

SUFFICIENTLY FUNDAMENTAL: SEARCHING FOR A CONSTITUTIONAL RIGHT TO LITERACY EDUCATION

Abstract: The Fourteenth Amendment’s Due Process Clause protects rights that, though not in the Constitution, are deemed sufficiently fundamental that they may not be infringed. Although the Supreme Court has explicitly disclaimed a fundamental right to education, it has left open the possibility that some basic level of education might be a fundamental right, as a way of safeguarding constitutional rights to free speech and political participation. In 2020, the Sixth Circuit Court of Appeals in *Gary B. v. Whitmer* held that the Due Process Clause protects a fundamental right to access literacy. Although the Sixth Circuit’s decision was short-lived and has no precedential value, this Note argues that it presents a formulation of a right to education that respects Supreme Court precedent, acknowledges the importance of literacy and public education in American life, and provides a powerful tool for potential plaintiffs seeking to address educational inequity.

INTRODUCTION

The COVID-19 pandemic has drawn increased attention to the United States’ education system, with students falling behind an average of five months of learning compared to pre-pandemic expectations by the end of the 2020–2021 school year.¹ Learning loss was especially felt by historically dis-

¹ See EMMA DORN, BRYAN HANCOCK, JIMMY SARAKATSANNIS & ELLEN VIRULEG, MCKINSEY & CO., COVID-19 AND EDUCATION: THE LINGERING EFFECTS OF UNFINISHED LEARNING 2 (2021), <https://www.mckinsey.com/industries/education/our-insights/covid-19-and-education-the-lingering-effects-of-unfinished-learning> [<https://perma.cc/JE8D-A6L5>] (finding that students in general lost the equivalent of five months of mathematics learning and four months of reading during the school years affected by COVID-19). “Learning loss” is a phrase that connotes declines in knowledge, academic skills, or school achievements, usually brought on by interruptions in school attendance. *Learning Loss*, THE GLOSSARY OF EDUC. REFORM (Aug. 29, 2013), <https://www.edglossary.org/learning-loss/> [<https://perma.cc/U45T-LVDC>]. Students ended the 2019–2020 school year around three months behind expectations in math, losing the equivalent of two more months of learning over the 2020–2021 school year. DORN ET AL., *supra*, at 5. By contrast, in reading, students ended the 2019–2020 school year only one month behind, but lost three months of learning in 2020–2021. *Id.* at 6. The study found that the economic impact of learning loss could total upwards of \$150 billion across the U.S. economy. *Id.* at 10. In addition, chronic absenteeism, defined as missing over three weeks of school in a year, more than doubled during the pandemic, with around forty percent of newly absent students not going to school at all. *Id.* at 8. Standardized test scores from the 2020–2021 school year were also considerably lower than scores from the spring of 2019, the most recent school year not disrupted by the pandemic. See Jacqueline Reis, *DESE Releases 2021 MCAS Results*, MASS. DEP’T OF EDUC. (Sept. 21, 2021), <https://www.mass.gov/news/dese-releases-2021-mcas-results> [<https://perma.cc/HG4W-NF7J>] (reporting a six percent decrease in students meeting expectations in Massachusetts

advantaged communities, with Black students losing six months of learning and low-income students losing seven.² Of course, the inequality presented in pandemic learning loss is a reflection of general inequities that have been present in the American education system for quite some time.³

Faced with similar educational inequities in 2018, a class of plaintiffs made up of Rhode Island public school students sued the State in federal court with the aim of making public education a fundamental right protected by the United States Constitution.⁴ The student plaintiffs argued that the State of Rhode Island, through many of its public schools, had failed to provide a rudimentary education to allow their students to meaningfully exercise their right to vote and to free speech.⁵ The plaintiffs alleged that this failure was a violation of their constitutional right to an education that could train them to be informed citizens able to engage in the democratic process.⁶

In October of 2020, in *A.C. v. Raimondo*, the United States District Court for the District of Rhode Island dismissed the student plaintiffs' lawsuit.⁷ Although it dismissed their case, the District Court praised the plaintiffs for commencing a lawsuit that highlighted the Rhode Island education system's shortcomings and acknowledged the importance of an educated citizenry to the continuance and health of democracy.⁸

state English testing, and a sixteen percent decrease in students meeting expectations in math). DESE is the Massachusetts Department of Elementary and Secondary Education. *Id.*

² DORN ET AL., *supra* note 1, at 4. Additionally, high school students were more likely to leave high school without obtaining a degree, and high school seniors were more likely to forego college. *Id.* at 9. According to standardized testing, students whose schooling was affected by the pandemic scored ten points lower in math and nine points lower in reading compared to students in past years. *Id.* at 3.

³ See *id.* at 6 (showing that in addition to losing more learning than their white peers, Black and Latino students lost learning relative to an already lower baseline than white students).

⁴ See Center for Educational Equity, Cook (A.C.) v. McKee: *The Case to Establish a Right to Education Under the U.S. Constitution*, TEACHERS COLL. COLUM. UNIV. (Feb. 3, 2022), <http://www.cookvmckee.info/> [<https://perma.cc/8KKS-GBYR>] (describing the student plaintiffs and their goals in bringing the lawsuit); THE EDUC. TR., A SNAPSHOT OF EDUCATIONAL INEQUITY IN AMERICA 11–12 (2017) (illustrating the persistent inequity in educational performance on the basis of race based on data collected through 2015). The plaintiffs in *A.C. v. Raimondo* have retained as their counsel Columbia Law School Professor Michael A. Rebell, and are supported by the Columbia Center for Educational Equity. Center for Educational Equity, *supra* note 4.

⁵ Center for Educational Equity, *supra* note 4.

⁶ *Id.* The students argued that the Constitution provides a right to education in order to provide students with the skills necessary to engage in civic life, such as voting and jury service. *A.C. v. Raimondo*, 494 F. Supp. 3d 170, 174 (D.R.I. 2020).

⁷ *Raimondo*, 494 F. Supp. 3d at 197.

⁸ See *id.* at 175 (rejecting the notion that plaintiffs' lawsuit is absurd, and opining that plaintiffs were correct in drawing attention to threats to American democracy). The District Court cited social science scholarship that argued for civics education as a vital tool for maintaining the health of a democratic society. *Id.* at 179 (citing A.C. GRAYLING, *DEMOCRACY AND ITS CRISIS* 161 (1st ed. 2017)) (arguing that an informed and reflective population serves as a defense against the usurping of democratic institutions by partisan political forces or oligarchic interests).

In January of 2022, the Rhode Island plaintiffs lost again at the appellate level, when the First Circuit Court of Appeals upheld the dismissal of the lawsuit in *A.C. ex rel. Waithe v. McKee*.⁹ The plaintiffs now plan to petition for certiorari from the U.S. Supreme Court.¹⁰

Even though a constitutional right to education may seem far-fetched, a limited right to education under the Due Process Clause has some support in Supreme Court jurisprudence.¹¹ After all, the Supreme Court's jurisprudence related to public schools has been described as the most culturally important area of constitutional interpretation.¹² Although the Supreme Court has held that there is no broad right to education, the 1972 Supreme Court decision in *San Antonio Independent School District v. Rodriguez* and its progeny leave open the possibility that some amount of basic education needed to exercise the right to vote and to free expression might be a fundamental right protected under the Due Process Clause.¹³ Since *Rodriguez*, plaintiffs in a variety of fora have attempted to argue for a fundamental right to education, but to date none have had success.¹⁴

This Note explores the issue of a fundamental right to basic education by examining relevant Supreme Court precedents and the historical development of the American education system.¹⁵ This Note also explores this issue by using the majority and dissenting opinions written by the Sixth Circuit Court of Appeals in *Gary B. v. Whitmer* in 2020 as exemplars of the dichotomous potential endpoints to the question of a constitutional right to education.¹⁶

⁹ *A.C. Waithe v. McKee*, 23 F.4th 37, 48 (1st Cir. 2022).

¹⁰ Center for Educational Equity, *supra* note 4. The Supreme Court grants a writ of certiorari when it chooses to hear a case. *Certiorari*, BLACK'S LAW DICTIONARY (11th ed. 2019).

¹¹ *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36–37 (1973) (discussing but not deciding the possibility that some amount of education is safeguarded as a right under the Constitution in order to allow the meaningful exercise of the right to vote or the right to free expression).

¹² *See* JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* 9 (2018) (arguing that the number of Supreme Court cases surrounding the rights of students, as well as the importance of public schooling in the United States, make schools the most juridically significant point of conflict).

¹³ *Rodriguez*, 411 U.S. at 35, 36–37; *see also infra* notes 102–113 (discussing in more detail *Rodriguez* and its progeny cases).

¹⁴ *See, e.g., Papasan v. Allain*, 478 U.S. 265, 285 (1986) (acknowledging that the Supreme Court had not opined on the issue of a fundamental right to “minimally adequate education” and deciding the plaintiffs’ allegations did not force the court to decide the issue); *McKee*, 23 F.4th at 43 (rejecting the plaintiffs’ contention that the Due Process Clause grants citizens a right to civics education); *Gary B. v. Whitmer*, 957 F.3d 616, 642 (6th Cir.), *vacated by Gary B. v. Whitmer*, 958 F.3d 1216 (6th Cir. 2020) (describing a “fundamental right to a basic minimum education” and defining this right as education that “provides access to literacy”).

¹⁵ *See infra* notes 24–51 and accompanying text.

¹⁶ *See Whitmer*, 957 F.3d at 642 (holding that the Due Process Clause protects a right to minimum education, quantified as attaining basic literacy); *id.* at 662 (Murphy, J., dissenting) (arguing the Constitution does not provide any right to education, and criticizing the majority’s conclusions); *infra*

Part I of the Note summarizes the Supreme Court jurisprudence surrounding fundamental rights and education, and provides an overview of both the history of public education in the United States and the inequities that characterize the current state of American education.¹⁷ Part II evaluates the arguments of the majority opinion and the dissenting opinion of the Sixth Circuit Court of Appeals in *Whitmer*.¹⁸ Finally, Part III argues that plaintiffs seeking to establish a meaningful right to education should follow the Sixth Circuit majority's framing of a right to access basic literacy, because although the Sixth Circuit's conception of the right to access literacy is limited, it could serve as a useful tool for plaintiffs seeking to affect change.¹⁹

I. THE LEGAL AND HISTORICAL BACKGROUND OF FUNDAMENTAL RIGHTS JURISPRUDENCE AND AMERICAN PUBLIC EDUCATION

The question of whether access to education is sufficiently fundamental to warrant substantive due process protection rests a great deal upon the legal framework for categorizing constitutional rights, as well as education's place in the nation's "history and tradition."²⁰ Section A of this Part provides a brief summary of the history of public education in the United States, tracing its development and the increase of state involvement in education over time.²¹ It also provides some information regarding the current state of educational inequity in the United States.²² Section B explores the history of fundamental rights jurisprudence, as well as relevant Supreme Court cases involving access to education.²³

A. A Brief History of Education in the United States

Public schooling has deep roots in the political and social history of the United States.²⁴ The first public education institutions in America predate the

notes 149–205 and accompanying text (discussing the majority and dissenting opinions in more detail).

¹⁷ See *infra* notes 20–120 and accompanying text.

¹⁸ See *infra* notes 121–205 and accompanying text.

¹⁹ See *infra* notes 206–237 and accompanying text.

²⁰ See *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015) (holding that fundamental rights inquiries should begin with an examination of history, but should ultimately lie with a court using its “reasoned judgment” to decide if a right warrants Due Process protections); *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (holding that fundamental rights are only those that are “deeply rooted in the Nation’s history and traditions” and “implicit in the concept of ordered liberty”); see also *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022) (adopting the *Glucksberg* standard for fundamental rights).

²¹ See *infra* notes 24–50 and accompanying text.

²² See *infra* notes 24–50 and accompanying text.

²³ See *infra* notes 52–120 and accompanying text.

²⁴ See M.S. KATZ, A HISTORY OF COMPULSORY EDUCATION LAWS 11–20 (1976) (describing the evolution of compulsory education laws from the colonial era into the twentieth century).

United States, with Boston Latin School, the first public school founded by Europeans in America, opening its doors on April 23, 1635.²⁵ In 1642, the Massachusetts Bay Colony enacted a law tasking government officials with assessing the education of all children in the Colony.²⁶ In 1648, the Colony created educational standards for its children.²⁷

When the Commonwealth of Massachusetts wrote its state constitution in 1780, it emphasized the importance of public education and public schools.²⁸ By the time of the ratification of the Fourteenth Amendment to the United States Constitution in 1868, thirty of the thirty-seven states in the union included education in their constitutions.²⁹ Today, all fifty state constitutions in the United States task the state with providing education for their children, with eighteen state constitutions stating that education is crucial to democracy.³⁰ State courts in

²⁵ See Mary Crooks, *Apr 23, 1635 CE: First Public School in America*, NAT'L GEOGRAPHIC SOC'Y (Apr. 6 2020), <https://www.nationalgeographic.org/thisday/apr23/first-public-school-america/> [<https://perma.cc/B4SX-HB6Y>] (providing that although the Boston Latin School has moved multiple times over its history, it has been open since its founding by a Puritan settler). John Hancock, Samuel Adams, and Benjamin Franklin all attended the Boston Latin School. *Id.* Universities followed soon after public schools, with the establishment of Harvard, the first university in the American colonies, in September of 1636. *About Harvard: The History of Harvard*, HARV. UNIV. (2022), <https://www.harvard.edu/about-harvard/harvard-history/> [<https://perma.cc/S45D-9BZX>].

²⁶ KATZ, *supra* note 24, at 11–12.

²⁷ *Id.* A 1647 law also mandated that communities with more than fifty households employ someone to teach reading and writing for the community, and those with one hundred or more households to create a school. *Id.* at 12. Nevertheless, evidence implies that the 1647 law was not especially well enforced. *Id.* at 12–13.

²⁸ See MASS. CONST. pt. 2, ch. V, § 2 (acknowledging the importance of knowledge being generally available to the people through education, and charging the legislature with the responsibility to “cherish the interests of literature and the sciences” through universities and public schools). John Adams, the second president of the United States and primary author of the Massachusetts Constitution, wrote that education should be a public service funded by the public itself. See 9 CHARLES FRANCIS ADAMS, *THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES* 540 (Charles Francis Adams, ed., Little, Brown & Co. 1854) (1850) (advocating for public education, and suggesting that an educated nation would admire itself rather than individuals it produced); *John Adams & the Massachusetts Constitution*, COMMONWEALTH OF MASS. (2022) <https://www.mass.gov/guides/john-adams-the-massachusetts-constitution> [<https://perma.cc/6LTR-YGCV>] (recognizing Adams as the author of the Massachusetts Constitution, the first Vice President of the United States, and the second U.S. President).

²⁹ Amicus Brief of Martha Minow at 19, *Gary B. v. Whitmer*, 957 F.3d 616 (6th Cir. 2020) No. 18-1855, 2018 WL 6330616, at *19 (citing Steven Calabresi & Michael Perl, *Originalism and Brown v. Board of Education*, 2014 MICH. ST. L. REV. 429, 450–51).

