THE RIGHT TO EDUCATION: STATES RECOGNIZE IT AND SO SHOULD THE FEDERAL GOVERNMENT

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ABSTRACT

Education, without a doubt, is the proverbial gatekeeper of societal advancement for individuals of moderate means. Furthermore, regardless of a child's socioeconomic status, each child deserves the opportunity to have a quality education. Despite education's great importance in American society, the right to education for K-12 students is poorly protected, especially at the federal level. This Article argues that the fundamental right to education can, and should be, found within the United States Constitution under either the Fifth and Fourteenth Amendment Due Process Clauses or the Equal Protection Clause.

I. INTRODUCTION

There are few things more vital to living a worthwhile life in America than a quality education.[1] Not only is education a "powerful driver of prosperity," but "Americans with higher levels of education are more likely to vote, to volunteer, and to donate to charity."[2] Furthermore, a plethora of social science research

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1. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (noting that "[t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance . . .").

2. Scott Sargrad et al., *A Quality Education for Every Child: A New Agenda for Education Policy*, CTR. FOR AM. PROGRESS (July 2, 2019), https://www.americanprogress.org/article/quality-education-every-child.

indicates that a quality education enables lower-class individuals to transcend "gaps between social classes. Everyone would be able to have an equal chance at higher paying jobs—not just those that are already well-off."[3] Not only has social science and society recognized the importance of education, but the legal system has recognized education's importance as well.[4] Indeed, "[education] 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."[5]

Veneration of the importance of education is no newfound phenomenon.[6] America's Founding Fathers understood the importance of education and even attempted to pass legislation in their respective states establishing public education systems.[7] While charter and private schools may offer enticing alternatives for K-12 students and their parents, the vast majority of K-12 students attend public schools.[8] Today, "[e]ach state is required by its state constitution to provide a school system whereby children may receive an education."[9] In 2016, roughly ninety-one percent of students in first through twelfth grade were enrolled in a public school.[10] If a student's access to a quality public education is barred or detracted from in some way, oftentimes litigation ensues.[11]

When a right or liberty interest is deemed to be pervasively entrenched within the fabric of American society, the Supreme

3. *Top Ten Reasons Why Education is Important*, UNIV. OF THE PEOPLE, https://www.uopeople.edu/blog/10-reasons-why-is-education-important (last visited Mar. 5, 2022).

4. *See* Plyer v. Doe, 457 U.S. 202, 223 (1982) ("In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."); *see also* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments.").

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

6. *See* Derek W. Black, *America's Founders Recognized the Need for Public Education. Democracy Requires Maintaining That Commitment*, TIME MAG. (Sept. 22, 2020, 11:00 AM), https://time.com/5891261/early-american-education-history.

7. *Id.*

8. *See Public School Choice Programs*, NATL. CTR. FOR EDUC. STAT., https://nces.ed.gov/fastfacts/display.asp?id=6 (last visited Mar. 5, 2022).

9. Legal Information Institute, *Education*, CORNELL L. SCH., https://www.law.cornell.edu/wex/education (last visited Mar. 5, 2022).

10. *Public School Choice Programs*, *supra* note 8.

11. *See, e.g.*, Leandro v. State, 488 S.E.2d 249 (N.C. 1997) (individuals from low-wealth school districts brought a declaratory judgment action alleging a violation of their constitutional right to equal educational opportunity); A.C. By Waithe v. McKee, 23 F.4th 37 (1st Cir. 2022) (public school students brought putative class action against the state of Rhode Island for failing to provide adequate civics education in its public schools).

Court has determined those rights to be "fundamental."[12] The designation of a right as "fundamental" is of great significance. When a state government, through its legislature or some other form of state action, infringes upon a fundamental right, courts must apply strict scrutiny.[13] To survive strict scrutiny, a law must be "narrowly tailored to achieve a compelling governmental interest."[14] Laws that infringe rights that are not fundamental may be subject to only intermediate or rational-basis scrutiny.[15] If education is not a fundamental right, this means that states will be able to infringe upon K-12 students' ability to obtain an education while being subject to a lower level of scrutiny.

Seeing that both federal and state governments recognize the dire importance of public education, it begs the question of why a fundamental right to education under the Federal Constitution ("Constitution") does not exist. Why should state governments be allowed to impede children's education while not being placed under the strictest level of scrutiny? Indeed, the Supreme Court in *San Antonio Independent School District v. Rodriguez* explicitly held that such a right under the Constitution does not exist.[16] This should not be the case. *Rodriguez*'s nearly fifty-year reign should end, and the Court should recognize a fundamental right to education under the Constitution.

