What *Lawrence* Brought for "Show and Tell": The Non-fundamental Liberty Interest in a Minimally Adequate Education

Matthew Brunell

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WHAT LAWRENCE BROUGHT FOR "SHOW AND TELL": THE NON-FUNDAMENTAL LIBERTY INTEREST IN A MINIMALLY ADEQUATE EDUCATION

Matthew A. Brunell*

Abstract: In 1973, under an Equal Protection Clause challenge, the Supreme Court in San Antonio v. Rodriguez held that education is not a fundamental right implicitly or explicitly found within the U.S. Constitution. The substantive due process jurisprudence of the Court's 2003 term raises serious questions about the legal and theoretical underpinnings of Rodriguez. Lawrence v. Texas stands for a bold, new architecture that the Court may employ in future substantive due process decisions. This Note argues that if the due process analysis forged in Lawrence is followed, the Supreme Court may reconsider its thirty-year-old Rodriguez decision, recognize the non-fundamental liberty interest in a minimally adequate education under the Due Process Clause, and provide some relief to schoolchildren in grossly underperforming schools.

INTRODUCTION

Education is the highway that propels America, driving its businesses, delivering opportunity, and fueling its political, social, and moral conscience. Yet the American public school system is very

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* Executive Editor, Boston College Third World Law Journal (2004–2005). The author wishes to thank Professor Calvin Massey for his perception, my wife for her encouragement and my former students at C.O. Greenfield Middle School for their persistence.

much a "non-system system," in which individual school districts progress at vastly different speeds. Many school districts in America, such as South Phoenix's Roosevelt School District, are marooned in the highway's breakdown lane. In neglecting these school districts, state legislatures have effectively abdicated their supervisory role in the development of responsible citizenry, and in the process, excluded the poor from the opportunity of education. State courts are also often unhelpful, simply redirecting the problem to indifferent legislators. Abysmally performing school systems like the Roosevelt School District suggest the need for greater federal intervention. However, the improbability of Congress passing a well-funded, comprehensive stat-

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2 James Traub, The Test Mess, N.Y. Times, Apr. 7, 2002, § 6 (Magazine), at 46 (noting that America "has never had an 'educational system'; what it has had is 15,000 or so school districts, which decide more or less for themselves how and what to teach and what students need to learn in order to move from grade to grade, or to graduate").


4 See Haki R. Madhubuti, All Voices Matter: Artists, Intellectuals, Students and War, BLACK ISSUES IN HIGHER EDUC., May 22, 2003, at 36 (noting that the "most critical learning period for all children is between birth and 6 years old," and arguing that education is "vital for an informed citizenry [because a] full citizen is an informed and involved citizen").

5 See discussion infra Part IV.B.

6 See Greenfield Report Card, supra note 3; see also ABIGAIL THERNSTROM & STEPHAN THERNSTROM, No EXCUSES: CLOSING THE RACIAL GAP IN LEARNING 12, 14, 15, 124, 125 (2003). The National Assessment of Educational Progress (NAEP), a test initiated by Congress in 1969 and administered to a representative sample of students nationwide in various grades, divides students into four categories. Id. The lowest achieving of these categories, labeled "Below Basic," is "for students unable to display even 'partial mastery of prerequisite knowledge and skills that are fundamental for proficient work' at their grade." Id. To be sure, white and Asian students' NAEP results are not particularly laudable. Id. Yet the performance of black students, particularly those attending city schools, is abysmal. Id. For instance, three out of four black students rank in the "Below Basic" category for science and seven out of ten rank "Below Basic" on the mathematics portion of the NAEP. Id.
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ute means that schoolchildren in places like South Phoenix have little hope of becoming well educated.

This Note argues that in light of the bold, new substantive due process architecture announced in *Lawrence v. Texas*, the schoolchildren living in grossly underperforming school districts may in fact have a federal constitutional remedy under the Due Process Clause. *Lawrence* represents a sea change in the Court's substantive due process analysis, and as a result, decisions such as *San Antonio Independent School District v. Rodriguez* are no longer on firm footing. When abys-

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7 See Diana Jean Schemo, *Kennedy Demands Full Funding for School Bill*, N.Y. Times, Apr. 7, 2004, at A18. The Bush administration’s foray into education, the No Child Left Behind (NCLB) Act, raised federal funding 42% in “high-poverty schools” but, as critics of the legislation maintain, there is a wide disparity between what the administration can authorize under the Act and what the administration actually has budgeted. Id. Senator Edward Kennedy argues that President Bush must have “misstated, misspoke, misrepresented his position” on the financing of the NCLB Act, because the 42% was much lower than President Bush initially suggested. Id.

8 See Brent Staples, *Schools Fail Children, Not the Other Way Around*, N.Y. Times, Apr. 6, 2004, at A22 (pointing out that it is not that the children are failing the schools, but that “the schools are failing the children”). In response to New York City Mayor Bloomberg’s proposal to hold back all students who fail third grade, Staples argues for the academic equivalent of the “Marshall Plan,” in which the city brings in “new principals, teachers, a proven new curriculum and smaller classes in the early grades.” Id.

9 539 U.S. 558 (2003). Justice Scalia’s dissent in *Lawrence* provides a perceptive analysis of the majority’s reasoning, *Id.* at 586–605 (Scalia, J., dissenting). This Note often refers to his dissent to shed light on the majority’s methodology in *Lawrence*.


Another major decision of the 2003 term, *Grutter v. Bollinger*, 539 U.S. 306 (2003), suggests that an Equal Protection Clause challenge to *Rodriguez* may have new life. The Court in *Grutter* revamped its strict scrutiny and rational basis tests for disputes under the Equal Protection clause. See id. Professor Wilson Huhn comments on this novel approach, implying that the Court’s entire equal protection jurisprudence may now stand on unstable ground:

Justice O’Connor’s deferential mode of strict scrutiny in *Grutter* is not the only modification that she makes to traditional standards of review. In her concurring opinion in *Lawrence*, Justice O’Connor stated that rational basis
mally performing schools fail to provide a baseline level of education, *Lawrence* implies that the students in these schools may have a limited constitutional remedy via the Due Process Clause.  

In *Lawrence*, the Supreme Court struck down a Texas state law that prohibited consensual homosexual activity between adults. Admittedly, the holding in *Lawrence* has nothing to do with education, but the manner in which the Court reached its result has tremendous implications for the Court's future approach to Due Process Clause challenges. *Lawrence*, as some commentators have already noted, represents the ascension of Justice Kennedy's school of substantive due process. Not only did the majority in *Lawrence* radically depart from the accepted norms of substantive due process jurisprudence, a departure noted below, but they were receptive to protecting interests related to an "autonomy of self that includes freedom of thought, belief, [and] ex-

analysis is also contextual, noting that in certain cases the Court has applied "a more searching version of rational basis." In particular, she reasoned that laws that exhibit a desire to harm politically unpopular groups, laws that express moral disapproval of particular groups, and laws that inhibit personal relationships are scrutinized more strictly than laws that do not . . . . The adoption of "higher order rational basis" and "lower order strict scrutiny" essentially signals acceptance of the "sliding scale" equal protection standard advocated by Justice John Paul Stevens in *Cleburne v. Cleburne Living Center*.

Huhn, *supra* note 10, at 96-97 (citations omitted).

12 One thorny issue among legal education scholars is how exactly to define the educational liberty interest safeguarded by the Due Process Clause. See Michael Heise, *The Courts, Educational Policy, and Unintended Consequences*, 11 CORNELL J. L. & PUB. POL'Y 633, 647-49 (2002). Professor Michael Heise notes the move from "equity," a claim that schools within a state should receive comparable funding, to "adequacy," a claim that schools should receive the funding necessary to achieve somewhat comparable educational results. *Id.* at 647. Considering that *Rodriguez* was principally cast in the "equality" framework, an "adequacy" assertion may be more likely to succeed. See *id.* This Note restricts the scope of the "adequacy" approach and suggests that only the educationally moribund or grossly underperforming schools should be entitled to constitutional relief under the Due Process Clause. To put the fiscal magnitude of this issue into perspective, one observer notes that the cost alone of restoring school facilities to an adequate level would be $111.1 billion. See Kristen Safier, *Note, The Question of a Fundamental Right to a Minimally Adequate Education*, 69 U. CIN. L. REV. 993, 993 (2001).

13 539 U.S. at 578-79.

14 See *id.* Professor Huhn contends that "prior to *Lawrence*, one wing of the Supreme Court believed that the 'right to privacy' is circumscribed by tradition, while the other recognized a general right to make 'personal and intimate choices' that are 'central to personal dignity and autonomy.'" Huhn, *supra* note 10, at 73. It should be noted from the outset that Justice O'Connor did not join the Kennedy majority in *Lawrence*, electing instead to nullify the Texas sodomy statute as a violation of the Equal Protection Clause. *Lawrence*, 539 U.S. at 579-85. Justice O'Connor may eventually subscribe to *Lawrence*'s architecture, given her concurring opinion in *Michael H. v. Gerald D.* See 491 U.S. 110, 132 (1989) (O'Connor, J., concurring) (rejecting Justice Scalia's substantive due process analysis).
pression . . . .” For purposes of this Note, three lodestars in Lawrence highlight the Court’s potential willingness to reconsider Rodriguez.

First, the Court in Lawrence utilized a surprising form of scrutiny in which the majority neither enumerated a “fundamental right” nor explicitly employed the heightened form of scrutiny associated with a “fundamental right.” Conservative commentators decry this collapsing scrutiny as nothing less than a consequentialist approach. Results oriented or not, the Kennedy school of substantive due process in Lawrence has certainly tinkered with the doctrinal, three-tiered levels of scrutiny.

Second, a majority of the Court looked to foreign judicial authority in deciding whether a non-fundamental “liberty interest” should survive scrutiny. By invoking international case law in its decisionmaking, the Kennedy majority signaled that the Supreme Court is open to a more global view of the law. International authority, particularly decisions of the European Court of Human Rights and the Charter of Fundamental Rights of the EU, favor granting a constitutional liberty interest in a minimally adequate education. Third, the Court in Lawrence expressed a willingness to shed the cloak of

15 Lawrence, 539 U.S. at 574–76. One scholar labeled this radical departure a “flawed performance.” Kevin F. Ryan, A Flawed Performance, 29 Vt. B.J. 5, 6 (2003). According to the Kevin Ryan, “The Court—or at least Justice Kennedy—has chosen to build jurisprudential castles on the most shifting of sands, if not on thin air.” Id. Ryan’s disdain for Justice Kennedy’s methodology borders on the vitriolic. Id. at 7. He argues that, “To the mindlessly liberal, the product of our overly therapeutic and new age times, talk of concepts of existence and the mystery of life evoke positive, oozy feelings—but it does not provoke thought.” Id.

16 Lawrence, 539 U.S. at 586–87 (Scalia, J., dissenting); see Huhn, supra note 10, at 112 (arguing that in Lawrence the Court demonstrated how “[s]tandard[s] of review such as strict scrutiny and rational basis are not static but are sensitive to context”).

17 See Ryan, supra note 15, at 9 (reasoning that the Court “has a responsibility to explain its reasoning” and “should not simply adopt what it takes to be a generally accepted view, else it makes itself vulnerable to just these sorts of populist and reactionary attacks”).

18 Justice Scalia believes the “sweet-mystery-of-life paragraph” in Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992), included by the majority in Lawrence, is nothing short of results-oriented activism. Lawrence, 539 U.S. at 587–89 (Scalia, J., dissenting). According to Justice Scalia, this line of reasoning “ate the rule of law.” Id. at 588 (Scalia, J., dissenting).

19 See Lawrence, 539 U.S. at 576–78.

20 See id. Justice Scalia responds that such views are simply “meaningless,” even “[d]angerous,” because the Supreme Court “should not impose foreign moods, fads or fashions” in its decisions. Id. at 598 (Scalia, J., dissenting) (quoting Foster v. Florida, 537 U.S. 990 n. (2002) (Thomas, J., concurring in denial of cert.)).

stare decisis, a startling turnaround after Casey. Given the Court’s revamped approach to stare decisis, the Court may modify the rigid holding of Rodriguez, if students were to bring a claim based on their liberty interest in a minimally adequate education.