³⁰ See Molly A Hunter, *State Constitution Education Clause Language*, EDUC. L. CTR. (2011), <https://edlawcenter.org/assets/files/pdfs/State%20Constitution%20Education%20Clause%20Language.pdf> [<https://perma.cc/N6EF-EUA8>] (describing education clauses in state constitutions and listing the language used in every state constitution). Education clauses in state constitutions vary widely; notably, Alabama’s state constitution until 2020 called for schools segregated on the basis of race. See Tariro Mzezewa, *Alabama Begins Removing Racist Language from Its Constitution*, N.Y. TIMES (Sept. 19, 2021), <https://www.nytimes.com/2021/09/19/us/alabama-constitution-racist.html> [<https://perma.cc/XAR5-X6VG>]. Alabama voters in 2004 and 2012 voted down referendum measures that would have deleted the segregationist language from its constitution. See *Alabama*, EDUC. L.

some states, such as North Carolina and Connecticut, have gone further and held that education is a fundamental right under their state constitutions.³¹

Before the 1830s, schools were locally run, with little to no state or federal oversight.³² In the decades that followed, however, educational reformers such as Horace Mann advocated for the creation of compulsory state-run public education as a democratic imperative.³³ On May 18, 1852, Massachusetts became the first state to make public schooling compulsory for its children, requiring all children of ages eight to fourteen to attend school.³⁴ By 1891, a majority of the states had followed suit in mandating school attendance for children.³⁵ By 1918, all of the forty-eight states then existing had passed laws mandating school attendance.³⁶

CTR. (2011), <https://edlawcenter.org/litigation/states/alabama.html> [<https://perma.cc/XU9P-TVYE>] (describing the results of the 2004 constitutional referendum); Ian Lovett, *Alabama—Election 2012*, N.Y. TIMES (Nov. 7, 2012), <https://www.nytimes.com/elections/2012/results/states/alabama.html> [<https://perma.cc/V5M3-NKS5>] (showing that over sixty percent of Alabama voters voted to keep the segregationist language in the state constitution, and noting that the measure also would have removed references to poll taxes).

³¹ See *Sneed v. Greensboro City Bd. of Educ.*, 264 S.E.2d 106, 113 (N.C. 1980) (holding that “equal access to participation in the public school system” is safeguarded as a fundamental right under the state constitution of North Carolina); *Horton v. Meskill*, 376 A.2d 359, 373 (Conn. 1977) (holding the right to education constitutionally protected in Connecticut); see also Brooke Wilkins, *Should Public Education Be a Federal Fundamental Right?*, 2005 BYU EDUC. & L.J. 261, 285–88 (describing the approaches different state courts have taken with regard to a right to education). This Note focuses only on decisions under the federal Constitution, and not decisions under state constitutions.

³² Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 117 (2013). The lack of state or federally-financed public schools was used by the District Court in *Gary B. v. Snyder* as evidence that education did not meet the *Glucksberg* standard for fundamental rights, suggesting that the lack of federal- or state-operated schools during the early years of the United States meant that education was not necessary for a free society. *Gary B. v. Snyder*, 329 F. Supp. 3d 344, 366 (E.D. Mich. 2018); see *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (reserving fundamental right status to rights that are “deeply rooted in this Nation’s history and tradition”).

³³ See KATZ, *supra* note 24, at 15–16 (describing Horace Mann’s mission to achieve publicly funded education, including the publication of twelve reports describing the state of education in the state of Massachusetts, and the role of public schools as a public benefit).

³⁴ An Act Concerning the Attendance of Children at School, ch. 240, 1852 Mass. Acts 170 (codified as amended at MASS. GEN. LAWS ch. 76). The penalty for not following the compulsory schooling law was a fine of twenty dollars. *Id.* § 2. It appears that this law, like its 1647 predecessor, was only sporadically imposed in its early years. See KATZ, *supra* note 24, at 17 (noting that state reports on education did not make mention of the compulsory school attendance law for around twenty years following its passage).

³⁵ See WILLIAM T. HARRIS, U.S. BUREAU OF EDUC., REPORT OF THE COMMISSIONER OF EDUCATION FOR THE YEAR 1890–91, at 34–36 (1891) (detailing the compulsory schooling and truancy laws of twenty-seven states and the District of Columbia, the laws’ mechanisms for enforcement, and the amount of time students were required to spend in school per year). In 1890, about sixty-nine percent of the country’s school-aged children attended school. *Id.* at 7–9. Northern states enrolled comparatively more of their children in public schools than did southern states. *Id.* at 10.

³⁶ KATZ, *supra* note 24, at 17. The final state to pass a mandatory education law was Mississippi in 1918. *Id.* at 18. The states’ definitions of truancy differed significantly, ranging from a week of unexcused absences in Connecticut to four months of nonattendance in Nevada. *Id.*

Even before the adoption of the Constitution, as early as 1787, the federal government concerned itself with education, with the Northwest Ordinance acknowledging the importance of knowledge to good government, and supporting the creation of schools and education in the Northwest Territories.³⁷ In 1867, in the wake of the civil war, Congress established the United States Department of Education to compile data on education in the states, and provide support to state and local officials in creating educational institutions.³⁸

Over its first century in existence, the role of the Department of Education grew in scope and size.³⁹ In 1979, Congress passed the Department of Education Organization Act, which raised the Department of Education to a cabinet-level department.⁴⁰ The Act also created the position of Secretary of Education as a full time, cabinet-level federal official responsible for education.⁴¹ Per its stated purpose, the Department of Education aims to help students achieve academic success by improving the quality of and access to education.⁴²

In 2018, the United States spent around \$580 billion on primary and secondary education, or more than \$14,000 per student.⁴³ Most of this investment came from individual states and localities, with the federal government chip-

³⁷ Northwest Territory Ordinance of 1787, art. III, 1 Stat. 51 (July 13, 1787). The Northwest Ordinance was a law passed in 1787 to oversee the territories west of the Ohio River, and to provide a framework for their eventual admission into the United States. *The Northwest Ordinance of 1787*, U.S. HOUSE OF REPRESENTATIVES (Jan. 9, 2022), <https://history.house.gov/Historical-Highlights/1700s/Northwest-Ordinance-1787/> [<https://perma.cc/F2DS-PZDQ>]. The first Congress reauthorized the Northwest Ordinance in 1789, after the ratification of the Constitution. *Id.*

³⁸ *The Federal Role in Education*, U.S. DEP'T OF EDUC. (June 15, 2021), <https://www2.ed.gov/about/overview/fed/role.html> [<https://perma.cc/9AMK-ZCQY>]. Shortly thereafter, in a speech given in Des Moines, Iowa in 1875, President Grant expressed support for free public schools in order to strengthen and safeguard the democratic character of the nation. *See Army of the Tennessee*, N.Y. TIMES (Oct. 1, 1875), <https://timesmachine.nytimes.com/timesmachine/1875/10/01/79251561.pdf> [<https://perma.cc/L6JJ-3C32>] (describing and reprinting excerpts from Grant's speech to the Army of the Tennessee).

³⁹ *See The Federal Role in Education*, *supra* note 38 (describing various acts of Congress entrusting more duties to the Department of Education, including operating land grant colleges, aiding states in providing vocational training at the high school level, and helping students pay for higher education).

⁴⁰ Department of Education Organization Act of 1979, Pub. L. No. 96-88, § 201 93 Stat. 668 (codified at 20 U.S.C. § 3411). In its declaration of purpose, Congress described education as "fundamental to the development of individual citizens and the progress of the Nation." *Id.* § 3401(1). Congress also found that education's importance is tied to the development of technology and the increasing sophistication of society. *Id.* § 3401(6).

⁴¹ *See id.* § 3411 (creating the role of Secretary of Education, appointed by the President with the Senate's approval); *see also id.* § 3412 (creating the position of Deputy Secretary of Education to support the Secretary of Education and the Department).

⁴² *The Federal Role in Education*, *supra* note 38.

⁴³ Melanie Hanson, *U.S. Public Education Spending Statistics*, EDUC. DATA INITIATIVE (Aug. 2, 2021), <https://educationdata.org/public-education-spending-statistics> [<https://perma.cc/F4G8-UNSE>]. Spending on education varies dramatically by state, from around \$7,500 per pupil in Utah, to more than \$25,000 per pupil in New York. *Id.*

ping in on average seven percent of funding for K-12 education.⁴⁴ Altogether, public schools educate over fifty million students, which represents more than eighty-five percent of all students in the United States.⁴⁵

Despite this heavy investment, and the lofty language used by the Department of Education, education inequities still permeate the U.S. education system.⁴⁶ Students in “predominantly white” districts as a whole received more than \$23 billion in investment compared to students in predominantly “nonwhite” districts, amounting to around \$2,000 more per student.⁴⁷ Furthermore, although poor predominantly white school districts on average receive about \$150 less than an average U.S. school district, low income predominantly nonwhite districts fall about \$1,600 below average.⁴⁸ In addition to losing more learning during the COVID-19 pandemic, minority and low income students began at a disadvantage, often attending underperforming schools.⁴⁹ Furthermore, low income and disabled students are far more likely to drop out of

⁴⁴ *Id.*

⁴⁵ Maya Riser-Kositsky, *Education Statistics: Facts About American Schools*, EDUCATIONWEEK, <https://www.edweek.org/leadership/education-statistics-facts-about-american-schools/2019/01> [https://perma.cc/DYL7-LHG3] (Nov. 22, 2021).

⁴⁶ See DORN ET AL., *supra* note 1, at 4 (showing that low income and minority students have lost more learning during the COVID-19 pandemic than white and more affluent students). Separately, the number of school-aged children enrolled in public school declined by more than one million in the 2021–22 school year. Thomas S. Dee, *Public School Enrollment Is Down by More than a Million. Why?* EDUCATIONWEEK (Nov. 2, 2022), <https://www.edweek.org/leadership/opinion-public-school-enrollment-is-down-by-more-than-a-million-why/2022/11> [https://perma.cc/P6HB-947J]. It is not immediately clear whether this reflects a disillusionment with public education by part of the U.S. population, or whether it is attributable to other causes. See *id.* (discussing potential reasons for the decline in enrollment and its potential consequences). In some districts, part of the declining enrollment is due to high-school aged children dropping out of school, which has led to efforts to reengage those learners. Bailey Allen, *Here's How School Is Going to Help You: Boston Public Schools Team Knocks on Doors, Encourages Students to Return*, BOS. GLOBE (Sept. 7, 2022), <https://www.bostonglobe.com/2022/09/07/metro/heres-how-school-is-going-help-you-boston-public-schools-team-knocks-doors-encourages-students-return> [https://perma.cc/HEF2-FYV4].

⁴⁷ EDBUILD, 23 BILLION 1, 4 (2019), <https://edbuild.org/content/23-billion> [https://perma.cc/HC6F-7WDB]. The study defined predominantly white districts as those where more than seventy-five percent of students are white, and defined predominantly nonwhite districts as those where more than seventy-five percent of students are nonwhite. *Id.* app. A.

⁴⁸ EDBUILD, *supra* note 47, at 5.

⁴⁹ See DORN ET AL., *supra* note 1, at 6 (showing that majority-Black schools lost six months of learning compared to five months on average, and were already behind relative to the average school before the pandemic began). The averages measured in the Dorn study were arrived at by analyzing assessment data from the i-Ready standardized assessment, used by many districts to measure academic progress. *Id.* at 4; see Laura Meckler, *Public Education Is Facing a Crisis of Epic Proportions*, WASH. POST (Jan. 30, 2022), <https://www.washingtonpost.com/education/2022/01/30/public-education-crisis-enrollment-violence/> [https://perma.cc/DV83-4E42] (describing i-Ready data as among the most robust sources of information on student achievement during the pandemic, because the test is standardized and administered to millions of students at various points in the school year).

high school, as are Black, American Indian, and Hispanic students.⁵⁰ If the Department of Education's purpose is to help all students succeed, the disparities in access to and quality of education along racial and class lines suggest that the Department's mission has yet to be successful.⁵¹

B. The Due Process Clause and Fundamental Rights Jurisprudence

The United States Constitution guarantees to the people of the United States certain rights that generally may not be infringed upon by federal, state or local government officials.⁵² A number of rights, such as the right to free speech and the right to bear arms, are contained directly in the text of the Constitution.⁵³ Other rights, such as the right to marry, are considered fundamental rights protected under the Fourteenth Amendment's Due Process Clause, which states that the government cannot "deprive any person of life, liberty, or property, without due process of law."⁵⁴ The Due Process Clause has been in-

⁵⁰ JOEL MCFARLAND, TRENDS IN HIGH SCHOOL DROPOUT AND COMPLETION RATES IN THE UNITED STATES: 2018, at 13–14 (2018).

⁵¹ See *The Federal Role in Education*, *supra* note 38 (stating that the purpose of the Department of Education is to ensure equal access to education and to improve the quality of education in the United States).

⁵² See, e.g., U.S. CONST. amend. I (guaranteeing "freedom of speech," freedom to practice religion, freedom of the press, freedom of assembly, and freedom to "petition the government for a redress" of injuries); *id.* amend. VIII (providing a right to be free from "excessive fines," and "cruel and unusual punishment"); *Timbs v. Indiana*, 139 S. Ct. 682 686–87 (2019) (holding that the Eighth Amendment's bar on "excessive fines" applies to state and local governments as well as the federal government). Although the rights contained in the Bill of Rights originally only applied to the federal government, following the passage of the Fourteenth Amendment in 1868, many of the rights in the Bill of Rights have been applied to state and local governments by the Supreme Court via a method called incorporation. *Incorporation*, BLACK'S LAW DICTIONARY, *supra* note 10.

⁵³ See U.S. CONST. amend. I (providing that Congress may not pass laws infringing on the freedom of speech); *id.* amend. II (stating that the right to bear arms is protected by the Constitution); *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (holding that the Second Amendment protects an individual's right to own and use firearms). It is worth noting that the understanding of the Second Amendment as granting an individual right is relatively new. See Nina Totenberg, *From 'Fraud' to Individual Right, Where Does the Supreme Court Stand on Guns?*, NPR (Mar. 5, 2018), <https://www.npr.org/2018/03/05/590920670/from-fraud-to-individual-right-where-does-the-supreme-court-stand-on-guns> [<https://perma.cc/6Y5M-LVNP>] (describing the formerly widespread view that the Second Amendment protected rights for militia members, and the evolution of Supreme Court jurisprudence on gun rights). In a 1991 interview with PBS, former Supreme Court Chief Justice Warren Burger described the idea that the Second Amendment protected an individual right as "one of the greatest pieces of fraud . . . on the American public by special interest groups that I have ever seen in my lifetime." *Id.*

⁵⁴ U.S. CONST. amend. XIV, § 1; see *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015) (holding that the Due Process Clause protects an individual's "fundamental right to marry"); *Loving v. Virginia*, 388 U.S. 1, 12 (1968) (same). Section 1 of the Fourteenth Amendment also states that States may not "abridge the privileges and immunities of citizens of the United States," but Supreme Court jurisprudence has held that the protections offered by this clause of the Fourteenth Amendment are severely limited. U.S. CONST. amend. XIV, § 1 (the Privileges and Immunities Clause); see the *Slaughterhouse Cases*, 83 U.S. (1 Wall.) 36, 55 (1872) (holding that the Privileges and Immunities Clause of

interpreted to safeguard procedural rights, the rights enumerated in the Bill of Rights against infringement by the states, and fundamental rights, also called substantive due process rights.⁵⁵ Because education is not mentioned in the Constitution, any constitutional protections it might receive would need to be as a fundamental right under the Due Process Clause.⁵⁶

Subsection 1 of this Section will describe the different frameworks the Supreme Court has laid out for deciding what rights are sufficiently fundamental to receive protection under the Due Process Clause.⁵⁷ Subsection 2 will specifically examine Supreme Court jurisprudence discussing fundamental rights in the education context.⁵⁸

1. Substantive Due Process and Fundamental Rights

Fundamental rights jurisprudence under the Fourteenth Amendment has evolved significantly over the past century.⁵⁹ From the early twentieth century until 1937, the Supreme Court considered economic freedoms, such as the freedom to enter into contracts, to be protected under the Due Process Clause.⁶⁰ In 1905, in *Lochner v. New York*, the Court reasoned that the right to contract for employment was a liberty interest ensured by the Fourteenth Amendment.⁶¹ In what has since been described as a period of judicial over-

the Fourteenth Amendment only protects a limited subset of rights arising from U.S. citizenship, and not the broader rights arising from state citizenship).

