

THE RIGHT-WING RIGHT TO EDUCATION: STATE-FUNDED RELIGIOUS SCHOOLING AFTER *CARSON v. MAKIN*

Abstract: In 1973, in *San Antonio Independent School District v. Rodriguez*, the United States Supreme Court held that education is not a fundamental right under the Constitution. In 2022, the Supreme Court ruled in *Carson v. Makin* that states cannot restrict generally available tuition assistance programs to nonsecular schools without running afoul of the Free Exercise Clause. This Note argues that *Carson* has created a new constituency for the fundamental right to education: religious conservatives. Religious conservatives are now more likely to support the right to education because if found, *Carson*'s expansion of the Exercise Clause would require states to provide tuition grants to parents who wish to send their children to religious private schools. In addition, religious conservatives are now more likely to support the right to education because *Carson* changed how the right to education would be defined by the Court. This Note discusses whether compulsory religious education funding is merely a possibility because of *Carson*, or whether *Carson* requires that the Court rule in such manner. Lastly, this Note argues that despite the harm that a right to education could do to secular, public education in light of *Carson*, liberals should still fight for the right to education because it is a foundational goal of liberalism and should not be sacrificed to prevent the religionization of education.

INTRODUCTION

“Education is the silver bullet, education is everything.”¹ Education plays a paramount role in the lives of Americans and citizens of the world.² Educa-

¹ *The West Wing: Six Meetings Before Lunch* (NBC television broadcast Apr. 5, 2000) (spoken by fictional White House Deputy Communications Director Sam Seaborn in an argument with the daughter of fictional White House Chief of Staff Leo McGarry); see also Staci L. Beavers, “The West Wing” as a Pedagogical Tool, 35 PS: POL. SCI. & POL. 213, 213–16 (2002) (describing the influence of *The West Wing* as a pedagogical tool); Matthew Yglesias, *In Defense of “The West Wing,”* SLOW BORING (Jan. 9, 2023), <https://www.slowboring.com/p/in-defense-of-the-west-wing> [<https://perma.cc/353Z-CVC2>] (arguing that *The West Wing* is still useful in modern political analysis). But see Damon Linker, *What I Learned Rewatching The West Wing in the Biden Era*, THE WEEK (Apr. 9, 2021), <https://theweek.com/articles/976281/what-learned-rewatching-west-wing-biden-era> [<https://perma.cc/R7CD-NG9G>] (arguing that *The West Wing* has lost cultural relevance in the twenty years since it finished airing).

² See *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (holding that education is “of supreme importance” to the American people and that the Court cannot ignore the social costs suffered by the nation when education is denied to Americans (quoting *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923))); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (holding that “education is perhaps the most important function of state and local governments”); Matthew Patrick Shaw, *The Public Right to Education*, 89 U. CHI. L. REV. 1179, 1181–82 (2022) (explaining the reasons why the Supreme Court has seen fit to

tion is the great equalizer.³ It has the ability to bring people up from the depths of poverty and give them a voice in society.⁴ The Supreme Court has therefore considered whether Americans have a fundamental right to education, same as they do to marriage, familial relations, and contraception.⁵ Although a more liberal Court nearly found the right over fifty years ago, as the Court has grown more conservative, hopes for a fundamental right to education have been dashed.⁶

The case for a right to education is well documented.⁷ The right could potentially rest on three different constitutional bases.⁸ First, advocates have ar-

recognize the importance of education). *The West Wing* was famous for giving Sam Seaborn soaring soliloquies on various issues, including the referenced speech on education, a passionate defense of space exploration, and an exchange with students on why non-violent protest is more powerful than terrorism at achieving political objectives. *The West Wing: Galileo* (NBC television broadcast Nov. 29, 2000) (advocating for space exploration); *The West Wing: Isaac and Ishmael* (NBC television broadcast Oct. 3, 2001) (explaining how violent terrorism will always fail in an episode airing just after the September 11th attacks).

³ See C. Kirabo Jackson, Rucker C. Johnson & Claudia Persico, *The Effects of School Spending on Educational and Economic Outcomes: Evidence from School Finance Reforms*, 131 Q.J. ECON. 157, 157 (2016) (finding a link between education funding and future income levels); Christopher R. Tamborini, ChangHwan Kim & Arthur Sakamoto, *Education and Lifetime Earnings in the United States*, 52 DEMOGRAPHY 1383, 1402–05 (2015) (finding that education increases lifetime earnings for Americans); Ron Haskins, *Education and Economic Mobility*, BROOKINGS INST., https://www.brookings.edu/wp-content/uploads/2016/07/02_economic_mobility_sawhill_ch8.pdf [<https://perma.cc/4C5S-THU6>] (noting that income inequality is widening in similar ways that educational inequality is increasing); see also John N. Friedman, Opinion, *School Is for Social Mobility*, N.Y. TIMES (Sept. 1, 2022), <https://www.nytimes.com/2022/09/01/opinion/us-school-social-mobility.html> [<https://perma.cc/V3BD-7VQF>] (arguing that America should view education as a vehicle for social mobility).

