A "Right" to Access to Literacy: Due Process & Justifying Compulsory Education

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I. INTRODUCTION

In 2017, students at Raines Elementary School in Jackson, Mississippi, arrived each day to a dark, dilapidated building where lights flickered and ceilings and walls were in visible disrepair.[1] There were not enough textbooks to go around, so the students worked from photocopies—when they had that option.[2] The students not only lacked textbooks, but they also lacked access to experienced teachers, tutoring programs, and even basic supplies like toilet paper.[3] That year, Raines Elementary received an "F" rating from Mississippi's Department of

1. Brad Bennett, *SPLC Lawsuit Challenging Mississippi's Failure to Provide a Uniform Public School System Moves Forward*, S. POVERTY L. CTR. (Apr. 27, 2020), https://www.splcenter.org/news/2020/04/27/splc-lawsuit-challenging-mississippis-failure-provide-uniform-public-school-system-moves.

2. *Id.* One student who attended Raines Elementary was a plaintiff in a lawsuit against the state of Mississippi alleging that the state's current constitution violates a provision of the Mississippi Readmission Act, which formally restored the state's place in the Union after the Civil War. *See* Williams v. Reeves, 954 F.3d 729, 731–33 (5th Cir. 2020). The Act provided that Mississippi's readmission to the Union was conditioned on, among other things, the state never amending its constitution in a way that would deprive any citizen or class of citizens of "school rights and privileges" guaranteed by the state's constitution. *Id.* at 732–33.

3. Bennett, *supra* note 1.

Education.[4] In 2019, only 15.2 percent— about twenty-two of Raines Elementary School's 150 third-through-fifth-grade students—were considered "proficient" in reading.[5]

In 2018, nearly 1,000 miles away, students in Detroit, Michigan, faced similar challenges.[6] The Detroit students alleged that their schools lacked qualified teachers and failed to meet city health and

4. *2017 Accountability,* MISS. DEP'T OF EDUC., https://www.mdek12.org/OPR/Reporting/Accountability/2017 (last visited Sept. 22, 2021).

5. *2019 Accountability*, MISS. DEP'T OF EDUC., https://www.mdek12.org/OPR/Reporting/Accountability/2019 (last visited Sept. 24, 2021). After accessing the "2019 Accountability" source cited, the link that says "2019 Accountability Results" is where this data is from. It is an Excel file, and the school-specific data is found on the "700 Point Schools" sheet. There is a column for reading proficiency, which shows the percentage of students who took and scored proficient on the state reading assessment that year for each listed school. *Id.* The total number of students in the tested grades for that year is found on a different page on the MDE website. *Public Reporting*, MISS. DEP'T OF EDUC., https://newreports.mdek12.org (last visited Sept. 24, 2021). To arrive at the roughly 22 students figure, I used this student enrollment data to calculate the total number of third-through-fifth-grade students at Raines Elementary during the 2018-19 school year, which is the total number of students who took the state test at Raines that year. *See Mississippi Academic Assessment Program (MAAP)*, MISS. DEP'T OF EDUC., https://www.mdek12.org/OSA/MAAP (last visited Sept. 24, 2021). I then multiplied 0.15 (percentage of students who scored proficient in reading) by 150 (total test-taking students). Under the Every Student Succeeds Act, public school students must take state-administered standardized tests in core subjects, including reading, to measure their academic achievement. *See* MISS. DEP'T OF EDUC., MISS. CONSOLIDATED ST. PLAN, 18–19 (2019), https://www.mdek12.org/sites/default/files/Offices/MDE/SSE/mississippi-essa-consolidated-state-plan-usde-v6-2019.09-submitted-clean.pdf. Under Mississippi's testing and accountability model, third-through-eighth-grade students take the state test. They are then classified into levels of proficiency—based on their test scores—that range from one to five, with one being the lowest and five being the highest. Students whose scores place them in at least level four are considered proficient. Students who are considered proficient are generally meeting grade-level skill expectations. Emma Crawford Kent, *Student Achievement Rising Across Region*, NE. MISS. DAILY J. (Aug. 18, 2017), https://www.djournal.com/news/education/student-achievement-rising-across-region/article_3efdc05f-1b2b-5f94-a1a5-888f41fa24f8.html (explaining Mississippi's state test scoring model and proficiency levels).

6. *See* Gary B. v. Whitmer, 957 F.3d 616 (6th Cir.), *vacated*, 958 F.3d 1216 (6th Cir. 2020).

safety codes.[7] According to the Detroit students, their schools also failed to provide literacy instruction or even textbooks and reading materials.[8] The proficiency rates in reading at these schools were near zero.[9]

The students in Jackson and Detroit must attend their schools, with or without textbooks and safe school facilities, according to state law.[10] In every state, compulsory education laws require children to attend school, regardless of whether that school adequately educates them.[11] This conundrum raises several questions that beg to be answered: Why do states require children to attend schools? What justifies requiring children to attend schools by law if those schools do not educate them? Is there a minimally adequate level of education schools must provide? The latter of these questions has generated litigation along with calls for recognition of a fundamental right to education under the United States Constitution for years.

The Detroit students became plaintiffs in two of the latest in a long line of right-to-education cases, *Gary B. v. Snyder* and *Gary B. v. Whitmer*, in which they argued that the state of Michigan violated a group of Detroit students' due process rights when it failed to provide them with a minimal level of education, specifically access to literacy skills.[12] Although the parties ultimately settled, the *Gary B.* cases[13] show a new way forward for education advocates seeking recognition of a fundamental right to education. Further, the cases demonstrate that this right could be found by applying a negative-rights due process theory to public schools' failure to provide students with minimally

7. *Id.* at 624–26.

8. *Id.* at 626–27.

9. *Id.* at 627.

10. *See* MISS. CODE ANN. § 37-13-91 (2021); MICH. COMP. LAWS § 380.1561 (2020).

11. *See* Cassidy Francies & Zeke Perez Jr., *50-State Comparison: Free and Compulsory School Age Requirements*, EDUC. COMM'N OF THE STS. (Aug. 19, 2020), https://www.ecs.org/50-state-comparison-free-and-compulsory-school-age-requirements (giving an overview of all 50 states' compulsory education requirements and noting the general types of exemptions from those requirements).

12. 313 F. Supp. 3d 852, 871–75 (E.D. Mich. 2018).

13. The case was appealed to the Sixth Circuit, where the case name changed to Gary B. v. Whitmer. *See* Gary B. v. Whitmer, 957 F.3d 616 (6th Cir.), *vacated*, 958 F.3d 1216 (6th Cir. 2020). Throughout this Note, they may be referred to collectively as "the Gary B. cases."

adequate education—particularly, access to basic literacy skills.[14] If the state's interest in requiring students to attend schools[15] is to prepare citizens for participation in our democracy and economy, then requiring students to attend schools that fail to provide even the most basic level of education—foundational literacy skills—is not justifiable.

Under this theory, students would be entitled to some level of basic education under the Due Process Clause to justify the deprivation of liberty imposed upon them by the state's compulsory attendance laws. This negative-rights argument—that schools that fail to provide a basic education yet require students to attend school by law violate due process—may be the best way to gain recognition of some fundamental right to education under the U.S. Constitution, particularly because the Supreme Court has been historically hesitant to create affirmative or positive fundamental rights.[16] History, compulsory education case law, and Supreme Court precedent indicate that the government has a legitimate interest in equipping young people with the basic educational skills that allow them to participate in society. Thus, the government can enforce compulsory education laws despite their deprivation of students' individual liberty interests. The question becomes: Are compulsory education laws still justifiable when they are ineffective at providing students with a basic education?

The Supreme Court continually leaves open the question of whether any right to education can be found under the U.S. Constitution. Although the plaintiffs in the *Gary B.* cases ultimately settled their case, their negative-rights due process claim and the Sixth

14. The Sixth Circuit held that there was an affirmative fundamental right to access to literacy under the Due Process Clause, accepting the plaintiffs' positive-rights argument. *Id.* The court remanded the case, and an *en banc* poll was called, with most of the Sixth Circuit judges voting in favor of rehearing. Gary B. v. Whitmer, 957 F.3d 616, 662 (6th Cir.), *vacated*, 958 F.3d 1216 (6th Cir. 2020). The panel opinion was thus vacated. *Id.* However, the parties settled before rehearing took place. Gary B. v. Whitmer, Nos. 18-1855/1871, 2020 U.S. App. LEXIS 18312, at *1 (6th Cir. June 10, 2020).

15. For purposes of this Note, "schools" and "education" refer to public schools and public education funded by state and local governments, unless otherwise indicated.

16. *See* Washington v. Glucksberg, 521 U.S. 702, 720 (1997). *See also Snyder*, 313 F. Supp. 3d at 872 ("Even when the Supreme Court has ventured to recognize a right as fundamental, it has typically limited them to 'negative rights'—i.e., the right to be free from restraint or barrier.").

Circuit's recognition of its potential success, hinted at a new path for public education advocates seeking to secure some minimal level of adequate education for public school students. The Supreme Court should recognize a minimum level of education necessary to compel students to attend schools as this would ensure students' due process rights are not violated by requiring them to attend "schools in name only" that fail to give them access to foundational literacy skills.[17]

This Note proposes that a negative-rights due process argument is necessary to resolve the Supreme Court's unwillingness to recognize a federal right to education. Part II of this Note will overview the Supreme Court's precedent regarding whether a federal constitutional right to education exists, leading up to the *Gary B.* cases. This part will also explain the history of compulsory education laws, states' interests in public education, and the due process framework. Part III of this Note will apply the negative-rights theory to compulsory education laws, showing that requiring students to attend schools without providing some level of education runs afoul of the Due Process Clause. This part will also explain why literacy is necessary and why access to basic literacy skills should be guaranteed. Part IV proposes that the Supreme Court should recognize an implied right to access to literacy as a floor of minimally adequate education. This part will show how the Court would recognize the right and evaluate a claim brought under this negative-rights theory. This part also proposes that the Court should apply a professional judgment approach to determining whether schools have provided access to literacy sufficient to protect students' due process rights. Finally, this part will explore policy rationales supporting the recognition of an implied right to access to literacy. Part V concludes by referencing the main points of this Note and the proposed solution.

II. BACKGROUND: EDUCATION, LITIGATION & SUBSTANTIVE DUE PROCESS

While public education in the United States has been an important function of state governments since before the Civil War, compulsory education laws did not become commonplace until the early

17. The *Gary B.* plaintiffs' complaint characterized their schools as "schools in name only" because of the conditions of the buildings and lack of resources and education they alleged the schools afforded them. *Whitmer*, 957 F.3d at 624 (citing the plaintiffs' complaint).