⁵⁵ See generally Nathan S. Chapman & Kenji Yoshino, *The Fourteenth Amendment Due Process Clause*, NAT'L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xiv/clauses/701> [<https://perma.cc/3HTV-HGTG>] (providing an overview of the rights protected by the Due Process Clause and the various approaches advanced by the Supreme Court with regard to fundamental rights).

⁵⁶ See U.S. CONST. (making no mention of education); Chapman & Yoshino, *supra* note 55 (explaining that fundamental rights are rights that, despite not being explicitly mentioned in the Constitution or the Bill of Rights, are nonetheless preserved under the Due Process Clause).

⁵⁷ See *infra* notes 59–85 and accompanying text.

⁵⁸ See *infra* notes 86–120 and accompanying text.

⁵⁹ Compare *Lochner v. New York*, 198 U.S. 45, 53 (1905) (citing *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897)) (holding that the Fourteenth Amendment protects economic liberties such as the freedom to contract), with *Griswold v. Connecticut*, 381 U.S. 479, 481–82 (1965) (disclaiming the *Lochner* Court's approach to substantive due process as overly political). This Note uses the term “*Lochner* era” to describe the period from the late nineteenth century to 1937 when the Court used an expansive understanding of fundamental rights to invalidate laws that affected economic liberty. See, e.g., *Lochner*, 198 U.S. at 53 (striking down a state law that capped the working hours for bakers at sixty hours per week, because it violated economic freedoms ensured by the Due Process Clause).

⁶⁰ See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 381–82 (1937) (finding that a Washington law setting a minimum wage for women did not violate the Constitution); *Allgeyer*, 165 U.S. at 589 (holding that the ability to become a party to a contract is a “liberty” protected under the Fourteenth Amendment).

⁶¹ *Lochner*, 198 U.S. at 53. The Court considered the constitutionality of a New York law that provided a limit to the number of hours bakers could work per week. *Id.* at 52. The law also prohibited bakers from working more than ten hours in one day. *Id.* Police powers are powers reserved to the states by the Tenth Amendment of the Constitution to enact laws regulating public welfare, safety, and

reach, the Supreme Court used *Lochner* and its progeny to invalidate economic legislation until *Lochner* was overturned in 1937, in *West Coast Hotel Co. v. Parrish*.⁶²

Following the *Lochner* era, the Court did not approve of the creation of new fundamental rights for some time.⁶³ Nevertheless, in 1965, in *Griswold v.*

health. *Police Power*, BLACK'S LAW DICTIONARY, *supra* note 10; see U.S. CONST. amend. X (allocating to states powers not assigned to the federal government or prohibited to states). The Court considered whether the law could be considered a labor or health law, and concluded that as a labor law, the law was not an exercise of the state's police powers. *Lochner*, 198 U.S. at 57. The Court also reasoned that the law did not affect public health, because the safety of bakery products was not related to the number of hours per day or per week a baker could work. *Id.* The Court took great pains to distinguish the case from *Holden v. Hardy*, a 1898 Supreme Court case in which a Utah law restricting the workday of miners to eight hours a day was upheld. *Id.* at 54–55; see *Holden v. Hardy*, 169 U.S. 366, 395 (1898) (finding the law to be a permissible use of a state's police powers). The *Lochner* court distinguished the New York law from the Utah law in *Holden* because the New York law concerned bakers instead of miners, and did not have a provision providing an exception for emergencies. *Lochner*, 198 U.S. at 55. Dissenting in *Lochner*, Justice Oliver Wendell Holmes decried the decision, arguing that the majority had invalidated the law based on their political opinions, and infringed on the right of the legislative majority to make law. *Id.* at 75 (Holmes, J., dissenting). Holmes argued that the Fourteenth Amendment, correctly understood, should not be used to subvert the will of the majority. *Id.* at 76. Holmes believed that the New York law at issue in *Lochner* was not so clearly violative of fundamental rights that it deserved to be struck down. *Id.* He argued that the Court should use restraint when invalidating laws, using the Due Process Clause to strike down only laws that clearly violate fundamental rights based in historical and legal traditions. *Id.* Holmes' emphasis on tradition and history in understanding fundamental rights mirrors the standard later set by the Supreme Court in *Washington v. Glucksberg*. See 521 U.S. 702, 721 (1997) (stating that fundamental rights are only those rights that are ingrained in the traditions and history of the United States); *Lochner*, 198 U.S. at 75–76 (Holmes, J., dissenting) (same); see also *infra* notes 69–72 and accompanying text (describing further the Supreme Court's holding in *Glucksberg*).

⁶² See *Griswold*, 381 U.S. at 481–82 (describing the doctrine of *Lochner* as the Court acting like a “super-legislature”); *W. Coast Hotel*, 300 U.S. at 392 (finding that the freedom to contract should be protected from arbitrary restraint, but not from legislation enacted to protect the interests of the community). *Lochner* has been described as part of the American anticanon, an example of a case any theory of constitutional interpretation should repudiate. See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380–81 (2011) (describing the anticanon as a set of cases that cogent theories of constitutional law should condemn as incorrectly decided). During the *Lochner* period, the Supreme Court in *Meyer v. Nebraska* described the Fourteenth Amendment as protecting the rights to contract, work, “acquire useful knowledge,” marry, raise a family, and practice religion. *Meyer v. Nebraska*, 390 U.S. 390, 399 (1923). Even though *Meyer* has not been overturned, this expansive view of Due Process Clause protections has not been echoed in later Supreme Court decisions. See, e.g., *Glucksberg*, 521 U.S. at 721 (holding that the Due Process Clause covers only those rights that are based in U.S. history and “implicit in our concept of ordered liberty”). For more details on *Meyer*, see *infra* notes 89–93 and accompanying text.

⁶³ See Chapman & Yoshino, *supra* note 55 (noting the dearth of fundamental rights cases between *W. Coast Hotel* and *Griswold*). In 1961, in *Poe v. Ullman*, the Court dismissed an appeal challenging a Connecticut law that prohibited the use of contraceptives. 367 U.S. 497, 508–09 (1961). The Court would go on to rule that the same Connecticut law was unconstitutional only four years later in *Griswold v. Connecticut*. See 381 U.S. at 485 (holding that privacy of the marital relationship is protected by the Constitution, and finding the ban on contraceptives unconstitutional). Dissenting from the majority opinion, Justice Harlan laid out a view of fundamental rights, arguing that the Court should have found the Connecticut law unconstitutional. *Poe*, 367 U.S. at 542 (Harlan, J., dissenting) (stating that

Connecticut, the Supreme Court struck down the Connecticut ban on contraceptives, finding that the right to privacy between married individuals was protected by the Constitution from governmental intervention.⁶⁴ The *Griswold* Court declined to hold that privacy was protected as a fundamental right, instead finding that many of the protections enshrined in the Bill of Rights implied a right to marital privacy.⁶⁵ Though concurring with the judgment of the majority in *Griswold*, Justice Harlan criticized the approach taken by the majority to invalidate the Connecticut law, arguing that the right to privacy was best understood to be protected under the Due Process Clause.⁶⁶

Later cases involving a fundamental right to privacy agreed with Justice Harlan's concurrence, and held that the right to privacy was a fundamental right under the Fourteenth Amendment.⁶⁷ In 1973, in *Roe v. Wade*, the Supreme Court first articulated the right to privacy as a fundamental due process right, and stated that the right to privacy extended to a woman's choice to have an abortion.⁶⁸

In the past twenty-five years, the Supreme Court has provided two potential frameworks for fundamental rights jurisprudence that guide lower courts today.⁶⁹ In 1997, in *Washington v. Glucksberg*, the Supreme Court articulated a standard for deciding fundamental rights protected by the Due Process Clause.⁷⁰ The majority specified that fundamental rights are only those rights

defining due process cannot be a "formula[ic]" exercise, but rather requires rational analysis, guided by the traditions and ideals of the nation). Justice Harlan considered fundamental rights jurisprudence to be an interpretive exercise, based in tradition and reason, but looking towards the future and weighing the needs of an organized society against individual freedoms. *Id.*

⁶⁴ See *Griswold*, 381 U.S. at 485 (striking down the Connecticut ban on contraceptives as violative of a constitutionally protected right to privacy).

⁶⁵ See *id.* at 482–85 (describing how the First, Third, Fourth and Fifth Amendments to the Constitution suggest a right to privacy).

⁶⁶ *Id.* at 500 (Harlan, J., concurring).

⁶⁷ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (interpreting a fundamental right to privacy as prohibiting the criminalization of sodomy); *Roe v. Wade*, 410 U.S. 113, 164 (1973) (holding that the fundamental right to privacy protects the right of women to terminate a pregnancy), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

⁶⁸ *Roe*, 410 U.S. at 164. *But see Dobbs*, 142 S. Ct. at 2242 (overruling *Roe* and its progeny). The majority opinion in *Dobbs* specified that its holding applied only to the right to abortion and not more broadly to other fundamental rights protected by the Due Process Clause. *Id.* at 2280. The concurring opinion written by Justice Clarence Thomas, however, argued for the overturning of the entirety of the Court's fundamental rights jurisprudence. See *id.* at 2301 (Thomas, J., concurring).

⁶⁹ Compare *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (requiring judicially recognized fundamental rights to be ingrained in the country's history), with *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015) (stating that although history should begin the analysis of what constitutes a fundamental right, the decision must ultimately be made by courts using their "reasoned judgment").

⁷⁰ *Glucksberg*, 521 U.S. at 720–21. The *Glucksberg* plaintiffs challenged the constitutionality of a Washington state law that prohibited physician-assisted suicide. *Id.* at 707. Physician assisted suicide is a term that describes the prescription of lethal drugs to a patient who is terminally ill, which the patient can then use to end their life. *Assisted Suicide*, BLACK'S LAW DICTIONARY, *supra* note 10. Chief Justice Rehnquist, writing for the majority, held that such a right to assisted suicide was not

that are “deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed.”⁷¹ Going further, the Court mandated that fundamental rights be specifically outlined, and expressed a preference for a conservative approach to substantive due process.⁷²

In the years after *Glucksberg*, Justice Anthony Kennedy led the court in outlining a more progressive vision for substantive due process, suggesting that each generation may adapt the Constitution and its ideals to the problems they face.⁷³ In 2003, in *Lawrence v. Texas*, the Supreme Court invalidated a Texas state law that criminalized sodomy.⁷⁴ Writing the majority opinion in *Lawrence*, Justice Kennedy stated that tradition and history need not be dispositive to a fundamental rights analysis.⁷⁵ Later, in 2015, in *Obergefell v. Hodges*, the Supreme Court held that several state laws defining marriage as between a man and a woman violated the fundamental right to marriage protected by the Due Process Clause.⁷⁶ Writing for the majority, Justice Kennedy acknowledged the importance of history and tradition in determining fundamental rights, but

protected under the Constitution. *Glucksberg*, 521 U.S. at 735. The State of Washington would go on to legalize assisted suicide for terminally ill patients by initiative petition in 2008. *Death with Dignity Act*, WASH. ST. DEP’T OF HEALTH (2021), <https://www.doh.wa.gov/youandyourfamily/illnessanddisease/deathwithdignityact> [<https://perma.cc/ZK8X-QW4E>]; see *Initiative*, BLACK’S LAW DICTIONARY, *supra* note 10 (defining initiative as voter proposed and enacted legislation, allowed in certain states).

⁷¹ *Glucksberg*, 521 U.S. at 721 (describing history and tradition as restraints on the Fourteenth Amendment’s reach).

⁷² *Id.*

⁷³ See *Obergefell*, 576 U.S. at 681 (finding that the fundamental right to marriage allowed same-sex couples to marry); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (invalidating anti-sodomy laws as violative of the Due Process Clause).

⁷⁴ *Lawrence*, 539 U.S. at 578. *Lawrence* overturned *Bowers v. Hardwick*, a 1986 case where the Supreme Court had found anti-sodomy criminal statutes to be constitutional. *Id.* at 578; see *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986) (finding that anti-sodomy laws did not violate the Constitution because they did not discriminate against any particular group, given that both heterosexual and homosexual sodomy was outlawed), *overruled by Lawrence*, 539 U.S. at 558. In *Lawrence*, the Court reaffirmed a fundamental right to privacy that the Court had identified in *Griswold* and *Roe*, and found that the Texas law infringed upon this fundamental right. *Lawrence*, 539 U.S. at 578; see *Roe v. Wade*, 410 U.S. 113, 164 (1973) (finding a fundamental due process right to privacy protecting the right to abortion), *overruled by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding that the Constitution protects a right to privacy).

⁷⁵ *Lawrence*, 539 U.S. at 572 (citing *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J. concurring)).

⁷⁶ *Obergefell*, 576 U.S. at 681. It is noteworthy that *Obergefell* garnered four vociferous dissents that argued that the Court had overstepped its role in expanding the institution of marriage to same sex couples. See *id.* at 686 (Roberts, C.J., dissenting) (favoring a narrower framework for identifying fundamental rights under the Fourteenth Amendment); *id.* at 713 (Scalia, J., dissenting) (characterizing the majority opinion as a “threat to American democracy”); *id.* at 721 (Thomas, J., dissenting) (suggesting that the doctrine of substantive due process should not be extended to positive rights); *id.* at 736 (Alito, J., dissenting) (similar).

held that history alone could not determine when a right should be deemed fundamental.⁷⁷ Instead, courts must “exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect.”⁷⁸ Applying this framework, the Court then held that marriage is a fundamental right, and therefore could not constitutionally be withheld from same sex couples.⁷⁹

In the years following the *Obergefell* opinion, it was not entirely clear if *Obergefell* or *Glucksberg* was the standard for courts to determine fundamental rights under substantive due process.⁸⁰ As a practical matter, it appeared unlikely that the standard from *Obergefell* would be used as the Court became markedly more conservative in the years following *Obergefell*.⁸¹ In 2022, the Court confirmed this suspicion when it overturned *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* in *Dobbs v. Jackson Women’s Health Organization*.⁸² Writing for the majority, Samuel Alito stated that *Glucksberg*’s “deeply rooted in . . . history and tradition” framework was the guiding principle for determining rights under the Due Process Clause.⁸³ Alito

⁷⁷ *Id.* at 664 (majority opinion) (“History and tradition guide and discipline [the inquiry into whether a right is protected under substantive due process] but do not set its outer boundaries.”). The majority also quoted Justice Harlan’s *Poe* dissent favorably, lending credence to the idea that substantive due process analysis is not formulaic. *Id.* at 663–64 (citing *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

⁷⁸ *Id.* at 664. *Obergefell* could be understood as setting a new framework for analyzing fundamental rights protected by the Fourteenth Amendment, and some lower courts have used similar language in the time since *Obergefell* when recognizing new potential fundamental rights. *See, e.g.*, *Juliana v. United States*, 947 F.3d 1159, 1177–78 (9th Cir. 2020) (Staton, J., dissenting) (citing *Obergefell*, 576 U.S. at 664) (referencing *Obergefell* in support of a right of the nation to continue to exist in the context of a lawsuit about climate change).

⁷⁹ *Obergefell*, 576 U.S. at 665.

⁸⁰ *See, e.g., id.* at 702 (Roberts, C.J., dissenting) (accusing the majority opinion of overturning *Glucksberg*); Gary B. v. Snyder, 329 F. Supp. 3d 344, 365 (E.D. Mich. 2018) (stating that *Obergefell*’s impact on fundamental rights jurisprudence is not yet entirely clear); *see also* Robert Turner, *W(h)ither Glucksberg?*, 15 DUKE J. CONST. L. PUB. POL’Y 183, 210 (2020) (contending that the future of *Glucksberg* as valid precedent is unclear after the *Obergefell* decision).