⁴ See *Brown*, 347 U.S. at 493 (holding that education is the most important service provided by state and local governments); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (finding that public schools are the apex function of states); *supra* note 3 and accompanying text (discussing the equalizing effect of education).

⁵ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) (considering whether education is a fundamental interest under the Constitution); *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015) (upholding marriage as a fundamental right); *Moore v. City of East Cleveland*, 431 U.S. 494, 504–06 (1977) (plurality opinion) (upholding the fundamental right to choose one's family); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (upholding the fundamental right to contraception for all persons, married or single).

⁶ See *Rodriguez*, 411 U.S. at 4–6 (5–4 decision) (rejecting the fundamental right to education under the United States Constitution by one vote); *Plyler*, 457 U.S. at 221 (affirming that education is not a fundamental right under the Constitution); *Decade-Long Study Shows Supreme Court Is Now Further to the Ideological Right Than Most Americans*, HARV. KENNEDY SCH. (June 6, 2022), <https://ash.harvard.edu/articles/decade-long-study-shows-supreme-court-is-now-further-to-the-ideological-right-than-most-americans/> [<https://perma.cc/5M4F-4FM7>] (explaining how the ideological makeup of the Supreme Court has become more conservative over time).

⁷ See *Brown*, 347 U.S. at 493 (stating education's vital importance to state and local governments); *Yoder*, 406 U.S. at 213 (holding that education is of paramount importance for all governments); *Rodriguez*, 411 U.S. at 71–72 (Marshall, J., dissenting) (arguing broadly for a fundamental right to education). See generally Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 579–606 (1992) (explaining the legal basis for a fundamental right to education).

gued that the right to education lives in the various rights afforded to children and families.⁹ For example, the Due Process Clause of the Fourteenth Amendment already guarantees the right to marry, to procreate, and to raise children.¹⁰

Second, the potential right to education lives in the First Amendment rights to freedom of speech and expression.¹¹ If the theory behind the First Amendment is a search for objective truth via the marketplace of ideas, that search is only effective if it is pursued by an educated and knowledgeable citizenry.¹² A citizen is only able to fully exercise their First Amendment rights if they have access to a quality education.¹³

Lastly, the potential right to education lives in the right to vote.¹⁴ Democracy only functions when its citizens are active civic participants.¹⁵ The more educated a person is, the more likely they are to participate in democracy.¹⁶ Therefore, to ensure that people properly exercise their recognized right to vote

⁸ See Bitensky, *supra* note 7, at 579–606 (explaining how the right to education is found in the Due Process Clause, the Free Speech Clause, and the right to vote).

⁹ See, e.g., *Moore*, 431 U.S. at 504–06 (plurality opinion) (establishing the right to choose one's family); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 533–35 (1925) (establishing the right for parents to choose their child's education); *Meyer v. Nebraska*, 262 U.S. 390, 402–03 (1923) (establishing the right to establish a home and raise children); see also *Michael H. v. Gerald D.*, 491 U.S. 110, 128–30 (1989) (plurality opinion) (recognizing the marital interest in child-rearing over the biological interest).

¹⁰ U.S. CONST. amend. XIV § 1; *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (upholding the fundamental right to marry); *Skinner v. Oklahoma*, 316 U.S. 535, 541–42 (1942) (establishing the fundamental right to procreate); *Meyer*, 262 U.S. at 402–03 (establishing the fundamental right to raise children). But see *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2284–85 (2022) (holding that abortion is not a fundamental right under the Constitution, overruling *Roe v. Wade*). Although *Dobbs* held as a matter of law that other cases decided under the doctrine of substantive due process are still considered good law, not all Justices in the majority agreed with that holding. See 142 S. Ct. at 2301–03 (Thomas, J., concurring) (arguing that other cases decided under the doctrine of substantive due process ought to be “reconsidered”).

¹¹ See *Rodriguez*, 411 U.S. at 112 (Marshall, J., dissenting) (arguing that education directly affects a person's ability to utilize their First Amendment rights).