Part I of this Note highlights the dire need for a federal remedy to the alarming lack of education students receive in places like South Phoenix. Part II focuses on the Rodriguez decision itself, explaining the factual and legal principles at work in the decision. Part III looks to the Court’s ruling in Lawrence and the effects of this decision on substantive due process methodology, emphasizing the three pillars of the decision. Part IV argues that Lawrence’s three pillars effectively uproot the legal premises underlying the Court’s decision in Rodriguez. Each part concludes with some of the practical difficulties in a post-Lawrence world, cautioning that there are still aspects of Lawrence that should trouble proponents of a liberty interest in a minimally adequate education. Nevertheless, for the children of destitute school districts of America, Lawrence brings a hope unseen for thirty years.

I. UNDER THE BASELINE OF MINIMALLY ADEQUATE: THE CASE OF SOUTH PHOENIX’S C.O. GREENFIELD MIDDLE SCHOOL

A survey of America’s public schools presents some rather troubling statistics: a third of the students who begin high school fail to graduate, Latinos are four times less likely and blacks two times less likely than whites to graduate from high school, and over ten thousand schools have been identified as “needing improvement” under the No Child Left Behind Act. A closer look at low-income school districts in America presents an even more sobering view of our “non-system system”: when students in low-income school districts reach the age of nine, they are typically three grade levels behind those students in higher-income school districts in both reading and mathematics.

22 Casey begins with an emphatic call to follow stare decisis, stating, “Liberty finds no refuge in the jurisprudence of doubt.” See 505 U.S. at 833. Justice Scalia, in his Lawrence dissent, rebuffs the majority’s approach to stare decisis as confusing consequentialism. See 539 U.S. at 586 (Scalia, J., dissenting). When “stare decisis meant preservation of judicially invented abortion rights,” stare decisis binds the Court, yet when unpopular positions are at issue, it does not. Id. (Scalia, J., dissenting).

23 See Lawrence, 539 U.S. at 577–79; see also Rodriguez, 411 U.S. at 59.


25 See Thernstrom & Thernstrom, supra note 6, at 12, 14, 15, 124, 125; Who We Are, Teach for America, at http://teachforamerica.org/about.html# (last visited Jan. 15,
By looking at one such school—C.O. Greenfield Middle School in South Phoenix, Arizona—situated in a low-income school district, the education crisis taking place in America’s worst schools comes more sharply into focus.²⁶

In Roosevelt Elementary School District No. 66 v. Bishop (Roosevelt Elementary), the Arizona Supreme Court declared that the state financing scheme for public education violated the state constitutional requirement to provide a general and uniform public school system.²⁷ Following Roosevelt Elementary, no one expected underperforming schools such as C.O. Greenfield Middle School, infused with greater monetary resources, to transform overnight into the academic powerhouses of neighboring Scottsdale and Paradise Valley.²⁸ Yet, ten years after the decision, the optimism shared by many in the wake of Roosevelt Elementary is now gone.²⁹ The plight of the schoolchildren remains just as pronounced as it was in 1994.³⁰ Moreover, the current Arizona legislature remains just as ambivalent about changing the distribution of educational resources as it was prior to Roosevelt Elementary.³¹

Some commentators suggest that education reform is subject to the same critique as Russian-penned novels: “It goes on forever, and
in the end, everyone dies."³² In the Roosevelt School District, children actually are dying; asthma rates are the highest in Phoenix and schools are too financially strapped to combat the problem.³³ To illustrate further the disparate distribution of educational resources in the Phoenix metropolitan area, one need only look to Baseline Road, linking South Phoenix to Mesa. Along Baseline Road are two public schools: C.O. Greenfield Middle School in the Roosevelt School District, and Rhodes Junior High School in the Mesa Unified District.³⁴

Rife with escalating unemployment and beset with a migratory population, only 1% of Greenfield's fifth grade student body met Arizona's educational competency exams—the Arizona Instrument to Measure Standards, or AIMS—standards in mathematics.³⁵ Only 2% of the eighth grade student body met or exceeded AIMS standards in math.³⁶ Rates on the same eighth grade exam at Rhodes Junior High, located in a wealthy suburb, were 33%, a figure 12% higher than the state average for eighth grade math.³⁷ The Greenfield scores on the Stanford 9, a nationally administered standardized test, confirm these abysmal results—students in the fifth and eighth grade consistently ranked in the bottom 5% of students taking the exam.³⁸ Students at Rhodes, on the other hand, ranked in the upper 25%.³⁹ Few think Greenfield is improving and yet schools such as the neighboring Rhodes continue to thrive.⁴⁰

³³ Karina Bland, AsthmaRobst Childhds, ARIZ. REPUBLIC, Feb. 25, 2001, at A10 (reasoning that schools in South Phoenix have higher rates of children hospitalized with asthma than anywhere else in the Phoenix area).
³⁴ In the Roosevelt School District, “51 percent of the teachers are either non-tenured or substitutes.” Beverly Medlyn, Schools Gasping for Teachers, ARIZ. REPUBLIC, Mar. 8, 2001, at B1. To put this high number in perspective, a recent study by Education Week found that students of certified teachers, as opposed to uncertified teachers, attained at least two months improvement on grade equivalency scales over the course of one year, equivalent to 20% in terms of overall academic growth, Maggie Galehouse, National Report Grades Arizona Teachers Poorly, ARIZ. REPUBLIC, Jan. 8, 2003, at B3.
³⁷ Rhodes Junior High School, GREATSCHOOLS.NET, at http://www.greatschools.net/cgi-bin/az/district_profile/1133 (last updated Sept. 2004) [hereinafter Rhodes Junior High].
³⁸ Greenfield Report Card, supra note 3, at 8.
³⁹ Rhodes Junior High, supra note 37.
⁴⁰ See Rhodes Junior High, supra note 37. Granted that the state average on the AIMS for eighth grade math was an unspectacular 21% in 2003, Greenfield had no student pass the exam in either 2001 or 2002. Greenfield Report Card, supra note 3, at 6.
With a demographic significantly composed of aging, wealthy retirees who steadfastly vote against state tax increases for education and vote out legislators who support such measures, Arizona’s funding of education is not likely to change through the democratic process. Moreover, in Roosevelt Elementary, the Arizona Supreme Court emphasized that the state constitution does not require perfect equality and that disparities that “are not the result of the state’s own financing scheme do not implicate the interests sought to be served by art. XI, §1.” It is not surprising that Arizona currently ranks second to last in education spending per student in America and thirty-third on the wealth neutrality scale.

Though currently locally run, some within the Roosevelt School District would prefer the state to takeover their failing schools. In light of stalled legislative initiatives and the Arizona Supreme Court’s reluctance to achieve financial equity, it is unlikely that a state takeover would improve these children’s prospects. The state legislature repeatedly demands that underperforming school districts meet standards, yet does not provide the necessary resources to achieve desired results. The federal government could help these flagging schools, but if the most recent federal foray into education is any indication, that help may not be forthcoming. In his 1973 Rodriguez dissent, Justice Marshall stated, “[C]ountless children unjustifiably receive inferior educations that ‘may affect their hearts and minds in a way un-

41 See Chris Fiscus & Mel Melendez, Education Bills Flooding Legislature, ARIZ. REPUBLIC, Feb. 13, 2003, at B1. A recent initiative put forward by the current Superintendent of Public Instruction, Tom Horne, would further reduce state spending on education, shifting funding to local school districts. Id. Critics maintain that hiking local taxes will hurt poor school districts. Id.

42 Roosevelt Elementary, 877 P.2d 806, 816 (Ariz. 1994). Chief Justice Feldman, concurring in the judgment, would have resolved the funding disparity issue by appealing to the state’s equal protection clause. Id. at 818 (Feldman, C.J., concurring). He went further than the majority by concluding that “the equal protection clause prevents a state from making the quality of a child’s basic educational opportunity a function of the wealth of the district in which the pupil resides.” Id. (Feldman, C.J., concurring).


44 Id.


46 See id.

47 See Fiscus & Melendez, supra note 41.

48 Pat Kossan, U.S. Education Law to Cost State $108 Million, ARIZ. REPUBLIC, Aug. 10, 2003, at A1. The members of the Arizona legislature and Arizona Supreme Court are not the only responsible parties. See id. Federally required tests under NCLB will cost Arizona $108 million, with the federal government picking up less than half the cost. Id.
likely ever to be undone."49 More than thirty years after Rodriguez, there remain countless children toiling in America's worst schools—schools such as C.O. Greenfield Middle School in South Phoenix—whose plight deserves some immediate remedy.50

II. INTRODUCTION TO RODRIGUEZ

Arriving at a constitutional remedy for the crisis in America’s worst schools requires an exposition of the factual and legal principles underlying Rodriguez, the towering precedent in the debate over the federal right to education.51 The plaintiffs in Rodriguez were the schoolchildren of the low-income Edgewood Independent School District, possessing a minority population of over 96%, 90% of whom were Mexican-American and over 6% of whom were black.52 In contrast to the nearby Alamo Heights Independent School District, whose equalized local tax rate yielded $356 per student, the tax rate in Edgewood yielded only $26 for the education of each child.53 The defendants in the Rodriguez class action consisted of the State Board of Education, the Commissioner of Education, the Attorney General, and the Bexar County (San Antonio) Board of Trustees.54 The plaintiffs relied on a two-prong Equal Protection Clause challenge.55 Either education was a fundamental right under the Equal Protection Clause that the Texas system of education finance violated without a compelling purpose, or the education-financing scheme disadvantaged a suspect class without a compelling governmental purpose.56 Significantly,

50 See id. at 7–17.
51 In its substantive due process decisions, the Court has recognized numerous fundamental rights as safeguarded by the Due Process Clauses of the Fifth and Fourteenth Amendments. See, e.g., Loving v. Virginia, 388 U.S. 1 (1967) (reasoning that state law prohibiting interracial marriage violates right to marry); Griswold v. Connecticut, 381 U.S. 479 (1965) (reasoning that state law prohibiting sale of contraceptives violates right to privacy); Pierce v. Soc’y of Sisters, 268 U.S. 510 (1925) (reasoning that state law prohibiting parochial education violates parents’ right to control upbringing of their children).
52 411 U.S. at 12.
53 Id.
54 Id. at 5 n.2. In an interesting turn of events, the class action first brought suit against the San Antonio Independent School District (SAISD) as well, but the trial judge dismissed SAISD. Id. SAISD later joined the plaintiffs’ side, even filing an amicus brief on behalf of the schoolchildren of Englewood. Id.
55 Id. at 18.
56 Id.
however, the plaintiffs did not put forward a substantive due process challenge to the Texas financing scheme.\textsuperscript{57}

The plaintiffs in \textit{Rodriguez} emphasized three previous decisions in which the Court spoke of education as immensely important, even fundamental to the function of society.\textsuperscript{58} \textit{Meyer v. Nebraska} invalidated a Nebraska law that had prohibited the teaching of German because it violated the cardinal right of parents to decide children’s upbringing and schooling.\textsuperscript{59} Likewise, in \textit{Pierce v. Society of Sisters}, the Court struck down a state law that prohibited attendance at parochial school as a violation of the right of parents to choose their child’s education.\textsuperscript{60} Perhaps most famously, \textit{Brown v. Board of Education} put an end to state-authorized segregation of school districts and recognized that “education is perhaps the most important function of state and local governments.”\textsuperscript{61} The Court in \textit{Rodriguez}, however, distinguished constitutionally fundamental from socially fundamental, explaining that education was a socially fundamental right and that the legislative branch therefore holds dominion over it.\textsuperscript{62}

The plaintiffs in \textit{Rodriguez} could not convince the Court that the fundamental right to education is a necessary precondition for other rights, such as the right to vote or the right of free speech.\textsuperscript{63} The “un-

\begin{itemize}
\item \textsuperscript{57} See \textit{Rodriguez}, 411 U.S. at 18.
\item \textsuperscript{59} 262 U.S. at 403.
\item \textsuperscript{60} 268 U.S. at 535.
\item \textsuperscript{61} 347 U.S. at 493.
\item \textsuperscript{62} See 411 U.S. at 30-31, 33-34. The Court invoked Justice Harlan’s cautionary view of fundamental rights, stating that:

\begin{quote}
Mr. Justice Harlan, dissenting from the Court's application of strict scrutiny to a law impinging upon the right of interstate travel, admonished that “[v]irtually every state statute affects important rights.” ... [I]f the degree of judicial scrutiny of state legislation fluctuated, depending on a majority's view of the importance of the interest affected, we would have gone “far toward making this court a 'super-legislature.'"
\end{quote}
\end{itemize}
\textit{Id.} at 30-31 (quoting \textit{Shapiro v. Thompson}, 394 U.S. 618, 655, 661 (1969)).