1900s.[18] At that time, states began to require children to attend school until a certain age to prepare them to carry on the functions of a republican government as informed citizens.[19] As states began exercising more control over schools and students, the Supreme Court increasingly became involved in challenges to state laws governing school operations and funding.[20] In the latter part of the twentieth century, these cases seem to have solidified the Court's stance against recognizing a general fundamental constitutional right in public education while leaving the door open to recognizing some minimally adequate level of education as a right.[21] Most of these challenges have been brought under the Equal Protection and Due Process clauses, and as a result, the Court's substantive due process doctrine has developed primarily through plaintiffs challenging state education laws .[22]

A. History of Public Education in the United States

Providing public education historically fell to the states, with each state handling the task of educating its citizens differently.[23] Through the years, states have formed state departments of education,

18. Chelsea Lauren Chicosky, Comment, *Restructuring the Modern Education System in the United States: A Look at the Value of Compulsory Education Laws*, 15 BYU EDUC. & L.J. 1, 15–16 (2015).

19. *See id.* at 13–16 (explaining the rise of compulsory education in the U.S.); Karen Clay, Jeff Lingwall, & Melvin Stephens, Jr., *Do Schooling Laws Matter? Evidence from the Introduction of Compulsory Attendance Laws in the United States* 9 (Nat'l Bureau of Econ. Rsch., Working Paper No. 18477, 2012); *see also* Justin R. Long, *Democratic Education and Local School Governance*, 50 WILLAMETTE L. REV. 401, 411 (2014) (explaining that one purpose of public education is to develop self-governing citizens).

20. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Brown v. Bd. of Educ., 347 U.S. 483 (1954); Wisconsin v. Yoder, 406 U.S. 205 (1972) (involving various challenges to state education laws under the Due Process and Equal Protection clauses).

21. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); Plyler v. Doe, 457 U.S. 202 (1982); Papasan v. Allain, 478 U.S. 265 (1986); Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450 (1988) (holding that education generally is not a fundamental right).

22. *See* cases cited *supra* note 20 (showing claims arising in each case under the Equal Protection Clause, the Due Process Clause, or both).

23. *The Federal Role in Education*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/overview/fed/role.html (last updated June 15, 2021).

delegated educational-decision-making to school boards and superintendents, and passed additional state education laws, including compulsory education laws.[24] All fifty states now have some form of compulsory education law that requires students to attend school.[25] The laws generally require parents to send their children to school from a certain minimum age until a maximum age.[26] Parents are subject to various penalties for noncompliance with compulsory education laws, depending on the jurisdiction, but compulsory education laws are generally enforced through truancy actions.[27] Truancy actions filed against students or parents can lead to incarceration, fines, loss of driving and other privileges, and more.[28]

Supreme Court precedent, history of the states, and the necessity of basic skills to become informed, productive citizens of a democracy clearly demonstrates states' interest in preparing young people to actively participate in the democratic process. By the early 1900s, many states added compulsory education requirements to their public education systems.[29] Later, in 1948, the Supreme Court of Virginia in *Rice v. Commonwealth* found that "the legitimate interest of the State in the welfare and education of its children is universally recognized," noting that "[t]here is nothing which contributes more to the development of the highest type of *citizenship* than the intelligence, training, and character-building which are the products of our schools."[30]

The history of public education, even before compulsory education laws, shows the states' interest in educating citizens lies in

24. *See id.;* Nadav Shoked, *An American Oddity: The Law, History, and Toll of the School District*, 111 NW. U.L. REV. 945, 955–57 (2017).

25. Chicosky, *supra* note 18, at 21.

26. *Id.* at 21–25. The requirements are not absolute, and parents have the flexibility to choose private school or homeschool for their children, although some proof of education is typically required to comply with state law. *Id.* at 26.

27. Judith G. McMullen, *"You Can't Make Me!": How Expectations of Parental Control over Adolescents Influence the Law*, 35 LOY. U. CHI. L.J. 603, 622–23 (2004).

28. Dean Hill Rivkin, *Truancy Prosecutions of Students and the Right [to] Education*, 3 DUKE F. FOR L. & SOC. CHANGE 139, 141 (2011); *see also* McMullen, *supra* note 27, at 623–24 (describing examples of penalties imposed upon students and parents for noncompliance with compulsory education laws).

29. Chicosky, *supra* note 18, at 15–16.

30. Rice v. Commonwealth, 49 S.E.2d 342, 348 (Va. 1948) (emphasis added).

preparing them for democratic participation and citizenship.[31] As states set up their own governments, they also began to form education systems, and "the function of education evolved to serve the needs of democracy and the formation of the republic. Education would create citizens able to participate in democracy . . . ."[32] Five of the original thirteen states adopted state constitutions in the late 1700s that referenced support for education, with the Massachusetts Constitution noting that providing education for its citizens was "necessary for the preservation of their rights and liberties."[33] In 1787, the federal government, through the Northwest Ordinance, explicitly recognized the connection between education and the American form of government, expressing encouragement for states to establish "schools and means of education."[34]

After the Civil War, Congress conditioned Southern states' readmission to the Union on their ratification of the Fourteenth Amendment, which also required that states adopt new constitutions for a republican form of government, including the provision of education.[35] In fact, many federal legislators argued in post-war congressional debates that a national entitlement to education was implicit in the definition of American citizenship.[36] By almost 1875, every state had an education clause in its constitution that "clearly articulated citizenship as the motivating purpose."[37]

Although public education and state constitutions have changed immeasurably since the 1800s, many states' constitutions still include education provisions directly tying citizenship in a democracy to

31. *See* Chicosky, *supra* note 18, at 6–7.

32. INST. FOR EDUC. EQUITY & OPPORTUNITY, EDUCATION IN THE 50 STATES: A DESKBOOK OF THE HISTORY OF STATE CONSTITUTIONS AND LAWS ABOUT EDUCATION 9 (2008), https://www.pubintlaw.org/wp-content/uploads/2012/04/EDU_50State.pdf.

33. Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1083–84 (2019) (quoting MASS. CONST. pt. II, ch. V, § 2).

34. Elisabeth Jaffe, Note, *A Federally Mandated National School Curriculum: Can Congress Act?*, 24 SETON HALL LEGIS. J. 207, 221 (1999) (citation omitted).

35. Black, *supra* note 33, at 1071–72; *see also* Peggy Cooper Davis, *Education for Sovereign People*, *in* A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY 164, 172–73 (Kimberly Jenkins Robinson ed., 2019) (describing the relationship between education and citizenship post-Civil War).

36. Cooper Davis, *supra* note 35, at 172.

37. Black, *supra* note 33, at 1094, 1098.

education.[38] For example, Arkansas provides that "[i]ntelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free public schools . . . ."[39] The Idaho Constitution states that "the stability of a republican form of government" depends "mainly upon the intelligence of the people" and charges the state's legislature with providing funds for schools to educate Idahoans for that purpose.[40] Similarly, the education provision in North Dakota's Constitution states that "a high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people" is necessary to continue that government.[41]

Further proof of this nexus between the states' interest in education and citizenship can be found throughout Supreme Court precedent. In *Brown v. Board of Education*, the Court asserted that "[c]ompulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society" and that education is "required in the performance of our most basic public responsibilities . . . . It is the very foundation of good citizenship."[42] The *Brown* Court went so far as to declare that "education is perhaps the most important function of state and local governments" for that reason.[43] Later, in *Plyler v. Doe*, the Court affirmed its recognition of "public schools as a most vital civic institution for the preservation of a democratic system of government."[44] Even in cases like *San Antonio Independent School District*

38. *See K-12 Governance: State Constitutional Language 50-State Comparison*, EDUC. COMM'N OF THE STS. (Nov. 2020), https://reports.ecs.org/comparisons/k-12-governance-state-constitutional-language-02 (showing constitutional language regarding education in each of the fifty states).

39. ARK. CONST. art. XIV, § 1.

40. IDAHO CONST. art. IX, § 1.

41. N.D. CONST. art. VIII, §1.

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

43. *Id.*

44. Plyler v. Doe, 457 U.S. 202, 221 (1982) (quoting Abington Sch. Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring)). In his concurrence, Justice Blackmun notes that children who are "denied an education are placed at a permanent and insurmountable competitive disadvantage, for an uneducated child is denied even the opportunity to achieve." *Id.* at 234 (Blackmun, J., concurring). This focus on the *opportunity* to achieve speaks to the focus of this Note: What is the

v. Rodriguez, where the Court refused to recognize education as a fundamental right, the Court emphasized the "vital role of education in a free society."[45]

Wisconsin v. Yoder provides another example.[46] In *Yoder*, the Supreme Court considered a challenge brought against a Wisconsin compulsory education law that required students to attend school until age sixteen.[47] The plaintiffs, the parents of two children age fourteen and fifteen, declined to send the children to school after the eighth grade, citing their Amish religious beliefs.[48] The state convicted the plaintiffs of violating the compulsory attendance law, and the plaintiffs defended by arguing that doing so violated their First Amendment right to free exercise of religion.[49] The state of Wisconsin argued that its interest in compulsory education was to enable students "to participate effectively and intelligently in our democratic process."[50] The plaintiffs ultimately prevailed, but the Court acknowledged the state's interest in preparing students for democratic participation as a legitimate and commonly-held interest among the states.[51]

B. Substantive Due Process: Fundamental Rights & Standards of Review

Even though the states and the Supreme Court have long acknowledged education as key to accessing the full rights of citizenship,[52] the view that the right to an education would be a "positive" or affirmative one may be one reason why the Court hesitates to recognize it as fundamental. Rights are often classified by courts as either

minimum level of education that states must provide to give children simply the *opportunity* to become informed and politically engaged citizens?

45. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 30 (1973); *see also id.* at 63 (Brennan, J., dissenting) ("[T]here can be no doubt that education is inextricably linked to the right to participate in the electoral process . . . .").

46. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972).

47. *Id.* at 207.

48. *Id.*

49. *Id.* at 208–09.

50. *Id.* at 225.

51. *Id.* at 221, 225–27. The Court found that the state's interest in two years of high school education was not sufficient to outweigh the burden it placed on the plaintiffs' free exercise of religion. *Id.*

52. *See* discussion *supra* Section II A.

positive or negative, and the nature of the right at issue often determines whether a court will deem it "fundamental."[53] Generally, negative rights are "freedoms from government intervention or intrusion," whereas positive rights "entail affirmative obligations that the state must afford its citizens."[54] As can be seen in the *Gary B.* cases, the nature of the right at issue can also affect the success of a plaintiff's due process claim.[55]

1. Positive vs. Negative Rights

The distinction between positive and negative rights lies in the nature of the government's role: must the government refrain from doing something or affirmatively act?[56] The Supreme Court's right-to-education cases thus far fall into the latter category. In those cases, and in any substantive due process case asserting a positive right, the court engages in a two-part analysis to determine whether the right being asserted is so fundamental that it warrants substantive due process protection: (1) whether it is a right that is "deeply rooted in this Nation's history and tradition" such that it should be considered fundamental and "implicit in the concept of ordered liberty," because "neither liberty nor justice would exist if they were sacrificed;" and (2) whether a plaintiff has made a "'careful description' of the asserted fundamental liberty interest."[57] For example, the Supreme Court continually affirms that the right to marry is fundamental in the positive-rights sense, meaning that states must provide access to marriage and perform marriages for citizens without undue restriction.[58]

53. *See* Gary B. v. Whitmer, 957 F.3d 616, 629 (6th Cir.), *vacated*, 958 F.3d 1216 (6th Cir. 2020).

