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**RESTORING THE RIGHTS MULTIPLIER:
THE RIGHT TO AN EDUCATION
IN THE UNITED STATES**

Katherine Smith Davis and Jeffrey Davis***

In 1973 the U.S. Supreme Court ruled that education was not a fundamental right, leaving in place systems that continue today to perpetrate vast inequities among school districts.¹ Through a comparative analysis of treaties, constitutions, legislation, and international and state judicial decisions, we demonstrate that education is indeed a fundamental human right, though our constitutional jurisprudence has denied its fundamental right status. We use case studies from Baltimore, a typical city whose residents face economic hardships, to reveal the dire consequences of this ruling.² Without the right to an education, schoolchildren in poor

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

² Katherine Davis has spent six years working closely with students and families in the Baltimore City Public Schools system, offering educational advocacy and assistance with other types of services related to their ability to access an appropriate education. The case studies cited are derived from first-hand experience with families, students, teachers, and administrators. Names and in some cases minor circumstances have been changed to preserve anonymity. A

systems continue to be deprived of the myriad of human rights that a quality education delivers.

Education operates as a multiplier, enhancing the enjoyment of all individual rights and freedoms where the right to education is effectively guaranteed, while depriving people of the enjoyment of many rights and freedoms where the right to education is denied or violated.³

– Katarina Tomaševski, United Nations Special Rapporteur, Right to Education

INTRODUCTION

In *San Antonio Independent School District v. Rodriguez*, the United States Supreme Court incorrectly ruled that education was not a fundamental right.⁴ While many scholars have analyzed and criticized this decision,⁵ we show that the Court fundamentally misunderstood the very nature of rights. Unlike other critiques, we use a comparative approach examining international, regional, state, and federal laws and decisions to demonstrate conclusively that education is a fundamental human right. In so doing, we use a particularly apt case study, Baltimore, to show the severe damage inflicted by the Supreme Court's *Rodriguez* decision.⁶

few are composites created to explain a situation, but all demonstrate an accurate reflection of situations encountered in Baltimore City's public schools.

³ KATARINA TOMAŠESKI, HUMAN RIGHTS OBLIGATIONS: MAKING EDUCATION AVAILABLE, ACCESSIBLE, ACCEPTABLE AND ADAPTABLE 10 (2011).

⁴ *Rodriguez*, 411 U.S. at 37.

⁵ Barry Friedman & Sarah A. Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 129 (2013); Timothy Lynch, *Education as a Fundamental Right: Challenging the Supreme Court's Jurisprudence*, 26 HOFSTRA L. REV. 953, 970–77 (1998); Julia A. Simon-Kerr & Robynn K. Strum, *Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education*, 6 STAN. J. C.R. & C.L. 83, 85 (2010); Michael A. Rebell, *The Right to Comprehensive Educational Opportunity*, 47 HARV. C.R.-C.L. L. REV. 47 (2012); Brooke Wilkins, *Should Public Education Be a Federal Fundamental Right?*, 2005 BYU EDUC. & L.J. 261, 290 (2005).

⁶ *Rodriguez*, 411 U.S. at 37.

By 6:00 AM each weekday, Baltimore City Public School children as young as ten are already traveling across the city on various modes of public transportation on their way to school. Many must take two or more overcrowded and chronically late busses or trains to a stop that is still a long walk from their schools. Upon arriving at school, students typically wait in line to go through a metal detector and have their bags searched prior to entering the building. Students' complaints of busses running late or simply passing them by and security lines moving slowly are met with exacerbated shrugs and admonitions to simply get up earlier and try for an earlier bus. "If the 7:05 is always late or full, try for the 6:35," they hear.⁷ In part due to these transportation issues, 52.6% of Baltimore City Public School high school students and 26.2% of middle schoolers were absent from school for more than twenty days in 2018.⁸ These absences—and countless more days tardy—account for thousands of hours of lost educational time each year.

In January 2018, Baltimore City's public schools were featured in U.S. national news stories when approximately one third of the schools were closed due to lack of heat.⁹ Thousands of school children across the city were again deprived of their education because the city had not been able to afford maintenance of its aging heating systems.¹⁰ Even after students were allowed to return to school, many buildings continued to suffer from inadequate heating

⁷ A comprehensive report on the commutes of Baltimore City Public School students found that "on average high school student commutes are more complicated than [those of] the typical public transportation user," most requiring at least one transfer and taking an average of 36.2 minutes. Mark L. Stein et al., *Getting to High School in Baltimore: Student Commuting and Public Transportation*, BALT. EDUC. RES. CONSORTIUM (Jan. 30, 2017), <https://baltimore-berc.org/getting-to-high-school-in-baltimore/>.

⁸ *2018 Maryland Schools Report Card*, MD. ST. DEP'T EDUCATION <https://msp2018.msde.maryland.gov/Graphs/#/Demographics/AbsenteeRate2013/M/3/3/3/3/3/3/3/3/3/3/6/30/XXXX> (last visited Feb. 24, 2020).

⁹ Christine Hauser, *Baltimore City Schools Are Without Heat, Prompting Protests from Teachers and Parents*, N.Y. TIMES (Jan. 4, 2018), <https://www.nytimes.com/2018/01/04/us/baltimore-schools-winter-heating.html>.

¹⁰ Liz Bowie, *Baltimore City Students Have Missed Almost 1.5 Million Hours of Class Time Because of Inadequate School Facilities*, BALT. SUN (Feb. 4, 2020), <http://www.baltimoresun.com/education/bs-md-ci-school-facilities-jhu-study-20200204-schzujfgozgabbzmsuub7xlfia-story.html>.

and cooling, flooding, and structural decay. Broken pipes and failing heat and air conditioning throughout the aging buildings led to highly irregular temperatures, forcing students to navigate between classes that were extremely hot and those where the temperature matched that of the outdoors.¹¹ Harsh uniform policies (such as those prohibiting hoodies from being worn in class) and tight family budgets prevented some students from being able to dress warmly enough to be comfortable indoors, much less during their long commutes. More than a few students observed that the area jails are nicer than the schools.

The inequities do not stop with infrastructure. Many schools lack basic supplies such as books, paper, and pencils.¹² At an elementary school in East Baltimore, when a student named Mylia¹³ misplaced her math worksheet and asked for a replacement, she was told that she couldn't have one because her teacher had run out of paper. Neither Mylia nor any of her classmates are allowed to take their books out of the classroom, both because the school cannot afford to replace them if they are lost and because the same set of books is used for more than one class. Not only is valuable instruction time lost while allotting time for students to read in class, but those students who are slower readers are left without much opportunity to catch up outside of class. Because education is not deemed a fundamental right in the United States, students in Baltimore and in poor cities across the country have little to no legal recourse for denial of a quality education.

¹¹ See, e.g., Joshua M. Sharfstein et al., *Baltimore City Public Schools Infrastructure Dashboard*, JHU CENT. FOR APPLIED PUB. RES. (Jan. 29, 2020), <https://appliedresearch.jhu.edu/baltimore-school-equity/>.

¹² See Gail O'Connor, *The School Supply Gap*, TEACH FOR AM. (Sept. 8, 2019), <https://www.teachforamerica.org/stories/the-school-supply-gap>.

¹³ Note that all student names have been changed to protect the privacy of those involved, and that many of the profiles are composites, built from actual observations to represent recurring issues in a school system struggling with insufficient funding while tasked with educating students struggling with extreme poverty. This Article is not a critique of the students, families, teachers, administrators, or staff who study and work in the Baltimore City Public Schools system but rather an argument that depriving Baltimore and similar districts of adequate resources violates students' fundamental right to an education.

Similar stories can be heard from many urban, poor, and primarily minority school districts in the United States. Schools in these districts struggle due to inadequate funding compounded by the increased needs of students who are traumatized by excessive poverty and violence in their neighborhoods.¹⁴ Many of these schools are segregated by race and socioeconomic status to an extent not witnessed since before court-ordered desegregation began in 1955, and all of them are tasked with preparing students to succeed in a world in which a formal education is vitally important.¹⁵ The stories being told about these school systems today are reminiscent of those from the Edgewood public schools in San Antonio, Texas in 1973, the school system that was the object of the Supreme

¹⁴ For example, teachers in Los Angeles have resorted to strikes in response to underfunded schools. California has suffered a steady decline in school funding since the state limited expenditures from property tax, ironically in an effort to equalize funding among economically diverse districts, which has led to massive teacher strikes. *See, e.g.*, EDUCATION TRUST, FUNDING GAPS 201 (2015), https://edtrust.org/wpcontent/uploads/2014/09/FundingGaps2015_TheEducationTrust1.pdf; Allie Bidwell, *Most U.S. Students Live In or Near Poverty*, U.S. NEWS & WORLD REP. (Jan. 16, 2015), <https://www.usnews.com/news/blogs/data-mine/2015/01/16/most-us-students-come-from-low-income-families>; Andrew Gumbel, *California Schools Were Once the Nation's Envy. What Went Wrong?*, THE GUARDIAN (Jan. 19, 2019), <https://www.theguardian.com/education/2019/jan/19/california-school-funding-los-angeles-strike-what-went-wrong>; Ivy Morgan & Ary Amerikaner, *Funding Gaps 2018*, EDUC. TRUST (Feb. 27, 2018), <https://edtrust.org/resource/funding-gaps-2018/>; Jack Schneider, *The Urban-School Stigma*, THE ATLANTIC (Aug. 25, 2018), <https://www.theatlantic.com/education/archive/2017/08/the-urban-school-stigma/537966/>.

¹⁵ *See, e.g.*, EDBUILD, NON-WHITE SCHOOL DISTRICTS GET \$23 BILLION LESS THAN WHITE DISTRICTS DESPITE SERVING THE SAME NUMBER OF STUDENTS 1–3 (2019), <https://edbuild.org/content/23-billion/full-report.pdf>; Sarah Butrymowicz, *Struggling Cities and Excelling Suburbs: A Repeated Pattern Around the Country*, HECHINGER REP. (Sept. 28, 2015), <https://hechingerreport.org/struggling-cities-and-excelling-suburbs-a-repeated-pattern-around-the-country>; Emma García & Elaine Weiss, *Education Inequalities at the School Starting Gate*, ECON. POL'Y INST. (Sept. 27, 2017), <https://www.epi.org/publication/education-inequalities-at-the-school-starting-gate>; Valerie Strauss, *How, After 60 Years, Brown v. Board of Education Succeeded—And Didn't*, WASH. POST (Apr. 24, 2014), <https://www.washingtonpost.com/news/answer-sheet/wp/2014/04/24/how-after-60-years-brown-v-board-of-education-succeeded-and-didnt/>.

Court's evisceration of the right to an education in *San Antonio Independent School District v. Rodriguez*.¹⁶

At that time, Edgewood's public school district enrolled almost 22,000 students in twenty-five schools.¹⁷ Approximately 90% of these students were Mexican American, and 6% were African American.¹⁸ Pursuant to a state law dictating a school funding scheme, the district's combined funds from local property taxes and state and federal allocations allowed it to spend \$356 per pupil.¹⁹ Even though Edgewood had lower income levels and property values than other districts, its property tax rate was the highest in the San Antonio area.²⁰ On the other hand, the most affluent district in San Antonio, Alamo Heights, using the same system, raised \$333 per student in property taxes alone while assessing a significantly lower local property tax rate.²¹ With state and federal contributions, the district had \$558 to educate each student—over \$200 more per student than Edgewood with a lower tax rate.²²

Families of children enrolled in Edgewood public schools sued Texas, claiming that its system of funding schools with property taxes deprived their children of fundamental rights to an education and to equal protection of the laws.²³ The Supreme Court rejected their claims, however, ruling that there was no fundamental right to education and that the vast difference in funding and resulting inequities did not unconstitutionally violate the students' right to equality.²⁴

¹⁶ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 4–6 (1973).

