

The Aftermath of *San Antonio v. Rodriguez*:  
Arguments In Favor of a Fundamental Right to a Minimally  
Adequate Education in the 21<sup>st</sup> Century

*“[Educational] opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”<sup>1</sup>*

For most of us, it’s a given fact that where you live and how much money your parents make will determine the quality of your K-12 education. Disparities in funding, facilities and resources between schools situated merely five miles apart are commonplace. In an effort to mitigate drastic disparities among schools, the argument that children have a fundamental right to an education was brought before the United States Supreme Court in *San Antonio Independent School District v. Rodriguez* in 1973.<sup>2</sup> The Court declined to recognize education as a fundamental right, but left open the question of whether or not there is a fundamental right to a *minimally adequate* education.<sup>3</sup> This paper argues that the Federal Constitution implicitly protects a fundamental right to a minimally adequate education for three reasons: (1) a minimally adequate education is necessary to exercise our First Amendment Rights, (2) vast inequalities in education violate that Equal Protection Clause of the Fourteenth Amendment, and (3) multiple States have recognized a fundamental right to a minimally adequate education within their own state constitutions.

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<sup>1</sup> *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954).

<sup>2</sup> *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18 (1973) (ruling that education was not a fundamental right, district wealth was not a suspect classification, and the Texas system of school finance was rational, passing the standard used by the court when judicial "strict scrutiny" is not required).

<sup>3</sup> *Id.* at 90. Justice Marshall's dissent, however, reiterated that the Constitution may entitle children to a minimally adequate education by stating that the majority did not address whether a State constitutionally could deny a child access to a minimally adequate education. In prior cases, this Court explicitly has left open the question whether such a deprivation of access would violate a fundamental constitutional right. *Id.*

The Federal Constitution does not expressly state that all citizens have a fundamental right to a minimally adequate education. However, in the past, the Court has recognized several fundamental rights *implicitly* guaranteed by the Constitution. Some of these rights include: the right to marry,<sup>4</sup> the right to make a choice about whether or not to have children,<sup>5</sup> the right to privacy,<sup>6</sup> the right to travel between States,<sup>7</sup> and the right to attend criminal trials.<sup>8</sup> Thus, merely because the Constitution does not explicitly grant a fundamental right to a minimally adequate education will not preclude the Court from implicitly finding one.

The first place to locate an implicit right to education in the Constitution is within the First Amendment. A wealth of case law and legal theory has recognized that a minimally adequate education is necessary to exercise our First Amendment rights. Beginning with the founding of the country, American society has identified education as important to maintaining liberty and upholding our civil rights. In *A Bill for the More General Diffusion of Knowledge*, Thomas Jefferson stated, “free citizens, in order to remain free, must be educated.”<sup>9</sup> His statement argues that a democracy works best with educated citizens and public officials. Thus, since the eighteenth century, scholars have recognized that education is necessary to exercise our First Amendment liberties.

Scholars today have also argued that valuable public debate and civic behavior must be informed. Susan Bitensky’s article *Theoretical Foundations for a Right to*

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<sup>4</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>5</sup> *Roe v. Wade*, 410 U.S. 179 (1973).

<sup>6</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>7</sup> *Shapiro v. Thompson*, 394 U.S. 618 (1969).

<sup>8</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

<sup>9</sup> See Michael Heise, *Equal Educational Opportunity Hollow Victories, and the Demise of School Finance Equity Theory: An Empirical Perspective and Alternative Explanation*, 32 GA. L. REV. 543, 551-52 (Winter 1998).

*Education Under the U.S. Constitution*,<sup>10</sup> argues that education is necessary to engage in political debates, which is an extension of our right to free speech and expression. Also, education is necessary to express concerns to our Congressman and other state and city officials. Without education it would be near impossible to formulate constructive criticism in a cogent and effective manner, making the guarantee of free speech, press and expression an empty promise for uneducated citizens.

Beyond the arguments of legal scholars, ample case law has also recognized education is an important factor in our ability to exercise our First Amendment Rights.<sup>11</sup> In *Abington School District v. Schempp*, the Court noted that, “Americans regard public schools as a most vital civic institution for the preservation of a democratic system of government.”<sup>12</sup> In other words, education teaches students how to think critically, such that they can carry the tradition of democracy into the future. Additionally, in *Brown v. Board of Education*, the Court stressed that

“[t]oday, education is perhaps the most important function of state and local governments... [Education] 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.”<sup>13</sup>

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<sup>10</sup> 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 (1991-1992).