This Article will argue that a proper substantive due process analysis will yield that there should be a fundamental right to education under the Constitution. Part II will discuss the historical background of public education, including how the Founding Fathers viewed public education, state government's recognition of the right to education, and the federal government's lack of recognition. Part III will provide a substantive due process analysis for the right to education under both *Washington v. Glucksberg*'s "deeply rooted" test and *Obergefell v. Hodges*'s "reasoned judgment" test. Finally, Part IV will reiterate the importance of education and why it should be protected under the Constitution.

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12. *See* McDonald v. City of Chicago, 561 U.S. 742, 764 (2010) (assessing whether the Second Amendment was "fundamental to *our* scheme of ordered liberty and system of justice); *see also* Duncan v. Louisiana, 391 U.S. 145, 148 (1968) ("The question has been asked whether a right is among those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions[.]'").

13. *See* Kolbe v. Hogan, 849 F.3d 114, 133 (4th Cir. 2017).

14. *Id.*

15. *See id.*

16. 411 U.S. 1, 35–39 (1973).

II. HISTORICAL BACKGROUND ON EDUCATION

The idea of education as an important public commodity has enjoyed a long history in America.[17] Subsection A will discuss the Founding Fathers' perspective on education being vital to a successful nation. Subsection B will focus on the various state governments that recognize a fundamental right to education under their respective state constitutions. Subsection C will discuss the federal government's lack of recognition of a fundamental right to education under the Constitution, specifically focusing on the *Rodriguez* decision.

A. The Founding Fathers' View of Education

America's Founding Fathers found public education to be a necessity for a successful nation. The most iconic Founding Father, President George Washington, stated in his final address to Congress that "the common education of a portion of our Youth from every quarter, well deserves attention."[18] James Madison believed that "[a] popular [g]overnment, without popular information, or the means of acquiring it, is but a [p]rologue to a [f]arce or a [t]ragedy; or, perhaps both."[19] Indeed he, along with the other Founding Fathers, held the maxim that "[l]earned [i]nstitutions ought to be favorite objects with every free people."[20] At the time of America's founding, John Adams believed that the government had a responsibility to provide education to "'every rank and class of people, down to the lowest and the poorest' and pay for it at 'public expense.'"[21] Thomas Jefferson agreed by pointing out that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."[22]

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17. *See* Black, *supra* note 6.

18. George Washington, *Eighth Annual Message to Congress*, MILLER CTR. (Dec. 7, 1796), https://millercenter.org/the-presidency/presidential-speeches/december-7-1796-eighth-annual-message-congress.

19. James Madison, *Letter to W. T. Berry*, LIBR. OF CONG. (Aug. 4, 1822), https://www.loc.gov/resource/mjm.20_0155_0159/?sp=1&st=text#:~:text=A%20popular%20Government%2C%20without%20popular,the%20power%20which%20knowledge%20gives.

20. *Id.*

21. Derek W. Black, *Old Ideas, Not New Ones, Are the Key to Education–and Democracy*, PHI DELTA KAPPAN (Jan. 25, 2021), https://kappanonline.org/old-ideas-key-education-democracy-black.

22. Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

The Founding Fathers' veneration for nationwide education is not only supported by their oral and written remarks but also supported by their actions. A prime example is Thomas Jefferson's drafting and attempted passing of "A Bill for the More General Diffusion of Knowledge" in his home state of Virginia.[23] In this bill, Jefferson explicated that one of the best ways to foster the development of a new nation and to prevent tyranny is to "illuminate, as far as practicable, the minds of the people at large."[24] Specifically, the bill called for every county in Virginia to elect three aldermen who would divide their respective county into hundreds "so as that they may contain a convenient number of children to make up a school, and be of such convenient size that all the children within each hundred may daily attend the school to be established therein . . . ."[25] The bill also set out a statewide curriculum that included "reading, writing, and common arithmetic[] . . . ."[26] Although the bill was not passed, it was not considered a rejection of public schools; instead, Jefferson strongly believed that the bill was enthusiastically supported and the only thing that stopped its passage was the lack of resources.[27]

In 1780, James Madison drafted the Massachusetts Constitution that directly addressed and accounted for the importance of public education within the state. Chapter V, Section II expressly stated that "[w]isdom, and knowledge, as well as virtue, diffused generally among the body of the people" is necessary for the preservation of "their rights and liberties . . . ."[28] Madison likewise stated that "it shall be the duty of legislators and magistrates, in all future periods of this Commonwealth, to cherish the interests of . . . public schools, and grammar schools in the towns . . . ."[29]

The statements and actions from America's Founding Fathers can only draw one logical conclusion: they vehemently believed "the future of the republic depended on an educated

23. Thomas Jefferson, *79. A Bill for the More General Diffusion of Knowledge*, NAT'L ARCHIVES (June 18, 1779), https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0079.