54. *Id.*

55. *See generally* Gary B. v. Snyder, 313 F. Supp. 3d 852 (E.D. Mich. 2018); Gary B. v. Whitmer, 957 F.3d. 616 (6th Cir.), *vacated*, 958 F.3d 1216 (6th Cir. 2020).

56. *See supra* notes 53–54 and accompanying text.

57. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (first quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion); then quoting Palko v. Connecticut, 302 U.S. 319, 325–26 (1937); and then quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

58. *See* Obergefell v. Hodges, 576 U.S. 644, 664–69 (2015); Zablocki v. Redhail, 434 U.S. 374, 385–87 (1978); Loving v. Virginia, 388 U.S. 1, 12 (1967) (affirming the States' obligation to provide access to and perform marriages); *see also Whitmer*, 957 F.3d at 657 (explaining that "[s]ince access to marriage was so

Historically, the Supreme Court has been hesitant to recognize new fundamental rights or "positive rights" and "expand the concept of substantive due process because guideposts for responsible decision-making in this unchartered area are scarce and open-ended."[59] As a result, lower federal courts are reluctant to deem any new positive or affirmative rights "fundamental" under the Due Process Clause.[60] This reluctance is one reason why courts do not recognize education as a fundamental constitutional right.

An individual may also bring a negative-rights due process claim when the government restricts that individual's constitutionally protected liberties, including freedom from physical confinement or restraint.[61] These claims have historically been more successful because courts tend to view the Constitution as protecting individual liberty "against unwarranted government interference," but not "confer[ring] an entitlement to such [governmental aid] as may be necessary to realize all the advantages of that freedom."[62] However, protection of liberty interests under the Due Process Clause, even under a negative-rights theory, are not absolute. Under this negative-rights theory, the court must weigh the individual's liberty interests "against the [s]tate's asserted reasons for restraining individual liberty."[63] For the government to succeed, a court would then need to find that there exists a proper balance between the legitimate interests of the state in restricting

uniformly provided by the states and expected by the people as of right, it took on a fundamental character under the Due Process Clause, even though the performance of a marriage is an affirmative act by the state.").

59. *Glucksberg*, 521 U.S. at 720 (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)).

60. Interestingly, the Sixth Circuit found that access to literacy would fall into this category as a fundamental "positive right." *Whitmer*, 957 F.3d at 662. If the case had not settled and the decision had not been vacated, *Gary B.* would be a landmark ruling, making the Sixth Circuit the only circuit court to recognize access to literacy as a fundamental federal constitutional right.

61. *See* Youngberg v. Romeo, 457 U.S. 307, 316 (1982) ("[L]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action.") (quoting Greenholtz v. Neb. Penal Inmates, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part)).

62. Harris v. McRae, 448 U.S. 297, 317–18 (1980).

63. *Youngberg*, 457 U.S. at 320.

individual liberty and the rights of the individual to be free from the restriction in question.[64]

2. The Negative-Rights Theory in Action

When the Supreme Court applies the negative-rights theory to claims of substantive due process, it considers the burden that state action places on individual liberties. For example, in *Youngberg v. Romeo*, an individual who was involuntarily committed to a state institution for the mentally handicapped claimed that his constitutional due process rights were violated when he was physically restrained for prolonged periods, and employees at the facility "fail[ed] to provide him with appropriate 'treatment or programs for his mental [condition].'"[65] The Court balanced the plaintiff's rights to be free from unreasonable restraints against the state's interests in keeping the patient committed in the facility.[66] The *Youngberg* Court held that the state's action was unjustified unless the patient was provided "minimally adequate training" that furthered the state's purpose for his confinement—to treat his condition.[67] Later, the Court reaffirmed in *Foucha v. Louisiana* that "[d]ue process requires that the nature of [a] commitment bear some reasonable relation to the purpose."[68] *Foucha* concerned the state's commitment of an individual who had not been convicted of a crime and was no longer considered insane or suffering from mental illness or defect.[69] The Court found that because the individual was no longer considered so mentally ill as to be a threat to the public, the State no longer had a reasonable purpose for keeping the individual committed.[70]

64. *See id.* at 321 (explaining that whether a constitutional violation has occurred is determined by balancing a plaintiff's liberty interests against the relevant state interests).

65. *Id.* at 310–12.

66. *Id.* at 321–23.

67. *Id.* at 321–25.

68. Foucha v. Louisiana, 504 U.S. 71, 79 (1992) (citing Jones v. United States, 463 U.S. 354, 368 (1983)). The import of these analyses lies in the Court's recognition of the state's obligation to justify individual liberty restraints by, at least minimally, effectuating the purpose for which the liberty restraint is imposed on the individual.

69. *Id.* at 73.

70. *Id.* at 80–83.

3. Standards of Review

Courts typically evaluate substantive due process claims under two different standards: strict scrutiny and rational basis review.[71] State laws that infringe on rights classified as "fundamental" are subject to strict scrutiny.[72] This standard requires government action that burdens the exercise of fundamental rights or liberty interests to be "narrowly tailored to a compelling governmental interest."[73] For example, the Court applied strict scrutiny in *Zablocki v. Redhail* when evaluating a challenge to a Wisconsin statute prohibiting individuals with unpaid child support from getting married.[74] The Court struck down the Wisconsin statute, finding that it was not supported by "sufficiently important state interests" and was not "closely tailored to effectuate only those interests."[75] In striking down the law, the Court took issue with the "closely tailored" component because "the means selected by the State for achieving [its] interests unnecessarily impinge on the right to marry."[76] Essentially, the Court held that the state's purported interests in enforcing this statute did not justify the resulting burden on individuals' rights to marry.[77] *Zablocki* shows that when a state law significantly and unnecessarily interferes with the exercise of a fundamental right, such as the right to marry, the Court will apply strict scrutiny.[78]

71. Kelly A. Spencer, Note, *Sex Offenders and the City: Ban Orders, Freedom of Movement, and Doe v. City of Lafayette*, 36 U.C. DAVIS L. REV. 304–06 (2002).

72. *See* Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (explaining that certain rights require "heightened protection against governmental interference").

73. Seal v. Morgan, 229 F.3d 567, 574 (6th Cir. 2000) (citing United States v. Brandon, 158 F.3d 947, 956 (6th Cir. 1998)).

74. *See* Zablocki v. Redhail, 434 U.S. 374, 386–87 (1978). Note that *Zablocki* concerns claims under both the Equal Protection and Due Process Clauses and that both are contexts in which courts may apply strict scrutiny. However, for purposes of this Note, *Zablocki* is illustrative of the point that when a state statute "significantly interferes with the exercise of a fundamental right," it will be subject to strict scrutiny. *Id.* at 388.

75. *Id.* at 388.

76. *Id.*

77. *Id.* at 388–90.

78. *Id.* at 386–87.

Rational basis review applies to laws or government actions infringing upon rights not classified as fundamental.[79] These actions will be upheld if they are rationally related to a legitimate state interest or objective.[80] For example, in *San Antonio Independent School District v. Rodriguez*, a group of students challenged Texas's public school funding scheme under the Equal Protection Clause. The Supreme Court first determined that education is not a fundamental right under the Constitution, leading the Court to apply rational basis review to the funding system.[81] The Court found that the funding system, wherein local taxes helped fund local schools, rationally accomplished the state's objectives to fund public schools using tax revenues and preserve local control over public schools and thus, the Court upheld the statute.[82]

C. Education & the Supreme Court's Early Substantive Due Process Doctrine

The Supreme Court's earliest meaningful substantive due process jurisprudence is rooted in education. Under the Due Process Clause of the Fourteenth Amendment, "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."[83] The Due Process Clause protects individual liberty against government interference with certain rights and liberty interests.[84] Liberty interests protected under the Fourteenth Amendment are those that the Court has found necessary to "carefully refine[]."[85] It also protects certain fundamental rights—the right to marry, to have children, and to use contraceptives, to name a few.[86] Because schooling has historically been a function of state governments, substantive due process challenges

79. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40 (1973). *Rodriguez* is discussed in more detail in Part II, Section D of this Note.

80. *Id.* at 55.

81. *Id.* at 37–40.

82. *Id.* at 54–55.

83. U.S. CONST. amend. XIV, § 1. The Fifth Amendment to the Constitution uses the same language to forbid the federal government from depriving individuals from "life, liberty, or property, without due process of law." U.S. CONST. amend. V.

84. Washington v. Glucksberg, 521 U.S. 702, 719–20 (1997).

85. *Id.* at 722.

86. *Id.* at 720.

frequently show up in cases related to education and schooling.[87] Two of the earliest examples are *Meyer v. Nebraska* and *Pierce v. Society of Sisters*.

In *Meyer*, the Court held that the liberty protected by the Due Process Clause included the right of a teacher to teach and the right of parents to engage the teacher in educating their children.[88] The Court struck down a Nebraska law that prohibited teachers from teaching a foreign language at school to students in eighth grade or younger.[89] The *Meyer* Court, using a rational basis standard, assessed whether the statute that infringed on the teacher's individual liberty was reasonably related to the state's asserted purpose.[90] The Court held that the statute was arbitrary and thus unreasonably infringed upon the teacher's individual liberty.[91]

Two years later, the Court heard another substantive due process challenge in *Pierce v. Society of Sisters*.[92] In *Pierce*, the challenged compulsory education law required parents to send their children to a public school, and two private schools brought a claim arguing that the law infringed upon the fundamental rights of parents and of the schools themselves.[93] The Court, applying rational basis review, held that the law unreasonably interfered with the liberty of parents to direct their children's education and upbringing.[94] In striking down the law, the Court recognized that this liberty interest outweighed the state's interest in compelling children to be educated only through public schools.[95]

Both *Meyer* and *Pierce* show the Court engaging in its typical substantive due process analysis. When a state law or action infringes

87. Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc'y of Sisters, 280 U.S. 510 (1925). *See* Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527, 536 (2001).

88. *Meyer*, 262 U.S. at 400.

89. *Id.* at 402–03.

90. *Id.* at 399–400.

91. *Id.* at 403.

92. 268 U.S. 510 (1925).

93. *Id.* at 532–34.

94. *Id.* at 534–35.