⁸¹ *See* Amelia Thomson-Deveaux, Laura Bronner & Anna Wiederkehr, *What the Supreme Court’s Unusually Big Jump to the Right Might Look Like*, FIVETHIRTYEIGHT (Sept. 22, 2020), <https://fivethirtyeight.com/features/what-the-supreme-courts-unusually-big-jump-to-the-right-might-look-like/> [<https://perma.cc/S4MP-6ZNU>] (describing how the Court became more conservative with the death of liberal Justice Ruth Bader Ginsburg, and speculating on the consequences of a more conservative Court). Additionally, only a minority of the current Court actually attended public schools. *See* Alia Wong, *The Private School Persuasion of the Supreme Court*, THE ATLANTIC (July 17, 2018), <https://www.theatlantic.com/education/archive/2018/07/supreme-court-private-school/565211/> [<https://perma.cc/P23K-6WBK>] (noting that even though only nine percent of American high schoolers graduate from private schools, five members of the Supreme Court at that time had attended private Catholic schools, with Justices Neil Gorsuch and Brett Kavanaugh both attending Georgetown Prep, an elite Washington D.C. Catholic high school for boys).

⁸² *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022).

⁸³ *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). Bizarrely, even though Justice Alito professes to be guided by the test laid out in *Glucksberg*, some of the evidence he mar-

followed this with an analysis of U.S. history, purporting to show that a right to abortion did not survive the *Glucksberg* standard.⁸⁴ Accordingly, although *Obergefell* remains good law and could serve as a guide to more progressive jurists, it appears that *Glucksberg* continues to be the standard for fundamental rights jurisprudence.⁸⁵

2. Jurisprudence on Education and Constitutional Rights

In cases surrounding access to and quality of education, the Supreme Court has consistently emphasized the centrality of education and learning to the mission of government and to a democratic society.⁸⁶ Although many cases dealing with education in the constitutional context have been decided on equal protection grounds,⁸⁷ the Court has never decided the question of wheth-

shals in support of his conclusion bears little if any relevance to whether a right to abortion is “deeply rooted in this Nation’s history and traditions. See *id.* at 2252. For example, he notes that the British Parliament outlawed abortion in 1803, and states that “[o]ne scholar has suggested that Parliament’s decision ‘may partly have been attributable to the medical man’s concern that fetal life should be protected[.]’” *Id.* (first citing Lord Ellenborough’s Act, 43 Geo. 3, ch. 58 (1803); and then quoting J. KEOWN, ABORTION, DOCTORS AND THE LAW 22 (1988)). It is worth noting that the British Parliament no longer had control over the United States in 1803, so the relevance of 1803 Acts of Parliament to the history of constitutional rights in this country is not immediately apparent. See generally THE DECLARATION OF INDEPENDENCE (U.S. 1776) (declaring independence from Great Britain). If there are reasons to afford 1803 Acts of Parliament significance in determining constitutional rights in the United States, Justice Alito does not explain them. *Dobbs*, 142 S. Ct. at 2252.

⁸⁴ See *Dobbs*, 142 S. Ct. at 2242 (holding that U.S. history did not demonstrate that the Due Process Clause protects a right to abortion). Commentators were quick to note that the historical sources marshalled by Justice Alito did not provide a complete picture of laws concerning abortion, nor the attitudes of early Americans with regard to abortion. See, e.g., *History, the Supreme Court, and Dobbs v. Jackson*, AM. HISTORICAL ASS’N (Aug. 31, 2022), <https://www.historians.org/research-and-publications/perspectives-on-history/september-2022/history-the-supreme-court-and-emdobbs-v-jackson/em-joint-statement-from-the-american-historical-association-and-the-organization-of-american-historians> [<https://perma.cc/GN8V-FHV3>] (describing the *Dobbs* majority opinion as “a flawed interpretation of abortion criminalization,” and suggesting that the opinion misrepresents the historical development of law related to abortion); Deanna Pan, *Who Was Matthew Hale, the 17th-Century Jurist Alito Invokes in His Draft Overturning Roe?*, BOS. GLOBE (May 6, 2022), <https://www.bostonglobe.com/2022/05/06/metro/who-was-matthew-hale-17th-century-jurist-alito-invokes-his-draft-overturning-ro/> [<https://perma.cc/Q5M8-JZF>] (criticizing Justice Alito for his reliance on the writings of Jurist Matthew Hale, a jurist who advocated for the admission of “spectral evidence” in witchcraft trials, and who has been described by historians and “particularly misogynistic,” even for his time).

⁸⁵ See *Dobbs*, 142 S. Ct. at 2242 (applying the *Glucksberg* standard to find no right to abortion protected by the Due Process Clause); see also *supra* notes 69–72 and accompanying text (discussing *Glucksberg* in more detail).

⁸⁶ See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973) (emphasizing the importance of education); *Brown v. Bd. of Educ.* 347 U.S. 483, 493 (1954) (holding that education is among the most crucial duties of government); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (describing the significance of education to a democratic society).

⁸⁷ See *Plyler v. Doe*, 457 U.S. 202, 222, 230 (1982) (deciding that a Texas law requiring undocumented children to pay tuition to attend public schools violated the Equal Protection Clause); *Brown*, 347 U.S. at 494–95 (holding that segregating schools on the basis of race violated the Equal Protec-

er some amount of education could be protected from governmental infringement as a fundamental right.⁸⁸

In 1923, in *Meyer v. Nebraska*, the Supreme Court struck down several state laws that prohibited the teaching of foreign languages to children below the eighth-grade level.⁸⁹ The *Meyer* Court held that the United States has consistently considered education and learning to be of the utmost importance and worthy of promotion.⁹⁰ The Court also described the vocation of teaching and the existence of schooling as "essential . . . to the public welfare."⁹¹ Reasoning that learning foreign languages could not be harmful, the Court held that the freedom to teach foreign languages and parents' right to have their children learn foreign languages were protected by the Fourteenth Amendment.⁹² Accordingly, the Court struck down the state laws as unconstitutional.⁹³

Just two years later, the Court reaffirmed the importance of educational choice and education in general.⁹⁴ In 1925, in *Pierce v. Society of Sisters*, the Court held that an Oregon law requiring children to attend public schools to the exclusion of religious or private school was unconstitutional.⁹⁵ Citing its decision in *Meyer*, the Supreme Court reaffirmed that parents had a liberty in-

tion Clause of the Fourteenth Amendment). The Equal Protection Clause of the Fourteenth Amendment requires that government actions treat all people equally, subject to certain exceptions. *Equal Protection Clause*, BLACK'S LAW DICTIONARY, *supra* note 10. This Note does not discuss equal protection jurisprudence regarding education in detail, because the Supreme Court has held that disparities in school quality generally do not violate the Equal Protection Clause. *Rodriguez*, 411 U.S. at 50–51.

⁸⁸ See *Rodriguez*, 411 U.S. at 36–37 (leaving open the possibility that the Due Process Clause protects some amount of education requisite to utilize other constitutionally protected rights); see also *Papasan v. Allain*, 478 U.S. 265, 285 (1986) (reaffirming that the Court since *Rodriguez* has not decided whether some amount of education could be a fundamental right protected by the Due Process Clause).

⁸⁹ *Meyer*, 262 U.S. at 403. At the time of the *Meyer* decision, twenty-two states had passed similar laws barring the teaching of foreign languages to young children. *Id.* at 395. The purpose of these laws was, in theory, to better integrate and assimilate immigrant children into American society. *Id.* at 398.

⁹⁰ *Id.* at 400.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 403.

⁹⁴ See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (invalidating a law that required all children to attend public schools because it was deemed as a violation of parents' rights to make choices regarding their children's education, and their children's rights to influence that choice).

⁹⁵ *Id.* The law at issue in *Pierce* made it a misdemeanor to fail to send a child between the ages of eight and sixteen to a public school, punishable by a fine of between five and one hundred dollars and a jail sentence between two and thirty days, or both. *Id.* at 531. The plaintiffs were a religious school and a military academy, both of which would no longer be allowed to teach students below the eighth-grade level if the law went into effect. *Id.* at 531–33. The lower court in *Pierce* granted an injunction against enforcement of the act, reasoning that parent's and guardians' ability to choose among reputable schools for their children's education was a liberty protected by the Fourteenth Amendment. *Id.* at 533–34. The Society of Sisters also argued, among other things, that the law violated children's freedom to help their parents in selecting where to attend school. *Id.* at 532.

terest in guiding the education of their children, and that this fundamental liberty was protected by the Fourteenth Amendment.⁹⁶

In the years following *Meyer* and *Pierce*, education only grew in importance in the United States, and the issue of school segregation made its way to the Court.⁹⁷ In 1954, in *Brown v. Board of Education*, the Supreme Court held that the segregation of public schools was a violation of the Fourteenth Amendment's Equal Protection Clause, which prohibits state action that disparately impacts different groups of people based on categories such as race.⁹⁸ Although *Brown* was decided on Equal Protection Clause grounds, Chief Justice Earl Warren's unanimous opinion in *Brown* extols the centrality of education to the role of the government and the ability of students to lead successful lives.⁹⁹ In fact, the *Brown* Court opined that "education is perhaps the *most* important function of state and local governments."¹⁰⁰ The Court also stated that education functioned as a prerequisite for many public responsibilities, and that deprivation of education was the equivalent of removing any reasonable hope of success in life.¹⁰¹

Despite the Court's repeated recognition of the importance of education, plaintiffs who have asked federal courts to recognize a fundamental right to

⁹⁶ *Id.* at 534–35. The Court also held that the school plaintiffs had a right to be free of unreasonable regulation by the government, and that state governments' police powers did not extend to forcing all children to attend only public schools. *Id.* at 535–36. Although *Meyer* and *Pierce* were decided on fundamental rights grounds under the Fourteenth Amendment, Justice Anthony Kennedy argued in his dissent in *Troxel v. Granville* that they would have been more appropriately based in First Amendment jurisprudence. See *Troxel v. Granville*, 530 U.S. 57, 95 (2000) (Kennedy, J., dissenting).

⁹⁷ See Thomas D. Snyder, *Education Characteristics of the Population, in 120 YEARS OF AMERICAN EDUCATION: A STATISTICAL PORTRAIT* 1, 6 (Thomas D. Snyder, ed., 1993) (showing a dramatic rise in the percent of children enrolled in public schools between 1920 and 1950, with an especially pronounced rise in attendance among minority populations); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493, 495 (1954) (citing the significance of education to citizenship and success in life, and finding that segregated schools were a violation of constitutionally guaranteed Equal Protection).

⁹⁸ *Brown*, 347 U.S. at 483. In Equal Protection Clause jurisprudence, classifications that disparately impact groups on the basis of race are analyzed under strict scrutiny, a test whereby a proposed state action must be narrowly tailored to further a compelling government objective. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319–20 (1978) (applying strict scrutiny to strike down the University of California's undergraduate affirmative action program, finding that its racial quota system was insufficiently tailored to the goal of increasing educational diversity); *Strict Scrutiny*, BLACK'S LAW DICTIONARY, *supra* note 10 (defining strict scrutiny as the most stringent type of review used by a court to review government action, requiring "the state [to] establish that it has a compelling interest" for its proposed behavior).

⁹⁹ *Brown*, 347 U.S. at 493 (citing both mandatory attendance laws and heavy financial investments in schooling as evidence of the centrality of education).

¹⁰⁰ *Id.* (emphasis added). The Court did state, by contrast, that the original intention for the Fourteenth Amendment's impact on public schooling was unclear. *Id.* at 490.

¹⁰¹ *Id.* at 493. The Court went on to hold that even where segregated schools purported to be materially equal, they still meaningfully discriminated against nonwhite students. *Id.* at 495. Having struck down school segregation on Equal Protection grounds, the Court chose not to decide whether the Due Process Clause mandated school integration. *Id.*

education have so far come up short.¹⁰² In 1973, in *San Antonio Independent School District v. Rodriguez*, students attending underfunded public schools in Texas challenged the state's education funding scheme, which produced inequities in spending per student, with wealthier districts gaining access to more funds than poorer districts.¹⁰³ The Court addressed whether the school funding scheme violated the Equal Protection Clause, as well as the students' claimed fundamental right to education as protected by the Due Process Clause.¹⁰⁴ The plaintiffs argued that education was a fundamental right, given that some amount of education is required to meaningfully access the constitutionally protected rights to vote and to free speech.¹⁰⁵

The Supreme Court decided that there was no fundamental right to education broadly.¹⁰⁶ The Court found that the Texas education system was not depriving students of education to the degree where their First Amendment rights or their right to vote would be infringed upon.¹⁰⁷ Significantly, although the plaintiffs contended that the schools they attended were inferior to other Texas schools, they did not allege that they were denied access to fundamental literacy skills.¹⁰⁸ Accordingly, the Court held that plaintiffs had not established that the schools had not provided "the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process."¹⁰⁹

Although the *Rodriguez* Court held that education in general was not a fundamental right, it did emphasize the significance of education in the United States.¹¹⁰ Despite this recognition, the Court found that significance alone was

¹⁰² See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35, 36–37 (1973) (finding no fundamental right to education, but leaving open the possibility of some minimum level of education as a fundamental right).

¹⁰³ *Id.* at 12–13.

¹⁰⁴ *Id.* at 30, 35.

¹⁰⁵ *Id.* at 35.

¹⁰⁶ *Id.* The District Court found that wealth was a "suspect classification" under the Equal Protection Clause, meaning classifications based on wealth would be analyzed under the lens of strict scrutiny by the judiciary. *Id.* at 16. The Supreme Court disagreed with this analysis, holding that wealth was not a suspect classification in this case. *Id.* at 18–25 (comparing the facts of the case to Supreme Court precedents where discrimination against the poor had been found, and concluding no such discrimination was present). The Court also generally disagreed with the notion that funding public education through property taxes was a violation of the Equal Protection Clause, even though property tax funding creates unequal funding between school districts. *Id.* at 40.

¹⁰⁷ *Id.* at 37. The Court did emphasize the importance of the right to the franchise and the right to free expression, but reasoned that invalidating the Texas law would be an improper exercise of judicial power in safeguarding these rights. See *id.* at 36 (describing overturning the Texas scheme of education financing as "judicial intrusion into otherwise legitimate state activities").

¹⁰⁸ *Id.* at 37.

¹⁰⁹ *Id.* The Court considered the "only relative differences" pointed to by the plaintiffs to be insufficient to engender a constitutional injury. *Id.*

¹¹⁰ See *id.* at 29–30 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)) (expressing the Court's belief in the significance of education to the good of the nation).

not enough to render a state function fundamental.¹¹¹ Additionally, the Court, proceeding from the plaintiffs' argument, left open the possibility that there is a fundamental right to "some identifiable quantum of education" as a "constitutionally protected prerequisite" to the right to vote or the right to free expression.¹¹² The Court also suggested that a system that denied to students any education at all could infringe on their fundamental rights.¹¹³

Following *Rodriguez*, the Court soon had an opportunity to confront a system where some children were fully excluded access to education.¹¹⁴ In 1982, in *Plyler v. Doe*, the Supreme Court reaffirmed that there was no fundamental right to education broadly, but held that the state of Texas could not refuse undocumented children admission to public schools or require them to pay tuition to attend public schools.¹¹⁵

The Court cited the importance of education to the nation and its people, describing public schools as integral to the maintenance of American democracy.¹¹⁶ It specifically noted that education plays a crucial role in preparing students to vote and participate in political life, and that taking away this preparation was harmful.¹¹⁷ By denying undocumented children access to schools and to literacy, Texas effectively created an underclass of permanently deprived people, which the Court found to be in violation of the purpose of the Equal Protection Clause.¹¹⁸ The Court specifically described illiteracy as "an enduring disability," and emphasized the harm done to children who are refused ed-

¹¹¹ *Id.* at 30.