\textsuperscript{63} \textit{Id.} at 35-36, 37-38. Justice Brennan in dissent took issue with the majority’s narrowed definition of “fundamentality.” \textit{Id.} at 62-63 (Brennan, J., dissenting). Justice Brennan contends that fundamentality “is, in large measure, a function of the right's importance in terms of the effectuation of those rights which are in fact constitutionally guaranteed.” \textit{Id.} (Brennan, J., dissenting). For more on education as a precondition of other rights, see Timothy D. Lynch, Note, \textit{Education as a Fundamental Right: Challenging the Supreme Court's Jurisprudence}, 26 \textit{Hofstra L. Rev.} 953, 995-96 (1998) (reasoning that the \textit{Rodriguez} Court undervalued the “disparaging effects” on the right to vote, demonstrating that “the level of participation in our electoral democracy is lower among poor urban populations . . . compared to others”); Peter S. Smith, Note, \textit{Addressing the Plight of Inner-
held holding" of Rodriguez is that there may be an implicit right to "some identifiable quantum of education" within the Constitution.64 Yet this quantum must be an amount of education just short of absolute deprivation because the Rodriguez Court did not consider a right to a baseline level of education from plaintiffs' facts.65 In sum, the Court was not convinced that Texas financing system denied children "an opportunity to acquire the basic minimal skills necessary for the enjoyment" of Constitutional rights.66

Justice Powell, writing for the majority in Rodriguez, rejected as "simplistic" the district court's finding that wealth is a suspect classification for purposes of Equal Protection Clause challenges.67 He wrote:

However described, it is clear that appellees' suit asks this Court to extend its most exacting scrutiny to review a system that allegedly discriminates a large, diverse, and amorphous class, unified only by the common factor of residents in districts that happen to have less taxable wealth than other districts.68

64 411 U.S. at 36; Bitensky, supra note 11, at 595.
65 411 U.S. at 36.
66 Id. at 37. According to Justice Powell, the Court would have to guarantee every person adequate housing, clothing, and sustenance, because such necessities are the most basic preconditions for the enjoyment of constitutional rights. Id.
67 Id. at 28. Some commentators have noted, unlike the Court in Rodriguez, that "poor districts may tax property at an even higher rate than the wealthy districts, yet generate less revenue." Avidan Y. Cover, Is "Adequacy" a More "Political Question" Than "Equality": The Effect of Standards-Based Education on Judicial Standards for Education Finance, 11 CORNELL J.L. & PUB. POL'Y 403, 404 (2002).
68 Rodriguez, 411 U.S. at 19 (emphasis added). In his dissent, Justice Marshall looks to the racial segregation cases as standing for the principle that the invidiousness of segregated public institutions was not solely on the basis of race, but also on the basis of wealth. Id. at 84–85 (Marshall, J., dissenting). Justice Marshall writes:

In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the [whites only] Law School is superior . . . It is difficult to believe that one who had a free choice between these law schools would consider the question close.
Justice Powell’s critique was that such a classification lacks a “definitive description” of what separates an individual in the “poor” class as opposed to another class, and that such an amorphous classification does not result in the total deprivation of education for this class. As a result, the financing scheme for the state of Texas fell into the type of social and economic legislation subject to the most deferential level of scrutiny—rational basis. Not surprisingly, the scheme “abundantly” satisfied this minimal level of scrutiny. Local control, or the principle that local taxpayers should determine the amount of funding for government programs, represented a satisfactory basis for maintaining the school-funding scheme for the state of Texas.

III. INTRODUCTION TO THE THREE PILLARS OF LAWRENCE

Based upon the reasoning of Lawrence, the Supreme Court seems poised to revisit Rodriguez. In Lawrence, the Supreme Court overruled Bowers v. Hardwick, a seventeen-year-old decision in which the Court chose not to confer “the fundamental right upon homosexuals to engage in sodomy.” The Court noted the factual similarities between the two cases, but recognized that the Georgia law at issue in Bowers applied to both same-sex and heterosexual sodomy, whereas the Texas law at issue in Lawrence only applied to same-sex sodomy. In the ma-

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69 Id. at 19. One recent analysis contends that a “more discretely defined plaintiff class would have avoided the Court’s admonishment in Rodriguez” and potentially may have saved the suspect classification. David V. Abbott & Stephen M. Robinson, School Finance Litigation: The Viability of Bringing Suit in the Rhode Island Federal District Court, 5 Roger Williams U.L. Rev. 441, 450 (2000).

70 Rodriguez, 411 U.S. at 55.

71 Id. In Justice White’s dissent, he, like the majority, subjected the Texas financing scheme to rational basis scrutiny, but was unconvinced about Texas’ purported goal of local decisionmaking. Id. at 68-70 (White, J., dissenting). In a more searching form of rational basis scrutiny, Justice White concluded, “[I]n the present case we would blink reality to ignore the fact that school districts, and students in the end, are differentially affected by the Texas school-financing scheme . . . .” Id. at 70. But see Frank J. Macchiarola & Joseph G. Díaz, Disorder in the Courts: The Aftermath of San Antonio Independent School District v. Rodriguez in the State Courts, 30 Val. U.L. Rev. 551, 580 (1996) (reasoning that a “return to local control and a greater freedom to experiment with alternative forms of schooling appear to be working,” and that the judiciary should not undervalue local control as a legitimate governmental interest).

72 Rodriguez, 411 U.S. at 54.


74 Lawrence, 539 U.S. at 566. This distinction generated Justice O’Connor’s concurring opinion, which decided Lawrence based on the Equal Protection Clause Id. at 579-81, 585 (O’Connor, J., concurring). She believed that the “Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct—and only that conduct—subject
majority opinion delivered by Justice Kennedy, the Court expressly rebuffed the *Bowers* decision, declaring that it "ought not to remain binding precedent" and "now is overruled."75 Although wielding the sword of substantive due process, however, the Court never explicitly recognized a fundamental right in *Lawrence*.76

Unlike some aspects of Justice Kennedy's opinion, the facts and procedural history of *Lawrence* are straightforward.77 Houston police responded to a reported domestic disturbance at one defendant's home and found the defendants engaged in a private, consensual homosexual act.78 The Harris County Police Department charged and the Harris County Criminal Court convicted the defendants with violating a prohibition on same-sex "deviate sexual intercourse."79 The defendants to criminal sanction." *Id.* at 581 (O'Connor, J., concurring). Her analysis reflects an alignment closer with the Kennedy-led majority, because Justice O'Connor institutes an enhanced rational basis test in which "[m]oral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause." *Id.* at 583 (O'Connor, J., concurring). Justice O'Connor did not comment on the substantive due process challenge sufficiently to divine her current view of the law, stating:

> Whether a sodomy law that is neutral both in effect and application ... would violate the substantive component of the Due Process Clause is an issue that need not be decided today. I am confident, however, that so long as the Equal Protection Clause requires a sodomy law to apply equally to the private consensual conduct of homosexuals and heterosexuals alike, such a law would not long stand in our democratic society.

*Id.* at 584-85 (O'Connor, J., concurring).

75 *Id.* at 578.

76 *See id.* at 586 (Scalia, J., dissenting). In his dissent, Justice Scalia writes:

> Though there is discussion of "fundamental proposition[s]" ... and "fundamental decisions," ... nowhere does the Court's opinion declare that homosexual sodomy is a "fundamental right" under the Due Process clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy were a "fundamental right." Thus, while overruling the outcome of *Bowers*, the Court leaves strangely untouched its central legal conclusion.... Instead the Court simply describes petitioner's conduct as "an exercise of their liberty"—which it undoubtedly is—and proceeds to apply an unheard-of form of rational-basis review that will have far-reaching implications beyond this case.

*Id.* (Scalia, J., dissenting).

77 *Id.* at 562-63.

78 *Id.*

79 *Tex. Penal Code Ann.* § 21.06(a) (1993); *Lawrence*, 539 U.S. at 563-64. The statute read, "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." *Tex. Penal Code Ann.* § 21.06(a). Deviate sexual intercourse is defined as: "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object." *Id.* § 21.01(1) (a)–(b).
challenged the statute as a violation of the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Texas Constitution's own equal protection clause. Relying on Bowers, the controlling federal case, the Texas appeals court rejected defendants' federal claims and affirmed the trial court's ruling on the constitutionality of Texas' deviate sexual intercourse prohibition. In deciding the merits of the Due Process Clause challenge, the Court in Lawrence used three different tools in its substantive due process analysis: a malleable form of minimal scrutiny, an appeal to international case law, and a new stare decisis test.

A. Inscrutable Scrutiny and Fundamentally Not Fundamental: The Intriguing Level of Review in Lawrence

If Bowers held that homosexuals did not have the fundamental right to engage in same-sex intercourse, one might presume an "overturning" of Bowers would logically necessitate the declaration of a fundamental right. Instead, the Court provided a nebulous description of what Lawrence decided:

[Individual decisions by married [or unmarried] persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment.]

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80 Lawrence, 539 U.S. at 563-64.
81 Id.
82 See generally id.
83 See id. at 586-87 (Scalia, J., dissenting); Bowers, 478 U.S. at 190.
84 539 U.S. at 578. The Court in Lawrence essentially decided that Justice Stevens's dissenting opinion in Bowers now controls. Bowers, 478 U.S. at 216 (Stevens, J., dissenting). Melanie Falco argues that the Court could have more appropriately decided Lawrence under the Eighth Amendment. Melanie C. Falco, The Road Not Taken: Using the Eighth Amendment to Strike Down Criminal Punishment for Engaging in Consensual Sexual Acts, 82 N.C. L. Rev. 723, 758 (2004) (reasoning that the Eighth Amendment "provides a viable alternative framework for challenging punishment ... in light of the problems with the due process and equal protection analyses presented"). Falco fails to consider the gain netted by the gay and lesbian community by the Court's ruling in Lawrence, because Lawrence, rendered under the flexible Due Process Clause, can be a decision that the Court will revisit and possibly enlarge to encompass other legislation having only "public morality" as its basis. See id.
To complicate matters, the Court added that public morality is "not a sufficient reason for upholding a law prohibiting [a] practice" traditionally viewed as immoral.85

Justice Scalia’s dissent argued that the Lawrence majority must have adopted rational basis review, but Justice Kennedy never revealed which level of scrutiny failed his substantive due process analysis.86 Public morality, the Court implied, is an unconvincing justification for intrusive government action no matter the level of scrutiny—rational basis, intermediate or strict—employed.87 As a result, Lawrence does not fit cleanly into the Court’s prior substantive due process jurisprudence, because the decision neither recognizes a single fundamental right nor articulates which level of scrutiny the Court imposed.88 Perhaps the Court in Lawrence collapsed the treasured three tiers of scrutiny and replaced it with a “sliding scale” approach.89 As Judge Posner recently noted, “We should follow what the Supreme Court does and not just what it says it is doing. The Court rejects a ‘sliding scale’ approach to equal protection in words but occasionally accepts it in deeds.”90

Or perhaps Lawrence recognized a fundamental liberty interest for persons of any sexual orientation to engage in consensual intimate behavior.91 Maybe the Court applied a form of rational basis scrutiny in which the asserted basis for the sodomy statute was not rationally related to the non-fundamental liberty interest.92 Perhaps it is best to refer to the liberty interest to engage in private, consensual sexual acts as having the “stature of a fundamental right,”93 or being a “quasi-fundamental” right, a term Justice Burger coined in Plyler v. Doe.94 Until another Supreme Court decision clarifies Lawrence, there will be no

85 Lawrence, 539 U.S. at 577–78.
86 See id. at 577–79.
87 Id. at 586 (Scalia, J., dissenting).
88 See id. (Scalia, J., dissenting).
89 See id. (Scalia, J., dissenting).
91 See A. Scott Loveless, Children on the Front Lines of an Ideological War: The Differing Values of Differing Values, 22 St. Louis U. Pub. L. Rev. 371, 396 n.77 (2003) (reasoning that “the Supreme Court has elevated private, consensual sodomy from the realm of being subject to state regulation to the stature of a fundamental right”).
92 See Ryan, supra note 15, at 7 (arguing that the Court must have decided that the right to engage in sodomy was non-fundamental because it would be “extremely difficult to root such a right deeply in our history and tradition”).
93 See Loveless, supra note 91, at 396.
definitive answer.95 The initial reaction to Lawrence by the lower federal courts and state courts, however, indicates that judges are just as confused as legal scholars are.96

Since the Lawrence decision, the lower federal courts have described the “right” of Lawrence in varied, and sometimes contradictory, manners.97 The Court of Appeals for the Eleventh Circuit recognized the glaring absence of a “fundamental right” and hints that Justice Kennedy’s legal analysis was particular to the set of facts in Lawrence.98 The court in Lofton v. Secretary of Department of Children & Family Services treated the “right” in Lawrence as the “by-product of several different constitutional principles and liberty interests,” not carefully described and arrived at via rational basis review.99 Other courts refer to the “right” in Lawrence as the “individual’s liberty interest in the rights . . . to privacy and choice in one’s personal and sexual relationships”100 or, in more pragmatic terms, “the right to engage in consensual homosexual activity.”101

Similarly, state courts, in deciding issues under state constitutions, stumble over defining the “right” in Lawrence and have difficulty articulating how the lack of a fundamental right should fit into future

95 At least one lower court avoided the right decided in Lawrence by choosing more circumspect language. In re Marshall, 300 B.R. 507, 520, 524 (Bankr. C.D. Cal. 2003) (referring to Lawrence as “finding due process violation in Texas statute prohibiting same-sex sodomy,” while maintaining that substantive due process is “alive and well in its jurisprudence, insofar as it concerns individual rights and liberties”).