<sup>11</sup> In *Meyer v. Nebraska*, the Court noted, “the American people have always regarded education and the acquisition of knowledge as matters of supreme importance which should be diligently promoted.” *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). Also, in *Williams v. Rhodes*, the court ruled, “A system of competition in ideas and governmental policies is at the core of our electoral process and of the first Amendment freedoms.” *Williams v. Rhodes*, 393 U.S. 23, 23 (1968). Finally in *State of Wisconsin v. Yoder*, the court found “some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system...” and that “education prepares individuals to be self-reliant and self-sufficient participants in society.” *State. Wis. v. Yoder*, 406 U.S. 205, 213 (1972).

<sup>12</sup> *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963).

<sup>13</sup> *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954).

The Court's dicta in *Brown* identified education as a pillar of good citizenship and social awareness. Education prepares a student to make a contribution to society – be it a novel, a piece of art, or a role as a civic leader – each contribution is an extension of our freedom of speech, press and expression. Without education a student has little opportunity and few tools to exercise their freedoms in order to make a lasting contribution to society.

Furthermore, even though the Court in *San Antonio* declined to recognize a fundamental right to education under the Federal Constitution, the majority opinion recognized the importance of education to exercising our First Amendment rights, by agreeing “that education . . . is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote.”<sup>14</sup> Without being able to read, a citizen would have difficulty exercising his or her right to vote. Plus, the citizen would not be able to understand newspaper articles, and would perhaps even have trouble comprehending the issues at stake in an election. Democracy is grounded on the ideal of our right to vote. Without an education, this right would be difficult to exercise at all, and certainly could not be exercised to its fullest potential. Thus, Justice Marshall was clearly on point in his dissent in *San Antonio*, when he argued, “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.”<sup>15</sup>

Further case law has suggested that a fundamental right to a minimally adequate education is inherently tied to our First Amendment right to receive information and ideas. In *Board of Education v. Pico*, the Court held that local school boards may not

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<sup>14</sup> *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1972)

<sup>15</sup> *Id.* at 112.

remove books from school libraries merely because the board members disagree with the values and ideas expressed in them.<sup>16</sup> The Court explained that the right to receive information and ideas is a derivative of two express freedoms:

“the right to receive ideas follows ineluctably from the sender's First Amendment right to send them... More importantly, the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights to speech, press, and political freedom.<sup>17</sup>

Thus, an extension can be made from the Court's reasoning in *Pico* to acknowledge a fundamental right to receive an education. Education is an exchange of information and ideas. Just as the Court recognized a right to receive information from books in a school library, students should have a right to receive information from a minimally adequate education under the First Amendment, as well.

Because prior case law has identified the correlation between our First Amendment rights and education, it would not be an abrupt departure from the Court's prior rulings to locate an *implicit* fundamental right to a minimally adequate education under the First Amendment. As earlier cases have stressed, education is essential to exercising our civil liberties and securing our rights as free citizens of America.

The exact argument that education is necessary in order to exercise our First Amendment rights was argued before the U.S. Supreme Court in *San Antonio*, and as stated earlier, the Court declined to entertain this reasoning. However, *San Antonio* was decided in 1973, when there was little evidence to suggest that children were not receiving an adequate education. The Court specifically acknowledged this fact, stating, “even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have

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<sup>16</sup> Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 868-69 (1982).

<sup>17</sup> *Id.* at 867.

no indication that the present levels of educational expenditures in Texas provide an education that falls short.”<sup>18</sup> By contrast, today there are a wealth of statistics and studies revealing the inadequacy of education in America. In turn, the argument for a fundamental right to a *minimally adequate* education based on the exercise of our First Amendment Rights is different today than it was in 1973. Today there is evidence revealing that many children are not receiving the education they need to learn to exercise their First Amendment rights.

