

“The Ark Found Within: The Ninth Amendment and a Fundamental Right to Education”

A Reexamination of San Antonio Independent School District v. Rodriguez (1973)

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Abstract

“Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”

-Article III, Northwest Ordinance of 1787

In the same year the Founding Fathers drafted the United States Constitution, the Northwest Ordinance of 1787 highlighted the significance of a child’s right to an education. Yet, one hundred and eighty-six years later, five men rejected this claim. Based on the Equal Protection and Due Process Clauses of the Fourteenth Amendment, *San Antonio Independent School District v. Rodriguez* (1973) proclaims that a fundamental right to an education does not exist.

In light of the current state of education in America, and the neglect of a vital Constitutional provision which seeks to protect “the happiness of mankind” directly, this essay proposes that contrary to *Rodriguez*, an un-enumerated constitutional right to education exists under the Ninth Amendment. To conclude, a new level of scrutiny is introduced in order to identify un-enumerated rights under the Ninth Amendment; this test is hereby applied to find a fundamental right to an education.

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Introduction

In 1973, the Supreme Court adjudicated two cases involving fundamental rights, abortion and education. The former passed muster in *Roe v. Wade*,² while *San Antonio Independent School District v. Rodriguez*³ rejected the latter. As infringement claims continue to appear before the Court challenging a woman's fundamental (now quasi-fundamental) right to an abortion,⁴ *Rodriguez* remains good law. In light of the current state of public education in America, this paper advocates that the Supreme Court reconsider its decision, and declare the right to education to be fundamental. Contrary to *Rodriguez*, a fundamental right to an education exists in the United States Constitution. This un-enumerated right is protected by the Ninth Amendment.

Synopsis of *San Antonio Independent School District v. Rodriguez*

Before proposing a new jurisprudential theory, it is necessary to examine the basic elements of *Rodriguez*. A brief summary of the case's facts, issues, holding, rationale, and dissenting opinions follow.⁵

Facts

Since entering the Union in 1845, the State of Texas took a special interest in the financing of public schools. For decades, legislators experimented with a series of state sponsored programs which sought to allocate money evenly among individual school districts. In 1949, state lawmakers enacted the Minimum Foundation School Program, which operated as a "dual-approach" system to fund public elementary and secondary schools through the taxation of local commercial and personal property. However, with the recent growth of metropolitan industry, it became increasingly difficult for the state to apportion funds equally.

Expenditures for education increased after the program's establishment. Unfortunately for underprivileged students and their caretakers, significant funding disparities began to arise among neighboring school districts. Two regions in question, Edgewood and Alamo Heights represented the least and most affluent systems in the San Antonio area. In Edgewood, ninety percent of students were Mexican-American and six percent were black. The average property value per student was \$5,960, while the median family income was the lowest in the city,

² 410 U.S. 113 (1973).

³ 411 U.S. 1 (1973).

⁴ Landmark abortion cases following *Roe v. Wade* (1973) include: *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), *Stenberg v. Carhart*, 530 U.S. 914 (2000), and *Gonzalez v. Carhart*, 550 U.S. 124 (2007).

⁵ The "facts," "issues," "holding," "majority's rationale," and "dissenting opinions" are acquired from both the Western District Court of Texas, 337 F. Supp. 280 (W.D. Tex. 1971), and the U.S. Supreme Court, 410 U.S. 113 (1973), unless noted otherwise.

\$4,686. On the other hand, in Alamo Heights only eighteen percent of the students were Mexican-American, and less than one percent were black. The median property value per student exceeded \$49,000, and the average family income was almost twice the amount of Edgewood's. Furthermore, as outlined during sworn testimony in the District Court, residents of poorer neighborhoods, such as Edgewood, were subjected to higher taxes:

...a survey of 110 school districts throughout Texas demonstrated that while the ten districts with a market value of taxable property per pupil above \$100,000 enjoyed an equalized tax rate of only thirty-one cents, the poorest four districts, with less than \$10,000 in property per pupil, were burdened with a rate of seventy cents. Nevertheless, the low rate of the rich districts yielded \$585 per pupil, while the high rate of the poor districts yielded only \$60 per pupil.⁶

As a result, Alamo Heights received more money for educational facilities, supplies, and teacher's salaries.

Families residing in the "least affluent" systems (Rodriguez, et al.) argued that the disparity in financial support violated the Equal Protection Clause of the Fourteenth Amendment. Additionally, by denying them equal protection under the law, they also alleged a violation of their fundamental right to an education. In defense, the San Antonio Independent School District admitted that every state funded program, including the Minimum Foundation School Program, has its flaws. However, the plan was still constitutionally sound, considering that the federal government possessed the means to correct the allocation disparities within the state. The school district, in conjunction with Texas state legislators, insisted that the funding agenda in question passed the rational basis test. The state maintained a *legitimate* interest in providing adequate education to its minors. Subsequently, the Minimum Foundation School Program, despite its flaws, served as a rational measure related towards the achievement of the state's legitimate end.

Given that "wealth is a 'suspect' classification, and that education is a 'fundamental' interest, the [U.S. District Court for the Western District of Texas] held that the Texas system could be sustained only if the state could show that it was premised upon some compelling state interest."⁷ In other words, the Minimum Foundation School Program failed strict scrutiny. The state's funding program was not narrowly tailored to achieve a compelling government interest. Consequently, the San Antonio Independent School District filed an appeal to the U.S. Supreme Court. The Burger Court granted certiorari.

Constitutional Issues in *Rodriguez*

⁶ 337 F. Supp. 280, 282 (W.D. Tex. 1971).

⁷ *Id.* at 282-284.

When Rodriguez reached the Supreme Court, two constitutional issues were at the heart of the case. First, was whether the Minimum Foundation School Program violated the Equal Protection Clause of the Fourteenth Amendment. Second, and more substantially, whether the Constitution acknowledged a fundamental right to an education. In a 5-4 decision, Justice Lewis F. Powell, joined by Chief Justice Warren E. Burger, Justices William Rehnquist, Potter Stewart, and Harry Blackmun, rejected both claims.

Majority Rationale:

The Court dismissed the lower court's decision to employ strict scrutiny. In the first of two arguments presented, the Court proclaimed that Rodriguez, et al., despite their lack of wealth, did not constitute a suspect class, or an "insular or discrete minority." As the Court stated, "[there] is reason to believe that the poorest families are not necessarily clustered in the poorest property districts ... [while a lack] of personal resources has not occasioned an absolute deprivation of the desired benefit ..."⁸ As a result, the Texas Program became subject to rational basis. According to the Court, the state government's intentions to provide a free and adequate public education were legitimate, and the means used to achieve that goal through taxation were rationally related.

