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PROTECTING ACCESS TO EXTRACURRICULAR ACTIVITIES: THE NEED TO RECOGNIZE A FUNDAMENTAL RIGHT TO A MINIMALLY ADEQUATE EDUCATION

I. INTRODUCTION

Extracurricular activities provide an important source of education for high school students. According to former President Ronald Reagan, extracurricular activities afford students “valuable opportunities to discover and develop talent in areas other than those covered within the classroom.”¹ Indeed, empirical research shows that extracurricular activities have a far-reaching and positive impact on schoolchildren.² Students who participate in high school extracurricular activities, for example, are more likely to have good school attendance records, high grade-point averages, and aspirations for education beyond high school.³ Also, students who participate in extracurricular activities are less likely to engage in a variety of risky behaviors.⁴ These school-sponsored activities occupy students’ idle time, strengthen their commitment to school, and expose them to beneficial peer and adult influences.⁵

In addition, participation in high school extracurricular activities may be an indicator of future career achievement.⁶ Students who are

1. Exec. Procl. 5109, 48 Fed. Reg. 44749 (Sept. 30, 1983).

2. Br. of Amici Curiae Am. Acad. of Pediatrics et al. at 9, *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002) (citing Jacquelynne S. Eccles & Bonnie L. Barber, *Student Council, Volunteering, Basketball, or Marching Band: What Kind of Extracurricular Involvement Matters?*, 14 J. Adolescent Research 25 (1999) (finding “clear evidence” that participation in extracurricular activities provides higher than expected GPAs)); Joseph L. Mahoney & Robert B. Cairns, *Do Extracurricular Activities Protect Against Early School Dropout?*, 33 Dev. Psychol. 241 (1997) (finding that participation in extracurricular activities protects against early school dropout).

3. Natl. Ctr. for Educ. Statistics, *Extracurricular Participation and Student Engagement* <<http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=95741>> (June 1995) [hereinafter *Extracurricular Participation*].

4. Nicholas Zill, Christine Winquist Nord & Laura Spencer Loomis, *Adolescent Time Use, Risky Behavior and Outcomes: An Analysis of National Data* <<http://aspe.hhs.gov/hsp/cyp/xstimuse.htm>> (Sept. 11, 1995).

5. *Id.*

6. Br. of Amici Curiae, *supra* n. 2, at 9; Natl. Fedn. of St. High Sch. Assns., *The Case for High School Activities* <http://www.nfhs.org/scriptcontent/Va_custom/va_cm/contentpagedisplay.cfm?content_ID=163> (accessed Mar. 23, 2004).

involved in such activities are more likely to succeed at their chosen professions and make positive contributions to their communities.⁷ On the other hand, students who do not participate are 57 percent more likely to drop out of high school by the time they are seniors, 49 percent more likely to have used drugs, 37 percent more likely to have become teen parents, 35 percent more likely to have smoked cigarettes, and 27 percent more likely to have been arrested.⁸

Given the proven benefits that come from participation in extracurricular activities, it is no surprise that 99.8 percent of the nation's high schools offer some variety of these educational activities.⁹ About 80 percent of high school seniors participate in at least one of the extracurricular activities offered at their schools.¹⁰ Therefore, it is apparent that the term "extracurricular activities" is a misnomer. Instead, it is more appropriate to consider such activities as a standard and integral part of a student's education rather than imply that they are unimportant and supplementary.

Despite widespread participation in high school extracurricular activities and the myriad of benefits derived from them, the United States Supreme Court has twice ruled that a school district may limit or condition access to these important educational opportunities. First, in *Vernonia School District 47J v. Acton*,¹¹ the Court upheld a school policy that conditioned the opportunity to participate in interscholastic athletics on a student's submission to random urinalysis drug testing.¹² Next, in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*,¹³ the Court expanded the reach of *Vernonia* by upholding the constitutionality of a policy that required all students who participate in *any* extracurricular activity to submit to a drug-testing regime.¹⁴

Placing such a prerequisite upon extracurricular participation can have the dire result of depriving certain schoolchildren of important educational opportunities whether or not they are using illegal drugs.¹⁵

7. *The Case for High School Activities*, *supra* n. 6.

8. Zill, *supra* n. 4.

9. *Extracurricular Participation*, *supra* n. 3 (Extracurricular offerings include participation in various school publications, performing arts, athletics, honor societies, student government, academic clubs, vocational clubs, service clubs, and hobby clubs.).

10. *Id.*

11. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

12. *Id.* at 652-66.

13. *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002).

14. *Id.* at 837-38.

15. See Br. of Amici Curiae, *supra* n. 2, at 4, 20. Non-drug users may choose not to participate

Faced with the decision of whether to submit to drug testing or foregoing extracurricular activities, schoolchildren are forced to engage in a crude cost-benefit analysis. They must decide whether their participation in extracurricular activities is worth tolerating an intrusion upon their privacy.¹⁶ The records of *Earls* and other cases plainly suggest that some students will opt not to be subjected to a drug test at the expense of losing their eligibility for involvement in extracurricular activities.¹⁷

The Supreme Court was able to rule the way it did in *Vernonia* and *Earls* because education is not yet considered to be a fundamental right.¹⁸ A statute or rule that infringes on a fundamental right is subject to heightened scrutiny by the courts.¹⁹ As such, interference with a fundamental right will only be tolerated where the government employs necessary means to address a "compelling state interest."²⁰ Thus, the policies in *Vernonia* and *Earls* would likely have been struck down if the Court had previously recognized a fundamental right to education that encompassed extracurricular activities.²¹ Instead, the Court allowed two school districts to deprive certain students of access to educational

in extracurricular activities because they find that the administration of a drug test infringes too far upon their sense of modesty and privacy. *Id.* at 19–21. For example, some students who were subject to the policy in *Earls* "expressed embarrassment over the drug-testing procedure." *Earls v. Bd. Of Educ. of Tecumseh Pub. Sch. Dist.*, 115 F. Supp. 2d 1281, 1291 (2000), *rev'd*, 536 U.S. 822 (2002) [hereinafter *Tecumseh*]. Those students who do in fact use drugs may also choose to refrain from participation in extracurricular activities instead of submitting to a drug-testing regime. *Br. of Amici Curiae*, *supra* note 2, at 20. Justice Ginsburg noted in her *Earls* dissent that "even if students might be deterred from drug use in order to preserve their extracurricular eligibility, it is at least as likely that other students might forgo their extracurricular involvement in order to avoid detection of their drug use." 536 U.S. at 853 (Ginsburg, J., dissenting).

16. *Br. of Amici Curiae*, *supra* n. 2, at 19–20.

17. The *Tecumseh* record shows that one student told a teacher that she chose to stop participating in choir because of the drug-testing policy. 115 F. Supp. 2d at 1291 n. 38. See also *Penn-Harris-Madison Sch. Corp. v. Joy*, 768 N.E.2d 940, 943–44 (Ind. App. 2002) (Students refused to sign consent form for random, suspicionless drug testing required to participate in extracurricular activities or to receive a parking permit.); *Weber v. Oakridge Sch. Dist.* 76, 56 P.3d 504, 506 (Or. App. 2002) (student who chose not to consent to random urinalysis testing prevented from playing on volleyball team); *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1097 (Colo. 1998) (student suspended from participation in marching band because he chose not to consent to the school's mandatory drug policy); *Tannahill ex rel. Tannahill v. Lockney Ind. Sch. Dist.*, 133 F. Supp. 2d 919, 922–23 (N.D. Tex. 2001) (refusal to consent to drug testing resulted in suspension from all extracurricular activities); *Acton v. Vernonia Sch. Dist.* 47J, 796 F. Supp. 1354, 1359 (D. Or. 1992), *vacated*, 515 U.S. 646 (1995) (seventh grade student who refused to sign a consent form for drug and alcohol testing prohibited from participation in district-sponsored athletics).

18. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (Education "is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.") [hereinafter *San Antonio*].

