness . . . depends upon its quantity even where there is no difference in quality . . . just as a greater weight depresses the scale more,”² these lawyers claimed that their techniques improved foresight, thereby increasing the likelihood of a society’s obtaining “a greater weight” of whatever preference it wanted. By merging the self-evident goal of maximizing the overall benefits compared to costs with the technique of reducing all questions to the common denominator of money, they elevated utility above justice, pleasure and wealth above duty and happiness. They applied a variety of formulas, ranging from the illuminating supply-demand curve to elaborate mathematical models, thereby creating the impression (at least to themselves) that they were engaging in a science instead of an art. But it was a “science” with a partisan political agenda. Where Aristotle sought the best mixture of the “good and useful,”³ they wanted to maximize “efficiency.” By making wealth accumulation the primary norm, they accelerated the inherent tendency of capital to accumulate in relatively fewer hands. Empowering capital by deregulation and increased mobility invariably comes at the cost of labor, small business, stable communities, and the environment.⁴

While these skillful analysts often revealed consequences that many had not seen before, they usually ignored reasons for existing practices that did not satisfy the preferences already imbedded in their economic imagery. For example, they used Judge Learned Hand’s famous formula in tort law⁵ to limit liability to those situations in which the defendant’s economic costs to prevent the accident were less than the total amount of

¹ ARISTOTLE, *Politics*, in 2 THE COMPLETE WORKS OF ARISTOTLE 2121 (J. Barnes ed. 1991).

² *Id.* at 2001.

³ *Id.* at 2000.

⁴ HERMAN E. DALY & JOHN COBB, JR., FOR THE COMMON GOOD: REDIRECTING THE ECONOMY TOWARD COMMUNITY, THE ENVIRONMENT, AND A SUSTAINABLE FUTURE 209-35 (2d ed. 1994).

⁵ *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

the costs of the injuries caused by the defendant's existing actions or inactions. This formulation eliminates one major reason why so many Federalists and Anti-Federalists wanted to amend the proposed Constitution to protect their constitutional right to civil jury trials. One of the functions of a jury in a republican government is to constrain the rich and powerful by redistributing wealth to the weaker members of society. The Framers understood that the wealthy tend to exploit their fellow citizens. Whenever this exploitation becomes too brutal, juries could -- and would -- strike back. Anti-trust law was an even more important target. Relying on abstract myths about market conditions and functions, future judges such as Richard Posner and Robert Bork argued that market size and domination should never be considered illegally "unreasonable" under the Sherman Antitrust Act⁶ because some other competitor could always enter the market. Thus, there were no legal limits to capital's inherent tendency to consolidate and to dominate governments, labor, the environment, and markets. The Anti-trust Act's original concerns about corporate abuses and private tyranny were dismissed as misguided relics of an earlier era.

The maximization methodology can be extended to virtually every human decision because "time is money" and people must "choose" between different mixtures of "costs" and "benefits" to "maximize" their "preferences." Although Posner went through a stage when he apparently sought to reduce every normative issue to economic analysis,⁷ he eventually concluded that law and economics is best limited to the common law areas (and Anti-trust), not traditional constitutional issues. Thus, at the very moment when some combination of Madisonian Marxism and clever microeconomic theorizing

⁶ 15 U.S.C. §§ 1-7 (1994).

would have revealed many insights into the predictable effects of various constitutional doctrines on the distribution of wealth and power within the United States' political economy, Judge Posner adopted the far more amorphous concept of "pragmatism." More conservative counterparts, such as Justices Scalia and Thomas, publicly rely on such abstractions as "text," "history," "tradition," and "structure" to justify their constitutional choices. They bizarrely claim they can better help run American society by not considering the morality or the consequences of what they are doing. Admittedly, some law and economics professors applied their microeconomic jargon to constitutional cases, forcing the rest of us to try to remember the difference between "ex ante" and "ex post." However, such microeconomic analysis begged the most important constitutional descriptive and normative question predating Aristotle: how are wealth and power actually distributed in a particular society?

