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# SHOULD PUBLIC EDUCATION BE A FEDERAL FUNDAMENTAL RIGHT?

## I. INTRODUCTION

Education is not a commodity the State provides. Strictly speaking, education of one sort or another will happen, with or without any adult involvement, and in many ways and places having nothing to do with formal schooling. The subjects traditionally viewed as necessary to successful intellectual development (e.g. the three R's, history, science, the arts, etc.) can be considered boring by young humans (and some adults) and require discipline to learn, so we create schools where these elements of education are taught in an organized and measurable curriculum. This kind of formal education provides individuals intellectual development and the chance for future economic opportunity, thus fostering societal stability.<sup>1</sup> The State's concern is that the education, which inevitably happens, be of such a quality as to create responsible citizens. Therefore, the State provides resources in the form of money, facilities, teachers, regulations, etc., designed to ensure this result. These governmental provisions constitute public education.

But is it only governmental self-interest that motivates the existence of public education? Or is public education a right belonging to citizens who may demand it of the government? Is it a "fundamental right" such that it should be supervised and administered by state and federal courts? About twenty years ago the U.S. Supreme Court in *San Antonio Independent School District v. Rodriguez*<sup>2</sup> refused to recognize a fundamental federal right to public education.<sup>3</sup> Until recently the point seemed closed. However, the Court's recent approach to rights in *Lawrence v. Texas*<sup>4</sup> may re-open the debate on the federal level.<sup>5</sup> State courts historically have followed a more flexible approach, often finding a

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1. See Thomas J. Walsh, *Education as a Fundamental Right under the United States Constitution*, 29 Willamette L. Rev. 279 (1993).

2. 411 U.S. 1 (1973).

3. *Id.* at 2.

4. 539 U.S. 558 (2003).

5. *Id.* at 578-79 (For a discussion of the fundamentality of implicit constitutional rights using the autonomy approach see *infra* Section II(C)(i), notes 31-38).

fundamental right to public education under state constitutions.<sup>6</sup>

Both the federal and the state approaches have problems: the hands-off approach of the federal courts may seem to devalue education, while the hands-on approaches of the states may involve too much judicial intervention, thus enmeshing the state judiciaries in questions of educational and social policy they are not well suited to decide. Much of this judicial wrangling over the definition or existence of a fundamental right to education deflects attention from the practical concern, i.e. whether the federal government or the state governments should fund, provide, and superintend public education. After examining the varying approaches to this question, this paper concludes that the best approach, considering federalism issues, the competencies of the judiciary, and an appropriate emphasis on the importance of education, is for the federal judiciary to find that there is a right to some basic level of education, and for the states to determine and enforce this level.

Section II of this paper discusses definitions of “public education” and “rights,” and the basic outlines of constitutional analysis surrounding these issues. Section III discusses the early development of U.S. public education and how federal courts have dealt with questions regarding a right to education, and Section IV outlines the state court approaches after *Rodriguez*. Finally, Section V outlines the possibilities for a constitutional basis for a federal right to education, in light of the practical questions of which level of government is best suited to make educational policy decisions, provide educational resources, and otherwise supervise public education.

## II. BASIC DEFINITIONS AND BASIC CONSTITUTIONAL ANALYSIS

“Public education” and “fundamental rights” must be clearly defined when discussing whether public education is a federal fundamental or constitutional right. The dictionary provides some definitions for these terms, but they have become terms of art that only tangentially relate to their everyday meaning. The characterization and definitions of these rights become critical in constitutional analysis.<sup>7</sup> Though all men are created equal, not all rights are; only fundamental rights are afforded the greatest of constitutional protections. There are two general approaches to determine if a right in question is fundamental. The first emphasizes the experience of history and tradition, while the second emphasizes the

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6. See *infra* Section IV.

7. See *infra* Section II(B), (C)(i) (discussing constitutional analysis of fundamental rights).

importance of individual autonomy.<sup>8</sup>

### A. Public Education

The traditional American definition of public education is three-fold: (1) the government provides an education (2) free to the pupils and (3) funded through public money.<sup>9</sup> Generally, such public funds come from local property taxes as well as state and federal tax revenues.<sup>10</sup> These funding issues are the basis of the equal protection litigation in which the issue of education as a fundamental interest arises.<sup>11</sup>

The State is not the only provider of education. Private, parochial and home schools fulfill individual and societal educational needs. There are also other funding structures, such as charter schools or voucher systems, which blend the natures of public and private education.<sup>12</sup> While recognizing the positive addition these venues provide to the fabric of the U.S. educational landscape, this paper focuses solely on whether creating or defining a federal fundamental right to education is proper. In particular, the focus is whether U.S. citizens have the right to demand a free education, thereby putting the federal government under a duty to provide such.

### B. Fundamental Rights

A right is something “which is proper under law, morality, or ethics [and] . . . that is due to a person by just claim, legal guarantee, or moral principle.”<sup>13</sup> There are several different theories of rights, including natural law, positivism, and fundamental rights theories. Each theory emphasizes differences in the sources and effects of rights.

Natural law and positivism are a dichotomous pair in rights theory. According to the natural law view, rights and laws derive from the nature of the universe and exist independently of our knowledge of them. We discover what these rights are through correct reasoning. Natural law theory is closely tied to morality. For example, if a law exists which

8. See *infra* Section II(C)(i) (discussing history and autonomy approaches in determining fundamental rights).

9. See Stephen R. Goldstein, E. Gordon Gee & Phillip T.K. Daniel, *Law and Public Education*, 15 (3d ed., Michie L. Publishers 1995).

10. Joseph S. Patt, *School Finance Battles: Survey Says? It's All Just a Change in Attitudes*, 34 *Harv. Civ. Rights-Civ. Libs. L. Rev.* 547, 551 (1999).

11. *Id.* at 547–48.

12. See Phillip E. Johnson, *School Vouchers and the United States Constitution*, in *The School-Choice Controversy: What is Constitutional*, 51, 51–65 (James W. Skillen ed., Baker Books 1993) (discussing the constitutionality of voucher systems).

13. *Black's Law Dictionary* 1322 (Bryan A. Garner ed., 7th ed., West 1999).

violates the natural law then it is a wrong law, though it may still be legal. A natural right is an ability to act in a particular area. This ability to act is inherent in the individual regardless of what anyone else says or does. Government is in violation of natural law when it restricts its citizens' abilities to act in these areas. Natural rights are not entitlements that require government action in order to be realized; rather, the citizens are the primary actors and government is to refrain from acting as much as possible.

The Constitution was written in a time when natural law theories were dominant, and so the rights enumerated in the Constitution are classic examples of natural rights. At that time, government was viewed as an oppressor. After all, the Colonies had recently rebelled against the "lawful" government of the British Crown. The Constitution and the Bill of Rights were therefore set up to divide and limit government power to allow people enjoyment of their inalienable rights to life, liberty and property. Other natural rights include free speech, free exercise of religion, protection from unreasonable searches and seizures, protection from self-incrimination, and protection from the government taking property without just compensation. The rights enumerated in the Constitution are not entitlements provided by the government as much as descriptions of the way things ought to be.

In contrast, positive law theory declares that laws and rights are creations of the government, and come from nowhere else. Without government action, there is no law or right.<sup>14</sup> Law is a creation of man. This theory is therefore somewhat divorced from moral considerations, inasmuch as when the government does create a law, its morality or immorality does not affect its status as a law.<sup>15</sup> The decision-making power and the corresponding ability to act lie with the government, not the citizen; the government permits or mandates the citizens to act.

Under the positivist view of the Constitution, the government is not an oppressor, but the provider. The government creates and enforces laws and rights that regulate humans so that there is order or happiness or justice. These views are generally tied to utilitarian and pragmatic principles. Positive rights are those rights that entitle "a person to have another [i.e. the government] do some act for the benefit of the person entitled."<sup>16</sup> Examples of positive rights include welfare rights, social security rights, and educational rights.

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14. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593, 596 (1958).

15. *Id.*

16. *Black's Law Dictionary*, *supra* n. 13, at 1323.

