

POSITIVELY FUNDAMENTAL NEGATIVE RIGHTS: REIMAGINING A POSITIVE RIGHT TO EDUCATION AS A NEGATIVE RIGHT AGAINST ARBITRARY CONFINEMENT

Abstract: This Note explores the issue of access to adequate education by examining the liberty rights of students at chronically underperforming public schools. The issue was previously considered by the Sixth Circuit Court of Appeals in 2020, in *Gary B. v. Whitmer*. After delineating positive and negative rights and addressing the dearth of positive rights in the U.S. Constitution, the Note turns to the explicit and implicit adoption of the negative rights framework within federal education jurisprudence, as well as case law on arbitrary confinement. The Note then considers the factual allegations and liberty-based legal argument advanced by the *Gary B.* plaintiffs: schools that fail to provide a basic minimum level of education are schools in name only. Compulsory attendance laws and truancy policies, in this ‘warehousing’ context, arbitrarily confine students, infringing upon the right to personal liberty guaranteed by the Due Process Clause. In order to remedy this constitutional violation, plaintiffs argued, the State must provide students with some basic level of educational attainment. This Note argues that the *Gary B.* plaintiffs strategically sought to mask the goal of establishing a positive right to education in the language and dress of negative rights. Such a strategy exemplifies the weak philosophical and logical underpinnings of the broader negative/positive rights dichotomy. Although this negative rights argument may seem appealing—especially given the Court’s rejection of a positive right to education promulgated in *San Antonio Independent School District v. Rodriguez* in 1973—whether future litigants find success with this approach may require the Court to reconsider or ultimately abandon the negative/positive rights dichotomy.

INTRODUCTION

In 2012, Supreme Court Justice Ruth Bader Ginsburg was criticized for suggesting that the best constitutional model for new democracies might not be the United States, but South Africa.¹ Justice Ginsburg explained that the South

¹ See Joshua Keating, *Why Does Ruth Bader Ginsburg Like the South African Constitution So Much?*, FOREIGN POL’Y (Feb. 6, 2012), <https://foreignpolicy.com/2012/02/06/why-does-ruth-bader-ginsburg-like-the-south-african-constitution-so-much/> [https://perma.cc/2PPC-NLR3] (contextualizing Justice Ginsburg’s remarks). Justice Ginsburg explained that newer constitutional democracies have made “deliberate attempt[s]” to embrace basic human rights in their foundational texts. *Id.* But see Diana Schaub, *South Africa’s Orwellian Constitution*, HOOVER INST. (Apr. 4, 2012), <https://www.hoover.org/research/south-africas-orwellian-constitution> [https://perma.cc/3TJ6-LM89] (criticizing these modern constitutions for effecting mere “parchment barriers”).

African Constitution, unlike its older, American counterpart, contains explicit guarantees of social and economic rights.² Her remarks are part of a broader discussion comparing American constitutionalism to the increasing number of newer constitutional models, many of which enunciate positive rights to various social entitlements, including education and healthcare.³

The debate over what rights the federal government ought to provide, and what the Constitution requires, rages on today.⁴ One prominent arena is public education.⁵ At the nation's founding, there was virtually no federal oversight of education.⁶ Until the 1830s, primary schools were generally operated and overseen by local communities.⁷ Over the next century and a half, states increasingly regulated schools, and the federal government began to play a more active role in educational oversight.⁸ Although the U.S. Constitution says nothing about education, the Supreme Court has continuously recognized its importance to the healthy functioning of American society and democracy.⁹

² Keating, *supra* note 1. Justice Ginsburg noted that the South African Constitution creates affirmative duties for the State to work toward the fulfillment of certain social and economic rights for all citizens. *Id.* Among those enumerated rights are access to adequate healthcare and housing. *Id.* The South African Constitution was ratified post-Apartheid in 1997. *Id.* See generally Shedrack C. Agbakwa, *Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights*, 5 YALE HUM. RTS. & DEV. L.J. 177 (2002); Kristine Yigen, *Enforcing Social Justice: Economic and Social Rights in South Africa*, 4 INT'L J. HUM. RTS. 13 (2000).

³ See Adam Liptak, *'We the People' Loses Appeal with People Around the World*, N.Y. TIMES (Feb. 6, 2012), <https://www.nytimes.com/2012/02/07/us/we-the-people-loses-appeal-with-people-around-the-world.html> [<https://perma.cc/SQ28-7HBB>] (commenting on the uniquely antiquated and hard-to-update qualities of the U.S. Constitution and contrasting it with other national constitutions).

⁴ See, e.g., Rotem Litinski, *Economic Rights: Are They Justiciable, and Should They Be?*, A.B.A. (Nov. 30, 2019), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/economic-justice/economic-rights—are-they-justiciable—and-should-they-be/ [<https://perma.cc/CDF2-UKJ4>] (explaining how economic rights can take the form of derivatives of existing constitutional provisions); Danielle Kurtzleben, *Rep. Alexandria Ocasio-Cortez Releases Green New Deal Outline*, NPR (Feb. 7, 2019), <https://www.npr.org/2019/02/07/691997301/rep-alexandria-ocasio-cortez-releases-green-new-deal-outline> [<https://perma.cc/GG46-R8QC>] (summarizing Representative Alexandria Ocasio-Cortez and Senator Ed Markey's proposed "Green New Deal," which aims to transform the economy and provide special protection to marginalized peoples and derives its name from President Roosevelt's New Deal legislation); Lisa Friedman, *What Is the Green New Deal? A Climate Proposal, Explained*, N.Y. TIMES (Feb. 21, 2019), <https://www.nytimes.com/2019/02/21/climate/green-new-deal-questions-answers.html> [<https://perma.cc/U8JD-J57N>] (describing the Green New Deal's calls for the right to employment, clean air, and healthy food).

⁵ See *infra* note 9 and accompanying text (describing three landmark public education Supreme Court decisions).

⁶ Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 117 (2013).

⁷ *Id.*

⁸ *Id.*; see also Trish Brennan-Gac, *Educational Rights in the States*, A.B.A. (Apr. 1, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol_40_no_2_civil_rights/educational_rights_states/ (describing various efforts by U.S. Presidents to bolster federal oversight over public education).

⁹ See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973) (emphasizing that education is of "grave significance" to both individuals and to the country as a whole); *Brown v. Bd.*

Then, in 1973, in *San Antonio Independent School District v. Rodriguez*, the Supreme Court held that despite the unique importance of education, the Constitution does not guarantee a fundamental right to education, either explicitly or implicitly.¹⁰

The United States consistently ranks at the low-end of nations with high-income economies across various educational metrics.¹¹ And as the *Rodriguez* plaintiffs stressed fifty years ago, disparities in school conditions and outcomes are severe.¹² Often, students from low income or marginalized communities

of Educ., 347 U.S. 483, 493 (1954) (calling education “the most important function of state and local governments” and describing it as equally essential to basic public responsibilities as military service); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (describing the importance of education for a democratic society).

¹⁰ See *Rodriguez*, 411 U.S. at 30, 35 (holding that there is no guaranteed right to education and the Fourteenth Amendment does not recognize a claim that the San Antonio school finance system led to substantial disparities between people based on wealth and race). Despite holding that education is not a fundamental right, the Supreme Court has long viewed education as a unique or special social service. See *Brown*, 347 U.S. at 493 (singling out education for its unique function in society). Although the Constitution does not enumerate many rights beyond those found in the Bill of Rights, the Fourteenth Amendment’s Due Process Clause has long protected rights that the Court deems sufficiently fundamental, such as the right to privacy and marriage. See *Griswold v. Connecticut*, 381 U.S. 479, 481–82, 484 (1965) (explaining how the Due Process Clause protects not just the Constitution’s enumerated rights, but also those fundamental rights not explicitly mentioned in the Constitution or Bill of Rights).

¹¹ See Aria Bendix, *The US Was Once a Leader for Healthcare and Education—Now It Ranks 27th in the World*, BUS. INSIDER (Sept. 27, 2018), <https://www.businessinsider.com/us-ranks-27th-for-healthcare-and-education-2018-9> [<https://perma.cc/33VS-LSHL>] (summarizing multiple studies comparing education outcomes around the world). The Organization for Economic Co-operation and Development (OECD) is an intergovernmental organization comprising of 38 member nations with high-income economies. About, OECD.ORG, <https://www.oecd.org/about/> [<https://perma.cc/WG66-STF4>]. Most OECD nations outperform the United States in math, reading, and science. Bendix, *supra*.

¹² See *supra* notes 9–11 and accompanying text (describing the *Rodriguez* case and its impact). Although these issues have persisted since *Rodriguez*, the COVID-19 pandemic has recentered the discussion in our political discourse. See, e.g., 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/WW3W-3CTZ>] (“Test scores are down, and violence is up. Parents are screaming at school boards, and children are crying on the couches of social workers. Anger is rising. Patience is falling.”); Christian Spencer, *Teachers Across America Are Fleeing in Record Numbers*, THE HILL (Oct. 4, 2021), <https://thehill.com/changing-america/enrichment/education/575176-teachers-across-america-are-fleeing-in-record-numbers/> [<https://perma.cc/NNJ4-CHXH>] (reporting that gaps in student achievement and school stability have worsened due to the accelerated rates of teacher turnover and burnout caused by the COVID-19 pandemic). Although public school students in the United States have fallen below grade-level expectations in math and reading for decades, the pandemic pushed those percentages to all-time lows. Meckler, *supra*. According to the data from the i-Ready national school performance assessment, in the fall of 2021, the percentage of third graders reading below grade-level increased from 31% to 38% compared to pre-pandemic rates, and the percentage of third graders below grade-level in math rose from 29% to 39% over the same period of time. *Id.* Absenteeism rates have also shot up around the country. *Id.* In Connecticut, for example, the percentage of students deemed to be “chronically absent” has increased from 12% to 24%. *Id.* In the City of Oakland, California, that number skyrocketed from 17% to 43%. *Id.* On average, public schools that have majority-Black student populations are five months behind pre-pandemic learning levels, whereas those with majority-white student populations are only two months behind.

are forced to attend lower performing schools and disproportionately suffer the consequences of poor schooling.¹³ For example, the dropout rates of students from low income families are five times higher than those from more affluent families, and the dropout rate for Black students is double that of white students.¹⁴ This complex reality is often concurrent with de facto segregation.¹⁵ Empirically, the education system chronically fails children.¹⁶ As a result of the

Emma Dorn, Bryan Hancock, Jimmy Sarakatsannis & Ellen Viruleg, *COVID-19 and Education: The Lingering Effects of Unfinished Learning*, MCKINSEY & CO. (July 27, 2021), <https://www.mckinsey.com/industries/education/our-insights/covid-19-and-education-the-lingering-effects-of-unfinished-learning> [<https://perma.cc/92RX-USZW>]. The McKinsey study described the macro trends of pandemic recovery efforts as k-shaped, meaning that children from wealthy families have rebounded and are now improving while those from poorer households continue to decline. *Id.*

¹³ See *Closing America's Education Funding Gaps*, CENTURY FOUND. (July 22, 2020), <https://tcf.org/content/report/closing-americas-education-funding/> [<https://perma.cc/SA9H-RZUW>] (explaining how the chronic underfunding of public schools disproportionately harms Black, brown, and low-income children, and that the United States would need to spend about \$150 billion more per year in order to ensure children have access to quality education); DANIELLE FARRIE & DAVID G. SCIARRA, EDUC. L. CTR., *MAKING THE GRADE: HOW FAIR IS SCHOOL FUNDING IN YOUR STATE?* 11 (2022), <https://edlawcenter.org/research/making-the-grade-2021.html> [<https://perma.cc/5G23-BX5X>] (showing how, in many states, per-pupil spending is actually higher in districts with low poverty levels than in districts with high poverty levels); Kate Barrington, *The 15 Biggest Failures of the American Public Education System*, PUB. SCH. REV. (June 30, 2023), <https://www.publicschoolreview.com/blog/the-15-biggest-failures-of-the-american-public-education-system> [<https://perma.cc/BQ9Z-BJD6>] (quantifying the scope of student poverty in public schools).

¹⁴ CHRIS CHAPMAN, JENNIFER LAIRD, NICOLE IFILL & ANGELINA KEWALRAMANI, NAT'L CTR. FOR EDUC. STAT., *TRENDS IN HIGH SCHOOL DROPOUT AND COMPLETION RATES IN THE UNITED STATES: 2007–2009*, at 6 (2011), <http://nces.ed.gov/pubs2012/2012006.pdf> [<https://perma.cc/G345-WKXN>].

