PUTTING THE AMERICAN EDUCATION SYSTEM TO THE TEST: RECOGNIZING EDUCATION AS A FUNDAMENTAL RIGHT AND ABOLISHING UNEQUAL SCHOOL FUNDING

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I. INTRODUCTION

In the United States of America, a child's zip code often determines the quality of the child's education. A myriad of social, economic, and political factors contributes to this tragic truth. This article, however, focuses on the staggering, discriminatory effect that Unequal School Funding has on our nation's youth.

Consider the experience of Daniel Lopez, a fifth-grade student in Houston, Texas.[1] Daniel and his family live on the south side of Houston, near William P. Hobby Airport. The public school nearest Daniel is an old, dilapidated building. When Daniel arrives at school each morning, he sees broken computers, leaky air conditioners, and chipping turquoise paint. He sees a small athletic field, occupied by ten-year-old "temporary" trailers. He sees a physical education teacher, doing her best to teach a mathematics class.

Compare Daniel's experience to that of Thomas Smith, a fifth-grade student living near Houston, Texas.[2] Thomas and his family live in a neighborhood filled with multi-million dollar homes, located just miles away from Daniel's neighborhood. The public school nearest Thomas is a new, state-of-the art building. When Thomas arrives at school each morning, he sees new tablets for every student, interactive white boards in every classroom, and extra teacher assistants for individualized help. He sees the new soccer field, next to the tennis courts. He sees art and music teachers with specialized training.

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[1] Daniel Lopez is a fictional character, inspired by the author's experiences as a teacher in Houston's underserved communities.

[2] Thomas Smith is a fictional character, inspired by the author's research.

Which student do you expect is more likely to feel valued when he arrives at school each day? Which student is more likely to reach his potential? Which student do you think has more opportunities to succeed?

Such disparate realities exist between students in different zip codes in large part because of Unequal School Funding: the discriminatory practice in which school funding is based on unequal property taxes within the district. Discriminatory practices such as Unequal School Funding exist in our country because education is not protected as a fundamental right. The United States Supreme Court has only once considered whether education is a fundamental right. The Court's failure to recognize education as a fundamental right resulted in both the nation's pervasive practice of Unequal School Funding and the wildly varying protection of educational rights throughout the states. In light of these horrible repercussions, the Court should now readdress whether education is a fundamental right. Furthermore, the proper analysis of education as a fundamental right would undoubtedly abolish unequal and discriminatory practices such as Unequal School Funding.

I. EDUCATION IS A FUNDAMENTAL RIGHT

Education is a fundamental right because it is inextricably linked to the constitutional guarantees of liberty, voting, and freedom of expression. The quality and level of a United States citizen's education has a direct impact on that citizen's ability to exercise such constitutional rights. As compared to a citizen with a low-quality and low-level education, a person with a high-quality and high-level education is less likely to be incarcerated, more likely to vote, and more equipped to exercise his freedom of expression.

A. The Right to Liberty

"[An incarcerated man] has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State. He is civiliter mortuus; and his estate, if he has any, is administered like that of a dead man." – Ruffin v. Commonwealth[3]

A United States citizen's right to liberty is forfeited upon incarceration. Thomas Jefferson once described liberty as the

[3] Ruffin v. Commonwealth, 62 Va. 790, 796 (1871).

"unobstructed action according to our own will within limits drawn around us by the equal right of others."[4] A prisoner is stripped of the right to take unobstructed actions. For example, a prisoner cannot take the unobstructed actions of voting, traveling, starting a business, or having children.[5] A prisoner's every allowable action – what to eat, when to sleep, when to bathe, who to see, what to wear – is obstructed and confined by rules created by others.[6] A person's inalienable right to liberty, then, becomes alienable upon his incarceration.

A citizen with a low-level education is significantly more likely to be incarcerated than his well-educated counterpart. In 2004, the Bureau of Justice Statistics concluded that 36.3% of incarcerated men over the age of 18 have less than a high school diploma, and only 11.5% of incarcerated men over the age of 18 have some college education.[7] Likewise, a survey conducted by the American Community Survey in 2009 revealed that Black and White men who are "high school dropouts are about 5 times more likely to go to prison . . . than men who have completed high school."[8] Moreover, the amount of male high school dropouts who become incarcerated continues to rise every year, while the amount of high-school-educated men who become incarcerated remains virtually stagnant.[9]

The statistics for female prisoners are equally as staggering. A 2009 survey found that 37% of incarcerated women had less than a high school education, while only 14% of non-incarcerated women had less than a high school education.[10] The survey also found that only 31% of incarcerated women had some postsecondary education, while 58% of non-incarcerated women had some postsecondary education.[11] In short, education levels are inversely related with the likelihood of incarceration: the increased quantity of a person's education decreases the likelihood of incarceration and resulting forfeiture of liberties.