¹⁷ *Id.* at 11–12.

¹⁸ *Id.* at 12.

¹⁹ *Id.*

²⁰ *Id.* (The average property value in Edgewood was \$5,960 per student, and the district taxed this property at a rate of \$1.05 per \$100 of property value. As a result, it could spend \$26 to educate each student in its system. State and federal allocations raised that amount to \$356 per student.).

²¹ *Id.* at 12–13 (Alamo Heights taxed only \$0.85 per \$100 of assessed property.).

²² *Id.* at 63 (White, J., dissenting).

²³ *Id.* at 5–6 (majority opinion).

²⁴ *Id.* at 37.

I. DENYING THE RIGHT TO AN EDUCATION: *SAN ANTONIO
INDEPENDENT SCHOOL DISTRICT V. RODRIGUEZ*

Justice Powell wrote the opinion for the Court in *Rodriguez* and argued that, when asking if education is a fundamental right, “the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.”²⁵ He acknowledged the vital importance of education in a democratic society.²⁶ Citing landmark desegregation case *Brown v. Board of Education*, he observed that education “is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship . . . 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.”²⁷ He further admitted that “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”²⁸ Nonetheless, the Court refused to find a fundamental right to education in the Constitution, holding that “[i]t is not the province of this Court to create substantive constitutional rights.”²⁹

Justice Marshall dissented and rejected the majority’s insistence that rights be expressed in the Constitution when plaintiffs claim an equal protection violation.³⁰ He argued, “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.”³¹ Justice Marshall was endorsing an argument put forward by the lawyers for the Edgewood families.³² They argued that even though education is not expressly protected by the Constitution, it is a fundamental right because access to a quality education is “inextricably linked” with expressed constitutional

²⁵ *Id.* at 33.

²⁶ *See id.*

²⁷ *Id.* at 30.

²⁸ *Id.*

²⁹ *Id.* at 33.

³⁰ *Id.* at 70–72 (Marshall, J., dissenting).

³¹ *Id.* at 102.

³² *Id.* at 130–33.

rights—a position Justice Brennan’s dissent highlighted.³³ Education, they argued, is essential to full exercise of First Amendment rights to express oneself and receive information.³⁴ It is also indispensable for the effective use of the right to vote.³⁵

The majority of the Court rejected this argument, however, based upon the belief that the Constitution does not protect “the most effective speech or the most informed electoral choice.”³⁶ Even though it acknowledged education’s importance and the disadvantages placed on poor San Antonio families, the Court ignored practical considerations; it might as well have cried “let them eat cake.”³⁷ “How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter?” the Court asked. After all, the “ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process, and . . . they derive the least enjoyment from the benefits of the First Amendment.”³⁸ In refusing to recognize

³³ *Id.* at 63 (Brennan, J., dissenting).

³⁴ *Id.* at 35 (majority opinion); *id.* at 63 (Brennan, J., dissenting); *id.* at 103, 112–14 (Marshall, J., dissenting).

³⁵ *Id.* at 35–36 (majority opinion).

³⁶ *Id.* at 36.

³⁷ *See id.* at 56–58.

³⁸ *Id.* at 37. Justice Marshall’s dissent responded to this contention:

There can be no question that, as the majority suggests, constitutional rights may be less meaningful for someone without enough to eat or without decent housing. But the crucial difference lies in the closeness of the relationship. Whatever the severity of the impact of insufficient food or inadequate housing on a person’s life, they have never been considered to bear the same direct and immediate relationship to constitutional concerns for free speech and for our political processes as education has long been recognized to bear. Perhaps, the best evidence of this fact is the unique status which has been accorded public education as the single public service nearly unanimously guaranteed in the constitutions of our States. Education, in terms of constitutional values, is much more analogous, in my judgment, to the right to vote in state elections than to public welfare or public housing. Indeed, it is not without significance that we have long recognized education as

education as a fundamental constitutional right, particularly in a case based upon economic disparity, the Court threw open the door to persistent and increasing inequality in education across the country.³⁹ While this inequality may have its roots in economic disparity, the impact is often one of racial disparity (as it was in Texas), creating the exact unequal treatment that was so strongly and unanimously decried in *Brown v. Board of Education*.⁴⁰

This Article demonstrates that education is a fundamental human right, one that can be neither denied by states nor provided in an arbitrarily unequal manner. Nearly every democratic country in the world recognizes education to be a fundamental human right, a fact reinforced by the right's expression in several human rights treaties.⁴¹ In the United States, the right to education is recognized as fundamental in the constitutions of many states and has been endorsed by Congress in legislation.⁴² However, while the Supreme Court has acknowledged that denying education entirely to certain groups violates the right to equal protection,⁴³ it has refused to

an essential step in providing the disadvantaged with the tools necessary to achieve economic self-sufficiency.

Id. at 115 n.73 (Marshall, J., dissenting) (internal citations omitted).

³⁹ Jill Lepore, *Is Education a Fundamental Right?*, *NEW YORKER* (Sept. 3, 2018), <https://www.newyorker.com/magazine/2018/09/10/is-education-a-fundamental-right>.

⁴⁰ *See* *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

⁴¹ *United Nations Instruments*, RIGHT TO EDUC., <https://www.right-to-education.org/page/united-nations-instruments> (last updated 2018).

⁴² *See* Lepore, *supra* note 39.

The Constitution, drafted in the summer of 1787, does not mention a right to education, but the Northwest Ordinance, passed by Congress that same summer, held that religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. By 1868 the constitutions of twenty-eight of the thirty-two states in the Union had provided for free public education, open to all. Texas, in its 1869 constitution, provided for free public schooling for all the inhabitants of th[e] State, a provision that was revised to exclude undocumented immigrants only in 1975.

Id. (internal quotation marks omitted).

⁴³ *See* *Plyler v. Doe*, 457 U.S. 202, 223 (1982).

explicitly recognize education as a fundamental right protected by the Constitution.⁴⁴ This refusal has inflicted profound harm on the most vulnerable school children.⁴⁵ It has left the systematic inequalities described in *Rodriguez* alive and well in poor districts across the country.⁴⁶ Significant educational disparity may not lock students out of schools, but it insidiously pushes many out the side door and fails to prepare others for the demands of modern society.⁴⁷ This Article explores the effects of that disparity through case studies from the Baltimore City Public Schools district and calls for the universal recognition of education as a fundamental human right.⁴⁸ Such recognition would ensure equal access to a quality education for all students regardless of economic stature, race, or ability.

II. EDUCATION IS A FUNDAMENTAL HUMAN RIGHT

Education is a fundamental right—a human right—that may not be abridged and, more importantly, that must be protected by both state and federal governments. U.S. courts use the term “fundamental rights” usually to mean only the rights expressed or implied in the Constitution.⁴⁹ This is a tragic error, and the school children in *San Antonio Independent School District v. Rodriguez*

⁴⁴ *Id.*

⁴⁵ Derek W. Black, *Fight for Federal Right to Education Takes a New Turn*, AM. CONST. SOC'Y (Jan. 8, 2019), <https://www.acslaw.org/expertforum/fight-for-federal-right-to-education-takes-a-new-turn/>.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Baltimore City Public Schools is a large urban school system (serving 80,000 students) facing demands and challenges similar to dozens of urban districts throughout the United States and countless others worldwide. Like Chicago, Detroit, Cleveland, and other cities in twenty-nine states, Baltimore operates within a legal system that has endorsed the conclusion that education is not a fundamental right.

⁴⁹ *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) (“We must decide, first, whether the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny.”).

and those in school systems such as that of the Baltimore City Public Schools are among its casualties.⁵⁰ The Constitution cannot grant fundamental rights; the authors of the Constitution and the Bill of Rights never intended these documents to delegate rights. To believe that the Constitution could delegate rights would be a betrayal of those documents' philosophical foundation—that all power and rights reside in the people. The Constitution was a plan for government delegating limited powers to three federal branches of government. The Bill of Rights was only included to allay fears that the federal government would deprive people of *rights they already had*. The language of the document proves this conclusively. The First Amendment does not grant the right to free expression. Instead it states that “Congress shall make no law . . . abridging the freedom of speech.”⁵¹ The right is presumed to already exist, and the amendment merely assures us that this new institution of government will not abridge it. The Ninth Amendment also makes this clear, stating that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”⁵²

Human rights are possessed by all people simply because they are human. As Louis Henkin wrote, “Human rights are legitimate, recognized claims by every individual upon his or her *national society*, which that society is duty-bound to recognize and to realize, to respect and to ensure.”⁵³ He demonstrated that “human rights . . . are national rights, rights of the individual in his or her society, enforced and given effect by national laws.”⁵⁴ Human rights in their respective contexts are conceptually equivalent to fundamental rights in U.S. law in that they are not granted by states. As the Declaration of Independence provides, people “are endowed

⁵⁰ See EDBUILD, DISMISSED: AMERICA’S MOST DIVISIVE SCHOOL DISTRICT BORDERS 1 (2019), <https://edbuild.org/content/dismisssed/edbuild-dismisssed-full-report-2019.pdf>.

⁵¹ U.S. CONST. amend. I.

⁵² *Id.* amend. IX.

⁵³ Louis Henkin, *The Universal Declaration and the U.S. Constitution*, 31 PS: POL. SCI. & POL. 512, 512 (1998).

⁵⁴ *Id.*

by their Creator with certain unalienable Rights.”⁵⁵ Rights do not come from states, treaties, constitutions, or statutes. They are inherent. Louis Henkin explained, “Human rights are universal: they belong to every human being in society.”⁵⁶ Marko Milanović agreed that “rights are not gifts or privileges granted to individuals by generously disposed states, but rights which are inherent in the individuals’ own dignity as human beings.”⁵⁷ To determine if a right is protected by law, we look to whether national or state constitutions, national legislatures, judicial decisions, customary international law, and especially treaties recognize the right. These are not sources of the right but merely evidence in law that the right exists. The greater the international consensus recognizing the right, the stronger the evidence that the right exists.

When World War II drew to a close, officials and activists from every continent realized that the post-war world order had to articulate and protect human rights.⁵⁸ Article 1 (3) of the United Nations Charter calls on the U.N. to work for the “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”⁵⁹ Then, in 1948, the U.N. unanimously adopted the Universal Declaration of Human Rights.⁶⁰ Its Preamble asserts that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”⁶¹ Just five years later, twelve European nations adopted the European Convention on Human Rights, submitting to the binding jurisdiction of the European Court of Human Rights and making “a legal commitment to abide by certain standards of behavior and to protect

⁵⁵ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

⁵⁶ LOUIS HENKIN, *THE AGE OF RIGHTS* 3 (1990).

⁵⁷ Marko Milanović, *Norm Conflict in International Law: Whither Human Rights?*, 20 *DUKE J. COMP. & INT’L L.* 69, 99 (2009).

⁵⁸ *History of the Document*, UNITED NATIONS, <https://www.un.org/en/sections/universal-declaration/history-document/index.html> (last visited Feb. 24, 2020).

⁵⁹ U.N. Charter art. 1, ¶ 3.

⁶⁰ *History of the Document*, *supra* note 58.