19. Russell W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L. Rev. 625, 627 (1992).

20. *Id.*

21. See *infra* Part V.

opportunities that would have provided them with short- and long-term benefits. Since the *Earls* decision in June 2002, school districts across the country have implemented policies that call for urinalysis testing of students for the use of drugs, alcohol, and even tobacco.²² As a result, an increasing number of students, whether or not they use illicit substances, are being blocked from access to activities that would enrich their lives.

Despite its rulings in *Vernonia* and *Earls*, the Supreme Court, has explicitly left open the possibility that some minimal level of education is in fact constitutionally protected.²³ The Due Process Clause of the Fourteenth Amendment provides a constitutional basis for the recognition of this right.²⁴ In addition, the recent decision in *Lawrence v. Texas*²⁵ demonstrates a new willingness by the Court to interpret the Due Process Clause more broadly to protect rights that are not explicitly enumerated in the Constitution.²⁶ Hence, should the Court be confronted again with the question of whether the Constitution guarantees a right to education, it is now more likely to recognize a fundamental right to a minimally adequate education.

While some commentators have argued for the recognition of a fundamental right to a minimally adequate education,²⁷ they have not addressed the important issue of whether extracurricular activities would be protected by the acknowledgment of this right. This Note will demonstrate why the Supreme Court should recognize a fundamental right to a minimally adequate education. This Note will also argue that this fundamental right should be broad enough to protect students' access to extracurricular activities. Part II details the treatment of education as a fundamental right under state and federal law. Part III suggests that the Court may now be ready to recognize this right in the wake of the *Lawrence* decision. Part IV points to the constitutional bases for the recognition of a fundamental right to a minimally adequate education. Part V defines the scope of this right to include

22. See Tamar Lewin, *With Court Nod, Parents Debate School Drug Tests*, N.Y. Times A1 (Sept. 29, 2002); see also Greg Guffrida, *Urine Tests for Tobacco Use*, <<http://www.cbsnews.com/stories/2002/10/08/national/main524640.shtml>> (Oct. 8, 2002).

23. The Court did not dismiss the possibility "that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either [the right to speak or the right to vote]." *Papasan v. Allain*, 478 U.S. 265, 284 (1986) (quoting *Rodriguez*, 411 U.S. at 36).

24. See *infra* Part IV.

25. *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

26. *Id.* at 2484 (holding that the liberty protected by the Constitution allows homosexual persons the right to choose to enter into relationships in the confines of their homes and their own private lives and still retain their dignity as free persons).

27. See e.g., Kristen Safier, *The Question of a Fundamental Right to a Minimally Adequate Education*, 69 U. Cin. L. Rev. 993 (2001); Thomas J. Walsh, *Education as a Fundamental Right Under the United States Constitution*, 29 Willamette L. Rev. 279 (1993).

extracurricular activities. Part VI concludes by urging the Supreme Court to recognize a fundamental right to a minimally adequate education in order to protect fully the educational opportunities of the nation's schoolchildren.

II. EDUCATION AS A FUNDAMENTAL RIGHT

Public education is largely the province of state and local governments.²⁸ While the U.S. Constitution does not explicitly mention education, most state constitutions contain clauses concerning education.²⁹ These education clauses point to the importance of education and the role of the state government in providing education to its citizens.³⁰ More than half of the forty-odd states that have addressed the issue have concluded that their state constitutions guarantee a fundamental right to education.³¹ Interpretations, however, of the scope of this right vary from state to state.³²

Unfortunately, state-based education rights do not adequately safeguard the educational opportunities of the nation's schoolchildren. While only a handful of states have interpreted the education clauses of their constitutions to protect access to extracurricular activities to some extent,³³ a large majority of state courts have rejected this notion.³⁴ The limited reach of state constitutional rights to education has enabled school districts to create barriers to accessing extracurricular activities. In *Earls*, for example, a school district conditioned such access upon a student's submission to drug testing.³⁵

The recognition that the U.S. Constitution guarantees a fundamental right to a minimally adequate education that encompasses extracurricular activities would provide students with the necessary

28. Victoria J. Dodd, *Practical Education Law for the Twenty-First Century* 21 (Carolina Academic Press 2003).

29. *Id.* at 121.

30. *Id.*

31. Victoria J. Dodd, *A Critique of the Bush Education Proposal*, 53 Admin. L. Rev. 851, 866 (2001) (citing e.g., *Washakie County Sch. Dist. No. One v. Herschler*, 606 P.2d 310 (Wyo. 1980); *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971), *superceded*, *Crawford v. Huntington Beach Union High Sch. Dist.*, 98 Cal. App. 4th 1275 (2002)).

32. See *infra* Part V.

33. See e.g., *Grabow v. Montana High Sch. Assn.*, 59 P.3d 14, 17–18 (Mont. 2002) (“Students clearly have the right to participate in extracurricular activities. That right to participate in extracurricular activities is a right that is subject to constitutional protection.”) (internal citations omitted).

34. Dodd, *supra* n. 28, at 251.

35. *Earls*, 536 U.S. at 838.

protection.³⁶ Indeed, if the Supreme Court recognizes such a right, the educational opportunities of students will be protected regardless of the state in which they attend school.

A. *The Importance of Fundamental Rights*

The Fourteenth Amendment, in part, prohibits states from depriving "any person of life, liberty, or property, without due process of law."³⁷ Courts utilize the Due Process Clause as a vehicle to engage in a substantive review of state statutes that restrict individuals' freedom of action.³⁸

The level of scrutiny that a court applies in its evaluation of a law depends on the nature of the right upon which the regulation infringes.³⁹ If a statute regulates economics or matters of social welfare, for example, the courts will apply only a minimal level of scrutiny.⁴⁰ Under this standard of judicial review, a statute is constitutional so long as it is rationally related to a legitimate interest of the government.⁴¹ Hence, a court will uphold economic and social welfare laws unless it finds that the legislature has "acted in an arbitrary and irrational way."⁴²

If, however, a law regulates the exercise of fundamental rights and liberties that are explicitly or implicitly protected by the Constitution, the courts will apply a test of strict judicial scrutiny.⁴³ A court applying this heightened standard will give much less deference to the legislative body.⁴⁴ To withstand the strict-scrutiny test, a law that abridges a fundamental right will be found unconstitutional unless it has been narrowly tailored by the legislature to serve a compelling state interest.⁴⁵

36. See *infra* Part V.

37. U.S. Const. amend. XIV.

38. John E. Nowak & Ronald D. Rotunda, *Constitutional Law* 382 (5th ed., West 1995).

39. In *U.S. v. Carolene Prods. Co.*, Justice Stone, in his famous Footnote Four, succinctly stated that legislation is subject to a "more searching judicial inquiry" when it affects a fundamental right. *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 152-153 n. 4 (1938). Stone opined that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." *Id.* See also Milton R. Konvitz, *Fundamental Rights: History of a Constitutional Doctrine* 148-52 (Rutgers 2001).

40. Nowak, *supra* n. 38, at 383. See also *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 487-88 (1955); *Ferguson v. Skrupa*, 372 U.S. 726, 731-32 (1963).

41. Nowak, *supra* n. 38, at 383.

42. *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 83 (1978) (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)).

43. *Rodriguez*, 411 U.S. at 17-19.

44. Nowak, *supra* n. 38, at 383-84.

45. *Roe v. Wade*, 410 U.S. 113, 155 (1973); see also *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 627 (1969); *Griswold v. Conn.*, 381 U.S. 479, 485 (1965); Erwin Chemerinsky, *Constitutional*

Under this two-tier approach, even if the court identifies a compelling state interest for enacting a regulation, it will not uphold the statute unless the state's objective cannot be achieved in a less burdensome way.⁴⁶ Consequently, a court applying strict scrutiny is much more likely to render a statute unconstitutional than a court applying a lesser level of scrutiny.