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[4] Letter from Thomas Jefferson, Third President of the United States, to Isaac H. Tiffany, (Apr. 4, 2004) (polygraph copy at Library of Congress, Thomas Jefferson Papers).
[5] *See generally* Michael Romero, *A Day in the Life of a Prisoner*, PEN AM. (2012), http://www.pen.org/fiction-short-story/day-life-prisoner.
[6] *Id.*
[7] Stephanie Ewert & Tara Wildhagen, *Educational Characteristics of Prisoners: Data from the ACS*, MICH. 13, (Mar. 31–Ap. 2, 2011), http://paa2011.princeton.edu/papers/111587.
[8] Bruce Western et al., *Economic Inequality and the Rise in U.S. Imprisonment*, RUSSELL SAGE 4 (Apr. 2004), https://www.russellsage.org/sites/all/files/u4/Western,%20Kleykamp,%20%26%20Rosenfeld_Economic%20Inequality%20and%20the%20Rise%20in%20US%20Imprisonment.pdf.
[9] *See Id.*
[10] Ewert & Wildhagen, *supra* note 7, at 17.
[11] *Id.*

B. The Right to Vote

"A share in the sovereignty of the state, which is exercised by the citizens at large in voting at elections, is one of the most important rights of the subject, and in a republic ought to stand foremost in the estimation of the law." – Alexander Hamilton[12]

The right to vote and access to state and federal franchise is a revered and zealously protected right of all citizens.[13] The right to vote in federal elections is explicitly conferred by the United States Constitution, in Article I, Section 2, and in the Seventeenth Amendment. The right to vote in state elections, while not explicitly listed in the Constitution, has been provided special judiciary protection, as "it is the 'preservative of other basic civil and political rights.'"[14]

A citizen with a low-level education is significantly less likely to vote than his well-educated counterpart.[15] The U.S. Census Bureau's Current Population Survey in 2012 showed that only 7.9 million citizens without a high school diploma were registered to vote, compared to over 41.6 million citizens with a high school diploma who were registered to vote.[16] The same survey showed that only 6 million citizens without a high school diploma reported voting, compared to over 34.4 million with a high school diploma who reported voting.[17] Further, a study in 2009 showed that 50.4% of those with less than a high school education were registered to vote, while 84.8% of those with bachelor's degrees or more were registered to vote.[18] Education, thus, significantly contributes to the likelihood of a citizen's effective participation in a democratic society.[19]

C. The Right to Freedom of Expression

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[12] THE PAPERS OF ALEXANDER HAMILTON 544-45 (Harold C. Syrett ed., 1979).
[13] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 36 (1973).
[14] *Id.* at 114 (Marshall, J., dissenting) (citing Reynolds v. Sims, 377 U.S. 533, 562 (1964)).
[15] *See Table 5. Reported Voting and Registration, by Age, Sex, and Educational Attainment: November 2012*, U.S. CENSUS BUREAU (Nov. 2014), http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2012/tables.html [hereinafter *Reported Voting*]; *see also No Time to Lose: Why America Needs an Education Amendment to the Constitution to Improve Public Education*, S. EDUC. FOUND. 13 (2009), http://www.southerneducation.org/getattachment/43e3f5bb-714f-47c3-85ad-ece27529f99f/No-Time-Lose-Why-America-Needs-an-Education-Amendm.aspx [hereinafter *No Time To Lose*].
[16] *Reported Voting, supra* note 15.
[17] *Id.*
[18] *No Time to Lose*, *supra* note 15, at 13.
[19] *Id.*

"[Education] is required in the performance of our most basic public responsibilities . . . It is the very foundation of good citizenship." – Brown v. Board of Education[20]

The First Amendment of the United States Constitution guarantees freedom of speech and of assembly, collectively known as "freedom of expression."[21] Justice Benjamin Cardozo defined freedom of expression as "the matrix, the indispensable condition, of nearly every other form of freedom."[22] Exercise of freedom of expression continuously protects all other fundamental rights.[23]

A poor education significantly limits a citizen's ability to exercise freedom of expression. "Education directly affects the ability of a child to exercise his First Amendment rights, both as a source and as a receiver of information and ideas, whatever interests he may pursue in life."[24] The classroom – the "marketplace of ideas"[25] – holds a pivotal role of opening up an individual to key experiences in our culture and society.[26] Schools should instill in our young an interest in political discourse, the tools for political debate, and knowledge of governmental processes.[27] Indeed, Americans revere public schools as the "most vital civic institution" for encouraging political consciousness and protecting our democratic system of government.[28] A substandard education, however, strips a child of his ability to fully participate in our democratic society, thereby losing his voice and the ability to fight for his rights.