Beginning in the 1980’s, a flood of empirical data exposed the inadequacy of American education. A slew of studies warned of a “rising tide of mediocrity” in American education.<sup>19</sup> Theorists feared that the inadequacy of America’s school system was lowering the country’s strength in the global economy.<sup>20</sup> Comparative international assessments revealed the below average performance of American students in comparison to other countries such as France, the United Kingdom, China and Japan.<sup>21</sup> Specifically, America was trailing in the subjects of science and mathematics.<sup>22</sup> Also, a study conducted by the U.S. Department of Education found that few American students “showed the capacity for complex reasoning and problem solving.”<sup>23</sup>

Today further research has revealed that many school facilities are inadequate. Studies show that an estimated \$111.1 billion is needed to bring school facilities to a

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<sup>18</sup> San Antonio Independent Sch. Dist. v. Rodriguez, 411 U.S. 1, 36-37 (1973).

<sup>19</sup> NATIONAL COMMISSION ON EXCELLENCE IN EDUCATION, A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM 5 (1983); *see also* CARNEGIE FORUM ON EDUCATION AND THE ECONOMY, TASK FORCE ON TEACHING AS A PROFESSION, A NATION PREPARED: TEACHERS FOR THE 21ST CENTURY (1986); Robert Tomsho, *Study Tallies Education’s Gap Effect on the GDP*, THE WALL STREET JOURNAL, April 22, 2009.

<sup>20</sup> ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL: CONFERENCE SUMMARY 229 (2002), *available at* [http://www.nap.edu/openbook.php?record\\_id=10256&page=229](http://www.nap.edu/openbook.php?record_id=10256&page=229).

<sup>21</sup> *Id.*; *see also* NATIONAL ASSESSMENT OF EDUCATIONAL PROGRAMS, AMERICA’S CHALLENGE: ACCELERATED ACADEMIC ACHIEVEMENT (1990).

<sup>22</sup> *See* Robert L. Linn & Stephen B. Dunbar, *The Nation’s Report Card: Good News and Bad About Trends in Achievement*, 72 PHI DELTA KAPPAN 127, 131 (1990).

<sup>23</sup> U.S. DEPARTMENT OF EDUCATION, AMERICA 2000: AN EDUCATION STRATEGY (1991).

level of adequacy and roughly forty percent of schools are unable to house science laboratory facilities for students or find space for large-group instruction.<sup>24</sup> In New Jersey, for example, forty-one percent of the state's school facilities were built more than fifty years ago and in districts with lower income, thirty-five schools were constructed in the nineteenth century.<sup>25</sup> Further research has noted that in Ohio alone, over half of state school facilities were built over sixty years ago, and deterioration, from roof collapses to sewage overflow, is rampant.<sup>26</sup>

The fact that facilities, student test scores, and resources are below an adequate level, suggests that many schools do not have the means to provide students with the tools they need to learn how to exercise their First Amendment Rights. The ruling in *San Antonio* seemed to assume students were receiving similar levels of education, regardless of differing funding schemes. The majority opinion specifically noted that this case did not involve legislation which “deprived, infringed, or interfered with the free exercise of some such fundamental personal right or liberty.”<sup>27</sup> Now over thirty years later, the inadequate state of school facilities reveals that a student's ability to exercise their First Amendment Rights *has* been “interfered with” and “infringed upon.” Students have a right to exercise their First Amendment freedoms and those who receive a less than adequate education are not as equipped to exercise those rights as students who have received higher quality instruction.

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<sup>24</sup> Kristen Safier, *The Question of a Fundamental Right to a Minimally Adequate Education*, 69 U. CIN. L. REV. 993, 995 (2001); *see also* PERCY E. BURRUP ET AL., FINANCING EDUCATION IN A CLIMATE OF CHANGE, at xv (1999).

<sup>25</sup> WILLIAM A. FIRESTONE ET AL., FROM CASHBOX TO CLASSROOM: THE STRUGGLE FOR FISCAL REFORM AND EDUCATIONAL CHANGE IN NEW JERSEY 141 (1997).

<sup>26</sup> Kristen Safier, *The Question of a Fundamental Right to a Minimally Adequate Education*, 69 U. CIN. L. REV. 993, 995-96 (2001).

<sup>27</sup> *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 38 (1973).

The disparities between students' educational experiences not only affect their ability to exercise their First Amendment rights, but are also in violation of the Equal Protection Clause. Unfortunately, the differences between students' educations are based on their parent's income and where the child resides – which are both elements that a child cannot control. The child has no earning power or political power to effectuate a change in which school they attend; their education is a product of the environment. This type of disparity (the kind that a child has no power to alter) is the type of disparity the Equal Protection Clause was designed to protect. Just as race, gender, and sex are qualities that a citizen cannot alter, the same is true of a child who is born into a certain school district. Because statistics have shown that educational inequalities are beyond negligible, and education is something a child cannot control, the right to a minimally adequate education should receive heightened protection under the Equal Protection Clause of the Constitution.