24. *Id.*

25. *Id.*

26. *Id.*

27. Black, *supra* note 6.

28. MASS. CONST. pt. 2, ch. V, § 2.

29. *Id.*

citizenry" and "that the opportunities offered by schooling should be available to rich and poor alike."[30]

B. *The State Governments' Recognition of the Right to Education*

Along with a revered reputation provided by the Founding Fathers, the importance of education in America is further expounded upon examination of how the respective state governments have treated education in their state constitutions and high courts.

Although the Constitution does not have a provision discussing education, and in *Rodriguez*, the Court proclaimed that there is no federal right to education, "[w]ithin the constitution[s] of each of the [fifty] states, there is language that mandates the creation of a public education system."[31] Furthermore, thirty-nine states contain a provision indicating how their respective public education system is to be funded.[32] Some states specifically detail how their K-12 public education system is to be laid out directly in their constitutions, while other states choose to leave the formatting details to the state legislature.[33] While all state constitutions mandate K-12 public education, thirty states go "above and beyond" by "speak[ing] to the establishment of higher education."[34] Unlike the fifty states, "there is no constitutional foundation for public education in Washington, D.C."[35] This, however, does not detract from the importance of education in the District of Columbia.

Separate from their mandates of a public education system, twenty-two states have recognized a fundamental right to education under their respective state constitutions.[36] These twenty-two states,

30. Johann N. Neem, *The Founding Fathers Made Our Schools Public. We Should Keep Them That Way.*, WASH. POST (Aug. 20, 2017), https://www.washingtonpost.com/news/ made-by-history/wp/2017/08/20/early-america-had-school-choice-the-founders-rejected-it.

31. Emily Parker, *Constitutional Obligations for Public Education,* EDUC. COMM. OF THE STATES (Mar. 2016), https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* Because Washington, D.C. is not a state, the District uses the Constitution as its own. Even the District of Columbia Home Rule Act, which most closely resembles a D.C. "Constitution," does not specifically address public education. *See* D.C. CODE § 1-201 (1997).

36. Trish Brennan-Gac, *Educational Rights in the States,* A.B.A. (Apr. 1, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol_40_no_2_civil_rights/educational_rights_states.

however, have not all recognized a fundamental right to education for a terribly long time. Rather, recognition of a fundamental right to education in state constitutions is a fairly modern trend. Before 1960, only Wyoming and North Carolina recognized a fundamental right to education under their state constitutions.[37] Through the mid-1970s and late 1980s, although not explicitly stated in their state constitutions, several states such as California, Kentucky, Connecticut, Washington, West Virginia, Mississippi, Oklahoma, and Wisconsin all recognized a fundamental right to education under their respective state constitutions through their high courts.[38] In the 1990s, twelve more states joined the movement.[39] Finally, in 2011, South Dakota recognized a fundamental right to education in its state constitution, pushing the total up to the current twenty-two states we have today.[40]

Effectively, all fifty states understand that "education is more important than ever in this era of global competitiveness."[41] It is also worth mentioning that twenty out of the twenty-two states which recognize a fundamental right to education recognized that right even after the Court's *Rodriguez* decision.[42] The fact that all fifty states recognize the importance of education and that nearly half of those states recognize a fundamental right to education underneath their respective State constitutions post-Rodriguez indicates that the Court should reconsider whether there is a fundamental right to education under the Constitution. A close analysis of the *Rodriguez* decision proves useful in advancing this proposition.

37. *Id.*; *see also* WYO. CONST. art. 1, § 23; N.C. CONST. art. 1, § 15.

38. Brennan-Gac, *supra* note 36; *see also, e.g.*, Serrano v. Priest, 487 P.2d 1241 (Cal. 1971); Rose v. Council for Better Educ., 790 S.W.2d 186, 205 (Ky. 1989).

39. Brennan-Gac, *supra* note 36.

40. Davis v. State, 804 N.W.2d 618, 627 (S.D. 2011) ("The constitutional language and intent of the framers guarantee *the children of South Dakota a constitutional right to an education that provides them with the opportunity to prepare for their future roles as citizens, participants in the political system, and competitors both economically and intellectually.*") (emphasis added).