With regards to the second issue, the Court found that the Constitution did not contain a fundamental right to an education. The lower court is responsible for this outcome. The District Court referred to a right to an education as a fundamental *interest*, rather than a fundamental *right*. "A fundamental interest differs from a fundamental right, in that it imposes no positive obligations on the state."⁹ By labeling the right as an *interest*, the District Court failed to accentuate fully a fundamental right to education. It is evident why the Supreme Court refused to take the argument seriously. *Rodriguez* cited *Brown v. Board of Education* in stating that "education is perhaps the most important function of state and local governments."¹⁰ Yet, according to Justice Powell, to consider this right fundamental, it needed to be either *explicitly* or *implicitly* in the Constitution: "Education, of course, is not among the rights afforded explicit protection under [the] Constitution. Nor do we find any basis for saying it is implicitly so protected."¹¹ Only then could an infringement of such a right be challenged by the most rigid level of scrutiny.

Furthermore, while education prepares a person to excel in the social, political, and economic sectors, Powell asserted that it is not the judiciary's duty to "pick out particular human activities, characterize them as 'fundamental,' and give them added protection."¹² Such interests are the responsibility of the state

⁸ 411 U.S. 1, 23 (1973).

⁹ Jack M. Balkin, *What Brown v. Board of Education Should Have Said*, 57 (2001).

¹⁰ 347 U.S. 483, 493 (1954).

¹¹ 411 U.S. 1, 35 (1973).

¹² Powell, J. citing Stewart, J. in *Shapiro v. Thompson* 394 U.S. 655, 661 (1969).

legislature. Justice Stewart wrote a brief concurrence to restate the four critical elements explained by the majority:

First, as the Court points out, the Texas system has hardly created the kind of objectively identifiable classes that are cognizable under the Equal Protection Clause. Second, even assuming the evidence of such discernible categories, the classifications are in no sense based upon constitutionally 'suspect' criteria. Third, the Texas system does not rest 'on grounds wholly irrelevant to the achievement of the state's objective.' Finally, the Texas system impinges upon no substantive constitutional rights or liberties.¹³

Despite differences in the choice of words, one thing is certain: the Burger Court refused to declare a right to an education as fundamental. This majority opinion and paralleling concurrence were contested eloquently by four dissenters, Justices Byron White, William O. Douglas, William J. Brennan, Jr., and Thurgood Marshall.

The Opposition

Justice White's dissent, joined by Justices Douglas and Brennan, focused primarily on the constitutional validity of the Minimum Foundation School Program. According to White, the funding disparity among school districts severely impacted a student's right to an education. Generally, the Court employs the rational basis test to examine a violation of Equal Protection.¹⁴ "[Justice White could not] agree, however that the difference of magnitude appearing in this case [could] sensibly be ignored, particularly since the state itself [considered] it so important to provide opportunities to exceed the minimum state educational expenditures."¹⁵ Justice Brennan filed a separate dissent where he observed: "... I also record my disagreement with the Court's rather distressing assertion that a right may be deemed 'fundamental' for the purposes of equal protection analysis, only if it is 'explicitly or implicitly' guaranteed by the Constitution."¹⁶

Justice Thurgood Marshall, a former National Association for the Advancement of Colored People (NAACP) litigator in *Brown v. Board of Education*, arguably wrote the most noteworthy dissent in *Rodriguez*. It is evident throughout the opinion that Marshall encouraged the Court to reconsider the fundamental principles outlined by Chief Justice Earl Warren nineteen years prior. Immediately, Marshall states that "[The] majority's holding can only be seen as a retreat from our historic commitment to equality of education opportunity..."¹⁷ "... [Even] before

¹³ 411 U.S. 1, 62 (1973).

¹⁴ The intermediate scrutiny test, as applied to the Equal Protection Clause of the Fourteenth Amendment, did not appear until three years after *Rodriguez*. See *Craig v. Boren* 429 U.S. 190 (1976).

¹⁵ 411 U.S. 1, 69 (1973).

¹⁶ *Id.* at 62.

¹⁷ *Id.* at 71.

[the] Court recognized its duty to tear down the barriers of state-enforced racial segregation in public education,” Marshall noted the Court’s willingness to acknowledge that “[an] inequality in the educational facilities provided to students may be [a] discriminatory state action as contemplated by the Equal Protection Clause.”¹⁸ Furthermore, Marshall wrote:

[It] is true that this Court has never deemed the provision of free public education to be required by the Constitution... [But] the fundamental importance of education is amply indicated by the prior decisions of this Court, by the unique status accorded public education by our society, and by the close relationship between education and some of our most basic constitutional values.¹⁹

The legacy of *Brown* and Marshall’s prior NAACP litigation strategies resonated throughout his passionate dissent. He urged the Court to re-familiarize itself with *Sweatt v. Painter*²⁰ and *McLaurin v. Oklahoma State Regents for Higher Education*.²¹ These cases not only tackled racial segregation in higher academia, but stressed the importance of an individual’s right to an education. In accordance with these landmark precedents, Marshall asserted that the San Antonio Independent School District needed to provide more than just “adequate” educational opportunities. Goals of a fundamental value, such as the right to an education, deserved more than “adequate” treatment. To counteract Justice Powell’s majority opinion which stated that a fundamental right to an education was neither explicitly nor implicitly protected by the Constitution, Justice Marshall urged his Brothers to reexamine how the Court ought to declare rights, fundamental:

Although not all fundamental interests are constitutionally guaranteed, the determination of which interests are fundamental should be firmly rooted in the text of the Constitution. The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.²²

Consequences of *Rodriguez*

Before this paper proves that a fundamental right to an education does exist through the Ninth Amendment, some of *Rodriguez*’s overarching principles

¹⁸ *Id.* at 84.

¹⁹ *Id.* at 111.

²⁰ 339 U.S. 629 (1950).

²¹ 339 U.S. 637 (1950).