⁶¹ Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. Doc. A/810 (Dec. 10, 1948).

the basic rights and freedoms of ordinary people.”⁶² Today, forty-seven nations are bound by the European Convention.⁶³ In 1969, nations of the Americas signed the American Convention on Human Rights, which also endorsed the view that “the essential rights of man are not derived from one’s being a national of a certain state, but are based upon attributes of the human personality.”⁶⁴ Seven years later, the International Covenant on Civil and Political Rights (“ICCPR”) came into force, and the United States ratified it in 1992.⁶⁵ One hundred and sixty-nine nations have ratified the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) which came into force in 1976.⁶⁶ While the United States has signed both the ICCPR and ICESCR, it has ratified only the ICCPR.⁶⁷ The United States also has not ratified the American Convention on Human Rights.⁶⁸

Due to their widespread acceptance, these documents—in particular those binding treaties (where ratified) like the ICCPR, American Convention, European Convention, and ICESCR⁶⁹—are

⁶² *What Is the European Convention on Human Rights?*, AMNESTY INT’L UK (Aug. 21, 2018), <https://www.amnesty.org.uk/what-is-the-european-convention-on-human-rights>.

⁶³ *Id.*

⁶⁴ Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention on Human Rights].

⁶⁵ *FAQ: The Covenant on Civil & Political Rights (ICCPR)*, ACLU, <https://www.aclu.org/other/faq-covenant-civil-political-rights-iccpr> (last updated Apr. 2019).

⁶⁶ *See* International Covenant on Economic, Social and Cultural Rights, *adopted and opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

⁶⁷ International Covenant on Civil and Political Rights, *adopted and opened for signature* Dec. 16, 1966, S. Exec. Rep. 102-23, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); International Covenant on Economic, Social and Cultural Rights, *supra* note 66.

⁶⁸ *See* American Convention on Human Rights, *supra* note 64.

⁶⁹ *See, e.g.*, International Covenant on Civil and Political Rights, *supra* note 67; American Convention on Human Rights, *supra* note 64; International Covenant on Economic, Social and Cultural Rights, *supra* note 66; Council of Europe, European Convention for the Protection of Human Rights and

the best evidence of whether a right exists. Their drafters express the existence of rights with the wisdom gained by enduring a world war that taught, in the starkest terms, the dangers of ignoring basic human rights. Rather than simply accept that an eighteenth-century document that endorses slavery is the source of rights in American law, courts should rely on the modern and universally accepted expression of rights in human rights treaties buttressed by the national Constitution, state constitutions, national legislation, and other sources.⁷⁰ As we demonstrate, these sources universally and consistently recognize education to be a human right—one which in U.S. legal terms should be called a fundamental right. We also show that education is a right inextricably tied to another human right—one recognized in the U.S. Constitution—the right to equal protection of the laws. The refusal to recognize education as a fundamental right has led to the denial of a largely recognized human right with severe disparate impacts nationwide.

A. Treaties Recognize Education as a Fundamental Human Right

International human rights law recognizes and protects the fundamental right to education.⁷¹ Treaties, rulings of international courts, national constitutions, and state constitutions can all serve as evidence that a human right exists and is protected by law, and the right to education is enshrined in all of these sources. Article 26 of the Universal Declaration of Human Rights states, “Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages.”⁷² Article 2 of the first Protocol

Fundamental Freedoms, *as amended by* Protocols Nos. 11 and 14, Nov. 4, 1950, E.T.S. No. 005 [hereinafter *European Convention*].

⁷⁰ It should be noted that the Court has previously looked abroad to determine fundamental rights relating to other issues. For example, in overturning Missouri’s use of capital punishment for those who committed homicide while under eighteen, the Court noted that the U.S. is “the only country in the world that continues to give official sanction to the juvenile death penalty.” *See Roper v. Simmons*, 543 U.S. 551, 575 (2005).

⁷¹ *See, e.g.*, G.A. Res. 217 (III), *supra* note 61; International Covenant on Economic, Social and Cultural Rights, *supra* note 66, at 171.

⁷² G.A. Res. 217 (III), *supra* note 61.

to the European Convention for the Protection of Human Rights and Fundamental Freedoms also protects the right.⁷³ Article 28 of the International Convention on the Rights of the Child, a treaty ratified by every country in the world except the United States, recognizes the right to education, requiring states to enact policies focusing on “achieving this right progressively and on the basis of equal opportunity.”⁷⁴ States should “make primary education compulsory and available free to all” and establish “different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need.”⁷⁵ It requires states to “make higher education accessible to all on the basis of capacity by every appropriate means” and to “take measures to encourage regular attendance at schools and the reduction of drop-out rates.”⁷⁶ Katarina Tomaševski, the first United Nations Special Rapporteur on the right to education, explained that “[e]ducation operates as a multiplier, enhancing the enjoyment of all individual rights and freedoms where the right to education is effectively guaranteed, while depriving people of the enjoyment of many rights and freedoms where the right to education is denied or violated.”⁷⁷

The ICESCR, a treaty signed and ratified by 166 nations, and signed (but not ratified) by the United States, protects “the right of everyone to education.”⁷⁸ This Covenant recognizes the connection between education and the protection of other human rights, stating that “education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.”⁷⁹ In fact,

⁷³ European Convention, *supra* note 69.

⁷⁴ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ KATARINA TOMAŠEVSKI, REMOVING OBSTACLES IN THE WAY OF THE RIGHT TO EDUCATION 9 (2001), https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Tomasevski_Primer%203.pdf.

⁷⁸ International Covenant on Economic, Social and Cultural Rights, *supra* note 66, at 171.

⁷⁹ *Id.*

it connects education to the foundation of human rights—human dignity. Like the Convention on the Rights of the Child, this Covenant mandates that “primary education shall be compulsory and available free to all; [and] secondary education . . . including technical and vocational secondary education, shall be made generally available and accessible to all.”⁸⁰

The Committee on Economic, Social and Cultural Rights, the United Nations body charged with interpreting and implementing the ICESCR, emphasized the importance of the human right to an education.⁸¹ It held that “[e]ducation is both a human right in itself and an indispensable means of realizing other human rights.”⁸² The Committee referred to education as “an empowerment right” that is “the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.”⁸³ Not only is this similar to the dissenters’ point in *Rodriguez*, arguing that education is essential to enable all persons to participate effectively in a free society,⁸⁴ but there is no end to the statistics that bear this out.⁸⁵ The Committee found that the right to an education requires “educational institutions and programmes . . . to be accessible to everyone, without discrimination,” and later it reiterated that the right must be provided “without discrimination of any kind.”⁸⁶ In fact, the Covenant specifically prohibits economic

⁸⁰ *Id.*

⁸¹ *See id.*

⁸² Committee on Economic, Social and Cultural Rights, General Comment 13, art. 13 (Twenty-First Session, 1999), U.N. Doc. E/C.12/1999/10, at 1 (1999).

⁸³ *Id.*

⁸⁴ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 112 (1973) (Marshall, J., dissenting).

⁸⁵ For example, a recent study of graduates from the Baltimore City Public Schools district found that by age twenty-four, 32% of students who graduated from entrance-criteria city high schools had completed higher degrees while only 6% of students from other city schools had. Of the students without college experience, fewer than one in ten were earning a livable wage. *See Rachel E. Durham & Faith Connolly, Launching into Adulthood: Class of 2009 Six Years Later*, BALT. EDUC. RES. CONSORTIUM (Apr. 3, 2018), <https://baltimore-berc.org/launching-into-adulthood>.

⁸⁶ Committee on Economic, Social and Cultural Rights, *supra* note 82.

discrimination in education.⁸⁷ The Committee directly addressed the issue in *Rodriguez* and held that “[s]harp disparities in spending policies that result in differing qualities of education for persons residing in different geographic locations may constitute discrimination under the Covenant.”⁸⁸ The Covenant allows states to work toward meeting some of its requirements—“progressive realization”—in order to accommodate economic disparities between certain states.⁸⁹ However, “the prohibition against discrimination . . . is subject to neither progressive realization nor the availability of resources; it applies fully and immediately to all aspects of education.”⁹⁰

B. The European Court of Human Rights: The Right to an Education Must Be Granted to All Equally

A Bulgarian court sentenced Velyo Velev to prison for fraud in 2003 and then for firearms possession in 2004.⁹¹ Mr. Velev decided it was time to turn over a new leaf, so he requested that he be enrolled in the prison school in order to finish his secondary education.⁹² Prison officials refused.⁹³ After appealing to local courts, Mr. Velev brought his case to the European Court of Human Rights (“ECtHR”).⁹⁴ The ECtHR enforces the European Convention on Human Rights in cases from its forty-seven member states.⁹⁵ Article 2 of the First Protocol to the Convention declares, “No person shall be denied the right to education.”⁹⁶ While the ECtHR

⁸⁷ International Covenant on Economic, Social and Cultural Rights, *supra* note 66, at 171.

⁸⁸ Committee on Economic, Social and Cultural Rights, *supra* note 82.

⁸⁹ International Covenant on Economic, Social and Cultural Rights, *supra* note 66, at 171.

⁹⁰ Committee on Economic, Social and Cultural Rights, *supra* note 82.

⁹¹ *See Velev v. Bulgaria*, 2014-IV Eur. Ct. H.R. 175, 179.

⁹² *See id.* at 180.

⁹³ *Id.* at 180–81.

⁹⁴ *Id.*

⁹⁵ *European Court of Human Rights*, INT’L JUST. RES. CTR. <https://ijrcenter.org/european-court-of-human-rights/> (last visited Feb. 24, 2020).

⁹⁶ European Convention, *supra* note 69.

has ruled that the right “cannot be interpreted as imposing a duty on the Contracting State to set up or subsidize particular educational establishments,” it requires states that do so “to afford effective access to them.”⁹⁷ In Mr. Velev’s case, the ECtHR ruled that he had a right to obtain an education while in prison in part because Bulgaria provided secondary education to other classes of prisoners.⁹⁸ As the ECtHR held, because Bulgaria failed to demonstrate “practical reasons . . . for the restriction,” it did not meet its burden of showing its refusal “pursued a legitimate aim and was proportionate to that aim.”⁹⁹

i. *Altınay v. Turkey*: The Right to an Education Requires Equality and Fairness

Bekir Güven Altınay was finishing his degree at a vocational high school specializing in communications when Turkish education officials changed the standards for admission to their national universities.¹⁰⁰ The change favored students attending regular high schools over those students in vocational schools. As a result, Mr. Altınay was unable to gain admittance to a national university. He challenged the admission changes locally, and eventually in the ECtHR, claiming that they discriminated against vocational school students. While the ECtHR recognized Turkey’s right to establish admission standards for its universities and found that its new standards were reasonable, it ruled that Turkey had treated Altınay unfairly by failing to give him a chance to transfer to a traditional high school. In so ruling, the ECtHR explained that states may regulate their education systems but “must not impair the very essence of the right to education” and must not be “incompatible with equality and fairness.”¹⁰¹ “The differential treatment at issue,” it explained, “curtailed the applicant’s right of

⁹⁷ Velev v. Bulgaria, 2014-IV Eur. Ct. H.R. 175, 191.

⁹⁸ *Id.* at 193–94.

⁹⁹ *Id.* at 194.

¹⁰⁰ Altınay v. Turkey, 2013-II Eur. Ct. H.R. 652.

¹⁰¹ *Id.* ¶ 41.

access to higher education by depriving it of any effectiveness[and] was not reasonably proportionate to the aim pursued.”¹⁰²

ii. *Ponomaryov v. Bulgaria*: The Right to an Education Prohibits Arbitrary Discrimination

Anatoliy and Vitaliy Vladimirovich moved from Russia to Bulgaria as children when their mother married a Bulgarian man.¹⁰³ Their mother became a legal permanent resident because she was married to a Bulgarian, and the boys had the same status through their mother.¹⁰⁴ When the boys turned eighteen, while they were still finishing high school, Bulgaria required them to become legal residents on their own.¹⁰⁵ Eventually they did so, but Bulgaria charged the boys substantial fees for the education they received while they were not legal permanent residents.¹⁰⁶ The boys could not pay, and after challenging the fees in Bulgarian courts, they eventually reached the ECtHR.¹⁰⁷ They argued that Bulgarian education officials deprived them of their right to an education in violation of Article 2 of Protocol 1 by discriminating against them “due exclusively to their nationality and immigration status.”¹⁰⁸ Article 14 of the European Convention prohibits states from discriminating in the protection of rights set out in the Convention.¹⁰⁹ Unlike the U.S. Supreme Court’s majority in *Rodriguez*, the ECtHR recognized the integral connection between the rights to an education and to equality.¹¹⁰ It pointed out that the boys were “clearly treated less favorably than others in a relevantly similar situation on account of a personal characteristic.”¹¹¹

¹⁰² *Id.* ¶ 13.