The level of scrutiny that a court employs in evaluating the constitutionality of a particular piece of legislation plays a vital role in the determination of whether the law will be upheld or struck down. As such, determining which rights are "fundamental," and thus trigger strict scrutiny, is of immense importance. The Fourteenth Amendment's Due Process Clause provides heightened protection against governmental interference with certain fundamental rights and liberty interests that are not specifically enumerated in the Constitution or its Amendments.⁴⁷ The Supreme Court has described fundamental rights as those rights that are "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.'"⁴⁸ The Court has determined that the Due Process Clause gives fundamental-right status to the right to marry, the right to have children, the right to direct the education and upbringing of one's children, the right to enjoy marital privacy, the right to use contraception, the right to maintain bodily integrity, and the right to have an abortion.⁴⁹ While the Court has historically been reluctant to recognize new fundamental rights imbedded in the Due Process Clause,⁵⁰

Law: Principles and Policies 529 (Aspen L. & Bus. 1997).

46. *Rodriguez*, 411 U.S. at 51; *Dunn v. Blumenstein*, 405 U.S. 330, 343 (1972). It should be noted that the *Rodriguez* and *Dunn* cases involved equal protection, rather than substantive due process analysis. Nonetheless, the courts should use the same standards of review regardless of whether they are employing a substantive due process or equal protection review. Nowak, *supra* n. 38, at 383.

47. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); see also Nowak, *supra* n. 38, at 387. In his famous dissenting opinion in *Lochner v. N.Y.*, Justice Holmes suggested that certain rights deserve heightened protection from legislative intrusion:

I think the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the tradition of our people and our law.

198 U.S. 45, 76 (1905) (Holmes, J., dissenting); see also Konvitz, *supra* n. 39, at 15.

Indeed, a "fair and enlightened system of justice" would be impossible if the nation's citizens were denied certain fundamental rights. See *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *rev'd in part on other grounds*, *Benton v. Maryland*, 395 U.S. 784 (1969).

48. *Washington*, 521 U.S. at 720–21 (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)); *Palko*, 302 U.S. at 325–26.

49. *Washington*, 521 U.S. at 720 (internal citations omitted).

50. *Bowers v. Hardwick*, 478 U.S. 186, 194–95 (1986), *overruled*, *Lawrence v. Texas*, 123 S. Ct.

its recent decision in *Lawrence v. Texas* suggests a new willingness by the Court to recognize protections not explicitly written into the text of the Constitution.⁵¹

B. Education as a Fundamental Right under the U.S. Constitution

The Supreme Court has acknowledged that “education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all.”⁵² Indeed, an adequate public education is necessary to prepare our nation’s citizens to “exercise the role of self-government,” and to produce the well-trained and educated workforce upon which our economic system relies.⁵³

In *Brown v. Board of Education*, the Supreme Court found that racial segregation in public schools deprives schoolchildren of equal educational opportunities in violation of the Equal Protection Clause of the Fourteenth Amendment.⁵⁴ Chief Justice Warren’s majority decision stressed the significance of education to the nation’s children and society as a whole:

[E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.⁵⁵

This view of education is consistent with that of prior and subsequent Supreme Court decisions. For example, in *Meyer v. Nebraska*,⁵⁶ the Court noted that “[t]he American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance”⁵⁷ Furthermore, the Court’s decision in

2472 (2003); *Washington*, 521 U.S. at 720.

51. See *infra* Part III(B).

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

53. Elizabeth Reilly, *Education and the Constitution: Shaping Each Other and the Next Century*, 34 Akron L. Rev. 1, 1–2 (2000).

54. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493–95 (1954).

55. *Id.* at 493.

56. *Meyer v. Neb.*, 262 U.S. 390, 400 (1923) (invalidating a state law that prohibited the teaching of foreign languages to young children).

57. *Id.*

*Wisconsin v. Yoder*⁵⁸ pointed out that “some degree of education is necessary to reasonably prepare citizens to participate effectively and intelligently in our political system if we are to preserve freedom and independence.”⁵⁹

Despite the Court’s stated high regard for education, it has repeatedly refused to elevate education to the status of a fundamental right. In *San Antonio Independent School District v. Rodriguez*, the Supreme Court specifically held that there is no fundamental right to education.⁶⁰ The Court found that Constitution does not explicitly or implicitly provide for such a right.⁶¹ The 5–4 decision upheld Texas’ unequal school financing system, which provided more funding to schools in districts with higher property taxes.⁶² Because the Court declined to recognize education as a fundamental right, the Texas law was subjected to, and survived, only a minimal level of judicial scrutiny.⁶³ The Court rejected the argument that education is essential to the effective exercise of other constitutional rights, such as the right to free speech and the right to vote.⁶⁴ The *Rodriguez* decision evinces the Court’s fear that the recognition of a fundamental right to education would create a slippery slope where more and more unenumerated rights would have to be acknowledged.⁶⁵ Certainly, such a decision would raise the possibility of the Court having to recognize fundamental rights to other necessities, such as housing, food, or employment.⁶⁶

In *Plyler v. Doe*, the Supreme Court reiterated its position that education is not entitled to fundamental-right status.⁶⁷ However, Justice Brennan’s majority opinion noted that education is not “merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation.”⁶⁸ The *Plyler* Court went on to strike down a Texas statute that denied a free public education to the children of illegal

58. *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (exempting Amish students, on religious freedom grounds, from a state requirement to attend school until the age of sixteen).

59. *Id.*

60. 411 U.S. at 35.

61. *Id.*

62. *Id.* at 11–12.

63. See Safier, *supra* n. 27, at 1003 (noting that “the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State’s social and economic legislation.” *Rodriguez*, 411 U.S. at 35).

64. *Id.* at 35–37.

65. See *id.* at 37.

66. See *id.* (“How . . . is education to be distinguished from the significant personal interests in the basics of decent food and shelter?”). See also James E. Ryan, *The Supreme Court and Public Schools*, 86 Va. L. Rev. 1335, 1392 (2000).

67. 457 U.S. at 221.

68. *Id.*

aliens.⁶⁹ In reaching its decision, the majority relied on “the innocent nature of the children,” whose parents brought them into this country, and on the importance of education.⁷⁰ The Court did not employ strict scrutiny, but it used a heightened level of judicial review to analyze the Texas statute.⁷¹ Under this “intermediate” level of review, the law was declared unconstitutional because it denied certain children of a basic education without furthering a “substantial state interest.”⁷² Even so, the enhanced scrutiny utilized by the Court in *Plyler* was dependent upon the specific facts of that case,⁷³ and the Court has declined to extend its rationale to other cases.⁷⁴

The Court’s repeated failure to recognize a fundamental right to education has paved the way for decisions, such as *Vernonia* and *Earls*, which enable states to enact legislation that significantly infringes on schoolchildren’s educational opportunities. While *Plyler* acknowledges that education is more than a mere governmental benefit,⁷⁵ the decision does little to safeguard the education of children who do not find themselves in the unique position of the children in that case. Until some minimum level of education is formally granted constitutional protection, students will be left without a sufficient judicial mechanism to challenge laws that ultimately restrict them from achieving their full educational potential.

III. TWO RAYS OF HOPE

While the Supreme Court’s jurisprudence regarding education has had the effect of depriving some students of important educational opportunities, there is room to remedy the situation. First, the Court has never conclusively determined whether there is some minimal degree of education that is indeed fundamental.⁷⁶ Second, the decision in *Lawrence* may demonstrate the Court’s new approach to fundamental rights analysis, which increases the probability that additional fundamental

69. *Id.* at 230.

70. See Ryan, *supra* n. 66, at 1393.

71. *Plyler*, 457 U.S. at 223–24.

72. *Id.* at 230.

73. The alien children that were harmed in *Plyler* were brought to the United States by their parents. The Texas statute penalized them for the actions of their parents. See *id.* at 220.

74. See Ryan, *supra* n. 66, at 1394–95. The Supreme Court has not extended *Plyler* “beyond the ‘unique circumstances’ that provoked its ‘unique confluence of theories and rationales.’” *Kadrmas v. Dickson Pub. Sch.*, 487 U.S. 450, 459 (1988).