²² 411 U.S. 1, 102-103 (1973).

must be clearly analyzed. For instance, while the Equal Protection Clause is the only constitutional provision under direct examination, the Due Process Clause in this case is neither absent nor neglected. After all, fundamental rights can be defended by both the Equal Protection and Due Process Clauses of the Fifth and Fourteenth Amendments.²³ In fact, the legal interpretations between both clauses are so close that sometimes it is difficult to make a “real distinction between the two.”²⁴ Accordingly, instead of isolating the Equal Protection Clause with respect to its lack of protection towards educational rights, the Court also rejected outright the opportunity to declare the right fundamental under Due Process. This is not *obiter dictum*, but rather an essential element of the *Rodriguez* holding. According to the Court, education may be an *important* matter of the state, but it is unworthy of *paramount* security:

We have carefully considered each of the arguments supportive of the District Court’s finding that education is a fundamental right of *liberty* and have found those arguments unpersuasive. In one further respect we find this a particularly inappropriate case in which to subject state action to strict judicial scrutiny. The present case, in another sense, is significantly different from any of the cases in which the Court has applied strict scrutiny to state or federal legislation touching upon constitutionally protected rights. Each of our cases involved legislation which ‘deprived,’ ‘infringed,’ or ‘interfered’ with the *free exercise* of some such fundamental personal right or liberty.²⁵

A person’s free exercise of a right is synonymous with liberty.²⁶ Furthermore, liberty is a key term found within the Due Process Clause. With that in mind, the school district’s arbitrary taxation provisions denied *Rodriguez* and others their fundamental right to an education. More specifically, the school district violated a San Antonio parent’s *free exercise to choose* an educational opportunity for their child which exceeded mere “adequacy.” With this detailed analysis, it is safe to proclaim that the Court’s holding in *Rodriguez* ultimately rejected both an Equal Protection and Due Process claim of a fundamental right to an education.

After the Court’s refusal of Equal Protection and Due Process, advocates for a fundamental right to an education must now find another constitutional provision. The answer lies within a law just twenty-one words in length, the Ninth Amendment. Despite its presence in the Bill of Rights, it remains one of the most historically neglected provisions in the United States Constitution. This paper seeks to bring this forgotten amendment to the forefront of American jurisprudence. With that in mind, a fundamental right to an education is protected under the

²³ The Fifth Amendment implicitly includes an Equal Protection Clause. See *Bolling v. Sharpe* 347 U.S. 497 (1955).

²⁴ *Brown v. Board of Education*, Oral Arguments, December 9, 1952, 18.

²⁵ Powell, J., majority opinion 411 U.S. 1, 37-38 (1973) (emphasis added).

²⁶ See *Bartels v. Iowa* 262 U.S. 404 (1923), *Meyer v. Nebraska* 262 U.S. 390 (1923), and *Pierce v. Society of Sisters* 268 U.S. 510 (1925).

Ninth Amendment: The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others by the people.²⁷

The remainder of this paper will address the following legal claims: First, while providing a definition for the term “education,” it will explain why the right is fundamental. Second, given the current state of American education, the paper will advocate for federal, as opposed to state protection of the fundamental right. Third, the newly proposed fundamental right will be incorporated into the Ninth Amendment. Finally, given the declaration of this fundamental right, the paper will introduce a new level of scrutiny for the judiciary to safeguard its protection.

Fundamentally Sound

Typically, the U.S. Supreme Court relies on a series of four jurisprudential prongs to determine whether or not a right can be declared fundamental:

- 1) Without the right, neither liberty nor justice would be possible.
- 2) The right is essential to the concept of ordered liberty.
- 3) The right is deeply rooted in the traditions and consciousness of the American people.
- 4) The right is inherent in human nature; it is inalienable.²⁸

A close examination of each prong and its affiliation with the right to an education will prove this right to be fundamental.

1) Without the right, neither liberty nor justice would be possible

Liberty – “The right and power to act, believe, or express oneself in a manner of one’s own choosing... A right or immunity to engage in certain actions without control or interference ...²⁹Freedom from arbitrary or due external restraint, especially by a government...”³⁰

Justice – “The fair and proper administration of laws ...³¹ The upholding of what is just, especially fair treatment and due reward in accordance with honor, standards, or law.”³²

The constitutional desire here is not a mere “right to *acquire* an education,” but rather an overall “right to education.” Without a right to education, liberty and

²⁷ U.S. Const. Amend. IX

²⁸ See *Palko v. Connecticut* 302 U.S. 319 (1937) and *Moore v. East Cleveland* 431 U.S. 494 (1977).

²⁹ *The American Heritage College Dictionary*, Fourth Edition, 798 (2007).

³⁰ *Black Law Dictionary, Third Pocket Edition*, 428 (1996).

³¹ *Id.* at 400.

³² *The American Heritage College Dictionary*, 753.

justice cannot exist. For example, racial minorities and women were subjected to centuries of discrimination; liberty and justice did not exist for them. One critical explanation for this injustice was the denial of educational opportunities. With an education, too many believed that slaves would challenge the status quo. Likewise, women found it nearly impossible to enter the fields of law, medicine, and engineering. As opportunities were made available, America became one step closer to making liberty and justice a reality for all.

With regards to *Rodriguez*, the State of Texas did not infringe upon a child's right to *attend* school. Instead, by accepting such prominent financial disparities, the Minimum Foundational School Program denied Rodriguez, et al., the *choice to attend* an academic institution of a higher caliber, as opposed to the "adequate" schooling funded by the state legislature. While some may argue that these children and their families were able to relocate to another school district, it is important to recognize the role wealth plays in *Rodriguez*. As members of a suspect class, not all families in the San Antonio metropolitan area possessed the financial means to seek better educational opportunities, let alone escape or improve upon their impoverished surroundings. In light of *Rodriguez*, along with the comfortable presumption that liberty and justice are indeed present in the United States, it is fair to assert the existence of a fundamental right to an education.

The Court has recognized, and subsequently awarded such educational liberties in a host of historical precedents. For example, in *Sweatt v. Painter*, Mr. Herman Sweatt was denied admission to the University of Texas School of Law solely because of his race. During the case's proceedings, the Texas trial courts ordered the State to open a "separate but equal" law school explicitly for black students. Upon completion, Sweatt still refused to attend the segregated institution as a matter of personal principle. Sweatt also critiqued the newly constructed school's subpar facilities and accreditation. He appealed to the U.S. Supreme Court.

On behalf of a unanimous Court, Chief Justice Fred M. Vinson highlighted Sweatt's right to attend the University of Texas School of Law. It is within the text of the Court's opinion where a fundamental right to an education is implicitly promoted and thereby protected:

What is more important, the University of Texas law school possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. *It is difficult to believe that one who had a free choice between these schools would consider the question close.*³³

In order to understand the proposed thesis, it is obligatory to emphasize the term "free choice" found in the excerpt above. Essentially, Chief Justice Vinson

³³339 U.S. 629, 634 (1950) (emphasis added).

acknowledged Sweatt's right to select the legal institution of his choice. This assertion later influenced the Court to assert that the University of Texas School of Law violated the Equal Protection Clause of the Fourteenth Amendment. Additionally, the Court's explanation of Sweatt's "free choice" to seek admission provides a fundamental precedent for a prospective analysis of educational rights protected by the Due Process Clause of Fourteenth Amendment. Unfortunately, the *Rodriguez* majority did not recognize such a vital relationship. As a result, advocates for a fundamental right to an education must discover alternative provisions that provide comparable forms of legal protection.