An economic approach combining the insight-generating tools of microeconomics with the profoundly illuminating perceptions of Aristotelian-Marxist distributive macroeconomics undermines the hoary belief that judges do not make "policy" based upon foreseeable consequences but instead rely on "principles" plucked from text and history. It reveals how frequently and profoundly the Constitution itself and the Supreme Court's interpretation of that document influence the perpetual struggle between the few and the many. Macroeconomic analysis of constitutional law raises questions of distributive justice, concerns that call into question the foreseeable effects of the relentless use of microeconomics in private law and the expressed indifference to economic consequences in constitutional law—the concentration of wealth and power in

⁷ See Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974).

fewer hands at the expense of the middle class, the working poor, and the desperately poor at home and abroad. Economic considerations drag the legal system into the dirty worlds of money and politics, reducing any judicial claims to neutrality and autonomy. For example, the 1974 Supreme Court's creation in *Buckley v. Valeo*⁸ of free speech rights facially favoring the wealthy by permitting them to spend as much money as they wanted on themselves remains the most flagrant example of doctrinal class warfare. It is not coincidental that soon after *Buckley*, both political parties quickly moved to the right to raise more campaign money. Money has many attributes, but neutrality is not one of them. History, Aristotelian theory, and modern economics all teach us that the rich will collectively spend a large part of their discretionary wealth to make themselves richer. The crude reductionism of the law and economics movement should not prevent us from learning and applying some of the classical theories about political economy.

Focusing on the relationship of the written Constitution to the United States' overall political economy also reveals some of the dangers in basing one's system on the assumption that improving individuals' faculties through the maximization of wealth is the ultimate end and everything else is a means to that end. Rather, our society should perceive individual and human self-satisfaction -- ends that require a certain degree of wealth to be realized -- as legitimate Kantian ends that must compete against other compelling interests. The economist Herman Daly and the theologian John Cobb described some of the grave distortions caused by the economic theory imbedded in our civilization, Constitution, and constitutional doctrine:

Just as the absence of acknowledgment of community in economic theory has led to the destruction of human community in economic practice, so also the neglect of the physical world in economic theory has led to its

⁸ *Buckley v. Valeo*, 424 U.S. 1, 54 (1976).

degradation in economic practice. We do not believe the reduction of nature to matter as formless passivity or to a construct of the human mind can be justified, and we doubt that anyone can live and think consistently in those terms.⁹

Quite simply, the interrelated threats of violent class war and environmental catastrophe (not to mention the basic indecency of such practices) require that we redefine our notions of constitutionalism to start dealing with these problems. We cannot wait for the Constitution's text to change, nor can we expect or even wish for the judiciary to be primarily responsible for solving these difficult and enduring problems. Constitutional lawyers need to take their useful techniques and powerful norms outside the courtroom.

II. EDUCATION, "FORMAL EQUALITY," AND "EQUAL OPPORTUNITY"

Both Aristotle and Rousseau shed important light on the two underlying conceptions of equality that have animated the Supreme Court's constitutional jurisprudence in education cases: "formal equality" and "equal opportunity." Because such abstract analysis quickly becomes tedious when unsupported by specific examples, this article shall first briefly review the Supreme Court's fluctuations between these two approaches.

The text of the United States Constitution does not contain the word "education." Consequently, humanitarian judicial activists needed to rely upon the Constitution's more abstract passages. To strike down racist school systems in the states and in the District of Columbia, the liberal justices of the Warren Court turned to the Equal Protection Clause of the Fourteenth Amendment and a creatively implied counterpart, the "equal protection

⁹ DALY & COBB, *supra* note 4, at 190.

component” of the Fifth Amendment’s Due Process Clause. While *Brown v. Board of Education*¹⁰ was such an important victory that it legitimated judicial review for the entire twentieth century, it had an important omission. Chief Justice Warren could not convince his colleagues that all children had a “fundamental right” to an education under an “equal opportunity” interpretation of the equal protection mandates. *Brown* spoke ambiguously, making education the focal point of subsequent judicial efforts to improve society. However, the decision doctrinally limited its focus primarily to racial (and later gender) issues, an emphasis that tended to elevate a conception of “formal equality” hostile to racial and sexual categories above a notion of “equal opportunity” that would provide a quality education for all.