¹⁵ See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 805–06 (2007) (Breyer, J., dissenting) (citing statistics suggesting increases in de facto racial segregation in public schools since 2000). Justice Breyer cited findings indicating that “more than one in six black children attend a school that is 99%–100% minority,” while, on average, white students attend schools where 78% of their peers are also white. *Id.*; see also DEREK W. BLACK, *EDUCATION LAW: EQUALITY, FAIRNESS, AND REFORM* 89–91 (2d ed. 2016) (describing how segregation persists, harming students from low income and marginalized communities). The forces of segregation and economic disadvantage are highly correlated. BLACK, *supra*, at 89–91. Segregated schools in poorer communities often suffer from “[c]oncentrated poverty,” a term used to describe the many issues unique to schools in resource-constrained environments that collectively impact academic achievement. *Id.* at 91. For instance, struggling schools will often have less qualified and experienced teachers, more rudimentary and remedial curricula, and high professional staff turnover rates. *Id.* These problems create a negative feedback loop, adding additional financial costs to schools, because they now have to spend even more on instructional costs to remediate lost learning and to sufficiently supervise and train new teachers. *Id.*

¹⁶ See *supra* notes 13–15 and accompanying text (addressing poor education outcomes and disproportionately harsh disparities for low income students and students of color). Although school funding relies on a web of sources, approximately 90% of K–12 public school funding derives from state and local government budgets. See Michael Leachman, Kathleen Masterson & Eric Figueroa, *A Punishing Decade for School Funding*, CTR. ON BUDGET & POL'Y PRIORITIES (Nov. 29, 2017), <https://www.cbpp.org/research/state-budget-and-tax/a-punishing-decade-for-school-funding> [<https://perma.cc/MZ79-WR2J>] (breaking down spending on education as 45% from local revenue, 47% from state revenue, and 8% from federal revenue). In the past decade, most states have cut funding, leading

Supreme Court's holding in *Rodriguez*, federal courts are not friendly venues for advocates seeking to reform the education system.¹⁷

This Note explores the liberty-based negative rights view advanced by the Sixth Circuit Court of Appeals in *Gary B. v. Whitmer* as an alternative means for securing a right to education.¹⁸ In *Gary B.*, the plaintiff-appellants—a group of students from Detroit Public Schools—argued that the Due Process Clause guarantees that individuals be free from arbitrary governmental confinement.¹⁹ Thus, students attending chronically underperforming schools must be conferred *some* minimal educational benefit in order to justify the compulsory nature of schooling.²⁰ This Note contextualizes the *Gary B.* liberty argument within the broader framework of positive and negative constitutional rights, and shows how this framework influences the way the Supreme Court's jurisprudence separates constitutional rights from underlying socio-economic realities.²¹

to fewer teachers, programs, and resources. *Id.* The lifetime collateral consequences of inadequate schooling are well known. *See, e.g., Why Education Matters to Health: Exploring the Causes*, VCU CTR. ON SOC'Y & HEALTH (Feb. 13, 2015), <https://societyhealth.vcu.edu/work/the-projects/why-education-matters-to-health-exploring-the-causes.html#gsc.tab=0> (explaining how poor education and health can worsen through harsh negative feedback loops).

¹⁷ *See supra* note 10 and accompanying text (summarizing the *Rodriguez* holding); *see also* Andrea Sachs, *The Worst Supreme Court Decisions Since 1960*, TIME (Oct. 6, 2015), <https://time.com/4056051/worst-supreme-court-decisions/> [<https://perma.cc/8ABD-PTZ7>] (arguing that the *Rodriguez* decision played a pivotal role in enabling the legal and socio-economic conditions for present-day educational inequality).

¹⁸ *See infra* notes 135–155 and accompanying text (describing the plaintiff-appellants' arbitrary confinement argument).

¹⁹ *See Gary B. v. Whitmer*, 957 F.3d 616, 638 (6th Cir.), *vacated by Gary B. v. Whitmer*, 958 F.3d 1216 (6th Cir. 2020) (addressing the merits of plaintiffs' argument, prior to dismissing it due to insufficient pleading). Plaintiffs advanced two main arguments, the first, that there is a federal fundamental right to literacy education. *Id.* at 629. The Sixth Circuit held that there is a positive, fundamental right to “a basic minimum education,” setting the floor at “[a]ccess to a foundational level of literacy.” *Id.* at 642. The second argument, the subject of this Note, was seen as meritorious, but discarded due to inadequacy of briefing. *Id.* at 641. Plaintiffs sought to advance a due process violation claim on the basis that compulsory attendance laws, as applied, constitute an unconstitutional form of arbitrary confinement. *Id.*

²⁰ *Id.* at 678. In other words, plaintiffs argued that their chronically underperforming schools were of such poor quality that they constituted “schools in name only,” and thus students were essentially being held against their will at detention-like facilities. *Id.* at 624. This “liberty-based argument” has been further developed by anti-racist abolitionist scholars. *See, e.g., Helen Hershkoff & Nathan Yaffe, Unequal Liberty and a Right to Education*, 43 N.C. CENT. L. REV. 1, 41–43 (2020) (arguing that a liberty-based due process argument is consistent with jurisprudence reading the U.S. Constitution as a “charter of negative rights against the government, and not of positive duties by the government to its citizens”).

²¹ *See infra* notes 27–216 and accompanying text. Negative rights are conceptually the same as “non-interventionist” rights—political and legal rights that restrict the government's ability to interfere with them. Ran Hirschl, *“Negative” Rights vs. “Positive” Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order*, 22 HUM. RTS. Q. 1060, 1063 (2000). Negative rights can be thought of as guarantees of criminal and legal due process. *Id.* at 1076. For example, the right to be free from unreasonable searches and seizures is an individual

Part I, Section A of this Note defines positive and negative rights and explains their conceptual differences, and then highlights the main scholarship addressing the lack of positive constitutional rights in the United States.²² Part I, Section B applies the framework of positive and negative rights to a brief summary of federal education jurisprudence.²³ Part I, Section C summarizes U.S. due process and arbitrary confinement jurisprudence.²⁴ Part II of this Note evaluates the liberty-based argument advanced in *Gary B.*—that students compelled to attend schools that fail provide any basic minimum education are arbitrarily confined in violation of the Due Process Clause.²⁵ Finally, Part III of this Note concludes that although the *Gary B.* argument presents a powerful rhetorical framework for understanding American education inequity and injects new life into judicial reform efforts, whether future litigants find success with this approach may require the Supreme Court to abandon its notion of a negative/positive rights dichotomy.²⁶

I. THE LEGAL AND PHILOSOPHICAL BACKGROUND OF THE POSITIVE AND NEGATIVE RIGHTS DICHOTOMY AND ITS INFLUENCE ON EDUCATION AND ARBITRARY CONFINEMENT JURISPRUDENCE

In order to understand how a right to education could take the form of a claim against arbitrary governmental confinement, it is necessary to contextualize what is meant by positive and negative rights, and how these philosophical concepts apply to constitutional legal norms.²⁷ Section A of this Part defines positive and negative rights and outlines the main scholarship addressing the absence of positive social and economic rights in the U.S. Constitution.²⁸ Relying on this context, Sections B and C then summarize U.S. education jurisprudence, as well as major arbitrary confinement cases that interpret these acts as due process violations.²⁹

right that limits government intervention into the sphere of private actions or affairs. *Id.* Conversely, “positive” rights can be construed as “subsistence social rights.” *Id.* at 1063. This includes a right to government-provided healthcare, education, or housing. *Id.* at 1083.

²² See *infra* notes 30–65 and accompanying text.

²³ See *infra* notes 66–82 and accompanying text.

²⁴ See *infra* notes 83–103 and accompanying text.

²⁵ See *infra* notes 104–178 and accompanying text.

²⁶ See *infra* notes 179–216 and accompanying text.

²⁷ See *infra* notes 39–65 and accompanying text.

²⁸ See *infra* notes 39–65 and accompanying text.

²⁹ See *infra* notes 66–103 and accompanying text.

A. A Brief Background on Negative and Positive Rights in the U.S. Constitution

According to many political theorists, there is an important distinction between negative and positive rights.³⁰ Broadly speaking, negative rights may be thought of as checks on the government's authority and ability to interfere with individual or private actions and choices.³¹ In practice, negative rights are traditionally guarantees of criminal and legal due process of law.³² Classic examples of negative rights include the right to free speech, free press, free worship, trial by jury, and freedom from unreasonable searches.³³ Each of these rights shares an underlying assumption that the government ought not to interfere—that realizing these rights necessitates that the government preserve “a sphere of private immunity.”³⁴

Scholars have not settled on one definition of positive rights.³⁵ Nevertheless, positive rights can be construed as economic and social in nature; these “subsistence social rights,” such as rights to healthcare, education, or housing, require that the government play an active, rather than “non-interventionist,” role to ensure that these guarantees are met.³⁶

Subsection 1 of this subpart examines the drafting of the U.S. Constitution and Bill of Rights, assessing whether it makes sense to conceptualize negative and positive rights as strictly dichotomous.³⁷ Subsection 2 addresses why U.S. constitutional jurisprudence seemingly does not recognize any social and economic rights.³⁸

1. Negative and Positive Rights: Is a Theoretical Dichotomy Appropriate?

Scholars often characterize negative rights as predating positive rights conceptually—they are “[f]irst [g]eneration” rights—at least in the Western

³⁰ See Hirschl, *supra* note 21, at 1063 (defining negative and positive rights).

³¹ *Id.* Negative rights can also be construed as “non-interventionist” rights because they negate governmental authority and action. *Id.*

³² *Id.* at 1076.

³³ Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1, 1–2 (2005).

³⁴ *Id.* at 5–6.

³⁵ Francesca Bignami & Carla Spivack, *Social and Economic Rights as Fundamental Rights*, 62 AM. J. COMP. L. SUPP. 561, 561–62 (2014). The Toronto Initiative for Economic and Social Rights classifies these rights into ten categories: “(1) The right to social security not related to employment; (2) The rights of children; (3) The right to healthcare; (4) The right of access to land; (5) The right to housing; (6) The right to food and water; (7) The right to education; (8) The right to development; (9) The right to a safe or healthy environment; (10) The right to state protection of the environment.” *Id.* at 562.

³⁶ Hirschl, *supra* note 21, at 1063.

³⁷ See *infra* notes 39–52 and accompanying text.

³⁸ See *infra* notes 53–65 and accompanying text.

democratic tradition.³⁹ This perspective is largely based on the fact that both the Bill of Rights and the Magna Carta enumerate guarantees enjoyed by private citizens against government interference—quintessentially negative rights.⁴⁰ Meanwhile, positive rights did not proliferate in national constitutions until the twentieth century.⁴¹ Accordingly, social and economic rights have been dubbed “[s]econd [g]eneration” rights.⁴²

Cass Sunstein, one of the foremost scholars on the relationship between negative and positive rights in American constitutional jurisprudence, argues that the traditional conceptual division of the two types of rights is misguided.⁴³ The dichotomous understanding of negative and positive rights rests on the assumption that negative rights protect individuals *from* government action,

³⁹ Sunstein, *supra* note 33, at 8.

⁴⁰ *Id.* The Magna Carta, written in 1215 in England, laid out a series of traditional rights and liberties recognized by the King of England, granted “to all freemen of our kingdom.” *Magna Carta*, NAT’L ARCHIVES FOUND., <https://archivesfoundation.org/documents/magna-carta/#~:text=Magna%20Carta%20also%20guaranteed%20due,Constitution%2C%20and%20Bill%20of%20Rights> [https://perma.cc/8V3V-XVSJ]. In 1297, the Magna Carta was reissued, being entered into the official Statute Rolls of England, enshrining it as an unalterable guarantee of unalienable rights. *Id.* Among the rights guaranteed are the due process of law, freedom from arbitrary imprisonment, and trial by a jury of one’s peers. *Id.*

⁴¹ See Liptak, *supra* note 3 (explaining how more modern national constitutions have recognized positive social and economic rights).

⁴² Sunstein, *supra* note 33, at 8–9. According to Sunstein, the majority thinking is that negative guarantees are both time-honored and in line with classical liberal thinking, while positive rights are often derogatorily construed as pleas for public assistance that merely try to cloak themselves in the language of “rights.” *Id.* at 6. Nevertheless, the conventional academic thinking that negative rights are older than positive rights is misleading—it is more apt to describe their *presence* in certain foundational constitutional documents, rather than their *conceptualization*, as older. *Id.* Although the Bill of Rights did not include any “positive” guarantees of a social or economic nature, there was discussion of the sorts at the time of the nation’s founding. *Id.* For example, James Madison proposed a clause to ensure that extreme poverty be ameliorated by the federal government without infringing on existing private property interests. See James Madison, *Parties*, NAT’L GAZETTE, Jan. 23, 1792, *reprinted in* 14 THE PAPERS OF JAMES MADISON 197 (Robert A. Rutland & Thomas A. Mason eds., 1983) (stating that, without violating private property rights, “extreme wealth [be reduced] towards a state of mediocrity, and . . . extreme indigence [be raised] towards a state of comfort”) (emphasis added). Thomas Jefferson also advocated that government play a role in ensuring certain levels of social and economic equality. *Letter From Thomas Jefferson to James Madison, 28 October 1785*, in 8 THE PAPERS OF THOMAS JEFFERSON 682 (Julian P. Boyd ed., 1953). For instance, Jefferson argued that the government must protect against gross unequal access to property ownership. *Id.* If left unchecked by the government, he argued that inequality would “produc[e] so much misery to the bulk of mankind.” *Id.* Thomas Jefferson advocated for a progressive taxation scheme because it would be unrealistic to perfectly subdivide property. *Id.* Ultimately, he concluded, the government must intervene because, “[w]henver there is in any country, uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right. The earth is given as a common stock for man to labour and live on.” *Id.* In short, despite the fact that the Bill of Rights ultimately excluded these ideas, many of the “classical liberal thinkers” of the time endorsed them. Sunstein, *supra* note 33, at 8–9.

⁴³ Sunstein, *supra* note 33, at 7 (arguing that the government must intervene in some form in order to effectuate any and all “rights,” whether it be to protect existing private property rights or to provide housing).

whereas positive rights protect individuals *through* government action.⁴⁴ This view, however, tends to ignore both the reality that all negative rights require some level of government action in order to exist and have effect in the real world, and that socio-economic barriers lead to unequal enjoyment of negative rights.⁴⁵

For example, the Bill of Rights presupposes the existence of a legal regime of private property, protecting individuals' property interests through the Fourth and Fifth Amendments.⁴⁶ These rights are ostensibly negative, in that they guarantee protection *from* various forms of governmental interference.⁴⁷ Nevertheless, in order for there to be a regime of private property, the government must first expend resources to recognize and protect that individual right—such as through administrative bureaucracy and policing.⁴⁸ Thus, although these rights are written in the negative—that is, the government shall not deprive a person of their property, without due process of law, or confiscate that property, without just compensation—the actualization and implementation of that negative right requires some tangible, perceptible level of government action.⁴⁹ Similarly, in order for the government to guarantee a negative right to be free against unreasonable searches and seizures, it must allocate funds and other valuable resources toward the training and oversight of police officers.⁵⁰

Given that the realization and maintenance of all constitutional rights requires some minimum level of government expenditure and resource allocation, the difference between rights is quantitative rather than qualitative, and should be viewed as a question of degree, not kind.⁵¹ The failure to recognize this nuance results in a jurisprudence that tends to divorce constitutional rights from underlying socio-economic realities.⁵²

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See U.S. CONST. amends. IV, V (protecting private property interests from government interference through the Due Process Clause and Just Compensation Clause, and from unreasonable searches and seizures). The Court has often recognized enhanced constitutional protections within the home. See, e.g., *Kyllo v. United States*, 533 U.S. 27, 37 (2001) (where Justice Scalia explains the “sanctity of the home” under the Constitution).