Sweatt's sister case, *McLaurin v. Oklahoma State Regents for Higher Education* also serves as notable precedent in support of a fundamental right to an education. Mr. George McLaurin, a black man seeking to acquire his Masters Degree in Education, applied to the University of Oklahoma. Based solely on his race, McLaurin was denied admission. McLaurin won his case in the District Court for the Western District of Oklahoma by stating an infringement upon his Equal Protection Rights under the Fourteenth Amendment. Even though he could attend the University, McLaurin had to comply with a series of segregationist tactics. These included separate seating areas in classrooms, campus libraries, and various dining halls. In order to integrate fully, McLaurin filed suit once more; he could not exercise completely his fundamental right to an education.

An application of each case's facts proves that *Rodriguez* is more analogous to *McLaurin*, than *Sweatt*. Like Respondents in *Rodriguez*, McLaurin's right to *acquire* an education remained intact. However, his fundamental right to an education, like that of the children's in San Antonio, Texas, did not exist. With a detailed examination of *McLaurin*, it is clear that "education" encompasses more than just the number of textbooks, classrooms, and teachers available; the quality of these subjects is essential. The State of Oklahoma denied McLaurin not only the equal protection of the law, but also his ability to learn the importance of social development through diversity. Such a denial of liberty and justice constituted an infringement of McLaurin's fundamental right to an education. Likewise, the denial of his fundamental right to education violated his rights to liberty and justice.

Once again, in light of *Sweatt*, Chief Justice Vinson referred implicitly to an overall fundamental right to an education:

McLaurin uses the same classroom, library and cafeteria as students of other races; there is no indication that the seats to which he is assigned in these rooms have any disadvantage of location. He may wait in line in the cafeteria and there stand and talk with his fellow students, but while he eats he must remain apart. ... The result is the appellant [McLaurin] is *handicapped in his pursuit of effective graduate education. Such restrictions impair and*

*inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.*³⁴

The rationales in *McLaurin* and *Sweatt* would later influence the other jurists to examine racial segregation in public schools, while essentially analyzing an undeclared fundamental right to an education.

Circuit Judge Walter A. Huxman of the U.S. District Court of Kansas during the *Brown v. Board* proceedings even underlines the fundamentality of educational rights:

If segregation with a school as in the *McLaurin* case is a denial of due process, it is difficult to see why segregation in separate schools would not result in the same denial. Or if the denial of the right to commingle with the majority group in higher institutions of learning as in the *Sweatt* case and gain the educational advantages resulting therefrom, is a lack of due process, *it is difficult to see why such denial would not result in the same lack of due process if practiced in the lower grades.*³⁵

It was clear that an infringement of liberty, or in other words, a fundamental right did exist in *Sweatt* and *McLaurin*. However, the District Court would not rule upon such an implicit assertion. As the lower court later recognized: “It must however be remembered that [the Court is] confining itself to answering the one specific question, namely: “To what extent does the Equal Protection Clause limit the power of a state to distinguish between students of a different race in [public schools?]”³⁶ By trying to avoid a “Lochnerism” or activist label, the District Court of Kansas, and even the Warren Court thereafter, focused strictly on equal protection, and refused to declare a well deserved and long-awaited right to an education to be fundamental.³⁷ It is unfortunate that *Rodriguez* did not learn from the Court’s past errors. Because of this, American jurisprudence now upholds a critical flaw that has denied, is denying, and will continue to deny millions of Americans their fundamental right to an education.

2) The right is essential to the concept of ordered liberty

This second prong used to define a fundamental right is quite synonymous with the first (without the right, neither liberty nor justice would be possible). However, the selected adjective, “ordered” symbolizes a more paramount significance of liberty. “Ordered liberty” means “freedom under law.” In other words, the fundamental right must protect more than a mere choice to buy a car,

³⁴ 339 U.S. 637, 640-641 (1950) (emphasis added).

³⁵ 98 F. Supp. 797, 800 (D. Kan. 1951) (emphasis added).

³⁶ *Id.*

³⁷ Ironically, despite the Court’s efforts to avoid such labels, the Warren Court (starting with *Brown*) is considered the most liberal in Supreme Court history.

travel the world, or work more than sixty hours a week in a bakery.³⁸ By defining what education represents, it becomes clear that the fundamental protection of such a right is essential.

Education constitutes more than just a series of certificates or degrees; it allows humans to excel beyond what at first might appear to be impossible. Throughout the history of mankind, education has served as a vehicle toward progress. Education's fundamental element is none other than the questions: *Who? What? When? Where? Why? How?* These are the inquiries that lay the groundwork for the preservation and continuity of civilization. When some dared to *ask*, others accepted the challenge to *respond*. Answers are interpreted in the visible world; education – those basic questions – is the ark found within.³⁹

With time, the idea of education became institutionalized through the development of public and private schools, academies, universities, colleges, and trade schools. Regardless of the major advances in technology and industry, the continuity of humanity still depends on the basic elements of education, *the desire to ask and the courage to answer*. If any law should prevent a person from contributing to the greater good, it undoubtedly violates a fundamental right. Noting the importance of education, and its vital relationship to the integrity and survival of civilization, governments should make an earnest effort to cater to this paramount liberty. There is no excuse. Furthermore, “education is necessary for an individual to participate fully in any modern society politically as well as economically. The Supreme Court has acknowledged this fact but has not been willing to [declare] education to be a fundamental right. With all due respect, the Court is simply wrong on this one.”⁴⁰

Education is vital for the survival of humanity. There is nothing intangible about this notion; history outlines the evidence:

The fundamental right to an education [even] has strong international support. Article 26 of the Universal Declaration of Human Rights provides that everyone has the right to an education, which should be “directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms.” ... At the end of the day, the point is simply that education is an indispensable part of a free society. The Supreme Court ought to recognize that fact. After all, everyone else does.”⁴¹

³⁸ See *Lochner v. New York* 198 U.S. 45 (1905).

³⁹ Many thanks to Dr. Alan M. Tartakoff for coining this phrase, and his memorable response to a *student's mere observation*:

“Fantasy knows no bounds. The ark is to be found within, not in the visible world.”

⁴⁰ Daniel A. Farber, *Retained by the People: The “Silent” Ninth Amendment and the Constitutional Rights Americans Don’t Know They Have*, 145 (2007).

⁴¹ *Id.* at 151-153.