¹⁰³ *Ponomaryov v. Bulgaria*, 2011-V Eur. Ct. H.R. 799, 801–02.

¹⁰⁴ *Id.* at 802.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 811.

¹⁰⁹ *Id.* at 809.

¹¹⁰ *Id.* at 812.

¹¹¹ *Id.* at 811.

The Court recognized that “education is an activity that is complex to organise and expensive to run, whereas the resources that the authorities can devote to it are necessarily finite.”¹¹² It acknowledged that “a State must strike a balance between, on the one hand, the educational needs of those under its jurisdiction and, on the other, its limited capacity to accommodate them.”¹¹³ Unlike the U.S. Supreme Court’s majority, however, the ECtHR embraced the idea that “in a democratic society, the right to education . . . is indispensable to the furtherance of human rights.”¹¹⁴ It held that Bulgaria had unlawfully deprived Anatoliy and Vitaliy of their right to an education.¹¹⁵

C. *The Inter-American Human Rights System*

The Inter-American Human Rights system was established by the Organization of American States through the American Convention on Human Rights. It consists of the Inter-American Commission for Human Rights based in Washington and the Inter-American Court of Human Rights based in San Jose, Costa Rica.¹¹⁶ President Carter signed the Convention in 1978, but the Senate has not ratified the treaty.¹¹⁷ The United States, therefore, participates in non-binding hearings and investigations before the Commission but is not subject to the jurisdiction of the Court.

Dilcia Yean and Violeta Bosico were born in the Dominican Republic to a Dominican mother and a Haitian father.¹¹⁸ When the girls’ parents sought birth certificates when Dilcia was ten months old and Violeta was twelve years old, Dominican officials refused, claiming that the parents had failed to comply with the conditions

¹¹² *Id.* at 812.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 810.

¹¹⁶ American Convention on Human Rights, *supra* note 64.

¹¹⁷ *International Human Rights Treaties: Hearings Before the Comm. on Foreign Relations*, 96th Cong., 1st Sess. 1 (1979).

¹¹⁸ Case of the Girls Yean and Bosico v. Dominican Republic, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 130, ¶ 144 (Sept. 8, 2005).

required for late certifications of birth.¹¹⁹ As a result, Violeta, and after a few years Dilcia, were unable to attend school.¹²⁰ The girls' parents appealed to the Inter-American Court of Human Rights ("IACtHR"), asserting that the Dominican Republic violated several rights protected by the American Convention on Human Rights including the right to legal personhood (Article 3), the rights of the child (Article 19), the right to equality (Article 24), and the right to judicial protection of these rights (Article 25).¹²¹ In addition, they argued that the state deprived the girls of their right to an education.¹²² The American Convention does not expressly protect that right, but its predecessor, the American Declaration of the Rights and Duties of Man, did.¹²³

The Court ruled that the Dominican Republic had violated Dilcia and Violeta's rights by depriving them of legal personhood and by discriminating against them because of their Haitian father (among other violations).¹²⁴ In addition, the Court ruled that the state unlawfully deprived them of their right to an education.¹²⁵ Based on the protections of the rights of children expressed in Article 19 of the American Convention, the International Convention on the Rights of the Child, and the Additional Protocol to the American Convention, the Court found that "the State must provide free primary education to all children in an appropriate environment and in the conditions necessary to ensure their full intellectual

¹¹⁹ *Id.* ¶ 109.

¹²⁰ *Id.*

¹²¹ *See id.* ¶¶ 115, 117–18, 199.

¹²² *Id.* ¶ 115.

¹²³ The American Declaration of the Rights and Duties of Man was signed by the American nations in 1948 as they established the Organization of American States. These nations signed the American Convention on Human Rights in 1969 to enshrine the rights expressed in the Declaration in a binding treaty. *What Is the IACHR?*, ORG. AM. STATES, <https://www.oas.org/en/iachr/mandate/what.asp>.

¹²⁴ *Case of the Girls Yean and Bosico*, Inter-Am. Ct. H.R. (ser. C), No. 130, ¶¶ 187, 193, 206.

¹²⁵ *See id.* ¶ 243.

development.”¹²⁶ It must do so, the Court held, “irrespective of their origin or parentage.”¹²⁷

III. NATIONAL RECOGNITION OF THE RIGHT TO AN EDUCATION: A LANDSLIDE

Eighty-two percent of all countries recognize the right to an education in their national constitutions.¹²⁸ Furthermore, understanding that including a right in a constitution does not necessarily lead to the recognition of that right in reality, most of those countries have taken measures to ensure that the right is judicially enforceable.¹²⁹ In fact, the Right to Education Project, an advocacy group, found that 107 countries make the right to education judicially enforceable and found recent cases in which courts have done so in at least eighty such countries.¹³⁰ Argentina, Brazil, China, Egypt, France, Greece, India, Italy, Japan, Mexico, South Africa, Sweden, and Turkey, for example, all expressly recognize the right to education.¹³¹ Specifically, Argentina’s constitution requires the national Congress to pass laws establishing and protecting the right to education equally, without discrimination of any kind.¹³² Brazil’s constitution refers to education as a subjective public right, meaning that the state has a duty to provide it and that the right may be enforced in court.¹³³ The Greek

¹²⁶ *Id.* ¶ 185.

¹²⁷ *Id.* ¶ 244.

¹²⁸ See THE RIGHT TO EDUC. PROJECT, ACCOUNTABILITY FROM A HUMAN RIGHTS PERSPECTIVE: THE INCORPORATION AND ENFORCEMENT OF THE RIGHT TO EDUCATION IN THE DOMESTIC LEGAL ORDER 32 (2017), <http://www.right-to-education.org/resource/accountability-human-rights-perspective-incorporation-and-enforcement-right-education>.

¹²⁹ *Id.*

¹³⁰ *Id.* at 38.

¹³¹ See GLOBAL LAW RESEARCH CENT., CONSTITUTIONAL RIGHT TO AN EDUCATION IN SELECTED COUNTRIES, LIBRARY OF CONGRESS 3–47 (2016), <https://www.loc.gov/law/help/constitutional-right-to-an-education/constitutional-right-to-education.pdf> (explaining each nation’s constitutional provisions regarding education).

¹³² *Id.* at 3.

¹³³ *Id.* at 5.

Constitution declares that “education is a basic mission of the state” and that “[a]ll Greeks have the right to free education at all levels in public educational institutions.”¹³⁴ In 2002, India amended its constitution to enshrine education as a fundamental right and to require the state to provide free and compulsory education.¹³⁵ China’s constitution recognizes that citizens not only have the right to obtain an education, but that they have a duty to do so.¹³⁶ Some constitutions require national legislatures to allocate a minimum percentage of GDP to education funding.¹³⁷ For example, 6% of GDP is required to be allocated to education in Argentina, 4% in Egypt, and Mexico’s General Law on Education mandates no less than 8%.¹³⁸

When Turkey passed a law banning students expelled for disciplinary reasons from all state schools, the Constitutional Court was quick to enforce educational rights.¹³⁹ In 2011 it vacated the law, ruling that it violated the constitutional right to an education.¹⁴⁰ That same year, South Africa’s Constitutional Court ruled that its constitution obligated states to fulfill the right to education “immediately” and that it was not something that could be “progressively realised” dependent on “available resources” or “reasonable legislative measures.”¹⁴¹ Four years later, the South African Supreme Court of Appeal ruled that the right to an effective education meant more than the right to attend school and included a right to effective resources such as teachers, teaching materials, textbooks, and other appropriate facilities for students.¹⁴²

England does not have a written constitution but has incorporated the European Convention on Human Rights into its

¹³⁴ *Id.* at 19.

¹³⁵ *Id.* at 21.

¹³⁶ *Id.* at 6.

¹³⁷ *Id.* at 3, 8, 30.

¹³⁸ *Id.*

¹³⁹ *See id.* at 46.

¹⁴⁰ *Id.* at 47.

¹⁴¹ *Id.* at 41 (quoting *Madzodzo v. Minister of Basic Educ.*, 2014 (3) SA 441 (CC) para. 20 (S. Afr.)).

¹⁴² *Id.* (quoting *Minister of Basic Educ. v. Basic Educ. for All*, 2016 (1) All SA 369 (SCA) para. 46 (S. Afr.)).

national law through its Human Rights Act, including Article 2 of Protocol 1, which specifically protects the right to an education.¹⁴³ France's constitution delegates the right in some detail, declaring that "the Nation guarantees equal access for children and adults to instruction, vocational training and culture" and goes further by obligating the state to provide and protect this education.¹⁴⁴ It states, "The provision of free, public and secular education at all levels is a duty of the State."¹⁴⁵ Nicaragua also provides an expansive right to education in its constitution.¹⁴⁶ In addition to expressing the right, it extends it to adults as well as children and obligates the state "to educate and train, at all levels and specialties, the professional and technical personnel necessary for the development and transformation of the country."¹⁴⁷ It also requires the state to allocate at least six percent of its annual budget to higher education.¹⁴⁸

Many of the countries that do not recognize the right to education in their constitutions do so in other ways, such as through delegation or in statutes. Like the United States, Germany leaves education to the provision and regulation of its states.¹⁴⁹ Most of these governments have endorsed the right to education in their state constitutions, while the remainder have done so in state law.¹⁵⁰ The constitution of Baden-Württemberg, for example, states that "every young person has a right to education and training in accordance with his or her abilities without regard to origin or economic situation."¹⁵¹ Unlike the United States, however, Germany has also ratified several treaties that express the right to education such as the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, and the Charter of Fundamental Rights of the European Union.¹⁵² Similarly, though

¹⁴³ *Id.* at 9.

¹⁴⁴ *Id.* at 12.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 34.

¹⁴⁷ *Id.* at 34–35.

¹⁴⁸ *Id.* at 35.

¹⁴⁹ *Id.* at 14.

¹⁵⁰ *Id.* at 15.

¹⁵¹ *Id.*

¹⁵² *Id.* at 14.

Israel does not include the right to education in its constitution, it passed a law requiring children aged three to seventeen to attend school and assuring the fundamental human right to at least fifteen years of free education.¹⁵³ There is overwhelming consensus in the international community, therefore, that education is a fundamental human right, rendering the United States an outlier for its refusal to recognize such a fundamental right at the federal level.

IV. PRESERVING THE RIGHT TO AN EDUCATION IN THE UNITED STATES

Even within the confines of the United States, the Supreme Court's refusal to recognize the fundamental right to an education is out of step with the rest of the nation. As we show below, nineteen states have recognized a fundamental right to an education under their state constitutions, and others have enforced the right through their highest courts. Furthermore, the legislative branch has repeatedly passed and amended federal legislation based upon the recognition of the importance of an equal education for all children.

A. *Twenty-One U.S. States Judicially Enforce the Right*

One month after the U.S. Supreme Court released its opinion in *San Antonio Independent School District v. Rodriguez*, the New Jersey Supreme Court ruled that its system of funding schools with local property taxes violated the state constitution.¹⁵⁴ Article VIII of the New Jersey Constitution requires the legislature to “provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this State.”¹⁵⁵ Though the New Jersey Supreme Court decided the case solely based on its state constitution, it recognized the flaws in the U.S. Supreme Court's approach.¹⁵⁶ When the U.S. Supreme Court considered whether the Texas property tax funding system treated students in poor districts unequally, the majority manufactured

¹⁵³ *Id.* at 24.