⁴⁷ U.S. CONST. amends. IV, V.

⁴⁸ Sunstein, *supra* note 33, at 6. This is why “[p]roperty and law are born and must die together. Before the laws, there was no property; take away the laws, all property ceases.” *Id.*

⁴⁹ *Id.* at 7.

⁵⁰ *Id.* at 7–8. Similarly, Sunstein argues, even the negative right of free speech, at the very least, requires governments to expend the resources and energy to ensure that its own agents do not interfere with private actions. *Id.*

⁵¹ See *id.* (arguing that because all rights require government expenditure and resources, they ought to be conceptually distinguished in the quantitative terms of resource allocation).

⁵² See *id.* at 5 (arguing that this dichotomy is often exploited politically to derogate positive rights as socially undesirable “entitlements”). In fact, in many societies, the government spends much more to manage the system that protects property rights than it does to manage social welfare systems. *Id.*; see

2. The Absence of Positive Social and Economic Rights in the U.S. Constitution

As explained in the previous subsection, there is no definitive and theoretically precise definition for negative and positive rights.⁵³ Nonetheless, there is widespread consensus among American legal scholarship that social and economic rights—whether or not we label them as positive rights—are not explicitly protected in the Constitution.⁵⁴ Sunstein provides four main reasons for this: (1) comparatively speaking, the U.S. Constitution is old, having been formalized before domestic and international movements to include positive social and economic rights came into force in the twentieth century; (2) justiciability of social and economic rights is difficult to ensure, which is problematic given American legal culture's focus on judicial review; (3) historically speaking, the United States never experienced a widespread socialist movement the way that other democratic nations have; and (4) in the 1970s, the composition of the Supreme Court became more conservative, solidifying a rigid, narrow rights framework.⁵⁵

Efforts to broaden constitutional mandates—from proposed executive and legislative action to changes in constitutional jurisprudence—spanned the twentieth century.⁵⁶ In 1944, President Franklin D. Roosevelt pushed for an

also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 2 (1973) (holding that socio-economic status is not a protected class under the Fourteenth Amendment); Michele Gilman, *A Court for the One Percent: How the Supreme Court Contributes to Economic Inequality*, 2014 UTAH L. REV. 389, 389 (exploring how the Supreme Court's selective deference to Congress leads to wealth and income inequality).

⁵³ See *infra* notes 39–52 and accompanying text.

⁵⁴ See HersHKoff & Yaffe, *supra* note 20, at 42–43 (addressing the view that the Constitution is “a charter of negative rights against the government, and not of positive duties by the government to its citizens”); Bignami & Spivack, *supra* note 35, at 567 (describing the various ways that the U.S. Supreme Court has interpreted positive rights extremely narrowly, while interpreting negative rights broadly). Bignami and Spivack further argue that although the Supreme Court has never recognized economic and social rights as a form of liberty under the Due Process Clause of the Fourteenth and Fifth Amendments, it theoretically could do so. *Id.*; see also Robin West, *Reconstructing Liberty*, 59 TENN. L. REV. 441, 446–57 (1992) (“It is liberty or freedom from, not liberty or freedom to, which the Bill of Rights protects.”).

⁵⁵ Sunstein, *supra* note 33, at 4–5. Sunstein's analysis demonstrates that the scope of Constitutional guarantees is not permanently fixed, but is the result of ongoing historical, political, social, and cultural movements. See *id.* (arguing that no single reason adequately explains the lack of social and economic guarantees).

⁵⁶ See *infra* notes 56–65 and accompanying text (describing various political movements to evolve thinking regarding constitutional rights throughout the twentieth century). Within the American political and cultural context, the debate over what role the government plays in securing rights for its citizens—and how those rights ought to be defined—is frequently framed by evoking the foundational guarantees of “[l]ife, [l]iberty, and the pursuit of [h]appiness.” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). The Declaration of Independence has long been an effective rhetorical source for the rights and obligations of American citizens. See Pauline Maier, *The Strange History of “All Men Are Created Equal,”* 56 WASH. & LEE L. REV. 873, 877 (1999) (explaining how subsequent generations of Americans have imbued the Declaration of Independence with meaning that its drafters

“[E]conomic [B]ill of [R]ights.”⁵⁷ In his appeal to Congress, President Roosevelt argued that physical welfare is as dependent on economic and social security as it is upon political freedoms—the latter of which were already protected in the Bill of Rights.⁵⁸ The near collapse of society after the Great Depression and Second World War buttressed President Roosevelt’s belief that to safeguard American freedom, the federal government must ensure that fundamental socio-economic necessities, such as shelter, education, and healthcare, are actualized for every American.⁵⁹

Moreover, while the Supreme Court has never interpreted the Constitution to explicitly provide social and economic rights, such as a right to education or healthcare, in the 1960s, the Warren Court decided a string of cases whose underlying logic blurred the line between negative and positive rights.⁶⁰ In 1963, in *Gideon v. Wainwright*, the Supreme Court held that indigent defendants in criminal cases have a right to court-appointed counsel under the Sixth

likely did not intend, including the phrase “all men are created equal,” which was essentially boilerplate language at the time of its drafting). In his 1689 work, *Two Treatises of Government*, philosopher John Locke wrote that the government’s role was to protect “life, liberty, and estate.” JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 163 (Thomas I. Cook ed., Hafner Press 1947) (1689). Many historians have examined the overlap between Locke’s treatise and the Declaration of Independence, taking different positions on Thomas Jefferson’s meaning in the Declaration. See, e.g., James P. Young, Book Review, *The Natural Rights Republic: Studies in the Foundation of the American Political Tradition*, 28 POL. THEORY 870, 873 (2000) (comparing Jefferson and Locke’s ideologies); Kenneth D. Stern, *John Locke and the Declaration of Independence*, 15 CLEV.-MARSHALL L. REV. 186, 186 (1966) (arguing that Jefferson endorsed Locke’s views). Some scholars claim that this sentiment is a direct appeal to the conception of limited government. Jeffrey H. Anderson, *A Limited Government Amendment*, NAT’L AFFS. (2010), <https://www.nationalaffairs.com/publications/detail/a-limited-government-amendment#> [<https://perma.cc/87UA-XFZV>]. Other scholars have argued that the Declaration provides an effective rhetorical basis for promoting social and economic rights. See Linda M. Keller, *The American Rejection of Economic Rights as Human Rights & the Declaration of Independence: Does the Pursuit of Happiness Require Basic Economic Rights?*, 19 N.Y.L. SCH. J. HUM. RTS. 557, 613 (2003) (arguing that a minimum level of positive economic conditions is necessary to give meaning to the Declaration of Independence).

⁵⁷ Sunstein, *supra* note 33, at 1–2. In his 1944 State of the Union speech to Congress, President Roosevelt delineated between the Constitution’s ‘unalienable’ political, or negative, rights (those protecting free speech, free press, free worship, trial by jury, freedom from unreasonable searches), and a separate class of economic and social rights that would guarantee “a new basis of security and prosperity” (such as “[t]he right to a useful and remunerative job in the industries,” “[t]he right to earn enough to provide adequate food and clothing and recreation,” “[t]he right of every family to a decent home,” “[t]he right to adequate medical care and the opportunity to achieve and enjoy good health,” and “[t]he right to a good education”). *Id.* While the proposal’s name suggests an effort to amend the Constitution, realistically, President Roosevelt employed it as a rhetorical strategy to mobilize Congress toward robust economic legislation. *The Economic Bill of Rights*, US HISTORY.ORG, https://www.ushistory.org/documents/economic_bill_of_rights.htm [<https://perma.cc/PT2U-QL3T>].

⁵⁸ See Cass R. Sunstein, *We Need to Reclaim the Second Bill of Rights*, 50 CHRON. HIGHER EDUC. B9, B9–B10 (2004) (explaining President Roosevelt’s position and noting how his speech has directly influenced countless modern constitutions around the world).

⁵⁹ See *id.* (contextualizing Roosevelt’s push for economic and social rights in the post-War era).

⁶⁰ See Sunstein, *supra* note 33, at 20–21 (describing the importance of the personnel shift on the Supreme Court in the late 1960s and early 1970s).

Amendment.⁶¹ The Court reasoned that it would be unconstitutional for a criminal defendant's poverty to stand in the way of their right to counsel; therefore, the government has an affirmative obligation to provide an attorney in those circumstances.⁶² Similarly, in *Griffin v. Illinois* in 1956, *Douglas v. California* in 1963, and *Boddie v. Connecticut* in 1971, the Court recognized that socio-economic realities animate the extent to which a person can meaningfully access their rights, holding that where indigent persons do not have the financial means to assert their rights, the government must accommodate them.⁶³ In other words, these cases affirmed that when an enumerated negative right is implicated (for example, the right to a fair trial), then the state may be required to ensure certain economic conditions so that all citizens may access that right equally.⁶⁴

When Court personnel shifted in the 1970s, these Warren era holdings were narrowed, with the Court clarifying that an affirmative duty may be imposed on States only when historically fundamental rights are implicated.⁶⁵

⁶¹ *Gideon v. Wainwright*, 372 U.S. 335, 339–40 (1963).

⁶² *See id.* at 344–45 (indicating that the “noble ideal [of the right to a fair trial] cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him”). Similarly, the Court has recognized a right to counsel for juveniles in delinquency proceedings. *In re Gault*, 387 U.S. 1, 41 (1967).

⁶³ *Griffin v. Illinois*, 351 U.S. 12, 19 (1956); *Douglas v. California*, 372 U.S. 353, 357–58 (1963); *Boddie v. Connecticut*, 401 U.S. 371, 377–78 (1971). In 1956, in *Griffin v. Illinois*, the Court held that by imposing an administrative fee on an indigent defendant appealing his criminal convictions, which the defendant was unable to pay due to his financial situation, the State impermissibly discriminated against the defendant. *Id.* at 19. The Court imposed an affirmative duty on the State to provide the defendant with the transcript for free. *See id.* (holding that the State Supreme Court must make transcripts available to indigent defendants). In 1963, in *Douglas v. California*, the Court held that defendants were denied their request for a new state-provided attorney after the original public defender handling their case was removed. *Id.* at 354. After they were convicted, the defendants appealed, but were not appointed counsel to represent them on appeal. *Id.* The Supreme Court held that California's treatment of defendants must be responsive to those defendants' economic situation. *Id.* at 357–58. Finally, in 1971, in *Boddie v. Connecticut*, the Court held that the State violated the due process of welfare recipients seeking divorces in state court by requiring that they pay fees in order to access the judicial divorce process. *Id.* at 377–78.

⁶⁴ Bignami & Spivack, *supra* note 35, at 567; *see also* Sunstein, *supra* note 33, at 20 (“These decisions emphatically recognize social and economic rights; they say that the government must provide financial assistance to poor people in certain domains.”).

⁶⁵ Bignami & Spivack, *supra* note 35, at 569. This idea will be discussed further within the context of education jurisprudence in Section B of this Part. *See infra* notes 66–75 and accompanying text. In 1969, Warren Burger was appointed as the Chief Justice of the Supreme Court after Chief Justice Warren retired. *Justices 1789 to Present*, SUP. CT. U.S., https://www.supremecourt.gov/about/members_text.aspx [<https://perma.cc/5YZE-7HXS>]. Then in 1970, Harry Blackmun replaced Justice Fortas' seat. *Id.* In 1971, Justice Black and Harlan passed away, and were replaced by Justices Powell and Rehnquist. *Id.* In 1975, Justice Douglas' seat was filled by John Paul Stevens. *Id.* These appointments steadily shifted the court toward a more conservative political disposition. Linda Greenhouse, *Warren E. Burger Is Dead at 87; Was Chief Justice for 17 Years*, N.Y. TIMES (June 26, 1995), <https://www.nytimes.com/1995/06/26/obituaries/warren-e-burger-is-dead-at-87-was-chief-justice-for-17-years.html?pagewanted=all> [<https://perma.cc/C5PP-C5SJ>]. The right of indigent criminal defendants and juveniles to court-appointed counsel has not been extended since *In re Gault*. *See Turner v. Rogers*, 564 U.S. 431, 435 (2011) (holding that an indigent noncustodial parent facing incarceration for

B. U.S. Education Jurisprudence

This Section does not reproduce the entire history of education jurisprudence.⁶⁶ Instead, it organizes some of the landmark Supreme Court cases around two main principles: (1) that the government may not impede private choices and actions related to education; and (2) that education is uniquely important to both individuals and society.⁶⁷

The Supreme Court has consistently emphasized that private choices and actions must be protected, limiting the government's ability to influence or mandate certain educational requirements.⁶⁸ In 1923, in *Meyer v. Nebraska*, the Court struck down a state statute forbidding the teaching of non-English languages in public schools because it interfered with private liberty interests.⁶⁹ Next, in 1925, in *Pierce v. Society of Sisters*, the Court affirmed its holding in *Meyer*, confirming that parents and guardians have a protected liberty interest in determining how their children are raised and educated.⁷⁰

The Court's protection of private liberty interests in the realm of education-related decision-making continued after *Brown v. Board of Education* in 1954, the case in which the Court declared de jure segregation unconstitutional.⁷¹ In 1974, in *Milliken v. Bradley*, the Court held that the State could not

civil contempt for failure to comply with child support orders was not entitled to counsel under the Due Process Clause of the Fourteenth Amendment where the custodial parent, entitled to receive the child support, was also unrepresented by counsel). In recent years, advocates of the "Civil Gideon" movement have argued for recognition of an expanded right to counsel in civil cases. *Civil Right to Counsel*, ABA, https://www.americanbar.org/groups/legal_aid_indigent_defense/civil_right_to_counsel/ [https://perma.cc/JUS7-374Z].