Not only should education be granted higher protection under the Equal Protection Clause because of vast inequalities between school facilities, but also because education is arguably more important in today's society than it was in 1973. Today, education is fundamental to a citizen's survival and ability to secure a job. Studies have indicated that receiving an education today is significantly more critical to an individual's financial security than it was in the 1970's. According to the Council of Economic Advisors, in 1979, a male college graduate earned only twenty-nine percent more than a male high school graduate and fifty-seven percent more than a male worker who did not



complete high school. By 1999, the gap greatly increased.<sup>28</sup> A male college graduate earned on average sixty-eight percent more than a male high school graduate and nearly one hundred forty-seven percent more than a male who has not completed high school.<sup>29</sup> Additional studies have noted that higher wage manufacturing and construction jobs, which used to be available to citizens with less education, are becoming more scarce.<sup>30</sup> Thus, students today place greater reliance on education to provide them with a job and financial security than students in the 1970's. And with society's growing dependence on technology and the information age,<sup>31</sup> the importance of education will only continue to grow.<sup>32</sup>

These recent statistics suggest that education today is more than a societal value; it is an essential ingredient for surviving in today's highly competitive job market. As the Court stated in *Brown v. Board of Education*, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity for an

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<sup>28</sup> NATIONAL ACADEMIES PRESS: ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL, COUNCIL OF ECONOMIC ADVISORS 135-136 (2000), available at [http://books.nap.edu/openbook.php?record\\_id=10256&page=16](http://books.nap.edu/openbook.php?record_id=10256&page=16).

<sup>29</sup> *Id.*; see also Jennifer Cheeseman Day & Eric C. Newburger, U.S. DEP'T OF COMMERCE, *The Big Payoff: Educational Attainment and Synthetic Estimates of Work-Life Earnings* 3 (2002), available at <http://www.census.gov/prod/2002pubs/p23-210.pdf>. The U.S. Census Bureau posts slightly different numbers, but a similar amount of growth in the level of disparity between educated and non-educated citizens today, than in the 1970's. In 1975, full-time employees with a bachelor's degree earned 50% more than those employees with only a high school diploma. In 1999, bachelor's degree-holders earned 80% more than employees with a high school diploma.

<sup>30</sup> ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL: CONFERENCE SUMMARY 229 (2002), available at [http://www.nap.edu/openbook.php?record\\_id=10256&page=229](http://www.nap.edu/openbook.php?record_id=10256&page=229).

<sup>31</sup> Shave D. Jeffries, *The Structural Inadequacy of Public Schools For Stigmatized Minorities: The Need For Institutional Remedies*, 34 HASTINGS CONST. L.Q. 1, 51 (2006); see, e.g., RICHARD ROTHSTEIN & TAMARA WILDER, THE MANY DIMENSIONS OF RACIAL INEQUALITY 112 (2005), available at [http://devweb.tc.columbia.edu/manager/symposium/files/83\\_rothstein.pdf](http://devweb.tc.columbia.edu/manager/symposium/files/83_rothstein.pdf).

<sup>32</sup> See Jennifer Cheeseman Day & Eric C. Newburger, U.S. DEP'T OF COMMERCE, *The Big Payoff: Educational Attainment and Synthetic Estimates of Work-Life Earnings* 3 (2002), available at <http://www.census.gov/prod/2002pubs/p23-210.pdf> (noting that "education has become more closely identified with national policy concerns such as workforce readiness, national security, and international economic competitiveness.").

education.”<sup>33</sup> Because education is so important to a citizen’s ability to thrive, a minimally adequate education should be protected under the Equal Protection Clause of the Fourteenth Amendment. By denying students an equal opportunity for an education, students are denied an equal chance to achieve financial and job security – or to even find a job at all. This type of gross inequality is exactly the type of disparity the Equal Protection Clause is intended to prevent.