97 See, e.g., Fields v. Palmdale Sch. Dist., 271 F. Supp. 2d 1217, 1221 (C.D. Cal. 2003) (citing Lawrence for the proposition that there is a “right to engage in private consensual homosexual conduct”).

98 See Lofton v. Sec’y of Dep’t of Children & Family Servs., 358 F.3d 804, 817 (11th Cir. 2004), cert. denied, 125 S. Ct. 869 (2005) (reasoning that Lawrence “cannot be extrapolated to create a right to adopt for homosexual persons”).

99 Id. at 817 (reasoning that it would be a "strained and ultimately incorrect reading of Lawrence to interpret it to announce a new fundamental right").

100 Doe v. Miller, 298 F. Supp. 2d 844, 871 (S.D. Iowa 2004) (reasoning that Iowa statute that prohibited a criminal sex offender from living within two thousand feet of a school violated the sex offender’s fundamental right to family choice, privacy, and interstate travel).

101 Bradley v. N.C. Dep’t of Transp., 286 F. Supp. 2d 697, 706 (W.D.N.C. 2003) (reasoning that the reporting of corruption is not protected by one’s right to substantive due process).
due process analysis. In Commonwealth v. Mayfield, the Supreme Court of Pennsylvania referred to the Lawrence decision as standing for the “due process right of consenting adults to engage in private sexual conduct free from governmental interference.” A recent Arizona appellate decision on the issue of gay marriage takes a different approach. In Standhardt v. Superior Court, the court found that because “the Court did not consider sexual conduct between same-sex partners a fundamental right, it would be illogical to interpret Lawrence as recognizing a fundamental right to enter a same-sex marriage.” Put another way, the fundamental right analysis after Lawrence is “one great blooming, buzzing confusion.”

B. Justice Without Borders: International Authority Informing Constitutional Liberty Interests

Justice Kennedy’s frequent appeals in Lawrence to international authority suggest that the Court is globalizing its substantive due process analysis. To begin, Justice Kennedy uses international authority to undermine Justice Burger’s version of history. International

102 The Kansas Court of Appeals, for example, referred to the right announced in Lawrence as a homosexual’s “privacy right to be free from the criminalization of homosexual sex.” State v. Limon, 83 P.3d 229, 234–35 (Kan. Ct. App.), cert. granted, 2004 Kan. LEXIS 284 (Kan. May 25, 2004). The court applied minimal scrutiny to an equal protection and a due process challenge of a Kansas law that imposed harsher penalties for same-sex statutory rape than for heterosexual statutory rape. Id.

103 832 A.2d 418, 425 (Pa. 2003) (reasoning that nonconsensual sexual acts are not protected by Lawrence).


105 77 P.3d at 457.

106 WILLIAM JAMES, THE PRINCIPLES OF PSYCHOLOGY 488 (1998). Although the state and lower federal courts leave the right espoused in Lawrence ill-defined, the courts have in fact found limits to this right. See, e.g., United States v. Peterson, 294 F. Supp. 797, 803 (D.S.C. 2003) (reasoning that there is no violation of Due Process Clause for conviction under the federal child pornography possession laws); State v. Clark, 588 S.E.2d 66, 68–69 (N.C. Ct. App. 2003) (reasoning that Lawrence does not control alleged violation of Due Process Clause since the present case, unlike Lawrence, involved minors).

107 For a critique of Justice Kennedy’s appeal to international case law in Lawrence and Justice Ginsburg’s appeal to United Nations standards in her concurring opinion in Grutter, see John Leo, Editorial, What in the World Were the Justices Thinking?, SEATTLE TIMES, July 15, 2003, at B5 (arguing that the U.S. Constitution should not be “adapted to foreign governing documents”).

authority, particularly the British parliament’s 1967 repeal of anti-sodomy statutes and a 2001 decision of the European Court of Human Rights, discredit Burger’s overstated belief in the Western Civilization tradition of criminalizing homosexual conduct.\(^{109}\) Later in the decision, Justice Kennedy appeals to international case law to show that the values of the international community have changed since Bowers, and that the Court’s due process analysis must be in concert.\(^{110}\) He discusses three additional decisions of the European Court of Human Rights that speak to “action consistent with an affirmation of the protected right of homosexuals to engage in intimate sexual intercourse” in the forty-five nations of the EU.\(^{111}\)

Each of these decisions is grounded in article 8 of the European Convention of Human Rights, which, unlike the U.S. Constitution, explicitly asserts a right to privacy.\(^{112}\) Justice Kennedy takes legal and cultural values from jurisdictions with much more expansive constitutional rights and uses these values to inform his substantive due process analysis.\(^{113}\) If the Court follows this aspect of Lawrence in future substantive due process cases, the government must assert that its purported justification is “somehow more legitimate or urgent” than justifications that have failed previously in international jurisdic-

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\(^{109}\) Lawrence, 539 U.S. at 573 (citing Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) (1983) (striking down anti-sodomy laws as applied to persons over the age of twenty-one)).

\(^{110}\) Id. at 576 (reasoning that, to “the extent Bowers relied on values we share with a wider civilization, it should be noted that the reasoning and holding in Bowers have been rejected elsewhere”).


\(^{112}\) See CHARTER OF FUNDAMENTAL RIGHTS, supra note 21, art. 8(1), at 10 (“Everyone has the right to the protection of personal data concerning him or her.”).

\(^{113}\) See Lawrence, 539 U.S. at 576; Leo, supra note 107 (perceiving Lawrence to be part of the “push toward standards out of sync with American traditions of liberty”).
tions. The dissent chastises the manner in which the majority plucked precedent from international authority. Justice Scalia refers to Justice Kennedy's appeal to international law as "dangerous dicta, for this Court should not impose foreign moods, fads, or fashions on Americans." In the recently decided *Olympic Airways v. Husain*, Justice Scalia rebukes the Court for paradoxically being international on some issues, such as the criminalization of homosexual conduct, but insular on others. He suggests that the Court deems international authority "relevant" only when this authority comports with its own policy determination. The federal courts have taken notice of the "English experience and decisions of the European Court of Human Rights" in cases involving individual liberties. As Justice Scalia correctly argues, however, the Court in *Lawrence* did more than just take notice of foreign authority; it deferred to it. As one commentator notes, *Lawrence* achieves "landmark status" by using international authority to define liberty interests under the U.S. Constitution's Due Process Clause. In this respect, if *Lawrence* serves as a guide for future due process challenges, internationally recognized values may

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114 539 U.S. at 577.
115 See id.
116 Id. at 599 (Scalia, J., dissenting) (arguing that the "Court's discussion of these foreign views [is] meaningless" for substantive due process analysis).
117 Id. (Scalia, J., dissenting) (quoting Foster v. Florida, 537 U.S. 990 n. (2002) (Thomas, J., concurring in denial of cert.)).

Today's decision stands out for its failure to give any serious consideration to how [international courts] have resolved the legal issues before us. This sudden insularity is striking, since the Court in recent years has canvassed the prevailing law in other nations (at least Western European nations) to determine the meaning of an American Constitution that those nations had no part in framing and that those nations' courts have no role in enforcing.

Id.
119 Id.
120 United States v. Sampson, 275 F. Supp. 2d 49, 65-66 (D. Mass. 2003) (noting that although "judicial consideration of attitudes in other countries has been criticized," some provisions of the Constitution should be evaluated in light of the "English experience").
121 See 539 U.S. at 599.
122 See Barbara K. Bucholtz, *Father Knows Best: The Court's Result-Oriented Activism Continues Apace: Selected Business-Related Decisions from the 2002-2003 Term*, 39 TULSA L. REV. 75, 78 (2003) (reasoning that the *Lawrence* Court "ushered in a new authoritative source from which to develop and deploy legal argument: the authority of other sovereignties").
help determine whether a non-fundamental liberty interest survives this new form of scrutiny.23

C. Decisis-isis: The Court’s Multifactor Test for Relying on Precedent

Lawrence also broke ground with Justice Kennedy’s bold test for stare decisis, subjecting the Court’s prior substantive due process decisions to a greater possibility of reversal.124 The Lawrence test for stare decisis includes the extent that state government has relied upon the prior decision, the degree that subsequent decisions have eroded the foundations of the prior decision, and amount or pervasiveness of the criticism lodged against the prior decision.125 Since Bowers was the guinea pig for this innovative stare decisis test, the Lawrence-Bowers relationship must be regarded as the standard-bearer for future substantive due process analysis.126

Although Justice Scalia tries to delineate the three provisions of the Lawrence stare decisis test as though they are mutually exclusive, the provisions of this multifactor test are interrelated, and as a result, must be read together.127 For example, the Court’s assessment of the detrimental reliance on Bowers takes into account subsequent decisions of the Court.128 The Court looked to two decisions rendered after the 1985 Bowers decision—Romer v. Evans and Planned Parenthood v.

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123 See Janet Koven Levit, Going Public with Transnational Law: The 2002-2003 Supreme Court Term, 39 TULSA L. REV. 155, 164 (2003) (arguing that “a majority of justices sent a potent message to foreign constitutional courts that they will engage their foreign colleagues in a court-to-court transnational dialogue and will participate in the evolution of a ‘global jurisprudence.’”).

124 See 539 U.S. at 587 (Scalia, J., dissenting).

125 Id. (Scalia, J., dissenting). The Court’s first prong of the test, “detrimental reliance,” is something of a redundancy in terms. In keeping with the Court’s parlance, this Note uses “detrimental reliance” similarly, to describe the degree to which state courts rely upon a U.S. Supreme Court decision in resolving state constitutional issues. Detrimental reliance, therefore, measures the extent by which the federal precedent served as a guidepost for the state’s decision. For example, scant detrimental reliance would indicate that the state court or state legislature did not rely upon the Supreme Court’s decision in interpreting rights under the state constitution. On the other hand, considerable detrimental reliance would signify that the ruling in question played an important role in the state’s determination. Justice Scalia argues that this new three-prong test “should surprise no one” because the Lawrence analysis of stare decisis “exposed Casey’s extraordinary deference to precedent for the result-oriented expedient that it is.” Id. at 592 (Scalia, J., dissenting).

126 See id. at 572–79; Vitro v. Mihelcic, 806 N.E.2d 632, 641 (Ill. 2004) (Fitzgerald, J., dissenting) (looking in part to Lawrence for the proposition that “stare decisis is not so static a concept that it binds our hands to do justice when we have made a mistake”).

127 See Lawrence, 539 U.S. at 587–88 (Scalia, J., dissenting).

128 See id. at 570–79.
In *Romer*, the Court struck down a ratified amendment to the Colorado state constitution that would have denied persons of bisexual and homosexual orientation certain privileges, including protection under state anti-discrimination laws. The *Lawrence* Court also cited *Casey*, a decision that affirmed the fundamental right to an abortion, as standing for the proposition that “[p]ersons in a homosexual relationship may seek autonomy ... just as heterosexual persons do.” According to the Court, the *Casey* and *Romer* opinions advised state governments not to rely on the decision in *Bowers*.

Moreover, the Court held that states placed little reliance on the *Bowers* decision because most states post-*Bowers* had abolished criminal prohibitions on private acts of sodomy. At the time of *Lawrence*, only four states actually enforced prohibitions targeting homosexuals. The Court also measured “societal reliance on *Bowers*” by looking at the “emerging awareness” of a liberty interest that provides “substantial protection to adult persons in deciding how to conduct their private lives.”