¹¹² *Id.* at 36–37.

¹¹³ *Id.* at 37. The Court reasoned that the argument advanced by the plaintiffs was inapplicable to the Texas education financing scheme that resulted in unequal financing for different districts, but not the wholesale denial of education to any particular population. *Id.* The Court seemed concerned with the consequences of accepting education as a fundamental right for furthering the right to free expression and the right to vote, suggesting that if the plaintiffs' argument succeeded, there might also be a fundamental right to housing or food for the same reasons. *See id.* (hypothesizing that those with limited or nonexistent access to food or housing could also be limited in their ability to access the franchise or meaningfully use their right to free speech).

¹¹⁴ *See Plyler v. Doe*, 457 U.S. 202, 230 (1982) (striking down a Texas law that excluded undocumented children from the public education system).

¹¹⁵ *Id.* at 221, 230. The *Plyler* plaintiffs were undocumented children who sought the right to attend Texas public schools for free. *Id.* at 206. The state law being challenged prevented the state from providing funding to school districts for the education of undocumented children, and allowed school districts to prevent undocumented children from enrolling. *Id.* at 205. The District Court held that the law ran afoul of the Equal Protection Clause, and declined to decide whether the law could pass strict scrutiny, because there was no legitimate reason for the discriminatory law. *Id.* at 208.

¹¹⁶ *Id.* at 221 (citing *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring)).

¹¹⁷ *Id.* at 222 n.20 (responding to the State's assertion that refusing education to undocumented children was less important than refusing education to citizens, as noncitizens cannot vote).

¹¹⁸ *Id.* at 222.

ucation and thus denied opportunities and social mobility.¹¹⁹ Finding that Texas had failed to show that the law furthered any substantial goal of the state, the Court struck down the law.¹²⁰

II. A FUNDAMENTAL RIGHT TO ACCESS LITERACY?: THE MAJORITY OPINION AND DISSENTING OPINION IN *GARY B. V. WHITMER*

In a 2020 split decision, the Sixth Circuit Court of Appeals in *Gary B. v. Whitmer* became the first federal court in the United States to recognize a federal constitutional right to basic education, which it described as education sufficient to provide access to literacy.¹²¹ Because the *Whitmer* majority opinion represents the first federal court to affirm a right to basic literacy, and because the decision garnered a dissent that argued against the recognition of a right to education, the *Whitmer* opinions provide a useful lens for analyzing the debate around a right to education.¹²²

Section A of this Part discusses the factual and procedural background that led to the 2020 Sixth Circuit panel decision in *Whitmer*.¹²³ Section B analyzes the majority opinion's reasoning in recognizing a fundamental right to access basic literacy.¹²⁴ Section C analyzes the dissent's position that the Constitution provides no fundamental right to education whatsoever.¹²⁵

A. The Factual and Procedural Background of *Gary B. v. Whitmer*

The failings of the Detroit Public Schools (collectively called the Detroit Public Schools Community District or "DPSCD") are emblematic of the dis-

¹¹⁹ *Id.* Considering the state's argument that the education law was meant to deter illegal immigration, the Court considered the law to be ineffective. *Id.* at 228.

¹²⁰ *Id.* at 230. Justice Marshall, concurring with the opinion, argued that education should be a fundamental right, based in the importance of education and its close relationship with the Framers' priorities. *Id.* at 230–31 (Marshall, J., concurring). On the other occasions the Supreme Court has had opportunities to decide the issue of a limited right to education, it has declined to do so. *See Papasan v. Allain*, 478 U.S. 265, 285–86 (1986) (acknowledging that the Court had left open the question of a fundamental right to "minimally adequate education" but choosing not to decide the issue). Against this legal backdrop, the Sixth Circuit in 2020 was asked to decide *Gary B. v. Whitmer*, 957 F.3d 616, 642 (6th Cir.), *vacated by Gary B. v. Whitmer*, 958 F.3d 1216 (6th Cir. 2020).

¹²¹ *See Whitmer*, 957 F.3d at 621 (holding that the Due Process Clause protects a right to acquire basic literacy); *A.C. v. Raimondo*, 494 F. Supp. 3d 170, 175 (D.R.I. 2020) (describing the *Whitmer* decision as the single exception to the uniform refusal of federal courts to acknowledge a right to minimum education).

¹²² *See Whitmer*, 957 F.3d at 655 (recognizing a right to receive foundational literacy education); *id.* at 662 (Murphy, J., dissenting) (arguing that the Constitution does not protect a right to education); *Raimondo*, 494 F. Supp. 3d at 175 (acknowledging the *Whitmer* court as the first federal court to recognize a right to foundational education).

¹²³ *See infra* notes 126–148 and accompanying text.

¹²⁴ *See infra* notes 149–186 and accompanying text.

¹²⁵ *See infra* notes 187–205 and accompanying text.

parities in the American education system.¹²⁶ For example, DPSCD is the only district in the state of Michigan where people not licensed as teachers are allowed to teach.¹²⁷ Many schools in DPSCD do not have teachers who are certified to teach their content areas and have suitable experience.¹²⁸ Before the school year began in the fall of 2016, DPSCD had around two hundred unfilled teaching positions.¹²⁹ Because of the lack of teaching staff, classes are taught by either teaching aides who lack certification to teach content, substitute teachers, or teachers of other content areas.¹³⁰ In one school, an eighth-grader taught other seventh- and eighth-graders math for a month, because no suitable teacher could be found.¹³¹

Detroit schools also have trouble recruiting and retaining experienced teachers.¹³² At one Detroit school, most of the teachers hired to teach had never

¹²⁶ See *Whitmer*, 957 F.3d at 624–28 (describing the conditions at five schools in the Detroit Public School System that led to a lawsuit by students against the state of Michigan). Students in Detroit Public Schools are ninety-seven percent nonwhite, and seventy-eight percent of students qualify for free or reduced-price lunch. *About DPSCD*, DETROIT PUB. SCHS. CMTY. DIST. (2020), <https://www.detroitk12.org/Page/15183> [<https://perma.cc/GZ8A-PL3T>]. Generally, family income is positively correlated with higher standardized test scores in the United States. See, e.g., Josh Zumbrun, *SAT Scores and Income Inequality: How Wealthier Kids Rank Higher*, WALL ST. J. (Oct. 7, 2014), <https://www.wsj.com/articles/BL-REB-28270> [<https://perma.cc/Y62H-PG6V>] (finding that the mean SAT score for students from the wealthiest families was almost four hundred points higher than the mean score for students from the poorest families).

¹²⁷ *Whitmer*, 957 F.3d at 625.

¹²⁸ *Id.* at 624–25.

¹²⁹ *Id.* at 625.

¹³⁰ *Id.* Even when taught by certified teachers, classrooms are often overenrolled, with as many as fifty students per classroom—more than the number of desks and chairs provided. *Id.* at 626. Studies have shown that in general, smaller class sizes lead to better learning outcomes for students. See Matthew M. Chingos & Grover J. Whitehurst, *Class Size: What Research Says and What It Means for State Policy*, BROOKINGS INST. (May 11, 2011), <https://www.brookings.edu/research/class-size-what-research-says-and-what-it-means-for-state-policy/> [<https://perma.cc/CDV5-XF46>] (finding that having a class size around fifteen students for four years led to learning three months more content compared with class sizes around twenty-two students).

¹³¹ *Whitmer*, 957 F.3d at 625.

¹³² *Id.* The Sixth Circuit Court of Appeals panel in *Whitmer* cited DPSCD's need for teachers from Teach for America and similar programs as evidence of their difficulty in retaining staff. *Id.* Teach for America is a teacher training program that recruits applicants and trains them to teach for about five weeks during the summer before their first year in the classroom. *Summer Training Schedule*, TEACH FOR AM. (2022), <https://www.teachforamerica.org/life-in-the-corps/corps-member-training/summer-training-schedule> [<https://perma.cc/9NYT-83C5>]. Critics of Teach for America argue that Teach for America teachers tend to be inexperienced and under-resourced, and generally do not stay in the communities they serve after their two-year commitment is over, meaning the underserved communities where they work face shortages of experienced teachers. See Mokoto Rich, *Fewer Top Graduates Want to Join Teach for America*, N.Y. TIMES (Feb. 5, 2015), <https://www.nytimes.com/2015/02/06/education/fewer-top-graduates-want-to-join-teach-for-america.html> [<https://perma.cc/KW6W-HLEJ>] (suggesting a reason for the drop in Teach for America recruitment numbers could be the result of persistent bad press surrounding the organization); see also T. Jameson Brewer, *Teach for America's Biggest Problem Isn't Green Teachers or Failing Schools. It's That It Can't Take Criticism*, WASH. POST (Oct. 20, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/10/20/>

taught before when the 2016 school year began.¹³³ At another school, half the teachers who started teaching in 2012 had left the school by the end of the school year.¹³⁴ DPSCD's reliance on novice teachers who tend not to stay in the district contributes to the system's instability and robs students of effective education.¹³⁵

Detroit Public Schools also fail to teach basic literacy and develop reading skills in its students.¹³⁶ Elementary schools do not have consistent literacy instruction, so elementary school students fail to learn to read at grade level.¹³⁷ Once students reach high school, their teachers have not been prepared to support students reading at far below grade level, so students fall further behind.¹³⁸ One high school, in an effort to support its students through a tiered reading group system, failed to provide students with books beyond the fifth grade level.¹³⁹

In 2016, seeking to ameliorate their educational opportunities, students at five of Detroit's least successful schools sued the governor of Michigan and the officials in charge of the school district.¹⁴⁰ The plaintiffs claimed that DPSCD had violated their rights by failing to provide them with an adequate education, and that they had a fundamental right to education under the Due Process Clause.¹⁴¹ Specifically, the students argued that because the Detroit

teach-for-americas-biggest-problem-isnt-green-teachers-or-failing-schools-its-that-it-cant-take-criticism/
[https://perma.cc/RBL5-87X2] (arguing that Teach for America has used its resources to silence critics rather than to address valid criticism).

¹³³ *Whitmer*, 957 F.3d at 625. First year teachers tend to be less competent at promoting student success when compared to more experienced teachers. See TARA KINI & ANNE PODOLSKY, DOES TEACHING EXPERIENCE INCREASE TEACHER EFFECTIVENESS? 1 (2016).

¹³⁴ *Whitmer*, 957 F.3d at 625.

¹³⁵ See *id.* (describing DPSCD's staffing problems, as well as their difficulties in providing a meaningful education to their students).

¹³⁶ *Id.*

¹³⁷ *Id.* Research has found that learning to read at grade level by the third grade is critical for students' academic achievement, because foundational literacy education generally ends in third grade, and reading proficiency is required to succeed in the fourth grade and on. See SALLY BANKS ZAKARIYA, LEARNING TO READ, READING TO LEARN 1 (2015) (finding that students who fall behind in reading proficiency by the third grade are increasingly vulnerable to dropping out of high school).

¹³⁸ *Whitmer*, 957 F.3d at 625; see ZAKARIYA, *supra* note 137, at 1–5 (stating that generally reading proficiency disparities that open early in education are not resolved later in a child's education, and that reading deficiencies are markedly more likely to affect historically disadvantaged groups).

¹³⁹ *Whitmer*, 957 F.3d at 625.

¹⁴⁰ *Id.* at 620–21.

¹⁴¹ *Id.* at 621. The plaintiffs also argued that because they were deprived of any real education, laws requiring them to go to school were unconstitutional restraints on their liberty. *Id.* Because both the District Court and the Sixth Circuit Court of Appeals dismissed the plaintiffs' equal protection and compulsory attendance arguments, this Note will not discuss them in detail. See *id.* (upholding the District Court's dismissal of the plaintiffs' compulsory attendance and equal protection arguments); Gary B. v. Snyder, 329 F. Supp. 3d 344, 348 (E.D. Mich. 2018) (granting a motion to dismiss all the claims made by the *Whitmer* plaintiffs). For a more detailed look at the equal protection arguments advanced by plaintiffs, see Class Action Complaint at 123–25, *Snyder*, 329 F. Supp. 3d 344 (E.D.

schools they attended failed to teach them basic literacy, they were effectively denied their right to free expression and their right to vote.¹⁴²

The students' claims were dismissed by the Eastern District of Michigan, and they appealed to the Sixth Circuit Court of Appeals.¹⁴³ In 2020, in *Whitmer*, a divided Sixth Circuit panel of judges agreed with the plaintiffs, and held that the Due Process Clause of the Constitution protects a fundamental right to "basic minimum education."¹⁴⁴ And so, for twenty-six days in the spring of 2020, the people under the jurisdiction of the United States Sixth Circuit Court of Appeals had a fundamental right to education under the Constitution.¹⁴⁵

The Sixth Circuit panel's decision in *Whitmer* attracted both praise and criticism, but it was quickly undone.¹⁴⁶ Following the Sixth Circuit panel decision, the case was settled, and the Sixth Circuit agreed to an *en banc* rehearing of the case, invalidating the panel opinion.¹⁴⁷ So, although the Sixth Circuit

Mich. 2018) No. 16-CV-13292, 2016 WL 4775474 (setting out the plaintiffs' arguments that their equal protection rights were violated by the State of Michigan's failure to provide minimally adequate schools); Amicus Curiae Brief of Martha Minow, *supra* note 29 (arguing in support of plaintiffs' equal protection claim).

¹⁴² *Whitmer*, 957 F.3d at 642. The argument accepted by the Sixth Circuit in *Whitmer* is similar to that considered but ultimately not adopted by the Supreme Court in *San Antonio Independent School District v. Rodriguez*. Compare *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36–37 (1973) (considering the argument that "some identifiable quantum of education" necessary to engage in other constitutional rights might be protected by the Due Process Clause), with *Whitmer*, 957 F.3d at 642 (finding a fundamental right to "basic minimum education" to allow political participation). See also *supra* notes 102–113 (discussing the arguments and the Supreme Court's decision in *Rodriguez*).

¹⁴³ See *Snyder*, 329 F. Supp. 3d at 348 (dismissing the plaintiffs' complaint).

¹⁴⁴ *Whitmer*, 957 F.3d at 621.

¹⁴⁵ See *id.* (holding that the U.S. Constitution guarantees a fundamental right to "basic minimum education"); Gary B. v. *Whitmer* (*Whitmer II*), 958 F.3d 1216, 1216 (6th Cir. 2020) (vacating and granting rehearing en banc to the *Whitmer* case); Rocco Testanti, *A Short-Lived Constitutional Right to Education*, EDUC. NEXT (May 21, 2020), <https://www.educationnext.org/short-lived-constitutional-right-to-education-sixth-circuit-rehear-gary-b-whitmer/> [<https://perma.cc/52V4-F7WA>] (detailing the Sixth Circuit panel decision in *Whitmer*, as well as its subsequent vacatur by the Sixth Circuit *en banc*). Vacatur is a term for when a court invalidates a law or court decision. *Vacatur*, BLACK'S LAW DICTIONARY, *supra* note 10.

¹⁴⁶ See Ryan Jarvi, *MI AG Nessel Praises Sixth Circuit Opinion Confirming Literacy as a Basic Right*, MICH. DEP'T OF ATT'Y GEN. (Apr. 23, 2020), https://www.michigan.gov/ag/0,4534,7-359-92297_47203-526854--,00.html [<https://perma.cc/WHC4-T24C>] (describing the Michigan Attorney General's positive reaction to the panel opinion in *Whitmer*); Testanti, *supra* note 145 (lauding the vacatur of *Whitmer*, and arguing that the decision would have opened the way to federal control of local education to the detriment of students).