The third and final reason why the U.S. Supreme Court should find a fundamental right to a minimally adequate education under the Federal Constitution is because multiple States have already recognized a fundamental right to a minimally adequate education. In *San Antonio*, the Court expressed a concern about the implications of its decision with regard to the issue of federalism. The majority noted, “every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system.”<sup>34</sup> Education has traditionally been a state governed issue, provided to the states under the “reserved powers” of the Tenth Amendment. The decision in *San Antonio* recognized school funding as a state issue and seemed to provide deference to the states by not recognizing a fundamental right to a minimally adequate education under the Federal Constitution. The Court noted, that had a fundamental right been recognized, states would have been “urged to abrogate systems of financing public education presently in existence in virtually every[where].”<sup>35</sup>

However, the fear that a fundamental right to education would upset the balance of federalism and rule the majority of school funding schemes unconstitutional has dissipated since 1973. Today, multiple states have recognized a fundamental right to

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<sup>33</sup> *Brown v. Bd. of Educ. of Topeka*, 474 U.S. 483, 493 (1954).

<sup>34</sup> *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 44 (1973).

<sup>35</sup> *Id.*

education, or at least a minimally adequate education, within their own state constitutions. Because multiple states have already recognized this right and found their own funding schemes to be unconstitutional, finding a fundamental right to a minimally adequate education under the Federal Constitution would have a less dramatic impact on the constitutionality of many school's funding systems.

In *Serrano v. Priest*, the California Supreme Court found a that a fundamental right to education was guaranteed by the Equal Protection Clause in the California Constitution, and therefore applied strict scrutiny to the education funding legislation.<sup>36</sup> In *Rose v. Council for Better Education*, the Kentucky Supreme Court also held that every child had a fundamental right to an adequate education.<sup>37</sup> Additionally, both Connecticut and New York have ruled that education is a basic fundamental right guaranteed by their constitutions.<sup>38</sup> Finally, in *Helena Elementary School District No. 1 v. State*, the Montana Supreme Court not only found that students have a right to education, but that education must be a quality education, not just minimally adequate.<sup>39</sup> Because multiple states have recognized a fundamental right to a minimally adequate education under their state constitutions, if *today* the U.S. Supreme Court recognized a fundamental

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<sup>36</sup> *Serrano v. Priest*, 185 Cal. Rptr. 345 (1976); see also Kristen Safier, *The Question of a Fundamental Right to a Minimally Adequate Education*, 69 U. CIN. L. REV. 993, 995 (2001);

<sup>37</sup> *Rose v. Council For Better Educ., Inc.*, 790 S.W.2d 786 (Ky. 1989). The court also reaffirmed that the legislature had sole responsibility to provide an efficient system of common schools and defined the elements of that system. In so doing, the Kentucky Supreme Court decision declared the entire system of schools unconstitutional, which ultimately lead to the most all-encompassing education reform in history.

<sup>38</sup> In *Horton v. Meskill*, the Connecticut Supreme Court ruled public education is a right of all children of school age. The Court found that the right to education is so basic and fundamental that any infringement of it cannot be justified. *Horton v. Meskill*, 195 Conn. 24 (1985). Additionally, in *Campaign for Fiscal Equity, Inc. v. New York*, the court found that students must be provided a “sound basic education, one that prepares them to function productively as civic participants.” *Campaign for Fiscal Equity, Inc. v. New York*, 86 N.Y.2d 307, 316 (1995). The court defined basic education as access to “the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury.” *Id.*

<sup>39</sup> *Helena Elementary Sch. Dist. No. 1 v. State*, 236 Mont. 44, 52-53 (1989).

right to a minimally adequate education, the fear of upsetting the balance of federalism and declaring every state's funding scheme unconstitutional is less realistic.

In conclusion, this paper is not arguing that *San Antonio* was wrongfully decided, or should be overturned; however, in today's society thirty years later, the entire landscape surrounding the issue of a fundamental right to education has changed. Thus, a fundamental right to a *minimally adequate* education should be carved out of the ruling in *San Antonio* and recognized under the Federal Constitution. Scholars and case law alike acknowledge that education is essential to exercising our First Amendment Rights. Also, given the rising importance of education in our society, as well as, the ample case law that recognizes the necessity of education in order to survive, the Equal Protection Clause should implicitly guarantee a minimally adequate education for all students regardless of where they live or their household income. Finally, because multiple states have recognized a fundamental right to education within their own constitutions, the fear of ruling multiple state funding schemes unconstitutional is less egregious. Therefore, when the issue is presented before the U.S. Supreme Court, the Court should recognize a fundamental right to a minimally adequate education under the Federal Constitution.