II. THE PROBLEM: THE SUPREME COURT HAS FAILED TO RECOGNIZE EDUCATION AS A FUNDAMENTAL RIGHT

[20] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).
[21] *Freedom of Expression*, AM. C.L. UNION, https://www.aclu.org/free-speech/freedom-expression (last visited on Aug. 16, 2014).
[22] Palko v. Connecticut, 302 U.S. 319, 327 (1937).
[23] *See Freedom of Expression*, *supra* note 21.
[24] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 112 (1973) (Marshall, J., dissenting) (relying on Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (which speaks of students' right "to inquire, to study and to evaluate, to gain new maturity and understanding") (relying on Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (stating that the classroom is a "marketplace of ideas").
[25] *Keyishian*, 385 U.S. at 603.
[26] *Constitutional Law - Nonestablishment of Religion - Direct Grants by State to Nonpublic Schools for State-Mandated Testing and Record-Keeping Programs Violate Establishment Clause,* 86 HARV. L. REV. 1068, 1074 (1973).
[27] *Rodriguez*, 411 U.S. at 113 (Marshall, J., dissenting).
[28] Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring).

The Supreme Court's failure to recognize education as a fundamental right has allowed discriminatory and inconsistent treatment of educational rights throughout the states. For example, the trend of allotting unequal funding to school districts is a pervasive practice across the country. Moreover, without guidance from the Supreme Court, each state government's protection of educational rights is, at best, haphazard and wavering. Thus, the state where a citizen resides determines both whether education is considered to be a fundamental right and the level of educational equality the state government requires.

A. The Origin of the Problem: San Antonio Independent School District v. Rodriguez

In *San Antonio Independent School District v. Rodriguez*, the Court considered for the first time whether education is a fundamental right and whether Unequal School Funding is constitutional. In 1973, as was mandated by Texas law, 40% of the cost of Texas public education was derived from local ad valorem property taxes.[29] The tax revenue generated from this practice varied greatly from district to district, as it was based on local tax rates and the "amount of taxable property" within each district.[30] The unequal tax revenue was allocated to the public schools within each district.[31]

Appellant parents initiated the suit on behalf of their children, who attended elementary and secondary schools in Edgewood Independent School District in San Antonio, Texas.[32] Edgewood Independent School District was located in an urban neighborhood with a low property tax base.[33] The appellants argued that education is a fundamental right[34] and the "substantial interdistrict disparities in school expenditures" based on local property taxation was unconstitutional.[35]

In a shocking divergence from a historical reverence for education,[36] the Court held that education is not a fundamental right and Unequal School Funding based on local property taxation was

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[29] *Rodriguez*, 411 U.S. at 73 (Marshall, J., dissenting).
[30] *Id*.
[31] *Id.*
[32] *Id.* at 4-5.
[33] *Id.* at 5.
[34] *Id.* at 35.
[35] *Id.* at 53.
[36] *Id*. at 29-30 (quoting Brown v. Bd. of Educ., 347 U.S. 483 (1954), "education is perhaps the most important function of state and local governments.").

constitutional.[37] Justice Lewis Powell delivered the opinion of the Court, and wrote that determining whether a right is fundamental depends on whether the right is "explicitly or implicitly guaranteed by the Constitution."[38] The Court found that education cannot be found either explicitly or implicitly within the Constitution, and is therefore not a fundamental right.[39]

Based on the finding that education was not a fundamental right, the Court refused to apply the strict scrutiny test to the practice of Unequal School Funding.[40] The Court recognized that the current school funding system resulted in "substantial interdistrict disparities in school expenditures."[41] Yet, the Court upheld the unequal funding system, finding that it was rationally related to a legitimate state interest.[42]

B. The Impact of Rodriguez: Where Are We Now?

In the wake of *Rodriguez*, we are faced with a pervasive, discriminatory practice of Unequal School Funding. Whether education is a fundamental right depends on judicial analysis of each state court. Today, a child's only hope for the government's recognition of education as a fundamental right depends on state courts, each applying their own unique standards and rules.

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[37] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 18 (1973)

[38] *Id.* at 33-34 (1973) (relying on Eisenstadt v. Baird, 405 U.S. 438 (1972); Dunn v. Blumstein, 405 U.S. 330 (1972); Police Dept. of City of Chicago v. Mosley, 408 U.S. 92 (1972); Skinner v. Oklahoma, 316 U.S. 535 (1942)).

[39] *Rodriguez*, 411 U.S. at 35.

[40] *Id.* at 44.

[41] *Id.* at 15-16 (conceding that "substantial interdistrict disparities in school expenditures" existed and were "largely attributable to differences in the amounts of money collected through local property taxation").

[42] *Id.* at 54-55. *See generally* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006) (describing the three basic levels of judicial scrutiny. First, the rational basis test is a highly deferential test that is applied to non-fundamental rights. A challenged practice will be upheld "so long as the practice is a 'rational' way of furthering any 'legitimate' government purpose". Second, intermediate scrutiny is slightly less deferential than the rational basis test, and challenged practices will be upheld under the test as long as the practice is "substantially related" to an "important government interest." Finally, and as will be discussed further in this paper, strict scrutiny is a rigorous test which is applied to fundamental rights and suspect classifications. Challenged practices will be upheld only if the practice furthers a "compelling governmental interest" and is "narrowly tailored" to achieve such interest.).