3) The right is deeply rooted in the traditions and consciousness of the American people

As noted earlier, in the same year the Founding Fathers drafted the U.S. Constitution, the Northwest Ordinance of 1787 governed the Northwest Territory (present-day Ohio, Indiana, Illinois, Michigan, Wisconsin, and Eastern Minnesota). Within that ordinance, two noteworthy provisions presided over the newly settled lands: slavery was prohibited, and the right to an education was protected. Subsequently, as states were admitted into the Union, their respective constitutions contained amendments protecting a right to an education. Currently, “every state constitution contains a requirement for public education. Many state courts [as opposed to the national government, have sought] to provide far greater protection to education.”⁴² Even the *Rodriguez* oral arguments highlight the state of Texas’s special interest in public school funding since entering the Union in 1845. Despite this investment of time and interest by the individual states, the Federal Government has yet to contribute to these efforts forcefully. Congress is not the only branch to blame for this shortcoming; the Supreme Court missed several occasions to declare a fundamental right to an education. The NAACP school desegregation cases were certainly not the only lawsuits to examine implicitly the denial of a fundamental right to an education.

In the 1920s, the Supreme Court presided over three landmark education cases: *Bartels v. Iowa*,⁴³ *Meyer v. Nebraska*,⁴⁴ and *Pierce v. Society of Sisters*.⁴⁵ These cases examined implicitly the denial of a student, a parent, and a teacher’s fundamental right to an education. Even though the Court ruled based on the grounds of the Due Process Clause of the Fourteenth Amendment, the Justices fell short of officially declaring the right to an education fundamental. Nonetheless, each opinion hinted at the notion that such a right did exist. In *Meyer*, Justice James Clark McReynolds presented the evidence needed to confirm the “deeply rooted” argument. Again, Article III of the Northwest Ordinance takes precedence:

The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. The [Northwest] Ordinance of 1787 declares, “Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”⁴⁶

To conclude, it is difficult to see why one of the most protected rights, the right to free speech is fundamental, and the right to an education is not. When comparing free speech to education, one cannot survive without the other. The

⁴² *Id.* at 146.

⁴³ 262 U.S. 404 (1923).

⁴⁴ 262 U.S. 390 (1923).

⁴⁵ 268 U.S. 510 (1925).

⁴⁶ 262 U.S. 390, 400 (1923).

essence of debate, written publications, and informal conversation, which allow for human development, finds its foundation in knowledge. Life experiences shared, advice acquired, and lessons learned are just some results of an education, as translated through free speech. It is difficult to imagine a “marketplace of ideas” without the right to an education.⁴⁷

4) The right is inherent in human nature; it is inalienable

Humans are born with the innate desire to learn. From a young age, babies are captivated by their surroundings with the eagerness to crawl, to stand, and to walk. The brain from an early age begins a never ending journey, a quest which encourages the development of the psyche through knowledge. This quest for wisdom – longing for what is true, good, and beautiful – is lifelong. Simply put, humanity is a treasure chest, and education is one of its prized jewels. The law should not deny a child the opportunity to explore. No child should be denied the right to learn, to achieve, and to excel. Indisputably, the right to an education is inalienable.

Why Federal Rather Than State Protection is Essential

During times of war and national crisis, powers of the individual states are limited, as those of the federal government are expanded. Prominent examples of this include President Abraham Lincoln’s declaration of martial law during the Civil War, President Dwight D. Eisenhower’s order to desegregate public schools in the South, and the introduction of the New Deal program by President Franklin Delano Roosevelt’s administration. While these historical models seem to highlight the executive and legislative branches solely, it is important to note the role of the federal judiciary, especially that of the United States Supreme Court.⁴⁸

Given the state of American education today, this same form of federal intervention should be enforced immediately.

Why?

America’s current crisis is its flawed educational system. And, unfortunately, the principal victims of this national calamity are the country’s most vulnerable population, our children.

⁴⁷ Holmes, Jr., J., dissenting in *Abrams v. United States* 250 U.S. 616 (1919).

⁴⁸ Following the Lincoln administration, the U.S. Supreme Court held that Congress may “court strip” case from the judiciary. See *Ex Parte McCordle* (1869). President Eisenhower received support from the Supreme Court in his efforts to desegregate public schools in *Cooper v. Aaron* (1958). During the height of the New Deal Program, the Supreme Court helped to expand the Congressional power under the Commerce Clause. See *National Labor Relations Board v. Jones and Laughlin Steel Corporation* (1937), *United States v. Carolene Products Company* (1938), and *Wickard v. Filburn* (1942).

Currently, under state governmental control, America's educational system is failing both domestically and internationally. On the home front, as *San Antonio Independent School District v. Rodriguez* proves, factors other than merit or intelligence, such as race, gender, and socioeconomics coincide greatly with a child's chance of success in school. Simply put, equality in American education does not exist. Furthermore, on a global scale, when examining students' performances in science, math, and reading, America ranks #22, #27, and #33 among other countries in the industrial world.⁴⁹ Unsurprisingly, those that rank higher (i.e.: Finland, Sweden, and Japan) all share one central characteristic, *a federally recognized fundamental right to an education*. Based on these statistics, it is apparent that support from the federal government is essential to the strength of a country's educational system. Indeed, America is missing this vital element.

State and local governments have deprived, and are still depriving their children. Why should they continue to be denied their fundamental right to an education any longer? It is time for the national government to take control, make amends, and protect the promising minds of America's youth, the leaders of tomorrow. One crucial step toward success can be found within the scope of judicial power; the U.S. Supreme Court should incorporate a fundamental right to an education into the Ninth Amendment.

How to Incorporate the “Fundamental Right to an Education” Into the Ninth Amendment

“[A] lawyer friend asked me in a friendly way what I thought the Ninth Amendment to the Constitution meant. I vainly tried to recall what it was. ... What are those other rights retained by the people? To what law shall we look for their source and definition? ... [T]he Ninth Amendment rights which are not to be disturbed by the Federal Government are still a mystery to me.”

Justice Robert H. Jackson⁵⁰

Because *Rodriguez* refused to declare a fundamental right to an education under the Equal Protection and Due Process Clauses of the Fourteenth Amendment, it is essential that the judiciary find it in the Ninth Amendment. A detailed examination of this constitutional provision's history in conjunction with scholarly interpretations of its purpose, will present a valid argument in favor of protecting a fundamental right to an education.