¹⁵⁴ *Robinson v. Cahill*, 303 A.2d 273, 276 (N.J. 1973).

¹⁵⁵ *Id.* at 285 (citation omitted).

¹⁵⁶ *Id.* at 282.

obscurity by claiming that there was no clear relationship between funding and student success.¹⁵⁷ The New Jersey court simplified the issue, holding that it would focus on “discrepancies in dollar input per pupil.”¹⁵⁸ As New Jersey Chief Justice Weintraub explained, “We deal with the problem in those terms because dollar input is plainly relevant and because we have been shown no other viable criterion for measuring compliance with the constitutional mandate.”¹⁵⁹ The New Jersey court could not “understand how the tax burden c[ould] be left to local initiative with any hope that statewide equality of educational opportunity w[ould] emerge.”¹⁶⁰

Four years later, the Connecticut Supreme Court struck down a similar funding system as violating the right to education expressed in its state constitution.¹⁶¹ That court pointed out that, like in Texas, “taxpayers in property-poor towns . . . pay higher tax rates for education than taxpayers in property-rich towns,” and that these “higher tax rates generate tax revenues in comparatively small amounts.”¹⁶² The result is that “property-poor towns cannot afford to spend for the education of their pupils, on a per pupil basis, the same amounts that property-rich towns do.”¹⁶³ The court quoted the Connecticut governor’s finding that “many towns can tax far less and spend much more; and those less fortunate towns can never catch up in school expenditure because taxes are already as high as homeowners can tolerate.”¹⁶⁴ As a result, school children in poor districts receive an education that “is to a substantial degree narrower and lower in quality than that which pupils receive in comparable towns with a larger tax base and greater ability to finance education.”¹⁶⁵

The Connecticut court explained that it did not matter whether it followed the fundamental rights reasoning in *Rodriguez* or the New

¹⁵⁷ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 56 (1973).

¹⁵⁸ *Robinson*, 303 A.2d at 295.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Horton v. Meskill*, 376 A.2d 359, 369 (Conn. 1977).

¹⁶² *Id.* at 367.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 373.

¹⁶⁵ *Id.*

Jersey Supreme Court's approach, stating, "We must conclude that in Connecticut the right to education is so basic and fundamental that any infringement of that right must be strictly scrutinized."¹⁶⁶ Though the decision was based on Connecticut's constitution, the state's supreme court noted that the state "has for centuries recognized it as her right and duty to provide for the proper education of the young."¹⁶⁷ Its protection of the right to an education began in 1650—well before Connecticut was a state and the right was enshrined in its constitution.¹⁶⁸ Therefore, "elementary and secondary education is a fundamental right," and "pupils in the public schools are entitled to the equal enjoyment of that right."¹⁶⁹ In so holding, the Connecticut Supreme Court endorsed Justice Marshall's dissent in *Rodriguez*. It emphasized Justice Marshall's argument that the U.S. Supreme Court "has never suggested that because some 'adequate' level of benefits is provided to all, discrimination in the provision of services is therefore constitutionally excusable."¹⁷⁰ On the contrary, "[t]he Equal Protection Clause is not addressed to the minimal sufficiency but rather to the unjustifiable inequalities of state action."¹⁷¹ The right to equality "mandates nothing less than that 'all persons similarly circumstanced shall be treated alike.'"¹⁷²

Every state constitution in the United States provides for free public education in some manner.¹⁷³ In addition to New Jersey and Connecticut, at least nineteen other states have enforced the right to

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 373–74.

¹⁶⁸ *Id.* at 374.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 373.

¹⁷¹ *Id.*

¹⁷² *Id.* (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

¹⁷³ Alfred A. Lindseth, *Constitutional Requirements Governing American Education*, *EDU. ENCYCLOPEDIA – STATEUNIVERSITY.COM*, <https://education.stateuniversity.com/pages/1882/Constitutional-Requirements-Governing-American-Education.html> (last visited Feb. 24, 2020).

education in their highest courts.¹⁷⁴ That each of these states issued such rulings despite a U.S. Supreme Court decision to the contrary indicates the strength of their conviction that education is indeed a fundamental right. The California Supreme Court held that “access to public education is a right enjoyed by all—not a commodity for sale.”¹⁷⁵ Minnesota’s highest court held that “education *is* a fundamental right under the state constitution, not only because of its overall importance to the state but also because of the explicit language used to describe this constitutional mandate.”¹⁷⁶ Similarly, the West Virginia Supreme Court ruled that “the mandatory requirement of a thorough and efficient system of free schools, found in [the West Virginia] Constitution, demonstrates that education is a fundamental constitutional right in this State.”¹⁷⁷ In 1786, after the United States won independence, Vermont was “compelled to create an entirely new Constitution setting forth, at a minimum, a declaration of fundamental human rights.”¹⁷⁸ In so doing, the authors of that constitution “chose, in this statement of first principles, to include a right to public education.”¹⁷⁹ The Supreme Court of Vermont commented that, “in light of the relative paucity of state-supported public schools in existence at the time,” the constitution’s recognition of the right to education “is remarkable.”¹⁸⁰

In 1995, the Wyoming Supreme Court ruled that the state’s system of funding schools violated the constitutional mandate for a “thorough and efficient system of public schools.”¹⁸¹ In a final

¹⁷⁴ Research for this Section was conducted by our excellent research assistant, Morgan Nelson, B.A. (2018), University of Maryland, Baltimore County (UMBC). Alabama, Alaska, Arizona, California, Florida, Indiana, Kentucky, Minnesota, Mississippi, Montana, New Hampshire, North Dakota, Pennsylvania, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming have endorsed the fundamental right to an education.

¹⁷⁵ *Hartzell v. Connell*, 679 P.2d 35, 44 (Cal. 1984).

¹⁷⁶ *Skeen v. State*, 505 N.W.2d 299, 313 (Minn. 1993).

¹⁷⁷ *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979) (internal quotations omitted).

¹⁷⁸ *Brigham v. State*, 692 A.2d 384, 391 (Vt. 1997).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Campbell Cty. Sch. Dist. v. State*, 907 P.2d 1238, 1246 (Wyo. 1995).

ruling on the litigation which stretched for over twenty years, the court specifically recognized the “fundamental right to a thorough and efficient education without disparities” and noted the evidence of the “severe negative impact of inadequate resources and wealth-based disparities on a school system not built upon the constitutional principles of equality, efficiency and thoroughness.”¹⁸² The court held, however, that “the parties and the courts have steadfastly and in good faith worked toward the challenging constitutional goal of funding primary and secondary public education to assure each child the opportunity to receive a quality education regardless of where that child resides or the location of the school which that child attends.”¹⁸³

Nonetheless, many of the remaining states have followed the *Rodriguez* ruling and refused to recognize education as a fundamental right.¹⁸⁴ For example, in 1983, Maryland’s highest

¹⁸² *Campbell Cty. Sch. Dist. v. State*, 181 P.3d 43, 47 (Wyo. 2008).

¹⁸³ *Id.* at 84 (requiring “that every child may enter a structurally safe building, which is staffed with competent and sufficient teachers and which contains appropriate and sufficient teaching material and equipment, and upon graduation from high school be ‘equipped for a role as a citizen, participant in the political system and competitor both intellectually and economically.’” (quoting *Campbell*, 907 P.2d at 1278)).

¹⁸⁴ See *In re New Maurice J. Moyer Acad., Inc.*, 108 A.3d 294, 317 (Del. Ch. 2015); *Williams v. State*, 627 S.E.2d 891, 893 (Ga. Ct. App. 2006); *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724, 733 (Idaho 1993); *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1194–95 (Ill. 1996); *King v. State*, 818 N.W.2d 1, 27 (Iowa 2012); *Unified Sch. Dist. No. 229 v. State*, 885 P.2d 1170, 1189 (Kan. 1994); *State ex rel. Yarber v. McHenry*, 915 S.W.2d 325, 328 (Mo. 1995) (en banc); *Kolesnick ex rel. Shaw v. Omaha Pub. Sch. Dist.*, 558 N.W.2d 807, 813 (Neb. 1997); *Bd. of Educ., Levittown Union Free Sch. Dist., Nassau Cty. v. Nyquist*, 408 N.Y.S.2d 606, 636 (N.Y. Sup. Ct. 1978), *modified*, 443 N.Y.S.2d 843 (1981), *modified sub nom.*, 439 N.E.2d 359, 366 (N.Y. 1982); *Leandro v. State*, 468 S.E.2d 543, 551 (N.C. Ct. App. 1996), *aff’d in part, rev’d in part*, 488 S.E.2d 249 (1997); *Britt v. N.C. State Bd. of Educ.*, 357 S.E.2d 432 (N.C. Ct. App. 1987); *Novak v. Revere Local Sch. Dist.*, 583 N.E.2d 1358, 1361 (Ohio Ct. App. 1989); *Fair Sch. Fin. Council of Okla., Inc. v. State*, 746 P.2d 1135, 1144–45 (Okla. 1987); *Withers v. State*, 891 P.2d 675, 681 (Or. Ct. App. 1995); *Woonsocket Sch. Comm. v. Chafee*, 89 A.3d 778, 794 (R.I. 2014); *Abbeville Cty. Sch. Dist. v. State*, 767 S.E.2d 157, 173 (S.C. 2014), *amended*, 777 S.E.2d 547 (2015); *Kirby v. Edgewood Indep. Sch. Dist.*, 761 S.W.2d 859, 863 (Tex. App. 1988).

court turned away a challenge to its funding system—a system that it acknowledged was very similar to the Texas scheme.¹⁸⁵ It ruled that despite a state constitutional provision obligating it to “establish throughout the State a thorough and efficient System of Free Public Schools,” education was not a fundamental right under that document.¹⁸⁶ The court held “[t]he right to an adequate education in Maryland is no more fundamental than the right to personal security, to fire protection, to welfare subsidies, to health care or like vital governmental services.”¹⁸⁷ Subsequent challenges to educational funding in Maryland have continued to struggle with the limitations set by this decision.¹⁸⁸ Thirteen years later, the Supreme Court of Illinois considered a challenge to its education funding system under its constitution.¹⁸⁹ The Illinois Constitution declares that a “fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities” and requires the state to “provide for an efficient system of high quality public educational institutions.”¹⁹⁰ Like in Maryland, the Illinois high court adopted *Rodriguez* and ruled that, “[w]hile education is

¹⁸⁵ *Hornbeck v. Somerset Cty. Bd. of Educ.*, 458 A.2d 758, 767 (Md. 1983).

¹⁸⁶ *Id.* at 764 (citation omitted).

¹⁸⁷ *Id.* at 786.

¹⁸⁸ *See Maryland State Bd. of Educ. v. Bradford*, 875 A.2d 703, 706 (Md. 2005). The plaintiffs in *Bradford* filed a class action in 1994 challenging the state’s funding of the Baltimore City Public Schools district. The case is still pending and has been only partially successful in securing funding to ensure an adequate education for all. The ACLU of Maryland and the NAACP Legal Defense and Educational Fund, Inc. recently expressed grave concern that, despite numerous consent decrees and orders in the *Bradford* case, significant gaps between “current and constitutionally-adequate educational funding for the immediate infrastructure needs of Baltimore City’s aging school buildings” persist. *Concerned Parents and Civil Rights Organizations Call On the State of Maryland to Provide More Education Funding for Baltimore Schools and Investment in Children of Color*, LEGAL DEF. FUND (Jan. 22, 2019), <https://www.naacpldf.org/press-release/concerned-parents-civil-rights-organizations-call-state-maryland-provide-education-funding-baltimore-schools-investment-children-color>.