41. Brennan-Gac, *supra* note 36.

42. *See id.*

C. The Federal Government's Lack of Recognition of the Right to Education

In 1973, the Court decided in *San Antonio Independent School District v. Rodriguez* that there is no fundamental right to education under the Constitution.[43] The litigation in this case centered around the funding of two Texas school districts: the Edgewood Independent School District ("Edgewood") and the Alamo Heights Independent School District ("Alamo Heights").[44] Edgewood was the least affluent school district and Alamo Heights was the most affluent school district in Texas.[45] The primary complaint in *Rodriguez* was that the Texas system of financing public education was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.[46] The comparison between the two school districts "serves to illustrate the manner in which the dual system of finance operates and to indicate the extent to which substantial disparities exist despite the state's impressive progress in recent years."[47] Indeed, Edgewood, composed of ninety percent Mexican-American residents, only received $356 per pupil under the Texas financing system; on the contrary, Alamo Heights, composed of eighty-one percent White-American residents, received $594 per pupil.[48] It is also worth noting that Edgewood serviced twenty-two thousand students while Alamo Heights only serviced five thousand students.[49] This statistic implies that the majority of the money allocated to public education in Texas, instead of being fairly dispersed among every school district, was centralized in small, largely white communities.

A three-judge panel from the United States District Court for the Western District of Texas rendered a per curium opinion holding that the Texas system of financing public education was indeed unconstitutional.[50] Determining that Texas's financing system was infringing upon the fundamental rights of students, the district court proceeded to apply strict scrutiny when determining

43. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973).
44. *Id.*
45. *Id.*
46. *Id.* at 6.
47. *Id.* at 11.
48. *Id.* at 12–13.
49. *Id.* at 11–12.
50. *Id.* at 6.

whether Texas's plan was constitutional.[51] When Texas appealed the decision to the Supreme Court, the Court analyzed two questions, the first being: "whether the Texas system of financing public education . . . impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny."[52] If the answer to this question was yes, the Court would simply have affirmed the district court. If the answer, however, was no, the Court would inquire about the second question: "whether [Texas's financing plan] rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment."[53] Texas admitted that its financing plan could not survive strict scrutiny.[54]

In its analysis of whether the right to education was fundamental under the Constitution, the Court started by stating that the district court opinion did not "reflect the novelty and complexity of the constitutional questions" raised by Rodriguez and other Edgewood students.[55] The district court's analysis relied upon cases concerning "the rights of indigents to equal treatment in the criminal trial and appellate processes, and on cases disapproving wealth restrictions on the right to vote."[56] The Court quickly brushed the district court's analysis to the side and began the fundamental right analysis anew.

While the Court noted the importance of *Brown*'s observation that "education is perhaps the most important function of state and local governments,"[57] it did not give that observation much weight. Instead, the Court noted that the answer to whether education is "fundamental" lies not in its importance but rather "in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution."[58]

The Court then proceeded to observe that a fundamental right to education is not explicitly or implicitly guaranteed by the Constitution.[59] In the process, the Court rejected Rodriguez's

51. *Id.* at 17–18.
52. *Id.* at 17.
53. *Id.*
54. *Id.* at 16.
55. *Id.* at 17–18.
56. *Id.* at 18.
57. *Brown*, 347 U.S. at 493.
58. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 33–34.
59. *Id.* at 35.

argument that "education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote."[60] The Court did not dispute the fact that education, the First Amendment, and voting are indeed intertwined; instead, it stated that it "ha[s] never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice."[61] The Court then shifted this task back onto "the people" by saying "[t]hese are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be implemented by judicial instruction into otherwise legitimate state activities."[62]

Finally, the Court assessed that "the logical limitations on appellees' nexus theory are difficult to perceive."[63] The Court struggled to identify how it would distinguish this case from "the significant personal interests in the basics of decent food and shelter[.]"[64] In other words, the Court worried that if it found education to be a fundamental right because education is necessary for a person to exercise other fundamental rights (i.e., First Amendment and voting rights), it would be unable to draw a line between education and other ancillary, non-fundamental rights that are needed to effectuate other fundamental rights.[65]

In the conclusion of its analysis, the Court held that it "considered each of the arguments supportive of the district court's finding that education is a fundamental right or liberty and have found those arguments unpersuasive."[66] Accordingly, the Court concluded that there is no fundamental right to education under the Constitution. The Court then found that Texas's financing plan survived rational-basis scrutiny under the Equal Protection Clause of the Fourteenth Amendment.[67]

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60. *Id.*
61. *Id.* at 36.
62. *Id.*
63. *Id.* at 37.
64. *Id.*
65. *Id.* ("How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter? Empirical examination might well buttress an assumption that the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process, and that they derive the least enjoyment from the benefits of the First Amendment.").
66. *Id.*
67. *Id.* at 54–55.