1. Unequal School Funding is a Pervasive American Practice

"Unequal School Funding" is the practice in which a school district's funding is based on unequal property taxes within the district.[43] Public education is financed by Unequal School Funding in forty-nine states.[44] The amount of revenue a school district can raise through Unequal School Funding usually depends on two factors: (1) the local tax base, and (2) the assessed value of real property within the district.[45] The widely varying district property wealth throughout each state results in a wide and disparate range of tax revenue in each school district.[46]

Unequal School Funding disfavors property-poor districts in a manner that strips the residents of any meaningful participation in deciding how their tax money is spent. First, the amount of taxable property within a district is not a factor that taxpayer residents can control.[47] Furthermore, residents' choice to increase their tax rate in an attempt to compete with the revenue collected in property-rich districts is does not enable residents to compensate for their low-value property. For example, the ten richest Texas districts in 1970 produced $585 per pupil "with an equalized tax rate of 31 cents on $100" valuation. In contrast, the four poorest districts were only able to produce $60 per pupil, even though their equalized tax rate had been increased to 70 cents on $100 valuation.[48] Moreover, this same correlation between low taxable property and low per pupil spending was found to persist in the ninety-six Texas districts.[49]

2. Protection of Educational Rights Varies by State

Whether a child has a fundamental right to education and the constitutionality of Unequal School Funding depends on the interplay of each state's constitution, individual legislatures, general assemblies, and court systems.[50] The states have plenary, or absolute, power in the area of education because (1) education is not explicitly listed in the Constitution

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[43] *See generally* Jonathan M. Purver, *Validity of Basing Public School Financing System on Local Property Taxes,* 41 A.L.R.3d 1220, 2 (2011).
[44] *Id.* at 2.
[45] *Id.*
[46] *Id.*
[47] *Rodriguez*, 411 U.S. at 128 (Marshall, J., dissenting).
[48] *Id.* at 75-76.
[49] *See id.* at 76.
[50] Meira Schulman Ferziger, Annotation, *Validity of Public School Funding Systems*, 110 A.L.R.5th 293, 2 (2004).

as a right, and (2) the Supreme Court has not deemed education to be a fundamental right.[51]

San Antonio was the first and only time that the Supreme Court has considered whether education is a fundamental right, and the decision has gone unquestioned by the Supreme Court since its split 5-4 decision in 1973. A plethora of conflicting state court opinions have followed in *San Antonio*'s wake. Thus, we are now faced with fifty different school-financing models, fifty different state legislatures interpreting the school-financing models, and fifty different state court systems determining whether school-financing models have met that state's constitutional standards. Since *San Antonio*, each state court's interpretation of their own constitutions, laws, and application of judicial scrutiny has resulted in a vastly disparate judicial history of Unequal School Funding outcomes.

Some state courts have upheld their Unequal School Funding system, despite the court's acknowledgement that the system resulted in financial disparities between school districts.[52] In *Matanuska-Susitna Borough School District v. State*, for example, the Alaska Supreme Court applied the rational basis test to Unequal School Funding and found that, while school funding was unequal, the educational interests of the students were not disparately affected.[53] In *Skeen v. State*, additionally, the Supreme Court of Minnesota held that the state's education clause did not require "identical" or "nearly identical" educational expenditures, and simply required school funding to meet the basic educational needs of all districts.[54]

On the other side of the spectrum, some states have struck down Unequal School Funding, because it fails to result in the equal education of all students, it fails to pass the muster of the strict scrutiny test, or because it does not pass "the educational standards set by the state['s] constitution."[55] In *Rose v. Council for Better Education*, for example, the Supreme Court of Kentucky interpreted the Kentucky constitution's requirement of "efficient" education to mean "equal" education, meaning all state-funded schools must be "substantially uniform."[56] Thus, the court held that Kentucky's

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[51] Russell Dennis, *The Role of the Federal Government in Public Education in the United States* (2000), https://educabilityrocs.wordpress.com/2015/01/13/what-is-and-what-should-be/ (explaining that the Tenth Amendment grants plenary power to the states for powers which the Constitution does not delegate to the federal government, unless the Supreme Court classifies the interest as fundamental. A Supreme Court ruling may classify an interest as fundamental if it is closely related to a constitutional rights.).
[52] *See generally* Ferziger, *supra* note 50, at 2.
[53] Matanuska-Susitna Borough Sch. Dist. v. State, 931 P.2d 391, 402 (Alaska 1997).
[54] Skeen v. State, 505 N.W.2d 299, 311-12 (Minn. 1993).
[55] Ferziger, *supra* note 50, at 4-4a.
[56] Rose v. Council for Better Educ., 790 S.W.2d 186, 207 (Ky. 1989).