The concept of “formal equality” seeks fairness by preventing governments from using certain traits, notably race and gender, to disable individuals. Violations are fairly easy to diagnose and remedy because the Court can delete virtually all statutory references to any “suspect classifications.” The doctrine is also relatively inexpensive because the Court does not require the state to provide any services; it merely prevents the states from invidiously offering their pre-existing services. Thus the state can either raise its services equally for all or reduce them equally for all. The equal opportunity vision is more substantive. Its assumption that adequate education can solve our most pressing social and political problems requires governments to spend a large amount of money to educate every child living in America. But equal opportunity resembles formal equality in its aversion to substantive outcomes. Both the Court’s and society’s obligations to people radically diminish after they graduate from school and enter an economic system dominated by private power and regulated at a constitutional level by a

¹⁰ *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

far less compassionate conception of formal equality. Under both approaches, the judicial goal is to create a “level playing field” for subsequent class and individual competition.

The two norms of racial and educational equality initially appeared to be compatible, but soon came into conflict. Eliminating Southern apartheid and combating more insidious forms of Northern school segregation immediately improved the quality of education for many black and white children. The black children received more resources under a far less stigmatic system, and some fortunate white children now were educated with their fellow African-American citizens. One of the most important educational molds for all Americans is learning the importance of overcoming with tolerance and affection their grisly history of racial injustice and hostility. During this optimistic period, it seemed as if the federal judiciary, often supported by the other two branches, could create a meaningful right to “equal opportunity” through equal education of the races. Everyone knew that improving the conditions of blacks would improve life for many poor people because so many of the impoverished were African-American.

Tragically, the federal judiciary’s focus on race frequently came at the expense of class-based concerns. Instead of requiring a high-quality education for everyone—something that could be partially measured through such basic techniques as class size, teacher payrolls, types of classes, and classroom support—the Court made desegregation its immediate goal and school busing its primary remedy.¹¹ The consequences were easy to foresee, whether one uses economic tools or not—the burden of curing urban school segregation fell upon both the black and white working classes who inhabited the inner cities, which had a long history of racism since they were the places where the races

commingled. Neighborhood schools disappeared, isolating black and white parents from the one public institution that helped their families the most. Many whites and middle-class blacks fled the steadily declining public school systems by sending their children to parochial schools or by moving to nearby suburbs. The racially focused remedies reinforced the blacks' understandable sense of racial injustice, exacerbating the destructive conclusion of many that they should not actively participate in the educational system for fear of becoming an "Uncle Tom." The white working class reacted with rage; a rage admittedly influenced by racism, but also by a correct foreboding that liberals and conservatives alike would consistently downplay their interests in the future. For many millions, judicial conceptions of "formal equality" and "equal educational opportunity for all" meant increased racial polarization and political disempowerment over their children's education.

The liberal justices should not be blamed for all the subsequent disasters that have left many inner city public schools in a state of chaos. In part, because the liberal Justices angered so many white working class voters who had previously voted for the Democratic Party, the liberals soon were outnumbered by far more conservative colleagues who were uninterested in either racial or economic justice. In *Milliken v. Bradley*, the conservatives limited the divisive, counterproductive remedy of busing to the inner cities that initially faced racial problems, leaving the allegedly innocent suburbs free from any constitutional obligations.¹² Although many progressives have attacked this opinion, it may have been the best result for the more humane wing of the Democratic Party. Imagine the political backlash if inner-city students had been bussed

¹¹ *Green v. County Sch. Bd.*, 391 U.S. 430, 438 (1968).

¹² *Milliken v. Bradley*, 418 U.S. 717, 744 (1974).

throughout the suburbs. It is very likely that many inner ring suburbs would have quickly let their school systems deteriorate through yet another wave of privatization and class flight.

As part of their agenda to stop the liberals from interpreting the Constitution to protect the poor, the conservatives decided, in *San Antonio Indep. Sch. Dist. v. Rodriguez*, that the states could continue to have school districts that spent significantly different amounts depending upon their tax base.¹³ Just as the *Plessy* Court had put on blinders to deny the racial impact of segregated trains,¹⁴ the *Rodriguez* Court claimed that the poor and working class were not being discriminated against because not every member of an impoverished school district would be poor.¹⁵ Under this conception of “formal equality,” the Constitution’s concerns about education diminished once state officials stopped using race as a factor.