Departing from *Michael H. v. Gerald D.*, the majority in *Lawrence* looked to the “emerging awareness” of the last twenty-five years as the basis for the historical context of their decision, rather

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130 *Romer*, 517 U.S. at 624. The Court in *Romer* applied a rational basis level of review and rejected the state’s proposed justification because it was “born of animosity toward the class of persons affected.” *Id.* at 634.

131 *Lawrence*, 539 U.S. at 573–74. The majority in *Lawrence* invoked *Casey*’s so-called “sweet-mystery-of-life passage.” *Id.* at 574. Reprinted in *Lawrence*, the passage from *Casey* reads:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

*Id.* (quoting *Casey*, 505 U.S. at 851).

132 See *id.*; *Romer*, 517 U.S. at 634; *Casey*, 505 U.S. at 851. Justice Kennedy does not explain why state courts should have looked to *Casey*, a case dealing with the right to an abortion and, more nebulously, with the right to autonomy, instead of *Bowers*, a case directly on point with issues similar to those encountered in *Lawrence*. See *Lawrence*, 539 U.S. at 573–74.

133 *Lawrence*, 539 U.S. at 573.

134 *Id.*

135 *Id.* at 572.

136 See *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989) (finding a state law that created the irrebuttable presumption that a woman’s husband is her child’s father did not infringe on the biological father’s substantive due process rights, granted by the Fourteenth Amendment).
than looking to the whole of American history or even the history of western civilization.\textsuperscript{137} This "emerging awareness" began before \textit{Bowers} but intensified in the last seventeen years, particularly on the federal level with the Court's decisions in \textit{Romer} and \textit{Casey}.\textsuperscript{138} The Court integrated the lack of detrimental reliance placed on \textit{Bowers}, the mounting criticism of the decision, and subsequent decisions eroding the foundation of \textit{Bowers} in order to disregard stare decisis.\textsuperscript{139} As a result, the Court in \textit{Lawrence} boldly announced a revamped stare decisis test that questions longstanding substantive due process decisions.\textsuperscript{140}

\section*{III. From Rodriguez to Lawrence: The Non-Fundamental Liberty Interest in a Minimally Adequate Education After Lawrence}

In \textit{Lawrence}, the Court masked its level of scrutiny and its finding of a right, appealed to international authority, and disregarded the

\begin{itemize}
\item \textsuperscript{137} See \textit{Lawrence}, 539 U.S. at 572. Some proponents of the fundamental right to education under the due process clause contend that all of American history, not just the last quarter century, demonstrates the value attached to this right. Bitensky, \textit{supra} note 11, at 592. Professor Bitensky states, "[T]here is a long and pervasive tradition in the United States of protecting children's access to public elementary and secondary education, a tradition which, therefore, necessarily manifests the exceptional importance which this society attaches to children's education." \textit{Id.}

\item \textsuperscript{138} Justice Kennedy's history of legal prohibitions on same-sex intercourse differs with Justice Burger's history in \textit{Bowers}, perhaps only in Justice Kennedy's focus on western Europe and the latter half century in America. See \textit{Lawrence}, 539 U.S. at 572-74.

\item \textsuperscript{139} The "mounting criticism" component of the \textit{Lawrence} stare decisis test is by far the least developed by the Court. See \textit{id.} As a result, this Note considers it the least influential in future substantive due process analysis. See \textit{id.} Justice Scalia correctly critiques the Court's specious reasoning, stating:

\begin{quote}
\textit{Bowers}, the Court says, has been subject to "substantial and continuing [criticism] disapproving of its reasoning in all respects, not just as to its historical assumptions." Exactly what those nonhistorical criticism are, and whether the Court even agrees with them, are left unsaid . . . . Of course, \textit{Roe} too (and by extension \textit{Casey}) has been (and still is) subject to unrelenting criticism, including criticism from the two commentators cited by the Court today.
\end{quote}

\begin{itemize}
\item \textit{Lawrence}, 539 U.S. at 574-76 (Scalia, J., dissenting) (citations omitted).
\end{itemize}

\item \textsuperscript{140} See 539 U.S. at 574-76.
stare decisis of a historically and culturally outdated precedent.141 These three aspects of the decision represent not simply legal reasoning peculiar to the Lawrence decision, but a dramatic shift in the Court's substantive due process analysis.142 Therefore, if schoolchildren confined to grossly underperforming schools raised a Due Process Clause challenge, Justice Kennedy's reasoning in Lawrence suggests that the Court may be receptive to a non-fundamental liberty interest in a minimally adequate education.143 By relying on the methodology of Lawrence, the Court may revisit Rodriguez, modify its outdated holding, and find that children shackled to abysmally achieving schools are constitutionally entitled to a minimally adequate education.144

A. Liberty Interests and Judicial Scrutiny After Lawrence: Opening the Door to a Minimally Adequate Education

The lower federal courts have interpreted Rodriguez as holding that education is not a fundamental right under the Due Process Clause.145 When plaintiffs allege the denial of the fundamental right

141 See discussion infra Part II.
142 See Bucholtz, supra note 122, at 77 (reasoning that Lawrence may be a "seminal and watershed" event because of its "path-breaking reliance upon international and foreign legal authority"); Huhn, supra note 10, at 66 (reasoning that the Lawrence and Grutter decisions "represent a revolutionary shift in the interpretation of the Constitution of the United States"); Ryan, supra note 15, at 5 (arguing that Lawrence "may well have implications for constitutional jurisprudence of lasting significance").
143 See Lawrence, 539 U.S. at 573–74; Mark Cenite, Federalizing Or Eliminating Online Obscenity Laws as an Alternative to Contemporary Community Standards, 9 COMM. L. & Pol'y 25, 69 (2004) (speculating that the "implications of Lawrence could indeed be wide-ranging"); Wilkins, supra note 138, at 137 (arguing that "wherever the road created in Lawrence leads," the Court should be "exceptionally wary with any journey into the landscape of marriage").
144 See Lawrence, 539 U.S. at 573–74; Cenite, supra note 143, at 69.
145 See Galdikas v. Fagan, 342 F.3d 684, 689 (7th Cir. 2003), cert. denied, 540 U.S. 1183 (2004) (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 34 (1973)) (reasoning that former graduate students' § 1983 action should be dismissed, because alleged conduct was insufficient to support a claim for substantive due process violations); Wagner v. Fort Wayne Comty. Sch., 255 F. Supp. 2d 915 (N.D. Ind. 2003) (dismissing middle school student's civil rights action against school district because the school district did not violate the student's substantive due process rights).

In deciding educational matters, the Supreme Court differentiates the "substantive" component of due process from the "procedural" component of due process. See Goss v. Lopez, 419 U.S. 565, 574 (1975). Although states were not obligated under the Constitution to maintain a public school system, if such a benefit is provided, the state is "constrained to recognize a student's legitimate entitlement to a public education" as an interest protected by the Due Process Clause. Id. This interest "may not be taken away for misconduct without adherence to the minimum procedures required by that Clause." Id.; see, e.g., Johnson v. Collins, 233 F. Supp. 2d 241, 243 (D.N.H. 2002) (reasoning that a high
to education, and frame the allegation in precisely those terms, the federal courts summarily dismiss the challenges, relying solely on the Court’s decision in *Rodriguez.*[^146] *Lawrence,* however, instructs children attending grossly underachieving schools, as potential plaintiffs, to assert a lesser interest than a “fundamental right to education.”[^147] By claiming a less sweeping, more limited liberty interest—the non-fundamental liberty interest in a minimally adequate education—the post-*Lawrence* Court may provide some constitutional remedy for the children in America’s worst schools.[^148] Two reasons support this claim: first, if there is debate over the existence of a *constitutionally fundamental right* to a minimally adequate education, then surely a *non-fundamental liberty interest* in a minimally adequate education—a lesser constitutional interest than a fundamental right—must exist;[^149] and second, if this liberty interest is subjected to the same level of scrutiny school’s procedures for the reinstatement of an expelled student violated student’s procedural due process rights).

[^146]: See, e.g., *Galdikas,* 342 F.3d at 689; *Wagner,* 255 F. Supp. 2d at 922; *Johnson,* 233 F. Supp. 2d at 247.

[^147]: See 539 U.S. at 586 (Scalia, J., dissenting).

[^148]: See id. *Rodriguez* likely controls the other avenue for substantive due process violations, the so-called “shocks the conscience” test. See 411 U.S. at 12–13. The “shocks the conscience” test has many detractors. See, e.g., *Sacramento v. Lewis,* 523 U.S. 833, 861 (1998) (Scalia, J., dissenting) (arguing that the test is a “throw back to highly subjective substantive-due-process methodologies”); *Rochin v. California,* 342 U.S. 165, 176 (1952) (Black, J., concurring) (reasoning that the test grants the Court “unlimited power to invalidate laws”) The test remains a viable way of asserting a due process violation, but four principal reasons exist as to why *Rodriguez* would dissuade federal courts from employing the test. See *Rodriguez,* 411 U.S. at 12–13; *Lewis,* 523 U.S. at 846–48. First, the facts of *Rodriguez* discourage finding other school districts “shocking,” because the Court in *Rodriguez* was not moved by the gross disparity between the Alamo Heights Independent School and the Edgewood School District. See *Rodriguez,* 411 U.S. at 12–13. Second, courts are reluctant to expand “shocks the conscience” substantive due process “because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.” *Washington v. Glucksberg,* 521 U.S. 702, 720 (1997) (quoting *Collins v. Harker Heights,* 503 U.S. 115, 125 (1992)). Third, many consider the standard of “shocks the conscience” to be shaky judicial ground. See *Bishop v. Wood,* 426 U.S. 341, 350 (1976) (arguing that the Due Process Clause is “not a guarantee against incorrect or ill-advised personnel decisions”); *Abbott & Robinson,* supra note 75, at 476; *Eric L. Muller,* *Constitutional Conscience,* 83 B.U. L. Rev. 1017, 1040 (2003) (reasoning that the “shocks-the-conscience test stays with us . . . but it hangs by a thread”). Fourth, at least one circuit has not decided whether the “shocks the conscience” standard applies to all substantive due process violations. See *Butler v. Rio Rancho Pub. Schs. Bd. of Educ.,* 341 F.3d 1197, 1201 n.4 (10th Cir. 2003) (holding that student’s suspension did not violate Due Process Clause, because the suspension did not “shock the conscience” of the court).

[^149]: See *Lawrence,* 539 U.S. at 586–87 (Scalia, J., dissenting); *Bogen,* supra note 96, at 388 (arguing that the Court may be “far more active in imagining fundamental rights beyond existing traditions” in future decisions).
as Lawrence—a review that looked to international recognition of rights—children in underperforming schools could lay claim to a new constitutional interest.\textsuperscript{150}

1. From Fundamental Right to Non-Fundamental Liberty Interest

Because the right asserted in Rodriguez—the fundamental right to education—sweeps far broader than the non-fundamental liberty interest of a minimally adequate education, analysis of the non-fundamental liberty interest does not begin with Rodriguez.\textsuperscript{151} Instead, Papasan v. Allain offers a better starting point, as it considers whether a curtailed fundamental right to a minimally adequate education existed at all.\textsuperscript{152} To be sure, even alleging an infringement of the unsettled right as done by the plaintiffs in Papasan is difficult.\textsuperscript{153} The plaintiffs in Robinson v. Kansas were at least taught how to "read or write" and received "instruction on . . . educational basics," thus the district court did not explore the scope of the undecided fundamental right to a minimally adequate education.\textsuperscript{154} Similarly, a Pennsylvania district court found in Brian B. v. Pennsylvania Department of Education that a school-aged, incarcerated child is not deprived of his or her fundamental right to a minimally acceptable education, even if the state withholds all forms of education during the incarcerated years.\textsuperscript{155} Brian B. and Robin-

\textsuperscript{150} See Calvin Massey, Federalism and the Rehnquist Court, 53 HASTINGS L.J. 431, 463 (2002) (reasoning that judicial scrutiny is often "so gossamer that it is akin to the translucent newly shed skin of the snake: It has the form of the snake but none of its substance").

\textsuperscript{151} See, e.g., Galdikas, 342 F.3d at 689; WagnC1, 255 F. Supp. 2d at 915; Johnson, 233 F. Supp. 2d at 241. One law professor helps inform what this non-fundamental liberty interest to a minimally adequate education should entail. See Edward B. Foley, Rodriguez Revised: Constitutional Theory and School Finance, 32 GA. L. REV. 475, 540-41 (1997-98). Professor Foley views education as a necessary precondition for the creation of "philosopher-citizens." Id. According to Professor Foley, education fails when students leave the system not fully versed in the ethic of good citizenship, not knowledgeable about the political process and not fluent in general policy discourse. Id.