Unequal School Funding system was unconstitutional.[57] Additionally, in *Opinion of the Justices*, the Alabama Supreme Court found that education is a fundamental right and must be scrutinized under strict scrutiny.[58] Alabama's Unequal School Funding system was found to be unconstitutional because there was no compelling state interest that would justify the existing discrepancies in educational opportunity.[59] Finally, in *Claremont School District v. Governor*, the Supreme Court of New Hampshire held that a constitutionally adequate education was a fundamental right, and that the state's Unequal School Funding system unconstitutionally violated the state's duty to provide an adequate education for its public school students.[60] In short, whether a citizen has a fundamental right to an equal education, and how zealously such right is protected, is a seemingly arbitrary luck of the draw.

III. THE SOLUTION: THE SUPREME COURT MUST READDRESS WHETHER EDUCATION IS A FUNDAMENTAL RIGHT

The Supreme Court must readdress whether education is a fundamental right because state supreme courts greatly conflict regarding this immensely important issue. The Supreme Court has jurisdiction to hear a case challenging state laws when the state's laws and related judicial decisions conflict with other states' laws and judicial decisions.[61] As has been shown in this paper, the Supreme Court has failed to guide the states on whether education is a fundamental right, and on how to appropriately scrutinize the pervasive Unequal School Funding programs used throughout the country.

As a result of the states' divide, forty-nine states implement Unequal School Funding programs, and all fifty states apply vastly different standards of scrutiny when assessing educational inequity.[62] Indeed, states currently differ in every possible analysis of education, including whether

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[57] *Id.* at 215.
[58] Opinion of the Justices, 624 So. 2d 107, 159 (Ala. 1993).
[59] *Id.*
[60] Claremont Sch. Dist. v. Governor, 142 N.H. 462, 473, 76 (1997).
[61] *See generally* Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 887 (2003).
[62] *See generally* Keyishian v. Bd. of Regents, 385 U.S. 589 (1967); *see generally* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963) (Brennan, J., concurring); *see generally* Opinion of the Justices, 624 So. 2d 107 (Ala. 1993); *see generally* Matanuska-Susitna Borough Sch. Dist. v. State, 931 P.2d 391 (Alaska 1997); Skeen v. State, 505 N.W. 2d 299, 312 (Minn. 1993); *see generally* Claremont Sch. Dist. v. Governor, 703 A.2d 1353 (N.H. 1997).

education is a fundamental right, whether the rational basis or strict scrutiny judicial review should be applied, and the standard for determining when an Unequal School Funding program has violated a state's unique standard for "adequate" or "equal" education.[63]

Additionally, the Supreme Court should readdress whether education is a fundamental right because of the great national interest in education. The Supreme Court has discretion to hear a case that is of great national importance. In *Roe v. Wade*, for example, the Supreme Court chose to address the issue of whether a woman has a fundamental right to an abortion, despite the fact that such right is not explicitly listed in the Constitution, and had never before been found to be implicitly protected by the Constitution.[64] The Court heard *Roe* because abortion was of great national importance, not because it was explicitly or implicitly found in the Constitution.

The Supreme Court's historic interest in education, moreover, illustrates the great national importance of education. The Court seems to have addressed, decided, and reaffirmed every other major issue concerning educational equality. Most notably, unequal educational facilities were abolished in *Sweatt v. Painter* in 1950,[65] and state-enforced racial segregation was abolished in *Brown v. Board of Education* in 1954.[66] In light of the vastly conflicting laws and strong national interest in education, the Supreme Court must readdress whether education is a fundamental right.

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[63] *See generally* Keyishian v. Bd. of Regents, 385 U.S. 589 (1967); *see generally* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963) (Brennan, J., concurring); *see generally* Opinion of the Justices, 624 So. 2d 107 (Ala. 1993); *see generally* Matanuska-Susitna Borough Sch. Dist. v. State, 931 P.2d 391 (Alaska 1997); Skeen v. State, 505 N.W.2d 299 (Minn. 1993); *see generally* Claremont Sch. Dist. v. Governor, 703 A.2d 1353 (N.H. 1997).

[64] Roe v. Wade, 410 U.S. 113 (1973).

[65] Sweatt v. Painter, 339 U.S. 629, 633-34 (1950) ("In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the [whites-only] Law School is superior . . . It is difficult to believe that one who had a free choice between these law schools would consider the question close.").

[66] Brown v. Bd. Of Educ., 347 U.S. 483, 493 (1954) ("Today, education 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. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.").