In *Plyler v. Doe*, Justice Powell, who had cast the swing vote in *Rodriguez*, created a limited judicial conception of “equal opportunity.”¹⁶ States could not “absolutely deny” a child an education, even though they could continue to provide lousy learning experiences. Thus, something like Warren’s equal opportunity “fundamental right to an education” became part of the doctrine. This test was judicially manageable because it would be easy for plaintiffs to prove “complete deprivation.” It kept the Court from determining the proper way to run and finance schools. But even this grudging, limited right has been undermined; in *Kadrmas v. Dickinson Public Schools*, the Supreme Court held that a State could, in effect, “completely deprive” a poor child of a public

¹³ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

¹⁴ *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

¹⁵ *San Antonio Indep. Sch. Dist.*, 411 U.S. at 23.

¹⁶ *Plyler v. Doe*, 457 U.S. 202 (1982).

education by charging that child's parents with busing fees.¹⁷ Apparently there is nothing in the Constitution to prevent the states from precluding the poor by transferring massive costs to them. In a few states -- including Ohio -- state courts have attempted, with varying degrees of success, to impose more egalitarian educational systems through their interpretation of state constitutions. Subsequent popular outrage and political resistance indicate that courts will rarely have the authority or capacity to adequately correct this continuing constitutional outrage. Nor did Congress ever seriously intervene to provide funds to equalize educational opportunities. American justices and politicians talk of "the land of opportunity," but they implement an educational system that exacerbates the different levels of opportunity actually available for the different classes.

What is to be learned by this agonizing tale, a mixture of dazzling judicial triumphs, most notably the desegregation of Southern public schools, judicial overreaching through the remedy of busing, and judicial and legislative callousness toward the continuing plight of minority, poor, and working-class families? The most obvious solution for ambitious constitutional lawyers is to propose a judicially created "equal right to a quality education for all" that is indifferent to modes of taxation and funding. Such a right would diminish the importance of race and regain the allegiance of many white and black voters who want more control over local schools. But there are serious problems with such a doctrine. Under our representative system of government, the legislative branch is primarily responsible for raising the taxes to provide governmental services. Courts are ill-fitted to run educational institutions. How can a judge determine, as a matter of constitutional law, what is the right mixture of administrators and teachers, construction projects and special education classes? A

¹⁷ *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 459 (1988).

judicially mandated quality education would raise taxes while threatening the suburban status quo by requiring the wealthy suburbanites to pay more for less. The backlash could strengthen political conservatism for decades. Most importantly, there is little reason to believe that such a right, whether enforced by the federal courts or subsidized by Congress, will be sufficient to create a stable, humane society because both “formal equality” and “equal opportunity” fail to address basic constitutional problems.

III. ARISTOTLE, AGRARIAN LAWS, AND EQUAL OPPORTUNITY

The flaw with the above story, like most other constitutional law textbooks and articles, is that it is excessively court-focused.¹⁸ When most American lawyers and citizens think of the word “Constitution,” they immediately envision an ancient, unique document supported by volumes of legal decisions and interpretations. Aristotle provides us with several different conceptions of constitutionality that permit us to escape this murky, unsatisfying story. The most important has already been discussed: a country’s “constitution” consists of its distribution of wealth and power between the many, the few, and the one (if there is a monarchy or tyranny).¹⁹ Aristotle thus anticipated Madison’s concerns about civil conflicts over the distribution of property and Marx’s anger at the capitalists’ systemic exploitation of labor. Under Aristotle’s definition, constitutional lawyers and analysts need to look far beyond the Court and its opinions both to understand their particular system and to solve its problems. The legislative branches of Congress and the Presidency become crucial parts of any worthwhile, viable

¹⁸ For a relatively rare discussion on the need to expand our conceptions of constitutionality to persuade the electorate to combat the abuses of private power, *See, e.g.*, Robin West, *Is Progressive Constitutionalism Possible?*, 4 WIDENER L. SYMP. J. 1-18 (1999).