Following the ratification of the U.S. Constitution, ten amendments were designed to provide citizens additional protection from a potentially overpowering national legislature. James Madison, the Father of the Constitution acknowledged

⁴⁹ These statistics are from the Organisation for Economic Co-Operation and Development – 2009 Figures: “Student Performances on the Reading, Scientific, and Mathematical Literary Scales”

⁵⁰ Eugene M. Van Loan, III cited in: Randy E. Barnett, *The Rights Retained by the People: The History and Meaning of the Ninth Amendment*, 149 (1989).

that, “First, that there be prefixed to the constitution a declaration, that all power is originally vested in, and consequently derived from, the people.”⁵¹ Formally known as the Bill of Rights, these provisions were deemed essential to the unification of the former thirteen British colonies. The first eight amendments were constructed with precise language declaring that “Congress shall make no law” infringing upon particular liberties such as freedom of speech, the right to bear arms, and a right to a public trial by jury. The Tenth Amendment, known for protecting American federalism, reads: “powers not delegated to the [federal government] ... are reserved to the States respectively, or to the people.”⁵² While amendments one through eight and ten are examined extensively and cited frequently, little is understood, let alone known, about the Ninth. This neglected provision remains one the most unsolved enigmas in American jurisprudence.⁵³

The Ninth Amendment lay dormant for one hundred and seventy-four years after its ratification.⁵⁴ However, thanks to Justices William O. Douglas and Arthur Goldberg, the national judiciary would initiate the resurrection of this neglected provision. In *Griswold v. Connecticut*,⁵⁵ the Court declared unconstitutional a law which prohibited the use of contraception and any accessory to preventing conception. In doing so, the Warren Court proclaimed that the Constitution does acknowledge a “right to privacy.” Among the “penumbras” and “emanations” found in the First, Third, Fourth, and Fifth Amendments, Justice Douglas for the majority recognized that the Ninth also protected this un-enumerated right. While Douglas’s opinion brought the Ninth Amendment to the forefront, Justice Goldberg’s concurrence inspired legal scholars and jurists to investigate further the Founders’ purpose for the enactment of this constitutional provision:

[The Ninth Amendment was] proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all rights and that the specific mention of certain rights would be interpreted as a denial that others were protected. ... While this Court has had little occasion to interpret the Ninth Amendment, “[i]t cannot be presumed that any clause in the constitution is intended to be without effect.” *Marbury v. Madison*, 1 Cranch 137, 174. [To] hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. ... [The] Ninth

⁵¹ *Id.* at 54.

⁵² U.S. Const. Amend. X

⁵³ Arguably, American jurisprudence’s top two unsolved mysteries are the Privileges or Immunities Clause of the Fourteenth Amendment, and of course, the Ninth Amendment.

⁵⁴ A couple of exceptions include *Houston v. Moore* 18 U.S. 1 (1820), (Story, J., dissenting) and *United Public Workers of America v. Mitchell* 330 U.S. 75 (1947).

⁵⁵ 381 U.S. 479 (1965).

Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive.⁵⁶

Since *Grissold*, "...the ninth amendment has been cited in cases which include claims for protection for the right to privacy or more broadly, the right of personal autonomy."⁵⁷ However, in recent years, jurists and legal scholars have wondered, *Does the Ninth Amendment protect any other rights besides those related to privacy?* As suggested by the late Professor Leonard Williams Levy, "[This] question [of] whether the Ninth Amendment was intended to be a cornucopia of un-enumerated right produces as many answers as there are points of view."⁵⁸

Some dared to ask. This paper accepts the challenge to respond...

The starting points for interpreting the Ninth Amendment are the text itself and the rule of construction which holds that if a plain meaning exists, it should be allowed. As Justice Joseph Story said, "The first and fundamental rule in interpretation of all instruments is, to construe them according to the sense of the terms, and the intentions of the parties."⁵⁹

"The Ninth Amendment is James Madison's unique and personal contribution to our Constitution."⁶⁰ His original draft of this constitutional provision provides the courts and legal academia with some vital evidence regarding the Founders' intentions for ratifying the law:

The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be construed as to diminish the just importance of other rights retained by the people; or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.⁶¹

In this earlier version of the Ninth Amendment, Madison values the existence of other important rights "retained by the people" that are not necessarily incorporated into the first eight amendments. Alone, this statement nullifies Justice Powell's justifications in *Rodriguez* for not declaring the right to education as fundamental: "Education of course, it is not among the rights afforded explicit

⁵⁶ 381 U.S. 479, 489-492 (1965).

⁵⁷ Stephen K. Shaw, *The Ninth Amendment: Preservation of the Constitutional Mind*, 153 (1990).

⁵⁸ Leonard Williams Levy, *Origins of the Bill of Rights*, 242 (1999).

⁵⁹ *Id.* at 244.

⁶⁰ Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment*, 93 Iowa Law Review, 808 (2008).

⁶¹ Neil H. Cogan, *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins*, 627 (1997).

protection under the Constitution...⁶² Additionally, the inclusion of the clause “either as actual limitations of such powers, or as inserted merely for greater caution” suggests Madison’s knowledge and understandings of societal development, the ills of partisan politics, and humanity’s never-ending quest for wisdom. In other words, “[the Ninth] was Madison’s answer to his own fear that political obstacles might result in an insufficiently comprehensive definition of some rights.”⁶³ Perhaps, the ratification of the Ninth Amendment and its purposefully ambiguous language proves that Madison interpreted the Constitution to be a living and breathing document.

In essence, rights recognized and retained by the people are not only apt to vary over time; they are also prone to evolve. One of the greatest examples of such societal change in American history is the abolition of slavery. Moreover, as people’s views of liberty and justice continue to modify over time, the government should rule with greater caution to ensure that these newly accepted liberties are not violated. “The ninth amendment was phrased in the alternative to guard against either the implication of a power or the implication of the nonexistence of a right; the only rights which were subject to both dangers were fundamental substantive rights.”⁶⁴ Here lies the complicated, yet admirable jurisprudential balance between rights of the individual and powers of the government.

Even though it was not formally asserted at the time of the Constitution’s drafting, approval, and ratification, education has always been a fundamental right; it is a right retained by the people. Nevertheless, as noted earlier, with the institutionalization of learning via schools, society began to accept openly this unenumerated liberty. Through his formulation of the Ninth Amendment, Madison paved the way for America’s present and future protection of a fundamental right to education. Unfortunately for children across the country, the Supreme Court has yet to recognize this vital constitutional provision and one of its primary objectives.

While it is clear that Madison identified the presence of un-enumerated liberties, scholars have spent decades trying to categorize these “other rights.” According to Randy E. Barnett, a Georgetown law professor, “the Ninth Amendment was meant to preserve the ‘other’ individual, natural, preexisting rights that were ‘retained by the people’ when forming a government but were not included in ‘the enumeration of certain rights.’”⁶⁵ On the other hand, other scholars like Kurt T. Lash, professor of law at Loyola of California, argue that the Ninth Amendment does not protect the rights of the individual. Rather, these liberties are reserved *collectively* for the people:

The Ninth prevents a construction that denies or disparages other rights “retained by the people.” This language echoes language that closes the Tenth

⁶² *Supra* note 9.