IV. LOOKING FORWARD: PUTTING THE AMERICAN EDUCATION SYSTEM TO THE TEST

The appropriate application of strict scrutiny to Unequal School Funding would inevitably lead to the abolishment of the discriminatory practice. Judicially challenged practices that affect fundamental rights must be analyzed under strict scrutiny, and such challenged practices will survive only if found to be necessary to promote a compelling governmental interest. In *Rodriguez*, the Court erred in applying the deferential rational basis test to education. Upon the Supreme Court's revisit to the issue, the Court should hold that education is a fundamental right and Unequal School Funding is unconstitutional.

A. The Appropriate Application of Strict Scrutiny to Fundamental Rights

The strict scrutiny test is appropriately applied to judicially challenged practices affecting fundamental rights. Under the traditional and most-common application of strict scrutiny, regulations "that restrict the exercise of 'fundamental' rights can survive only if necessary to promote a compelling governmental interest."[67]

Despite the appearance of being based in doctrinal necessity, the application of the "strict scrutiny test is of relatively recent origin, having developed only in the 1960s."[68] Strict scrutiny is a judicially-crafted formula; indeed, the words "strict judicial scrutiny" and its infamous accompanying terms "necessary," "narrowly tailored," and "compelling governmental interest" appear nowhere in the United States Constitution.[69] Instead, the revered concept of strict scrutiny was crafted by the Warren Court in order to protect fundamental, or "preferred," rights that were too significant to be analyzed under the rational basis test.[70]

The decision to apply strict scrutiny – and the way in which it is applied – has evolved and fluctuated throughout time.[71] Throughout this evolution, the Court has attempted to create "a jurisprudential distinction

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[67] Richard J. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1269 (2007).
[68] *Id.* at 1270-71.
[69] *See id.* at 1270-72.
[70] *Id.* at 1270.
[71] *See id.* at 1271.

between ordinary rights", and fundamental liberties "entitled to more stringent judicial protection."[72] This distinction, however, has been fraught with disputes. The Court has fluctuated with recurring and conflicting applications of strict scrutiny to a myriad of cases, including whether there is a fundamental right to an abortion under the Due Process Clause,[73] whether flag burning and campaign donations are protected as free speech under the First Amendment,[74] and whether a "substantial burden" on free exercise of religion offends the First Amendment.[75] In short, the Court has oscillated on when and how strict scrutiny should be applied, and individual Justices have varied strict scrutiny's application "based on their personal assessments of the importance of the right in question."[76]

While the application of strict scrutiny has organically evolved, the Court has consistently allowed special judicial consideration of discriminatory state practices that affect constitutional rights.[77] In other words, the Court has applied strict scrutiny to a number of important interests despite the fact that such interests are nowhere listed in the Constitution.[78] In *Skinner v. Oklahoma*, for example, the Court held that strict scrutiny must be applied to state discrimination affecting procreation because "marriage and procreation are fundamental to the very existence and survival of the race."[79] In *Roe v. Wade*, additionally, the Court extended the right to privacy under the Due Process Clause of the 14th Amendment, to a woman's right to an abortion.[80] In *Griffin v. Illinois*, the Court established a right to an appeal from a criminal conviction.[81] Finally, in *Yick Wo v. Hopkins*, the Court determined that the right to vote in state elections is a "fundamental political right," because it is "preservative of all rights."[82] These cases illustrate the Supreme Court's continuous application of strict scrutiny to important interests, despite the fact that such interests are not explicitly found in the Constitution.

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[72] *Id.* at 1285.
[73] *Roe*, 410 U.S. at 152-56.
[74] United States v. Eichman, 496 U.S. 310, 315 (1990).
[75] *See generally* Hobbie v. Unemp. Appeals Comm'n, 480 U.S. 136, 139-42 (1987); *see generally* Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 717-18 (1981); *see generally* Wis. v. Yoder, 406 U.S. 205, 220-21 (1972); *see generally* Sherbert v. Verner, 374 U.S. 398, 403-04 (1963).
[76] Fallon, *supra* note 67, at 1271.
[77] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 103 (1973) (Marshall, J., dissenting).
[78] *Id.*
[79] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).
[80] *Roe*, 410 U.S. at 152-54.
[81] Griffin v. Ill., 351 U.S. 12, 24 (1956).
[82] Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

B. The Inappropriate Application of the Rational Basis Test to Unequal School Funding

In *Rodriguez*, the Supreme Court erred in applying the rational basis test to Unequal School Funding.[83] The application of the rational basis test was premised on the Court's novel and bold assertion that a right is fundamental – and thus worthy of strict scrutiny – only if the right is "explicitly or implicitly guaranteed by the Constitution."[84] The Court stated, "It is not the province of this Court to *create* substantive constitutional rights in the name of guaranteeing equal protection of the laws."[85] In essence, the Court ignored the judicial history of the ever-changing application of the strict scrutiny test, and instead favored the façade that some unknown, deep-rooted doctrine would simply not allow the court to consider education under the strict scrutiny test.

Upon applying the rational basis test to Unequal School Funding,[86] the *San Antonio* Court upheld the practice and concluded that Unequal School Funding in Texas was a rational method of furthering the legitimate government purpose of protecting local control of public education.[87] This conclusion, however, was premised on multiple fallacies.