¹⁹ ARISTOTLE, *supra* note 1, at 2030-31.

constitutional vision. Lawyers need to take their social engineering skills, their capacity to design constitutional doctrine to solve basic social problems, and apply them to issues that will be primarily resolved by Congress and the President. For instance, it is hard to imagine that the Courts could ever single-handedly create and enforce a “right to a quality education.” Looking beyond judicial doctrine also enables us to make constitutional arguments to institutions like Congress that have rarely been seen as the repository of important Constitutional rights. These more overtly political arguments reveal additional reasons for a quality education; reasons that might persuade a more humane Court to act at the margins.

The big difference between Aristotle and most contemporary constitutional legal theorists is that Aristotle feared both the rich and the poor. As a group, the rich grow up pampered, unsympathetic to democratic norms. They sense, quite rightly, that internal democracy is the greatest threat to their wealth. Their greed knows no limits; they are willing to drive the masses into poverty to gain additional wealth. Aside from massive poverty’s inherent immorality caused by the widespread destruction of individual happiness, severe wealth disparity increases the risk of revolution. The people will either try to overthrow the powerful or they will turn to a demagogue purporting to represent them against their rapacious superiors. In America, public power is always questioned, but the legitimacy of private power is rarely considered a constitutional issue. The American Constitution aggravates this problem by explicitly limiting private power only once, outlawing slavery under the Thirteenth Amendment. Thus, traditional constitutional analysis continually questions the “legitimacy” of judicial review and the

threat of “majoritarian tyranny,” but rarely worries about the “legitimacy” of the rich and the dangers of “private tyranny.”

Aristotle harshly proposed that constitutional democracies exile²⁰ the excessively rich to guarantee the triumph of the relatively stable middle class over the rich and poor: “[W]here the middle class is large, there are least likely to be factions and dissensions.”²¹ Aristotle also sought to provide public assistance to those less fortunate citizens so they would not plunge into alienating poverty. For example, the city could pay them to be jurors. Overall, Aristotle proposed a political economy shaped like a trapezoid: the state would eliminate the wealthiest members, while raising the poorest section to a tolerable level. Toward the end of the Roman Republic, the Gracchi brothers implemented an alternative means to reaching a trapezoidal system that does not turn the rich into a coalition of dangerous martyrs living at home and exiled abroad, eager to use their wealth to strike back at the system that threatens them. Under the “agrarian laws,” the state took the extensive lands of the wealthy and distributed them to the poor so they could make a living. A similar system could be created in the United States by reestablishing high marginal income tax rates on the wealthy, eliminating most tax exemptions for the wealthy, and increasing taxes on their personal and intangible property. Most importantly, the system should severely tax intergenerational wealth transfers to prevent the rise of a hereditary aristocracy.

But what support can be given the poor that would be the equivalent of excessive lands redistributed to Roman citizens? Two of the major purposes of the agrarian laws were to make the poor economically self-sufficient and politically committed to their

²⁰ *Id.* at 2078.

²¹ *Id.* at 2057.

society. Thus, any modern alternative should seek the same goals. At the least, every American child ought to have a constitutional right to enough basic resources (such as food, clothing, housing, and health care) and a quality education so that he or she can make a good living in this primarily nonagrarian society. However, agrarian laws take us far beyond “equal opportunity.” So long as people are willing and able to work (which includes the raising of children), the government should provide them with decent jobs. No matter what happens to particular individuals, we should not let the poor live in hopeless squalor. The agrarian analogy can be more specific. Assuming that Herman Daly and John Cobb are correct in arguing that family farms have more long-run viability than federally supported corporate farming, our government should limit farms to a certain size and to individual families, creating numerous new opportunities for hard-working families.

IV. ROUSSEAU AND FORMAL EQUALITY

The more conservative members of the current Supreme Court generally rely on “formal equality” to resolve most “equal protection” issues, including those surrounding education. The most pressing and immediate example is the affirmative action controversy, which pits the conservatives’ hatred of racial categories against the more moderate members’ acknowledgment of the continuing, tragic need to use race as a benign factor. Historically, the *Lochner* era represented the high-water mark of formal equality by attempting to constitutionalize the formal equality permeating the common

law.²² Under that theory, redistributive purposes (at least to benefit labor) could never be part of a government's agenda.