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

76. See *infra* Part III(A).

rights, such as a right to education, will be acknowledged.⁷⁷

A. *The Door Left Open*

The *Rodriguez* and *Plyler* decisions declared that education is not a fundamental right.⁷⁸ However, in *Plyler*, the Supreme Court found that a complete denial of access to education is unconstitutional.⁷⁹ Therefore, the issue of whether the Constitution protects some minimal degree of education remains open today. Indeed, in *Papasan v. Allain*, the Court noted that *Rodriguez* and *Plyler* indicate that it “has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to . . . infringe that right should be accorded heightened . . . review.”⁸⁰

In *Rodriguez*, the Court upheld a Texas school financing system and declared that education is not a fundamental right.⁸¹ However, Justice Powell’s majority opinion twice implied that there might be a fundamental right to a minimally adequate education. First, the decision observed that Texas provided “an adequate base education for all children” and suggested that the statute might be deemed unconstitutional if some children were excluded from access to school altogether.⁸² Second, the Court noted that there was no meaningful disparity in school funding between Texas’ different districts, and hinted that the statute might be struck down if such a disparity existed.⁸³ Justice Powell opined that “[e]ven if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of [the right to speak or the right to vote], we have no indication that the present levels of educational expenditures in Texas provide an education that falls short.”⁸⁴ Furthermore, the majority explained that there is

no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where . . . no charge fairly could be made that the system fails to provide each child

77. See *infra* Part III(B).

78. *Plyler*, 457 U.S. at 223; *Rodriguez*, 411 U.S. at 35.

79. See Ryan, *supra* n. 66, at 1393.

80. *Papasan*, 478 U.S. at 285. See also *Kadmas*, 487 U.S. at 467 n. 1 (Marshall, J., dissenting) (“In prior cases this Court explicitly has left open the question whether a deprivation of access [to a minimally adequate education] would violate a fundamental constitutional right. That question remains open today.”) (internal citations omitted).

81. *Rodriguez*, 411 U.S. at 11–12, 35.

82. *Id.* at 25 n. 60; see Ryan, *supra* n. 66, at 1392.

83. *Rodriguez*, 411 U.S. at 36–37.

84. *Id.*

with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.⁸⁵

Based on this reasoning, the Court might be willing to recognize a fundamental right to a minimally adequate education if it were confronted with a case where some children were deprived of the opportunity to acquire a basic education.

In *Plyler*, the Supreme Court struck down, on equal protection grounds, a Texas statute that denied a free public education to children of illegal aliens.⁸⁶ At first glance it would appear that the *Plyler* Court had the opportunity to recognize a fundamental right to an adequate education and declined to do so. Indeed, the Court confronted a statute that completely denied some children access to a basic education. Instead of recognizing a fundamental right, however, the Court applied an intermediate level of scrutiny.⁸⁷

It is important to remember, however, that the children affected by the Texas statute were undocumented aliens in violation of federal law,⁸⁸ and that such status is not a constitutional irrelevancy.⁸⁹ For example, undocumented aliens cannot be treated as a suspect class for the purpose of triggering strict scrutiny in an equal protection analysis.⁹⁰ Similarly, the Court may not have been comfortable recognizing a new fundamental right in a case that dealt with the opportunities of those who were in this country illegally. Nonetheless, the idea of a complete denial of education to certain children, whose illegal status was brought about by their parents, did not sit well with the Court.⁹¹

Since undocumented aliens are not considered a suspect class, the Court relied on the importance of education in order to employ a heightened standard of judicial review.⁹² The majority opinion noted that education is more than a mere governmental benefit, and that it "has a fundamental role in maintaining the fabric of our society."⁹³ The Court further stated that "[b]y denying . . . children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the

85. *Id.* at 37.

86. *Plyler*, 457 U.S. at 230.

87. *Id.* at 218 n. 16, 223–24.

88. *Id.* at 205.

89. *Id.* at 223.

90. *Id.*

91. See *Plyler*, 457 U.S. at 223–24.

92. *Id.*

93. *Id.* at 221.

smallest way to the progress of our Nation.”⁹⁴ Notably, this reasoning highlights the significance of education to society, and demonstrates the Court’s willingness to elevate its judicial scrutiny of laws that seriously infringe upon a child’s educational opportunities, even without formal recognition of a fundamental right.⁹⁵

In sum, the reasoning in *Rodriguez* and *Plyler*, as acknowledged in *Papasan*, indicates that the Supreme Court has not foreclosed the possibility of recognizing a fundamental right to a minimally adequate education.

B. A Roadblock Removed

When the Supreme Court issued its decision in *Bowers v. Hardwick*, it placed a barrier on the path to the future recognition of new fundamental rights through the Due Process Clause. In that case, the Court held that the Constitution does not confer a fundamental right upon homosexuals to engage in consensual sodomy.⁹⁶ According to the majority, proscriptions against sodomy have ancient roots that pre-date the birth of the United States.⁹⁷ Furthermore, until 1961, all fifty States outlawed the practice.⁹⁸ Hence, the Court stated, a homosexual’s right to engage in sodomy cannot be considered “‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty.’”⁹⁹

Most importantly, the *Bowers* Court declared that it was not “inclined to take a more expansive view of [its] authority to discover new fundamental rights imbedded in the Due Process Clause.”¹⁰⁰ Justice White’s majority opinion states:

The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution There should be, therefore, great resistance to expand the substantive reach of [the Due Process Clauses of the Fifth and Fourteenth Amendments], particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without constitutional authority.¹⁰¹

94. *Id.* at 223.

95. *See id.* at 223–24.

96. *Bowers*, 478 U.S. at 192.

97. *Id.* at 192. The majority noted that sodomy was considered a criminal offense by the laws of the original thirteen States when they ratified the Bill of Rights. *Id.*

98. *Id.* at 193.

99. *Id.* at 194.

100. *Id.*

101. *Id.* at 194–95.

While *Bowers* clearly demonstrated the Supreme Court's unwillingness to recognize new fundamental rights, there is some question as to whether the decision would have actually prevented the Court from recognizing a fundamental right to a minimally adequate education. The Court decided *Bowers* on June 30, 1986.¹⁰² One day later, the Court decided *Papasan v. Allain*.¹⁰³ That opinion, which was also written by Justice White, clearly stated that the Court had yet to determine whether there is a fundamental right to a minimally adequate education.¹⁰⁴ Therefore, one could argue that *Bowers* was not intended to bar the possible future recognition of a fundamental right to a minimally adequate education. Considering that both opinions were written by Justice White within such a short period of time, if such a restriction were to be imposed Justice White would likely have mentioned it in *Papasan*.

In *Lawrence v. Texas*, the Supreme Court removed any possible barrier that *Bowers* might have presented to the recognition of a fundamental right to a minimally adequate education by explicitly overruling *Bowers*.¹⁰⁵ *Lawrence* involved an almost identical set of facts as *Bowers*. Police officers were dispatched to a private home in response to a reported weapons disturbance.¹⁰⁶ They entered Lawrence's apartment and observed him engaging in a sexual act with another man.¹⁰⁷ The two men were arrested and eventually convicted for violating a Texas statute that prohibited "deviate sexual intercourse with a member of the same sex."¹⁰⁸ The Texas Court of Appeals rejected the defendants' constitutional arguments under the Equal Protection and Due Process Clauses of the Fourteenth Amendment,¹⁰⁹ and relied on *Bowers* to uphold the convictions.¹¹⁰ The Supreme Court seized the opportunity to readdress *Bowers* and granted certiorari.¹¹¹

The *Lawrence* majority expanded the scope of the Due Process Clause to include a homosexual's right to engage in private, consensual

102. *Id.* at 186.

103. *Papasan*, 478 U.S. at 265.

104. *Id.* at 285.

105. *Lawrence*, 123 S. Ct. at 2484 ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

106. *Id.* at 2475.