The two greatest fallacies in *San Antonio*'s logic were (1) the purpose of Unequal School Funding was to protect local control of public education,[88] and (2) Unequal School Funding does not adversely affect the quality of education provided to students.[89]

1. Unequal School Funding Does Not Promote Local Control of Public Education

Texas's statewide laws, not local property taxes, control almost every minute detail of the public school system.[90] State laws dictate required courses, approved textbooks, qualifications for obtaining a teaching certificate, and the length of the school day.[91] Texas's own courts have recognized this stark reality: "As a result of the acts of the

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[83] *See generally* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 88 (1973).
[84] *Id.* at 33 (1973) (Marshall, J., dissenting).
[85] *Id.* (emphasis added).
[86] *Id.* at 44.
[87] *See id.* at 51-55.
[88] *Id.* at 49.
[89] *See id.* at 37.
[90] *Id*. at 126 (Marshall, J., dissenting).
[91] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 127 (1973).

Legislature, our school system is not of mere local concern but it is statewide."[92]

Contrary to contentions made by the *Rodriguez* Court, Unequal School Funding strips residents in property-poor districts of any meaningful control over educational decisions. The *Rodriguez* Court reasoned that allowing school funding to be based on local property taxes gave residents "'[d]irect control over decisions'" affecting their children's education, and even encouraged a "healthy competition" between school districts.[93] In reality, and as was previously discussed in this paper, Unequal School Funding is based upon two factors, neither of which allow for property-poor residents to have control over their children's education: (1) the amount of taxable property located within a district, a factor over which residents have no control, and (2) local tax rates, which can never be raised high enough to allow property-poor districts to compete with the vastly greater revenues being produced by property-rich districts. The *Rodriguez* court then concluded that Unequal School Funding was serving the legitimate interest of protecting local control over education, despite the fact that Unequal School Funding truly dispossesses residents of any such control.[94] The proposition that Unequal School Funding protects local fiscal control in any way is a "mere sham."[95]

2. Unequal School Funding Adversely Affects the Quality of Education

Money matters in education. The *Rodriguez* Court conceded that basing school funding on local property taxes directly resulted in "substantial interdistrict disparities in school expenditures".[96] The Court, however, somehow still managed to conclude that such stark inequity had no effect on the quality of education offered to students.[97] Conflicting expert testimony was offered at trial regarding whether spending variations affected educational achievement, or quality.[98]

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[92] Treadaway v. Whitney Indep. Sch. Dist. 205 S.W.2d 97, 99 (Tex. Civ. App. 1947).
[93] *Rodriguez*, 411 U.S. at 49-50.
[94] *Id.* at 55.
[95] *Id.* at 130 (Marshall, J., dissenting).
[96] *Id.* at 15-16 (conceding that "substantial interdistrict disparities in school expenditures" are "largely attributable to differences in the amounts of money collected through local property taxation").
[97] *Rodriguez,* 411 U.S. 1.
[98] *Id.* at 42-43.

Continued and modern research collectively shows "'a strong positive relationship between school funding and student performance.'"[99] A recent study by the Southern Education Foundation, for example, showed that students in property-poor districts benefit from higher per-pupil spending. In school districts that were both property-poor and had below-average per-pupil spending, 91% of students failed to establish proficiency in math.[100] Alternatively, in school districts which were property-poor but which had above-average per-pupil spending, 60% of the students established proficiency in math.[101] While Unequal School Funding is not the only variable that affects student outcomes, research shows that increased per -pupil spending significantly increases student outcomes.[102]

Regardless of differing statistics and analyses regarding the impact of Unequal School Funding, the fact remains that the government's allotment of significantly more funds to certain public entities is different and unequal. Increased funds per pupil allow for more educational resources and more options in educational planning.[103] As compared to property-poor districts, property-rich districts have more college-educated teachers, less teachers with emergency teacher permits, higher teacher salaries, and lower teacher-student ratios.[104]

Students that overcome the disadvantages that arise out of Unequal School Funding demonstrate student grit and perseverance, not equal educational opportunities. It is true that some students are able to overcome disadvantages, such that certain surveys and data may fail to reflect a difference in educational achievement between property-poor and property-rich districts. However, the relevant assessment when considering Unequal School Funding is the disparate input (the resources the State offers to its students), not the output (how well students are able to perform despite their unequal treatment).[105] To be sure, the success of a student in the face of educational discrimination – including larger class sizes, less courses, less-qualified teachers, outdated books – demonstrates the students' perseverance, and is not an indication that the inadequate resources afforded to the student are suddenly adequate.[106]

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[99] *No Time to Lose*, *supra* note 15, at 21. *See* Rob Greenwald et al., *The Effect of School Resources on Student Achievement*, REV. OF EDUC. RES. 362 (1996), http://www.viriya.net/jabref/the_effect_of_school_resources_on_student_achievement.pdf.
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Rodriguez*, 411 U.S. at 83-84, 86 (1973) (Marshall, J., dissenting).
[104] *Id.* at 85-86.
[105] *Id*. at 83-84.
[106] *Id.* at 84 (citing Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 349 (1938)).