C. *Fundamental Rights and Constitutional Analysis under the Fourteenth Amendment*

I. *History v. Autonomy*

The reason we care whether a right, natural or positive in nature, is also a “fundamental” right is because a “fundamental” right is afforded great Constitutional protection under the Fourteenth Amendment Due Process and Equal Protection Clauses. Fundamental rights analysis is the primary means courts use to determine the meaning of the word “liberty” in the Fourteenth Amendment.<sup>17</sup> A fundamental right can be found either explicitly or implicitly in the Constitution. The classic fundamental rights include those natural rights enumerated in the Constitution, including the right to vote. Other fundamental rights, not enumerated but considered implicit in the Constitution, include the right to travel,<sup>18</sup> the right to direct your child’s upbringing,<sup>19</sup> the right to marry<sup>20</sup> and an expanding right to privacy,<sup>21</sup> which includes the right to bodily integrity.<sup>22</sup> There are two chief methods of determining if an implicit right in question is fundamental. The first is an historical approach, analyzing the history and tradition behind the exercise and effect of the right. The second approach is a more open autonomy approach exemplified by decisions like *Griswold*<sup>23</sup> and, more recently, *Lawrence*.<sup>24</sup> Here the analysis focuses on the importance of the right to the individual.<sup>25</sup>

Under the first approach, the fundamentality analysis focuses on history and tradition. The word “fundamental” does not carry the dictionary definition, but is a term of art. “Fundamental” does not mean important, basic or necessary.<sup>26</sup> Most rights deemed fundamental are usually also important, basic and necessary. However, being important,

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17. The relevant wording of the Fourteenth Amendment is “No State shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.

18. *Saenz v. Roe*, 526 U.S. 489, 498 (1999).

19. *Meyer v. Neb.*, 262 U.S. 390, 399 (1923), *overruled in part on other grounds*, *Abbott v. Bragdon*, 912 F. Supp. 580, 594–595 (D. Me. 1995).

20. *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978); *Loving v. Va.*, 388 U.S. 1, 12 (1967).

21. *Griswold v. Conn.*, 381 U.S. 479, 485 (1965).

22. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 847, 851 (1992).

23. *Griswold*, 381 U.S. at 484. Discussed *infra* this section, note 32.

24. *Lawrence*, 539 U.S. at 578–79. Discussed *infra* this section, notes 36, 38.

25. *Infra* notes 31–38 and accompanying text.

26. *Rodriguez*, 411 U.S. at 30.

basic or necessary does not automatically mean a right is fundamental.<sup>27</sup> For example, food is a critical necessity, but there is no positive right that requires the government to provide food for all citizens.

A fundamental right is primarily a right which is “deeply rooted in this Nation’s history and tradition,”<sup>28</sup> and is part of “the very essence of a scheme of ordered liberty . . . which lie[s] at the base of all of our civil and political institutions.”<sup>29</sup> The Supreme Court has also required the right in question to have been protected.<sup>30</sup> For example, being “long recognized at common law”<sup>31</sup> is one way to show that the right is necessary to a just government. Fundamental rights thus appeal to natural law concepts of the way things ought to be, while at the same time, by considering history and tradition, pay deference to the positive law aspects of that history and tradition.

The second approach to determining the fundamentality of implicit constitutional rights involves an inquiry into the importance of the right to the autonomy of the individual. In *Griswold*, the U.S. Supreme Court determined that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance . . . creat[ing] zones of privacy.”<sup>32</sup> In other words, the explicit guarantees of the Constitution outline the general concepts of the rights to be protected, and the prime right not explicitly enumerated but which can be reasonably inferred is the right to privacy, or the right to the autonomy of the individual. This reasoning was further expanded in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>33</sup> where the Court stated, “It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.”<sup>34</sup> The Court also stated, “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>35</sup> The Court explicitly relied on this type of

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27. *Id.* at 33 (“[T]he central importance of welfare benefits to the poor was not an adequate foundation for requiring the State to justify its law by showing some compelling state interest.”).

28. *Wash. v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality)). See also *Reno v. Flores*, 507 U.S. 292, 303 (1993) (Fundamental liberty interests must be “so rooted in the traditions and conscience of our people as to be ranked as fundamental.” (internal quotations marks and citations omitted)).

29. *Palko v. Conn.*, 302 U.S. 319, 325, 328 (1937) (internal quotation marks and citations omitted), *overruled on other grounds*, *Benton v. Md.*, 395 U.S. 784, 794 (1969).

30. *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989).

31. *Meyer*, 262 U.S. at 399.

32. 381 U.S. at 484.

33. 505 U.S. 833.

34. *Id.* at 847.

35. *Id.* at 851.

reasoning when invalidating Texas's law against homosexual sodomy in *Lawrence*:

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. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.<sup>36</sup>

This sort of analysis protects constitutional liberties that are important to the individual determination of freedom. This current approach is more flexible in determining what a fundamental right is. History may provide a context, but the most relevant context is the present.<sup>37</sup> In fact, the Court specifically rejected a historical approach in *Lawrence*, stating that the “laws and traditions in the past half century are most relevant”<sup>38</sup> in determining the nature of a fundamental right.

## 2. *Flexibility v. Stability*

There is particular difficulty when the judiciary interprets social issues involving important rights that are determined to be fundamental. Important social issues tempt justices to base decisions on extra-constitutional considerations, inviting unpredictable interpretations of the defining document of our nation. The Court gets involved in enacting “Herbert Spencer’s Social Sta[tis]tics.”<sup>39</sup> Constitutional interpretation becomes unpredictable and almost legislative.<sup>40</sup> Worse, if the Court gets it wrong, the only way to fix it is with a Constitutional amendment or by the infrequent occurrence of the Court overruling itself.

36. *Lawrence*, 539 U.S. at 578–579.

37. *Id.* at 571–72.

38. *Id.*

39. *Lochner v. N.Y.*, 198 U.S. 45, 75 (1905). (Holmes, J., dissenting), overruled, *Honeywell, Inc. v. Minn. Life & Health Ins. Guaranty Assn.*, 110 F.3d 547, 554 (8th Cir. 1997) (“Cases of that era frequently invalidated statutes that limited economic autonomy in a manner thought by the Court to be unnecessary or unwise, but in more recent decisions, the Court plainly sees its role differently.”); and overruled, *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (“The doctrine that prevailed in *Lochner* . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded.”). *But see Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 846–47 (1992) (The Court states that the “privacy” and “liberty” analyses are the substantive due process analysis purportedly discarded by *Ferguson*.)

40. *Honeywell*, 110 F.3d at 554 (“We do not sit as a super legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare.” (quoting *Day-Brite Lighting, Inc. v. Mo.*, 342 U.S. 421, 423, (1952))).

The Constitution should be a predictable guide for government action. The definition of the various constitutional rights becomes significant in determining the stability of constitutional interpretation over time. Courts can act with confidence in areas that have been well trod. But the newer, less well-defined aspects of a case presented to a court should invite caution in judicial action. It takes time and experimentation to see how certain rights affect political, social, economic, familial, individual and legal aspects of society.

Thus, there is an ongoing tension between the need for constitutional stability on one hand and flexibility on the other. An easily amended constitution becomes unpredictable and loses the authority of history and tradition. Rather than being something by which to measure state action, a too-malleable constitution makes state action a high-stakes gamble. Consequently, to protect the stability and integrity of the Constitution, the amending procedures built into it are extremely difficult and make it unlikely for any amendment to pass. On the other hand, a constitution should not be a straightjacket, imprisoning the future with restrictions from the past. It should be flexible and adaptable to the times.

This difficult balancing act of stability and flexibility was demonstrated in *Harper v. Virginia Board of Elections*.<sup>41</sup> At one point Justice Douglas stated, "In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights."<sup>42</sup> This statement implies that the requirements of both due process and equal protection will change over time. On the next page Justice Douglas declared that the Court's conclusion "is founded not on what we think governmental policy should be, but on what the Equal Protection Clause requires."<sup>43</sup> This implies a built-in stability to the interpretation of the Equal Protection Clause. But if the Court is the only determiner of the changing meaning of the Equal Protection Clause, how can any interpretation be based on anything other than what the Court thinks governmental policy should be?