\textsuperscript{152} See 478 U.S. 265, 285 (1986). In Papasan, the Court stated that it had "not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review." Id.


\textsuperscript{154} Robinson, 117 F. Supp. 2d at 1148 (quoting Papasan, 478 U.S. at 286) (holding that the plaintiffs "failed to allege the facts necessary, under Papasan, in order to receive a heightened standard of review under their Equal Protection claim"). The court did not note the fact that the plaintiffs did not learn educational basics, but instead commented that the state had made some attempt to teach them these basics. Id.

\textsuperscript{155} 51 F. Supp. 2d 611, 625-26 (E.D. Pa. 1999), aff'd, 230 F.3d 582 (3d Cir. 2000) (reasoning that the state's "radical abridgement of classroom hours" did not give rise to a Papasan analysis since there was no denial of education).
son are powerful examples of the federal courts’ reluctance to decide the unsettled fundamental right to a minimally adequate education.\textsuperscript{156}

Though the standard for alleging the denial of the fundamental right to a minimally adequate education may be daunting, at least one federal district court has found the threshold surmountable.\textsuperscript{157} In \textit{Donnell C. v. Illinois State Board of Education}, the court found that the plaintiffs successfully pled the deprivation of education rights guaranteed under the Due Process Clause.\textsuperscript{158} This contrasts with the other district court dismissals of plaintiffs’ suits in \textit{Robinson} and \textit{Brian B.}.\textsuperscript{159} Moreover, \textit{Louisiana ex rel. S.D.} cited \textit{Donnell C.} as standing for the proposition that a “lack of instruction gave rise to claim under substantive due process” and that “juveniles in correctional facilities have a federal constitutional right to an adequate educational program.”\textsuperscript{160} There is a practical difficulty with looking to \textit{Donnell C.} and \textit{S.D.} as supporting a right to a minimally adequate education, because few courts have recognized such a right.\textsuperscript{161} However, the cases are powerful proof that some courts will decide the open question posed by \textit{Papasan} in the affirmative.\textsuperscript{162}

If the \textit{Papasan} Court thought enough of education to leave unsettled the right to a minimally adequate education, and if federal courts have sometimes recognized the fundamental right to a minimally adequate education, then it is reasonable to suggest that the Court will confer non-fundamental “liberty interest” status upon a minimally


\textsuperscript{157} See \textit{Donnell C. v. Ill. State Bd. of Educ.}, 829 F. Supp. 1016, 1018 (N.D. Ill. 1993). In \textit{Donnell C.}, among other claims, the plaintiffs alleged that the state did not provide pretrial detainees in need of special educational services with such classes, and that pretrial detainees received instruction in only reading and math. \textit{Id.}

\textsuperscript{158} \textit{Id.} (reasoning that “the Court cannot say that no relief could be granted plaintiffs”).

\textsuperscript{159} \textit{Robinson}, 117 F. Supp. 2d at 1149–50; Brian B., 51 F. Supp. 2d at 625–26; \textit{Donnell C.}, 829 F. Supp. at 1018. Unfortunately for legal observers, the \textit{Donnell C.} case settled out of court, leaving open the question whether the purported claim would have been successful at trial. See Safier, supra note 12, at 1007.

\textsuperscript{160} 832 So. 2d 415, 423–35 (La. Ct. App. 2002).

\textsuperscript{161} \textit{Donnell C.}, 829 F. Supp. at 1018; S.D., 832 So. 2d at 423–35; see also Galdikas, 342 F.3d at 689; Wagner, 255 F. Supp. 2d at 915; \textit{johnson}, 233 F. Supp. 2d at 241. Also, the context of \textit{Donnell C.}, a prison detainee dispute, is not entirely analogous to disputes over the quality of a public school education. See \textit{Donnell C.}, 829 F. Supp. at 1018. Moreover, \textit{Donnell C.} recognized a lack of education instruction, not substandard educational results, as the reason for the claim. See \textit{id.}

\textsuperscript{162} See \textit{Donnell C.}, 829 F. Supp. at 1018; S.D., 832 So. 2d at 423; Safier, supra note 12, at 1009 (arguing that \textit{Donnell C.} “helped define the contours” of a fundamental right to a minimally adequate education “if it were to be recognized”).
adequate education. Considering the sympathetic treatment that education generally receives from the Court, the Court seems poised to recognize the non-fundamental liberty interest in a minimally adequate education.

This liberty interest may seem, on its face, to be an awkward fit in the Court's largely "privacy"-dominated substantive due process jurisprudence. Lawrence and Casey, however, suggest that autonomy, not privacy concerns, motivate the Court's recent substantive due process decisions. The Lawrence Court makes plain that the Due Process Clause safeguards interests "central to personal dignity and autonomy" and core to "one's own concept of existence . . . ." Moreover, the closing words of Lawrence focus on violations of autonomy interests, not simply privacy interests:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific . . . . They knew times can blind us to certain truths and later generations can see that

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165 See Lawrence, 539 U.S. at 574 (reasoning that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do"); Helen M. Alvare, Saying Yes Before Saying "I Do": Premarital Sex and Cohabitation as a Piece of the Divorce Puzzle, 18 NOTRE DAME J.L. ETHICS & PUB. POL'y 7, 67 n.276 (2004) (reasoning that "the Lawrence Court declared that the constitutional right of privacy protected consensual sexual behavior"); Falco, supra note 84, at 750 (arguing that the "due process right to privacy . . . was brought before the Supreme Court in Lawrence, and it was ultimately successful"); James A. Gardner, State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions, 91 GEO. L.J. 1003, 1042 (2003) (reasoning that Lawrence safeguards "a personal right of private sexual autonomy").
laws once thought necessary and proper in fact serve only to oppress.\textsuperscript{168}

When schools fail to provide a minimally adequate education, the children lose the opportunity to be autonomous "in a way unlikely ever to be undone."\textsuperscript{169}

Such a loss of autonomy is indeed the loss of "an important constitutional value."\textsuperscript{170} Even if the non-fundamental liberty interest in a minimally adequate education is a non-privacy application of substantive due process, the failure of such claims is not necessarily assured.\textsuperscript{171} The liberty interest asserted in this Note targets only grossly underperforming schools, and therefore, only seeks a judicial remedy for a narrowly defined subset of schools. The more perplexing issue is whether this liberty interest would survive \textit{Lawrence}'s brand of scrutiny.

2. Application of \textit{Lawrence}'s Global Brand of Scrutiny

\textit{Lawrence} portends a "careful scrutiny" of certain socially valuable, albeit non-fundamental, liberty interests by taking into account international authority.\textsuperscript{172} Under this global brand of scrutiny, the Court may recognize a non-fundamental liberty interest in a minimally adequate education against the State's interest.\textsuperscript{173} The State's interest is assuredly the preservation of "local control" over the financing of

\textsuperscript{168} See \textit{Lawrence}, 539 U.S. at 578–79; see also Hon. Diarmuid O'Scanlaim, \textit{Rediscovering the Common Law}, 79 NOTRE DAME L. REV. 755, 761 n.17, (2004) (reasoning that \textit{Lawrence} stands for the substantive due process right to sexual autonomy); Bogen, \textit{supra} note 96, at 333 n.4 (arguing that \textit{Lawrence} creates a "fundamental right to autonomy in intimate choices").

\textsuperscript{169} See \textit{Brown}, 347 U.S. at 494.

\textsuperscript{170} See Michael Heise, \textit{Equal Educational Opportunity and Constitutional Theory: Preliminary Thoughts on the Role of School Choice and the Autonomy Principle}, 14 J.L. & Pol. 411, 452 (1998) (reasoning that autonomy "remains an important value to consider in determining the nature, shape, and contour of normative constructions of our constitutional doctrine").

\textsuperscript{171} See Michael J. Phillips, \textit{The Nonprivacy Applications of Substantive Due Process}, 21 RUTGERS L.J. 537, 598 (1990) (arguing that "substantive due process's non-privacy applications are less likely to offend majoritarian values . . . [because] many of them involve institutions—e.g., prisons, public schools and universities, mental institutions, public employers—that are only indirectly subject to majority control in the first place").

\textsuperscript{172} See Civil Liberties for Urban Believers v. City of Chi., 342 F.3d 752, 769 (7th Cir. 2003) (Posner, J., dissenting) (reasoning that "discrimination against sensitive uses is to be given more careful, realistic, skeptical scrutiny by the courts than discrimination against purely commercial activities").

\textsuperscript{173} See \textit{Lawrence}, 539 U.S. 577–79; Plyler v. Doe, 457 U.S. 202, 244 (1982); \textit{Brown}, 347 U.S. at 493.
education, similar to the justification asserted in Rodriguez.174 "Local control" may appear off-limits, but many thought the same of "morals based" legislation.175 The Court in Lawrence was apparently not persuaded by either the implications of declaring morality an illegitimate interest176 or the ramifications of the decision on principles of federalism.177 The Court in Lawrence, however, was moved by the international recognition of the liberty interest.178

With this dramatic step, the Court opened the door to a hitherto unavailable argument for reconsidering Rodriguez, namely that the courts and governments of western countries overwhelmingly support a right to a minimally adequate education, if not a right to education in and of itself.179 The Court in Lawrence cast aside the most obvious problem that comes from importing authority from foreign jurisdic-

174 See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 54 (1973) (reasoning that "local taxation for local expenditures" is a sufficiently legitimate state interest); City of Pawtucket v. Sundlun, 662 A.2d. 40, 62 (R.I. 1995) (reasoning that "the preservation of local control [over education] is a legitimate state interest and that the current financing system is rationally related to that legitimate interest").
175 See Lawrence, 539 U.S. at 577–78 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)). Further, Justice Stevens's dissent argued that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice ...." 478 U.S. at 216 (Stevens, J., dissenting); see Ryan, supra note 15, at 7–8 (arguing that Justice Kennedy makes a "historically odd claim" in Lawrence that "the state has no legitimate interest in barring conduct because it is deemed to be deviant or immoral").
176 See Lawrence, 539 U.S. at 586 (Scalia, J., dissenting) (arguing that the breadth of this holding could signal the end to all morals-based legislation); Cenite, supra note 143, at 25 (suggesting that Lawrence points "toward elimination of obscenity law entirely").
177 See Rodriguez, 411 U.S. at 54; Rizzo v. Goode, 423 U.S. 362, 380 (1976) (stating that "principles of federalism ... play such an important part in governing the relationship between federal courts and state governments").
178 Lawrence, 539 U.S. at 576–77. There is an overlap between American due process jurisprudence and European codified rights. See, e.g., Costello-Roberts v. United Kingdom, 247 Eur. Ct. H.R. (ser. A) 47 (1993). In Costello-Roberts, the European Court of Human Rights decided that a seven-year-old who received corporal punishment could not claim a violation of article 3 (right against inhuman and degrading treatment), article 8 (right of privacy), or article 13 (right to effective remedy) of the European Convention. Id. at 54-57; see also Goss v. Lopez, 419 U.S. 565, 574 (1975). The European Court in Costello-Roberts looked to the fact that "the English courts would have been in a position to grant him appropriate relief." 247 Eur. Ct. H.R. (ser. A) at 57. Reaching the same result, the U.S. Supreme Court in Goss also relied in large part on the fact that the student had a remedy in state civil court. See 419 U.S. at 574.
179 See Charter of Fundamental Rights, supra note 21, art. 14, at 11. One European nation with a separate constitutional right to education is Greece. Greece Const. art. 16, § 2. The provision in the Greek Constitution reads, "[e]ducation constitutes a basic mission for the State and shall aim at the moral, intellectual, professional and physical training of Greeks, the development of national and religious consciousness, and at their formation as free and responsible citizens." Id.
tions into the analysis of American constitutional rights, namely that this law is simply different. 180 Nonetheless, the Court departed from prior substantive due process jurisprudence, suggesting that international authority helps establish a constitutional liberty interest. 181

Belgian Linguistics, decided by the European Court of Human Rights thirteen years before Rodriguez, demonstrates important international authority supporting the right to a minimally adequate education. 182 For the French-speaking parents living in Belgium, Belgian Linguistics struck down Belgium legislation that refused public funding to any French language school in a Flemish dominant-language region. 183 The European Court of Human Rights stated that the right to education "would be meaningless if it did not imply, in favour of its beneficiaries, the right to be educated in the national language or in one of the national languages, as the case may be." 184 Not only has the EU codified a fundamental right to education, 185 but its governing

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180 For instance, the courts of South Africa and the European Union require considerably greater socioeconomic rights than does the Supreme Court. See Mark S. Kende, The South African Constitutional Court’s Embrace of Socioeconomic Rights: A Comparative Perspective, 6 CHAP. L. REV. 137, 160 (2003) (contending that the "Supreme Court and American scholars could learn much from the South African Constitutional Court’s socio-economic decisions"); W. Kent Davis, Answering Justice Ginsburg’s Charge That the Constitution Is ‘Skimpy’ in Comparison to our International Neighbors: A Comparison of Fundamental Rights in America and Foreign Law, 39 S. TEX L. REV. 951, 990 (1998). Davis responds to a speech by Justice Ginsburg that characterized the U.S. Constitution as "skimpy" on human rights, whereas foreign jurisdictions offer more expansive fundamental rights. Id. at 951. Davis believes that turning to international law to resolve American fundamental rights could be a disastrous enterprise in that fundamental rights "vary because of vast differences in socioeconomic, historical and cultural backgrounds among the world’s nations." Id. at 990.