C. *The Inevitable Result: Abolishment of Unequal School Funding through the Appropriate Application of Strict Scrutiny*

Education's inextricable relationship with the right to liberty, the right to vote, and the right to freedom of expression undeniably distinguishes it as a fundamental right – as it deeply affects other constitutional rights. Similar to other interests affecting constitutional rights, education deserves special judicial consideration. The discriminatory state practice of Unequal School Funding, furthermore, deserves to be analyzed using the strict scrutiny test.[107]

In *Rodriguez*, both the Appellant and the Court agreed that Unequal School Funding, as used within Texas and across the nation, would be found to be unconstitutional if analyzed under the strict scrutiny test.[108] The Court conceded that the government simply could not demonstrate that Unequal School Funding was narrowly tailored to serve a legitimate government interest.[109] However, the *Rodriguez* Court was able to uphold the discriminatory practice of Unequal School Funding, by refraining from applying strict scrutiny and instead applying the rational basis test.[110] Application of the rational basis test was based on the erroneous premise that education is not a fundamental right.[111] The appropriate application of strict scrutiny to Unequal School Funding, therefore, would finally abolish the discriminatory practice.

D. *Passing the Test: Reaping the Benefits of Educational Equality*

As it stands, the lack of educational equality in the current school funding system assigns countless helpless children to receive a substandard education which "'may affect their hearts and minds in a way unlikely ever to be undone.'"[112] The education system created by Unequal School Funding is eerily similar to the school system that the Supreme Court rejected 66 years ago, in *Sweatt v. Painter*.[113] In determining whether schools were separate but equal, courts prior to *Sweatt* had only focused on tangible, physical factors of the educational facilities in question; if the facilities were substantially similar, the schools were found to be equal.[114]

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[107] *See generally id.* at 103.
[108] *Id.* at 16-17.
[109] *Rodriguez,* 411 U.S. at 68.
[110] *Id.* at 88.
[111] *Id.*
[112] *Id.* at 71-72 (Marshall, J., dissenting) (quoting Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954)).
[113] *See generally* Sweatt v. Painter, 339 U.S. 629 (1950).
[114] *Id.* at 634.

The *Sweatt* Court applied a groundbreaking standard and considered "intangible" qualities of a school, such as the reputation and experience of the faculty and administration, the position of the alumni, and the standing in the community.[115] The Court concluded that the "[W]hites only" law school was superior, because of "the number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities."[116] The Court further quipped, "It is difficult to believe that one who had a free choice between these law schools would consider the question close."[117] Likewise, it is difficult to understand how modern courts can allow Unequal School Funding to continue when it undisputedly creates unequal tangible and intangible qualities of public schools.

The recognition of education as a fundamental right, and the abolition of Unequal School Funding, would have an enormous impact on students. In addition to enjoying the improved tangible and intangible qualities of the education system, students will be given greater access to their fundamental rights. A student's zip code will be less likely to increase the risk of being incarcerated, becoming disenfranchised, and being removed from active participation in our democratic society. To be sure, the disenfranchisement of poor citizens is a grave issue that faces our democracy, and educating these citizens to be active members of society is the first step in tackling this issue.

The recognition of education as a fundamental right would also have an extremely beneficial impact on the American education system as it stands with other nations. A recent global ranking of education systems ranked the United States, 17th out of 40 countries.[118] The top sixteen countries had "a fundamental commitment in common": "a constitutional, or statutory, guarantee of the right to education."[119] The United States' decision to finally join the world's education leaders in this fundamental commitment to education will set the country on the track to continue improving educational outcomes.

V. CONCLUSION

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[115] *Id.* at 633-34.
[116] *Id.*
[117] *Id.* at 634 (1950).
[118] Stephen Lurie, *Why Doesn't the Constitution Guarantee the Right to Education?*, THE ATLANTIC (Oct. 16, 2003), http://www.theatlantic.com/education/archive/2013/10/why-doesnt-the-constitution-guarantee-the-right-to-education/280583.
[119] *Id.*

"[T]he liberties of none are safe unless the liberties of all are protected."– Justice William O. Douglas[120]

Protecting the liberties of all citizens is of utmost importance to American society. Because education is so closely intertwined with the free exercise of our liberties, education must be revered and protected as such. The downfall of education will lead to the downfall of our democratic society. The recognition of education as a fundamental right and the rejection of Unequal School Funding are essential in protecting our citizens' liberties.

[120] WILLIAM O. DOUGLAS, A LIVING BILL OF RIGHTS 64 (1961).