107. *Id.* at 2476-77.

108. *Id.* at 2476.

109. *Id.*

110. *Id.*

111. *Id.*

homosexual activity without the intervention of the government.¹¹² In reaching this conclusion, the opinion rejected the assumptions on which the *Bowers* decision rested. The *Bowers* Court pointed to historical proscriptions against sodomy to find that sexual conduct between members of the same sex is not a right that is “deeply rooted in this Nation’s history and tradition,” and, therefore, is not fundamental.¹¹³ To the contrary, the *Lawrence* Court stated that there is no longstanding history in this country of laws directed against homosexual conduct as a distinct matter.¹¹⁴ According to the majority, state laws targeting same-sex couples do not possess “ancient roots.”¹¹⁵ In reality, no state singled out same-sex relations for criminal prosecution until the 1970s, and only nine states have ever done so.¹¹⁶ Furthermore, the majority criticized the *Bowers* Court’s reliance on the historical Judeo-Christian condemnation of homosexual practices.¹¹⁷

Significantly, *Lawrence* notes that “our laws and traditions in the past half century are of most relevance” in determining whether a right is fundamental.¹¹⁸ Accordingly, in the view of the Court, an examination of legislation and public attitudes during the most relevant time period reveals “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”¹¹⁹ The Court’s new willingness to look more searchingly into the nation’s recent past, as opposed to clinging to ideals that were predominant when the Constitution was drafted, suggests that additional fundamental rights might be recognized as the attitudes of the nation evolve over time. Indeed, it now appears that the Court may acknowledge fundamental rights that are “deeply rooted” in the United States’ history and tradition of the past half century.

The significance of the *Lawrence* decision stretches far beyond the new protections given to homosexuals. The decision reveals the Supreme Court’s new approach to fundamental rights analysis. In dissent, Justice Scalia correctly noted that the Court did not declare that homosexual sodomy is a fundamental right.¹²⁰ Hence, strict scrutiny was not

112. *Id.* at 2484.

113. *Bowers*, 478 U.S. at 192–94.

114. *Lawrence*, 123 S. Ct. at 2478. Early American sodomy laws were not directed at homosexuals, but instead sought to prohibit nonprocreative sexual activity regardless of the gender of those involved. *Id.* at 2479.

115. *Id.* at 2479.

116. *Id.*

117. *Id.* at 2480.

118. *Id.*

119. *Id.*

120. *Id.* at 2488 (Scalia, J., dissenting).

triggered. The Court instead applied a rational-basis test to strike down the Texas sodomy statute.¹²¹ Notwithstanding, the majority opinion represents a shift away from the slippery-slope concerns that were evident in *Bowers* and *Rodriguez*.¹²² According to the *Lawrence* majority:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. . . . As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.¹²³

As such, the *Lawrence* Court announced its current prerogative to interpret the Constitution and the Due Process Clauses more broadly in order to protect the liberties of the nation's citizens. A majority of the Court has now rejected the philosophy of *Bowers*,¹²⁴ which preached resistance to expanding the body of rights deemed to be fundamental.¹²⁵

The *Lawrence* decision demonstrates that the Supreme Court is open to the possibility of recognizing new fundamental rights when they are "deeply rooted" in the history and tradition of the past half century. The Court's attitude has clearly changed since it addressed the question of a fundamental right to education in *Rodriguez* and *Plyler*. Therefore, should the Court again be faced with the issue, it is now more likely that it will find that the right exists to some extent.

IV. CONSTITUTIONAL FOUNDATIONS FOR THE RECOGNITION OF THIS FUNDAMENTAL RIGHT

The Fourteenth Amendment, in part, prohibits the states from depriving "any person of life, liberty, or property, without due process of law."¹²⁶ Any examination of "fundamental rights under the Due Process Clause of the U.S. Constitution involves interpreting the word 'liberty.'"¹²⁷ Given the broader view of "liberty" expounded by the Supreme Court in *Lawrence v. Texas*,¹²⁸ there are two likely bases upon

121. *Id.* at 2484.

122. See *Rodriguez*, 411 U.S. at 37 (expressing concern that if a fundamental right to education were recognized, the Court may be compelled to recognize other significant personal interests, such as rights to decent food and shelter).

123. *Lawrence*, 123 S. Ct. at 2484 (emphasis omitted).

124. *Id.*

125. See *Bowers*, 478 U.S. at 194-95.

126. U.S. Const. amend. XIV.

127. Walsh, *supra* n. 27, at 285.

128. See *supra* Part III(B).

which the Court could find a fundamental right to a minimally adequate education. First, the Court could determine that this fundamental right is implicit in the other rights that are expressly protected by the Constitution or the Bill of Rights.¹²⁹ Second, the Court could find that a right to a minimally adequate education is “deeply rooted in this Nation’s history and tradition” such that “neither liberty nor justice would exist” if the right was not recognized.¹³⁰

A. *Penumbras and Emanations*

In *Griswold v. Connecticut*, the Supreme Court held that privacy is a fundamental right.¹³¹ Like the right to education, the right to privacy is not specified in the text of the Constitution. However, according to Justice Douglas’s majority opinion, “[s]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”¹³² The *Griswold* opinion declared that the explicitly protected rights of the First, Third, Fourth, Fifth, and Ninth Amendments implicitly formed the fundamental right of privacy.¹³³ Indeed, the Court found that “[t]he right of privacy is an ‘emanation’ from the specific guarantees of the Bill of Rights, which are incorporated into the ‘liberty’ of the Due Process Clause of the Fourteenth Amendment.”¹³⁴

The *Rodriguez* Court declined to apply *Griswold*’s reasoning to education, despite the argument that education is essential to the effective exercise of other constitutional rights, such as the right to free speech and the right to vote.¹³⁵ However, the theory that the right to education is implicit in other enumerated rights deserves further consideration. *Rodriguez* was a 5–4 decision that contained several strong dissenting opinions.¹³⁶ As such, the Court’s determination regarding the right to education, in the words of one scholar, “is not an impregnable fortress incapable of being successfully attacked.”¹³⁷ Moreover, shifts in the Supreme Court’s makeup and its attitude toward

129. See *infra* Part IV(A).

130. See *infra* Part IV(B). See also *Washington*, 521 U.S. at 720–21 (quoting *Moore*, 431 U.S. at 494).

131. 381 U.S. at 484–85.

132. *Id.* at 484.

133. *Id.* at 484–85. See also *Walsh*, *supra* n. 27, at 286.

134. Konvitz, *supra* n. 39, at 114; see *Griswold*, 381 U.S. at 484.

135. *Rodriguez*, 411 U.S. at 35–37.

136. Timothy D. Lynch, *Education as a Fundamental Right: Challenging the Supreme Court’s Jurisprudence*, 26 Hofstra L. Rev. 953, 992 (1998).

137. *Id.*

fundamental rights analysis could lead it to reverse *Rodriguez*.¹³⁸

The *Lawrence* decision evinces such a shift. With *Lawrence* the Court eliminated the slippery slope concerns that highlighted the *Rodriguez* Court's rejection of the *Griswold*-like argument that the right to education stems from other enumerated rights.¹³⁹ Hence, if the Court were presented with question of a fundamental right to a minimally adequate education today, the Court might be more likely to agree with Justice Marshall's dissent in *Rodriguez*. In *Rodriguez*, Marshall reasoned that "[a]s the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed . . . must be adjusted accordingly."¹⁴⁰

Several specific guarantees in the Bill of Rights require some amount of education before they can be effectively exercised.¹⁴¹ Hence, the Court may rely on *Griswold*'s "penumbras" doctrine to find a fundamental right to a minimally adequate education. Certainly, one could argue that some degree of education is a necessary prerequisite to the exercise of the right to speak and the right to vote.¹⁴² The right to speak may be considered meaningless unless the speaker is able to articulate his or her thoughts intelligently and persuasively.¹⁴³ Similarly, citizens cannot effectively utilize their right to vote if they do not possess some level of reading and reasoning skills.¹⁴⁴ In addition, the Fourth Amendment protects against unreasonable searches and seizures by requiring a warrant describing the place to be searched, and the persons or things to be seized.¹⁴⁵ Some degree of education is necessary for a citizen to determine whether a warrant is valid.¹⁴⁶ Likewise, some quantity of education is required to exercise the First Amendment right to "petition the Government for a redress of grievances."¹⁴⁷

In sum, *Griswold* provides a basis for the recognition of a fundamental right to a minimally adequate education. Although the

138. *See id.*

139. *Rodriguez*, 411 U.S. at 37.