181 See Lawrence, 539 U.S. at 572–73, 576–77; Leo, supra note 113. For an interesting analysis of the many international treaties affirming the right to education that are signed by the United States, see Bitsenky, supra note 11, at 318.


184 Id.; see Kjeldsen, Buck Madsen, & Pederson v. Denmark (Pederson), 23 Eur. Ct. H.R. (ser. A) 3, 20 (1976). (reasoning that governments must provide "a right of access to educational institutions existing at a given time").

185 See CHARTER OF FUNDAMENTAL RIGHTS, supra note 21, art 14, at 11.
courts attach certain minimal obligations for governments to meet to preserve this right.186

Furthermore, the EU Charter clearly establishes the right of all persons, regardless of age, to education—a right far broader than a mere liberty interest in a minimally adequate level of education.187 The current right to education for the European Union reads:

Everyone has the right to education and to have access to vocational and continuing training. This right includes the possibility to receive free compulsory education. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.188

Belgian Linguistics and the EU Charter, therefore, have created a “positive right,” an unsettling proposition for those who hold the U.S. Constitution to be a “charter of negative rather than positive liberties.”189 The European Court’s decision in Belgian Linguistics, however, establishes a middle ground between Rodriguez and the recognition of a positive right to education.190

In deciding that certain governmental obligations attach to education, both the European Court of Human Rights and the EU Charter recognize a liberty interest in a minimally adequate education.191 As one commentator writes, the right to education found in international jurisdictions has evolved “progressively, in stages.”192 The beg-

186 See Belgian Linguistics, 6 Eur. Ct. H.R. (ser. A) at 25, 66; Dove v. Scottish Ministers, 2002 Sess. Cas. 257 (Scot. Extra Div.). In Dove, a Scottish court concluded that the EU’s right to education should not extend to the management of the school, but only to the effectiveness of the instruction. 2002 Sess. Cas. at 265. The Court noted that “art 2 relates to the content of the education provided, rather than administrative arrangements for its provision.” Id. at 266.

187 See CHARTER OF FUNDAMENTAL RIGHTS, supra note 21, art. 14, at 11.

188 See DeShaney v. Winnebago County, 489 U.S. 189, 196 (1989) (reasoning that the Due Process Clauses confer “no affirmative right to government aid, even when such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual”); Jackson v. Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983).

189 See Belgian Linguistics, 6 Eur. Ct. H.R. (ser. A) at 25, 66 (reasoning that a student must be taught in the national language of the country in which the school is located).


192 Bitensky, supra note 11, at 617.
gars of our educational system—those who attend grossly underper- 
forming schools in America—cannot be choosers. The Supreme 
Court’s first step must be the step the European Court took in Bel-
 gian Linguistics—to establish a baseline level of education. Under 
Lawrence’s global brand of scrutiny, therefore, the Court should 
recognize the non-fundamental liberty interest in a minimally ade-
quately educate by relying upon the international authority of the EU Charter 
and cases like Belgian Linguistics.

B. When Precedent Doesn’t Bind: Applying Lawrence’s 
Stare Decisis Test to Rodriguez

Under the final remarkable aspect of Lawrence, the Court’s new 
stare decisis test, the Rodriguez decision does not bind the Supreme 
Court in deciding the constitutionality of a liberty interest in a mini-
"mally adequate education. To be sure, the stare decisis test poses 
the same logistical risk faced by all multifactor balancing tests— 
"namely, which factors weigh the most. However, the two principal 
factors in Lawrence’s stare decisis test—the impact of subsequent Su-
preme Court decisions and the degree that states have detrimentally 
relied on the decision—demonstrate that stare decisis privileges 
should not apply to Rodriguez. Two decisions post-dating 
Rodriguez militate against employing 
stare decisis in our analysis of the liberty interest in a minimally ade-
quate education.\textsuperscript{198} Both \textit{Papasan} and \textit{Plyler} resulted in "serious erosion" of \textit{Rodriguez}'s broad holding that no fundamental right to education exists in the Constitution.\textsuperscript{199} \textit{Papasan} considered "unsettled" the narrower right to a minimally adequate education.\textsuperscript{200} After \textit{Papasan}, it is reasonable to suggest that the net of \textit{Rodriguez} does not cast as widely as once thought.\textsuperscript{201} Therefore, a more limited right to education, such as the liberty interest in a minimally adequate education, warrants discussion rather than blind deference to precedent.\textsuperscript{202} Seemingly, \textit{Rodriguez} also would have been dispositive of the issue in \textit{Plyler}, the right to education for undocumented schoolchildren.\textsuperscript{203} Instead, the Court again embraced a more relaxed view of \textit{Rodriguez}.\textsuperscript{204} \textit{Plyler}, like \textit{Papasan}, demonstrates that the \textit{Rodriguez} holding is weakest at its margins.\textsuperscript{205} Similar to the way that \textit{Casey} and \textit{Romer} eroded \textit{Bowers}, \textit{Papasan} and \textit{Plyler} have eroded \textit{Rodriguez}.\textsuperscript{206} The subsequent decisions of the Court, therefore, certainly do not foreclose a challenge that asserts the liberty interest in a minimally adequate education, a curtailed right to education at the margins of \textit{Rodriguez}.\textsuperscript{207}

\textsuperscript{198} See \textit{Papasan}, 478 U.S. at 265; \textit{Plyler} v. Doe, 457 U.S. 202, 202 (1982); Molly S. McUsic, \textit{The Future of Brown v. Board of Education: Economic Integration of the Public Schools}, 117 \textit{HARV. L. REV.} 1334, 1346 n.75 (2004) (noting that "if plaintiffs could prove that they were not receiving a minimally adequate education," \textit{Papasan} and \textit{Plyler} would entitle their claims to "heightened scrutiny under the Equal Protection Clause").

\textsuperscript{199} See \textit{Lawrence}, 539 U.S. at 576; \textit{Papasan}, 478 U.S. at 285; \textit{Plyler}, 457 U.S. at 223 (noting how the "stigma of illiteracy" would mark the plaintiffs "for the rest of their lives" if the law was not changed).

\textsuperscript{200} 478 U.S. at 285.

\textsuperscript{201} Id.

\textsuperscript{202} See \textit{id}.

\textsuperscript{203} See \textit{Plyler}, 457 U.S. at 221 (noting the "importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child").

\textsuperscript{204} Id. at 221–23; see Eric P. Christofferson, Note, \textit{Rodriguez Reexamined: The Misnomer of "Local Control" and a Constitutional Case for Equitable Public School Funding}, 90 \textit{GEOL. L.J.} 2553, 2575 (2002) (arguing that the importance of education in \textit{Plyler} demonstrates how "Rodriguez did not foresee heightened scrutiny in education cases").

\textsuperscript{205} \textit{Plyler}, 457 U.S. at 221 (noting that "education has a fundamental role in maintaining the fabric of our society"); see Roni R. Reed, Note, \textit{Education and the State Constitutions: Alternatives for Suspended and Expelled Students}, 81 \textit{CORNELL L. REV.} 582, 591 n.74 (1996) (reasoning that \textit{Plyler} "enunciated the importance of education and rested not only on the strength of the education right, but also on the consequences of the denial of education to the children affected").


\textsuperscript{207} See \textit{Lawrence}, 539 U.S. at 573–78; Michael Heise, \textit{State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy}, 68 \textit{TEMP. L. REV.} 1151, 1156–57 (1995) (reasoning that "whether the U.S. Constitution ensures a minimal amount of educational services remains the subject of continued debate," and that \textit{Plyler} "fuels this debate").
Perhaps Justice Kennedy's strongest argument for abandoning Bowers, and stare decisis in the process, was that state governments had not relied to their detriment upon the seventeen-year-old decision.\(^{208}\) Justice Kennedy implies that only thirteen state court systems detrimentally relied on Bowers in deciding the merits of state law challenges to anti-sodomy laws.\(^{209}\) In the context of a liberty interest in a minimally adequate education challenge, therefore, Lawrence calls for a determination of the degree to which states detrimentally relied on Rodriguez.\(^{210}\) Strong, pervasive reliance on Rodriguez by state courts would militate against overturning this precedent, whereas scant reliance on Rodriguez enables the Court to modify the precedent of Rodriguez and recognize the liberty interest in a minimally adequate education.\(^{211}\)

A survey of state court decisions indicates no significant detrimental reliance on Rodriguez, and therefore, that no stare decisis privileges should apply.\(^{212}\) State courts typically turn to Rodriguez when

\(^{208}\) See Lawrence, 539 U.S. at 573-78.

\(^{209}\) See id.

\(^{210}\) Id. at 577 (reasoning that "there has been no individual or societal reliance on Bowers of the sort that could counsel against overturning its holding once there are compelling reasons to do so"); cf. Bill Swinford, Shedding the Doctrinal Security Blanket: How State Supreme Courts Interpret Their State Constitutions in the Shadow of Rodriguez, 67 TEMP. L. REV. 981, 992 n.61 (1995) (noting that "[i]n every case brought before a state supreme court after Rodriguez that involved education finance, the state court found Rodriguez to be controlling in claims under the Fourteenth Amendment").

\(^{211}\) See Lawrence, 539 U.S. at 573-78. One commentator recently also noted how "state courts have the ability to influence indirectly the content of nationally guaranteed liberties through their rulings under cognate provisions of state constitutions." Gardner, supra note 165, at 1042.

there are challenges to state systems for the funding of public education based on state constitutional provisions.\textsuperscript{213} For example, the California Supreme Court grappled with the \textit{Rodriguez} decision and ultimately rejected its reasoning in the post-\textit{Rodriguez} ruling on school finance, the \textit{Serrano v. Priest (Serrano II)} decision.\textsuperscript{214} The court noted, “We do not think it open to doubt that the \textit{Rodriguez} majority had


\textsuperscript{213} See, e.g., \textit{Serrano II}, 557 P.2d at 929. \textit{Rodriguez} did not close the door on challenges to state funding systems. See \textit{id}. The progenitor of this type of challenge was \textit{Serrano I}, in which, prior to \textit{Rodriguez}, the California Supreme Court found that the state’s funding of education disproportionately affected those students living in low-tax generating school districts. See \textit{Serrano I}, 487 P.2d at 1241.

States sometimes turn to \textit{Rodriguez} when there are alleged violations of state fundamental rights and find \textit{Rodriguez} to be instructive in deciding whether a certain right is “fundamental.” See, e.g., \textit{Hammond v. Comm’r of Corr.}, 792 A.2d 774, 791 (Conn. 2002) (holding that credit for pre-sentence incarceration is not a fundamental right, and citing \textit{Rodriguez} for the principle that “[i]t is not the province of [the courts] to create substantive constitutional rights in the name of guaranteeing equal protection of the laws”); \textit{Doe v. Superintendent of Schs.}, 653 N.E.2d 1088, 1097-98 (Mass. 1995). The state courts observe \textit{Rodriguez} as an example of judicial restraint in the area of fundamental rights, but do not find the restraint exercised in \textit{Rodriguez} as the motivating reason for not recognizing fundamental rights in state law. See, e.g., \textit{Webster v. Ryan}, 729 N.Y.S.2d 315, 433 n.15 (Fam. Ct. 2001) (holding that a child had a fundamental right to maintain contact with person who held a parent-like relationship with the child and citing \textit{Rodriguez} for the principle that “some things that most people would probably consider as a constitutional (or fundamental) right are not so at all”).