¹⁴⁷ See Testanti, *supra* note 145 (approving of the Sixth Circuit's decision to vacate the original panel decision). The settlement included a promise by Governor Whitmer to draft a bill authorizing an investment of almost \$100 million for literacy education in Detroit's public schools. *Id.* A rehearing en banc is when all the active judges on a Circuit Court of Appeals decide to rehear a case, usually only in cases where there is a split between decisions in the circuit, or where the matter under adjudication is particularly significant. FED. R. APP. P. 35(a). A party petitioning for rehearing en banc must petition the Circuit and explain either that the decision is inconsistent with a prior Circuit Court or

panel's decision now has no precedential value, it raises the question of whether education ought to be considered a fundamental right protected by the Due Process Clause of the Fourteenth Amendment.¹⁴⁸

*B. The Whitmer Majority Opinion: A Right to Plausibly
Access Basic Literacy*

Although its decision was ultimately short-lived, the *Whitmer* majority decision granted the residents under the jurisdiction of the Sixth Circuit Court of Appeals a fundamental right to "basic minimum education."¹⁴⁹ The court operationalized "basic minimum education" to mean an education that provides a plausible opportunity for attaining literacy.¹⁵⁰

The court began by acknowledging the historical reluctance of federal courts to expand fundamental rights under the Due Process Clause, and cited the Supreme Court's framework in its 1997 *Washington v. Glucksberg* decision as a guide to substantive due process analysis.¹⁵¹ Under *Glucksberg*, the Due Process Clause only protects fundamental rights that are "objectively, deeply rooted in this Nation's history and tradition," such that they are "implicit in the

Supreme Court decision, or that the issues involved are sufficiently significant to warrant rehearing. *Id.* R. 35(b).

¹⁴⁸ See *Whitmer II*, 958 F.3d at 1216 (vacating the Sixth Circuit panel's decision, meaning it is no longer binding precedent in the Sixth Circuit); *Whitmer*, 957 F.3d at 621 (finding a fundamental right to education protected by the Due Process Clause of the Constitution); see also *infra* notes 149–205 (explaining the majority and dissent in *Whitmer* as examples of the different arguments on either side of the debate about a right to basic education). Plaintiffs in other states have advanced similar arguments to the *Whitmer* plaintiffs, but have yet to find success. See, e.g., Brief of Appellants at 40, A.C. v. Raimondo, 494 F. Supp. 3d 170, No. 20-2082, (1st Cir. Jan. 25, 2021) (arguing that plaintiff students' fundamental due process rights were violated when they were deprived of minimally adequate schools). The Sixth Circuit opinion in *Whitmer* also raises the related issue of how broad or limited a right to minimally adequate education should be. Compare *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (stating that providing education is the most important function of the state, and that children are unlikely to thrive without access to good education), and *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (stating that the United States has continuously considered education and learning to be critical, and an important function of the state), with *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29–30, 35 (1973) (quoting language from *Brown* and emphasizing the significance of education, but finding no generalized fundamental right to education), and *Whitmer*, 957 F.3d at 621 (holding that the Due Process Clause protects a fundamental right to "basic minimum education," operationalized as access to foundational literacy).

¹⁴⁹ *Whitmer*, 957 F.3d at 621.

¹⁵⁰ *Id.* at 659. Nevertheless, the majority opinion did uphold the dismissal of the plaintiffs' claim that their school system had deprived them of equal protection of the law under the Fourteenth Amendment, because the complaint did not allege that the Detroit School System had received disparate treatment compared to any other district. *Id.* at 637. The court similarly upheld the dismissal of the plaintiff's claim that the schools unconstitutionally deprived students of their liberty by mandating that they attend school. *Id.* at 642.

¹⁵¹ *Id.* at 643 (citing *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)).

concept of ordered liberty.”¹⁵² A potential fundamental right under *Glucksberg* must also be outlined with particular specificity.¹⁵³

The *Whitmer* court also noted that despite the historical requirement for fundamental rights expressed in *Glucksberg*,¹⁵⁴ the historical inquiry of rights should be understood in light of contemporary conditions.¹⁵⁵

The court then discussed the cases in which the Supreme Court discussed education and its role in society.¹⁵⁶ It highlighted the parties’ conflicting interpretations of the Supreme Court’s 1954 decision in *Brown v. Board of Education*.¹⁵⁷ Plaintiffs argued that *Brown* stands for the fundamental role of education in society, and defendants contended that the *Brown* decision reaffirmed that the state need not provide education at all.¹⁵⁸ The court also noted the Supreme Court’s 1972 decision in *San Antonio Independent School District v. Rodriguez*, which held that there is no fundamental right to education generally.¹⁵⁹ Nevertheless, the majority opinion read *Rodriguez* as holding open the possibility of later recognizing a fundamental right to “basic minimum education.”¹⁶⁰ Discussing later Supreme Court cases touching on education, the court concluded that the issue of a fundamental right to “basic minimum education” had yet to be concluded.¹⁶¹

¹⁵² *Glucksberg*, 521 U.S. at 720–21 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)).

¹⁵³ *Id.* at 721.

¹⁵⁴ *Whitmer*, 957 F.3d at 643–44. For a discussion of the *Glucksberg* decision and its effect on substantive due process jurisprudence, see *supra* notes 69–79 and accompanying text (discussing *Glucksberg*, as well as subsequent Supreme Court substantive due process cases).

¹⁵⁵ *Whitmer*, 957 F.3d at 644 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022)).

¹⁵⁶ *Id.* at 644–48.

¹⁵⁷ *Id.* at 645 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

¹⁵⁸ See *id.* (acknowledging that *Brown* can be understood to argue for or against education as a fundamental right); see also *Brown*, 347 U.S. at 493 (stating that “education is perhaps the most important function of state and local governments,” but also holding that education need only be furnished equally to all “where the state has undertaken to provide it,” suggesting that the state could choose not to provide education at all); *supra* notes 98–101 and accompanying text (describing the Supreme Court’s holding and analysis in *Brown*).

¹⁵⁹ *Whitmer*, 957 F.3d at 646 (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973)); see also *supra* notes 106–113 (discussing *Rodriguez* in more detail).

¹⁶⁰ *Whitmer*, 957 F.3d at 646. In making this decision, the majority quoted the *Rodriguez* Court’s statement that some amount of education might be necessary to access the right to free speech, or the right to vote. *Id.* (quoting *Rodriguez*, 411 U.S. at 36–37).

¹⁶¹ *Id.* at 646–48. The court specifically discussed the Supreme Court’s opinion in *Plyler v. Doe* as a recognition of education as a foundational tool of social mobility. See *id.* at 647 (quoting 457 U.S. 202, 221–22 (1982) (noting the importance of education as a “social equalizer,” and discussing the drastically negative consequences stemming from the denial of education to the children affected and society in general)); see also *supra* notes 114–120 (discussing further the Supreme Court’s decision in *Plyler*). The *Whitmer* court also considered the Supreme Court’s opinion in *Papasan v. Allain*, where the Supreme Court dismissed a complaint alleging the violation a fundamental right to “minimally adequate education,” but did not deny the potential existence of the right claimed. *Whitmer*, 957 F.3d at 647–48 (citing 478 U.S. 265, 286 (1986)). Finally, the court cited a dissent written by Justice Thur-

The *Whitmer* majority determined that the Constitution protects a fundamental right to “basic minimum education—meaning one that plausibly provides access to literacy.”¹⁶² It concluded that the history of the nation showed a consistent emphasis on the foundational importance of education to the maintenance of democracy.¹⁶³

Noting that public schools were widespread and prominent at the time the Fourteenth Amendment was ratified, the court found support for a fundamental right to basic education consistent even with an originalist understanding of the Constitution.¹⁶⁴ The court also found a deep historical connection between the ability to read and the ability to achieve political and economic power.¹⁶⁵ It highlighted the historical correlation between access to literacy and full political participation, as well as the historical role of the courts in helping marginalized groups receive education.¹⁶⁶

The court then examined whether basic minimum education is “implicit in the concept of ordered liberty,” as required by *Glucksberg*.¹⁶⁷ It observed that practically all transactions between the government and its people hinge on basic literacy, and that illiteracy significantly hinders political and civic participation.¹⁶⁸

The majority acknowledged the Supreme Court’s observation in *Rodriguez* that the significance of a state function does not render the function a fundamental right.¹⁶⁹ Nevertheless, the Sixth Circuit held that this general

good Marshall wherein he acknowledged that the question of a fundamental right to basic education remained unresolved. *See id.* at 648 (quoting *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 460, 466 n.1 (1988) (Marshall, J., dissenting)).

¹⁶² *Whitmer*, 957 F.3d at 648.

¹⁶³ *See id.* at 649 (noting the Supreme Court has repeatedly emphasized the long history and significance of education).

¹⁶⁴ *Id.* (citing opinions by Justice Antonin Scalia stating that the Fourteenth Amendment should be understood based on state laws at the time of its ratification). Originalism is a judicial philosophy that posits that a legal text should be understood to mean what it would have meant when it was originally passed or ratified. *Originalism*, BLACK’S LAW DICTIONARY, *supra* note 10. The court observed that at the time of the ratification of the Fourteenth Amendment, thirty-six of thirty-seven states, representing ninety-two percent of the population of the United States, required their state governments to provide public education to their people. *Whitmer*, 957 F.3d at 649–50 (citing Steven Calabresi & Sarah Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified*, 87 TEX. L. REV. 7, 108 (2008)).

¹⁶⁵ *Whitmer*, 957 F.3d at 650. As evidence of this connection, the majority opinion cited antebellum era legislation that outlawed educating slaves, as well as violence directed towards black schools during Reconstruction, both of which were aimed at outlawing or discouraging political participation. *Id.* at 650–51.

¹⁶⁶ *Id.* at 651–52.

¹⁶⁷ *Id.* at 652 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)); *see also supra* notes 151–153 and accompanying text (summarizing the requirements for fundamental rights laid out by the Supreme Court in *Glucksberg*).

¹⁶⁸ *Whitmer*, 957 F.3d at 652–53.

¹⁶⁹ *Id.* at 653 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973)).

principle could not properly extend to basic literacy, because literacy serves as a necessary prerequisite to the exercise of “other, clearly fundamental rights.”¹⁷⁰ It also reasoned that denial of any education to a child denies that child of practically all opportunity for economic and social advancement, whatever the child’s potential might otherwise be, and that the Constitution could not, consistent with the “concept of ordered liberty,” condone such an outcome.¹⁷¹ The court then concluded that education sufficient to “plausibly impart literacy” was required under the Fourteenth Amendment.¹⁷²

The majority went on to consider and refute arguments against the recognition of a fundamental right to education.¹⁷³ First, the court considered the charge that defining a new fundamental right undercut the democratic process and usurped the role of the legislative branches of government.¹⁷⁴ It rejected this argument, reasoning that because access to literacy is a prerequisite to meaningful political engagement, those who are denied access to literacy face an acute impairment when seeking to affect change in the political arena.¹⁷⁵

The court also discussed the objection that the Constitution protects only negative rights, which are rights that protect people from governmental intrusion, and not positive rights, which are rights that the government must active-

¹⁷⁰ *Id.* The court also cited the Supreme Court’s description of public education as “the very apex of the function of the State” in support of the idea that education is more than simply significant. *Id.* (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972)). The majority also discounted the defendants’ contention that literacy is not implicit to ordered liberty because public education was not widespread when the Constitution was adopted in the 1789. *Id.* It reasoned that social structures of the 18th century should not guide a court in determining what is required in a modern liberal democracy. *Id.*

¹⁷¹ *Id.* at 654–55 (citing *Plyler v. Doe*, 457 U.S. 202, 219–20 (1982)).

¹⁷² *Id.* at 655 (quoting *Glucksberg*, 521 U.S. at 721).

¹⁷³ *Id.* at 655–59.

¹⁷⁴ *Id.* at 655. The court used Chief Justice John Roberts’ dissent in *Obergefell* as the archetype of this argument. *Id.*; see *Obergefell v. Hodges*, 576 U.S. 644, 710 (2015) (Roberts, C.J., dissenting) (arguing that the Supreme Court should not decide on the issue of same-sex marriage because the ultimate decision on the issue should be the product of democratic debate); see also *supra* notes 76–79 (discussing the *Obergefell* case and its dissents in more detail). This argument suggests that courts ultimately are ill-equipped to decide on new rights, because they are required to address only the specific issues before them, and cannot always foresee the ultimate effects of their decisions. *Obergefell*, 576 U.S. at 711 (Roberts, C.J., dissenting).

¹⁷⁵ *Whitmer*, 957 F.3d at 655–56. Research has found that in the United States, political participation is positively correlated with educational achievement, meaning those who attend school for longer periods of time or attain higher degrees are more likely to vote and become politically active. Kevin Milligan, Enrico Moretti & Philip Oreopoulos, *Does Education Improve Citizenship? Evidence from the United States and the United Kingdom*, 88 J. PUB. ECON. 1667, 1669–70 (2004) (finding that more educated individuals in the United States were more likely to vote, discuss and follow politics, and advocate for issues in their communities). Studies also found that more educated individuals were better informed about candidates and political parties, and attributed part of the correlation between education and voting to U.S. rules about voter registration, which increases costs, particularly for those who might have difficulty navigating bureaucracy. *Id.* at 1670–71.

ly provide.¹⁷⁶ It acknowledged that the Supreme Court and others have suggested that the Due Process Clause protects primarily negative liberties.¹⁷⁷ It held, nonetheless, that Supreme Court opinions establishing a right to an attorney and the fundamental right to marry were recognitions of positive rights.¹⁷⁸ Much like the Due Process Clause's requirement that the government perform a marriage to recognize a person's fundamental right, so too could the Clause require the government to provide an education.¹⁷⁹

The majority, acknowledging the *Glucksberg* standard for the description of a fundamental right, sought to describe the limits of a right to basic education, holding that a school district violates a student's fundamental rights only where a school system lacked basic infrastructure such that it was not feasible that a student could access literacy.¹⁸⁰ The majority specified that a constitutional right to education could not ensure learning outcomes, much like how the Sixth Amendment's right to counsel is not a guarantee of an acquittal in a criminal case.¹⁸¹ The court also declined to specify the level of literacy, or level of basic educational infrastructure that would be necessary to satisfy a constitutional minimum, opining that the district court, on remand, would be better situated to make such determinations.¹⁸²

Admitting that the basic minimum education it was affording fundamental right status was constrained, the court stated that it did not protect an education of the kind most Americans would want for their children.¹⁸³ Instead, the education required under the Constitution would only include what is necessary to

¹⁷⁶ *Whitmer*, 957 F.3d at 656–59. Negative rights are rights that afford people protection from government action, whereas positive rights require the government to actively provide people with benefits. See David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 864 (1986) (describing Judge Richard Posner's opinion in *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983), wherein Posner stated that the Constitution provides for only negative rights). For a more detailed look at the argument against a Constitutional guarantee of positive rights, see *infra* notes 187–205 and accompanying text (describing the position taken by the *Whitmer* dissent).

¹⁷⁷ *Whitmer*, 957 F.3d at 656. The court noted Judge Posner's opinion in *Jackson*, where the judge characterized the Constitution as a grant of negative rights. *Id.* (citing *Jackson*, 715 F.2d at 1203). It also acknowledged that the Supreme Court described many fundamental rights in negative rights terms, such as the right to privacy or to make personal choices. *Id.* (quoting *Planned Parenthood v. Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022)).