III. THE RIGHT TO EDUCATION SHOULD BE RECOGNIZED AS A FUNDAMENTAL RIGHT

The Court's reasoning in *Rodriguez* has flaws that when carefully parsed welcome the conclusion that *Rodriguez* was improperly decided. Further, a proper substantive due process analysis under either *Glucksberg*'s "deeply rooted" test or *Obergefell*'s "reasoned judgment" test will show that there should be a right to education under the Constitution. Subsection A will expound on the flaws of *Rodriguez* and why it was incorrectly decided. Subsection B will apply the first prong of *Glucksberg*'s "deeply rooted" test to education and will attempt to define the right to education. Subsection C will apply the second prong of *Glucksberg*'s "deeply rooted test" and will demonstrate that education is indeed deeply rooted in American history and tradition. Finally, Subsection D will apply *Obergefell*'s "reasoned judgment" test to education. These analyses, along with both education's veneration from the Founding Fathers and its importance in American society, urge a right to education under the Constitution.

A. Why Rodriguez *is Wrongly Decided*

The Court's reasoning in *Rodriguez* has three flaws in its reasoning that collectively warrant the conclusion that *Rodriguez* was improperly decided and should be overruled. First, the Court applied the incorrect test when assessing whether there is a right to education under the Constitution. The Court stated that whether education is "fundamental" lies not in its importance but rather "the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution."[68] Even though neither the "deeply rooted" test nor the "reasoned judgment" test existed at the time *Rodriguez* was decided, the test applied by the Court is simply a false statement.

The majority in the *Rodriguez* case was simply too quick to discount Rodriguez's argument that education is "fundamental" because it is necessary to effectuate the fundamental rights of free speech and voting. But the Court's prior cases "stand for the proposition that 'fundamentality' is, in large measure, a function of

68. *Id.* at 34.

the right's importance in terms of the effectuation of those rights which are in fact constitutionally guaranteed."[69]

Furthermore, both before and after *Rodriguez*, the Court has recognized several rights as fundamental that are not "explicitly or implicitly guaranteed by the Constitution."[70] Indeed, there have been instances where "the Court has determined that the Due Process Clause applies rights against the States that are not mentioned in the Constitution at all, even without seriously arguing that the Clause was originally understood to protect such rights."[71] In *United States v. Guest*, the Court affirmed that there was a fundamental right to travel among the several states even though "that right finds no explicit mention in the Constitution."[72] The Court reasoned "that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created."[73] This is strikingly similar to how the Founding Fathers viewed education to be essential to a successful nation.[74]

In *Skinner v. Oklahoma*, the Court found both marriage and procreation to be fundamental rights.[75] Nowhere in the Constitution are fundamental rights to marriage and procreation expressly stated or even remotely implied.[76] The Court has also recognized a fundamental right to appeal a criminal conviction.[77] Once again, nowhere in the Constitution is the fundamental right to appeal a criminal conviction expressly stated or implied.[78] As the Court stated in *Obergefell*, the drafters of the Bill of Rights and Fourteenth Amendment "did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning."[79] Therefore, much like Justice

69. *Id.* at 62 (Brennan, J., dissenting).
70. *Id.* at 34; *see also* McDonald v. City of Chicago, 561 U.S. 742, 811 (2010).
71. *McDonald*, 561 U.S. at 811.
72. 383 U.S. 745, 758 (1966).
73. *Id.*
74. *See* Black, *supra* note 6.
75. 316 U.S. 535, 541 (1942).
76. *See* U.S. CONST.
77. *See* Griffin v. Illinois, 351 U.S. 12, 20 (1956) (Frankfurter, J., concurring) ("The right to an appeal from a conviction for crime is today so established that this leads to the easy assumption that it is fundamental to the protection of life and liberty and therefore a necessary ingredient of due process of law.").
78. *See* U.S. CONST.
79. Obergefell v. Hodges, 576 U.S. 644, 664 (2015).

Thurgood Marshall, "I . . . cannot accept the majority's labored efforts to demonstrate that fundamental interests, which call for strict scrutiny of the challenged classification, encompass only established rights which we are somehow bound to recognize from the text of the Constitution itself."[80]

Second, while assessing Rodriguez's argument that education is fundamental because it is necessary to effectuate the fundamental rights of free speech and voting, the Court stated that "these are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be implemented by judicial instruction into otherwise legitimate state activities."[81] Here, the Court is worried about the federal government involving itself in an area of law that is predominately left up to the individual states. Fifty years later, however, that line of reasoning is thoroughly outdated.