\textsuperscript{214} 557 P.2d at 951.
considerable difficulty accommodating its new approach to certain prior decisions, especially in the area of fundamental rights."215

Admittedly, Serrano II is the exception to these state funding cases in its express rejection of the Rodriguez methodology.216 Yet state supreme courts have at most seen Rodriguez as mildly persuasive in deciding whether a state funding scheme violates the respective state constitution.217 Some of these courts have adopted the rational basis level of scrutiny for issues involving education.218 Northshore School District No. 417 v. Kinneer, the case that relies most heavily on Rodriguez, however, is suspect after Seattle School District No. 1 of King County v. State.219 In Seattle School District No. 1, the Washington Supreme Court did not consider Rodriguez to be a "leading" or "controlling" case as it

215 Id.
216 Id.
217 See Matanuska-Susitna Borough Sch. Dist., 931 P.2d at 402 (reasoning that although the Alaska Constitution "is stricter in its protection of individual rights than its federal counterpart," the plaintiffs failed to show that they had been disparately affected, unlike the "plaintiffs in ... Rodriguez did"); Lujan, 649 P.2d at 1016-17 (disagreeing with the Rodriguez fundamental rights test, but agreeing with the decision's approach to the right to education as a prerequisite to the right to vote); Horton I, 376 A.2d at 371 (reasoning that significant factual similarities with Rodriguez and referring to the decision as persuasive authority "very relevant"); McDaniel, 285 S.E.2d at 167 (deeming Rodriguez to be an "important" case that provides "guidance to the states"); Thompson, 537 P.2d at 646 (agreeing with Rodriguez's cautionary language that if state funding systems are to fall, then other services such as police or fire protection "might be subjected to the same fate"); Edgar, 672 N.E.2d at 1196 (reasoning that plaintiffs in challenging state funding schemes have failed to carry burden announced in Rodriguez, that discrimination is sufficiently invidious to a fundamental right); Unified Sch. Dist. No. 229,885 P.2d at 1189 (agreeing with Rodriguez's conclusion that "courts should avoid excessive involvement in questions of taxation"); Sch. Admin. Dist. No. 1, 659 A.2d at 857 (reasoning that rational basis standard adopted in Rodriguez is the most appropriate level of scrutiny); Hornbeck, 458 A.2d at 786 (agreeing with Rodriguez, that "whether a claimed right is fundamental does not turn alone on the relative desirability or importance of that right" and that no discriminatory purpose was present in the state system of financing education); Nyquist, 439 N.E.2d at 359 (reasoning that Rodriguez's legitimate interest, local control, constitutes a sufficient basis for state funding system); Leandro v. State, 488 S.E.2d 249, 260 (N.C. 1997) (agreeing with Rodriguez principle that the complexity of the education reform debate militates against finding the state system unconstitutional); Olsen, 554 P.2d at 144-45 (reasoning that existence of some inequality, like that found in Rodriguez, does not provide a reason for striking down the entire public school funding scheme); Northshore Sch. Dist. No. 417, 530 P.2d at 200 (finding the school financing scheme to be constitutional and Rodriguez to be both a "leading case" and "a direct and controlling ruling"); Chafin, 376 S.E.2d at 117-18 (reasoning that individual districts could utilize excess levies for education without running afoul of the state equal protection clause and citing Rodriguez's rational basis review as persuasive).
218 See, e.g., Thompson, 537 P.2d at 646; Sch. Admin. Dist. No. 1, 659 A.2d at 857; Nyquist, 439 N.E.2d at 359; Chafin, 376 S.E.2d at 117-18.
had in *Northshore School District No. 417*.220 Instead, *Seattle School District No. 1* implicitly rejected *Rodriguez*, finding that "there can be compliance with the State's [constitutional] duty only if there are sufficient funds derived through dependable and regular tax sources to permit school districts to carry out a basic program of education."221

If decisions such as *Northshore School District No. 417* represent a high-water mark for state courts' reliance on *Rodriguez*, that mark has never been surpassed.222 The remaining decisions regarding state funding systems can be loosely categorized, with each category marked by less and less reliance placed on *Rodriguez*. The first grouping consists of decisions that find *Rodriguez* informative, yet unpersuasive in determining the constitutionality of state funding schemes.223 These decisions typically acknowledge the legal reasoning in *Rodriguez*, such as Justice Powell's level of scrutiny, but ultimately disregard this aspect.224 A second tier observes the federal approach to the fundamental right to education, but rejects the *Rodriguez* approach as inapplicable to the analysis of state constitutions.225 In this category, the

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220 See *Seattle Sch. Dist. No. 1*, 585 P.2d at 75-76; *Northshore Sch. Dist. No. 417*, 530 P.2d at 200-01.
221 See *Seattle Sch. Dist. No. 1*, 585 P.2d at 76-77.
222 See infra notes 221-225 and accompanying text.
223 See *Alabama Coalition for Equity, Inc.*, 1993 WL 204083, at *57 (reasoning that "Rodriguez does not control" because "the question is instead, the nature of the right to education under the constitution of Alabama" and that the present system of public schools in Alabama violates the state constitution); *Lake View Sch. Dist. No. 25*, 91 S.W.3d at 499 (following the rational basis level of review of *Rodriguez* but ultimately finding that the current public school funding system violated the state constitution); *Clarendon II*, 703 A.2d at 1358-59 (noting the *Rodriguez* approach to fundamental rights, but finding a "[s]tate funded constitutionally adequate education is a fundamental right" under the state constitution); *Robinson I*, 303 A.2d at 282 (reasoning that *Rodriguez* approach to fundamental rights "vulnerable" to criticism in holding that the state funding scheme violates state constitution); *Fair Sch. Fin. Council of Okla., Inc.*, 746 P.2d at 1149 (rejecting the *Rodriguez* fundamental rights tests as "inappropriate," but finding that equal expenditures per pupil was not guaranteed by express terms of the state constitution); *Edgewood III*, 826 S.W.2d at 494 (citing *Rodriguez* for the principle that education plays a vital role in society, but ultimately finding that state funding scheme based on *ad valorem* tax violated state constitution); *Vincent v. Voight*, 614 N.W.2d 388, 414 (Wis. 2000) (noting *Rodriguez* in that there is no fundamental right to education under the Constitution and finding that existing state financing scheme did not violate state constitution); *Kukor v. Grover*, 436 N.W.2d 568, 579 (Wis. 1989) (upholding state financing scheme as "consistent with principles articulated by the United States Supreme Court in *Rodriguez*.")
224 See, e.g. *Edgewood III*, 826 S.W.2d at 494.
225 See *Serrano II*, 557 P.2d at 951 (reasoning that state funding of education in violation of state constitution and sharing the curiosity of Justice Marshall's dissent in *Rodriguez*); *Pauley*, 255 S.E.2d at 864 (reasoning that examination of *Rodriguez* reveals "an embarrass­ing abundance of authority . . . by which the majority might have decided that education is a fundamental right of every American").
particular state court cuts its own fundamental rights path without regard to the federal approach.\textsuperscript{226} Third, there are decisions in which the state court merely observes the federal approach in \textit{Rodriguez} without comment, thereby implying very little reliance on \textit{Rodriguez}.

\textsuperscript{227} Similarly and lastly, some state courts ignore \textit{Rodriguez} completely.\textsuperscript{228}

\textsuperscript{226} See Serrano II, 557 P.2d at 951; Paulley, 255 S.E.2d at 864.

\textsuperscript{227} See Roosevelt Elementary, 877 P.2d at 814 (noting that \textit{Rodriguez} stands for only the principle that the U.S. Constitution does not recognize a right to education, but that the Arizona Constitution does); Green II, 212 N.W.2d at 714 (noting that \textit{Rodriguez} does not foreclose state constitutional challenges and finding that state funding does not violate state constitution); Sheen, 505 N.W.2d at 313 (reasoning that interpretation of state constitution is not limited to those rights the Supreme Court deems fundamental); Abbot I, 495 A.2d at 389 (holding that the Commissioner of Education should first consider the merits of the plaintiffs' allegation, but dismiss the wealth-based classification in light of \textit{Rodriguez}); Bismarck Pub. Sch. Dist. No. 1, 511 N.W.2d at 255 (limiting \textit{Rodriguez} to federal challenges and recognizing that the "state constitution may afford broader rights than those granted under the equivalent provision of the federal constitution"); City of Pawtucket, 662 A.2d at 49 (citing \textit{Rodriguez} for the proposition that the delegates at the 1986 state constitutional convention were cognizant of the fundamental right to education, but ultimately such a right was rejected); Tenn. Small Sch. Sys., 851 S.W.2d at 152 (citing \textit{Rodriguez} for the principle that "local control" is a sufficient reason for a disparate state spending scheme); Brigham, 692 A.2d at 391 (citing \textit{Rodriguez}, but limiting the decision's importance to the U.S. Constitution to when there is a "virtual absence" of an education clause); Buse, 247 N.W.2d at 147 (striking down a redistribution of property tax revenues to poor school districts and observing that \textit{Rodriguez} is not controlling since the state constitution has an education clause); Washakie County Sch. Dist. No. One, 606 P.2d at 319 (reasoning that the state financing system violated state constitution, but noting the decision in \textit{Rodriguez}).

\textsuperscript{228} See Coalition for Adequacy & Fairness in Sch. Funding, Inc., 680 So. 2d at 408 (reasoning that the state system did not violate state constitution because plaintiff failed to define "adequacy" as a judicially cognizable term); Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989) (holding that state's common school system violated state constitution); Charlet, 713 So. 2d at 1199 (reasoning that state's scheme of funding public schools did not violate state constitution); McDuffy, 615 N.E.2d at 516 (holding that the state constitution obligated the Commonwealth to provide an adequate education); CEE, 967 S.W.2d at 62 (reasoning that educational funding system did not violate state constitution); Helena Elementary Sch. Dist. No. 1, 769 P.2d at 684 (reasoning that public school funding violated state constitutional guarantee of equal educational opportunity); Gould, 506 N.W.2d at 349 (dismissing challenge to statutory funding scheme because of procedural error); Campaign for Fiscal Equity, Inc., 655 N.E.2d at 661 (reasoning that challenge to state funding scheme constituted a viable cause of action); DeRolph, 677 N.E.2d at 733 (reasoning that public funding violates constitutional provision of a thorough and efficient system of common schools throughout the state); Danson, 399 A.2d at 360 (reasoning that school funding scheme did not violate provisions of the state constitution); Abbeville County Sch. Dist., 515 S.E.2d at 535 (reasoning that school funding scheme challenge was not a cognizable equal protection claim); Richland County, 364 S.E.2d at 470 (reasoning that school funding scheme did not violate state constitution by taking into account individual wealth of each school district); Edgewood IV, 917 S.W.2d at 717 (reasoning that public school financing system did not violate state constitution); Edgewood I, 777 S.W.2d at 391 (holding that local district financing showing a 700 to 1 ratio between districts violated state constitution); Scott, 443 S.E.2d at 138 (reasoning that state constitution did not mandate "substantial
This absence suggests that the outmoded approach of the federal government matters little, if at all, to the states.

In sum, these decisions support the conclusion that there has been scant detrimental reliance specifically placed upon the Court’s 1973 decision in *Rodriguez*. As a result, the *Lawrence* stare decisis test, as applied to *Rodriguez*, suggests that the Court need not be bound to *Rodriguez* when evaluating the liberty interest in a minimally adequate education. With *Rodriguez* not foreclosing less sweeping educational rights, the Court may be more willing to recognize a liberty interest in a minimally adequate education.

**Conclusion**

For the last thirty years, *San Antonio v. Rodriguez* has stood as the white elephant in the debate over the fundamental right to minimally adequate education; *Rodriguez* gloomily forecasted that the Due Process Clause did not protect this right. *Lawrence v. Texas*, however, suggests that only a mere shadow of the elephant still remains. If the Supreme Court follows *Lawrence*'s global brand of scrutiny and its reconfigured stare decisis test, the Court could recognize a non-fundamental liberty interest in a minimally adequate education, and in the process, modify the rigid holding of *Rodriguez*. To be sure, this liberty interest would not be a panacea for schools such as C.O. Greenfield Middle School, but it would raise awareness, and more importantly, provide some tangible remedy for America’s forgotten schools.

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229 See Swinford, supra note 210, at 1001 (noting how “most courts also distanced themselves . . . from the United States Supreme Court’s specific application of the test in the context of claims against state systems of education finance”).