In his dissent, Justice Harlan pointed out the unsuitability of too

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41. 383 U.S. 663 (1966). *Harper* forms part of the background for subsequent federal and state educational funding cases. *Serrano v. Priest*, 487 P.2d 1241, 1250 (Cal. 1971), *superseded on other grounds*, *Crawford v. Huntington Beach Union High Sch. Dist.*, 121 Cal. Rptr. 2d 487 P.2d at 1249 (App. 4th Dist. 2002); *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 282-83 (W.D. Tex. 1971) [hereinafter *Rodriguez II*].

42. *Harper*, 383 U.S. at 669.

43. *Id.* at 670.

much judicial flexibility in constitutional analysis:

It is of course entirely fitting that legislatures should modify the law to reflect such changes in popular attitudes. However, it is all wrong, in my view, for the Court to adopt the political doctrines popularly accepted at a particular moment of our history and to declare all others to be irrational and invidious, barring them from the range of choice by reasonably minded people acting through the political process.<sup>44</sup>

Political processes are better fitted to determine issues upon which reasonable people can reasonably disagree. If an outcome is inadequate, a majority of the people can change the outcome to better fit the needs of the time; the issue is not elevated to the level of constitutional debate, and yet it is satisfactorily handled. On the other hand, if the Supreme Court makes a determination of such a highly debatable issue on ostensibly constitutional principles, the outcome of which is insufficient, unless the justices overturn themselves, only a supermajority of the people, through a constitutional amendment, can remedy the situation.<sup>45</sup>

### 3. *Levels of Constitutional Analysis*

Because of the need to limit judges and send questions of legislative importance to the political branches, courts have generally required a showing that a right is fundamental, or that a suspect classification is being used, before strictly scrutinizing a governmental action. Rights that are not fundamental are subject to a lesser standard of scrutiny. The idea behind these differing levels of scrutiny is that the judiciary should involve itself only in matters where the individual right is such that it would be a grave injustice for the majoritarian process to violate that right.<sup>46</sup> If the right is fundamental, it is critical that the courts be able to counter the will of the majority to protect the individual. Strict scrutiny is also applied if the government uses a suspect classification, such as race or gender.<sup>47</sup>

Strict scrutiny requires that the regulation in question have a compelling governmental interest as its end goal, and that the means

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44. *Id.* at 686 (Harlan & Stewart, JJ., dissenting).

45. *Marbury v. Madison*, 5 U.S. 133, 178 (1803) ("So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.")

46. *Mugler v. Kan.*, 123 U.S. 623, 622 (1887).

47. See *Strauder v. W. Va.*, 100 U.S. 303, 307 (1879); *Reed v. Reed*, 404 U.S. 71, 75 (1971).

used to achieve that end are narrowly tailored to accomplish it.<sup>48</sup> Narrow tailoring means that the methods used must be necessary to the accomplishment of the objective and there must not be any less restrictive means possible to attain the end.<sup>49</sup> In other words, there must be a tight fit between the means and the end. The government carries a substantial burden in proving a tight fit between the means and the end. In practice, the “necessary” prong of the strict scrutiny analysis can kill almost any regulation because there are very few things that are absolutely necessary to accomplish any goal.<sup>50</sup> There is always more than one way to skin a cat. Thus, strict scrutiny is frequently lethal to a governmental regulation.

Rational basis scrutiny, on the other hand, only requires that the regulation be in furtherance of a legitimate, as opposed to compelling, state interest, and that the means used are rationally related to the end sought.<sup>51</sup> These two requirements are relatively easy for the government to satisfy. Generally, if a regulation of a right is subject to rational basis scrutiny, in all likelihood the regulation will survive. The person challenging the governmental action carries the burden of disproving the rationality of the action.<sup>52</sup>

The consequence of identifying public education as a constitutionally protected fundamental right is that any regulation of public education would be subject to strict judicial scrutiny. The government, on both state and federal levels, would be required each time to show that every action taken regarding public education is necessary to accomplish the goal of education. This leads to competing difficulties. First, it would require the federal government to provide for and finance public education, leading to many economic and social repercussions. Second, combining the amorphous process of education with the stringent requirements of strict scrutiny could hamstring the government’s ability

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48. See e.g. *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (“Accordingly, we have held that the Fourteenth Amendment requires state legislation that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling governmental interest.”).

49. *Wash. v. Glucksberg*, 521 U.S. at 721.

50. Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: a Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972) (“The Warren Court embraced a rigid two-tiered attitude. . . . [Strict scrutiny] was ‘strict’ in theory and fatal in fact.”).

51. See e.g. *Plyler v. Doe*, 457 U.S. 202, 224 (1982) (“[T]he . . . [statute] can hardly be considered rational unless it furthers some substantial goal of the State.”).

52. This description of a two-tiered system of judicial scrutiny oversimplifies the current Supreme Court jurisprudence. In certain areas, such as gender discrimination, age discrimination and sexual orientation, the Court does not adhere clearly to one standard or the other. Rather it applies some form of mid-tier scrutiny.

See e.g. Norman T. Deutsch, *Nguyen v. INS and the Application of Intermediate Scrutiny to Gender Classifications: Theory, Practice, and Reality*, 30 Pepp. L. Rev. 185, 186 (2003).

to provide education, and convert the judiciary into school administrators.

### III. EARLY DEVELOPMENT OF PUBLIC EDUCATION AND THE FEDERAL TREATMENT OF EDUCATIONAL RIGHTS

From the beginning, America's leaders have stressed education's importance. Thomas Jefferson drafted a plan by which the poor in Virginia could receive the benefits of education. He stated,

Every government degenerates when trusted to the rulers of the people alone. The people themselves therefore are its only safe depositories. And to render even them safe, their minds must be improved to a certain degree. This indeed is not all that is necessary, though it be essentially necessary. An amendment of our [state] constitution must here come in aid of the public education.<sup>53</sup>

The purpose behind the schooling was to protect democratic government. Jefferson also envisioned public education as a means of socio-economic redistribution, benefiting not just the nation's political health but also its social and economic aspects, as well as a means for providing for individual improvement.<sup>54</sup>

However, the federal government felt no compulsion to mandate education, and though state constitutions contained clauses requiring education for children, compulsory attendance was not a law.<sup>55</sup> In 1852, Massachusetts was the first state to pass compulsory school attendance laws.<sup>56</sup> Families were primarily responsible for the education of their children. Families with sufficient resources would send their children to private schools or tutor them at home.<sup>57</sup> Poor families could send their children to government-sponsored schools, but attendance was not mandatory.<sup>58</sup> In other words, decision-making power concerning a child's education rested with the family. This concept is behind the holdings in *Meyer v. Nebraska*<sup>59</sup> and *Pierce v. Society of Sisters*.<sup>60</sup> However, as compulsory school attendance laws became universal,

53. Thomas Jefferson, *The Works of Thomas Jefferson* vol. 4, 64 (Paul Leicester Ford, ed., fed. ed., G.P. Putnam's Sons 1904)).

54. *Id.*; Goldstein, *supra* n. 9 at 8.

55. Mark J. Yudof et al., *Educational Policy and the Law* 1 (4th ed., West 2002).

56. Daniel J. Rose, *Compulsory Education and Parent Rights: A Judicial Framework of Analysis*, 30 B.C. L. Rev. 861, 868 (1989).

57. Yudof, *supra* n. 55, at 2.

58. *Id.* at 1.

59. *Meyer*, 262 U.S. at 401. Discussed *infra*, this section, notes 75–78.

60. 268 U.S. 510, 532 (1925). Discussed *infra* this section, notes 80–85.

making education look more like a positive right, the decision-making power shifted. For example, the presumption in *Wisconsin v. Yoder*<sup>61</sup> was enough against the parents' right to choose their child's education that the holding had to be extremely narrow to apply practically only to the Amish.<sup>62</sup>

This concept of publicly funded compulsory education is relatively new—approximately one hundred years old.<sup>63</sup> During the entire course of this history, the states, and more precisely, the local school districts, have been primarily responsible for funding education. States have also been primarily responsible for making educational policy decisions. Because of the newness of compulsory education and because of the traditional competency of the states in handling education, it would be a departure from historical analysis for a court to declare a *federal* fundamental right to education.

Until recently, Congress has had little or nothing to do with the vast majority of educational issues. This is largely due to constitutional restrictions on the federal government's ability to act. The federal government cannot act without authority explicitly granted to it by the Constitution, and nothing in the Constitution explicitly delegates educational authority to the federal government.