¹⁸⁹ *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1180 (1996).

¹⁹⁰ *Id.* at 1198 (Freeman, J., dissenting) (citation omitted).

certainly a vitally important governmental function[,] . . . it is not a fundamental individual right for equal protection purposes.”¹⁹¹

B. Denial of Education Persists: Baltimore City Public Schools Today and Edgewood School District in 1973

While federalism is a central concept of our system of government, the effects of denying what is broadly considered a basic human right cannot be ignored. The decisions of the high courts of Maryland and Illinois, as well as those of other states that have followed suit, demonstrate the great damage inflicted by the *Rodriguez* decision.¹⁹² While parts of Maryland are home to some of the best and most technologically advanced schools in the nation, students in one of the most highly regarded Baltimore City public high schools had to mount a fundraising campaign in 2015 just to reopen the school library, which had not been updated since the late 1960s.¹⁹³ Schools that do have library space struggle to update books, much less computers, and to maintain the staff necessary to allow student access. In Tykesia’s school, the library that was once beautiful and light-filled sits empty most days due to broken windows that make it impossible to heat or cool. Even if the windows were fixed, there is no funding for a librarian and no one to unpack or shelve the boxes of donated books. Tykesia, however, chose her high school not for its library, but for its focus on preparing students for careers in the medical sciences. In fact, she wakes up each morning at 5:00 AM to travel across town to school because she dreams of becoming an Emergency Medical Technician. One month into her freshman year, however, the school’s only biology teacher walked out of class and never

¹⁹¹ *Id.* at 1195 (majority opinion). Interestingly, Illinois continues to have one of the largest funding gaps between wealthy districts and those with the highest poverty rates. IVY MORGAN & ARY AMERIKANER, FUNDING GAPS 2018, AN ANALYSIS OF SCHOOL FUNDING EQUITY ACROSS THE U.S. AND WITHIN EACH STATE 6 (2018), https://1k9g11yevnfp2lpq1dhrqe17-wpengine.netdna-ssl.com/wp-content/uploads/2014/09/FundingGapReport_2018_FINAL.pdf.

¹⁹² See *supra* note 184.

¹⁹³ Danielle Sweeny, *City College Raising Funds for New Library*, BALT. BREW (Jan. 19, 2015), <https://www.baltimorebrew.com/2015/01/19/city-college-raising-funds-for-new-library/>.

returned. Unable to fund a replacement, the school was forced to use a series of substitutes for the remainder of the year.

Across town, Amiya attends an elementary school with a large art room filled with supplies that she can never access because the school lost its art teacher a year earlier due to budget cuts. Similarly, Nevaeh, a high school junior, has been teaching herself to draw and would like to pursue a career in art but attends a high school where the only non-academic offering is an introductory music class, and Kyle rarely gets to use his school playground because the school does not have the staff necessary to supervise recess. These schools have had to make hard budgetary decisions. Without a firm recognition that education is a fundamental right, these students, like those in the Edgewood School District in *Rodriguez*, suffer from narrower, less predictable, and overall inferior educational opportunities.

*C. Recognizing an Equal Right to Education for All
Students: The Legislative Branch*

Congress has recognized the right to an equal education for all students by stepping in to preserve the right to an education for certain types of students, such as those with disabilities.¹⁹⁴ Historically, school districts in many states had been allowed to exclude those who were “uneducable” due to intellectual or physical disabilities.¹⁹⁵ After *Brown v. Board of Education*, however, advocacy groups and parents challenged laws permitting

¹⁹⁴ Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 1, 89 Stat. 773 (Nov. 29, 1975) (codified at 20 U.S.C.A. §§ 1400 *et seq.* (West 2020)); Rehabilitation Act of 1973, § 504 (codified at 29 U.S.C. § 794 (2018)); Americans with Disabilities Act of 1990, Title II (codified at 42 U.S.C. §§ 12101 *et seq.* (2018)).

¹⁹⁵ See Richard C. Handel, *The Role of the Advocate in Securing the Handicapped Child’s Right to Effective Minimal Education*, 36 OHIO ST. L.J. 349, 351–52 (1975). Handel notes that, even in the thirty-five states with legislation or court rulings mandating educational services for students with disabilities, observers found flagrant violation of these laws. For example, “in general crippled children in Boston are not allowed to attend school.” *Id.* at 352.

such exclusions based upon the Equal Protection Clause and had some success at the district court level.¹⁹⁶

In one of the first such cases to reach a federal court, *Pennsylvania Association of Retarded Children v. Pennsylvania*, families of disabled children challenged a Pennsylvania law that allowed public schools to deny admission to students who were eight years old but had the mental abilities of only five-year-olds or those who were deemed “uneducable or untrainable.”¹⁹⁷ The families grounded their arguments in the Equal Protection Clause, citing *Brown*.¹⁹⁸ The district court agreed that there was no rational reason to exclude “retarded” students from school and approved a plan requiring schools to provide them with a free public education and due process regarding their educational status.¹⁹⁹

In the same year, in *Mills v. Board of Education of the District of Columbia*, parents challenged the District of Columbia’s public schools’ practice of expelling or refusing admission to disabled students by bringing a class action on behalf of all students who were eligible for a free education and needed additional support.²⁰⁰ All of the plaintiffs were black and poor. Most were deemed to have “discipline problems,” had sustained brain injuries, or suffered from minor to more extreme learning disabilities.²⁰¹ While the schools argued that they did not have the funding or resources to provide an education to disabled children (estimating that 12,300 disabled children were not being served by public school), the court was unsympathetic, finding the practice in violation of the Equal Protection Clause as well as the District’s own code and

¹⁹⁶ See, e.g., *Reid v. Bd. of Educ. of New York*, 453 F.2d 238 (2d Cir. 1971); *Panitch v. Wisconsin*, 390 F. Supp. 611 (E.D. Wis. 1974); *Pennsylvania Ass’n of Retarded Children v. Pennsylvania*, 343 F. Supp. 279, 282 (E.D. Pa. 1972); *In re G.H.*, 218 N.W.2d 441 (N.D. 1974); *In re Jessup*, 379 N.Y.S.2d 626 (N.Y. Fam. Ct. 1975); *In re David H.*, 337 N.Y.S.2d 59 (N.Y. Fam. Ct. 1972).

¹⁹⁷ *Pennsylvania Ass’n of Retarded Children*, 343 F. Supp. at 282.

¹⁹⁸ *Id.* at 283, 283 n.8.

¹⁹⁹ *Id.*

²⁰⁰ *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 868 (D.D.C. 1972).

²⁰¹ *Id.* at 869.

regulations.²⁰² Upholding the doctrine of “equal educational opportunity,” the court found that “[t]he inadequacies of the District of Columbia Public School System, whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the ‘exceptional’ or handicapped child than on the normal child.”²⁰³

As similar cases advanced in lower courts across the country, Congress stepped in to help ensure the availability of an equal opportunity for education for students with disabilities nationwide.²⁰⁴ Building on legislation passed in the 1960s related to students with disabilities and educational services, Congress passed the Education for All Handicapped Children Act of 1975 (“EAHCA”).²⁰⁵ The EAHCA eventually became known as the Individuals with Disabilities Education Act (“IDEA”), which today dictates how school districts nationwide educate students with disabilities and has been used to establish a substantive right in all students to a “Free Appropriate Public Education” (“FAPE”).²⁰⁶ Congressional records are instructive on the ideas behind the

²⁰² *Id.* at 874. The court cites to D.C. Code 31-207, which imposed criminal penalties on parents who failed to send their children to school. The court noted the implications therein, stating:

The Court need not belabor the fact that requiring parents to see that their children attend school under pain of criminal penalties presupposes that an educational opportunity will be made available to the children. The Board of Education is required to make such opportunity available. It has adopted rules and regulations consonant with the statutory direction.

Id.

²⁰³ *Id.* at 875–76 (citing *Hobson v. Hansen*, 269 F. Supp. 401, 493 (D.D.C. 1967)). Judge Wright concluded that “the doctrine of equal educational opportunity—the equal protection clause in its application to public school education—is in its full sweep a component of due process binding on the District under the due process clause of the Fifth Amendment.” *Id.* at 875.

²⁰⁴ By this time, legal challenges had been brought in twenty-seven other states. *See Honig v. Doe*, 484 U.S. 305, 310 (1988).

²⁰⁵ Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified at 20 U.S.C.A. §§ 1400 *et seq.* (West 2020)).

²⁰⁶ Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, 104 Stat. 1103 (1990) (codified at 20 U.S.C.A. §§ 1400 *et seq.* (West 2020)).

importance of an equal education for all.²⁰⁷ Senator Harrison Williams, Committee Chairman at the time of the IDEA's passage, stated, "Exclusion from school, institutionalization, the lack of appropriate services to provide attention to the individual's need—indeed the denial of equal rights by a society which proclaims liberty and justice for all of its people—are echoes which the subcommittee has found throughout all of the hearings."²⁰⁸ He further stated that:

the denial of the right to education and to equal opportunity within this Nation for handicapped children—whether an outright exclusion from school, the failure to provide an education which meets the needs of a single handicapped child, or the refusal to recognize the handicapped child's right to grow—is a travesty of justice and a denial of equal protection of the law.²⁰⁹

Furthermore, the IDEA was characterized in the Conference Report as a law which "fulfills the promise of the Constitution that there shall be equality of education for all people."²¹⁰

In 1990 and in further recognition of the right to an education for all children, Congress amended the McKinney-Vento Homeless Assistance Act of 1987 to help alleviate the unintended consequences of unstable housing on children's access to public education.²¹¹ Congress recognized that routine processes—such as obtaining birth certificates or medical or academic records—can be

²⁰⁷ For example, the Committee noted that "Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity." S. REP. NO. 94-168, at 7 (1995), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1433.

²⁰⁸ *Education for all Handicapped Children, 1973–74: Hearings on S6 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 93rd Cong. (1st Sess. 1973–1974).

²⁰⁹ 120 CONG. REC. S15271 (1974).

²¹⁰ 191 CONG. REC. 15272 (1974).

²¹¹ 42 U.S.C. §§ 11431 *et seq.* (2018). Since 1987, the McKinney-Vento Act has been revised and reauthorized multiple times, most recently in December 2015 by the Every Student Succeeds Act ("ESSA"). Each revision and reauthorization requires states to "ensure that each child of a homeless individual and each homeless youth has equal access to the same free, appropriate public education . . . as provided to other children and youths." *Id.* § 11431(1).

enormously complicated procedures for a family with no permanent address.²¹² Accordingly, Congress required schools to take measures to remove these and other barriers particular to students living in unstable housing so that they can benefit from an equal education regardless of their housing situations.²¹³

Both of these laws have been interpreted by courts to require an equal opportunity for an education irrespective of cost.²¹⁴ Since its implementation, the IDEA and its requirement for FAPE have consistently been interpreted by the courts to require an “equal and adequate” education for all, which is consistent with the “equal educational opportunity” cited in *Mills*.²¹⁵ Even as the courts have disagreed about the specific educational requirements embedded in the term FAPE, they have consistently recognized the need to provide equal access to an education that is appropriate for the individual student, regardless of the educational barriers created by disability, poverty, or family hardship. Most recently, the Supreme Court, rejecting the concept that the IDEA mandates only “de minimis” educational progress, held that the IDEA demands an educational program “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”²¹⁶

The evidence that education is a fundamental, enforceable human right is overwhelming. The Universal Declaration of Human Rights and four international treaties ratified by every, or nearly every nation on the planet with the exception of the United States, recognize this right. The European and Inter-American human rights courts have enforced the right. More than 100 nations make the right

²¹² Stewart B. McKinney Homeless Assistance Amendments Act of 1990, Pub. L. No. 101-645, § 612(8)(G), 104 Stat. 4673, 4735 (1990).