95. *See id.* (holding that the compulsory education law unreasonably interfered with the "liberty of parents and guardians to direct the upbringing and education of children under their control").

a fundamental right, the Court conducts a balancing test to determine whether the state action burdens that right in such a way as to make the state action unconstitutional.[96] While states have considerable power to legislate and even reasonably interfere with individual liberty, "rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation" to some state purpose.[97] In *Meyer* and *Pierce*, as well as in its other substantive due process cases, the Court looks to strike the proper balance between the state's power to govern and the liberty interests of individuals.[98] Although the fundamental rights at issue in *Meyer* and *Pierce* are not education itself, these cases illustrate the Court's substantive due process analysis and show an early connection in the Court's jurisprudence between substantive due process and the state's role in regulating public education—some regulation of liberty through compulsory education statutes is allowable, but only where a state interest justifies it.[99]

D. The Supreme Court's Right-to-Education Cases

As the twentieth century continued, the Court heard more education cases in which it explored whether to afford education protection as a fundamental constitutional right.[100] The Supreme Court has never recognized a fundamental federal constitutional right to education for all United States citizens, even despite the fact that most Americans—and the Court itself—continues to designate public education as an issue of the utmost importance.[101] However, the Court continually leaves

96. *See* Youngberg v. Romeo, 457 U.S. 307, 321 (1982) (explaining that whether a particular plaintiff's "constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests").

97. *Pierce*, 268 U.S. at 534–35.

98. *See* Meyer v. Nebraska, 262 U.S. 390, 403 (1923); *Pierce*, 268 U.S. at 534–35; *Youngberg*, 457 U.S. at 321 (showing the Court engaging in substantive due process analysis).

99. *See* Wisconsin v. Yoder, 406 U.S. 205, 221, 225–26 (1972) (holding that compulsory education was generally allowable but was improper where the State's interest was insufficient to justify infringement on plaintiffs' constitutional rights).

100. *See* cases cited *infra* note 101.

101. *See* Plyler v. Doe, 457 U.S. 202, 230 (1982); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (holding that education is not a fundamental right yet acknowledging its significance and importance in American society); *see also* PHI DELTA KAPPA EDUC. FOUND.,

open the question of whether a minimally adequate education is a fundamental right under the Due Process Clause of the U.S. Constitution.[102] The Court has yet to directly address this question, nor has it given any hints as to what a minimally adequate education might look like if ever recognized as a fundamental right.[103] Although many questions remain regarding how the issue would play out before the Court, the Court's right-to-education cases provide useful context and insight into how the Court might recognize some form of a federal constitutional right to education in the future.

1. *San Antonio Independent School District v. Rodriguez*

In 1973, the Court addressed this issue for the first time in *San Antonio Independent School District v. Rodriguez*.[104] The *Rodriguez* plaintiffs claimed that Texas's school-funding scheme based on taxation violated the Fourteenth Amendment's Equal Protection Clause because school districts with wealthier tax bases had more funding and resources than districts with lower-income tax bases.[105] The plaintiffs claimed this created a discrepancy in the amount of money the school districts spent per student, leading to a difference in the quality of education students received.[106] The Court held that the school funding system did not "operate to the peculiar disadvantage of any suspect class,"

PUBLIC SCHOOL PRIORITIES IN A POLITICAL YEAR K5 (2020), https://pdkpoll.org/wp-content/uploads/2020/08/Poll52-2020_PollSupplement.pdf (finding that six in ten Americans and seven in ten parents consider public education "extremely important").

102. *See generally* Derek W. Black, *Implying a Federal Constitutional Right to Education*, *in* A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY 135 (Kimberly Jenkins Robinson ed., 2019) (giving an overview of the history of the Supreme Court's jurisprudence regarding the recognition of education as a fundamental constitutional right).

103. *Id.*

104. 411 U.S. 1 (1973).

105. *Id.* at 15–17.

106. *Id.* at 13–16. The plaintiff-appellees specifically compared their school district, the Edgewood Independent School District—the least affluent district in the San Antonio area—with one of the most affluent districts in the area, the Alamo Heights Independent School District. *Id.* at 11–16. The average per pupil expenditure in the Edgewood district was $356, while the average per pupil expenditure in the Alamo Heights district was $594. *Id.* at 12, 13. The difference in per-pupil spending was largely attributable to differences in the funds collected through local property taxes. *Id.* at 11–16.

and therefore, did not violate the Equal Protection Clause.[107] The Court also found that education was not a fundamental right under the Due Process Clause.[108]

The Court reasoned that the fact that education is important and affects the exercise of other fundamental rights does not warrant recognition of education itself as a fundamental right.[109] The Court applied rational basis review to the Texas funding system and ultimately found that the system bore a rational relationship to legitimate state purposes and upheld it.[110] *Rodriguez*, moreover, did not foreclose the possibility of the Court finding an implied right to a minimally adequate education under the Due Process Clause.[111] The Court even suggested that the outcome may have been different in the case of an "absolute denial" of education or if students were deprived of "basic minimum skills."[112]

2. *Plyler v. Doe*

In *Plyler v. Doe*, undocumented students claimed the state of Texas violated their Equal Protection rights when the state prohibited them from attending Texas public schools if they did not pay tuition.[113] The Supreme Court reiterated that education is not a fundamental constitutional right and that the children of illegal immigrants were not a "suspect class."[114] However, under rational basis review, the Court did strike down the Texas law, reasoning that when a discrete group of

107. *Id.* at 28.

108. *Id.* at 37.

109. *See id.* at 35–36.

110. *Id.* at 40, 54–55. The Court found that the state's school funding system, specifically, the use of local tax dollars to fund local schools, was rationally related to the legitimate state effort "to extend public education and to improve its quality," however imperfect that system might be in practice. *Id.* at 39.

111. *See id.* at 37.

112. *See id.*

113. Plyler v. Doe, 457 U.S. 202, 205–06, 216 (1982).

114. *Id.* at 223. It is important to note that the court held that discrimination based solely on immigration status was not discrimination against a "suspect class." *Id.* Other immigrants, if discriminated against based on national origin or race, are a suspect class. *See generally* Miller v. Johnson, 515 U.S. 900 (1995) (finding that classification of voters was motivated by racial purpose and thus was in violation of the Equal Protection Clause); Loving v. Virginia, 388 U.S. 1 (1967) (finding that racial classifications in state marriage laws violated the Equal Protection Clause).

children is *denied* a basic public education, that law can only survive if it furthers some substantial state interest.[115] Under the circumstances in *Plyler*, the Court found that the state's justifications for charging immigrant children tuition were "insubstantial in light of the costs involved to the children, the State, and the Nation."[116]

Plyler shows the tension between the Court's recognition of the importance of education but its reluctance to afford it blanket constitutional protection as a fundamental right.[117] Despite only requiring the state to have a rationally-related interest in prohibiting access to education, the Court gave little weight to the state's interest in prohibiting undocumented children from attending school.[118] The Court's emphasis on the state's justification for its tuition policy suggests that, under the right circumstances, the Court could recognize that some state actions will not justify deprivation of public education.[119]

3. *Papasan v. Allain*

Four years after *Plyler*, the Court again neglected to address whether a minimally adequate education was guaranteed under the U.S. Constitution in *Papasan v. Allain*.[120] In *Papasan*, the Supreme Court considered a challenge to the unequal distribution of benefits from lands sold from the Chickasaw Indian Nation to the state of Mississippi as part of a nineteenth century treaty.[121] The plaintiffs alleged that the disparity deprived the children in some counties "of a minimally adequate level of education and of equal protection of the laws."[122] The

115. *Plyler*, 457 U.S. at 224, 230.

116. *Id.* at 230.

117. *See id.* (recognizing that the denial of public education to this group of children would create "a subclass of illiterates," potentially exacerbate issues like "unemployment, welfare, and crime," and result in costs to the "children, the State, and the Nation" while maintaining the position that education itself is not a fundamental right).

118. *Id.*

119. *See id.* at 227–30. The states included as its justifications the preservation of resources, protection from opening the floodgates to illegal immigration, ability to continue providing quality education, and ensuring that state educated people "put their education to productive social or political use within the state." Id.

120. Papasan v. Allain, 478 U.S. 265, 285–86 (1986).

121. *Id.* at 274.

122. *Id.*

plaintiffs asserted that a right to a minimally adequate education "was fundamental and that because that right had been infringed the State's action here should be reviewed under strict scrutiny."[123] Ultimately, the Court concluded that deciding "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" was unnecessary to the resolution of the case.[124]

4. *Kadrmas v. Dickinson Public Schools*

More recently, in *Kadrmas v. Dickinson Public Schools*, the Court upheld a North Dakota statute that permitted some local school boards to charge students a user fee for bus transportation to and from school.[125] The plaintiff in *Kadrmas* claimed that the fee violated the Equal Protection Clause because it infringed on "minimum access to education" for those who could not afford to pay the bus fee.[126] However, the Court rejected the appellants' arguments, finding that the statute "discriminates against no suspect class and interferes with no fundamental right."[127] The Court declined to recognize "minimum access to [public] education" as a constitutionally-protected fundamental right under the Due Process Clause.[128] Despite this holding, the Court has not foreclosed the possibility that for students who *do* attend public schools, there may be some minimally adequate level of education protected by the Constitution.[129]

123. *Id.* at 285.

124. *Id.* at 285–86. The Court remanded the case without establishing any further precedent on the issue, leaving the question open as to whether a minimally adequate education is a fundamental right. *Id.* at 285–86, 275.

125. Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 452 (1988).

126. *Id.* at 458.

127. *Id.* at 464–65.

128. *Id.* at 458.

129. The Court's holding in *Kadrmas* was ultimately based on the narrow issue of transportation to school. *Id.* at 462. There was no claim that the school itself did not provide the plaintiff with education, only that the bus fee imposed by the state made it more difficult for her to get to school and access that education. *Id.* at 458. However, had the plaintiff attended a school where no basic education was taking place, the claim and the Court's analysis would have been very different. *See id.* at 461–62. The difference is a barrier to education versus a denial of education. Thus, *Kadrmas* did not foreclose the possibility of such an argument.

E. Gary B. v. Snyder *and* Gary B. v. Whitmer

In 2018, a group of Detroit public school students filed a lawsuit against the State of Michigan, alleging that the conditions of their schools were so poor that they failed to provide a "minimally adequate education," specifically, access to literacy.[130] According to their complaint, the plaintiffs attended five of the lowest performing schools in Detroit where most students lacked proficiency in nearly all subjects.[131]

Among the schools, the plaintiffs claimed that teachers lacked sufficient abilities to teach students literacy skills because substantial teacher vacancies led to classes—some of up to sixty students—being taught by paraprofessionals, substitute teachers, and teachers who lacked certification.[132]

The *Gary B.* plaintiffs also alleged that the schools lacked staffing to implement effective literacy instruction programs, with many students reading well below the normal skill level for their age and some students still struggling to write sentences and sound out simple words.[133] In addition to the lack of certified teachers, the plaintiffs claimed their schools failed to provide materials needed to "plausibly provide literacy" because textbooks were scarce, outdated, and damaged, rendering them almost useless.[134] The plaintiffs further alleged that the schools' facilities were grossly inadequate and made learning "nearly impossible."[135] The complaint described classrooms that reached ninety degrees during the summer and became extremely cold

130. Gary B. v. Snyder, 313 F. Supp. 3d 852, 856 (E.D. Mich. 2018), *aff'd in part*, *rev'd in part*, *sub nom.* Gary B. v. Whitmer, 957 F.3d 616, 649 (6th Cir. 2020) (reversing the district court's finding that plaintiffs, having no fundamental right to "basic minimum education" failed to state a claim for relief under the Fourteenth Amendment, because "the role of basic literacy education within our broader constitutional framework suggests it is essential to the exercise of other fundamental rights").