¹² See U.S. CONST. amend. I (establishing the freedom of speech); *Rodriguez*, 411 U.S. at 112–13 (Marshall, J., dissenting) (stating that although education may not be the “essential determinant” of a person's ability to exercise their rights to speech, expression, and association, it may “enhance the individual's enjoyment of those rights”); *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring) (arguing that a theoretical justification for the First Amendment rests in a search for political truth); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (asserting that the First Amendment stands for the proposition that the “the best test of truth is the power of the thought to get itself accepted in the competition of the market”).

¹³ See *Rodriguez*, 411 U.S. at 112–13 (Marshall, J., dissenting) (arguing that education is vital in allowing citizens to fully express their First Amendment rights).

¹⁴ See Bitensky, *supra* note 7, at 602–06 (explaining how the right to vote contributes to a right to education).

¹⁵ See *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (stating that any restriction on citizens' right to vote “strike[s] at the heart of representative government”).

¹⁶ See *Rodriguez*, 411 U.S. at 114–15 (Marshall, J., dissenting) (explaining that people become more civically active the more educated they are).

in state and national elections, advocates, often from the liberal side of the political spectrum, argue that the government ought to guarantee them an education.¹⁷

In 1973, in *San Antonio Independent School District v. Rodriguez*, the Supreme Court declined to find a right to education in the Constitution.¹⁸ The Court has not reconsidered its stance, and has instead taken to scaling back existing fundamental rights.¹⁹ Nevertheless, in 2022, in *Carson v. Makin*, the Supreme Court changed the contours of the potential fundamental right to education by broadly expanding access to religious schooling.²⁰

In *Carson*, the Court determined that when a state offers to pay for a citizen's private education in lieu of providing a state-run public school, it must pay for that citizen to go to a religious private school on an equal basis with non-sectarian private schools.²¹ This obligation on the part of the state exists because of the Free Exercise Clause's prohibition on governmental interfer-

¹⁷ See *id.* (arguing for a fundamental right to education founded in part on the right to vote); Bitensky, *supra* note 7, at 602–06 (using liberal theories of democratic government to justify the right to education).

¹⁸ See 411 U.S. at 4–6 (holding that there is no fundamental right to education under the United States Constitution); see also *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (reaffirming the holding in *Rodriguez* that education is not a fundamental right under the Constitution).

¹⁹ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284–85 (2022) (holding a previously found fundamental right to an abortion did not exist under the United States Constitution). In 1982, in *Plyler v. Doe*, the Supreme Court had the opportunity to determine whether education was a fundamental right once again but held true to its ruling in *Rodriguez*. *Plyer*, 457 U.S. at 221; see *Rodriguez*, 411 U.S. at 4–6 (rejecting the fundamental right to education). In *Plyler*, the Court considered whether a Texas ban on undocumented children attending public schools violated the Equal Protection Clause of the Fourteenth Amendment. 457 U.S. at 216; see U.S. CONST. amend. XIV § 1 (stating that no person within the jurisdiction of the United States shall be denied equal protection of the laws). Justice Brennan, writing for the majority, concluded that the words “within the jurisdiction” did not cause the Equal Protection Clause to apply to a smaller scope of persons than the Due Process Clause that appears just before it. U.S. CONST. amend. XIV § 1; *Plyler*, 457 U.S. at 214. The Court held that even though undocumented children are neither citizens nor in the country legally, they are not outside scope of the Equal Protection Clause. *Plyler*, 457 U.S. at 215. Although he remained true to the core holding in *Rodriguez* that education is not a fundamental right, Justice Brennan diverted somewhat from *Rodriguez*, concluding that education was more important than an ordinary benefit provided by the state. *Id.* at 221. Because there was not a racial or other suspect classification at issue in *Plyer*, the classification of children based on immigration status was subject to rational basis review. *Id.* at 208. Justice Brennan and four other Justices concluded that such a classification did not survive rational basis review, and the Court declared Texas's law unconstitutional. *Id.* at 230. Although the Court did not establish a right to education in *Plyler*, one can read the case as holding that education holds greater importance than an ordinary benefit, even if not considered fundamental. See *id.* at 221 (explaining how the Court has recognized the importance of education time and time again). Justice Marshall concurred in part, remaining true to his dissent in *Rodriguez* from six years earlier and his belief that education is a fundamental right. *Id.* at 230 (Marshall, J., concurring).

²⁰ See 142 S. Ct. 1987, 2002 (2022) (holding that a generally available tuition assistance program that was limited to nonsectarian secondary schools violated the Exercise Clause of the First Amendment).