However, Congress is no stranger to educational policy issues and such previous involvement may justify the creation of a federal right to public education. Congress has shaped public education through the authority of other provisions of the Constitution, such as the Spending Clause<sup>64</sup> and the Commerce Clause.<sup>65</sup> One hefty federal educational directive is the Individuals with Disabilities Education Act (IDEA).<sup>66</sup> Congress mandated significant state action to equalize educational

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61. 406 U.S. 205 (1972).

62. Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. Chi. L. Rev. 937, 992–93 (1996).

63. Rose, *supra* n. 56, at 868. It was not until 1983 that all fifty states and the District of Columbia had compulsory education laws. *Id.*

64. Susan H. Bitensky, *Theoretical Foundations for a Right to Education under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 Nw. U. L. Rev. 550, 631 (1992).

65. However, Congress's ability to use the commerce clause as a means to regulate public schools was effectively halted by *U.S. v. Lopez*, where the link between interstate commerce and gun control at schools was too attenuated to allow Congress to pass a Gun-Free School Zones Act. 514 U.S. 549, 567–68 (1995), *superseded*, *U. S. v. Tucker*, 90 F.3d 1135, 1140 (6th Cir. 1996) (“The [Lopez] Court’s decision also relied on the absence of a jurisdictional element in the statute and the lack of relevant congressional findings. While *Lopez* was pending review in the Supreme Court, Congress amended [the statute] to include such findings.” (internal footnotes omitted)).

66. 20 U.S.C. §§ 1400 et seq. (2000).

opportunity for the disabled.<sup>67</sup> This action was done under the authority of the Spending Clause,<sup>68</sup> yet is largely unfunded.<sup>69</sup> The IDEA creates a positive federal fundamental right to public education, but only for those who are disabled. Other examples of federal intervention in state public education include desegregation requirements,<sup>70</sup> and First Amendment requirements of free speech, and free exercise and non-establishment of religion.<sup>71</sup> Currently, the federal government is making a significant foray into the educational policy sphere under the No Child Left Behind Act (NCLB).<sup>72</sup> The actions together could serve as a justification for establishing a federal fundamental right to public education, whether under an historical or flexible-autonomy approach.

Some version of a right to education has long been recognized by the Supreme Court.<sup>73</sup> Generally this right has been characterized as a natural right held by parents to direct the upbringing and education of their children. This means that traditionally, the responsibility and decision-making power for a child's education rested in the first instance with the parent. It was not until the spread of compulsory education laws in the early twentieth century that the assumption of responsibility began to shift towards the state.<sup>74</sup>

One of the earliest cases in which the Supreme Court dealt with a right to education is *Meyer v. Nebraska*.<sup>75</sup> The Court struck down a statute that prohibited teaching foreign languages before the eighth grade.<sup>76</sup> The State's interest in acculturating its citizens did not outweigh

67. David Stewart, *Expanding Remedies for IDEA Violations*, 31 J.L. & Educ. 373, 377 (2002).

68. *Id.* at 376-77.

69. Only approximately eight percent of IDEA mandates are paid for from Federal coffers. The rest must be provided by the State. See 143 Cong. Rec. S4356 (daily ed. May 13, 1997) (statement of Sen. Gorton).

70. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), *aff'd*, 349 U.S. 294 (1955); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 30 (1971) (bussing students a permissible remedy for creating unitary school districts).

71. *Edwards v. Aguillard*, 482 U.S. 578, 596-97 (1987) (Act requiring balanced treatment between evolution and creationism was an establishment of religion in violation of the First Amendment); *Wallace v. Jaffree*, 472 U.S. 38, 41-42, 61 (1985) (Daily period of silence in public schools for meditation or voluntary prayer was an endorsement of religion in violation of the First Amendment); *W. Va. v. Barnette*, 319 U.S. 624, 642 (1943) (students with religious objections not required to salute the flag).

72. 20 U.S.C. §§ 6301 et seq. (2000).

73. See *Meyer*, 252 U.S. 390, *Brown*, 347 U.S. 483, *Rodriguez*, 411 U.S. 1.

74. Rose, *supra* n. 56, at 867.

75. 262 U.S. 390.

76. *Id.* at 399 (explaining that "liberty . . . denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men"). This case

the combined interests of parents in directing the education of their children, teachers in pursuing their professions, and children in acquiring knowledge.<sup>77</sup> The Court hinted at the fundamentality of these educational rights by stating “the individual has certain fundamental rights which must be respected.”<sup>78</sup> However, the case was decided under rational basis scrutiny and failed to establish conclusively that either parents or students hold a fundamental right to public education.<sup>79</sup>

The next landmark case in which the Court considered educational rights was *Pierce*.<sup>80</sup> In *Pierce*, the Court struck down a statute requiring that all students attend public schools.<sup>81</sup> Creating such a duty on the government would also create the commensurate right to demand public education.<sup>82</sup> The statute was struck down under rational basis scrutiny based explicitly on the reasoning in *Meyer*.<sup>83</sup> The Court’s language strongly stated that the State could not constitutionally compel students to attend public schools, and that to do so violated the parents’ right to direct their children’s education.<sup>84</sup> As in *Meyer*, the right to education was not considered to be held by students alone, but rather is a right held jointly by parents and teachers.<sup>85</sup> Consequently, the case does not answer the question of whether students could demand a public education from the State.

*Brown v. Board of Education*<sup>86</sup> is a milestone in the history of constitutional law. In this case, Justice Warren used sweeping language to describe what public education is:

[E]ducation is perhaps the most important function of state and local

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forms part of the background for expanding the definitions of “liberty” and “privacy” beyond what is explicitly written in the Constitution.

77. *Id.* at 401.

78. *Id.*

79. *Id.* at 403.

80. 268 U.S. 510.

81. *Id.* at 530, 534–35.

82. See e.g. *McDuffy v. Sec. of the Exec. Off. of Educ.*, 615 N.E.2d 516, 519 (Mass. 1993) (holding that a legal duty exists under the Massachusetts Constitution to provide an adequate public education).

83. *Pierce*, 268 U.S. at 534–35.

84. *Id.*

85. *Id.* at 532, 534–35. However, the fundamentality of the parents’ right to direct their children’s education has been undermined by recent cases involving home schooling and compulsory attendance laws. See *Null v. Bd. of Educ. of County of Jackson*, 815 F. Supp. 937, 939 (S.D.W. Va. 1993) (Parents, though they have an interest, have no fundamental right to home school children such that strict scrutiny is invoked when the parents challenge a law that removes students from home schools if the students did not adequately pass a standardized test.); *Hanson v. Cushman*, 490 F. Supp. 109, 114 (W.D. Mich. 1980) (Parents’ interest in directing their children’s education is not a fundamental right which invokes strict scrutiny.).

86. 347 U.S. 483.

governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>87</sup>

However, the question in this case was race-based classification, not the nature of a right to education.<sup>88</sup> Furthermore, equal protection analysis is inherently relative. *Brown* can only mean that when a state chooses to act by providing education, it must provide it on equal terms.<sup>89</sup> This does not actually require a state to provide public education, and therefore does not establish a fundamental right to public education.

More recently the question of whether public education is a fundamental right has come up largely under equal protection analyses of state funding schemes. The background of these equal protection cases begins with a voting rights case, *Harper v. Virginia Board of Elections*.<sup>90</sup> This case is important in at least two aspects relevant to the subsequent educational funding cases: the reasoning used to establish first, the fundamental right to vote,<sup>91</sup> and second, that wealth may be a suspect classification.<sup>92</sup>

In *Harper*, a poll tax was held unconstitutional as violating a citizen's fundamental right to vote.<sup>93</sup> The right to vote was held to be fundamental because it is "preservative of other basic civil and political rights"<sup>94</sup> Without the right to vote, a person not only would be denied first amendment rights of expression in the political arena, but also would lose the ability to use political processes to protect other rights.<sup>95</sup>

87. *Id.* at 493.

88. *Id.*

89. *Id.* ("Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.")

90. 383 U.S. 663.

91. *Id.* at 667.

92. *Id.* at 668 ("Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth... are traditionally disfavored.")