Because of formal equality's champions and its claimed indifference to substantive outcomes, some leftists will be tempted to jettison the doctrine completely as yet another example of legalistic obfuscation and oppression. But as is usually the case, such global dismissals of modes of legal reasoning throw out much of value. The formal egalitarians are following Chief Justice Marshall's approach in *McCulloch v. Maryland*²³ of preventing injustice by insuring that the burdens or benefits of a law fall equally on all those affected. Marshall held that the states could not tax federal bank "operations," but could tax federal real property because the states would have an incentive to overtax the federal banks' operations to make a profit and destroy a rival,²⁴ but they would not want to raise general property taxes to a high level since that would hurt their own citizenry far more than the bank. In other words, a proper definition of "formal equality" limits a majority's capacity to oppress a minority because it cannot single out that minority. Any legal disabilities must be distributed equally. Thus, *Brown* was correctly decided under a humanitarian conception of formal equality in that it held that states could not segregate black and white students. The use of race for malicious reasons, like the special tax on the federal bank, was dangerously and temptingly specific. Although formal equality cannot solve many constitutional problems, it winnows out many oppressive forms of governmental action. For another example, the First Amendment doctrine of "viewpoint neutrality" precludes governments from "suppressing" a particular political viewpoint.

²² *Lochner v. New York*, 198 U.S. 45 (1905). See J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 388 (discussing how the realists' critique of formal equality in the common law applied to *Lochner*).

²³ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

Although the application of that doctrine will remain controversial in the details, it is a good thing that governments cannot totally prevent American citizens from fully expressing their political beliefs.

This endorsement of formal equality remains half-hearted because Rousseau has explained how formal equality contains its own political economy, one that conservatives find inherently congenial. Like Aristotle, Rousseau feared the “tyranny of the rich.”²⁵ Rousseau wanted the state to deprive individuals of the opportunity of becoming rich instead of stripping them of their preexisting wealth. Rousseau’s “equal opportunity” did not include the possibility of great wealth. In his *Second Discourse*, Rousseau describes the formation of a social contract in terms far different and far more illuminating than Locke’s generally reasonable men and Hobbe’s frightened, violent masses.²⁶

Although Rousseau never used the term “noble savage,” the phrase captures his romantic beliefs about unspoiled, uncivilized human nature. Fortunately, one does not have to either accept or deny this idealized state to appreciate the power and relevance of his subsequent anthropological description of the changes in social relationships. At first, ignorant humans crowded together in tribes like monkeys and crows.²⁷ But their powerful minds slowly created language, which enabled them to foresee events more clearly. With increased foresight, they could develop industry, leading to crude conceptions of property regulated by force. The human heart became more generous

²⁴ *Id.* at 436.

²⁵ Jean Jacques Rousseau, *Discourse on Political Economy*, in *THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS* 19 (V. Gourevtich ed. and trans., 1997).

²⁶ JEAN JACQUES ROUSSEAU, *DISCOURSE ON POLITICAL ECONOMY, THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS* 19 (V. Gourevtich ed. and trans., 1997).

²⁷ *Id.* at 163.

once it formed into social units called families. But such progress exacted its costs; humans invented new things which quickly “degenerated into true needs.”²⁸ Slowly, these families formed tribes and nations. Although each person had the power to determine his or her rights, the social order was the “best for man” because it was neither so primitive nor so brutally sophisticated. Tragically, cooperation led to tyranny:

[B]ut the moment one man needed the help of another; as soon as it was found to be useful for one to have provisions for two, equality disappeared, property disappeared, work became necessary, and the vast forests changed into smiling fields that had to be watered with the sweat of men, and where slavery and misery were soon seen to sprout and grow together with the harvests.²⁹

Inevitably, those who were more ingenious, harder working, more skillful, or more fortunate would prevail over their fellow citizens. Soon, a new class of men emerged from this process: “[t]he rich, for their part, had scarcely become acquainted with the pleasure of dominating than they disdained all other pleasures, and using their old Slaves to subject new ones.”³⁰ But the poor fought back: “[t]he breakdown of equality was followed by the most frightful disorder: thus the usurpations of the rich, and the Banditry of the Poor, and the unbridled passions of all, stifling natural pity and the still weak voice of justice, made men greedy, ambitious, and wicked.”³¹ The rich quickly recognized that they had more to lose through such a violent version of class war. By emphasizing existing excesses, the rich brilliantly persuaded the majority to adopt a system of formal equality:

²⁸ *Id.* at 165.