The federal government has excessively entangled itself in state-level public education since the *Rodriguez* decision. It is no secret that "education is no longer solely a local concern."[82] Congress has promulgated a myriad of statutes that significantly affect how public education is handled at the state level.[83] For example, the No Child Left Behind Act,[84] which requires standardized testing for grades three through eight, is an act passed by Congress that must be followed by the states or it "would result in [a] state's loss of federal education assistance."[85] Another prime example of federal government entanglement is the Individuals with Disabilities Education Act.[86] This statute provides a host of protections for students with disabilities and serves "to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families."[87]

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80. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting).

81. *Id.* at 36.

82. Michael Salerno, Note, *Reading is Fundamental: Why the No Child Left Behind Act Necessitates Recognition of a Fundamental Right to Education*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 509, 538 (2007).

83. *See* ADAM STOLL ET AL., CONG. RSCH. SERV., IF10551, A SUMMARY OF FEDERAL EDUCATION LAWS ADMINISTERED BY THE U.S. DEPARTMENT OF EDUCATION (2022).

84. 20 U.S.C. § 6319.

85. Salerno, *supra* note 82.

86. 20 U.S.C. § 1400.

87. *Id.* § 1400(d)(2).

One important note to consider concerning the No Child Left Behind Act, the Individuals with Disabilities Education Act, and other laws entangling the federal government with state-level public education is their respective constitutional bases are all found in the Spending Clause.[88] It is well known that states retain a core sovereignty that Congress cannot invade and that the federal government cannot command either states or state officials to do any specific act in their official capacity.[89] But, the federal government may incentivize states to comply with its legislative prerogative by conditioning receipt of funding upon state compliance.[90] States, however, can choose to forgo those funds and not bend to the congressional will of Spending Clause legislation.[91] Yet this fact does not abrogate the federal government's excessive entanglement with state-level public education. The federal government knocked on the state legislatures' door, and the state legislatures welcomed it inside. It is federal government entanglement all the same.

Because Congress has already promulgated a number of statutes that excessively entangle the federal government with state-level public education, the Court no longer needs to worry about encroaching upon states by finding a fundamental right to education under the Constitution. Therefore, the *Rodriguez* Court's fear of "governmental interference" in "otherwise legitimate state activities" is both outdated and moot.

Third, the Court worried that if it found education to be a fundamental right because education is necessary for a person to exercise other fundamental rights (i.e., First Amendment and voting rights), it would be unable to draw a line between education and other ancillary, non-fundamental rights that are needed to effectuate fundamental rights.[92] Specifically, the Court inquired "[h]ow, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter?"[93] This issue, however, is embarrassingly easy to resolve.

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88. U.S. CONST. art. I, § 8, cl. 1.

89. *See* New York v. United States, 505 U.S. 144, 178 (1992); Printz v. United States, 521 U.S. 898, 926 (1997).

90. South Dakota v. Dole, 483 U.S. 203, 206–07 (1987).

91. *Id.* at 210.

92. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35–36 (1973).

93. *Id.* at 37.

In this particular instance, the main delineating factor between education and food or shelter is that state governments have a responsibility to provide for the education of their citizenry.[94] It bears remembering that all fifty states have within their respective constitutions a mandate to establish and maintain a public education system.[95] Contrarily, no state constitution has any mandate or clause stating that its state government is required to provide food or shelter for its citizens. Therefore, one test the Court may use to distinguish between education and other non-fundamental rights is whether the Constitution or all the state constitutions provide for the right in question. This test would effectively close the door to the fear the *Rodriguez* majority fostered. The three aforementioned flaws in the Court's reasoning in *Rodriguez* strongly suggest that the decision was wrongly decided and that it should be overruled.

B. How the Right to Education Should be Defined

The first step in determining whether either the Fifth or Fourteenth Amendment Due Process Clause provides for a fundamental right to education under the Constitution is to first properly define the right in question.[96] Unfortunately, the Court has never laid down a bright-line rule on how to properly define rights for the purposes of substantive due process analysis. But two cases, *Glucksberg* and *Cruzan v. Missouri Department of Health*, are instructive on how rights are to be defined.