93. *Id.*

94. *Id.* at 667 (quoting *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964)).

95. *See id.*

Perhaps the Court's most unique and difficult holding is that wealth is a suspect classification which states are not justified using in relation to fundamental rights.<sup>96</sup> However, wealth classifications are necessarily used in determining such things as welfare benefits and taxes. Subjecting a state to strict scrutiny in making these decisions could hamstring its ability to act at all, involving courts in the details of administering areas that they are ill-equipped to handle.<sup>97</sup>

However, these fears are unlikely to be realized soon. The Court has backed away from strict scrutiny of economic issues, including wealth classifications,<sup>98</sup> and has also curtailed considering government entitlements as liberty or property interests.<sup>99</sup> However, it appears that this change in reasoning is based more on practicality than on constitutional analysis. If providing welfare benefits were required due to a fundamental liberty or property right classification, the State would be severely strained providing for what could become a flood of demands on its resources. If there is not a limit to what is considered a fundamental right, individual property interests and majority democratic rule would fall to pieces. Shades of Marxism and communism dance in the shadows of ever-expanding fundamental rights.

It is important to note several distinctions between *Harper* and the educational funding cases that follow. *Harper* deals with a unique state power to tax, and a well-established inherent right that only the government has to tax.<sup>100</sup> Furthermore, U.S. citizens have long held the franchise to vote.<sup>101</sup> The question in *Harper* was not the existence of a fundamental right to vote,<sup>102</sup> rather, the question was whether state action inhibited the ability of citizens to exercise the already established right to vote.<sup>103</sup> In contrast, education is not a uniquely state prerogative and states rarely act to prohibit access to education.<sup>104</sup>

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96. *Id.* at 668.

97. *Infra* nn. 160–164 (discussing the problems with classifying education as a fundamental right).

98. *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) (“It is enough that the State’s action be rationally based.”).

99. See *Paul v. Davis*, 424 U.S. 693, 701 (1976); *Bd. of Regents v. Roth*, 408 U.S. 564, 577–78 (1972) (concepts of liberty and property interests severely limited when determining the extent of procedural due process required).

100. *Harper*, 383 U.S. at 666.

101. *Id.* at 667 (referring to “the political franchise of voting,” *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

102. *Id.*

103. *Id.* at 668.

104. There have been school districts which closed down in an effort to remain racially segregated. However, Courts required the districts to re-open, in as much as such action was illegally discriminatory. See A.E. Dick Howard, *Commentaries on the Constitution of Virginia* vol. 2, 883–84

Another important distinction between *Harper* and subsequent public education cases is that the right to vote is purely political and is inherent in a democratic government. The right to vote demands nothing more of the government except that a democracy exist.<sup>105</sup> In contrast, public education would not exist without significant state resource input. Furthermore, it is difficult to delineate a right to public education as a political right, civil right or human right. It is an amalgamation of them all.

#### A. *Serrano v. Priest*

This case, though a state court case, forms the background for the Supreme Court's decision in *Rodriguez*.<sup>106</sup> In *Serrano v. Priest*,<sup>107</sup> the California Supreme Court decided under an equal protection analysis that California's public school financing provisions were unconstitutional.<sup>108</sup> In the process, it declared that public education was a fundamental right<sup>109</sup> and that wealth is a suspect classification.<sup>110</sup>

At the time in California, there were two major sources of funding: the local property taxes (providing the majority of the funds) and aid from the State School Fund.<sup>111</sup> The total raw dollar amount available for education could be significantly more in property-rich districts than in property-poor districts, even if the rich districts tax at a significantly lower rate.<sup>112</sup>

Parents in a property poor district of Los Angeles brought a class action suit, representing "all public school pupils in California, 'except children in that school district, the identity of which is presently unknown, which school district affords the greatest educational opportunity of all school districts within California.'"<sup>113</sup> The listing of the members of this class shows that the plaintiffs weren't seeking merely

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(U. Press of Va. 1974).

105. And the ability to interpret various forms of chads.

106. 411 U.S. at 18-19 n. 48.

107. 487 P.2d 1241.

108. *Id.* at 1263.

109. *Id.* at 1258.

110. *Id.* at 1250.

111. *Id.* at 1246.

112. *Id.* It is interesting to note the assumption that putting more money into education is some sort of guarantee that the education will be better. In broad outlines this may be true, but throwing more money at an issue is no hard guarantee of improving any particular problem. Furthermore, an area's income per family is not necessarily the only determiner of the tax base. Industrial areas surrounded by neighborhoods of the lower socio-economic strata can have a significant tax base by virtue of the tax levied on the industrial property.

113. *Id.* at 1244.

that the State fulfill some basement definition of an adequate education. They were demanding that the State provide the best possible education to all students by equalizing and maximizing state funding of education.

The court held that the financing system based upon local property taxes was not necessary to accomplish a compelling state interest.<sup>114</sup> While the court decided the issue using strict scrutiny, the court acknowledged that the contention that education is “a fundamental interest which may not be conditioned on wealth” was without direct support.<sup>115</sup> The only support was tangential: dicta in *Shapiro v. Thompson*<sup>116</sup> indicated that wealth discrimination in public education would be unconstitutional.<sup>117</sup> Also, the Fifth Circuit had considered the issue of whether public education is a fundamental right, but avoided defining education as a fundamental right by deciding the matters under rational basis scrutiny.<sup>118</sup>

There are further difficulties not noted by this court in striking down such a funding scheme as a violation of equal protection. One is that there must be purposeful discrimination in order to violate equal protection.<sup>119</sup> However, because the local property tax system has been used almost universally to fund public education,<sup>120</sup> such purposeful discrimination is hard to prove.

After noting the “twin themes of the importance of education to the individual and to society,”<sup>121</sup> the court listed five reasons why education is a fundamental right. First, education is “essential in maintaining . . . ‘free enterprise democracy’—that is, preserving an individual’s opportunity to compete successfully in the *economic* marketplace, despite

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114. *Id.* at 1263.

115. *Id.* at 1255.

116. 394 U.S. 618 (1969), *overruled in part*, *Payne v. Tenn.*, 501 U.S. 808, 827 (1991) (The Supreme Court reversed its prior holding regarding “the admission of victim impact evidence and prosecutorial argument on that subject,” which is not discussed in this paper.).

117. *Serrano*, 487 P.2d at 1255 (quoting *Shapiro*, 394 U.S. at 633) (“We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools.”).

118. *Hargrave v. McKinney*, 413 F.2d 320, 324 (5th Cir. 1969) (“The equal protection argument advanced by plaintiffs is the crux of the case. Noting that lines drawn on wealth are suspect and that we are here dealing with interests which may well be deemed fundamental, we cannot say that there is no reasonably arguable theory of equal protection which would support a decision in favor of the plaintiffs” (internal citations omitted)).

119. *Washington v. Davis*, 426 U.S. 229, 240 (1976).

120. Patt, *supra* n. 10, at 551.

121. *Serrano*, 487 P.2d at 1257.

a disadvantaged background.”<sup>122</sup> This hearkens back to the reasoning from *Harper*: the right to education is preservative of other rights.<sup>123</sup>

The second, third, and fourth reasons why the court considered education as a fundamental interest all deal with the depth and breadth of education’s effect on each individual in society. These reasons hearken back to the U.S. Supreme Court’s language in *Brown*.<sup>124</sup> Each reason compared education with other government services, such as welfare, fire and police protection, and garbage collection.<sup>125</sup> The second reason was that everyone benefits from education.<sup>126</sup> Third, public education occurs over a continuous span of ten to thirteen years.<sup>127</sup> The fourth reason was that education “is unmatched in the extent to which it molds the personality of the youth of society.”<sup>128</sup> In contrast to these reasons, other government services may not be called upon by citizens, are intermittent in their operation, and are “essentially neutral in their effect on the individual psyche.”<sup>129</sup>

Finally, the court determined that education was a fundamental interest because the State had made attendance compulsory.<sup>130</sup> Furthermore, the compulsoriness was not limited to just requiring attendance at any school: a student must attend a particular district or school, unless the family has the resources to send the student to a private school.<sup>131</sup> This made poorer students take on “the complexion of . . . prisoner[s], complete with a minimum sentence of 12 years.”<sup>132</sup>

The State attempted to show that using local property taxes is narrowly tailored to the goal of educating children, claiming that local property taxes promoted a compelling interest in promoting local control of public education.<sup>133</sup> The court rejected this on two grounds. First, decision-making power could still lie with the districts, regardless of the funding scheme.<sup>134</sup> Second, local control means little if limited tax resources means limited educational choice. As the court put it, “So long

122. *Id.* at 1258–59 (emphasis added).