²⁹ *Id.* at 167.

³⁰ *Id.* at 171.

³¹ *Id.*

Let us united to protect the weak from oppression, restrain the ambitious, and secure for everyone the possession of what belongs to him: Let us institute rules of Justice and peace to which all are obliged to conform, which favor no one, and which in a way make up for the vagaries of fortune by subjecting the powerful and weak alike to mutual duties. In a word, instead of turning our forces against one another, let us gather them into a supreme power that might govern us according to wise Laws³²

Rousseau believed this argument was “specious” because it entrenched the power of the already powerful and guaranteed the triumph of future elites. Nevertheless, the poor accepted the contract because they sensed that this was the best deal they could get. When a person or a group has unequal bargaining power, formal equality is a huge step forward from oppression. Admittedly, the powerful had to give up some rights, but they now had the formal rule of law to protect them as they continued their plundering ways:

Such was, or must have been, the origin of Society and of Laws, which gave the weak new fetters, and the rich new forces, irreversibly destroyed natural freedom, forever fixed the Law of property and inequality, transformed a skillful usurpation into an irrevocable right, and for the profit of a few ambitious men henceforth subjugated the whole of Mankind to labor, servitude and misery.³³

This chilling anthropology is worth reviewing because it seems more accurate than the story of a group of equals making social contracts through majoritarian procedures. But even if it fails to accurately describe mankind’s original transition into lawful tyranny, it predicts, to a remarkable degree, the formation of the United States Constitution. One of the Framers’ major concerns at the Constitutional Convention was to provide as little democracy as possible to the people, although they knew that they needed the people’s support to implement their program. For instance, the delegates reluctantly conceded that there should not be any property qualifications for

³² ROUSSEAU, *supra* note 26, at 173.

Congressional members. To persuade reluctant Americans to adopt the new Constitution, these men pointed to threats from both ends of the spectrum. The Shays Revolution and Rhode Island pro-debtor legislation demonstrated the problems with too much democracy. But the seditious rumblings within the Society of Cincinnati were equally grim reminders of how the wealthy might respond if their needs were not met. To a large degree, the Constitution represented a deal between the few and the many. The “many” would be allowed to elect directly one-sixth of the government, the House of Representatives. An agrarian precapitalist, Madison also hoped that the rich would never become so rich that they would destroy the necessary virtue of the Aristotelean yeoman farmer. Influenced by Malthus, Madison feared that one day the rich would dominate the republic through clever manipulation of the poor. Historical experience has partially validated Rousseau’s and Madison’s dire predictions. Formal equality simultaneously protects every productive person while allowing the rich to manipulate the legal system to increase their power over the citizenry. While various conceptions of “merit” may define aristocracies for some time, Rousseau explained how wealth becomes the predominate factor: “[B]eing the most immediately useful to well-being and the easiest to transmit, it can readily be used to buy all the rest.”³⁴

More enlightened thinkers like Jefferson and Madison were not completely committed to formal equality and the eventual triumph of the wealthy. Education would be available to all regardless of income so that everyone could have the opportunity to compete. Eliminating the doctrine of primogeniture would prevent wealth from accumulating in too few hereditary hands. State laws, enforced by juries, were the parts

³³ *Id.*

³⁴ *Id.* at 184.

of the constitutional system that would redistribute the wealth to maintain basic economic equality so necessary for a republic's moral health and stability. This analysis demonstrates why some part of our constitutional system must proceed beyond formal equality to prevent a class subordination that Rousseau believes will eventually lead to slavery. It also shows why we can only expect so much from the judiciary. The issue is too vast and important to be left to the vagaries of constitutional lawyering through the awkward tool of judicial review. Because the judiciary cannot effectively solve most of our most pressing constitutional questions, we need to separate many of the judiciary's findings of constitutionality – conclusions that are often based upon reasonable beliefs about judicial competence and judicial role – from the understandable impression that those issues have thus become immune from further constitutional inquiry. Although many American lawyers may not like it, we need to utilize frequently the English argument that many governmental actions can be “unconstitutional” without necessarily being illegal.³⁵