⁶⁶ See *infra* notes 67–75 and accompanying text (covering landmark decisions that emphasize the uniqueness of education in our society and the importance of personal freedoms). Other scholars have written extensively on the history of education jurisprudence. See, e.g., Cass R. Sunstein, *Did Brown Matter?*, NEW YORKER (Apr. 25, 2004), <https://www.newyorker.com/magazine/2004/05/03/did-brown-matter> [https://perma.cc/ZP3V-BBUS] (summarizing a variety of scholars and commentators' opinions on the consequences and developments of American public education after *Brown*).

⁶⁷ See *infra* notes 69–76 and accompanying text (reviewing Supreme Court decisions through these thematic lenses).

⁶⁸ See *infra* notes 69–76 and accompanying text (summarizing Supreme Court decisions that protect private choice in the education context).

⁶⁹ See *Meyer v. Nebraska*, 262 U.S. 390, 400, 403 (1923) (describing parents' negative right to control the course and direction of their children's education). In *Meyer*, the Court also justified compulsory education laws as a corollary to parents' "right of control" over children. *Id.* at 400. All states have had some form of compulsory school attendance laws since 1918, and by the 1950s, virtually every state made school attendance mandatory through secondary school. Hershkoff & Yaffe, *supra* note 20, at 28; see also MICHAEL S. KATZ, A HISTORY OF COMPULSORY EDUCATION LAWS 11–34 (1976) (chronicling the development of compulsory education laws from the early 1600s through the 1970s).

⁷⁰ See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (holding that parents possess a fundamental liberty interest to direct the education of their children, which prevents the state from "forcing them to accept instruction from public teachers only").

⁷¹ See *Milliken v. Bradley*, 418 U.S. 717, 741–42 (1974) (indicating that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools").

force integration between different school districts, on the grounds of private choice and local control in schooling decisions.⁷²

In addition to protecting private liberty interests, the Supreme Court has also restricted the government's ability to interfere with enumerated negative rights in the school context.⁷³ For instance, in 1943, in *West Virginia State Board of Education v. Barnette*, the Court struck down a statute mandating that students recite the Pledge of Allegiance in schools because it infringed upon their First Amendment rights to intellectual and religious speech.⁷⁴ Twenty-five years later, in 1969, in *Tinker v. Des Moines Independent Community School District*, the Court held that a school district violated students' First Amendment rights to free speech by forbidding them from wearing black armbands to protest the Vietnam War.⁷⁵

The Supreme Court has also consistently emphasized the importance of education for the success of both the nation and democracy.⁷⁶ In 1973, *Rodriguez*, however, the Supreme Court held that despite the importance of education, there is no positive, fundamental right to education under the Due Process Clause of the Fourteenth Amendment.⁷⁷ The majority rejected plaintiffs' argu-

⁷² *Id.* at 745. The *Milliken* decision's protection of private choice is often credited with green-lighting "White flight" to suburban school districts. Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597, 1605–08 (2003). The impact of White flight has been widely described as catastrophic to learning outcomes, especially for marginalized communities and students of color. See, e.g., Susan Ratner, *Integration, School Finance Reform, and Milliken II Remedies: The Time Has Come for Equal Educational Opportunity* (Hooks Inst. Working Paper no. 1, 2005) <https://www.memphis.edu/benhooks/creative-works/pdfs/ratner.pdf> [<https://perma.cc/ME2T-UZN7>] (explaining that the racial isolation of schools worsens poverty and weakens trust in government, as well as harms national unity, patriotism, and collectivism); Kalyn Belsha & Koby Levin, *45 Years Later, This Case Is Still Shaping School Segregation in Detroit—and America*, CHALKBEAT (July 25, 2019) <https://www.chalkbeat.org/2019/7/25/21121021/45-years-later-this-case-is-still-shaping-school-segregation-in-detroit-and-america> [<https://perma.cc/Z465-628Y>] (describing how *Milliken* has kept Detroit and the nearby Grosse Pointe school districts among the most segregated in all of the United States).

⁷³ See *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 640, 642 (1943) (holding that it is unconstitutional to force school children to salute the American flag).

⁷⁴ *Id.*

⁷⁵ See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (holding that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate").

⁷⁶ See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973) (emphasizing the "grave significance" of education to the individual and to society); *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (recognizing education and military service as two of the most important functions of government); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (describing the importance of education for a democratic society).

⁷⁷ See *Rodriguez*, 411 U.S. at 30, 35 (holding that although education is one of the most important functions of state and local governments, the U.S. Constitution does not recognize a fundamental right to education). The case arose after a group of parents sought to challenge the State's school finance system, which funded schools through a combination of local property taxes and State funding. *Id.* at 6–7. The plaintiff-parents also asserted that funding through property taxes led to substantial disparities between communities, constituting a violation of the Equal Protection Clause of the Fourteenth

ment that some amount of education is necessary in order for individuals to access other protected constitutional rights, such as free speech and the right to vote.⁷⁸

In dissent in *Rodriguez*, Justice Thurgood Marshall criticized the majority's dismissal of the right to education and its approach to determining fundamental rights altogether.⁷⁹ Justice Marshall asserted that in order to determine whether the Constitution provides an implied right, the Court must assess the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution.⁸⁰ Justice Marshall explained that as the "nexus" draws closer between the explicit or specified constitutional guarantee and the "nonconstitutional interest," then this "nonconstitutional interest" increasingly stands as a fundamental right protected by strict judicial scrutiny.⁸¹

The Supreme Court has reaffirmed that the Constitution does not recognize a fundamental right to education on at least three occasions since *Rodriguez*.⁸²

C. U.S. Arbitrary Restraint and Confinement Jurisprudence

Due process is central to the constitutional guarantees of personal liberty and freedom from government interference.⁸³ The U.S. Constitution guarantees that federal and state governments cannot deprive people of life, liberty, or property, without due process of law.⁸⁴ Jurisprudence for arbitrary restraint and detainment exists within the realm of substantive due process, as arbitrary governmental action is antithetical to due process.⁸⁵

Amendment, by discriminating on the basis of wealth and race. *Id.* at 11. While the Supreme Court did not recognize a fundamental right to education under the U.S. Constitution, certain state constitutions include a positive right to education. *See, e.g.,* *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 206, 215 (Ky. 1989) (identifying education as a fundamental right and outlining the State's requisite duties for providing an adequate education).

⁷⁸ *Rodriguez*, 411 U.S. at 35.

⁷⁹ *Id.* at 102–03 (Marshall, J., dissenting).

⁸⁰ *Id.*

⁸¹ *Id.* Justice Marshall reaffirmed his view that education should be recognized as a fundamental right under the Due Process Clause in *Plyler v. Doe*, 457 U.S. 202, 230–31 (1982) (Marshall, J., concurring).

⁸² *See* *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 458 (1988) (affirming *Rodriguez*'s holding that education is not a fundamental right); *Papasan v. Allain*, 478 U.S. 265, 284–86 (1986) (same); *Plyler*, 487 U.S. at 223 (same).

⁸³ *See* Hirschl, *supra* note 21, at 1076 (explaining how due process operates as a key negative right).

⁸⁴ U.S. CONST. amends. V, XIV § 1. These protections apply in both the criminal and civil context. *Specht v. Patterson*, 386 U.S. 605, 608 (1967). These protections apply to both federal and state governments through the doctrine of incorporation. *Incorporation Doctrine*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/incorporationDoctrine> [<https://perma.cc/RN5J-5R4A>].

⁸⁵ *See* Hershkoff & Yaffe, *supra* note 20, at 41 (explaining how arbitrary confinement fits within the Court's substantive due process jurisprudence). Substantive due process ensures the right to be free of arbitrary government actions "regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986). In fact, the individual right to freedom from

The Supreme Court has also interpreted personal liberty to include liberty from bodily restraint and the freedom of movement.⁸⁶ Moreover, in order for the government to restrict an individual's physical liberty, the nature and duration of restrictions must bear some reasonable relation to the purpose of the restraint.⁸⁷

In 1972, in *Jackson v. Indiana*, a criminal defendant was deemed incompetent to proceed to trial for robbery, so the State committed him to a psychiatric hospital indefinitely.⁸⁸ The Supreme Court held this violated due process because involuntary confinement requires some reasonable relation between the nature and duration of the commitment, and the purpose for which the individual is committed.⁸⁹ Thus, in this defendant's case, if the State could not determine whether there was a substantial probability that he would be fit for trial in the near future, then it was required to either institute a formal civil commitment proceeding, or release him altogether.⁹⁰

In 1982, in *Youngberg v. Romeo*, the Supreme Court held that an individual who was involuntarily committed to a state hospital had protected liberty interests under the Due Process Clause, including a right to freedom of movement, a right to freedom from unreasonable bodily restraints, and a right to reasonably safe conditions of confinement.⁹¹ Romeo was a thirty-three-year-old man with a severe intellectual disability who was involuntarily committed to a state facility because he was deemed unable to care for himself.⁹² Romeo's mother sued the state for failing to protect his liberty interests after suffering a series of injuries and physical restraints during his commitment.⁹³ The Court held that whether his constitutional rights were violated must be determined by balancing each of his liberty interests against the relevant state interests, according to a reasonableness standard.⁹⁴ By holding that the respondent's liberty

arbitrary imprisonment traces at least all the way back to the Magna Carta. *See Magna Carta*, *supra* note 40 (providing that the people of England must be free from arbitrary imprisonment).

⁸⁶ *See, e.g.,* *Greenholtz v. Neb. Penal Inmates*, 442 U.S. 1, 18 (1972) (Powell, J., concurring in part and dissenting in part) (writing that liberty from bodily restraint is the "core of the liberty protected by the Due Process Clause from arbitrary governmental action"); *Youngberg v. Romeo*, 457 U.S. 307, 315–16 (1982) (holding that liberty from arbitrary bodily restraint includes the freedom of movement).

⁸⁷ *See Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (holding that, for an individual who is involuntarily committed to a facility, due process requires that "the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed").

⁸⁸ *Id.* at 715.

⁸⁹ *Id.* at 738.

⁹⁰ *Id.*

⁹¹ *See Youngberg*, 457 U.S. at 315–16 (holding that the Due Process Clause grants an involuntarily committed patient the right to safe confinement as well as the right to freedom from bodily restraints).

⁹² *Id.* at 309–10.

⁹³ *Id.* at 310–11, 314–15.

⁹⁴ *Id.* at 320–21.

rights must be met, the Court imposed certain affirmative duties on the state hospital, including minimally adequate training for hospital staff.⁹⁵

In 1989, in *DeShaney v. Winnebago County Department of Social Services*, the Supreme Court narrowed the substantive due process liberty protection recognized in *Youngberg*.⁹⁶ The *DeShaney* case was brought on behalf of a child after child protective services, despite knowing that the child faced physical violence at the hands of his father, returned the child to live with his abusive father, and the father subsequently inflicted severe and debilitating injuries on the child.⁹⁷ The Court held that the *Youngberg* analysis did not apply in this case because the child was not in the state's custody when he was injured by his father, nor was his father a government agent.⁹⁸

In 1992, in *Foucha v. Louisiana*, the Supreme Court explicitly stated that substantive due process bars the government from engaging in certain arbitrary, wrongful actions, regardless of the fairness of the procedures it implements.⁹⁹ At issue was a Louisiana statute that provided that when a criminal defendant is acquitted for insanity, they are committed to a psychiatric hospital unless they prove that they are not dangerous.¹⁰⁰ The State did not contend that the defendant was mentally ill at the time of his court hearing and commitment so its justification for confining him in a psychiatric facility had disappeared.¹⁰¹ The Court further held that criminal defendants acquitted on the basis of insanity are entitled to constitutionally adequate procedures to establish the grounds for confinement.¹⁰²

In 2001, in *Zadvydas v. Davis*, the Supreme Court held that government detention violates the Due Process Clause unless the detention is ordered in a criminal proceeding with adequate procedural protections, or there is a special

⁹⁵ See *id.* at 324 (“In this case, therefore, the State is under a duty to provide respondent with such training as an appropriate professional would consider reasonable to ensure his safety and to facilitate his ability to function free from bodily restraints. It may well be unreasonable not to provide training when training could significantly reduce the need for restraints or the likelihood of violence.”). The Supreme Court narrowed the substantive due process protection it had recognized in *Youngberg* in subsequent cases: *DeShaney v. Winnebago County Department of Social Services* and *County of Sacramento v. Lewis*. See Rosalie Berger Levinson, *Wherefore Art Thou Romeo: Revitalizing Youngberg's Protection of Liberty for the Civilly Committed*, 54 B.C. L. REV. 535, 536–37 (2013) (indicating that federal Circuit Courts have interpreted these two cases as narrowing the substantive due process holding in *Youngberg*).

⁹⁶ See *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 201 (1989) (holding that *Youngberg* did not apply).

⁹⁷ *Id.* at 191–95.

⁹⁸ *Id.* at 201.

⁹⁹ *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). The Court cited its prior holdings in *Zinerman v. Burch*, 494 U.S. 113 (1990), and *Daniels v. Williams*, 474 U.S. 327 (1986). *Id.*

¹⁰⁰ *Id.* at 73.

¹⁰¹ *Id.* at 78.