123. *See Harper*, 383 U.S. at 667.

124. *Brown*, 347 U.S. at 493.

125. *Serrano*, 487 P.2d at 1259.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 1259 (quoting John E. Coons et al., *Educational Opportunity: A Workable Constitutional Test of State Financial Structures* 57 Cal. L. Rev. 305, 388 (1969)).

133. *Id.* at 1260.

134. *Id.*

as the assessed valuation within a district's boundaries is a major determinant of how much it can spend for its schools, only a district with a large tax base will be truly able to decide how much it really cares about education."<sup>135</sup>

And so the court required the State to equalize all funds across the State assuming the result would be increased funding from the State's deep pocket.<sup>136</sup> However, centralizing school financing through judicial decree reduces property owners' incentives to pay for public schooling and limits legislative ability to appropriately respond to public demand for decreased taxes.<sup>137</sup> After *Serrano* took effect, the California Legislature was faced with a tax reduction measure known as Proposition 13, which had the effect of reducing educational funding statewide. The legislature was effectively restricted from acting to protect educational spending when taxpayers were demanding a reduction in total spending.<sup>138</sup> Ultimately, this led to "starv[ation of] the public sector, [with] school funding [as a] major victim."<sup>139</sup> In contrast, when local property taxes support schools, taxpayers self-interest in the "capitalization of the benefits of education into individual property values makes it rational for... [everyone] to offer support for education."<sup>140</sup>

Note the shift in the assumption of who holds the decision-making power. In the previous education cases, the parents were the primary decision makers. The right in question was clearly the parents' right to direct their child's education. In this case, the right in question is not as clear. It seems to be more of an amalgamation of a child's right to be educated in some manner, and the state's responsibility to provide that education. Parents are calling upon the state to act, rather than petitioning for the state to stop acting. Rather than the parents making a decision that directly affects their child, the parents are affecting their children indirectly through the agency of the state. The state's power over children is actually increased, for good or ill.

### *B. San Antonio Independent School District v. Rodriguez*

In *Rodriguez*, the U.S. Supreme Court was faced with a factual situation similar to that in *Serrano*, and reached a decidedly different

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135. *Id.*

136. William A. Fischel, *How Serrano Caused Proposition 13*, 12 J.L. & Pol. 607, 619 (1996).

137. *See id.*

138. *Id.* at 608-609.

139. *Id.* at 609.

140. *Id.* at 620.

outcome.<sup>141</sup> The *Rodriguez* Court unequivocally determined that public education is not a federal fundamental right.<sup>142</sup>

Just as in California, public school funds in San Antonio came largely from local property taxes and a supplementary state fund.<sup>143</sup> Plaintiffs were from Edgewood Independent School District, whose average assessed property value per pupil was the lowest in San Antonio, \$5,960.<sup>144</sup> In comparison, the Alamo Heights Independent School District, the most affluent district in the metropolitan area, had an assessed property value per pupil of more than \$49,000.<sup>145</sup> Despite Texas' efforts to equalize educational funding, there was still a \$238-per-pupil difference in expenditures.<sup>146</sup> To worsen the rub of the disparity, the taxpayers in the poor Edgewood District paid an equalized tax rate of \$1.05 per \$100 of assessed property, as opposed to only \$.85 per \$100 in Alamo Heights.<sup>147</sup>

Based on reasoning from *Harper* and *Serrano*, the Federal District Court found that the dual system of financing public schools violated the Equal Protection Clause.<sup>148</sup> The Supreme Court rejected *Harper*<sup>149</sup> and *Serrano*<sup>150</sup> as controlling precedent. *Harper* dealt with restrictions on the right to vote, not with disparities in disbursement of government entitlements.<sup>151</sup> Furthermore, there was no clearly defined class of people in *Rodriguez* who could be considered discriminated against on the basis of wealth.<sup>152</sup> It could have been people who fell below some specific level of poverty, or people who were generally more poor than others, or those who lived in a poor district, regardless of their actual income.<sup>153</sup> Justice Powell pointed out that the "relative—rather than absolute—nature of

141. 411 U.S. 1.

142. *Id.* at 35.

143. *Id.* at 9–10. Federal funds were also available, but did not amount to enough to be considered as significantly ameliorating the disparities. *Id.* at 12 n. 32.

144. *Id.* at 12.

145. *Id.*

146. *Id.* at 13.

147. *Id.* at 12–13.

148. *Id.* at 16 ("Finding that wealth is a "suspect" classification . . . , the District Court held that the Texas system could be sustained only if the State could show that it was premised upon some compelling state interest."). "Serrano convincingly analyzes discussions regarding the suspect nature of classifications based on wealth." *Rodriguez II*, 337 F. Supp. at 281. "Among the authorities relied upon to support the . . . conclusion 'that lines drawn on wealth are suspect' is *Harper*." *Id.* at 282 (quoting *Harper*, 383 U.S. at 668).

149. *Id.* at 18.

150. *Rodriguez*, 411 U.S. at 18–19.

151. *Id.* at 34–36.

152. *Id.* at 19.

153. *Id.* at 19–20.

the asserted deprivation is of significant consequence.”<sup>154</sup> The plaintiffs were claiming a deprivation, not because the State was actually depriving, but because it was giving more to one group than to another.<sup>155</sup> The Court found that the relativity of this argument undercut its strength, particularly as no one claimed that any students were actually being deprived of an education.<sup>156</sup>

This was an unexpected position for an equal protection analysis because equal protection concepts are inherently relative. Justice Marshall in his dissent pointed this out: “The Equal Protection Clause is not addressed to the minimal sufficiency but rather to the unjustifiable inequalities of state action. It mandates nothing less than that ‘all persons similarly circumstanced shall be treated alike.’”<sup>157</sup>

However, because of “the absence of any evidence that the financing system discriminates against any definable category of ‘poor’ people or that it results in the absolute deprivation of education,”<sup>158</sup> and because “[t]he system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness,” the Court did not apply strict scrutiny.<sup>159</sup>

The Court then went on to consider whether education is a fundamental right, using the classic historical approach. After noting the undeniable importance of education, Justice Powell noted “the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause.”<sup>160</sup> Conceivably every State action could have an important effect on citizens. Courts should not make “ad hoc determination[s] as to the social or economic importance” of a right.<sup>161</sup> If a court’s determination of “importance” were the only criteria on which to determine whether the right affected is a constitutional or fundamental right, then nearly all State action would be subject to strict judicial scrutiny, turning the judiciary into a “super-legislature.”<sup>162</sup>

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154. *Id.* at 19.

155. *Id.* at 15.

156. *Id.* at 25, 36–37.

157. *Id.* at 89 (Marshall, J. dissenting) (quoting *F. S. Royster Guano Co. v. Va.*, 253 U.S. 412, 415 (1920)).

158. *Id.* at 25.

159. *Id.* at 28. The traditional indicia of a suspect classification which plaintiffs lacked are, “the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.” *Id.*

160. *Id.* at 30.

161. *Id.* at 32.

162. *Id.* at 31 (quoting *Shapiro*, 394 U.S. at 655 (Harlan, J., dissenting)).

Rather, equal protection analysis must be limited to those rights that are established either explicitly or implicitly in the Constitution.<sup>163</sup> As Justice Powell pointed out, “It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws.”<sup>164</sup> Even though food, shelter, clothing and a job are all extremely important, the courts have refused to depart from normal modes of analysis of legislative classifications involving socio-economic questions.<sup>165</sup>

The Court stated that the question of whether education is a fundamental right could only be answered by determining if it is a right “explicitly or implicitly guaranteed by the Constitution.”<sup>166</sup> Obviously, there is nothing about education explicit in the Constitution. An argument can be made that education becomes a “fundamental political right” implicit in the Constitution as it is “preservative of all rights.”<sup>167</sup> The appellees in *Rodriguez* reasoned that without proper education, citizens are unable to meaningfully participate in the political process.<sup>168</sup> They argued that there is a “nexus between speech and education” and that without the ability to effectively communicate with others, the right to free speech is meaningless.<sup>169</sup> Furthermore, if a person is uneducated, their right to vote is not likely to benefit either that person or society in general.<sup>170</sup> The Court rejected these arguments, stating that it

[has] never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice. That these may be desirable goals of a system of freedom of expression and of a representative form of government is not to be doubted. These are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference.