140. *Id.* at 102-03 (Marshall, J., dissenting).

141. *See Walsh, supra* n. 27, at 286.

142. These arguments were rejected in *Rodriguez*. 411 U.S. at 35. However, as discussed, the Court might now take a different stance in the wake of the *Lawrence* decision.

143. *Id.* at 35.

144. *Id.* at 35-36. The Court has noted that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence." *Yoder*, 406 U.S. at 221.

145. U.S. Const. amend. IV.

146. *Walsh, supra* n. 27, at 286.

147. U.S. Const. amend. I. *See Walsh, supra* n. 27, at 286.

Rodriguez Court rejected the argument that certain enumerated rights form a fundamental right to education, the attitude of the current Court, as evidenced by its decision in *Lawrence*, suggests that it might, if asked, find that some amount of education is indeed deserving of fundamental rights protection in order to safeguard the exercise of specifically guaranteed rights.

B. Education is Deeply Rooted in The Nation's History and Tradition

The Court may also find a fundamental right to a minimally adequate education using a historical approach. Fundamental rights are those rights that are “‘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.’”¹⁴⁸ A brief look at the nation’s early history evinces the central role of education in the traditions of American society.¹⁴⁹ For example, some early seventeenth century colonies required local governments to establish schools that taught reading and writing.¹⁵⁰ By the eighteenth and nineteenth centuries, many colonial and state constitutions contained language guaranteeing a right to education for all children within a state.¹⁵¹ Shortly after Massachusetts established the first compulsory education system in 1837, most states followed Massachusetts’ lead and created similar systems.¹⁵²

Although evidence of the important role of education dates to pre-independence colonial times, the Supreme Court might still find that public education was not “deeply rooted” in our history and tradition when the Constitution was ratified. Despite the early origins of public education in America,¹⁵³ the public was largely unreceptive to involvement in education when the Constitution was signed.¹⁵⁴ Even as recently as 1910, only 6 percent of the nation’s population had completed high school.¹⁵⁵ Hence, the Founders’ silence regarding education, coupled with limited participation in available schooling, might indicate that the Founders did not consider education to be a guaranteed right of

148. *Washington*, 521 U.S. at 720–21 (internal citations omitted).

149. See *Dodd*, *supra* n. 31, at 863.

150. See *id.* (citing *Jenkins v. Andover*, 103 Mass. 94, 97 (1869) (explaining history and public utility of public schools)).

151. *Dodd*, *supra* n. 28, at 9.

152. *Id.*

153. See *Dodd*, *supra* n. 31, at 863.

154. See *Walsh*, *supra* n. 27, at 288.

155. *Dodd*, *supra* n. 28, at 9.

the people.¹⁵⁶ According to this line of reasoning, education, therefore, cannot be considered to be so “deeply rooted” as to be deemed fundamental.¹⁵⁷

Nonetheless, the *Lawrence* majority’s view of fundamental rights analysis indicates that the Court would be more likely to find education to be “deeply rooted,” and thus fundamental, if and when it addresses the issue again. As shown above, *Lawrence* indicates that the Court now believes that the nation’s “laws and traditions in the past half century are of most relevance” in determining whether a fundamental right exists.¹⁵⁸

It is clear that education has played a fundamental role in the lives of Americans over the past fifty years. In 1954, the *Brown* Court declared the importance of education to a democratic society,¹⁵⁹ writing: “[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”¹⁶⁰ In *Plyler*, the Court labeled education as playing “a fundamental role in maintaining the fabric of our society.”¹⁶¹ Even the *Rodriguez* decision noted the significance of education to society and the Court’s “historic dedication to education.”¹⁶² Additionally, in considering whether there is a fundamental right to education under their state constitutions, more than half of the forty-plus states that have addressed the issue have declared that such a right exists.¹⁶³ Hence, it is foreseeable that at some point in the future, a majority of states will have recognized a fundamental right to education under state law.¹⁶⁴ Such a development would demonstrate the important place of education in the United States and might influence the Supreme Court to recognize a federal fundamental right to education.¹⁶⁵

Most illuminating, however, is current statistical research showing that 87 percent of the nation’s children obtained a high school degree in 2000.¹⁶⁶ Notably, approximately 91 percent of eighth-grade children in

156. Walsh, *supra* n. 27, at 288.

157. *Id.* (“[O]ur early historical experience contravenes the notion of education as a fundamental right.”).

158. *Lawrence*, 123 S. Ct. at 2480.

159. 347 U.S. at 493.

160. *Id.*

161. 457 U.S. at 221.

162. 411 U.S. at 30.

163. Dodd, *supra* n. 31, at 866.

164. *Id.*

165. *Id.*

166. U.S. Dept. of Health and Human Services, *Trends in the Well-Being of America’s Children & Youth 2002* 325 <<http://aspe.os.dhhs.gov/hsp/02trends/EA1.pdf>> (accessed Jan. 22, 2004).

the United States attend a public, rather than a private, school.¹⁶⁷ As such, the dependence of schoolchildren on public education clearly demonstrates that the system of public education is now “deeply rooted” in this nation’s traditions and history and should be recognized as fundamental.¹⁶⁸

V. EXTRACURRICULAR ACTIVITIES ARE PART OF A MINIMALLY ADEQUATE EDUCATION

The Supreme Court’s decisions in *Vernonia* and *Earls* enable school districts to enact policies that interfere with schoolchildren’s access to extracurricular activities.¹⁶⁹ Such policies can have the result of depriving certain students of important educational opportunities.¹⁷⁰ Therefore, the scope of a fundamental right to a minimally adequate education should be broad enough to encompass extracurricular activities.¹⁷¹ The recognition of such a right would afford students protection from the types of policies that were upheld in *Vernonia* and *Earls*.¹⁷²

A. Defining the Right

Although the Supreme Court has left open the possible recognition of a fundamental right to a minimally adequate education,¹⁷³ it has said little to define the possible bounds of such a right.¹⁷⁴ It is clear, however, that extracurricular activities have a significant presence in the lives of schoolchildren across our nation. Approximately 99.8 percent of our nation’s high schools provide some type of extracurricular activity.¹⁷⁵ These offerings include participation in various school publications, performing arts, athletics, honor societies, student government, academic clubs, vocational clubs, service clubs, and hobby clubs.¹⁷⁶ About 80

167. Dodd, *supra* n. 28, at 10.

168. See Walsh, *supra* n. 27, at 292 (“[T]he value of public education in the minds of the American people has developed beyond what it was at the adoption of the Constitution. That value has now become so much a part of our historical experience that it should be considered a fundamental right.”).

169. See *supra* Part I.

170. See *id.*

171. See *infra* Part V(A).

172. See *infra* Part V(B).

173. See *supra* Part III(A).

174. Safier, *supra* n. 27, at 1009. Note, however, that the Court has indicated that “allegations of a funding disparity alone would not be sufficient to show educational inadequacy.” *Id.* (citing *Papasan*, 478 U.S. at 266).

175. *Extracurricular Participation*, *supra* n. 3.

176. *Id.*

percent of high school seniors participate in at least one of these activities.¹⁷⁷ According to the National Federation of High School Associations, “[s]tudents participating in a number of [extracurricular] activities not only achieve better academically but also express greater satisfaction with the total high school experience than students who do not participate.”¹⁷⁸ Indeed, “eliminating the opportunity for such participation eliminates the last link to fostering a sense of belonging to school that some students have.”¹⁷⁹ Hence, extracurricular activities should be encompassed within the fundamental right to a minimally adequate education if, and when, the Court recognizes this right.