131. *Whitmer*, 957 F.3d at 624.

132. *Id.* at 625.

133. *Id.* At a high school attended by one of the plaintiffs, the complaint alleged that the most advanced students read only at a fourth or fifth grade level. *Id.*

134. *Id.* at 626–27.

135. *Id.* at 626.

during the winter, along with other conditions that often cut students' classroom time short.[136]

Because of these deficiencies, the plaintiffs argued that their due process and equal protection rights had been violated because the state of Michigan intentionally discriminated against them and "'functionally excluded' [them] from Michigan's schools 'on the basis of their race.'"[137] The state of Michigan filed a motion to dismiss, alleging that the *Gary B.* plaintiffs failed to state a claim.[138] To decide whether the plaintiffs had properly pled their due process claim, the district court analyzed whether access to literacy is a fundamental right under the constitution, noting that "the Supreme Court has neither confirmed nor denied that access to literacy is [sic] a fundamental right. The Court must therefore cautiously take up the task."[139] The district court also noted that the relief sought by the plaintiffs was "positive in nature."[140] Accordingly, the district court analyzed the plaintiffs' claim solely as a substantive "positive right" due process claim—ultimately finding that access to literacy is not a fundamental right protected by the Due Process Clause, and thus, there was no violation of due process.[141]

By deeming the claim positive in nature, the district court highlighted a distinction typically made by courts regarding due process rights. Positive-rights claims are those in which the plaintiffs argue that the government must affirmatively act or provide something, while bringing a negative-rights claim would require the plaintiffs to argue that the government must refrain from doing something that interferes with their due process rights.[142]

136. *Id.* The plaintiffs also described overcrowded classrooms, contaminated drinking water, leaking roofs and pipes, and infestations of mice and cockroaches. *Id.*

137. Gary B. v. Snyder, 313 F. Supp. 3d 852, 875 (E.D. Mich. 2018), *aff'd in part*, *rev'd in part*, *sub nom.* Gary B. v. Whitmer, 957 F.3d 616, 649 (6th Cir. 2020) (citation omitted).

138. *Snyder*, 313 F. Supp. 3d at 856.

139. *Id.* at 871.

140. *Id.* at 873.

141. *Id.* at 876.

142. *See* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (explaining the distinction between positive or affirmative obligations under the Due Process Clause and negative rights); *see also supra* Part II, Section B, 1 (explaining the distinction between positive and negative rights).

On appeal, in *Gary B. v. Whitmer*, the plaintiffs alleged that the district court erred by considering their due process claim only as a positive-rights argument because their complaint also raised a negative-rights argument. In other words, Michigan's compulsory attendance laws unjustifiably restrain students' individual liberty by requiring them to attend school while not providing those students with access to basic literacy education.[143] They claimed that because the state of Michigan forces students to attend school— and thereby restraining their individual liberty—attending school implicates due process protections when the state fails to provide those students a basic education.[144] A panel of Sixth Circuit judges found that the plaintiffs failed to allege sufficient facts in their complaint to survive a motion to dismiss on this negative-rights theory, but the Court noted that a negative-rights argument could have been successful if supported by properly-alleged facts.[145] Notably, the Court also held that there is a fundamental right to access to literacy in the positive-rights sense under the Due Process Clause.[146] This decision would have been a landmark ruling if the case had not settled, with the Sixth Circuit being the first circuit to recognize such a right.

III. APPLYING DUE PROCESS TO COMPULSORY EDUCATION

Applying the above-described negative-rights due process theory to state compulsory education laws shows that the State must justify—to some extent, depending on the standard of review—its infringement on students' freedom from restraint by showing the laws are tailored to the state's interest. If the State's asserted purpose for requiring students to attend school is to educate them, and the students do not have access to even a basic education, then the State's infringement on those students' fundamental right of freedom from restraint is not justifiable. By examining the relationship between basic literacy skills and democratic participation, the importance of schools

143. Gary B. v. Whitmer, 957 F.3d 616, 638 (6th Cir.), *vacated*, 958 F.3d 1216 (6th Cir. 2020).

144. *Id.*

145. *Id.* at 637–38, 641–42. The court noted that the plaintiffs did not specifically challenge Michigan's compulsory attendance law in their complaint, which would have helped make their negative-rights claim viable. *Id.* at 637.

146. *Id.* at 662.

cultivating at least those basic skills to meet the State's objectives becomes clear. If basic literacy skills tend to increase democratic participation, finding an effective avenue for challenging the State's failure to provide those skills becomes even more compelling because not only are students' due process rights at issue, but their political voices are at risk of going unheard as well. Education advocates have yet to find that effective avenue.[147] This suggests that a new approach is needed, and challenging compulsory education laws by applying the negative-rights theory could be an effective step forward for education advocates bringing right-to-education cases to court.

A. Applying a Negative-Rights Due Process Theory to Compulsory Education

The Supreme Court recognizes freedom from unreasonable restraint as a fundamental liberty interest, and this freedom, coupled with the States' legitimate interest in compulsory education, should give rise to State duties to provide at least a basic education under the substantive due process doctrine.[148] As expressed by the Supreme Court in *Youngberg* and *Foucha*, state governments should not be permitted to implement regulations to significantly restrain individual liberty, without furthering the ultimate goal of such restrictions.[149] The restriction of individual liberty should not be limited to the more traditional context of involuntary commitment by the State in prisons or psychological hospitals. By requiring students to attend school through compulsory education laws, the State infringes on students' liberty interest of freedom from restraint or confinement. The State requires them to physically attend school for a specific number of hours per day and days per

147. *See* S. Educ. Found., *No Time to Lose: Why the United States Needs an Education Amendment to the US Constitution*, *in* A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY 208, 218–221 (Kimberly Jenkins Robinson ed., 2019) (describing the various types of education litigation brought in state and federal courts).

148. *See* Youngberg v. Romeo, 457 U.S. 307, 317–318 (1982); *see also* DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 199–200 ("[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.").

149. *See supra* Part II, Section B, 2 (describing the Supreme Court's decisions rooted in the negative-rights theory).

year, which is a consistent daily infringement on their individual liberty.[150] Although clearly to a lesser extent and not for punitive purposes, school officials have significant control over students' movement and activities, not unlike the structure of a prison environment.

Albeit temporary infringement—students are not confined continuously for months or years as they would be in prison or another State institution—compulsory education laws substantially restrain students' freedom of movement. The infringement of compulsory education on students' rights becomes even more apparent in consideration of the amount of time they must spend physically at school during the course of their education.[151] Most kindergarten-through-twelfth grade students spend about six-and-a-half hours per day at school, where they must be physically present in their scheduled classes, for approximately 180 days per year.[152] This is clearly a restraint on their liberty because their freedom to move outside of the school building is restricted. Further, enforcement of compulsory education laws restricts their freedom and their parents' freedom to choose how they spend such a significant portion of their time. However, this restraint is one that has always been seen as reasonable because requiring children to attend school is necessary for the purpose of educating them.

Applying due process principles to the school setting naturally requires that the purpose of requiring students to attend school—

150. Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 823–24 (1985); *see also* Gary B. v. Whitmer, 957 F.3d 616, 640–41 (6th Cir.), *vacated*, 958 F.3d 1216 (6th Cir. 2020) ("[F]orcing students to attend a 'school' in which they are simply warehoused and provided no education at all would run afoul of the Due Process Clause's protections. Such a deprivation would bear no reasonable relationship to the state's asserted purpose, and thus would be outweighed by the individual's interest in liberty. For cases in the middle, the question is whether the state's interest—here, the education it provides—is enough to justify the restraint." (citations omitted)).

151. See for example, Sarah D. Sparks, *U.S. Students Top Global Peers for Time Spent in School in OECD Study*, EDUC. WK. BLOG (Sept. 10, 2019), https://blogs.edweek.org/edweek/inside-school-research/2019/09/OECD_education_at_a_glance_2019.html, noting that U.S. students spend roughly 8,884 hours over nine years to complete their primary and lower secondary education.

152. Max Nisen, *America Needs to Suck It Up And Make School Days Longer*, BUS. INSIDER (Oct. 1, 2013, 10:38 AM), https://www.businessinsider.com/why-america-needs-longer-school-days-2013-9.

educating them—must actually be furthered to justify compulsory education laws.[153] *Youngberg* illustrates this concept. In *Youngberg*, the Supreme Court held that the State had to justify its confinement of an involuntarily committed and mentally disabled patient by providing him with at least minimum treatment for his condition.[154] Additionally, once the purpose of the State's action is no longer being accomplished, that restraint on liberty becomes unreasonable and unjustifiable.

This can be seen in *Foucha* as well, where the purpose of committing the plaintiff was to protect the public because of his uncontrolled mental illness.[155] Yet once he was no longer considered a danger, the purpose of his confinement was no longer being accomplished, and the Supreme Court held that it violated his liberty interest of freedom from restraint.[156] Applying this principle from *Foucha* to compulsory education laws again shows that students cannot be confined without that confinement accomplishing some State objective. Thus, if the State required students to come to school every day and sit in a room but provided nothing to them, that would clearly be an unconstitutional restraint on liberty; schools would not be accomplishing the purpose for which students' rights are restricted.

B. Literacy and Democratic Participation

If schools must provide students with an education to justify this deprivation, the question becomes: How much of an education justifies compulsory education laws? Although states may cite numerous reasons for compulsory education, the purpose of educating students has always been primarily to prepare them for citizenship and participation in government.[157] This means that whatever level of education justifies

153. It is important to distinguish *accomplishing* the purpose for which someone is confined and *furthering* the purpose. Accomplishing the purpose of compulsory education laws would mean actually ensuring that students became educated, but that would be unrealistic, too difficult to evaluate, and likely too burdensome on schools, states, and teachers. For purposes of this Note, what would justify compulsory education laws in terms of their purpose would be a minimum level or floor of access to basic literacy skills.

154. Youngberg v. Romeo, 457 U.S. 307, 322 (1982).

155. Foucha v. Louisiana, 504 U.S. 71, 73–4 (1992).

156. *Id.* at 80–3.