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163. *Id.* at 33.

164. *Id.*

165. *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972) (“So long as [the State’s] judgments are rational, and not invidious, the legislature’s efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket.”); *Richardson v. Belcher*, 404 U.S. 78, 81 (1971) (applying rational basis scrutiny for “a statutory classification in the area of social welfare”); *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (Court did not apply strict scrutiny even though it found that “welfare provides the means to obtain essential food, clothing, housing, and medical care.”), *superseded*, *St. ex rel. K.M. v. W. Va. Dept. of Health & Human Resources*, 575 S.E.2d 393, 402 (W. Va. 2002) (The specific holding that “cash assistance cannot be terminated prior to a due process hearing” was superseded when “Congress made sweeping changes to this area of the law,” but this is not addressed in this paper.).

166. *Rodriguez*, 411 U.S. 1, 33 (1973).

167. *Cf. Harper*, 383 U.S. at 667 (quoting *Yick Wo*, 118 U.S. at 370).

168. *Rodriguez*, 411 U.S. at 35–36.

169. *Id.* at 35.

170. *Id.* at 35–36.

But they are not values to be implemented by judicial intrusion into otherwise legitimate state activities.<sup>171</sup>

The majority, after determining that strict scrutiny would be inappropriate, went on to state what has been called “the un-held holding” of *Rodriguez*.<sup>172</sup> First, the Court recognized the possibility that “some identifiable quantum of education”<sup>173</sup> may be required to protect these established Constitutional rights. Second, whatever that quantum might be, it certainly existed in Texas at that time, even in the poorest districts.<sup>174</sup> This actually leaves open the question of whether some level of education is a fundamental right. Once a state provides education, is there a minimum level required that constitutes a fundamental right? Though the Court declined to exercise strict scrutiny because it found that education is not a federal fundamental right, one way to interpret *Rodriguez* is that the Court declined to exercise strict scrutiny because the fundamental interest in education was not implicated by the situation.

However, the dissent made the point that there are rights the Court has found that are not explicit in the Constitution.<sup>175</sup> Justice Marshall argued for a less restrictive approach to constitutional analysis than the strict textualism adopted by the majority in *Rodriguez*. In Marshall’s view, as the “nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer,” then that interest becomes more fundamental and judicial scrutiny should increase commensurately.<sup>176</sup> This reasoning is in line with cases establishing the right to procreate,<sup>177</sup> the right to privacy,<sup>178</sup> the right to vote,<sup>179</sup> and the right to appeal a criminal conviction.<sup>180</sup>

### C. *Plyler v. Doe*

The debate over whether education is a fundamental right became even more confusing after the outcome of *Plyler v. Doe*.<sup>181</sup> Texas was

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171. *Id.* at 36 (internal citations omitted).

172. Bitensky, *supra* n. 64, at 117.

173. *Rodriguez*, 411 U.S. at 36.

174. *Id.* at 37.

175. *Id.* at 100 (Marshall, J. dissenting).

176. *Id.* at 102–03 (Marshall, J. dissenting).

177. *Skinner v. Okla.*, 316 U.S. 535, 541 (1942).

178. *Roe v. Wade*, 410 U.S. 113, 152 (1973).

179. *Reynolds*, 377 U.S. at 561–562.

180. *Griffin v. Ill.*, 351 U.S. 12, 18 (1956) (“a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all” but strict judicial scrutiny is still applied).

181. *Plyler*, 457 U.S. 202.

denying children of illegal aliens entrance to public schools.<sup>182</sup> The Court held that this violated equal protection, even though the children were not citizens of the United States with the constitutional guarantees that follow from such citizenship.<sup>183</sup> The reasoning was not based on the fundamentality of the right to education. Rather, the legislation failed because the classification based on citizenship status did not further an important state interest—there is no rational basis on which to deny any child an education.<sup>184</sup> Essentially, the court dealt with the practical issue of the cost of education to governments. Not educating a child is more expensive than dealing with an un-educated adult, whether the adult is a citizen or not.

But where does that leave us? There is no federal fundamental right to public education, but no child can rationally be denied an education. Is there any way to reconcile these seeming inconsistencies? Is there some fundamental right to a minimally adequate education? And if so, how is it to be protected?

#### IV. STATE JUDICIARIES' TREATMENT OF THE RIGHT TO PUBLIC EDUCATION AFTER *RODRIGUEZ*

Based on their own constitutions, the states have generally been more welcoming to claims of education as a fundamental right. While the federal constitution does not explicitly mention education, most state constitutions do put an affirmative duty on the state to provide education.<sup>185</sup> After failing to establish a federal fundamental right to education in *Rodriguez*, litigators and reformers turned to the education provisions in state constitutions with some success.<sup>186</sup>

A classic case in this effort comes out of Kentucky: *Rose v. Council for Better Education*.<sup>187</sup> This was another school funding case where the plaintiffs were alleging an unconstitutional disparity.<sup>188</sup> This time however, the constitution in question was the Kentucky Constitution. The Kentucky court interpreted their constitution as creating a state fundamental right to education.<sup>189</sup> Furthermore, the court outlined a definition of a minimally adequate education, which has since become a

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182. *Id.* at 205.

183. *Id.* at 210, 230.

184. *Id.* at 230.

185. Walsh, *supra* n. 1, at 281.

186. Patt, *supra* n. 10, at 556.

187. 790 S.W.2d 186 (Ky. 1989).

188. *Id.* at 190.

189. *Id.* at 206.

guidepost for subsequent cases:

[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 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.<sup>190</sup>

This type of adequacy argument has taken the stage after the failure of the more overt equal protection claims.<sup>191</sup>

The North Carolina Supreme Court held that equal access to participation in the state public school system is a fundamental right guaranteed by the state constitutional provisions and “protected by considerations of procedural due process.”<sup>192</sup> Likewise, Connecticut’s Supreme Court found that whatever equal protection test is applied, “in Connecticut the right to education is so basic and fundamental that any infringement of that right must be strictly scrutinized.”<sup>193</sup> West Virginia’s Supreme Court held that mandatory requirements of a “thorough and efficient system of free schools,” found in the West Virginia Constitution, make education a fundamental, constitutional right.<sup>194</sup> Similarly, New Jersey’s Supreme Court held that its constitution’s guarantee of a “thorough and efficient system of public schooling” must be understood to embrace that educational opportunity

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190. *Id.* at 212.

191. Patt, *supra* n. 10, at 556.

192. *Sneed v. Greensboro City Bd. of Educ.*, 264 S.E.2d 106, 113 (N.C. 1980). *But see Britt v. N.C. State Bd. of Educ.*, 357 S.E.2d 432, 436–37 (N.C. App. 1987) (State constitutional mandate that “equal opportunities shall be provided for all students,” *Id.* at 436, does not confer upon “each student in the State . . . a fundamental right to an education substantially equal to that enjoyed by every other student in the State,” *Id.* at 434, but rather, only means that all students were entitled to “full participation in . . . public schools, regardless of race or other classification;” *Id.* at 436, thus, disparity in educational opportunities in counties with large tax base as opposed to those in counties with small tax base did not result in constitutional violation.).

193. *Horton v Meskill*, 376 A.2d 359, 373 (Conn. 1977).