State court decisions that consider educational adequacy may shed light upon the possible scope of a fundamental right to a minimally adequate education.¹⁸⁰ Unlike the U. S. Constitution, most state constitutions contain a clause pertaining to education.¹⁸¹ These education clauses vary in language from state to state.¹⁸² One of the most influential state court cases dealing with the interpretation of an education clause was decided by the Supreme Court of Kentucky in *Rose v. Council for Better Education*.¹⁸³ Regardless of the exact language of the state education clause in question, most state court adequacy decisions have taken the *Rose* interpretation into consideration when making their decisions.¹⁸⁴ The *Rose* Court defined the right to an adequate education as follows:

[A]n efficient system of education must have as its goal to provide each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make

177. *Id.*

178. *The Case for High School Activities*, *supra* n. 6.

179. John H. Holloway, *Extracurricular Activities: The Path to Academic Success?*, 57 *Educ. Leadership* 87, 88 (Dec. 1999) (citing Susan Gerber, *Extracurricular Activities and Academic Achievement*, 30 *J. Research & Dev. in Educ.* 42, 50 (Fall 1996)).

180. Safier, *supra* n. 27, at 1009.

181. Dodd, *supra* n. 28, at 121.

182. Erin E. Buzuvis, “A” for Effort: *Evaluating Recent State Education Reform in Response to Judicial Demands for Equity and Adequacy*, 86 *Cornell L. Rev.* 644, 654 (2001). More than half of the state education clauses mandate a threshold level of educational quality. Some clauses specifically identify subjects upon which the state’s education system should focus. Other state constitutions contain clauses emphasizing the purpose and importance of education. Finally, some constitutions include specific provisions for nondiscrimination, accessibility, and uniformity. *Id.*

183. *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989).

184. Buzuvis, *supra* n. 182, at 655; see also Kelly Thompson Cochran, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 *N.C. L. Rev.* 399, 413 (2000) (labeling the *Rose* interpretation of a minimally adequate education as “a prototype for other state courts around the country”).

informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.¹⁸⁵

The *Rose* decision outlined the goals of an adequate system of education. While most state courts that have addressed the issue have concluded that a state-based fundamental right to education does not encompass extracurricular activities,¹⁸⁶ it appears that those opportunities should fall within the protection of the minimal adequacy level defined in *Rose*. "Extracurricular activities provide a channel for reinforcing the lessons learned in the classroom, applying academic skills in a real-world context, and thus may be considered part of a well-rounded education."¹⁸⁷ For example, extracurricular activities foster the communication skills that enable students to function in our society by placing them in situations that enhance their social skills.¹⁸⁸

The *Rose* court declared that an adequate education should also prepare schoolchildren for advanced educational training and competition in the job market.¹⁸⁹ Indeed, extracurricular involvement is integral to those who wish to continue their academic training. A student's participation and success in extracurricular activities is an important factor in the admission process for most colleges and universities.¹⁹⁰ Furthermore, certain extracurricular activities, such as

185. *Rose*, 790 S.W.2d at 212.

186. *Dodd*, *supra* n. 28, at 251.

187. *Extracurricular Participation*, *supra* n. 3.

188. Exec. Procl. 5109, *supra* n. 1; *The Case for High School Activities*, *supra* n. 6; Holloway, *supra* n. 179.

189. 790 S.W.2d at 212; *see also* *Trinidad*, 963 P.2d at 1109 (noting that "the reality for many students who wish to pursue post-secondary educational training and/or professional vocations requiring experience garnered only by participating in extracurricular activities is that they must engage in such activities").

190. *See e.g. Harvard College Admissions*, FAQS, <http://www.admissions.college.harvard.edu/faqs/admissions/app_pols/> (accessed Jan. 13, 2004) (stating that "leadership and distinction in extracurricular activities" are part of Harvard's admissions criteria); *N.Y.U. Admissions*, <<http://admissions.nyu.edu/before/index.php>> (accessed Jan. 13, 2004) (stating that the New York University Admissions Committee considers extracurricular activities when reviewing application for admission); *U.C.L.A. Undergraduate Admissions and Relations with Schools*, *Freshman Admission Process* <http://www.admissions.ucla.edu/Prospect/Adm_fr/fradms.htm> (accessed Jan. 14, 2004).

Future Farmers of America, teach students vocational skills that they can use to enter the workforce directly after high school.¹⁹¹ In sum, extracurricular activities provide students with several of the educational opportunities that the *Rose* Court sought to protect, and thus should be included within this definition of a minimally adequate education.

While many state courts have used *Rose* as a guide to define the scope of an adequate education, some have taken a more conservative approach.¹⁹² For example, in *Abbeyville County School District v. State*,¹⁹³ the Supreme Court of South Carolina propounded a narrower definition of a minimally adequate education.¹⁹⁴ According to the *Abbeyville* court, an adequate education system provides students “with adequate and safe facilities and the opportunity to learn to read, write, and speak English, to acquire knowledge of mathematics, physical science, economic, social and political systems, history, governmental processes, and academic and vocational skills.”¹⁹⁵ Extracurricular activities would also fall within this more limited definition of a minimally adequate education because they teach academic and vocational skills that cannot be taught in the classroom.¹⁹⁶

Upon recognition of a fundamental right to a minimally adequate education, the federal judiciary will have to define its scope.¹⁹⁷ *Rose* and other state court cases, such as *Abbeyville*, can serve as a preliminary guide for the federal courts as to the goals the fundamental right should protect.¹⁹⁸ In addition, the Supreme Court has already demonstrated its view on the role of education. According to the Court, public schools are “the primary vehicle for transmitting ‘the values on which our society rests.’”¹⁹⁹ Furthermore, “some degree of education is necessary to

(stating that U.C.L.A. considers “exceptional achievement” in extracurricular activities when determining admissions); *Binghamton U. Freshmen Information* <<http://admissions.binghamton.edu/freshmen.html>> (accessed Jan. 25, 2004) (“[SUNY Binghamton’s] Undergraduate Admissions Committee evaluates each application for both academic and non-academic strengths [W]e look closely at a student’s extracurricular activities and community involvement, leadership abilities, intellectual curiosity, and the qualities that make each student unique.”).

191. National FFA Organization, *Mission Statement* <http://www.ffa.org/media/news/alger/downloads/ppt/student_parent-mac.ppt#2> (accessed Jan. 14, 2004) (“[Future Farmers of America] makes a positive difference in the lives of students by developing their potential for premier leadership, personal growth and career success through agricultural education.”).

192. Safier, *supra* n. 27, at 1014.

193. *Abbeyville County Sch. Dist. v. State*, 515 S.E.2d 535 (S.C. 1999).

194. See Safier, *supra* n. 27, at 1014; *Abbeyville*, 515 S.E.2d at 540.

195. Safier, *supra* n. 27, at 1014. (citing *Abbeyville*, 515 S.E.2d at 540).

196. See *supra* n. 184; *Rose*, 790 S.W.2d at 212; Exec. Procl. 5109, *supra* n. 1.

197. Safier, *supra* n. 27, at 1019.

198. *Id.*

199. *Plyler*, 457 U.S. at 221 (citing *Ambach v. Norwick*, 441 U.S. 68, 76 (1979)).

prepare citizens to participate effectively and intelligently in our open political system”²⁰⁰ The Court has also noted that “education provides the basic tools by which individuals may lead economically productive lives”²⁰¹ As such, the definition of a fundamental right to a minimally adequate education should provide schoolchildren with the assurance that they will receive a level of training necessary to achieve the goals of education previously expounded by the Supreme Court.