²¹ See *id.* (holding that a generally available funding stream that was limited based on the target's religious exercise violated the Exercise Clause of the First Amendment).

ence in the free exercise of religion.²² This Note argues that the right to education is ripe for reconsideration because *Carson* has expanded the constituency for a fundamental right to education to include religious conservatives.²³ It has expanded that constituency in two different ways; first, *Carson* allows the Court to frame the right to education in a way that is more palatable to religious conservatives; second, if the Court does find a fundamental right to education, *Carson* places an affirmative obligation on states to pay for children to attend a religious private school instead of a secular public school if the child's parent so desires.²⁴

Part I of this Note reviews the historical background of the fight to secure education as a fundamental right.²⁵ Part II discusses the legal and factual background to *Carson*.²⁶ Part III evaluates how a potential right to education has changed as a result of *Carson* and articulates a hypothetical claim brought by a claimant seeking government funding of their religious education.²⁷ Part IV evaluates whether the Court must or may rule in favor of the claimant in Part III and argues that liberalism should not abandon the pertinent fight to recognize education as a fundamental right merely because of the potential consequences to public education.²⁸

I. THE POTENTIAL RIGHT TO EDUCATION

Legal theorists and jurists have attempted to formulate a legal right to education for decades.²⁹ Its formulation is based on three principal foundations,

²² See U.S. CONST. amend. I (establishing the freedom of exercise); *Carson*, 142 S. Ct. at 2002 (holding that the Exercise Clause prohibited the government from giving a benefit solely to sectarian institutions).

²³ See 142 S. Ct. at 2002 (holding that a generally available tuition assistance program that restricted the recipients' ability to spend it only on non-sectarian schools violated the Exercise Clause of the First Amendment).

²⁴ See *Rodriguez*, 411 U.S. at 70–133 (Marshall, J., dissenting) (arguing for the establishment of a fundamental right to education); *Carson*, 142 S. Ct. at 2002 (holding that the Exercise Clause creates obligations on the part of the government to fund religious schools in certain situations); *id.* at 2006 (Breyer, J., dissenting) (suggesting that the holding in *Carson* may lead to a requirement that states pay for children to attend religious schools instead of public schools with equivalent funds).

²⁵ See *infra* notes 29–91 and accompanying text.

²⁶ See *infra* notes 92–142 and accompanying text.

²⁷ See *infra* notes 143–243 and accompanying text.

²⁸ See *infra* notes 244–289 and accompanying text.

²⁹ See, e.g., *Rodriguez*, 411 U.S. at 71 (Marshall, J., dissenting) (arguing that education is a fundamental right under the First and Fourteenth Amendments, and under the fundamental right to vote); see also Bitensky, *supra* note 7, at 550 (formulating a right to education based on similar bases as the dissents in *Rodriguez*). See generally Shaw, *supra* note 2 (arguing for a modern formulation of the right to education based on property interest); Michael Carden, Note, *Positively Fundamental Negative Rights: Reimagining a Positive Right to Education as a Negative Right Against Arbitrary Confinement*, 65 B.C.L. REV. 689, 717–21 (2024) (redefining the right to education as a right against arbitrary confinement).

each of which are covered in the sections of this Part.³⁰ Section A discusses the right to education in the Due Process Clause of the Fourteenth Amendment to the Constitution.³¹ Section B discusses the right to education in the Free Speech Clause of the First Amendment to the Constitution.³² Section C discusses the right to education in the Equal Protection Clause of the Fourteenth Amendment securing the right to vote.³³

A. The Right to Education in the Due Process Clause

The Due Process Clause of the Fourteenth Amendment guarantees that all Americans may not be deprived of "life, liberty, or property without due process of law."³⁴ Through the doctrine of substantive due process, the Supreme Court has found certain rights in the Due Process Clause that no state actor may infringe upon no matter the amount of process given to the claimant.³⁵

Historically, many of the rights found under the doctrine of substantive due process have been related to children and families.³⁶ In 1923, in *Meyer v. Nebraska*, the Supreme Court recognized that parents have a right to raise their children as they see fit, and similarly, in 1925, in *Pierce v. Society of Sisters*, the Court recognized a parent's fundamental right to choose their child's education.³⁷ In 1940, the Supreme Court held in *Skinner v. Oklahoma* that a person had a fundamental right to procreate.³⁸

As the Warren Court took up the substantive due process doctrine in the 1950s and 60s, the cases turned to the right to privacy.³⁹ In 1965, in *Griswold v.*

³⁰ See *Rodriguez*, 411 U.S. at 100–01, 112–13 (Marshall, J., dissenting) (asserting that the fundamental right to education rests principally on the Due Process Clause of the Fourteenth Amendment, the First Amendment, and the right to vote); Bitensky, *supra* note 7, at 579–606 (same).

³¹ See *infra* notes 34–65 and accompanying text.

³² See *infra* notes 66–79 and accompanying text.