¹⁰² *Id.* at 79.

circumstance, such as a harm-threatening mental illness, which outweighs the individual's liberty interest in avoiding bodily restraint.¹⁰³

II. UNPACKING THE NEGATIVE RIGHTS, LIBERTY-BASED DUE PROCESS ARGUMENT IN *GARY B. V. WHITMER*

In 2020, in *Gary B. v. Whitmer*, the U.S. Court of Appeals for the Sixth Circuit addressed, but ultimately dismissed, plaintiff-appellants' argument that the State infringed upon their negative right against arbitrary confinement by imposing compulsory attendance laws that required students to go to chronically underperforming schools that fail to provide any real education.¹⁰⁴

Section A of this Part describes the procedural history of *Gary B.* and highlights the plaintiffs' factual allegations about the low quality of educational conditions and outcomes throughout Detroit's public schools.¹⁰⁵ Section B recreates plaintiffs' negative rights, liberty-based argument.¹⁰⁶ Finally, Section C discusses the Sixth Circuit majority and dissenting opinions.¹⁰⁷

A. Summary of the Procedural History of Gary B. v. Whitmer and Plaintiffs' Factual Allegations About Detroit's Public Schools

In 2016, students at five of Detroit's most chronically underperforming public schools sued Michigan Governor Rick Snyder and various state officials

¹⁰³ See *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001) (holding that the Constitution demands that a post-removal-period detention be limited to a reasonably necessary period because the "indefinite detention . . . would raise serious constitutional concerns.").

¹⁰⁴ *Gary B. v. Whitmer*, 957 F.3d 616, 638 (6th Cir.), *vacated by Gary B. v. Whitmer*, 958 F.3d 1216 (6th Cir. 2020). Although it rejected this liberty-based argument, the Sixth Circuit ultimately recognized a federal positive right to a "basic minimum education." *Id.* at 642. The Sixth Circuit became the first and only circuit court to do so. See *A.C. v. Raimondo*, 494 F. Supp. 3d 170, 175 (6th Cir. 2020) (recognizing the *Gary B.* decision as the sole time a federal circuit court has held there to be a right to a minimum level of education). This federal right to education was short-lived, however, as less than a month after the decision, it was vacated by the court after a settlement was reached by the parties. See Rocco E. 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/6PMJ-NDA2>] (explaining the *Gary B.* decision and the subsequent settlement agreement). In the settlement agreement, defendant Whitmer, the Governor of Michigan, pledged to draft legislation authorizing approximately \$100 million for literacy education in Detroit's public schools. *Id.* In November 2022, Democrats retook control of the Michigan legislature and Democratic Governor Whitmer won her reelection. See Tracie Mauriello, *Democrats Won the Michigan Legislature and Governor's Office. What Does That Mean for Schools?*, CHALK-BEAT (Nov. 10, 2022), <https://detroit.chalkbeat.org/2022/11/10/23452044/michigan-trifecta-democrats-whitmer-education-plans-election-2022> [<https://perma.cc/3Q3W-TXNA>] (outlining multiple state-level education policy goals that could be pursued under democratic control of state governance). Governor Whitmer pledged to continue to push for the state legislature to pay out the settlement to Detroit schools. *Id.*

¹⁰⁵ See *infra* notes 108–134 and accompanying text.

¹⁰⁶ See *infra* notes 135–155 and accompanying text.

¹⁰⁷ See *infra* notes 156–178 and accompanying text.

in charge of the school district.¹⁰⁸ Plaintiffs' central claim was that the State—as the primary authority of Michigan public schools—failed to provide them with a basic minimum education.¹⁰⁹ The students substantiated the claim that they attended “schools in name only” by alleging substantially poor conditions across their five schools.¹¹⁰ In 2018, plaintiffs' action was dismissed by the District Court for the Eastern District of Michigan for failure to state a claim.¹¹¹ Plaintiffs appealed, and on April 23, 2020, in *Gary B.*, a split panel of the Sixth Circuit ruled 2–1 in favor of the plaintiffs, holding that the Due Process Clause protects a fundamental right to “a basic minimum education.”¹¹² Michigan Governor Gretchen Whitmer settled the underlying lawsuit on May 14, 2020; however, five days later on May 19, 2020, the Sixth Circuit agreed to

¹⁰⁸ *Gary B.*, 957 F.3d at 620–21. The five schools represented in the complaint include three Detroit Public Schools Community District schools (Osborn Academy of Mathematics, the Osborn Evergreen Academy of Design and Alternative Energy, and the Medicine and Community Health Academy at Cody) and two charter schools (Hamilton Academy and Experiencia Preparatory Academy). Class Action Complaint at 5, *Gary B.*, 329 F. Supp. 3d 344 (E.D. Mich. 2018) No. 16-CV-13292, 2016 WL 4775474. More than 97% of students at plaintiffs' schools are children of color and primarily low-income students. *Id.* Plaintiffs allege that, “Detroit is bounded by the most economically and racially segregating school district boundary in the country.” *Id.* at 5–6. The named defendant in the district court case was then-governor, Rick Snyder; Gretchen Whitmer replaced him as governor in 2019, ahead of the filing of the appeal. David Dorsey, *Education Is Still (For Now) Not a Fundamental Right Under the U.S. Constitution*, KAN. POL'Y INST. (Sept. 17, 2020), <https://kansaspolicy.org/education-is-still-for-now-not-a-fundamental-right-under-the-u-s-constitution/> [<https://perma.cc/P73P-JVY9>].

¹⁰⁹ *Gary B.*, 957 F.3d at 624. Plaintiffs sued the governor and state-level officials because, by virtue of their supervisory authority over all public education in Michigan, they have a responsibility to ensure that each school at least provides access to literacy. *Id.* at 631. The Sixth Circuit rejected the defendants' argument that the case did not need to be decided on its merits because plaintiffs had essentially “sued the wrong people.” See *id.* (explaining that the state board of education has leadership and general supervision over all public education, according to the Michigan state constitution, and that even if the state delegates much of the management of individual school districts and schools to local authorities, public schools remain “under the ultimate and immediate control of the state and its agents”).

¹¹⁰ *Id.* at 624–28.

¹¹¹ See *Gary B. v. Snyder*, 329 F. Supp. 3d 344, 348 (E.D. Mich. 2018) (dismissing plaintiffs' complaint). The district court noted that “a case like this one could be argued on either positive- or negative-rights theories.” *Id.* at 364. The district court reasoned that because “the relief sought is exclusively positive in nature,” it only needed to consider the due process claim in terms of whether access to literacy is a positive, fundamental right. *Id.* at 364–65. Turning to that question, the district court held there was no such right. *Id.* at 365–66. Thus, plaintiffs' negative rights, liberty-based argument was not evaluated on its merits until argued again on appeal in front of the Sixth Circuit panel. See *id.* at 629 (detailing the district court's procedural posture).

¹¹² *Gary B.*, 957 F.3d at 621. On appeal, plaintiff-appellants clarified that they were advancing two separate due process arguments—one, that there is a positive fundamental right to education, and two, that there is a negative right against arbitrary confinement—and argued that the district court erred by failing to separately consider the negative rights argument. *Id.* at 629. Discussion of the positive rights argument is outside of the scope of this Note. See William Blanchette, Note, *Sufficiently Fundamental: Searching for a Constitutional Right to Literacy Education*, 64 B.C. L. REV. 377, 377 (2023) (arguing that the positive rights argument advanced in *Gary B.* respects Supreme Court precedent and provides a blueprint for future litigants seeking to address educational inequity).

an en banc rehearing of the case and ultimately invalidated the original panel opinion.¹¹³

Subsection 1 of this Section describes the plaintiffs' factual allegations about the quality of instruction and the condition of the facilities and materials at their schools.¹¹⁴ Subsection 2 describes the plaintiffs' factual allegations about educational outcomes at their schools.¹¹⁵

1. Plaintiffs' Factual Allegations Regarding School Conditions

In their complaint, plaintiffs alleged that the poor conditions of their schools—a dearth of qualified teachers, dilapidated facilities, and insufficient physical resources—amount to “schools in name only, characterized by slum-like conditions and lacking the most basic educational opportunities that children elsewhere in Michigan and throughout the nation take for granted.”¹¹⁶

First, plaintiffs alleged a substantial shortage of qualified teaching staff with legal certification and proper training.¹¹⁷ Many underqualified personnel had been hired to teach classes outside of their expertise.¹¹⁸ Moreover, teacher shortages led to increases in class size and caused classes to be combined on short notice.¹¹⁹ Plaintiffs claimed that the high teacher turnover rate was exemplified and further exacerbated by their schools' reliance on Teach for America, an organization that recruits recent college graduates as teachers, the majority of whom have no academic or professional training in education.¹²⁰

¹¹³ See Testanti, *supra* note 104 (explaining the *Gary B.* decision and the subsequent settlement agreement).

¹¹⁴ See *infra* notes 116–126 and accompanying text.

¹¹⁵ See *infra* notes 127–134 and accompanying text.

¹¹⁶ Class Action Complaint, *supra* note 108, at 4. The complaint goes on to argue that these conditions mean that the “schools” are wholly incapable of delivering basic access to literacy, “functionally delivering no education at all,” and that the plaintiffs’ schools are therefore “not truly schools by any traditional definition or understanding of the role public schools play in affording access to literacy.” *Id.* at 10–11, 19.

¹¹⁷ *Id.* at 101. The complaint alleged that, in the 2016–2017 school year alone, there were as many as 200 vacancies in Detroit’s public schools right before the school year began. *Id.* at 102. In addition, plaintiffs alleged that substantial short-term absences were rampant; with some teachers, “absent as many as 50 days in one year.” *Id.* at 105.

¹¹⁸ *Id.* at 102. Chronic supply-demand problems cause school leaders to hire underqualified and non-certified paraprofessionals, substitute teachers, or to misassign existing teachers on the payroll to cover classes outside of their expertise. *Id.*

¹¹⁹ *Id.* at 105. At one of the plaintiff’s schools, there was a notable case where the school was so short staffed that, “an eighth grade student was put in charge of teaching seventh and eighth grade math classes for a month because no math teacher was available.” *Id.* at 16. This overcrowding in classrooms often requires students to stand or sit on the floor. *Id.* at 97–98.

¹²⁰ *Id.* at 101. Teach For America is a non-profit organization whose mission is to “develop leaders” and place them into classrooms in low-income communities. Elisa Villanueva Beard, *To Fix Our Education System, We Need to Develop Leaders at Every Level Committed to Equity and Excellence*, TEACH FOR AMERICA (Dec. 12, 2022), <https://www.teachforamerica.org/one-day/ideas-and-solutions/to-fix-our-education-system-we-need-to-develop-leaders-at-every-level> [<https://perma.cc/V3PS-M76W>];

Plaintiffs alleged that, in addition to the chronic shortage of qualified educators, their school buildings were in extremely poor and unsafe conditions.¹²¹ Due to broken heating and air conditioning systems, students allegedly had to wear multiple layers and coats during the winters to combat below-freezing temperatures, and suffer through unbearable heat in the summer.¹²² Additionally, plaintiffs' schools lacked safe drinking water due to contamination and other plumbing challenges with leaky pipes and roofing.¹²³

see also *Our Work*, TEACH FOR AMERICA, <https://www.teachforamerica.org/what-we-do/our-work> [<https://perma.cc/HAU9-NKDY>] (describing its recruits as mostly new to the teaching field, with only one in five corps members having planned to become teachers prior to joining Teach For America and only 10% having been education majors in college). Teach For America has faced criticism and backlash for its inefficacy and for worsening the revolving-door phenomenon of inexperienced teachers coming to and leaving schools in resource-constrained, low-income communities. See, e.g., Olivia Blanchard, *I Quit Teach For America*, THE ATLANTIC (Sept. 23, 2013), <https://www.theatlantic.com/education/archive/2013/09/i-quit-teach-for-america/279724/> [<https://perma.cc/JV94-AKWP>] (describing the insufficiency of training that inexperienced corps members receive prior to being placed into classrooms); Michael Hansen, *Losing Its Luster? New Evidence on Teach For America's Impact on Student Learning*, BROOKINGS INST. (Oct. 27, 2015), <https://www.brookings.edu/articles/losing-its-luster-new-evidence-on-teach-for-americas-impact-on-student-learning/> [<https://perma.cc/Q6KY-VRZ4>] (evaluating studies critical of the positive impact of Teach For America corps members. Not only do the school years begin with vacancies that must be filled with underqualified personnel, but vacancies worsen over the course of the school year, as teachers quit due to the stress and pressure of their jobs. See Class Action Complaint, *supra* note 108, at 103–04 (explaining how vacancies persist and worsen through the school year). At one of the five schools attended by plaintiffs, the majority of teachers were starting their first year of teaching when the complaint was filed. *Id.* at 102. At that same school, a paraprofessional hired to teach middle school science admitted that “she does not understand the material [she was hired to teach] and cannot lead classroom experiments.” *Id.* at 102–03. At another one of the five schools, about half of all teachers who started the 2012–2013 school year quit by the end of the year. *Id.* at 103–04. The problem is so chronic that in June 2016, the state passed legislation to permit non-certified instructors to teach in Detroit’s public schools. *Id.* at 106. This special authorization did not apply to schools elsewhere in Michigan. *Id.*

¹²¹ Class Action Complaint, *supra* note 108, at 80. The City of Detroit conceded that during the 2015–2016 school year, not a single one of the district’s school buildings was in compliance with city health and safety codes, and that at the time the complaint was filed, some of plaintiffs’ schools were noncompliant. *Id.* at 87.

¹²² *Id.* at 91. Plaintiffs were sent home from school on multiple occasions during the winter months because the classrooms were too cold for instruction to continue. *Id.* Temperatures at Hamilton reached as high as 110 degrees Fahrenheit during the school day, and on the first day of the 2016–2017 academic year, multiple students passed out, while other students and teachers vomited from heat stroke. *Id.* at 90–91. While 110 degrees was the recorded high, plaintiffs allege that temperatures in their classrooms regularly reach over 90 degrees with no working air conditioning. *Id.* Beyond heating issues, plaintiffs alleged that their schools were infested with mice and cockroaches. *Id.* at 88. Students and teachers alike describe the hallways and classrooms as smelling of “dead vermin and black mold.” *Id.* at 13. Black mold is considered to be toxic and can cause people to experience various symptoms, especially those who are allergic or sensitive to mold. See Editorial Contributors, *Can Black Mold Kill You?*, WEBMD (May 26, 2023), <https://www.webmd.com/lung/can-black-mold-kill-you#:~:text=There%20are%20many%20types%20of,types%20or%20colors%20of%20mold> [<https://perma.cc/8LQE-K2MT>] (describing some of the symptoms of prolonged mold exposure, including wheezing, coughing, dry and scaly skin, and nasal congestion).