²¹³ *Id.* § 612(8)(H).

²¹⁴ *See, e.g.,* *Andrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1002 (2017); *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 79 (1999); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188–89 (1982); *L.R. ex rel. G.R. v. Steelton-Highspire Sch. Dist.*, No. 1:10-cv-00468(SHR), 2010 WL 1433146, at *5 (M.D. Pa. Apr. 7, 2010); Nat’l Law Ctr. on Homelessness & Poverty, *R.I. v. New York*, 224 F.R.D. 314, 322 (E.D.N.Y. 2004).

²¹⁵ *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 875 (D.D.C. 1972) (quoting *Hobson v. Hansen*, 269 F. Supp. 401, 493 (D.D.C. 1967)).

²¹⁶ *Andrew F.*, 137 S. Ct. at 992–93.

to education enforceable in their courts, and courts in eighty of these countries have done so in recent years. Every U.S. state recognizes its obligation to provide a free public education, and courts in nearly half of the states have enforced the right to education.²¹⁷ Numerous federal courts have recognized the obligation to provide an education even to those students for whom it is more costly and complicated, such as those with disabilities or those living in poverty, and even Congress has stepped in to ensure an equal education for disabled youth and those experiencing unstable housing.²¹⁸ The law recognizing the right to education far outweighs the lonely voice of the Supreme Court in *Rodriguez*, but that voice has resoundingly enabled a denial of education in disadvantaged communities, depriving children of what the world has come to accept as a human right.

V. DENIAL OF EDUCATION PERSISTS: THE IMPACT OF SCARCITY ON BALTIMORE CITY PUBLIC SCHOOLS

Students like David and Daquan are routinely denied equal access to education due to the additional strains put on a school system operating with inadequate funding. David transferred from one high school to another mid-way through his junior year. Despite having an Individual Educational Program (“IEP”)²¹⁹ that required instruction in small classes, he was initially placed in standard-size classes at his new school, in part because the new school did not have the staff available to offer such small classes. Almost immediately, he began slipping out of classes, wandering the halls, and getting into trouble. When he was in class, he was disruptive and had a difficult time following the lectures. His grades plummeted, he was suspended numerous times, and he began skipping school altogether. Luckily, due to advocacy on the part of

²¹⁷ See *supra* notes 173–174.

²¹⁸ See *supra* note 214.

²¹⁹ An IEP is a plan developed under the authority of the IDEA to ensure that a child who has a disability, as identified under the law, and is attending an elementary or secondary educational institution receives specialized instruction and related services. See DEBRA PRICE-ELLINGSTAD ET AL., A GUIDE TO THE INDIVIDUALIZED EDUCATION PROGRAM 1 (2000), <https://www2.ed.gov/parents/needs/spced/iepguide/index.html#preface>.

a proactive parent and the school staff and administration, the school was able to arrange for staffing for a smaller classroom before David's behavior caused lasting damage, but not before he missed out on significant amounts of his classroom curriculum. In fact, his deficits were so extreme that he had to attend summer school in order to graduate with his classmates.

Daquan is fifteen and working his way through a Baltimore City middle school. His progress is slow, however, because he has been suspended numerous times, misses school frequently, has a difficult time staying in class when he is in school, and struggles to grasp basic academic concepts. His mother has asked the school to test Daquan for a disability but has been refused based upon his poor attendance and multiple suspensions. The school argues that until he attends regularly and still fails his classes, testing is not appropriate. This idea of waiting for failure rather than offering services preemptively to avoid failure is one that stems from scarcity. When a system is forced to manage with less than adequate resources, a common reaction is to attempt to preserve resources for those most demonstrably needy—to be reactive rather than proactive. While this may work in some situations, the impact on students already struggling with the effects of poverty and environmental barriers to education can be severe.²²⁰ Barriers to students' access to education can be traced in part back to the Supreme Court's refusal in 1973 to recognize education as a fundamental right.²²¹

A. Equality and Education in the United States

Today the U.S. stands alone among democratic nations in maintaining that the right to an equal education is not fundamental.

²²⁰ A 2011 study of Baltimore City's public school students found that "the probability of graduation is nearly two and a half times better for a student with ten or fewer absences compared to a chronically absent student As attendance rates fell, on-time graduation rates dropped as well, down to 13.2 percent for [sixth grade] students missing 40 or more days." BALT. EDUC. RES. CONSORTIUM, DESTINATION GRADUATION?: SIXTH GRADE EARLY WARNING INDICATORS FOR BALTIMORE CITY PUBLIC SCHOOLS: THEIR PREVALENCE AND IMPACT 2–3 (2011), <http://www.baltimore-berc.org/pdfs/SixthGradeEWIFullReport.pdf>.

²²¹ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973).

That was not always the case, however. On Monday, December 7, 1953, forty-five-year-old Thurgood Marshall argued before the Supreme Court on behalf of Dorothy Davis and several other African American schoolchildren who were denied access to whites-only schools.²²² Marshall and his co-counsel convinced the Court to rule that public education “*is a right* which must be made available to all on equal terms.”²²³ The Justices noted that “education is perhaps the most important function of state and local governments.”²²⁴ They found that state “[c]ompulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society” and recognized education as “the very foundation of good citizenship.”²²⁵ Writing for a unanimous Court, Chief Justice Earl Warren explained how segregated education violated the right to equality and emphasized the importance of equal education to individual children and to democracy as a whole.²²⁶ Separating African American students “from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”²²⁷ This disparate treatment, Chief Justice Warren explained, “affects the motivation of a child to learn.”²²⁸ As a result, the Court held that “in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”²²⁹

Twenty years later, when the Supreme Court decided the *San Antonio Independent School District v. Rodriguez* case, Justice Marshall, in his dissent, argued that the “majority’s holding can only be seen as a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a

²²² *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

²²³ *Id.* (emphasis added).

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* at 494.

²²⁸ *Id.*

²²⁹ *Id.* at 495.

system which deprives children in their earliest years of the chance to reach their full potential as citizens.”²³⁰ Marshall explained how the lack of funding made Edgewood’s school system unlawfully unequal.²³¹ For example, “100% of the teachers in the property-rich Alamo Heights School District had college degrees” whereas “only 80.02% of the teachers had college degrees in the property[-]poor Edgewood Independent School District.”²³² He also pointed out that almost half of the teachers in the Edgewood District were not certified but instead were teaching with emergency teaching permits.²³³ Only 11% of the teachers in Alamo Heights were uncertified.²³⁴ Teacher quality was “undoubtedly a reflection of the fact that the top of Edgewood’s teacher salary scale was approximately 80% of [that in] Alamo Heights.”²³⁵ These and other factors led to a far higher teacher-to-student ratio in Edgewood.²³⁶

According to Justice Marshall, these factors led to the inescapable conclusion that the inequality created by the funding scheme was unconstitutional under *Brown* and an earlier case, *Sweatt v. Painter*.²³⁷ In that case, the Court struck down Texas’s segregated law schools, finding that the law school for African American students was fundamentally inferior to the whites-only University of Texas law school.²³⁸ The system was unlawful because it denied African American students “substantial equality in the educational opportunities” offered to white students.²³⁹ The factors that led the Court to this conclusion were similar to factors that were unequal in *Rodriguez*, such as the “number of the faculty,

²³⁰ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 71 (1973) (Marshall, J., dissenting).

²³¹ *Id.* at 74–79.

²³² *Id.* at 85.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.* at 85–86.

²³⁶ *Id.*

²³⁷ *Id.* at 84.

²³⁸ *Id.*

²³⁹ *Id.* (quoting *Sweatt v. Painter*, 339 U.S. 629, 633–34 (1950)).

variety of courses and opportunity for specialization, size of the student body, [and] scope of the library.”²⁴⁰

B. The Equal Protection of Rights

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution guarantees that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”²⁴¹ Like the rights enumerated in the Bill of Rights, the language of the Fourteenth Amendment makes clear that the right is presumed to already exist.²⁴² The Amendment merely forbids states from violating it. In the international human rights context, a similar right to equality under the law is recognized in the U.N. Charter, the Universal Declaration of Human Rights, the ICCPR, the ICESCR, the European Convention, and the American Convention.²⁴³

Along with Justice Brennan, Justice Marshall argued in *Rodriguez* that Texas’s education funding system violated the right to equality for poor students under the Fourteenth Amendment.²⁴⁴ They both urged the Court to consider the interest at stake—education—when deciding whether Texas violated the right to equal protection of the laws.²⁴⁵ Justice Marshall criticized the majority for following a “rigidified approach to equal protection analysis” in which “cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality.”²⁴⁶ The majority ruled that, because education was not a fundamental right, and because the Edgewood families were not a “suspect class,” Texas’s funding system only had to be rational to

²⁴⁰ *Id.*

²⁴¹ U.S. CONST. amend. XIV, § 1.

²⁴² *See id.*

²⁴³ G.A. Res. 217 (III), *supra* note 61; International Covenant on Civil and Political Rights, *supra* note 67; International Covenant on Economic, Social and Cultural Rights, *supra* note 66; European Convention, *supra* note 69; American Convention on Human Rights, *supra* note 64.

²⁴⁴ *Rodriguez*, 411 U.S. at 83–84 (Marshall, J., dissenting).

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 98.

survive the constitutional challenge.²⁴⁷ Marshall disagreed with this approach and explained that the Court has, over time, “applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause.” “This spectrum,” he continued, “clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending . . . on the constitutional and societal importance of the interest adversely affected.”²⁴⁸ Justice Marshall argued that, instead of focusing on levels of scrutiny, the Court should examine “the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.”²⁴⁹

Justice Marshall pointed out that even though the Constitution does not mention the right to travel, the Court has ruled that states may not discriminate against those who travel across state lines.²⁵⁰ It protected the right to travel because a citizen’s interest in free travel is a “necessary concomitant of the stronger Union the Constitution created.”²⁵¹ The Court has stricken down discrimination in the right to procreate, the right to vote in state elections, and the right to an appeal from a criminal conviction, even though none of these rights are protected by the text of the Constitution.²⁵² Justice Marshall explained that:

due to the importance of the interests at stake, the Court has displayed a strong concern with the existence of discriminatory state treatment It is this very sort of intimate relationship between a particular personal interest and specific constitutional guarantees that has heretofore caused

²⁴⁷ *Id.* at 28–29, 40 (majority opinion).

²⁴⁸ *Id.* at 98–99 (Marshall, J., dissenting).

²⁴⁹ *Id.* at 99.

²⁵⁰ *Id.*

²⁵¹ *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969); *see, e.g., United States v. Guest*, 383 U.S. 745, 758 (1966); *Crandall v. Nevada*, 73 U.S. 35, 44 (1868).

²⁵² *Reynolds v. Sims*, 377 U.S. 533, 554–55 (1964); *Griffin v. Illinois*, 351 U.S. 12, 17–18 (1956); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

the Court to attach special significance, for purposes of equal protection analysis, to individual interests such as procreation and the exercise of the state franchise.²⁵³

The right to vote in state elections is a particularly persuasive example of Justice Marshall's point. Even though the Constitution does not protect the right to vote in state elections, the Court considered it "a fundamental political right" because it "concluded very early that it is 'preservative of all rights.'"²⁵⁴ Justice Marshall and the other dissenting Justices in *Rodriguez* explained how education is also "preservative of all rights."²⁵⁵ "For this reason," Justice Marshall argued, "a citizen has a constitutionally protected right" to exercise that interest "on an equal basis with other citizens."²⁵⁶ For him, "[a]s the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, 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."²⁵⁷ Quoting *Brown*—the case he argued twenty years earlier—Justice Marshall insisted that "the opportunity of education, 'where the state has undertaken to provide it, is a right which must be made available to all on equal terms.'"²⁵⁸

C. A Missed Opportunity to Overturn Rodriguez in Plyler v. Doe and the Right to Equality

In the spring of 1975, the Texas legislature amended its laws to end funding for the education of undocumented children and to allow local schools to refuse to admit these children.²⁵⁹ The families of children rejected from Texas schools sued, and the case reached

²⁵³ *Rodriguez*, 411 U.S. at 100, 115 (Marshall, J., dissenting).