In *Glucksberg*, the respondents attempted to define the right in question in a myriad of ways: a few examples include a right to "determining the time and manner of one's death," a right to "control of one's final days," and "the right to choose a humane, dignified death[.]"[97] When deciding how to properly define the right in the case at bar, the Court reflected on its decision in *Cruzan*. The Court noted that it "ha[d] a tradition of carefully formulating the interest at stake in substantive-due-process cases."[98] Indeed, although *Cruzan* is commonly referred to as the "right-to-die case," the Court more precisely defined the right at issue as the

94. *See* Parker, *supra* note 31.
95. *Id.*
96. *See* Washington v. Glucksberg, 521 U.S. 702, 722 (1997).
97. *Id.*
98. *Id.*

"constitutionally protected right to refuse lifesaving hydration and nutrition."[99] Following its precedent in *Cruzan*, the Court determined that the right at issue in *Glucksberg* was not any of the ones proffered by the respondents above, but rather "[the] right to commit suicide which itself includes a right to assistance in doing so."[100]

Taking *Glucksberg* and *Cruzan* together, it appears that it is the Court's practice to define the right in a substantive due process analysis as narrowly as possible. If this is the case, simply calling for a right to "education" under the Constitution may be too broad a right for the Court to analyze. For example, "education" could encompass both K-12 schools and higher education. To properly narrow the right to education to a point where it would be true to the Court's analyses in *Glucksberg* and *Cruzan*, it would be wise to look to the state supreme courts that have already defined the term. Out of the twenty-two states that have found a right to education under their respective constitutions, the Supreme Court of North Carolina offers the best definition of the right in question.

In *Leandro v. State*, the Supreme Court of North Carolina defined the right at issue as the "right to a sound basic education."[101] Indeed, "[a]n education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate."[102] The court then explicated exactly what a right to a "sound basic education" entailed:

> For purposes of our Constitution, a "sound basic education" is one that will provide the student with at least: (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's

99. Cruzan v. Mo. Dep't of Health, 497 U.S. 261, 279 (1990).
100. *Glucksberg*, 521 U.S. at 723.
101. 488 S.E.2d 249, 254 (N.C. 1997).
102. *Id.*

> community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.[103]

When narrowly defining the right at issue in a substantive due process analysis under the Constitution, the Court should follow the Supreme Court of North Carolina's footsteps and define the right as a right to a "sound basic education."

C. The Right to Education is Deeply Rooted in America's History and Tradition

The second step in determining whether either the Fifth or Fourteenth Amendment Due Process Clause provides for a fundamental right to education under the Constitution is to see whether the right to education is "deeply rooted in this Nation's history and tradition[.]"[104] In other words, the Court must assess whether the right to education is "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[105]

Without a doubt, the right to education is deeply rooted—indeed, it is entrenched—in America's history and tradition. One would need to look no further than the Founding Fathers' heavy emphasis on the importance of education and the implementation of the right to education by the respective state governments illustrated *infra* in sections II-A and II-B of this very Article. It bears remembering that some of America's most influential figures, George Washington, James Madison, John Adams, and Thomas Jefferson all advocated that the education of America's citizenry was necessary for the success of the nation.[106] That advocacy can also be seen through the actions of the Founding Fathers by Jefferson attempting to pass "A Bill for the More General Diffusion of

103. *Id.* at 255 (citing Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989)).

104. *Glucksberg*, 521 U.S. at 721.

105. *Id.* (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

106. Washington, *supra* note 18; Madison, *supra* note 19; Black, *supra* note 6; Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

Knowledge" in his home state of Virginia[107] and Madison expressly addressing and accounting for the importance of public education in the Massachusetts Constitution.[108]

All fifty states have mandated in their respective constitutions that there be a system of public education within their respective states.[109] Thirty-nine of those states contain a provision indicating how their respective public education system is to be funded.[110] Thirty states go beyond the K-12 realm and explicitly "speak to the establishment of higher education."[111] But most importantly, twenty-two states expressly recognize, either in their respective state constitution or through their high court, a fundamental right to education for their K-12 students.[112] From the 1970s to the present, states have made it abundantly clear that education is "the most important function of state and local governments."[113]

On top of education's ample support from the Founding Fathers and state governments, social science research accurately underscore education as the biggest equalizing factor between individuals with different socioeconomic statuses.[114] There is no dispute that education is the proverbial gatekeeper to living a more quality life.[115] Undoubtedly, it is worth appreciating that social science's recognition of the importance of equality in education is the predominant reason supporting integration and behind the fall of the "separate but equal" doctrine in America.[116] A close examination of the Founding Fathers' view of education, state government's view of education, and social science's view of education will inevitably reveal that the right to education is deeply rooted in American history and tradition. Indeed, "Americans

107. Jefferson, *supra* note 23.

108. MASS. CONST. pt. 2, ch. V, § 2.

109. Parker, *supra* note 31.

110. *Id.*

111. *Id.*

112. Brennan-Gac, *supra* note 36.

113. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954); *see also* Wisconsin v. Yoder, 406 U.S. 205, 213 (1972) ("Only last Term, the Court recognized that '[p]roviding public schools ranks at the very apex of the function of a State.'").