157. *See supra* Part I, Section C (describing various states' justifications for compulsory education).

compulsory education, that minimum level of education must be enough to accomplish that purpose. Basic literacy skills fit this purpose. Literacy skills allow citizens to participate in democracy and prepare citizens for democratic participation, two skills central to a state's interest in educating its students.[158] Literacy is the foundational skill that opens the door to democratic participation.[159]

Without basic literacy skills, an individual cannot navigate our political system because he or she will be unable to understand our form of government, to read about elections and candidates, or to make informed decisions when voting.[160] On a more basic level, an illiterate person will even struggle to register to vote, to locate his or her polling place, or to read a ballot.[161] Look no further than the Jim Crow-era literacy tests that prevented African-Americans from voting. States enacted laws requiring citizens to take literacy tests to register to vote knowing that those laws would keep many African-Americans—because many of them lacked education and reading skills[162]—from

158. Black, *supra* note 33, at 1097–99 (quoting MASS. CONST. pt. II, ch. V, § 2). The Supreme Court also recognized basic skills—like foundational literacy skills—as most pertinent to the state's interest in compulsory education in *Yoder*. *See* Wisconsin v. Yoder, 406 U.S. 205, 225 (1972) ("When Thomas Jefferson emphasized the need for education as a bulwark of a free people against tyranny, there is nothing to indicate he had in mind compulsory education through any fixed age beyond a basic education.").

159. *See supra* Part II, Section A; *see also* Yoder, 406 U.S. at 225 (recognizing that basic skills such as literacy skills are most important to the state's interest in educating children to become productive citizens).

160. Jaffe, *supra* note 34, at 235 ("The exercise of the . . . rights and duties of citizenship requires that citizens receive a proper education . . . .").

161. Jeff Kunerth, *Ballots Still Present Literacy Test for Some Voters*, CHI. TRIB. (Jan. 29, 2001, 2:00 AM), https://www.chicagotribune.com/news/sns-ballots-literacy-os-story.html ("The ability to read has not been a requirement to vote in more than 25 years. But with 24 million functionally illiterate adult Americans, the ability to understand a ballot has become its own literacy test.").

162. The fact that states kept African-Americans from getting an education or learning to read further drives home this point: States knew that education, and literacy skills, in particular, would empower African-Americans to access and exercise their full rights of citizenship. *See* Carol Anderson & Tonya Bolden, *Voter Suppression and Literacy Tests*, TEACHING TOLERANCE: PROJECT S. POVERTY L. CTR., https://www.learningforjustice.org/sites/default/files/2020-10/One-Person-No-Vote-Voter-Suppression-and-Literacy-Tests.pdf (explaining post-Reconstruction efforts to suppress African-Americans' political power and that "[t]the literacy test and

participating in elections and gaining political power.[163] Literacy tests no longer exist, but illiteracy can still be a barrier for voters.[164] Although the United States Code provides that any illiterate adult who needs assistance voting can have that assistance, many low-literate adults are reluctant to ask for help because of the stigma attached to illiteracy.[165]

Basic literacy skills are necessary for realizing full citizenship. Illiteracy also continues to be a persistent issue in the United States.[166] Over the last twenty years, only about one-third of American students scored at least "proficient" on national reading assessments.[167] The problem worsens among minority and low-income students, whose test scores are significantly lower than those of their white and more affluent counterparts.[168]

understanding clause were tailor-made for societies that systemically refused to educate millions of their citizens and ensured that the bulk of the population remained functionally illiterate").

163. Terrance Smith, *Timeline: Voter Suppression in the U.S. from the Civil War to Today*, ABC NEWS (Aug. 20, 2020, 5:03 AM), https://abcnews.go.com/Politics/timeline-voter-suppression-us-civil-war-today/story?id=72248473.

164. *See* Kavitha Cardoza, *Why 36 Million American Adults Can't Read Enough to Work — and How to Help Them*, PBS NEWS HOUR (June 11, 2019, 6:30 PM), https://www.pbs.org/newshour/show/why-36-million-american-adults-cant-read-enough-to-work-and-how-to-help-them (describing the experiences of low-literate adults and noting that they are less likely to vote).

165. 52 U.S.C. § 10508 (1982); Jessica Gilmour, *Does the Literacy Level of an Adult Affect Their Ability to Vote?*, PROLITERACY BLOG (Nov. 11, 2019), https://proliteracy.org/Blogs/Article/474/Does-the-Literacy-Level-of-an-Adult-Affect-Their-Ability-to-Vote.

166. *See* Valerie Strauss, *Hiding in Plain Sight: The Adult Literacy Crisis*, WASH. POST (Nov. 1, 2016), https://www.washingtonpost.com/news/answer-sheet/wp/2016/11/01/hiding-in-plain-sight-the-adult-literacy-crisis/ (describing the pervasiveness of adult illiteracy in the U.S. and its consequences for individuals and society).

167. Natalie Wexler, *Elementary Education Has Gone Terribly Wrong*, THE ATLANTIC (Aug. 2019), https://www.theatlantic.com/magazine/archive/2019/08/the-radical-case-for-teaching-kids-stuff/592765/.

168. *Id.* The United States also continues to fall behind other countries in literacy, another sign that our current methods for teaching literacy are either ineffective (although with the passage of the ESSA and a shift to more rigorous standards, teaching reading has changed since 2015), or the United States has failed to afford literacy education the emphasis it deserves considering its importance to every facet of learning and later, adult life. *Id.*

Students who never become proficient in literacy skills in school then go on to become adults who struggle to navigate everyday life, obtain high-paying jobs, teach their own children to read, and of course, participate politically.[169] According to the U.S. Department of Education, about 130 million U.S. adults between ages sixteen and seventy-four years old (or about fifty-four percent of adults in that age range) lack proficiency in basic literacy skills.[170] Although the factors affecting children's learning of literacy are many,[171] there is no doubt that schools are an integral part of the process.[172] If schools are ineffective at equipping students with basic literacy skills, the adverse effects will follow children into their adult lives, potentially preventing them from exercising all of the rights attached to full citizenship in our American democracy.

C. The Need for a New Approach: Challenges Faced by Education Advocates

Based on the negative-rights theory discussed above, states must justify enforcing compulsory education laws by providing a minimum floor of education. It is also clear that many Americans lack basic literacy skills needed to exercise their full rights of citizenship in our democracy.[173] Both of these facts make the task of education advocates in securing a federal right to education, or at least to literacy, more urgent. But education advocates have yet to succeed in that task under current laws and Supreme Court precedent,[174] suggesting a new approach to challenging the adequacy of public education is needed.

169. Strauss, *supra* note 166.

170. Michael T. Nietzel, *Low Literacy Levels Among U.S. Adults Could Be Costing The Economy $2.2 Trillion A Year*, FORBES (Sept. 9, 2020, 7:14 AM), https://www.forbes.com/sites/michaeltnietzel/2020/09/09/low-literacy-levels-among-us-adults-could-be-costing-the-economy-22-trillion-a-year/?sh=7cfe58d44c90.

171. *See infra* note 206 and accompanying text (describing various factors that affect literacy learning).

172. *See generally* Matthew H. Kim & Frederick J. Morrison, *Schooling Effects on Literacy During the Transition to School*, 4 AERA OPEN 1–2 (Sept. 20, 2018), https://journals.sagepub.com/doi/pdf/10.1177/2332858418798793.

173. *Supra* Part III, Section B.

174. *See supra* Part II, Section D (discussing the history of the Supreme Court's right-to-education cases); *see also* sources cited *infra* notes 177–78 (describing efforts under current laws to secure stronger education rights).

Supreme Court cases that address educational inequities provide a glimpse into some of the challenges education advocates face when trying to seek legal recourse for students who are not receiving an adequate education. First, as mentioned earlier, the Supreme Court and the lower federal courts are reluctant to recognize positive rights that place affirmative or overly burdensome obligations on the states.[175] The federal courts also tend to avoid overstepping their boundaries by getting involved in activities historically left to regulation by the states' "police power," like public education.[176]

Second, education lawsuits typically arise under state law and many times challenge what could be called "fundamental" rights to education granted by state constitutions.[177] However, state constitutional education clauses can be difficult to successfully challenge because their vague provisions lead to varying interpretations.[178] State constitutional provisions can vary hugely from state to state, creating a mixed

175. *See cases* cited *supra* note 16 (noting courts' reluctance to recognize new positive rights); Black, *supra* note 102 at 151–58 (noting the Supreme Court's resistance to recognizing affirmative or positive rights).

176. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 535–36 (2012) (explaining the relationship of the U.S. Constitution and federal and state governments under the doctrine of federalism). The Court points out that:

> The States thus can and do perform many of the vital functions of modern government—punishing street crime, running public schools, and zoning property for development, to name but a few . . . [o]ur cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the "police power."

Id.

177. *See* Kristine L. Bowman, *The Inadequate Right to Education*, *in* A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY 65, 66–67 (Kimberly Jenkins Robinson ed., 2019) (explaining that all fifty states have a right to education in their constitutions and describing the various approaches typically taken in state education litigation).

178. *See id.* at 66 ("The language of the right varies significantly, and the interpretation of that language varies even more."); *see also* Christine M. Naassana, Comment, *Access to Literacy Under the United States Constitution*, 68 BUFF. L. REV. 1215, 1241–42 (2020) (describing the wide variety of terms used by state courts to define what constitutes an "adequate" education).

bag of state-level education rights depending on where a child lives.[179] Plaintiffs may also attempt to challenge state education funding schemes, most of which are based on local tax revenues, but the Supreme Court held in *Rodriguez* that funding schemes based on property taxes—which often lead to socioeconomic gaps in school quality and student outcomes—are constitutional.[180] This avenue has become less advantageous for education advocates since the 2008 Recession, and even when courts have ruled in favor of plaintiffs, state legislatures have been unwilling to comply in some states.[181]

Lastly, federal education legislation, while helpful in some respects, also fails to provide education advocates with a direct avenue to seek legal remedies for students. In 2015, Congress passed the Every Student Succeeds Act (ESSA) to provide all children with the "opportunity to receive a fair, equitable, and high-quality education."[182] The ESSA shifted control back to states on school accountability, but the legislation "lacks teeth" in terms of federal enforcement.[183] Additionally, any new federal education legislation ultimately rests in Congress's hands.[184] At a time when Congress remains bitterly divided and American politics are more divisive than ever, depending on Congress to keep best interests of America's public schools at the forefront of new legislation seems less than ideal.[185] Further, with much of the

179. Bowman, *supra* note 177, at 69.

180. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 54 (1973).

181. Bowman, *supra* note 177, at 69.

182. 20 U.S.C. § 6301 (2015).

183. *See* Jason P. Nance, *Justifications for a Stronger Federal Response*, *in* A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY 35, 52–55 (Kimberly Jenkins Robinson ed., 2019) ("For the vast majority of schools in the United States, ESSA does not impose federal consequences for failing to make annual progress toward state-determined goals, requiring only that states and schools devise their own improvement plans when schools fail to meet the state's assigned criteria.").

184. *See* Kimberly Jenkins Robinson, *A Congressional Right to Education: Promises, Pitfalls, and Politics*, *in* A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY 186, 186–88 (Kimberly Jenkins Robinson ed., 2019) (describing Congressional expansion of the federal role in public education through legislation).