¹²³ Class Action Complaint, *supra* note 108, at 94. Water contamination continues to be a serious problem for Detroit’s public schools, well after the filing of the complaint. See Bill Chappell, *De-*

Finally, plaintiffs alleged that their schools lacked physical resources, such as books and classroom materials, which are necessary for a basic literacy education.¹²⁴ Due to a shortage of books and textbooks, students often did not have their own copies to bring home and teachers were unable to provide meaningful homework assignments.¹²⁵ Moreover, when books were available, they were often inappropriate for the students' grade levels; at one of the schools, for example, the third-grade classroom only had picture books until the teacher purchased grade-appropriate books with her own money.¹²⁶

2. Plaintiffs' Factual Allegations Regarding School Outcomes

Plaintiffs' complaint alleged that the previously described school conditions lead to abysmal educational outcomes, to the extent that their schools do not and cannot provide basic literacy.¹²⁷ At the time of the complaint, Detroit's public schools ranked last in math and reading proficiency among all large urban school districts in the country.¹²⁸ At plaintiffs' five schools, over ninety percent of all students did not meet state-level proficiency standards.¹²⁹ Between zero to twelve percent of students achieved "college ready" scores on the ACT college-admissions exam.¹³⁰

Plaintiffs alleged that literacy struggles begin at the elementary level and continue through high school.¹³¹ At two of the plaintiffs' schools, the ninth and tenth grade English-Language Arts teachers assigned third- and fourth-grade

troit's Public School District Shuts Off Drinking Water, Citing Lead, Copper Risk, NPR (Aug. 30, 2018), <https://www.npr.org/2018/08/30/643247780/detroits-public-school-district-shuts-off-drinking-water-citing-lead-copper-risk#:~:text=Carlos%20Osorio%2FAP-,Detroit%20Public%20Schools%20Community%20District%20Superintendent%20Nikolai%20Vitti%20has%20ordered,wat%20performed%20at%2024%20schools> [<https://perma.cc/N4LG-7YRW>] (reporting that Detroit Public Schools Community District Superintendent Nikolai Vitti ordered drinking water to be shut off at each of the district's schools after two-thirds of the buildings' pipes were found to have high levels of lead or copper).

¹²⁴ Class Action Complaint, *supra* note 108, at 81.

¹²⁵ *Id.* Of the books that the schools actually have, many are old, torn, and contain outdated information. *Id.*

¹²⁶ *Id.* at 82. In addition to purchasing books with their own funds, teachers often must supply their classrooms with all of the basic necessities, spending substantial sums out-of-pocket just to provide pens, pencils, and paper. *Id.* at 86.

¹²⁷ *Id.* at 6–7. Plaintiffs clarify that while outcomes are not entirely dispositive of whether there is "access" to education, aggregate results provide helpful data points about the lack of opportunity students have at these schools. *Id.* at 7–8. "Achievement data reveal that in Plaintiffs' schools, illiteracy is the norm. The proficiency rates in Plaintiffs' schools hover near zero in nearly all subject areas." *Id.*

¹²⁸ *Id.* at 47. According to national data, Detroit public schools, on average, are 2.3 levels below grade-level in basic reading proficiency. *Id.* at 72. Plaintiffs' schools are among the poorest performing schools within Detroit, thus their students are, on average, performing *even* lower than the city-average of 2.3 levels below grade-level. *See id.* (summarizing the national-level data trends).

¹²⁹ *Id.* at 62.

¹³⁰ *Id.* at 71–72.

¹³¹ *Id.* at 9–10.

level books to their classes, spending class time reading the books to students paragraph-by-paragraph.¹³²

Plaintiffs alleged that low levels of literacy adversely impacted learning outcomes across all other academic subject matter because those curricula assume a level of literacy that the students have not attained.¹³³ At plaintiffs' high schools, each of the eleventh-grade classes scored zero percent in at least one of the social studies, science, or math state exams.¹³⁴

B. Plaintiff-Appellants' Negative Rights, Liberty-Based Argument for a Guaranteed Minimum Level of Education

Plaintiff-appellants argued in their appellate brief that the district court erred by failing to recognize two distinct due process clause arguments.¹³⁵ In the alternative, they argued that even though the Fourteenth Amendment guarantees a positive, fundamental right to access to literacy, the court may independently rule in favor of a negative rights due process argument.¹³⁶ The plaintiff-appellants' negative rights argument was two-fold: (1) because the State significantly restricts students' personal liberty through compulsory school attendance, the State assumes an affirmative duty not to restrict that liberty arbitrarily; and (2) in order to satisfy that duty, the State must provide students with the opportunity to acquire a basic minimum level of education—namely, access to literacy.¹³⁷ In this case, given all of the facts alleged about their schools' poor conditions and outcomes, plaintiff-appellants argued that the State arbitrarily deprived plaintiffs of their personal liberty by failing to fulfill its duty.¹³⁸

In order to establish that the State's restraint of plaintiffs' liberty gives rise to a corresponding duty, plaintiff-appellants relied on *Youngberg v. Romeo*, arguing that the Due Process Clause is implicated when a state takes on a cus-

¹³² *Id.*

¹³³ *Id.* at 7–8.

¹³⁴ *Id.* at 10.

¹³⁵ Brief of Appellants at 28–29, *Gary B. v. Whitmer*, 957 F.3d 616 (6th Cir. 2020), No. 18-1855/18-1871, 2018 WL 6044766. The district court dismissed plaintiffs' claim concerning a positive, fundamental right to education, but failed to address, plaintiff-appellants contend, the separate and independent negative rights due process argument. *Id.*

¹³⁶ *Id.* at 47.

¹³⁷ *Id.* at 33.

¹³⁸ *Id.* In addition to the Due Process Clause argument, plaintiff-appellants also argued that the State's failure to provide basic access to literacy also independently violates the Equal Protection Clause. *Id.* "Nearly all children, attending nearly all public schools in the State, receive the benefit of access to literacy by attending school. Yet in their schools, Plaintiffs receive different—and fundamentally unequal—treatment. Plaintiffs, who attend schools that are overwhelmingly populated by students of color, have been functionally excluded from the statewide system of education, because their schools do not provide even the most basic education." *Id.* at 34. This important tangential constitutional argument falls outside of the scope of this Note. *But see* Hershkoff & Yaffe, *supra* note 20, at 20 (discussing the disparate impact of unequal treatment experienced by students of color).

todial role and consequently imposes, restricts or limits an individual's personal liberties.¹³⁹ In *Youngberg*, the Supreme Court held that in light of an individual's liberty interests in safety and freedom from unreasonable restraint, in order for the state to effectuate a reasonable restraint, it must ensure its agents receive some level of minimally adequate training.¹⁴⁰ Plaintiff-appellants therefore argued that *Youngberg* established that when a state takes on a custodial role with regard to a person, it also takes on certain affirmative duties.¹⁴¹

The plaintiff-appellants then relied on the Supreme Court's holding in *DeShaney v. Winnebago County Department of Social Services*, to argue that affirmative duties are triggered not only by restraints on liberty in prisons and mental institutions, but also in other custodial contexts.¹⁴² They distinguished the facts of *DeShaney*, pointing out that in that case, the State did not assume any liability for harm to the child because the harm was perpetrated by a private actor—the child's father—while outside of state custody, and thus, no affirmative duty was ever created.¹⁴³ In contrast, in *Gary B.*, the State's public schools impose compulsory attendance, directly undertaking to hold plaintiffs and all other students in its custody each school day.¹⁴⁴ Thus, like in *Youngberg*, the state's affirmative act—restraining school-aged children's liberties through the imposition of compulsory attendance—creates a corresponding duty to the children in its custody.¹⁴⁵

Having established that the state's oversight and compulsory attendance gave rise to a corresponding duty, plaintiff-appellants next argued that this cor-

¹³⁹ See Brief of Appellants, *supra* note 135, at 47–48 (explaining how *Youngberg*'s holding applies in this context); *supra* note 91–95 and accompanying text (describing the facts and holding of *Youngberg*).

¹⁴⁰ *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982). While the Court recognized that minimally adequate training was necessary to make the restraint reasonable, it clarified that future courts must show deference to qualified professionals when determining what is adequate and reasonable training. *Id.* In doing so, the Court expressly sought to “limit[] judicial review of challenges to conditions in state institutions.” *Id.*

¹⁴¹ Brief of Appellants, *supra* note 135, at 48.

¹⁴² See *id.* at 48–49 (quoting the *DeShaney* Court, “when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being”). “The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expression of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.” *Id.*; see also *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976) (holding that because an inmate has been deprived of his liberty to care for himself, the Constitution requires that the State care for him); *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983) (holding that the Due Process Clause requires the government to provide medical care to persons who have been injured while in police custody); *Reno v. Flores*, 507 U.S. 292, 315 (1993) (O'Connor, J., concurring) (suggesting that “[a] person's core liberty interest” is implicated not only by imprisonment, but also by confinement in “some other form of custodial institution, even if the conditions of confinement are liberal”).

¹⁴³ Brief of Appellants, *supra* note 135, at 50–51.

¹⁴⁴ *Id.* at 51.

¹⁴⁵ *Id.*

responding duty includes providing students with basic literacy competency.¹⁴⁶ Their argument relied primarily on *Youngberg*'s reasonableness standard.¹⁴⁷ The conditions of state confinement must bear some "reasonable relation" to the purpose of custody.¹⁴⁸ If the purpose of compulsory school attendance is to provide students with an education, it follows that the conditions of state confinement must bear some reasonable relation to that purpose.¹⁴⁹ In other words, *some* measure of education must be present, or else the State fails to meet its corresponding duty and therefore its confinement constitutes an arbitrary deprivation of personal liberty.¹⁵⁰ Invoking the Supreme Court's description of the state's duty in *San Antonio Independent School District v. Rodriguez* in 1973, plaintiff-appellants argued that this minimum level of education should be defined as "access to literacy."¹⁵¹

Finally, plaintiff-appellants argued that the Due Process Clause must be read in this way because taken to its logical endpoint, the alternative would clearly be unconstitutional.¹⁵² If the state were to "warehouse" children for hours each weekday absent *any* effort to provide them with an education, such an act would obviously violate their right to personal liberty.¹⁵³ There *must* be some genuine, minimal literacy provision to escape that unconstitutional floor.¹⁵⁴ Sending children to "schools in name only" therefore cannot pass constitutional muster.¹⁵⁵

¹⁴⁶ See *id.* at 51–54 (arguing that the state must provide students with access to literacy in order to subject them to regular confinement through compulsory attendance).

¹⁴⁷ *Id.* at 51–52; see *supra* note 91–95 and accompanying text (summarizing the *Youngberg* Court's reasonableness standard).

¹⁴⁸ Brief of Appellants, *supra* note 135, at 51–52; see also *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (affirming that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed").

¹⁴⁹ Brief of Appellants, *supra* note 135, at 51–52. Plaintiff-appellants do not seek to challenge the states' ability to mandate school attendance for the purpose of providing education; rather, they seek to ensure that, because states are mandating attendance, they actually ensure that the conditions of confinement minimally relate to this purpose. *Id.* In support of the general proposition that states may require school attendance, plaintiff-appellants cite a string of Supreme Court cases, from *Brown to Pierce. Id.*; see *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (explaining that compulsory education laws further state and local governments' "most important function" of providing education); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925) (clarifying that it is beyond questioning whether the state may require school attendance).

¹⁵⁰ Brief of Appellants, *supra* note 135, at 51–52.

¹⁵¹ See *id.* at 52 (quoting the *Rodriguez* Court's description of a "minimum 'quantum of education'" as being the basic education "necessary for the enjoyment of the rights of speech and of full participation in the political process").

¹⁵² See *id.* at 52–53 (describing the unconstitutional "warehousing" of children).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ See *id.* (elaborating on this argument).

C. *The Sixth Circuit's Approach in Gary B.*

Although the Sixth Circuit devotes most of its opinion in *Gary B.* to addressing plaintiff-appellants' first claim—the positive, fundamental rights argument—both the majority and dissenting opinions discuss the merits of the negative rights, liberty-based due process argument.¹⁵⁶ Subsection 1 of this Section discusses the majority approach and Subsection 2 summarizes the dissenting view.¹⁵⁷

1. The Majority Opinion: Acknowledging the Viability of the Negative Rights, Liberty-Based Due Process Claim

The majority writes in dicta that the negative rights due process claim has strong support in the law, but that, because of a failure of proper notice about the claim and insufficient factual allegations in the plaintiff-appellants' complaint, the district court was correct to dismiss it.¹⁵⁸ Despite affirming dismissal of the claim, the majority nonetheless addresses its merits.¹⁵⁹ First, the Sixth Circuit acknowledges that the Supreme Court traces the constitutional understanding of due process back to the Magna Carta and English common law, which recognize arbitrary detention as a violation of due process.¹⁶⁰ With this framing in mind, the court accepts the logic of plaintiff-appellants' argument that confining students to a "school" that provides no education is unequivocally a form of arbitrary confinement.¹⁶¹

Turning its attention to *Youngberg*, the court emphasizes that the right to personal security is a historical liberty interest recognized under the doctrine of substantive due process, and that freedom from bodily restraint is at the core of the negative right to be protected from arbitrary governmental action.¹⁶² Nevertheless, an individual's negative right to liberty is not absolute, and may conflict with compelling state reasons for restraining the individual.¹⁶³ Thus, courts must balance individual liberty interests against the State's proffered reasons for restraining personal liberty—the *Youngberg* balancing test.¹⁶⁴

The Sixth Circuit majority then interprets the progeny of liberty interest cases after *Youngberg* to reason that the *Youngberg* balancing test is central to

¹⁵⁶ See *infra* notes 158–178 and accompanying text.