³³ See *infra* notes 80–91 and accompanying text.

³⁴ U.S. CONST. amend. XIV § 1.

³⁵ See *Washington v. Glucksberg*, 521 U.S. 702, 719–21 (1997) (explaining the process by which the Court finds certain rights under the doctrine of substantive due process); see also *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (finding the fundamental right to marry regardless of race); *Skinner v. Oklahoma*, 316 U.S. 535, 541–42 (1942) (establishing the fundamental right to have children); *Meyer v. Nebraska*, 262 U.S. 390, 402–03 (1923) (finding the fundamental right to raise children).

³⁶ See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494, 504–06 (1977) (plurality opinion) (establishing the right to choose one's family); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 533–35 (1925) (establishing the right for parents to choose their child's education); *Meyer*, 262 U.S. at 402–03 (establishing the right to establish a home and raise children); see also *Michael H. v. Gerald D.*, 491 U.S. 110, 128–30 (1989) (plurality opinion) (recognizing the marital interest in child-rearing over the biological interest).

³⁷ *Pierce*, 268 U.S. at 533–35 (establishing a parental right to choose their child's education); *Meyer*, 262 U.S. at 402–03 (establishing the right to rear children and maintain a home).

³⁸ 316 U.S. at 541–42 (holding that a criminal could not be sentenced to castration because the right to procreate was fundamental under the Due Process Clause of the Fourteenth Amendment).

³⁹ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484–85 (1965) (holding that the penumbras of the Fourth and Fifth Amendments create a right to privacy). The Warren Court brought forth a

Connecticut, the Court found a fundamental right to birth control in marriage.⁴⁰ Seven years later, in *Eisenstadt v. Baird*, the Court expanded that right to all individuals, and in 1973, in *Roe v. Wade*, it found a fundamental right to abortion.⁴¹ One can still view these cases as expanding the rights of people *vis-à-vis* their relation to children, but scholars also view them through the right to privacy.⁴²

After *Roe* in 1973, the expansion of rights under substantive due process stagnated.⁴³ In 1976, the Court refused to find a fundamental right to education in *San Antonio Independent School District v. Rodriguez*.⁴⁴ In *Rodriguez*, a class of families who lived in an impoverished area of San Antonio brought suit alleging that a Texas law that allowed municipalities to supplement their education budgets with local property taxes violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.⁴⁵ Although Texas did guarantee some education funding to all districts, the plaintiffs argued that the funding scheme that allowed districts to supplement that budget with property taxes was unconstitutional because their school districts received less funding per pupil and were therefore of lower quality than wealthier districts.⁴⁶ The Court denied both challenges, holding that education is not a fundamental right

constitutional revolution. Morton J. Horwitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5, 5 (1993). The Court rapidly expanded rights, both through incorporation of Constitutional amendments to the states and substantive due process; it also ended segregation in public schools. *Id.* at 7–10. The Court was unique in that it included multiple labor lawyers, the first Black Supreme Court Justice, cultural and establishment outsiders, and Earl Warren himself whose enforcement of Japanese internment in California during World War II had a profound impact on his personal view of the Constitution and the law. *Id.* at 10–12. The Warren Court is considered one of the most important Constitutional turning points in American history. *Id.* at 13.

⁴⁰ See 381 U.S. at 484–86 (finding that the right to privacy extends to the use of birth control for married persons).

⁴¹ See *Eisenstadt v. Baird*, 405 U.S. 438, 453–54 (1972) (holding that “if the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child”); *Roe v. Wade*, 410 U.S. 113, 164 (1973) (finding the right to an abortion under the right to privacy), *overruled by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2284–85 (2022).

⁴² See *Eisenstadt*, 405 U.S. at 453–54 (holding that the privacy question was in relation to the ability to “bear or beget a child”).

⁴³ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37–38 (1973) (refusing to recognize a right to education under the doctrine of substantive due process); *Washington v. Glucksberg*, 521 U.S. 702, 719–21 (1997) (declining to recognize a constitutional right to die under the doctrine of substantive due process); *Dobbs*, 142 S. Ct. at 2253, 2284–85 (holding that there has never been a right to an abortion under the doctrine of substantive due process because a “right to abortion is not deeply rooted in the Nation’s history and tradition”).

⁴⁴ See 411 U.S. at 37–38 (holding that education is not a fundamental right under the Due Process Clause of the Fourteenth Amendment).

⁴⁵ *Id.* at 6–17.