185. *See* Michael Wines, *As Washington Stews, State Legislatures Increasingly Shape American Politics*, N.Y. TIMES (Aug. 29, 2021), https://www.nytimes.com/2021/08/29/us/state-legislatures-voting-gridlock.html (describing how

education debate now centered around issues of school choice and private school vouchers, education has become a more partisan issue over the past several years.[186] Unfortunately, this means that politics could ultimately hinder meaningful progress on federal legislation that bolsters public school students' rights or the quality of education they receive. As the application of a negative-rights due process theory to compulsory education reveals, students at schools like those in the *Gary B.* cases would endure unjustified infringement on their liberties while they wait for a Congressional solution that may get bogged down in the political process. These concerns warrant a new approach to securing a federal right to education via the judiciary—the negative-rights theory—because waiting for legislation to provide relief is impracticable and unfair to students who attend our nation's lowest-performing schools.

IV. PROPOSED SOLUTION: ACCESS TO LITERACY AS A MINIMUM JUSTIFICATION

Applying a negative-rights due process theory to state compulsory education laws shows that the State must provide at least some minimal floor of basic education to avoid violating students' due process rights. This leads to the conclusion that there exists an implied federal right to education under the Due Process Clause that the Supreme Court must recognize. The scope of a right implied under this theory should be access to basic literacy skills because literacy skills open the door to informed citizenship and democratic participation—the very purposes articulated by the states for compulsory education.[187]

current gridlock and partisanship in Congress has left it largely ineffective, leaving many issues to state legislatures); Michael J. Teter, *Congressional Gridlock's Threat to Separation of Powers*, 2013 WIS. L. REV. 1097, 1103–07 (2013) (describing trend of increasing "gridlock" in Congress and its effects on lawmaking); *see also* AJ Willingham, *How to Make Sense of the School Choice Debate*, CNN, https://www.cnn.com/2017/05/24/us/school-choice-debate-betsy-devos/index.html (May 24, 2017, 2:41 PM) (describing the politicization of education issues, specifically, school choice).

186. *See* Willingham, *supra* note 185 (describing the growing politicization of education issues).

187. *See supra* Part II, Section A (describing the history of the connection between compulsory education and citizenship).

Although the Supreme Court has been reluctant to attempt to define what constitutes minimally adequate education, using a professional judgment approach to implementing this right would prevent the Court from creating judicially unmanageable standards. This approach would also rely on the expertise of education professionals who are better equipped to evaluate whether states provide the requisite access to literacy through their schools. Together, an implied federal right to access to literacy and professional judgment approach to evaluating whether states provide it would give students who are unconstitutionally required to attend "schools in name only" a direct avenue to challenge the State's failure while keeping the Court's task manageable in deciding these types of cases.

A. Recognizing an Implied Federal "Right" to Access to Literacy

Under the negative-rights theory discussed in Part III, students would be entitled to a minimum level of education from the schools they are required to attend.[188] This is not a new argument. The Supreme Court has repeatedly danced around the question of whether students might be entitled to a "minimally adequate education" under the U.S. Constitution for decades, without ever delving into what exactly such a right would entail.[189] The scope of such an implied federal right to minimally adequate education should be access to basic literacy skills because basic literacy skills are those most essential to preparing students for democratic participation. If the states' asserted purpose for compulsory education is to prepare students to be productive citizens, then the scope of this implied right to education should align with that purpose. States, through public schools, should provide at least access to basic literacy skills, like reading and comprehension skills, to students as the educational foundation for citizenship. Access to basic literacy skills is the *minimum* amount of education schools must provide to justify enforcing compulsory education laws because basic literacy skills are the *minimum* skills needed to participate in our democracy. This means that, if challenged, states would be required to show that their schools provide students with access to basic literacy skills,

188. *Supra* Part III.

189. *See generally* Black, *supra* note 102, at 151–58 (describing the history of the Supreme Court's right-to-education cases and the various approaches attempted by advocates to secure a federal right to education).

showing that the compulsory education law furthers the state's interest in preparing students for citizenship.[190]

It is important to note that this proposed solution does not seek to ask the Supreme Court to recognize a *new* right to literacy. Instead, this solution asks that the Court recognize that access to basic literacy skills is required to constitutionally justify what state governments are *already* doing in enforcing compulsory education laws. Compulsory education laws are grounded in our nation's noble democratic ideals.[191] Yet, as currently applied to students who attend the many failing schools across our country, these laws could not be more undemocratic. In fact, they are *unconstitutional*. Imagine that the State came to you as a parent and said, "We are going to take your child away from you for seven hours per day, five days per week, make them sit in a chair at our school building, and do nothing to educate them." That would clearly be an unconstitutional infringement on your child's liberty.[192] Although this is an extreme example, we must acknowledge that our nation's lowest performing schools are closer to the "do nothing" end of the spectrum than the "prepare students for democratic participation" end. Unfortunately, the students who attend the lowest-performing schools are all too often minority and low-income students, creating further inequity among American children.[193] The focus of this solution is to push the lowest-performing schools closer to the justifiable end of the spectrum. This can be done through recognition of an implied right to access to literacy under a negative-rights due process theory.

Imagine again that you are a parent. Now imagine that the government not only requires that you send your child to the school where

190. *See* Gary B. v. Whitmer, 957 F.3d 616, 638 (6th Cir.), *vacated*, 958 F.3d 1216 (6th Cir. 2020) (explaining how this argument could be successful in federal court).

191. *See supra* Part II, Section B.

192. *See Whitmer*, 957 F.3d at 640–41 ("[F]orcing students to attend a 'school' in which they are simply warehoused and provided no education at all would run afoul of the Due Process Clause's protections.").

193. *See* Kimberly Jenkins Robinson, *The Essential Questions Regarding a Federal Right to Education*, *in* A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY 1, 4–9 (Kimberly Jenkins Robinson ed., 2019) (describing disparities in educational quality, resources, facilities, funding, and outcomes between minority and white students and between low-income and more affluent students).

he or she does nothing, but also that the state may punish you for failing to do so. Depending on the state that you live in, you may be subject to fines, loss of driving privileges, or even jail time.[194] Because compulsory education laws as applied to some students violate a fundamental right and may subject violators to punishment through truancy actions, courts should apply a heightened scrutiny in these types of cases. State actions that burden the exercise of a fundamental liberty interest are "subject to strict scrutiny, and will be upheld only when they are narrowly tailored to a compelling government interest."[195] Courts should apply strict scrutiny when evaluating challenges to compulsory education laws under a negative-rights due process theory because requiring students to attend school burdens their fundamental right of freedom from restraint.[196] Due to the radical nature of this deprivation—physical restraint for seven hours per day, five days per week, for twelve years—a sufficient justification should have to pass the strict scrutiny standard.[197] *Rodriguez* suggests that application of strict scrutiny to compulsory attendance laws would be appropriate.[198]

194. Dean Hill Rivkin, *Truancy Prosecutions of Students and the Right [to] Education*, 3 DUKE F. FOR L. & SOC. CHANGE 139, 141 (2011).

195. Seal v. Morgan, 229 F.3d 567, 574 (2000) (citing United States v. Brandon, 158 F.3d 947, 956 (6th Cir. 1998)).

196. Youngberg v. Romeo, 457 U.S. 307, 318 (1982) ("[W]e have recognized that there is a constitutionally protected liberty interest in safety and freedom from restraint . . . ."); *see also* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (first citing Reno v. Flores, 507 U.S. 292, 301–02 (1993); then citing Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992))(noting that the Due Process Clause provides "heightened protection against government interference with certain fundamental rights and liberty interests."); *Brandon*, 158 F.3d at 956 (explaining that government actions that burden the exercise of fundamental rights or liberty interests are subject to strict scrutiny, and will be upheld only when they are narrowly tailored to a compelling governmental interest).

197. Requirements under compulsory education laws vary by state. Chicosky, *supra* note 8, at 15–16.

198. *See generally* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 38 (1973) ("The present case, in another basic sense, is significantly different from any of the cases in which the Court has applied strict scrutiny to state or federal legislation touching upon constitutionally protected rights. Each of our prior cases involved legislation which 'deprived,' 'infringed,' or 'interfered' with the free exercise of some such fundamental personal right or liberty.") (citing Skinner v. Oklahoma, 316 U.S. 535, 536 (1942); then citing Shapiro v. Thompson, 394 U.S. 618, 634 (1969), *overruled in part by* FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 501 (2007); and then

In *Rodriguez*, the Court declined to apply strict scrutiny to Texas's school funding scheme because the case was "significantly different from any of the cases in which the Court has applied strict scrutiny to state or federal legislation touching upon constitutionally protected rights," noting that prior cases warranting application of strict scrutiny concerned legislation "which 'deprived,' 'infringed,' or 'interfered' with the free exercise of some such fundamental personal right or liberty."[199] Unlike the legislation at issue in *Rodriguez*, compulsory education laws fall within the strict scrutiny standard; for compulsory education laws to be sufficiently justified, the state must show that requiring students to attend school is narrowly tailored to a relevant state interest.[200] Access to basic literacy skills would function as the minimum justification for the deprivation of students' liberty under compulsory education laws, and a showing that a school provided access to those skills would show that the laws are narrowly tailored to the state's interest.

B. A Professional Judgment Approach

To determine whether a state is sufficiently justifying its compulsory education laws, the Supreme Court should apply a professional judgment approach when it evaluates a state's provision of access to literacy. Once the Court recognizes that public school students have an implied constitutional right to access to literacy under a negative-rights due process theory, it must then determine whether the state has met its burden. To ensure compulsory education is sufficiently justified, the state must show the school attended by the student provides

citing Dunn v. Blumstein, 405 U.S. 330, 338–343 (1972)). The Court in *Rodriguez* declined to apply strict scrutiny to the state school funding scheme at issue for the exact reason that this Note proposes strict scrutiny should apply to compulsory education laws—education is not a fundamental right or liberty interest, but freedom from restraint or "liberty" is. *See Glucksberg*, 521 U.S. at 719–21 (implying that the fundamental "liberty" protected by the Due Process Clause is "the absence of physical restraint"). Therefore, the Court's reasoning in *Rodriguez* would support an application of strict scrutiny to compulsory education laws because freedom from restraint is a fundamental liberty interest and requiring children to attend schools burdens that liberty interest. *See Rodriguez*, 411 U.S. at 38.

199. *Rodriguez*, 411 U.S. at 37–38 (citing *Skinner*, 316 U.S. at 536; then citing *Shapiro*, 394 U.S. at 634; and then citing *Dunn*, 405 U.S. at 338–343).

200. *See supra* Part III, Section A.

access to basic literacy skills, which would show that the compulsory education law furthers the state's interest in preparing students for citizenship. The Sixth Circuit framed this analysis in *Gary B. v. Whitmer* as consisting of a simple question: "[W]hether the state's interest—here, the education it provides—is enough to justify the restraint."[201] However, the Sixth Circuit stopped short of actually evaluating whether the state met its burden in the *Gary B. v. Whitmer* case.[202] Adopting a professional judgment approach would create a consistent standard to guide the Court in deciding the issue.