¹⁵⁷ See *infra* notes 158–178 and accompanying text.

¹⁵⁸ *Gary B. v. Whitmer*, 957 F.3d 616, 638 (6th Cir.), *vacated by Gary B. v. Whitmer*, 958 F.3d 1216 (6th Cir. 2020).

¹⁵⁹ *Id.*

¹⁶⁰ See *id.* (citing Justice Breyer's dissent in *Jennings v. Rodriguez*, 138 S. Ct. 830, 861 (2018) (Breyer, J., dissenting)).

¹⁶¹ *Id.*

¹⁶² *Id.* at 639.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

any due process analysis involving state-imposed restraints.¹⁶⁵ In other words, the court saw no reason to limit use of the *Youngberg* balancing test to circumstances involving involuntary commitment to a hospital or mental institution.¹⁶⁶ Compulsory school attendance laws function as state-imposed restraints on students' freedom of movement; therefore, they trigger due process protections and must be subjected to scrutiny under the *Youngberg* balancing principle.¹⁶⁷

Although the majority recognized a theoretical basis for state-imposed restraint, it noted the obvious countervailing state interest in providing public education.¹⁶⁸ Applying the *Youngberg* balancing test to compulsory attendance laws, the court reasons that in order for compulsory education not to impermissibly encroach on due process liberty interests, there must be *some* threshold level of education provided.¹⁶⁹ Tabling the issue of how courts could define such a threshold, the majority reasoned that if a school were to fall short of that threshold—such as where students are warehoused in school buildings providing no education at all—then the state would be violating students' constitutional liberty interests.¹⁷⁰ Finally, the majority held that for close cases—those where the education provided hovers around the theoretical threshold—the correct constitutional question is whether the state's interest, determined by the education it provides, is enough to justify the restraint.¹⁷¹

Turning to the plaintiffs' complaint, the Sixth Circuit majority affirmed the district court's dismissal on the grounds that there was insufficient pleading to carry out a *Youngberg* balancing analysis.¹⁷² Importantly, although the court held that the plaintiffs had not pled enough facts to determine the nature and duration of the restraint, it found that the facts pled regarding the chronically

¹⁶⁵ See *id.* at 639–40. (arguing that the *Youngberg* balancing principle is at the core of the due process analysis in subsequent Supreme Court cases).

¹⁶⁶ See *id.* (“While the degree of deprivation is obviously greatest in a case like involuntary commitment, there is no reason why this balancing principle should not apply to less-extensive restraints as well.”).

¹⁶⁷ See *id.* at 640 (arguing by analogy that the state would obviously violate people's liberty rights if it were to require, without any justification, that they sit idly in a building for multiple hours a day). The Supreme Court has similarly employed hypotheticals and analogies to define the edges of permissible state action. See *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) (“In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and [e]ntrusted their subsequent education and training to official guardians . . . [But] it hardly will be affirmed that any [State] legislature [today] could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.”).

¹⁶⁸ *Gary B.*, 957 F.3d at 640.

¹⁶⁹ *Id.*

¹⁷⁰ See *id.* at 640–41 (arguing that the absence of any education at all means that such a deprivation would “bear no reasonable relationship to the state's asserted purpose, and thus would be outweighed by the individual's interest in liberty”).

¹⁷¹ *Id.* at 641.

¹⁷² *Id.* at 641–42.

low quality of education and poor outcomes were sufficient to infer that the students' educational experience fell below the aforementioned threshold.¹⁷³

2. The Dissenting Opinion: Rejecting the Liberty-Based Argument Entirely

In his dissent, Judge Eric Murphy argued that the *Youngberg* balancing test should not be applied to the context of public schools because the Supreme Court's holding was narrow.¹⁷⁴ Judge Murphy relied on a string of Sixth Circuit cases, each concerning the issue of a school's responsibility to provide a safe learning environment for students in the presence of the threat of violence by private actors.¹⁷⁵ Based on the dissent's interpretation of these cases' holdings—that compulsory attendance laws do not trigger an affirmative constitutional duty to provide students with some level of a safe learning environment—compulsory attendance laws do not impose a constitutional duty for states to provide an adequate minimum education.¹⁷⁶

Furthermore, the dissent argued that compulsory education laws do not amount to state-imposed restraint on school-aged children because Michigan law provides multiple alternative options to traditional public schools, such as charter schools, private schools, online learning, and homeschooling.¹⁷⁷ Thus, although students may be required to complete some level of schooling, the state is not *forcing* individual students to attend specific schools.¹⁷⁸

¹⁷³ See *id.* at 642 (providing examples of what kind of factual pleadings could have substantiated the claim about the restraint suffered by students, such as “the hours per day of compulsory attendance, the number of days per year, or the restrictions on Plaintiffs’ liberty throughout the typical school day”). Although the court stated that the plaintiffs’ allegations were sufficient to infer that little to no education was being provided, the court did not attempt to define the threshold itself. *Id.*

¹⁷⁴ See *id.* at 678–79 (Murphy, J., dissenting) (arguing that the *DeShaney* holding narrows the scope of the *Youngberg* balancing principle).

¹⁷⁵ See *id.* (citing *Stiles ex rel. D.S. v. Grainger County*, 819 F.3d 834, 854 (6th Cir. 2016), *Sargi v. Kent City Bd. of Educ.*, 70 F.3d 907, 911 (6th Cir. 1995), and *Doe v. Claiborne County*, 103 F.3d 495, 510 (6th Cir. 1996) for support); see also Hershkoff & Yaffe, *supra* note 20, at 46–47 (arguing that Judge Murphy was incorrect to narrow the scope of *Youngberg* because he relied exclusively on cases that dealt with the issue of a school’s duty to protect students from harm “at the hands of a private actor” and not at the hands of the state itself, as the students’ custodian).

¹⁷⁶ See *Gary B.*, 957 F.3d at 678 (Murphy, J., dissenting) (finding no constitutional duty to provide an adequate learning environment).

¹⁷⁷ *Id.* at 679; see also MICH. COMP. LAWS §§ 380.501, 380.553a, 380.1561 (2023) (defining public school and various non-traditional settings, as well as outlining the exceptions by which a child is not required to attend public school).

¹⁷⁸ *Gary B.*, 957 F.3d at 679. But see Hershkoff & Yaffe, *supra* note 20, at 3–4 (arguing that state policies do in fact compel attendance at particular schools).

III. IMAGINING A BACKDOOR RIGHT TO EDUCATION THROUGH THE NEGATIVE RIGHTS DUE PROCESS ARGUMENT: A VIABLE PATH FORWARD OR A DEAD-END?

Section A of this Part analyzes the strength of the liberty-based argument and discusses its future viability in the courts, concluding that although it did not prove to be a successful litigation strategy before the Sixth Circuit in *Gary B. v. Whitmer* in 2020, it nonetheless functions as a powerful and sobering rhetorical device framing the chronic issues that public school students face.¹⁷⁹ Section B argues that the liberty-based argument illustrates the need to evolve past the Court's binary framework of negative and positive rights.¹⁸⁰ Although it may be unrealistic to imagine the Court collapsing the distinction between political and socio-economic rights, the Warren Court's jurisprudence proves the feasibility of blurring the line between negative and positive rights by acknowledging how socio-economic realities affect access to negative, political rights.¹⁸¹

A. Strength of the Liberty Interest Argument

Although there has not much momentum for the liberty interest argument since *Gary B.*, the Sixth Circuit's dicta offers a glimmer of hope—and reason for skepticism—about the future viability of this kind of due process argument.¹⁸² In terms of its use as a litigation strategy, the Sixth Circuit's reluctance to define the various elements of the argument—the threshold level and the nature and duration restraint—illustrates some of the challenges litigants may face in obtaining favorable rulings.¹⁸³ Moreover, it is conceivable that if courts were to take this argument seriously, then compulsory attendance laws themselves could be inadvertently placed in the crosshairs.¹⁸⁴ Such a result

¹⁷⁹ See *infra* notes 182–207 and accompanying text.

¹⁸⁰ See *infra* notes 208–216 and accompanying text.

¹⁸¹ See *supra* notes 60–64 and accompanying text (describing the Warren era cases that imported socio-economic context into the Court's understanding of individuals' ability to enjoy their negative rights).

¹⁸² See Hershkoff & Yaffe, *supra* note 20, at 42–43 (arguing that a liberty-based due process argument is consistent with jurisprudence reading the U.S. Constitution as a “charter of negative rights against the government, and not of positive duties by the government to its citizens”); *supra* notes 158–178 and accompanying text (discussing the Sixth Circuit's analysis of the liberty interest due process argument).

¹⁸³ See *supra* notes 158–178 and accompanying text (discussing the dissent's outright rejection of the argument, and the majority's dismissal of the argument on grounds of insufficient pleading).

¹⁸⁴ See Brief of Appellants, *supra* note 135, at 51–54 (explaining how plaintiff-appellants were clear to distinguish their argument from one that would undermine or question compulsory attendance laws themselves). The risk of this strategy may be that states, unwilling to invest in adequately minimum levels of education, somehow renege on their commitments to compulsory public education. Cf. Michael Leachman, Nick Albares, Kathleen Masterson & Marlana Wallace, *Most States Have Cut School Funding, and Some Continue Cutting*, CTR. ON BUDGET & POL'Y PRIORITIES (Jan. 25, 2016), <https://www.cbpp.org/research/state-budget-and-tax/most-states-have-cut-school-funding-and-some->

would not address the underlying problems that public school students are facing, but could instead simply further education equity gaps by undermining state commitments to providing adequate educations.¹⁸⁵ Ultimately, whether or not the liberty-based argument presents a viable or desirable litigation strategy for public education reformers, the *Gary B.* plaintiff-appellants' argument illustrates why a strict dichotomy of positive and negative rights leads to muddled jurisprudence and unjust outcomes.¹⁸⁶

First, the Sixth Circuit majority was correct that the balancing test, set forth by the Supreme Court in 1982 in *Youngberg v. Romeo*, ought to be applied to the school context.¹⁸⁷ Although the court was justified in stating that plaintiff-appellants insufficiently pled facts establishing the nature of their confinement, future litigants will need to test courts' willingness to entertain theories of confinement rooted in structural problems such as de facto school segregation.¹⁸⁸ The nature of confinement, and thus the severity of a deprivation

continue-cutting [<https://perma.cc/Y6W6-CNZQ>] (detailing how most states are currently spending less on elementary and secondary schools than pre-Great Recession levels).

¹⁸⁵ See *supra* notes 11–17 and accompanying text (addressing issues of poor education conditions and education inequity in the United States). Nevertheless, some advocates believe that targeting compulsory attendance laws could improve education prospects. See Kerry McDonald, *Compulsory Schooling Laws: What if We Didn't Have Them?*, FOUND. FOR ECON. EDUC. (Oct. 5, 2018), <https://fee.org/articles/compulsory-schooling-laws-what-if-we-didnt-have-them/> [<https://perma.cc/785K-AFEJ>] (arguing that eliminating compulsory attendance laws would result in a shift in power from the state to parents, promoting school choice and forcing society to broaden its centuries-old understanding of education).

¹⁸⁶ See *supra* notes 39–51 and accompanying text (explaining why a strict dichotomy of positive and negative rights misconstrues the reality that all rights bestowed by governments require government expenditure and resource allocation).

¹⁸⁷ See *supra* notes 162–173 and accompanying text (summarizing the Sixth Circuit's application of the *Youngberg* test).

¹⁸⁸ See *Gary B. v. Whitmer*, 957 F.3d 616, 638 (6th Cir.), *vacated by* *Gary B. v. Whitmer*, 958 F.3d 1216 (6th Cir. 2020) (dismissing the negative rights argument for pleading insufficient facts establishing students' "confinement"). The Sixth Circuit stated that to establish a claim of arbitrary confinement, more details regarding the *nature* of confinement are necessary, such as "the hours per day of compulsory attendance, the number of days per year, or the restrictions on Plaintiffs' liberty throughout the typical school day." *Id.* at 642. *But see* Hershkoff & Yaffe, *supra* note 20, at 3 (arguing that, for "Black, Brown, and poor children now and historically," "public schools, like prisons, function as a site of social control that relies upon confinement and force while failing to fulfill their pedagogic purpose"). Hershkoff and Yaffe argue that "confinement" is established by virtue of the fact that states gerrymander public education provision by apportioning "educational opportunity by districts within limited geographic areas that sort children by race and class." *Id.* at 3–4. In doing so, the school districts constitute legal boundaries that confine children within a fixed geographic space, prohibiting children in specific areas from attending schools in more affluent, well-resourced districts. *Id.* Hershkoff and Yaffe argue that this "[s]patial confinement inevitably produces economic confinement, stunting the child's lifetime ability to acquire the income and assets needed to achieve geographic mobility." *Id.* at 4; see also *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 805–06 (2007) (Breyer, J., dissenting) (citing statistics that show increases in de facto racial segregation in public schools since 2000). Justice Breyer cited findings indicating that "more than one in six black children attend a school that is 99%–100% minority," while, on average, white students attend schools where 78% of their peers are also white. *Parents Involved*, 551 U.S. at 805–06 (Breyer, J., dissenting);

of liberty, may not necessarily seem as substantial in the school context as in a case like involuntary commitment to a mental institution, but this difference of degree does not invalidate the underlying fact that students are effectively confined.¹⁸⁹ Furthermore, the collateral long-term consequences of being confined to a chronically poor performing school are grave.¹⁹⁰ Thus, as the majority notes, there is no reason not to apply the *Youngberg* balancing principle to these circumstances too.¹⁹¹

Logic necessitates, and precedent dictates, that when the state takes on a custodial role, it assumes an affirmative duty to those it restrains or confines.¹⁹² Nevertheless, it is unclear how courts would go about defining the threshold level discussed by the Sixth Circuit majority—defining the level of “education” below which a school could be legally deemed as holding students arbitrarily.¹⁹³ Perhaps this is why the *Gary B.* plaintiffs conservatively defined it simply as access to literacy, an admittedly low bar.¹⁹⁴ Although there is no clear answer to this problem, and this Note cannot in good faith suggest a bright line rule, the factual allegations in the plaintiffs’ complaint certainly provide an answer for what courts should deem to be insufficient.¹⁹⁵ In other words, although the *Gary B.* plaintiffs had no shortage of factual allegations supporting the claim that their schools were failing to provide them with meaningful educational opportunities, or even basic, safe learning environments, the question remains as to where future plaintiffs should draw the line for what the

see also BLACK, *supra* note 15, at 89–91 (describing how segregation persists, harming students from low income and marginalized communities).