⁶³ Van Loan, III, cited in Barnett’s, *The Rights Retained by the People*, 168.

⁶⁴ *Id.* at 164.

⁶⁵ Randy E. Barnett, *The Ninth Amendment, It Means What It Says*, 85 Texas Law Review, 13-14 (Nov. 2006).

Amendment, whereby certain powers are reserved “to the people.” Scholars have identified the term “the people,” as used in the Bill of Rights and in the Preamble of the Constitution, as an expression of popular sovereignty—the idea that ultimate authority is retained by the people who may alter or abolish their system of government as they see fit.⁶⁶

Juxtaposing the traditions of American jurisprudence with Professor Lash’s statement, it is difficult to assert that the Ninth Amendment only protects collective rights. While individual liberties are usually to be shared among many, it is often the individual who *first* attests to the infringement of a constitutional right. Fortunately, for the purposes of this central thesis, and the unresolved dispute between scholars, a fundamental right to education may be recognized as *both* an individual and collective right. As Professor Lash notes:

Local control of public education thus is likely one of the rights retained by the collective people in the several states. Unless the Fourteenth Amendment transformed public education into an individual right, this means that local control of public education remains one of the people’s retained un-enumerated rights guarded by the Ninth Amendment ...⁶⁷

A fundamental right to education is a liberty for one, deserved by all.

Because the right to an education is fundamental, it is undoubtedly “retained by the people.” Furthermore, those enumerated in the Constitution SHOULD NOT interfere, deny, or disparage one’s fundamental right to education. Regardless of whether they are citizens of the federal government, of a particular state, or both, persons are deserving of this liberty. In comparison to the Fourteenth Amendment which differentiates between citizens of the United States and the individual ones, there is no distinction found in the text of the Ninth. “The people” are the people. The elementary school children of Washington D.C., the middle school adolescents of Cleveland, Ohio, and the high school teenagers of San Antonio, Texas, are all worthy of this fundamental right to an education secured by the Ninth Amendment.

Proposal of a New Level of Scrutiny

Presuming the Ninth Amendment protects un-enumerated fundamental rights of the individual – as shared by the people – a governmental body must take responsibility to ensure this constitutional provision is properly construed. There is no entity better prepared for this task than the judiciary:

James Madison undoubtedly thought enumeration would lead to judicial enforceability, because he urged Congress to adopt a Bill

⁶⁶ Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 Texas Law Review, 341 (Dec. 2004).

⁶⁷ Lash, *The Inescapable Federalism of the Ninth Amendment*, 878.

of Rights on the grounds that if it were “incorporated into the Constitution, independent tribunals of justice [would] consider themselves in a peculiar manner the guardians of those rights; they [would] be an impenetrable power against every assumption of power in the legislative or executive; they [would] be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution of the declaration of rights.”⁶⁸

Some argue that the use of the Ninth Amendment in this behavior will “open the floodgates,” and give the U.S. Supreme Court authority to declare any and every right of their choosing fundamental. This assertion is unconvincing, as the judiciary consistently applies some accredited level of scrutiny to every case examined. As expected, there is no current form of scrutiny for the Ninth Amendment. The following test presents a possibility.

The “Ninth Amendment Test”

What criteria are judges to apply when faced with a claim that the Government is infringing a right reserved to the people and which is not enumerated in the Constitution? Is there any textual standard or have we merely substituted one constitutional formula for another by which judges are to apply their own notions of fundamental justice and fairness?⁶⁹

The “Ninth Amendment Test” consists of four prongs. In order for a “desired right” in question to be protected under the Ninth Amendment, it must survive each of these four measures:

- 1) The desired right is NOT explicitly mentioned in the Constitution.
- 2) The desired right is implicitly defined through distinguishable penumbras.
- 3) The desired right must be recognized as fundamental.
- 4) The desired right must be one that is retained by the people.

Should this desired right pass the test, the Court must automatically administer legal protection through the most rigorous standard of review, strict scrutiny. Under these standards, a fundamental right to an education passes constitutional muster.

1) The desired right is NOT explicitly mentioned in the Constitution

Because the Ninth Amendment is the key constitutional provision used in this level of scrutiny, the Court should only apply it to protect un-enumerated

⁶⁸ Calvin R. Massey, *Silent Rights: The Ninth Amendment and the Constitution's Unenumerated Rights*, 119 (1995).

⁶⁹ Norman Redlich, cited in Barnett's *The Rights Retained by the People*, 144.

rights of the people. Expressed liberties, such as free speech or the right to life, do not need additional protection through the Ninth Amendment. Pre-existing legal provisions found in the Bill of Rights and the Fourteenth Amendment (via selective incorporation) for instance, offer more than enough of a safeguard to uphold these enumerated rights. The Ninth Amendment should be used to target those rights that possess minimal to no original *federal* constitutional protection. Besides, “like other Founders, Madison shared the belief that the retained natural rights of man require no enumeration.”⁷⁰ While the enumeration of a fundamental right to education may not be needed, it still more than deserves to receive constitutional protection via the Ninth Amendment.

2) The desired right is implicitly defined through distinguishable “penumbras”

While the desired right may not be explicitly granted in the Constitution, it must nonetheless be relevant to prominent constitutional values. “Accordingly, the Ninth ... should be used to define rights adjacent to, or analogous to, the pattern of rights which we find in the Constitution.”⁷¹ This prong is perhaps the most decisive of them all, as Justices are entrusted with the responsibility to determine levels of what constitutes “implicit.” Nevertheless, “...the ninth amendment [can] be used in a principled, nonarbitrary way ... if judges and commentators are willing to recognize two critical factors: one, see the amendment for what it can do, and see it for what it cannot. [Judges] must be able to look at constitutional clauses with proper respect and mature realism.”⁷²

Throughout legal history, a number of jurists have risked noteworthy reputations for their unconventional interpretations.⁷³ Even so, American jurisprudence owes a great deal to those who dared to accept the ultimate challenge, balancing between government control and individual liberty. As mentioned earlier, a fundamental right to an education finds implicit protection in the First Amendment. Furthermore, one may argue for additional implicit protection through the Due Process Clause of the Fifth Amendment, considering that this fundamental right can be categorized as an individual liberty.

3) The desired right must be recognized as fundamental

In conjunction with the Court’s existing standard used to declare rights fundamental, the “Ninth Amendment Test” would determine whether the desired right survives each of the four sub-prongs listed below:

- 1) Without the right, neither liberty nor justice would be possible.

⁷⁰ Lash, *The Inescapable Federalism of the Ninth Amendment*, 808.