²⁵⁴ *Id.* at 101 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (citing *Reynolds*, 377 U.S. at 562)).

²⁵⁵ *Id.* (quoting *Yick Wo*, 118 U.S. at 370).

²⁵⁶ *Id.* (quoting *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)).

²⁵⁷ *Id.* at 102–03.

²⁵⁸ *Id.* at 116 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

²⁵⁹ *Plyler v. Doe*, 457 U.S. 202, 205 (1982).

the Supreme Court.²⁶⁰ The Court, in an opinion written by Justice Brennan, struck down the Texas law as a violation of the right to equality expressed in the Equal Protection Clause.²⁶¹ While acknowledging *Rodriguez's* holding that “[p]ublic education is not a ‘right’ granted to individuals by the Constitution,” Brennan nonetheless refused to consider it to be “merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation.”²⁶² He explained that “education has a fundamental role in maintaining the fabric of our society” and “in sustaining our political and cultural heritage.”²⁶³ There are “significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.”²⁶⁴

Justice Brennan demonstrated why education is intertwined with the right to equality. He referred to the “pivotal role of education” and argued that the “denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.”²⁶⁵ Thus, even as Justice Brennan cited *Rodriguez's* holding that education is not a fundamental right expressly recognized by the Constitution, he then embraced education as a right embedded in the Equal Protection Clause.²⁶⁶ When education is denied, he explained,

the inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.²⁶⁷

²⁶⁰ *Id.* at 209–10.

²⁶¹ *Id.* at 224–25.

²⁶² *Id.* at 221.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 221–22.

²⁶⁶ Lepore, *supra* note 39.

²⁶⁷ *Plyler*, 457 U.S. at 222.

If Justice Brennan were simply endorsing the *Rodriguez* holding, he would have had to apply the lowest level of scrutiny and uphold the Texas law as long as it was rationally related to a legitimate purpose. Instead, he examined the Texas law in light of “its costs to the Nation and to the innocent children who are its victims” and held that it could “hardly be considered rational unless it further[ed] some *substantial* goal of the State.”²⁶⁸ In other words, by looking at the “substantial goal” of the state rather than a “legitimate goal” as is normally done under rational basis review, Justice Brennan imposed a significantly higher standard than that which the rational basis level of review would normally require of a court because, “by denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.”²⁶⁹

Consider Antonio, a seventeen-year-old who reads at a third-grade level and struggles with his multiplication tables. Due to issues with transportation, violence at home and in school, and chronic asthma, he has frequently missed school. His father has been in and out of jail for most of his childhood, but Antonio has never attended a school with support staff available to offer counselling or assistance to his family. While he has never had special educational support, he was required to repeat the third grade. Upon entering high school, he believed that if he continued to come to school sporadically, as he had through the eighth grade, he would advance through twelfth grade, play sports, attend prom, and graduate with his peers. However, he discovered that because he did not have the background knowledge to pass most of his classes, he could not accumulate the credits needed to advance past the ninth grade. After two years in high school, he remained classified as a freshman; he no longer had the requisite grade point average to play sports; he could not attend prom due to his freshman status; and he found himself increasingly in classes with students much younger than himself. Antonio eventually grew tired of facing failure each day, lost his societal connections to school, and simply dropped out. As a student of color in an underfunded school system, he has suffered

²⁶⁸ *Id.* at 224 (emphasis added).

²⁶⁹ *Id.* at 223–24.

from a lack of support services, difficulty getting to school, and educational neglect. Without either a diploma or adequate skills, much like the students who were deprived of an education in *Plyler*, he is ill-equipped to “live within the structures of our civic institutions” or contribute in a meaningful way to the “progress of the Nation.”²⁷⁰ He has effectively been denied equal protection of the laws based upon the status-based denial of an education within an underfunded system.

Justice Blackmun pointed out that the Court in *Rodriguez* “squarely rejected the notion that ‘an *ad hoc* determination as to the social or economic importance’ of a given interest” determines whether something is a fundamental right in the United States.²⁷¹ And equally in the American rights and international human rights contexts, it is not the societal or economic importance of an interest that makes an interest fundamental. A fundamental human right is that which is essential or integral to human dignity.²⁷² Antonio’s story and Justice Brennan’s majority opinion in *Plyler* show that education is essential for human dignity and thus clearly a human right that the American Constitution protects as fundamental. As Justice Brennan explained, “by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority.”²⁷³ Moreover, “education prepares individuals to be self-reliant and self-sufficient participants in society,” and if a state fails to provide it, “[t]he inability to read and write will handicap the individual deprived of a basic education each and every day of his life.”²⁷⁴ Denying the right to education imposes an “inestimable toll . . . on the social, economic, intellectual, and psychological well-being of the individual.”²⁷⁵ While Antonio may not have been

²⁷⁰ *Id.*

²⁷¹ *Id.* at 232 (Blackmun, J., concurring).

²⁷² Moreover, the determination need not be “*ad hoc*” as the *Rodriguez* majority claimed. We can simply turn to sources of black letter law recognized by billions of people and often ratified as binding U.S. law—human rights treaties. *Id.*

²⁷³ *Id.* at 222 (majority opinion).

²⁷⁴ *Id.* (citation omitted).

²⁷⁵ *Id.*

physically barred from the school, he had the misfortune of attending schools with inadequate funding for social workers, special educators, school transportation, and other supports. He was deprived of an equal education and thus has suffered the social, economic, intellectual, and psychological toll. Justice Brennan quoted Chief Justice Warren's opinion in *Brown* to explain that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."²⁷⁶ He came as close as he could to reversing *Rodriguez* and acknowledging that education is a fundamental right.²⁷⁷

CONCLUSION: OVERTURNING *RODRIGUEZ*

The Supreme Court must expressly overturn *Rodriguez* and rule that education is a fundamental right. In doing so, it must abandon its practice of erasing human rights with its levels of scrutiny analysis. In *San Antonio Independent School District v. Rodriguez*, the Court wielded its levels of scrutiny scalpel to amputate the right to education from U.S. law when it determined that education is not a fundamental right and measured its viability against a rational basis standard.²⁷⁸ It arbitrarily divided the question before it in two, considering separately the alleged victims and the alleged harm.²⁷⁹ Because the Court had never ruled that the alleged victims—people living in a poor school district—were a "suspect class," they were not entitled to elevated scrutiny when their state discriminated against them.²⁸⁰ And because the alleged harm—providing a poor education—supposedly did not deprive the victims of a fundamental right, Texas could so inflict this harm without facing the elevated scrutiny requirement that it prove interference with education accomplished a compelling government purpose.²⁸¹

The question before the Court was much simpler—did Texas violate the students' right to equality and right to an education by

²⁷⁶ *Id.*

²⁷⁷ *See id.*

²⁷⁸ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18 (1973).

²⁷⁹ *See id.* at 19.

²⁸⁰ *Id.*

²⁸¹ *Id.* at 29.

funding their school district at a substantially lower rate simply because the district was poor? This question required the Court to confront the inextricable connection between education and equality—a connection it eloquently endorsed in *Brown v. Board of Education* and *Plyler v. Doe*. The rights to equality and education work together to eliminate “governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.”²⁸² The right to equality means that protections under the law belong to all people equally.²⁸³ The right to free speech belongs to those who support the government and those who oppose it equally.²⁸⁴ The right to petition the government for favorable legislation belongs to the popular majority and the politically disfavored minority equally.²⁸⁵ The right to marry belongs to opposite sex couples and same sex couples equally.²⁸⁶ And the right to education should belong to the wealthy and the poor equally. In fact, as an education is an inherently competitive commodity, vital to the preparation of a child for participation in a society of educated people, an unequal education is, by definition, an inadequate education.

This is the approach the Court took in its 2015 decision in *Obergefell v. Hodges*, in which it held that “the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that

²⁸² *Id.* at 22.

²⁸³ See generally *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (The Mississippi Supreme Court had dismissed a mother’s appeal of an order terminating her parental rights because she was unable to pay the costs of preparing the record. The court found the dismissal violated the Equal Protection and Due Process Clauses.); *Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (Louisiana law giving husband primary control over married couple’s real property violated the Equal Protection Clause).

²⁸⁴ *Texas v. Johnson*, 491 U.S. 397, 409 (1989); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). *But see* *Dennis v. United States*, 341 U.S. 494, 516–17 (1951).

²⁸⁵ See *United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass’n*, 389 U.S. 217 (1967).

²⁸⁶ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2591 (2015).

right and that liberty.”²⁸⁷ Like education, the right to marry is not expressed in the Constitution. The *Obergefell* majority practically ignored levels of scrutiny and instead recognized that rights such as those embraced in the concept of liberty in the Due Process Clause of the Fourteenth Amendment and the right to equality protected by the Equal Protection Clause are “connected in a profound way, though they set forth independent principles.”²⁸⁸ As Justice Kennedy explained, “[r]ights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other.”²⁸⁹ The right to equality protects rights “implicit in liberty” from being allocated in a discriminatory way.²⁹⁰ “This interrelation of the two principles,” Justice Kennedy ruled, “furthers our understanding of what freedom is and must become.”²⁹¹ As he pointed out, considering the liberty interest and the right to equality together is an effective way of “vindicating precepts of liberty and equality under the Constitution.”²⁹² By blindly clinging to its levels of scrutiny analysis, the Court in *Rodriguez* failed to consider whether Texas’s school funding scheme interfered with the liberty interest in education to the extent that the right to equality was violated. The majority in *Obergefell* even recognized how its enforcement of the right to marriage was linked to other fundamental rights *including education*.²⁹³ Justice Kennedy wrote, “A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related *rights* of childrearing, procreation, *and education*.”²⁹⁴ Though not expressed in the Constitution, procreation and childrearing, including the parents’ right to make decisions about their child’s education, have been recognized by the Court to be

²⁸⁷ *Id.* at 2591.

²⁸⁸ *Id.* at 2602–03.

²⁸⁹ *Id.* at 2603.

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.* at 2604.

²⁹³ *Id.* at 2590.

²⁹⁴ *Id.* (emphasis added).

fundamental rights.²⁹⁵ Like marriage, therefore, the demands of equality mandated by the Equal Protection Clause must apply to these rights as well.

International treaties, national constitutions and legislation, state constitutions, U.S. statutes, and international and state judicial decisions overwhelmingly recognize education to be a fundamental human right. The U.S. Supreme Court in *Brown* and *Obergefell* referred to education as a right of special importance and in *Plyler* recognized its indispensability to basic human dignity.²⁹⁶ Yet *Rodriguez*'s holding still inflicts damage on a daily basis as some states continue to deprive millions of children of their fundamental human right to an equal education, perpetuating systemic disadvantages to their livelihoods and the education of the nation. It is time to correct that tragic error.

²⁹⁵ *Troxel v. Granville*, 530 U.S. 57, 72–73 (2000); *Roe v. Wade*, 410 U.S. 113, 152–53 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 457 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

²⁹⁶ *Obergefell*, 135 S. Ct. at 2590; *Plyler v. Doe*, 457 U.S. 202, 222–23 (1982); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).