V. SCHOOL VOUCHERS: A CASE STUDY IN PRIVATE POWER, EDUCATION, AND JUDICIAL REVIEW

If one believes that private power, manifested through concentrated individual wealth and corporate institutions, is a great threat to our constitutional republic, how much should and could that belief affect constitutional law concerning education? I shall

³⁵ See, e.g., James G. Wilson, *American Constitutional Conventions: The Judicially Unenforceable Rule That Combine With Judicial Doctrine and Public Opinion to Regulate Political Behavior*, 40 BUFF. L. REV. 645 (1992) (providing as examples the standards used to remove a Prime Minister from office versus the standards used to remove federal officers).

explore that question by applying it to the issue of publicly financed vouchers for nonpublic education. One answer is that the proposition is judicially irrelevant; Supreme Court justices should keep their economic preferences out of constitutional doctrine. But that default rule has at least two costs. It tends to drive the Court toward formal equality, which has its own set of economic biases, and it leaves more humanitarian justices unable to counterattack against the current conservative justices' eagerness to constitutionalize their economic vision through such areas as federalism and the First Amendment. The Court should create doctrine that protects public education from private power in much the same way that it presently separates church and state.

Advocates of judicial restraint would reply that it is much better to make such constitutional arguments to the legislative branches. Courts cannot build a coherent "wall" separating public and private power. It surely must be permissible for schools to hire private contractors and private sellers of textbooks. Must federal courts ban Coca-Cola machines in the same way they preclude the posting of the Ten Commandments? Given the existing doctrinal chaos surrounding church and state issues in terms of supporting parochial schools, it is easy to foresee even more arbitrary outcomes if some members of the Court aggressively implemented this new agenda (even if they kept their motives *sub rosa* by following their conservative colleagues' example of dressing up their economic beliefs as First Amendment, separation-of-church-and-state issues).

The crucial constitutional issue of how to mold our children through education to create a better society needs to be fought primarily in the political arena. The legal doctrine concerning church and state can provide some guidance to subsequent political debate. There should be no advertisements in school, just as there are no crucifixes. The

students' textbooks should not contain math questions such as the following: "Joey wants to buy two pairs of Nike shoes. Each pair costs \$138. The onerous state tax is seven per cent. How much must he pay?" On the other hand, the following question would be acceptable in a social studies book: "Each pair of Nike shoes costs \$138. Nike paid each Indonesian fifty cents for making a pair of those shoes. What percentage of the consumer's cost goes to the actual producer?" After all, that question explores the role of corporate capitalism in our society, just as public schools can and should teach about the influence of religions on society. Any use of modern media should not contain advertising. Perhaps public schools could build their own websites and basic search machines so that students do not have to be pummeled with advertising while they learn how to use the Internet.

But judicial restraint does not necessarily mean complete judicial withdrawal. Whatever one thinks about school vouchers, the fact that they will potentially increase private power's direct influence over the education of millions of students provides another good reason to oppose them. We can be sure that the enlightened educational corporations will be championing the virtues of unlimited profit through the manipulation of state power and revenues. But there are also good political and economic arguments in favor of vouchers. Some will argue that public schools have already improperly indoctrinated their students into passivity, blind consumerism, and conformity. Progressive private schools might better "mold" citizens than the current system. Those who seek diversity will assert that a wide range of private schools will allow parents and communities to create a wide range of alternatives reflecting their own cultures. One of the best ways to give poor children a good education may be to make

them economically valuable through the voucher system. One of the arguments against the status quo, particularly in urban schools, is that they are not doing a good job. Then there is the problem of judicial competence and judicial role: rigid constitutional doctrine should not be used to prevent a potentially valuable experiment in educational reform.

Law review articles conventionally end with a confident conclusion. But this article prefers to conclude with a whiff of uncertainty, if only to demonstrate how general propositions and multiple arguments cannot resolve particular issues. I really do not know how I would decide the school voucher cases if I sat on the bench. But I guarantee that the above economic considerations would reinforce my wavering inclination to find vouchers to be an unconstitutional violation of the doctrine of separation of church and state.