⁴⁶ *Id.*

under the Due Process Clause and that wealth is not a suspect class under the Equal Protection Clause.⁴⁷

A decade later, in *Michael H. v. Gerald D.*, Justices Scalia and Brennan clashed over the meaning of substantive due process and shaped the debate over the doctrine for the coming decades.⁴⁸ *Michael H.* asked the Court to determine whether a child's biological father had a fundamental right to be considered the child's legal guardian, or whether a state may consider the man married to the child's mother to be the child's presumptive guardian.⁴⁹ Justice Scalia argued in his plurality opinion that a right had to be legally protected in American history and tradition to be considered fundamental under the Due Process Clause.⁵⁰ He reasoned that because the law traditionally protected the rights of the father by marriage rather than the biological father, a state may permissibly consider the marital interest of the mother's husband ahead of the biological interest of the genetic father.⁵¹

Justice Brennan's dissenting opinion argued that it is not the rights that have been traditionally legally protected that require the Due Process Clause's protection, but rather what society has traditionally found important.⁵² Justice

⁴⁷ See *id.* at 37–38 (holding that education is not a fundamental right); *id.* at 54–55 (holding that the funding scheme did not violate the Equal Protection Clause of the Fourteenth Amendment). In order for this challenge to be successful, the plaintiffs needed to win both arguments in the case. *Id.* at 37–38, 54–55. A holding simply that education is a fundamental right, without the commensurate holding that wealth is a suspect class, would likely not have rendered any relief for the plaintiffs because Texas was providing a basic education to the plaintiffs, just not at the same level that it was to wealthy citizens. See *id.* (implying that because Texas was providing some level of education to all citizens of Texas, a difference merely in quality was not enough to merit relief).

⁴⁸ See 491 U.S. 110, 122–23 (1989) (plurality opinion) (holding that an interest had to be traditionally legally protected to receive recognition under the doctrine of substantive due process); *id.* at 140–41 (Brennan, J., dissenting) (arguing that an interest merely had to be traditionally found important to receive such recognition).

⁴⁹ *Id.* at 115–16 (plurality opinion). Under California law, a child born to a woman who lived with her husband who was not sterile was presumed conclusively to be a child of the marriage. *Id.* at 115. This presumption could only be overcome by conclusive blood tests performed within two years of birth. *Id.* Michael H. had obtained no such blood tests and asserted that the presumption of marital parenthood violated his rights under the Due Process Clause of the Fourteenth Amendment. See *id.* at 115–16 (implying that Michael H. did not obtain the required blood tests within the time limit required by the statute).

⁵⁰ See *id.* at 122–23 (holding that an interest must be traditionally protected by society and rooted deeply in the history and tradition of American society).

⁵¹ *Id.* California did not change its law after the holding in *Michael H.* and the father by marriage is still presumed to be the natural parent of a child born while the father by marriage was married to the child's natural mother. CAL. FAM. CODE § 7611 (West 2025).

⁵² See *Michael H.*, 491 U.S. at 140–41 (Brennan, J., dissenting) (arguing that the Court ought to look at what society has traditionally found important, ignoring whether it has been protected under the law or not). Justice Brennan authored a dissent in *Michael H.* that Anna Quindlen described as “withering.” ANNA QUINDLEN, REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE 120 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997). His anger at the plurality's opinion is vivid, describing Justice Scalia's conception of the Constitution as “archaic” and “hidebound.” *Id.* at 121. Justice Brennan would retire from the Court just a year after the decision in *Michael H.* and it is

Brennan argued that society has traditionally found the biological father's interest to be of greater importance than the marital interest, and therefore there ought to be a fundamental right for fathers to claim legal guardianship over their biological children no matter when their fatherhood is proven.⁵³

This debate is central to the right to education because scholars have argued for a right to education under both frameworks.⁵⁴ Recent Court opinions have made clear that Justice Brennan's conception of substantive due process is not favored by the Court.⁵⁵ The Court emphasized in opinions such as *Washington v. Glucksberg* and *Dobbs v. Jackson Women's Health Organization* that Justice Scalia's formulation of traditional protection is now the standard for finding new fundamental rights.⁵⁶

Although liberals advocating for a fundamental right to education often rely on Justice Brennan's disfavored framework, some scholars have argued for a right to education under Justice Scalia's framework as well.⁵⁷ Even his requirement that the right must be viewed at the "most specific level" does not disrupt this argument from education rights activists.⁵⁸ Because there is a tradi-

tempting to view this opinion as his swansong. *Id.* His declarations that "'liberty' must include the freedom not to conform" and that a constitutional structure that so weds itself to history and tradition refuses to "recognize that times change" have continued to serve as a guiding light for those who still advocate for a liberal conception of substantive due process. *Id.*; *Michael H.*, 491 U.S. at 140 (Brennan, J., dissenting).