Further, extracurricular activities, which provide students with a myriad of benefits²⁰² and are inherently educational,²⁰³ should be encompassed within the right. Such activities are crucial, both to students who enter the workforce directly after high school and to those who move on to college. Indeed, these activities teach social and vocational skills that are crucial to future economic success and enjoyment in life.²⁰⁴

Finally, it should be noted that there appears to be support on the bench to include extracurricular activities within the definition of a fundamental right to a minimally adequate education. Justice Ginsburg stated in her *Earls* dissent that “[p]articipation in [extracurricular activities] is a key component of school life, essential in reality for students applying to college, and, for all participants, a significant contributor to the breadth and quality of the educational experience.”²⁰⁵ As such, the fundamental right to a minimally adequate education, when and if adopted by the Court, should include within its scope the opportunity to participate in extracurricular activities.

B. Greater Protection for the Nation’s Schoolchildren

The recognition of a fundamental right to a minimally adequate education that encompasses extracurricular activities will protect schoolchildren from the type of state policies that were upheld by the Supreme Court in *Vernonia* and *Earls*. Indeed, a school district would not be able to implement a drug-testing regime that has the ultimate effect of depriving students of the opportunity to participate in extracurricular activities. If a district enacted such a policy, a student would be able to bring a substantive due process challenge in federal

200. *Yoder*, 406 U.S. at 221.

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

202. See *supra* Part I.

203. *The Case for High School Activities*, *supra* n. 6.

204. Exec. Procl. 5109, *supra* n. 1.

205. *Earls*, 536 U.S. at 845 (Ginsburg, J., dissenting); see also *Harvard College Admissions*, *supra* n. 190; *N.Y.U. Admissions*, *supra* n. 190; *U.C.L.A. Undergraduate Admissions and Relations with Schools*, *supra* n. 190; *Binghamton U. Freshmen Information*, *supra* n. 190.

court to strike down the regulation.

If a state regulation interferes with a fundamental right, the courts must apply "strict scrutiny" to determine the constitutionality of the law.²⁰⁶ Under such review, the state must show that the law was justified by a compelling state interest and that the means employed by the state were necessary to achieve the compelling state objective.²⁰⁷ The drug-testing policies in *Vernonia* and *Earls* would have failed to meet this burden if the Court had previously recognized a fundamental right to a minimally adequate education that encompassed extracurricular activities. The policy would be struck down because there are several means of reducing drug use among schoolchildren that are less burdensome to the fundamental right.²⁰⁸

Drug policies like those in *Earls* and *Vernonia* should pass the first prong of "strict scrutiny" analysis because a state's interest in deterring drug use by schoolchildren may be fairly characterized as a compelling state interest.²⁰⁹ Such policies, however, are unacceptable under the second prong of judicial inquiry. While a school district's interest in deterring drug use may be considered compelling, a suspicionless drug-testing regime that has the effect of turning away students, whether or not they use drugs, is not the least intrusive means of achieving its desired end.²¹⁰

In fact, such testing may actually undermine a district's effort to combat student drug use. Empirical studies reveal that those who are not involved in extracurricular activities are 49 percent more likely to have used drugs than those who are involved.²¹¹ Thus, a school district seeking to decrease drug use among its students should be promoting student participation in extracurricular activities, not restricting access to them.

There would be several ways to deter student drug use without infringing on a fundamental right to education. A school district, for example, could make an increased effort to encourage extracurricular involvement while implementing a drug education/prevention program.²¹² Extracurricular activities offer students a wide array of

206. See *Rodriguez*, 411 U.S. at 17-19.

207. *Id.*

208. See *Dunn*, 405 U.S. at 343 ("[I]f there are other, reasonable ways to achieve [the compelling state interest] with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'") (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)).

209. See *Vernonia*, 515 U.S. at 661.

210. The *Earls* majority acknowledged that there was not a tight fit between testing students in extracurricular activities and solving the school's drug problems. 536 U.S. at 837-38.

211. Zill, *supra* n. 4.

212. There are additional alternatives, although some can be controversial, that can reduce

benefits,²¹³ including decreasing the likelihood that participants will use drugs.²¹⁴ As such, a school district should be promoting student participation in extracurricular activities instead of restricting access to them. A district might choose to offer a broader range of activities to appeal to more students. In addition, a district might encourage participation by holding award ceremonies to honor those who excel in each activity offered.

A school district also has the option of infusing a drug prevention program into its curriculum. One effective plan is Project Alert, which focuses on preventing the use of alcohol, tobacco, and marijuana among middle school students.²¹⁵ The program curriculum seeks to modify norms about drug use, give students reasons not to use drugs, and teach students to build resistance skills.²¹⁶ Students receiving the Project Alert curriculum are 30 percent less likely to start using marijuana.²¹⁷ A drug prevention program like Project Alert offers a less burdensome alternative to mandatory drug testing to districts seeking to address substance abuse among their students. By implementing this method, schools would be combating drug use through education, rather than attempting to achieve that same goal by erecting barriers to student development.

In sum, if the Supreme Court recognizes a federal fundamental right to a minimally adequate education that includes extracurricular activities, schoolchildren will have an effective means to challenge school policies that interfere with that right regardless of the state in which they attend school. While deterring drug use is a noble and compelling cause, a school district that wishes to do so must not unnecessarily infringe upon students' protected rights to a minimally adequate education.

drug use among schoolchildren without infringing upon a child's right to a minimally adequate education. See Cal. Dept. of J., *Creating a Drug Free Zone* <<http://www.stopdrugs.org/drugfreezone.html>> (accessed Sept. 8, 2003) (discussing what drug free school zones are, why there should be such zones, and strategies for starting them); Libertarian Party, *Should We Re-Legalize Drugs?* <<http://www.lp.org/issues/relegalize.html>> (accessed Jan. 14, 2004) (discussing how drug laws increase crime, make civil liberties suffer, and create a black market where organized crime prospers).

213. See *supra* Part I.

214. Zill, *supra* n. 4.

215. See generally Project Alert: Substance Abuse Prevention that Works! <<http://www.projectalert.best.org>> (accessed Sept. 8, 2003). A plan known as Alert Plus is currently being developed for use in high schools. RAND Health, *Research Highlights: Helping Adolescents Resist Drugs* <<http://www.rand.org/publications/RB/RB4518.1/>> (accessed Jan. 14, 2004).

216. RAND Health, *supra* n. 215.

217. See *id.* Project Alert Brochure <<http://www.projectalert.best.org/pdfs/overview.pdf>> (accessed Jan. 15, 2004). The Project Alert curriculum also decreases marijuana use among those who have starting using by 60 percent. *Id.*

VI. CONCLUSION

Extracurricular activities provide students with countless benefits,²¹⁸ yet a disturbing line of Supreme Court cases has allowed schools to restrict certain students' access to these vital educational opportunities.²¹⁹ Even so, the Court has specifically left open the question of whether there is some level of education that is protected by the Constitution.²²⁰ In *Lawrence v. Texas*, the Court exhibited a new willingness to broaden the liberties deemed fundamental under the Due Process Clause.²²¹ The right to a minimally adequate education should be deemed fundamental for two reasons. First, a fundamental right to education is implicit in several rights that are enumerated in the Constitution.²²² Second, the right may be considered "deeply rooted in this Nation's history and tradition."²²³ The *Lawrence* decision shows that the Court is now more likely to recognize a fundamental right to a minimally adequate education. This right should encompass extracurricular activities, which play a significant role in a student's education.²²⁴ If this fundamental right were recognized, policies such as those in *Earls* and *Vernonia* could be declared unconstitutional under a substantive due process challenge because such policies unnecessarily interfere with a student's fundamental right to a minimally adequate education.²²⁵

Now is the time for the Supreme Court to recognize a fundamental right to a minimally adequate education so that the education of children in this country will be protected from the intrusions sanctioned and made possible by the *Vernonia* and *Earls* decisions.

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218. See *supra* Part I.

219. *Id.*

220. See *supra* Part III(A).

221. See *supra* Part III(B).

222. See *supra* Part IV(A).

223. See *supra* Part IV(B).

224. See *supra* Part V(A).

225. See *supra* Part V(B).

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