So, how should the Court determine whether the state has met its burden in providing sufficient "access to literacy"? More specifically, what would constitute access to basic literacy skills? In answering this question, courts should look to the Supreme Court's approach in *Youngberg v. Romeo*.[203] In *Youngberg*, the Court said that the State would meet its burden in providing "minimally adequate training" that would be "reasonable" considering the patient's liberty interests.[204] The Court said whether minimally adequate training is "reasonable" would be determined by "judgment exercised by a qualified professional."[205]

Applied to the issue of access to literacy, adopting an approach like *Youngberg* would mean that states, through public schools, would need to provide a level of access to literacy that would be "reasonable" in the eyes of an education professional to avoid violating students' due process rights. The professional would need to look at whether a school provided students the opportunity to effectively obtain basic literacy skills. This would show the court whether the state's action of requiring students to attend school is "narrowly tailored" to ensuring access to literacy. However, a professional doing this evaluation would look only at those factors that the school could control as it would be unfair to hold states and schools responsible for all of the factors that

201. Gary B. v. Whitmer, 957 F.3d 616, 640–41 (6th Cir.), *vacated*, 958 F.3d 1216 (6th Cir. 2020).

202. *Id.*

203. Youngberg v. Romeo, 457 U.S. 307 (1982).

204. *Id.* at 321–23. *Youngberg* involved an involuntarily committed mentally ill person whose mother alleged, among other claims, that her son's due process rights were violated when the state facility failed to provide him appropriate treatment for his mental illness. *Id.* at 309–11.

205. *Id.* at 322.

ultimately affect a child's learning of literacy skills.[206] Those factors to be considered might include: (1) basic characteristics of the school environment, including whether school conditions are conducive to learning; (2) teacher qualifications; (3) class size; and (4) ability for students to receive individual help. Like in the *Gary B.* cases, schools lacking these basic supports are unlikely to provide meaningful access to literacy.[207] A professional would then also consider literacy-specific factors to conclude whether the school provides reasonable access to literacy considering the state's infringement on the students' liberty.

The policy rationale noted by the Court in *Youngberg* supports this professional judgment approach.[208] Applying a professional judgment approach would diminish concern that courts will get into the business of defining "minimally adequate education," or in this case, a minimally adequate level of access to literacy. This concern has consistently been voiced by some critics as a reason not to recognize a federal right to education.[209] Further, this professional judgment

206. Many studies show that factors affecting children's ability to learn to read are not actually school-related at all. A child's socioeconomic status, parental involvement, access to books at home, exposure to words during their first several years of life, and quality of pre-kindergarten education, if any, have all been shown to have a major impact on reading comprehension skills by the third grade. *See Literacy Challenges for the Twenty-First Century*, 22 FUTURE CHILD. 2, 39–49 (2012) (explaining the role of out-of-school factors in literacy learning). While those factors should serve as a backdrop for deciding whether a particular child has reasonable access to literacy, the focus of this Note will be on factors affecting literacy learning that can reasonably be provided by schools.

207. *See* Gary B. v. Whitmer, 957 F.3d 616, 624–29 (6th Cir.) (describing dismal conditions and lack of resources in plaintiffs' schools), *vacated*, 958 F.3d 1216 (6th Cir. 2020).

208. *Youngberg*, 457 U.S. at 322–23 (citing Parham v. J.R., 442 U.S. 584, 607 (1979); then citing Bell v. Wolfish, 441 U.S. 520, 544 (1979)) ("By so limiting [the] judicial review of challenges to conditions in state institutions, interference by the federal judiciary with the internal operations of these institutions should be minimized. Moreover, there certainly is no reason to think judges or juries are better qualified than appropriate professionals in making such decisions.").

209. Black, *supra* note 102, at 139–40; *see also* Alfred A. Lindseth, Rocco E. Testani, & Lee A. Peifer, *Federal Courts Can't Solve Our Education Ills*, 17 EDUC. NEXT (Feb. 22, 2017), https://www.educationnext.org/federal-courts-cant-solve-our-education-ills-forum-san-antonio-rodriguez/ (arguing that the federal judiciary lacks the knowledge to address education adequacy issues and that federal courts attempting to define a right to education would "need to start from scratch").

approach would be flexible, allowing a professional to consider schools' specific characteristics and existing programs or curriculum in evaluating what constitutes "reasonable" access to literacy.[210] Ultimately, states would need to ensure that their state-level requirements, policies, and funding structures are tailored to ensuring schools could provide this baseline level of access to literacy. Many states already have the infrastructure in place to monitor these things based on federal education laws that require schools to monitor children's progress in reading in exchange for federal funding.[211] While some children may never find themselves in a school that provides less than this minimum floor of access to literacy, recognition of an implied federal right to access to literacy and the application of a professional judgment standard would protect those who attend the lowest-performing schools, where their due process rights may very well be violated. This solution seeks to provide students an avenue for challenging those violations and the courts with a framework for evaluating these types of due process claims.

C. Policy Rationales for Recognizing a "Right" to Access to Literacy

Education in the United States is complicated. Federal and state legislation attempts to solve some of the public education system's problems, but individual students still lack an avenue to directly challenge the adequacy of their education in federal court. If access to literacy were recognized as an implied federal right under this negative-rights theory, every student would have the right to sue in federal court if the State failed to provide them with access to literacy sufficient to

210. This would in some ways be like a professional standard of care used in medical malpractice cases that considers the resources available to the physician based on geographic location and other factors.

211. Black, supra note 102 (discussing the growth of requirements imposed upon states that could provide courts qualitative measures with which to evaluate inequality or deprivation of education). Many states have also created third-grade reading tests, which are aimed at ensuring students are proficient in reading by the end of third grade. *Third-Grade Reading Legislation*, NAT'L CONF. OF ST. LEGISLATURES (Apr. 16, 2019), https://www.ncsl.org/research/education/third-grade-reading-legislation.aspx. These tests and data schools collect from them could also be useful in assessing whether schools are providing a baseline level of access to literacy. *See id.* (describing the adoption of third-grade reading legislation among the states).

justify the enforcement of compulsory education laws. Many of those students attend schools that lack adequate facilities and resources, and certainly do not provide them with even access to basic literacy skills. This means that those students' due process rights are violated every day that they attend school, and that school does nothing to teach them basic literacy skills. Although due process rights may seem conceptual, the reality of a due process violation in this context is that many students attend schools that, like the school in our hypothetical, do nothing to educate them.

Not only are students' due process rights potentially violated at many schools across the country, but many of those students are students of color.[212] This further widens the already large achievement gap between white and minority students.[213] Establishing a baseline level of access to literacy that schools must provide would promote uniformity and equity in education from state to state on this critical issue of literacy. As a result, greater access to literacy skills among minorities could lead to more individuals of color exercising their rights to vote and becoming politically active, ultimately helping our democracy become more representative and equitable.[214] Further, students who have access to basic literacy skills are more likely to have better overall educational outcomes.[215] Better educational outcomes have been shown to decrease involvement with the criminal justice

212. Research and data consistently show that the lowest performing and most under-resourced schools across the nation are often made up of majority minority and low-income students. Robinson, *supra* note 193.

213. *Id.* at 3–7

214. Jason P. Nance, *Justifications for a Stronger Federal Response*, *in* A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY 43–44 (Kimberly Jenkins Robinson ed., 2019) ("[E]ducation inequalities can and do lead to different levels of political participation along the lines of race and social class.").

215. *See* Robinson, *supra* note 193, at 7–8. Robinson describes the 2017 NAEP reading test results, which showed significant gaps in literacy skills between African American fourth graders and their peers. *Id.* at 7. Students' reading skills in the fourth grade are said to predict "future successes, such as graduating from high school, attending college, and maintaining employment." *Id.*; *see also Early Literacy Development*, NAT'L DROPOUT PREVENTION CTR., https://dropoutprevention.org/effective-strategies/early-literacy-development/ (last visited Sept. 25, 2021) (describing the connection between low literacy proficiency beginning in elementary grades and higher likelihood of dropping out of school).

system and lead to better overall health and jobs.[216] While the focus of this solution is narrow—implying a federal right to access to literacy—the larger issue of educational inequity and its impact on racial and economic justice issues always looms. Clearly, recognizing an implied right to access to literacy will not solve these problems, but this solution does have a role to play in the bigger picture.

Lastly, recognition of an implied federal right to access to literacy would move the Supreme Court one step closer to recognition of a fundamental right to education. The Supreme Court continually declines to recognize education as a fundamental right in the positive-rights sense.[217] By framing the argument as a negative-rights argument, the recognition of a right to access to literacy falls more squarely within the Court's due process precedent.[218] An implied right to access to literacy also eliminates some of the practical concerns raised by opponents to a fundamental right to education. Proponents of a fundamental right to education have often been met with criticism that recognition of such a right would unnecessarily involve the courts in defining a "minimally adequate education" and require them to engage in qualitative analysis better left to education experts.[219] However, by tailoring the scope of a fundamental right to education to an "access to literacy," that task becomes more manageable because the adequate skills are specific and already identified. Additionally, application of a professional judgment standard would prevent courts from making those qualitative judgments by leaving the evaluation of a school's provision of access to literacy to an education professional. While some advocates may argue that an implied right to access to literacy does not go far enough to remedy our nation's educational woes, those advocates should continue to hope for the eventual recognition of a federal right to education. In the meantime, an implied federal right to access to literacy is a step in the right direction.

216. Nance, *supra* note 214, at 40–42.

217. *See* Black, supra note 102, at 151–58 (citing the Supreme Court's resistance to recognizing affirmative or positive rights as a roadblock to recognition of education as a fundamental right).

218. *See* Gary B. v. Whitmer, 957 F.3d 616, 640–41 (6th Cir.) (noting that negative-rights theory has support in the law), *vacated*, 958 F.3d 1216 (6th Cir. 2020).

219. Naassana, *supra* note 178, at 1270–71.

V. CONCLUSION

Access to literacy is the minimum justification for enforcing compulsory education laws, and establishing this floor of minimally adequate education would help students who are the most disadvantaged by failing schools. If students must attend schools according to compulsory education laws—laws that limit students' freedom of movement—and states enforce those laws because of their interest in educating students, then it follows that states should provide students with at least some minimal level of education. Applying due process principles to compulsory education laws affirms this idea: If the state restrains students' liberty by requiring them to attend school, it must show it has an adequate justification for doing so. Literacy is the most important and foundational skill that children learn in schools, and it is also the skill that opens the doors to democratic participation. States have historically expressed their interest in providing public education as an interest in preparing children to participate fully as citizens in a democracy. Thus, basic literacy skills best align with that interest as the minimum level of education states should provide through public schools. While some advocates may say a right to access to literacy does not go far enough to remedy the educational issues faced by many public-school students, for students like those in the *Gary B.* cases, a fundamental right to access to literacy would ensure they are not required to attend "schools in name only" at which their due process rights are continually violated.