⁵³ See *Michael H.*, 491 U.S. at 142–43 (Brennan, J., dissenting) (arguing that a father's biological link with his child when combined with a substantial parental relationship with the child ought to guarantee Constitutional protection).

⁵⁴ See Bitensky, *supra* note 7, at 583–96 (arguing that under Justice Scalia's or Justice Brennan's conception of rights under the doctrine of substantive due process, one can find the right to education in either case).

⁵⁵ See *Dep't of State v. Muñoz*, 144 S. Ct. 1812, 1817–18 (2024) (applying Justice Scalia's framework for substantive due process); *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (same).

⁵⁶ See *Glucksberg*, 521 U.S. at 720–21 (holding that an interest must be rooted in history and tradition); *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2246 (2022) (holding that a right must be deeply rooted in American history and tradition).

⁵⁷ See Bitensky, *supra* note 7, at 585 (quoting *Michael H.*, 491 U.S. at 122 n.2) (explaining Justice Scalia's framework for finding fundamental rights). All fifty states have a legally protected right to education. *Id.* at 551.

⁵⁸ See *Michael H.*, 491 U.S. at 127 n.6 (stating that one must refer to the interest at the highest level of specificity when determining whether that interest has traditionally been protected by American society); Bitensky, *supra* note 7, at 585–86 (arguing that Justice Scalia's methodology can be used to show how states have historically long protected school-age children's interest in retaining access to an education). According to Justice Scalia, we could not look to traditional protection of primary education and conclude that a university education was a fundamental right, because *Michael H.* requires the highest level of specificity. See 491 U.S. at 127 n.6 (stating that one must refer to the interest at the most specific level to determine whether that interest has traditionally been protected by American society); Bitensky, *supra* note 7, at 585–86 (arguing that Justice Scalia's methodology can be used to show how states have historically long protected school-age children's interest in retaining access to an education). State and federal governments have played important roles in both primary and secondary education since the founding of the republic. See Bitensky, *supra* note 7, at 586–88

tion of public education going back to the eighteenth century, one does not need to rely on abstract notions of protected interests that require analogizing from *Pierce*, *Meyer*, and other fundamental rights cases that are not directly on point.⁵⁹

Nevertheless, there are distinctions between education and some of the other rights that the Court has recognized, like marriage and procreation.⁶⁰ The latter two are seen as first order rights, rights *from* the government to which people have the freedom to partake in or not.⁶¹ Education is often viewed as an affirmative or second order right, and if recognized, would be something that the government would have to actively provide as ordered by the Court.⁶² The Court may be reluctant to force governments to provide a service to all of its citizens, but considering all states already guarantee a public education to all persons, it would be a matter of guaranteeing certain levels of quality, rather than building a service from scratch.⁶³ In fact, *Rodriguez* may have come out differently if Texas had not been supplying certain citizens with an education at all, rather than simply varying the levels of quality between different groups of citizens.⁶⁴ Some scholars suggest that if Texas had not met a fundamental

(explaining the history of legal protections of education in the United States). In 1918, every state had compulsory education laws. *Id.* at 586–87.

⁵⁹ See *Michael H.*, 491 U.S. at 127 n.6 (holding that an interest must be viewed at the most specific level to be recognized as fundamental); *supra* note 58 and accompanying text (analyzing Justice Scalia's discussion of the "most specific level" requirement in *Michael H.*).

⁶⁰ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 71 (1973) (Marshall, J., dissenting) (arguing for an affirmative right to education, not just a right to be free from a government restriction); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (establishing a fundamental right to marriage); *Skinner v. Oklahoma*, 316 U.S. 535, 541–42 (1942) (finding a right to be free from government restriction on the right to procreate).

⁶¹ See Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1, 4–5 (2005) (discussing the history of first- and second-generation rights in the Constitution); 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) (noting the difference between first order negative rights and second order positive rights); Leif Wenar, *Rights* (explaining the difference between first and second order rights), in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta & Uri Nodelman eds., Spring 2023), <https://plato.stanford.edu/archives/spr2023/entries/rights> [<https://perma.cc/2D72-K9A7>]; see also Terry Skolnik, *Criminal Justice and the Erosion of Constitutional Rights*, 66 B.C. L. REV. 1679, 1723–25 (2025) (discussing the Sixth Amendment right to counsel as an affirmative second-order right); Carden, *supra* note 29, at 695–700 (discussing generally the right to education in the context of first order and second order rights).

⁶² See *Rodriguez*, 411 U.S. at 71 (Marshall, J., dissenting) (arguing for an affirmative right to education).