¹⁷⁸ *Id.* at 656–57 (quoting *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

¹⁷⁹ *Id.* at 657. The court found telling that in *Rodriguez* and its progeny, the Supreme Court had always neglected to decide whether “minimally adequate education” could be a fundamental right. *Id.* (citing *Papasan v. Allain*, 478 U.S. 265, 285 (1986)). Presumably, if basic education could not be a fundamental right due to its potential status as a positive right, the Supreme Court would have explicitly foreclosed the possibility of minimal education becoming recognized as a fundamental right. *Id.*

¹⁸⁰ *Id.* at 659–60; see also *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (requiring that the contours of a fundamental right be outlined in detail).

¹⁸¹ *Whitmer*, 957 F.3d. at 660 n.22.

¹⁸² *Id.* at 660.

¹⁸³ *Id.* at 659.

ensure access to basic literacy.¹⁸⁴ Specifically, the majority described the constitutional minimum for education as “at least a rudimentary educational infrastructure, such that it is plausible to attain literacy.”¹⁸⁵ Based on its conception of a fundamental right to access basic literacy, the court then found that the plaintiffs had alleged sufficient facts to survive a motion to dismiss.¹⁸⁶

C. *The Whitmer Dissent: No Fundamental Right to Education*

Writing in dissent, Judge Eric Murphy argued that the Constitution does not protect any right to education, whether limited or not.¹⁸⁷ Unlike the majority, Judge Murphy understood the Supreme Court precedents on education to mean that there is no fundamental right to education.¹⁸⁸ He contended that the Constitution is properly understood as a document that provides restraints on the power of government, rather than ordering the subsidy of citizens’ rights.¹⁸⁹

¹⁸⁴ *Id.* The court explained that this description would prevent federal courts from becoming overburdened with litigation surrounding the right to education. *Id.* at 659 n.20. It likened access to literacy to the right to counsel, meaning the state is not required to promise any definite result, so long as it makes the attainment of literacy possible. *Id.* at 659 n.22; *cf.* *Strickland v. Washington*, 466 U.S. 668, 683 (1984) (holding that a right to counsel under the Sixth Amendment means only the right to “reasonably effective assistance” in a criminal trial).

¹⁸⁵ *Whitmer*, 957 F.3d at 660. The majority suggested that this infrastructure would necessitate evidence of educators, physical infrastructure, and educational supplies like books. *Id.* The majority did not, however, opine as to specific requirements for any of these, so long as the school in the aggregate could plausibly teach a student to read. *Id.*

¹⁸⁶ *Id.* at 662. Notably, the state defendants did not provide any evidence that Detroit schools were plausibly providing an opportunity for literacy, and instead only argued that no fundamental right to literacy exists. *Id.* at 661.

¹⁸⁷ *Id.* at 662 (Murphy, J., dissenting) (arguing that ameliorating Detroit’s public schools should be taken on by members of the state legislature or the local school committee, not by federal judges). Judge Murphy is a contributor to the Federalist Society, a conservative legal group, and was appointed to the Sixth Circuit by President Donald Trump in 2019. *Hon. Eric E. Murphy*, FEDERALIST SOC., <https://fedsoc.org/contributors/eric-murphy> [<https://perma.cc/VR24-QGNK>]. Interestingly, federal appellate judges appointed by President Trump write in dissent much more frequently than appellate judges appointed by other presidents. *See* Rebecca Ruiz, Robert Gebeloff, Steve Eder & Ben Protess, *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES (Mar. 14, 2020), <https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html> [<https://perma.cc/FL35-2MYC>] (finding that split decisions by Circuit Courts were around 1.5 times more likely when a federal appeals court panel included a judge appointed by President Trump).

¹⁸⁸ *See Whitmer*, 957 F.3d at 664–65 (Murphy, J., dissenting) (discussing *Rodriguez* and its progeny, and noting that the Supreme Court has repeatedly declined to find a fundamental right to education). Judge Murphy emphasized that for each case where the Supreme Court left open the possibility of a limited right to education, the Supreme Court stated that education broadly is not a fundamental right. *Id.* at 665. He characterized the Supreme Court’s reluctance to foreclose the existence of a limited right to education to be dicta without meaningful authority. *Id.* at 671. Dicta is a part of a judicial opinion that is not necessary to the Court’s decision on the issues before it, and does not have precedential value for lower courts. *Dictum*, BLACK’S LAW DICTIONARY, *supra* note 10.

¹⁸⁹ *Whitmer*, 957 F.3d at 663 (Murphy, J., dissenting) (citing *Regan v. Taxation with Representation of Wash.*, 489 U.S. 540 (1983) (holding that a state choosing not to contribute to a resident’s use of a fundamental right did not violate that right)). In support of this position, Judge Murphy cited the

As a result, the Constitution does not provide positive rights to its citizens, only negative rights protecting people from government overreach.¹⁹⁰ Judge Murphy reasoned that because the Due Process Clause is phrased in the negative, it should not be understood to grant positive rights.¹⁹¹ Looking to Supreme Court precedent, he noted that the Supreme Court has declined to find a fundamental right to food, shelter, or medical services in cases where plaintiffs asserted the state had failed to provide these goods and services.¹⁹² This, Judge Murphy argued, highlights the constitutional difference between a state affirmatively banning a practice and a state refusing to subsidize that practice.¹⁹³

The dissent did not dispute the undeniable significance of education to the nation, but nevertheless argued that *Rodriguez* forecloses a fundamental right to education under the Constitution.¹⁹⁴ It also contended that finding a right to minimum education would make judges into legislators, and force courts to make policy judgements on issues ranging from taxation to teacher training to school building design.¹⁹⁵

Federalism, too, counsels against an affirmative right to access basic literacy, because the federal Constitution granting a fundamental right to literacy would undercut each state legislature's freedom to shape its state's education system.¹⁹⁶ Judge Murphy argued that the majority overstepped by creating the

Supreme Court's decision in *DeShaney v. Winnebago County Department of Social Services*, where the Court found that the individuals have no fundamental right to be safeguarded from aggression by private individuals. *Id.* (citing 461 U.S. 540, 549 (1983)). Judge Murphy also argued that the majority's formulation of a right to access literacy was unduly vague. *Id.*

¹⁹⁰ *Id.*; see *supra* note 176 (explaining the difference between positive rights and negative rights).

¹⁹¹ *Whitmer*, 957 F.3d at 667–68 (Murphy, J., dissenting) (noting that the right to abortion under the Due Process Clause does not require the government to pay for an abortion, only that the government may not unreasonably restrict the right). Judge Murphy emphasized the use of the verb “deprive” in the Due Process Clause, and cited two dictionaries from the 1870s and 1880s that defined deprive as meaning “take away.” *Id.* at 666. He also argued that when the Fourteenth Amendment was ratified in the 1870s, Americans would not have understood it as granting a right to education. *Id.*

¹⁹² *Id.* at 667. The Supreme Court, in *San Antonio Independent School District v. Rodriguez*, voiced similar concerns about whether a right to education could lead to a right to food and shelter. 411 U.S. 1, 37 (1973).

¹⁹³ *Whitmer*, 957 F.3d at 665 (Murphy, J., dissenting). As an example, a state may not prohibit political speech, but has no affirmative duty to subsidize political speech by any particular citizen or interest group. *Id.*

¹⁹⁴ *Id.* at 663 (citing *Rodriguez*, 411 U.S. at 30). Judge Murphy considered the policy question of education's significance to be separate and distinct from the constitutional question of education as a fundamental right. *Id.*

¹⁹⁵ *Id.* It also argued that giving federal courts the right to make this judgment would undermine the federalist system that allows states to investigate different policy designs. *Id.* The dissent's concern with giving federal courts more authority over education was shared school-choice advocates. See Testanti, *supra* note 145 (arguing that the *Whitmer* majority decision, if not vacated, would have permitted litigants and federal courts to usurp the power to control education policy from state and local governments).

¹⁹⁶ See *Whitmer*, 957 F.3d at 668–69 (Murphy, J., dissenting) (citing *United States v. Lopez*, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring)) (arguing that federalism concerns are especially im-

potential for federal judicial control of how states spend their money.¹⁹⁷ Allowing for judicial intervention into education policy, he contended, would stifle public discussion and legislative action in the education space.¹⁹⁸

Judge Murphy also suggested that the majority's decision overstepped the judicial role as interpreters of the law.¹⁹⁹ He also stated that courts should tread cautiously in the area of substantive due process, as counseled by *Glucksberg*.²⁰⁰ The dissent worried that the majority's holding could lead to federal courts directing state legislatures in allocating their funds.²⁰¹

Finally, Judge Murphy argued that the majority had misread or misunderstood the Supreme Court precedent regarding a right to a minimally adequate education.²⁰² The dissent contends that because *Rodriguez* and its progeny all involve the Equal Protection Clause, their comments regarding the fundamental right to minimally adequate education should be understood only in the context of whether equal protection cases involving education should subject government action to higher scrutiny.²⁰³ Judge Murphy considered Supreme Court precedent stating that there is no duty for the government to facilitate speech to support his view.²⁰⁴ The law is clear, Judge Murphy argued in his dissent: there is no constitutional right to education.²⁰⁵

portant in the education context, because education has historically been an area of law controlled by the states).

¹⁹⁷ *Id.* at 669 (arguing that education requires spending money, which at the state level often involves complicated interest balancing, and that state legislatures are the best-placed actors to engage in this balancing).

¹⁹⁸ *Id.* at 668. As an example of historical reticence by the federal government to involve itself in the education space, Judge Murphy noted that an 1870 bill to create a federal school system was not voted on by Congress due to constitutional concerns. *Id.* at 669.

¹⁹⁹ *Id.* at 670. Historical precedent clearly states, argued Judge Murphy, that judges should not strike down laws simply because they think the laws are unjust. *Id.* (citing *Calder v. Bull*, 3 U.S. (1 Dall.) 386, 399 (1798) (opinion of Iredell, J.)).

²⁰⁰ *Id.* (citing *Washington v. Glucksberg*, 521 U.S. 701, 720 (1997)).

²⁰¹ *Id.* at 670–71. Judge Murphy also emphasized that there is disagreement over how best to improve schools, and argued that federal judges are not well positioned to resolve these policy disputes. *Id.* at 671.

²⁰² *Id.* at 675.

²⁰³ *Id.* The Supreme Court has held that when a court analyzes a law that has the potential to violate the Equal Protection Clause of the Fourteenth Amendment, it should use strict scrutiny when the law or regulation burdens a suspect class, or where it burdens the exercise of a fundamental right. *Id.* (quoting *Heller v. Doe*, 509 U.S. 312, 319 (1993)).

²⁰⁴ *Id.* (quoting *Yursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 364 (2009)).

²⁰⁵ *See id.* at 678 (arguing that the majority's opinion is not in line with the Fourteenth Amendment). Somewhat similarly, some state courts, when considering the education clauses in their state constitutions, find that they impose no requirements upon the legislatures. *See L.M. v. State*, 862 N.W.2d 246, 252 (Mich. 2014) (holding that the Michigan Constitution did not create an individual right to education). *But see Campbell Cnty. Sch. Dist. v. State*, 907 P.2d 1238, 1279 (Wyo. 1995) (requiring all school districts to spend the same amount on all pupils in Wyoming, and opining that “lack of financial resources will not be an acceptable reason for failure to provide the best educational system”).

III. A FUNDAMENTAL RIGHT TO BASIC LITERACY WOULD HAVE LIMITED REAL-WORLD IMPACT, BUT REFLECTS THE VALUE OF EDUCATION IN AMERICAN SOCIETY

Taken together, the majority and dissent of the Sixth Circuit Court of Appeals in *Gary B. v. Whitmer* reveal both the inadequacy of a complete lack of a right to basic education and the limitations of a right to education under existing Supreme Court precedent.²⁰⁶ This Part argues that, although the right to access literacy as formulated by the *Whitmer* majority is weak, it is preferable to no fundamental right to education, and could still serve as a powerful tool for plaintiffs seeking to address educational inequity through the courts.²⁰⁷

As a threshold matter, it seems that education sufficient to provide access to literacy both respects Supreme Court precedent and satisfies the *Washington v. Glucksberg* framework for fundamental rights.²⁰⁸ In its 1997 decision in *Glucksberg*, the Supreme Court held that a right is only fundamental under the Due Process Clause if it is “deeply rooted” in the “history and tradition” of the

²⁰⁶ See *Whitmer*, 957 F.3d at 660 (defining the fundamental right to access literacy as only requiring sufficient educational infrastructure to conceivably allow students to achieve literacy); *id.* at 663 (Murphy, J., dissenting) (arguing that the Constitution does not grant a right to education).

²⁰⁷ See *infra* notes 208–237 (arguing for the recognition of a fundamental right to access literacy akin to the right articulated in the *Whitmer* majority). There is scholarship that argues that courts are not well placed to create social change, and that courts’ historical role in social change has been relatively small. See, e.g., GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 157 (2d ed. 2008) (arguing that the Supreme Court’s decision in *Brown v. Board of Education*, although notable, only contributed to larger societal shifts that were already taking place in the 1950s and 1960s). As discussed below, this Note argues that regardless of whether courts are the most efficient drivers of social change, the judicial recognition of a right to basic literacy would be an important development, as those who lack access to literacy face meaningful barriers to political engagement. See *Whitmer*, 957 F.3d at 655–56 (suggesting that the impediments faced by those who lack access to literacy justifies judicial intervention on their behalf); see also RONALD DWORKIN, *LAW’S EMPIRE* 213–14 (1986) (arguing that a state has political and moral legitimacy where its laws and practices show an equal regard for all its members, thus engendering legitimate moral obligations on its citizens to follow the law).

²⁰⁸ See *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (stating that fundamental rights must be grounded in the “history and tradition” of the United States, and be “implicit in the concept of ordered liberty”); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36–37 (1973) (foreclosing the existence of a broad right to education, but reserving the possibility that some level of education might have a fundamental right status in order to further the right to vote and the right to free expression). There is some debate about whether *Glucksberg* or *Obergefell* is the framework for recognition of fundamental rights under the Due Process Clause. See Turner, *supra* note 80, at 210 (discussing whether, after *Obergefell*, *Glucksberg* should properly be considered binding precedent). This Part focuses on the *Glucksberg* standard because the current more conservative Court seems likely to return to the *Glucksberg* standard, and because if a fundamental right to education satisfies the *Glucksberg* standard, it likely also passes the more lenient *Obergefell* standard. See *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015) (stating that although the analysis of fundamental rights is based on a study of history, it is not bound strictly by history); *Glucksberg*, 521 U.S. at 720–21 (reserving fundamental rights status for only those rights that are “objectively, deeply rooted in this Nation’s history and tradition”); Thomson-Deveaux et al., *supra* note 81 (describing the Court’s more conservative turn after the replacement of Justice Ruth Bader Ginsburg with Justice Amy Coney Barrett).

United States, and it is “implicit in the concept of ordered liberty.”²⁰⁹ Furthermore, the Court mandated that fundamental rights be described in detail.²¹⁰

Federal legislation promoting the expansion of public education predates our Constitution, and the founders wrote on the imperative of an educated population to the health of a democratic nation.²¹¹ When the Fourteenth Amendment was ratified, almost every state provided for public education, and the trend of free and compulsory education has only accelerated since that time.²¹² And, as the *Whitmer* majority notes, there has long been a connection between literacy, democratic participation, and full citizenship, which implies that literacy is “implicit in the concept of ordered liberty.”²¹³ The Supreme Court has explicitly labeled illiteracy “an enduring disability,” and has highlighted the difficulties faced by those who are denied education.²¹⁴ To deny students access to literacy is to severely limit their future opportunities and to essentially relegate them to an underclass.²¹⁵

Glucksberg also requires a specific delineation of any new fundamental right; the *Whitmer* right to access literacy passes this test as well.²¹⁶ Because the Supreme Court stated in its 1973 decision in *San Antonio Independent School District v. Rodriguez* that only some minimally basic amount of education could have fundamental right status in order to effectuate the right to vote or to free expression, the *Whitmer* standard is constrained to follow the Su-

²⁰⁹ *Glucksberg*, 521 U.S. at 720–21.