¹⁸⁹ See Hershkoff & Yaffe, *supra* note 20, at 4–6 (applying an abolitionist lens to the question of restraints experienced by students, especially students of color, in public schools).

¹⁹⁰ See *id.* at 4 (arguing that physical confinement in schools leads to economic confinement, “stunting the child’s lifetime ability to acquire the income and assets needed to achieve geographic mobility”).

¹⁹¹ Cf. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 398 U.S. 503, 506 (1969) (holding that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate”).

¹⁹² See *Gary B.*, 957 F.3d at 640 (arguing that there is inherently some discernable form of confinement when children are compelled to attend school, regardless of the level of education they receive).

¹⁹³ See Brief of Appellants, *supra* note 135, at 51–54 (arguing that the state must provide students with access to literacy in order to subject them to regular confinement through compulsory attendance).

¹⁹⁴ See *id.* (arguing that the state must provide students with access to literacy in order to subject them to regular confinement through compulsory attendance). This raises a host of questions regarding how states monitor and assess schools’ achievement and growth levels. See Larry Ferlazzo, *How Can You Measure a School’s Success? It’s Not Just Through Test Scores*, ED. WK. (Mar. 1, 2022), <https://www.edweek.org/leadership/opinion-how-can-you-measure-a-schools-success-its-not-just-through-test-scores/2022/03> [<https://perma.cc/BLA8-WTSL>] (describing the difficulties inherent in defining and measuring school “success,” and explaining why test scores are insufficient metrics).

¹⁹⁵ See *supra* notes 116–134 and accompanying text (summarizing plaintiffs’ factual allegations about the poor quality of service delivery and outcomes at their public schools).

state is required to provide.¹⁹⁶ Thus, in order for this negative rights argument to succeed, future plaintiffs will need to better substantiate both the nature of their confinement and the nature of the state's duty to them in light of that confinement.¹⁹⁷

Additionally, given that the balancing test requires comparing the restraint with the states' reasons for that restraint—in the scholastic context, to provide education—it is foreseeable that courts will assess not only school conditions and outcomes, but compulsory attendance laws.¹⁹⁸ The majority explained that it needed additional information about the nature and duration of the restraint faced by plaintiffs in order to carry out a *Youngberg* analysis.¹⁹⁹ The majority suggests that helpful information might include how many hours per day and how many days per year compulsory attendance laws mandate.²⁰⁰ One can imagine a reality in which a court, attempting to assess the “level of restraint,” might end up down the rabbit hole of questioning compulsory attendance laws themselves.²⁰¹ A worst case scenario might be that this leads courts to consider eliminating the compulsory component instead of addressing the harder issue of defining the minimum threshold level needed to render a restraint non-arbitrary.²⁰²

Despite these reasons for caution, courts have repeatedly shut down any positive fundamental rights analysis under the Due Process Clause.²⁰³ Even if the liberty-based argument does not prevail on the merits, given that the Court views the Constitution as a covenant of negative rights, this approach serves, at a minimum, as a powerful rhetorical strategy.²⁰⁴ Beyond simply citing to

¹⁹⁶ See Brief of Appellants, *supra* note 135, at 51–54 (arguing that the state must provide students with access to literacy in order to subject them to regular confinement through compulsory attendance).

¹⁹⁷ See *Gary B.*, 957 F.3d at 638 (dismissing the negative rights argument for pleading insufficient facts establishing the nature of students' “confin[ement]”).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 642.

²⁰⁰ *Id.*

²⁰¹ See Brief of Appellants, *supra* note 135, at 51–54 (addressing this concern about inadvertently challenging the constitutionality of compulsory attendance laws by conceding their constitutionality).

²⁰² See *Gary B.*, 957 F.3d at 640 (explaining that Supreme Court dicta has “generally” recognized states' power to compel attendance, but has not actually made this holding) (emphasis added). *But see* *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (favorably acknowledging the ubiquity of state compulsory attendance laws).

²⁰³ See *supra* note 10 and accompanying text (summarizing the impact of *Rodriguez* on establishing a positive federal right to education).

²⁰⁴ See Sunstein, *supra* note 33, at 6–7 (explaining the nuanced history of the Bill of Rights as a negative rights document). Although the Bill of Rights did not include any “positive” guarantees of a social or economic nature, there was certainly discussion of the sorts at the time of the nation's founding. *Id.* at 8–9. For example, James Madison drafted language that would ensure that extreme poverty be ameliorated by the government without infringing on existing property interests. See Madison, *supra* note 42, at 197 (stating that, without violating private property rights, “extreme wealth [be reduced] towards a state of mediocrity, and . . . extreme indigence [be raised] towards a state of com-

Youngberg and its progeny, future plaintiffs might seek to connect the liberty-based argument to the Supreme Court's other landmark negative rights education opinions.²⁰⁵ Throughout the twentieth century, the Court has continually emphasized liberty interests in its education cases, from *Meyer v. Nebraska* in 1923 and *Pierce v. Society of Sisters* in 1925, through *West Virginia State Board of Education v. Barnette* in 1943 and *Tinker v. Des Moines Independent Community School District* in 1969.²⁰⁶ Although these cases might not provide direct support for the liberty-based argument, they substantiate its underlying premise: that state education of children implicates, and is constrained by, fundamental liberty interests.²⁰⁷

B. Reimagining Negative and Positive Rights

When the U.S. Constitution was ratified over two centuries ago, it may have made sense to envision constitutional rights as those that protect individuals from government action.²⁰⁸ Nevertheless, as explored in Part I of this Note, this foundational premise was debated at the time, and has been continually challenged throughout American history in politics, courtrooms, and culture.²⁰⁹ Ultimately, whether negative or positive in nature, constitutional rights require the government's imprimatur and expenditure; and determining the accessibility of any right requires socio-economic context.²¹⁰ There is no right to fair trials, *for anyone*, without government expenditure to create and main-

fort") (emphasis added); see also West, *supra* note 54, at 447 ("It is liberty or freedom from, not liberty or freedom to, which the Bill of Rights protects.").

²⁰⁵ See *supra* notes 66–82 and accompanying text (organizing the underlying logic of negative rights around two main principles: (1) that the government may not impede private choice and actions related to education; and (2) that education is uniquely important to both individuals and society).

²⁰⁶ See *supra* notes 66–82 and accompanying text (summarizing Supreme Court decisions that position education as a uniquely important service for individuals).

²⁰⁷ See *supra* notes 66–82 and accompanying text (summarizing Supreme Court decisions that protect private choices and actions related to education).

²⁰⁸ See Hershkoff & Yaffe, *supra* note 20, at 42 (explaining that the U.S. Constitution is typically understood to merely protect citizens from government action, not to promise government support); Bignami & Spivack, *supra* note 35, at 567 (describing the various ways that the U.S. Supreme Court has interpreted positive rights extremely narrowly, while interpreting negative rights broadly). Bignami and Spivack further argue that although the Supreme Court has never recognized economic and social rights as a form of liberty under the Due Process Clause of the Fourteenth and Fifth Amendments, it theoretically could do so. Bignami & Spivack, *supra* note 35, at 567; see also West, *supra* note 54, at 446–57 (addressing the scope of Bill of Rights protections).

²⁰⁹ See *supra* notes 53–65 and accompanying text (summarizing some of the complicated history of how we view constitutional rights); Sunstein, *supra* note 33, at 4–5 (offering four main reasons why the United States has shut the door on recognizing social and economic rights).

²¹⁰ See *supra* notes 45–52 and accompanying text (explaining how all constitutional rights require some minimum level of government expenditure and resource allocation, rendering the distinction between rights quantitative in nature, not qualitative, and summarizing the claim that the difference between rights should be viewed as a question of degree, not kind).

tain courthouses, and to finance the justice system apparatus.²¹¹ Likewise, in a society where access to counsel requires money and resources, there is no right to fair trials, *for many individuals*, without the government guaranteeing a lawyer for any individual who cannot otherwise afford one.²¹²

Furthermore, in a society where some level of government action exists in every domain of economic and political life, it is often impossible to separate ideas of negative and positive rights.²¹³ The underlying logic of the *Gary B.* argument demonstrates this—establishing a positive right to a basic minimum level of education by showing how the government was otherwise infringing upon a negative right to personal liberty.²¹⁴ This approach highlights the need to untether our constitutional jurisprudence from a negative/positive rights dichotomy.²¹⁵ Although it seems unlikely that the Supreme Court will reverse its cabining of

²¹¹ See *supra* notes 45–52 and accompanying text (providing a similar example rooted in the right to privacy and the concept of private property).

²¹² See Sunstein, *supra* note 33, at 20–21 (addressing how the Warren Court expanded individual rights by considering socio-economic factors as a barrier to accessibility). In various cases involving the accessibility of negative rights, the Court centered its analysis around the context of the individual petitioner's socio-economic status, to determine whether a government duty existed in order to ensure the individual could access that right. *Id.* In 1963, in *Gideon v. Wainwright*, the Supreme Court held that indigent defendants in criminal cases have a right to court-appointed counsel under the Sixth Amendment. 372 U.S. 335, 339–40 (1963). The Court reasoned that it would be unconstitutional for a criminal defendant's poverty to stand in the way of their right to counsel, and so the State has an affirmative obligation to provide an attorney. See *id.* at 344–45 (indicating that the “noble ideal” of the right to a fair trial, “cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him”). Similarly, the Court has recognized a right to counsel for juveniles in delinquency proceedings. *In re Gault*, 387 U.S. 1, 41 (1967). In *Griffin v. Illinois*, *Douglas v. California*, and *Boddie v. Connecticut*, the Court recognized that socio-economic realities animate the extent to which a person can meaningfully access their rights, holding that where indigent persons do not have the financial means to assert their rights, the State must accommodate them. *Griffin v. Illinois*, 351 U.S. 12, 19 (1956); *Douglas v. California*, 372 U.S. 353, 354 (1963); *Boddie v. Connecticut*, 401 U.S. 371, 377–78 (1971). These cases affirmed that when an enumerated negative right is implicated (for example, the right to a fair trial), the State may be required to ensure certain economic conditions so that all citizens may access that right equally. Bignami, *supra* note 35, at 567; see also Sunstein, *supra* note 33, at 20 (“These decisions emphatically recognize social and economic rights; they say that the government must provide financial assistance to poor people in certain domains.”); Linda M. Keller, *The American Rejection of Economic Rights as Human Rights & the Declaration of Independence: Does the Pursuit of Happiness Require Basic Economic Rights?*, 19 N.Y.L. SCH. J. HUM. RTS. 557, 613 (2003) (arguing that a minimum level of positive economic conditions is necessary to give meaning to founding generation's vision for the country).

²¹³ See *supra* notes 39–52 and accompanying text (evaluating the limits of the dichotomous framework for positive and negative rights).

²¹⁴ See *supra* notes 135–155 and accompanying text (exploring the plaintiff-appellants' negative rights argument).

²¹⁵ See *supra* notes 45–52 and accompanying text (demonstrating how viewing political rights as negative, and social or economic rights as positive, leads to a less nuanced understanding of the role government places in the provision and safeguarding of *all* rights).

fundamental rights any time soon, it is worth remembering that this doctrinal change is not etched in stone, and indeed, did not solidify until the 1970s.²¹⁶

CONCLUSION

In 2020, in *Gary B. v. Whitmer*, the U.S. Court of Appeals for the Sixth Circuit addressed, but ultimately dismissed, plaintiff-appellants' argument that the State infringed upon their negative right against arbitrary confinement by imposing compulsory attendance laws that required students to go to chronically underperforming schools that fail to provide any real education. Although this claim has not led to any changes in the law across any of the federal circuits, the majority opinion in *Gary B.* offers a glimmer of hope about the prospect of reframing the problems faced by students at extremely low performing schools as a liberty-based due process issue.

Further, although this is far from a perfect litigation strategy, the failure of past positive, fundamental rights arguments leaves little room for plaintiffs seeking a judicial solution. Ultimately, whether or not the liberty-based argument presents a viable or desirable litigation strategy for public education reformers, the reframing of the issue, as demonstrated in *Gary B.*, illustrates why it may be best to move away from a jurisprudence that strictly dichotomizes positive and negative rights. Hopefully this rhetorical bridge between the negative right to personal liberty and the corresponding positive right to an adequate education can help the Court correct some of its past mistakes.

MICHAEL P. CARDEN

²¹⁶ See *supra* note 9 and accompanying text (explaining the lasting impact of *Rodriguez* on the jurisprudence of positive, fundamental rights). Although the Supreme Court has never interpreted the Constitution to explicitly provide social and economic rights, such as a right to education or healthcare, in the 1960s, the Warren Court decided a string of cases whose underlying logic blurred the line between negative and positive rights. See Sunstein, *supra* note 33, at 20–21 (describing the importance of the personnel shift on the Supreme Court in the late 1960s and early 1970s).