⁷¹ Redlich, cited in Barnett’s, *The Rights Retained by the People*, 146.

⁷² Shaw, *The Ninth Amendment*, 186.

⁷³ See Blackmun, J., in *Roe v. Wade* 410 U.S. 113 (1973) and Douglas, J., in *Griswold v. Connecticut* 381 U.S. 479 (1965).

- 2) The right is essential to the concept of ordered liberty.
- 3) The right is deeply rooted in the traditions and consciousness of the American people.
- 4) The right is inherent in human nature; it is inalienable.

This argument confirming the right to an education as fundamental is previously discussed under the segment entitled “Fundamentally Sound.”⁷⁴

4) The right must be one that is retained by the people

In line with the text of the Ninth Amendment, “certain rights ... [are] retained by the people,” the desired right must be one that will benefit and empower the people. The Ninth Amendment should not serve as another constitutional provision employed to expand the powers of the legislative or executive branches. It is the *People’s Amendment*. Government is designed by the people, for the people; “...power is originally vested in, and consequently derived from, the people.”⁷⁵ Furthermore, fundamental rights under the Ninth Amendment are made to protect the people. The Ninth should not be exploited by governmental institutions or the bureaucracy for the purpose of enhancing further their already expressed and implied powers.

However, it is important to reiterate that even though the Ninth Amendment reads “the people,” it is meant to harbor predominately individual rights, rather than collective ones. “When the Bill of Rights uses the term ‘the people,’ it consistently refers to individuals and not political collectives or electoral majorities, and all the enumerated [or un-enumerated] rights it protects belong to individuals and not collectives or majorities.”⁷⁶ The acknowledgement of collective rights would require the courts to examine an array of complicated numerical and abstract values that will more than likely vary across time and specific regions of America. *Is the fundamental right denied to all women, to all blacks, to all Jews, to all children, to all Northerners ...?* As an individual right, any person may contest to an infringement of this liberty, and obtain relief. If the Ninth Amendment is interpreted in this fashion, a fundamental right to education will receive its due protection.

Even though a fundamental right to education is one retained by the people, the Court should go forth prudently, and add supplementary safeguards. First, the Court ought to incorporate this Ninth Amendment right into the Due Process Clause of the Fourteenth Amendment:

⁷⁴ *Supra* page 11.

⁷⁵ James Madison, cited in Randy E. Barnett, editor, *The Rights Retained by the People*, 54.

⁷⁶ Randy E. Barnett, *Kurt Lash’s Majoritarian Difficulty: A Response to a Textual-Historical Theory of the Ninth Amendment* 60 *Stanford Law Review*, 947 (2008).

In order for positive Ninth Amendment rights, nationally conceived, to apply to the actions of state governments it is necessary either to conclude that such rights ought to be incorporated into the Fourteenth Amendment's due process clause or that, independently of the due process guarantee, positive Ninth Amendment rights ought to bind state governments.⁷⁷ This form of selective incorporation will ensure citizens of the states a fundamental right to education.

Second, the Court should urge Congress to provide additional protection through § 5 of the Fourteenth Amendment. By stating that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article," the national legislature would also become duly responsible for protecting a fundamental right to an education. The federal and state governments should be required to abide by the controlling measures of the Ninth Amendment. As previously stated, every state constitution recognizes a right to education. It is now time for the Supreme Court and Congress to do the same.

Employment of Strict Scrutiny

If the desired right in question – a right to education – passes all four prongs of the "Ninth Amendment Test," it shall be declared fundamental, and nonetheless protected under the Ninth Amendment. Subsequently, as a fundamental right, the Supreme Court must employ strict scrutiny to determine whether a state or federal statute infringes upon that said right. The government needs to have a *compelling interest* for denying a person their fundamental right to an education. Furthermore, the law must be *narrowly tailored* to the compelling interest proposed. Should a law fail strict scrutiny, it is in clear violation of the Ninth Amendment (as incorporated through the Due Process Clause of the Fourteenth).⁷⁸

The "Ninth Amendment Test" Applied to *Rodriguez*

While *Rodriguez* does not recognize a fundamental right to an education under the Equal Protection and Due Process Clauses of the Fourteenth Amendment, the Ninth Amendment does. Had the families residing within the San Antonio Independent School District brought their claims pursuant to the Ninth Amendment, and the Supreme Court applied this appropriate test, there would be no dispute as to whether a fundamental right to an education exists.

First, as mentioned by the Supreme Court in *Rodriguez*, a fundamental right to an education is NOT explicitly mentioned in the Constitution. This assertion is true; the word itself is never used. However, the right is implicitly

⁷⁷ Massey, *Silent Rights*, 138.

⁷⁸ For clarification purposes, the paper notes that strict scrutiny remains the Court's most rigid test. The "Ninth Amendment Test" would only provide an *additional* feature for the exclusive examination of unenumerated rights under the Ninth Amendment. This newly proposed standard of review does not intend to hamper nor invalidate the elements outlined by Justice Harlan Stone in his famous Footnote number four. See *U.S. v. Carolene Products*, 304 U.S. 144 (1938).

defined through distinguishable penumbras. For instance, Justices White, Douglas, Brennan, and Marshall, dissenting, noted that a fundamental right to an education is closely entangled with the First, Fifth, and Fourteenth Amendments.

As explained earlier, the right to an education is undoubtedly fundamental. Liberty and justice cannot exist without the presence and appreciation of education, knowledge, and wisdom. A primary component of ordered liberty is the right to education. America's history, traditions, and consciousness are dependent upon the support and development of the educational system. Furthermore, the right to an education is inherent in human nature. It is evident that the parents and children of the San Antonio School District asked the Court to defend one of their most treasured and precious inalienable rights.

Finally, the right to an education is undeniably a right retained by both the wealthy and underprivileged residents of San Antonio, Texas. It is a right retained by all.

Texas's Minimum Foundation School Program fails strict scrutiny. The San Antonio Independent School District may have a compelling interest, the desire to educate its youth. However, the program's measures to fulfill this interest are not narrowly tailored. The Minimum Foundation School Program has denied, and continues to deny children their fundamental right to an education. Accordingly, all similar provisions, laws, and programs across the country should be declared unconstitutional.

Conclusion

With Justice Lewis F. Powell and his majority opinion in San Antonio Independent School District v. Rodriguez, *I must respectfully disagree*. Without the right to education, neither liberty nor justice would be possible. The right to education is essential to the concept of ordered liberty. The right to education is deeply rooted in the traditions and consciousness of the American people. The right to education is inherent in human nature; it is inalienable. A fundamental right to an education does exist in the U.S. Constitution. This un-enumerated right is protected by the Ninth Amendment.