194. *Pauley v Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979) (quoting the W. Va. Const. art. 12 § 1).

which is needed in the contemporary setting to equip a child for his role as a citizen and as competitor in the labor market.<sup>195</sup>

Some states do not declare a strong fundamental right to education. Rather they cast it as a substantial right. A substantial right is afforded more constitutional protection than that provided by rational basis scrutiny, yet does not trigger the more stringent requirements of strict scrutiny.<sup>196</sup> For example, in New York, when the state undertakes to provide free education to all students, "it must 'recognize a student's legitimate entitlement to a public education as a property interest,'" though not a fundamental right.<sup>197</sup> Such a property interest is protected by the due process clause.<sup>198</sup> A federal district court in Utah, interpreting the Utah State Constitution, stopped short of creating a fundamental right to education, but held that the state has a duty to teach children living on Native American reservations.<sup>199</sup> This holding is in line with the reasoning of *Plyler*, that once the state has chosen to provide education it cannot rationally deny children from receiving it.<sup>200</sup> Perhaps a reason these state courts hold back from declaring education as a fundamental right stems from utilitarian concerns—state coffers are limited. Or, perhaps the judiciaries of these states feel institutionally incompetent to create and enforce educational policy, leaving it to the political branches.

While many state courts have held in favor of either a fundamental or substantial right to education, some have not. The Illinois Supreme Court reasoned that the state compulsory education laws, which arguably restrict physical liberty, impose no duty under the federal or Illinois Due Process Clauses to provide students with a minimally safe and adequate education.<sup>201</sup> Nebraska interpreted the education provision in its state constitution in such a way that despite the explicit enumeration of education, the court had no power to enforce it. The provision was not self-executing because it was directed only to the legislature.<sup>202</sup>

195. *Robinson v. Cahill*, 303 A.2d 273, 295 (N.J. 1973). See also *Buse v. Smith*, 247 N.W.2d 141, 149 (Wis. 1976) (Equal opportunity for education as defined by state constitution is a fundamental right.).

196. *In re Jessup*, 379 N.Y.S.2d 626, 632 (Fam. Ct. 1975)

197. *Id.* (quoting *Goss v. Lopez*, 419 U.S. 565, 574 (1975)).

198. *Id.*

199. *Meyers ex rel Meyers v. Bd. of Educ.*, 905 F.Supp. 1544, 1568 (D. Utah 1995). The Utah Constitution provides that "The Legislature shall provide for the establishment and maintenance of the state's education systems including: (a) a public education system, which shall be open to all children of the state; and (b) a higher education system. Both systems shall be free from sectarian control." Utah Const. art. 10, § 1.

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

201. *Lewis E. v. Spagnolo*, 710 N.E.2d 798, 806 (Ill. 1999).

202. *St. ex rel. Shineman v. Bd. of Educ.*, 42 N.W.2d 168, 170 (Neb. 1950).

Some may view this lack of state constitutional protection as an inexcusable harm to children. Perhaps it is. But the range of response which states demonstrate is part of the strength of federalism. States can more freely experiment with varying solutions to multifaceted problems. The educational process is highly individualized and organic and does not lend itself well to centralized dictation. Experimentation across many states is desirable for determining best practices. There may be losses and harms in a number of states, but at least those harms would be limited to those states rather than spread across the entire Union.

V. CONCLUSION: IS THERE A SUFFICIENT CONSTITUTIONAL AND PRACTICAL BASIS TO ESTABLISH A FEDERAL FUNDAMENTAL RIGHT TO PUBLIC EDUCATION?

Experience teaches us that formal education is good for individuals and society. The existence of formal education is the way things ought to be—is the natural law. But in order for education to be provided on a broad, society-wide scale, positive law must be created.<sup>203</sup> The federal judiciary has determined that the federal constitution does not create the positive law that protects educational rights.<sup>204</sup> However, current Supreme Court jurisprudence indicates a change in the winds. State judiciaries, analyzing constitutions with specific educational guarantees have come out largely in favor of a fundamental right to education, though not unanimously so.<sup>205</sup>

Often lost in all the debate is the question of what government structure is best suited to make decisions regarding the funding, provision and superintendence of education. On one level, all agree regarding the importance of education. But is the federal government best suited to deal with educational policy issues? Are the state governments? What is the role of the judiciary in creating and enforcing the positive law aspects of educational policy?

Using the analytical approach of *Lawrence*,<sup>206</sup> it is possible to argue for a federal fundamental right to education. Education is critical to each individual. The nature of our economy is now such that a citizen can hardly exist without an education. In the past, this was not so. Now, without an education, a citizen is both economically and politically vulnerable. The trend across the state governments is to protect the right

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203. See *supra* Section II(B) (discussing natural law and positivism).

204. See *supra* Section III(B) (discussing *Rodriguez*).

205. See *supra* Section IV (discussing state education cases).

206. *Lawrence*, 539 U.S. at 578–579.

to education.<sup>207</sup> And education is preservative of other rights. This reasoning, rejected in *Rodriguez*,<sup>208</sup> gains strength after *Lawrence*.<sup>209</sup> After all, it is rather absurd for our Constitution to ignore a child's right to education while protecting an adult's right to private sexual behavior. These arguments are only strengthened by the historical importance of education.

Though there has never been an outright positive right to education, there are several federal actions that indicate its existence. Congress has created a right to education for those with disabilities.<sup>210</sup> The Supreme Court has consistently held for the parents' right to direct the education of their children. And even *Rodriguez* did not absolutely leave out the possibility of a right to education.<sup>211</sup>

Yet if public education is considered a federal fundamental right it could embroil the federal judiciary in administrative educational issues. A fundamental right should invoke strict scrutiny.<sup>212</sup> Strict scrutiny means that any governmental regulation must be narrowly tailored to accomplish a compelling interest. Few regulations survive such analysis. So any educational policy that anyone would care to litigate would most likely be struck down by the court. The State could not accurately predict how to create educational policy. The difficulties and costs associated with litigation could harm educational processes. Courts would have to depend upon mounds of sociology, rather than legal or constitutional principles, in order to make decisions. The judiciary could be forced to expound the minutest details of educational policy.

*Missouri v. Jenkins*<sup>213</sup> is an example of what can happen when the judiciary takes on educational policy issues. The federal district court was attempting to enforce desegregation laws. By the time the issue reached the U.S. Supreme Court, the federal district court judge was ordering salary increases, ordering funding of educational programs, approving facility improvements and otherwise using judicial decrees to effect an increased attractiveness of the district. The course of the litigation took over eighteen years. A federal district court became mired in minute

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207. *Supra*, nn. 186–195 (discussing state education cases).

208. *Rodriguez*, 411 U.S. at 35 (“Education, of course, is not among the rights afforded explicit protection under our Federal Constitution.”).

209. *Lawrence*, 539 U.S. at 578–79 (referring to “the components of liberty” as worthy of protection).

210. *Individuals with Disabilities Education Act*, 20 U.S.C. §§ 1400 et seq.

211. *Rodriguez*, 411 U.S. at 36–37 (acknowledging the possibility of a “quantum of education [could be] . . . constitutionally protected”).

212. *Supra* Section II(C)(iii) (discussing strict scrutiny).

213. 515 U.S. 70 (1995).

educational procedures, and the resulting cost of litigation.<sup>214</sup> However, what was the district court to do when the political branches of the state government were not desegregating the schools? The tension is difficult.

The traditional repository for educational policy-making power is with the states. Such a federalist approach has the advantages of local control and of allowing for experimentation. The complex issues affecting educational processes and policies are not easily resolved. Finding that public education is a federal fundamental right would require the federal government to carry the responsibility to fund education.<sup>215</sup> Centralized control from the federal government may not be the best manner for controlling public education.

Perhaps the best approach, that respects federalism issues and the competencies of the judiciary, while placing appropriate emphasis on the importance of education is for the federal judiciary to state explicitly the un-held holding of *Rodriguez*—that there is a right to some basic level of education, and that the states must determine and enforce this level.<sup>216</sup> Such a finding would be in accord with natural law principles, that a right to education does exist,<sup>217</sup> while avoiding embroiling the federal judiciary in day to day educational procedural matters or incurring additional federal funds.<sup>218</sup>

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214. *Id.* at 75–80 (reciting the lengthy procedural history of the case).

215. See Bitensky, *supra* n. 64, at 632–33.

216. *Supra* nn. 172–174 and accompanying text.

217. *Supra* Section II(B) (discussing natural law and positivism).

218. *Jenkins*, 515 U.S. 75–80 (discussing the judiciary problems of enforcing desegregation provisions in a Missouri School District).