114. *Top Ten Reasons Why Education is Important*, *supra* note 3.

115. Sargrad et al., *supra* note 2.

116. *Brown*, 347 U.S. at 494 n.11 (listing a litany of social science articles emphasizing the negative effects that segregation has on African-American children).

regard the public schools as a most vital civic institution for the preservation of a democratic system of government."[117]

D. Application of the Court's "Reasoned Judgment" Standard in Obergefell

The "deeply rooted" test from *Glucksberg* illustrated in sections III-B and III-C is not the only way by which the Court may find a fundamental right to education under the Constitution. In *Obergefell v. Hodges*, the Court found that there is a fundamental right to same-sex marriage under the Fourteenth Amendment Due Process and Equal Protection Clauses.[118] But the Court did not apply the "deeply rooted" test from *Glucksberg*; instead, the Court applied a much more lenient standard.

The *Obergefell* Court noted that protecting fundamental rights "is an enduring part of the judicial duty to interpret the Constitution."[119] Determining which rights are fundamental, however, "has not been reduced to any formula."[120] Instead, "it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect."[121] Critically, the Court notes that "[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries."[122] The Court observes the importance of this facet by explicitly stating that this relaxed, "reasoned judgment" standard allows the Court to "respect[] our history and learns from it without allowing the past alone to rule the present."[123] To further cement this idea of not letting history control the determination of fundamental rights, the Court observed:

> The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals

117. Sch. Dist. of Abington Twp v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring).

118. 576 U.S. at 675.

119. *Id.* at 663.

120. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

121. *Obergefell*, 576 U.S. at 664.

122. *Id.*

123. *Id.*

discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.[124]

Some legal scholars have observed that "*Obergefell* removes many of the most significant doctrinal barriers to recognizing education as a fundamental right under the Due Process and Equal Protection Clauses."[125] In fact, Alexis Piazza, Deputy Attorney General of California, states that "*Obergefell* prescribes an approach to the interpretation of substantive due process rights that could support more vigorous enforcement of this constitutional obligation."[126] This may very well be true seeing that the *Obergefell* Court expressly distinguished itself from *Glucksberg*, effectively dodging the application of the "deeply rooted" test.[127] Piazza has persuasively applied *Obergefell*'s "reasoned judgment" standard: "[f]irst, education preserves the autonomy of children and parents;"[128] "[s]econd, education helps fulfill the Constitution's anti-caste promise;"[129] "[t]hird, education is necessary to protect other fundamental rights;"[130] "[f]inally, education is a keystone of our social order."[131]

As illustrated in sections III-B and III-C, the fundamental right to education can be found under the Fifth Amendment Due Process Clause by using *Glucksberg*'s "deeply rooted" test. Because this "reasoned judgment" test sets a lower bar by which the Court may find a fundamental right, the fundamental right to education should also be found under this test.

IV. CONCLUSION

While K-12 students in twenty-two states enjoy a fundamental right to education under their respective state constitutions and high courts, K-12 students in twenty-eight states do not. Students in those twenty-eight states are devoid of an effective mechanism by which they may bring suit against a school board of education for school or school-endorsed actions that place an undue burden on their ability to receive an education that enables them to compete

124. *Id.*
125. Alexis M. Piazza, *The Right to Education After Obergefell*, 43 HARBINGER 62, 65 (2019).
126. *Id.*
127. *Obergefell*, 576 U.S. at 671.
128. Piazza, *supra* note 125, at 75.
129. *Id.* at 76.
130. *Id.*
131. *Id.* at 77.

in higher education and the workforce. Additionally, for those states that recognize a non-fundamental right to education, those students may have their rights infringed by state action without the benefit of strict scrutiny review. This should not be the case. The Court should grant certiorari to the next petitioner who asserts that there should be a fundamental right to education under the Fifth or Fourteenth Amendment Due Process Clause, or the Equal Protection Clause, of the Constitution. The Court may find the fundamental right either through *Glucksberg*'s "deeply rooted" test or *Obergefell*'s "reasoned judgment" test. Under either test, the rich history and veneration of education both by the Founding Fathers and state governments should prove that the right to education indeed deserves federal protection. The states recognize the importance of a fundamental right to education and so should the federal government.