²¹⁰ *Id.* at 721.

²¹¹ See Northwest Territory Ordinance of 1787, art. III, 1 Stat. 51 (July 13, 1787) (promoting the development of public schools in the Northwest Territories); ADAMS, *supra* note 28, at 540 (quoting the letters of John Adams, describing public education funded by the government as imperative to the democratic character of the nation).

²¹² See *Whitmer*, 957 F.3d at 649–50 (citing Calabresi & Agudo, *supra* note 164) (stating that when the Fourteenth Amendment was ratified, thirty-six states, representing ninety-two percent of the U.S. population, required their state governments to fund public schools); KATZ, *supra* note 24, at 17 (noting that by 1918, every state had put in place laws requiring children to attend school).

²¹³ See *Glucksberg*, 521 U.S. at 721 (providing that fundamental rights must be closely tied to liberty); *Whitmer*, 957 F.3d at 650–51 (noting that antebellum laws against teaching slaves to read and write were intended to keep slaves and free African Americans from achieving full political participation); see also Milligan et al., *supra* note 175, at 1669 (highlighting the correlation between educational attainment and active political participation in the United States).

²¹⁴ See *Plyler v. Doe*, 457 U.S. 202, 222 (1982) (stating that withholding education inflicts lasting harm on children).

²¹⁵ See *id.* (stating that withholding education contravenes the purpose of the Fourteenth Amendment); accord Elka Torpey, *Measuring the Value of Education*, BUREAU OF LAB. STAT. (Apr. 2018), <https://www.bls.gov/careeroutlook/2018/data-on-display/education-pays.htm> [<https://perma.cc/N466-A8NY>] (showing that a higher education level is positively correlated with earnings and negatively correlated with unemployment rate, and concluding that education makes financial sense).

²¹⁶ See *Glucksberg*, 521 U.S. at 721 (requiring an asserted fundamental right to be specifically delineated, due to the heightened judicial scrutiny applied to government actions that infringe on fundamental rights); *Whitmer*, 957 F.3d at 660 (stating that a right to access basic literacy only requires the development of “rudimentary educational infrastructure” to the point where a student may conceivably achieve literacy).

preme Court's guidance.²¹⁷ Recognizing a narrow right to literacy that would require only that students plausibly may access basic literacy within a school system would create a system where judicial intervention is only warranted where schools fail most acutely.²¹⁸ By the *Whitmer* majority's own admission, the right it described did not ensure an ideal or even typical education, which suggests that the recognition of the right to access literacy would not convert courts into education policymakers.²¹⁹

Faced with this, the *Whitmer* dissent fails on two counts.²²⁰ First, it does not do justice to the Supreme Court's repeated assertions of the importance of education.²²¹ The Supreme Court has recognized education as "perhaps the most important function of state and local governments,"²²² and has recognized that denial of literacy education eviscerates the prospect of future economic and social opportunity.²²³ It is difficult to conceive of a concept more "imbedded in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed," than the ideal of social mobility and democratic participation through literacy and education.²²⁴

Second, the *Whitmer* dissent fails when it suggests that a state legislature could, if it so chose, abrogate its responsibility for education and do away with

²¹⁷ Compare *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36–37 (1973) (leaving open the possibility that "some identifiable quantum of education" could be protected to effectuate the right to free speech or the right to vote), with *Whitmer*, 957 F.3d at 652–53 (holding that basic literacy is a precursor to the meaningful ability to vote or to interact with the government).

²¹⁸ See *Whitmer*, 957 F.3d at 659–60 (clarifying that a right to access literacy does not ensure that each student will achieve a specific level of knowledge).

²¹⁹ See *id.* at 659 (restricting the right to access literacy to only what is required for democratic engagement); see also *infra* notes 229–232 (discussing the limited scope of the *Whitmer* standard for plaintiffs).

²²⁰ See *infra* notes 221–227 (arguing that the *Whitmer* dissent's view that the state has no duty to provide education conflicts with the Supreme Court's statements about the importance of education as a role of the government, and allows for the possibility that a state could choose not to provide education at all); see also *supra* notes 187–205 (discussing the arguments made by the *Whitmer* dissent in more detail).

²²¹ Compare *Brown v. Bd. of Educ.* 347 U.S. 483, 493 (1954) (stating that providing education is the "most important function of state and local governments"), and *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015) (stating that courts have a duty to safeguard rights that are sufficiently fundamental), with *Whitmer*, 957 F.3d at 662 (Murphy, J., dissenting) (arguing that the state has no duty to provide education to its people). See also *supra* notes 86–120 (summarizing the statements made regarding education by the Supreme Court over the course of the twentieth century).

²²² *Brown*, 347 U.S. at 493.

²²³ See *Plyler v. Doe*, 457 U.S. 202, 222 (1982) (describing a Texas law that barred undocumented children from attending public schools as creating a permanent underclass).

²²⁴ See *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citing *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937)) (providing that fundamental rights must be "implicit in the concept of ordered liberty"); *Whitmer*, 957 F.3d at 655 (holding that the Due Process Clause protects a fundamental right to access basic literacy).

its public schools entirely.²²⁵ It strains credulity that a constitutional order could recognize education as one of the foundational roles of the government in one breath²²⁶ and decry any responsibility to actually *provide* education the next.²²⁷

Of course, it is possible that the *Whitmer* standard for a right to access literacy is not broad enough to be meaningful.²²⁸ Should plaintiffs argue for a right to basic minimum education as described in *Whitmer*, they risk the eventuality of winning recognition of the right, but finding that the school system whose inadequacy they challenge passes the constitutional test.²²⁹ For example, Holyoke Public Schools, one of three school districts in Massachusetts currently categorized as chronically underperforming, had a graduation rate of around fifty percent in the 2012–2013 school year.²³⁰ Although a school system where only half the students graduate is likely far below the quality most Americans would believe their children are entitled to receive, the fact remains that such a school provides at the very least half of its students with literacy

²²⁵ See *Whitmer*, 957 F.3d at 645 (describing defendants' contention that the Supreme Court's *Brown* decision can be understood to imply that states have no duty to provide education to its people); *id.* at 675 (Murphy, J., dissenting) (contending that states have no duty under the Constitution to provide education); cf. KATZ, *supra* note 24, at 18 (noting that the State of Mississippi repealed its laws making school attendance compulsory in 1956 following *Brown*).

²²⁶ See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29–30 (1973) (agreeing with the *Brown* court's statements on the importance of education to the nation); *Brown*, 347 U.S. at 493 (discussing the significance of education both as a role of government and in the lives of citizens).

²²⁷ See *Obergefell v. Hodges*, 576 U.S. 646, 664 (2015) (opining that in determining fundamental rights, courts must "[i]dentify] interests of the person so fundamental that the State must accord them its respect"). But see *Rodriguez*, 411 U.S. at 35 (stating that despite the significance of education, it is not a fundamental right protected by the Due Process Clause).

²²⁸ *Whitmer*, 957 F.3d at 659 (admitting that the majority of Americans envision a higher standard of education than merely a school system that provides access to literacy).

²²⁹ See *id.* at 660 (suggesting the contours of a right to access literacy requires only basic educational infrastructure sufficient to make access to literacy possible).

²³⁰ See *Chronically Underperforming Districts*, MASS. DEP'T OF ELEMENTARY & SECONDARY EDUC., <https://www.doe.mass.edu/level5/districts/level5districts.html> [<https://perma.cc/X3LN-M67B>] (listing Holyoke, as well as Lawrence and Southbridge, as "chronically underperforming districts"); Jacqueline Reis, *Board of Elementary and Secondary Education Declares Holyoke Public Schools "Chronically Underperforming,"* MASS. DEP'T OF ELEMENTARY & SECONDARY EDUC. (Apr. 28, 2015), <https://www.doe.mass.edu/news/news.aspx?id=17923> [<https://perma.cc/EM9X-GUFY>] (justifying the placement of Holyoke in state receivership based on declining academic performance and growth). State receivership is the process through which state education officials designate a receiver to lead and reform a chronically underperforming school or district. Alexi Cohan, *Department of Education Board Member Floats Receivership for Boston Public Schools*, BOS. HERALD (Sept. 21, 2021), <https://www.bostonherald.com/2021/09/21/departments-of-education-board-member-floats-receivership-for-boston-public-schools/> [<https://perma.cc/V676-3D4M>]; see also Judy Taylor, *Major Improvements in Graduation and Dropout Rates for Holyoke Public Schools*, HOLYOKE PUB. SCHS. (Mar. 4, 2019), <https://www.hps.holyoke.ma.us/2019/03/04/press-release-major-improvements-in-graduation-and-dropout-rates-for-holyoke-public-schools/> [<https://perma.cc/984T-AKEE>] (stating that Holyoke's graduation rate in the 2017–2018 school year was seventy-two percent, representing a twenty-percent improvement over five years).

sufficient to achieve a high school diploma.²³¹ This strongly casts doubt on an assertion that, even in one of the lowest achieving public schools systems, it is not plausible for a student to access literacy, which would be required for a school system to violate a student's rights under *Whitmer*.²³²

Even if the *Whitmer* formulation of a fundamental right to access literacy might not lead to ultimate success for plaintiffs, it is still likely worth pursuing for education advocates, as it represents the only limited right to education approved by a federal court.²³³ If plaintiffs can successfully use the *Whitmer* standard to survive a motion to dismiss, it increases their leverage to create real changes by raising potential litigation costs and encouraging settlement.²³⁴ The *Whitmer* plaintiffs themselves won a settlement promising almost one hundred million dollars for their school system.²³⁵ Settlement agreements and litigation have in other areas proven to be effective in incentivizing school improvement.²³⁶

Although the *Whitmer* standard for a right to access literacy is admittedly narrow, the space left for a fundamental right to education after *Rodriguez* is correspondingly narrow.²³⁷ Because *Whitmer*'s right to access literacy satisfies

²³¹ See *MA Graduation Requirements and Related Guidance*, MASS. DEP'T OF ELEMENTARY & SECONDARY EDUC. (Jan. 12, 2022), <https://www.doe.mass.edu/mcas/graduation.html> [<https://perma.cc/PD82-PX9X>] (stating that to graduate from high school in Massachusetts, a student must earn a passing score on tenth grade standardized tests in English, math, and science, and meet any local requirements).

²³² See *Whitmer*, 957 F.3d at 659–60 (suggesting a school where a student may “plausibl[y] attain literacy” passes constitutional muster, and admitting that its standard for education would be below the level a majority of Americans would desire for their children). For reference, most Americans are dissatisfied with the current state of public schools, which in almost all cases go beyond teaching basic literacy. *Education*, GALLUP HISTORICAL TRENDS, <https://news.gallup.com/poll/1612/education.aspx> [<https://perma.cc/VN29-5BHA>] (finding that, in 2022, only forty-two percent of Americans were satisfied with the quality of education children received in American public schools); see also *supra* notes 229–231 and accompanying text (suggesting that even schools known for chronic underperformance would be unlikely to deprive students of a fundamental right to literacy education under the *Whitmer* standard).

²³³ See *A.C. Waithe v. McKee*, 23 F.4th 37, 48 (1st Cir. 2022) (affirming a motion to dismiss plaintiffs' complaint, but applauding them for highlighting educational deficiencies); *A.C. v. Raimondo*, 494 F. Supp. 3d 170, 175 (1st Cir. 2020) (recognizing *Whitmer* as the first time a federal court articulated a limited right to education under substantive due process).

²³⁴ See *Testanti*, *supra* note 145 (noting that after the Sixth Circuit in *Whitmer* reversed the dismissal of plaintiffs' lawsuit, the government of Michigan settled the suit, promising an investment of nearly \$100 million for literacy education in Detroit public schools).

²³⁵ See *id.* (reporting that as part of the *Whitmer* settlement, Governor Whitmer agreed to propose legislation to bring \$94.4 million to DPSCD).

²³⁶ See M. Braxton Marcella, *From Injustice at School to Justice in Court*, 17 CONN. PUB. INT. L.J. 87, 97–98 (2017) (reaching a settlement agreement with school districts in the civil rights context has shown to be an effective tool in resolving disparities).

²³⁷ See *Gary B. v. Whitmer*, 957 F.3d 616, 659–60 (6th Cir.) (limiting the right to access literacy to only require a school to provide conditions where students can conceivably learn basic literacy to the degree “required to participate in our democracy”), *vacated by* *Gary B. v. Whitmer*, 958 F.3d 1216 (6th Cir. 2020); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36–37 (1973) (considering but not deciding whether some amount of education necessary to engage in the political system could

both *Glucksberg* and *Rodriguez*, it could present an avenue by which potential plaintiffs can attempt to advocate for the rights of students.²³⁸

CONCLUSION

It seems likely that future plaintiffs will follow in the footsteps of the plaintiffs in *Gary B. v. Whitmer* and *A.C. v. McKee* in asking the federal courts to substantiate a fundamental right to education. Although there is support for a Due Process Clause right to some amount basic education, these plaintiffs will face formidable obstacles in the form of judicial reluctance to be seen as engaging in judicial policymaking or activism. As a result, future plaintiffs are faced with a choice. Those seeking to fit a right to education into existing precedent would do well to formulate their claims to mirror the *Whitmer* majority's right to access basic literacy. The space left for a fundamental right to basic education is fairly limited so long as *San Antonio Independent School District v. Rodriguez* remains binding Supreme Court precedent, and the *Whitmer* right to access literacy is at this moment the only conception of a limited right to education that has been approved by a federal court. Although alleging a violation of a right to access basic literacy might not often lead to ultimate victory in litigation, its limited scope increases the likelihood of surviving a motion to dismiss, and thus could serve as a meaningful tool to affect changes in underperforming schools by encouraging school districts to form settlement agreements that can lead to greater equity and accountability.

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be a fundamental right); *Papasan v. Allain*, 478 U.S. 265, 285 (1986) (acknowledging that the Supreme Court had not decided whether "minimally adequate education" could be a fundamental right).

²³⁸ See *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (requiring fundamental rights to be enumerated by the court in detail, based in the history and tradition of the country, and to be imbedded in our ideals of liberty); *supra* notes 216–219 and accompanying text (discussing the *Whitmer* decision in the context of *Glucksberg*'s fundamental rights analysis). Scholars have criticized the Supreme Court precedent on fundamental rights and education as emblematic of the problems with the Court's fundamental rights jurisprudence more broadly. See JAMAL GREENE, *HOW RIGHTS WENT WRONG* 94–103 (2021) (suggesting that the U.S. courts' reticence to acknowledge a right to education is a product of their all or nothing approach to constitutional rights). Courts in other countries with less stringent approaches to constitutional rights have used the idea of a fundamental right to education to improve the quality of schools. *Id.* at 101–03 (discussing decisions by the Indian Supreme Court requiring schools to provide students with safe infrastructure and free school meals). Because a fundamental right to education derived from the federal Constitution's Due Process Clause would have to contend with the limits of constitutional fundamental rights, plaintiffs may also wish to advocate for a right to education stemming from other sources of law. See generally *id.* (critiquing American jurisprudence surrounding "rights as trumps"); Scott L. Kafker, *State Constitutional Law Declares Its Independence: Double Protecting Rights During a Time of Federal Constitutional Upheaval*, 49 *HASTINGS CONST. L.Q.* 115 (2022) (discussing how state constitutional jurisprudence has begun deviating from federal constitutional rights as the Supreme Court upends its precedents).