⁶³ See Bitensky, *supra* note 7, at 551 (explaining that every state in the Union has enacted free primary and secondary education, as well as mandatory attendance).

⁶⁴ See *id.* at 566–67 (arguing that *Rodriguez* may have come out differently on the question of education as a fundamental right if Texas were not providing a basic minimum level of education to a portion of its citizens, rather than merely varying the levels in quality between them above that basic level); see also *Gary B. v. Whitmer*, 957 F.3d 616, 644 (6th Cir.) (discussing how *Rodriguez* left the door open for the Court to find a fundamental right to a basic minimum education), *vacated en banc*,

baseline of educational quality for the claimants in *Rodriguez*, the case may have come out the other way.⁶⁵

B. The Right to Education in the First Amendment

At the start of the twentieth century, the Supreme Court's First Amendment jurisprudence changed greatly.⁶⁶ No longer relying on an originalist interpretation of the First Amendment that merely banned prior restraint, the opinions by Justices Brandeis in *United States v. Abrams* in 1919 and Justice Holmes in *Whitney v. California* in 1927 brought forward the importance of the Marketplace of Ideas Theory and the Political Discourse Theory.⁶⁷ These theories now provide the theoretical justification for the Court's current First Amendment jurisprudence.⁶⁸

958 F.3d 1216 (6th Cir. 2020). In 2020, in *Gary B. v. Whitmer*, the Sixth Circuit Court of Appeals held that minors attending Detroit public schools had been denied a basic minimum education and that the Constitution guaranteed them such a right. *Id.* at 660–62. On appeal, however, the Sixth Circuit granted the state of Michigan a rehearing en banc, vacating the original holding for the plaintiffs. *Gary B.*, 958 F.3d at 1216. The parties settled before the case could be reheard, leaving the issue of basic minimum education unresolved for the time being in the lower courts. *Governor Whitmer and Plaintiffs Announce Settlement in Landmark Gary B. Literacy Case*, MICHIGAN.GOV (May 14, 2020), <https://www.michigan.gov/whitmer/news/press-releases/2020/05/14/governor-whitmer-and-plaintiffs-announce-settlement-in-landmark-gary-b--literacy-case> [<https://perma.cc/5BFJ-MDVE>]. The case was originally filed against then-Governor Rick Snyder, a Republican. *Id.* After Governor Gretchen Whitmer, a Democrat, was elected in 2018, she agreed to many of the plaintiffs' demands, including an additional \$94.4 million for literacy programs in Detroit Public Schools. John Wisely, *Michigan Right to Literacy Settlement Stands as Court Rejects Legislature's Appeal*, DETROIT FREE PRESS, <https://www.freep.com/story/news/education/2020/06/10/right-literacy-ruling-stands-court-rejects-legislatures-appeal/5337778002/> [<https://perma.cc/FA79-SZJH>] (June 10, 2020). The Republican-controlled Michigan legislature attempted to undo the settlement, but the Sixth Circuit rejected its appeal. *Id.*

⁶⁵ See Bitensky, *supra* note 7, at 566–67 (asserting that *Rodriguez* might have come out differently if Texas were not providing a basic education to a portion of its citizens rather than varying the level of education between different groups of citizens); see also *Gary B.*, 957 F.3d at 644 (holding that the Constitution guarantees a right to a basic minimum education notwithstanding the Court's holding *Rodriguez*), *vacated en banc*, 958 F.3d 1216.

⁶⁶ See *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring) (contending that a justification for the First Amendment's protection of free speech is a search for political truth); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (arguing that the First Amendment stands for the proposition that the “the best test of truth is the power of the thought to get itself accepted in the competition of the market”).

⁶⁷ See *Whitney*, 274 U.S. at 375–76 (Brandeis, J., concurring) (arguing that the First Amendment exists to further the search for political truth); *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) (arguing that the First Amendment exists so that ideas may be tested in the marketplace of ideas). Prior restraint is the act of restraining speech before it is spoken rather than after; it has “a heavy presumption against its constitutional validity.” Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 558–59 (1975); see also Marin Scordato, *Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. REV. 1, 4–5 (1989) (explaining the doctrine of prior restraint and the Supreme Court's treatment of statutes that restrain speech before it is spoken).

⁶⁸ See *Whitney*, 274 U.S. at 375–76 (Brandeis, J., concurring) (asserting that the search for political truth is a theoretical justification for the First Amendment); *Abrams*, 250 U.S. at 630 (Holmes, J.,

The Marketplace of Ideas Theory posits that the invention of new ideas and concepts functions similarly to a market for goods.⁶⁹ Society weeds out bad ideas and falsehoods through trial and error and naturally adopts ideas that are closer to objective truth.⁷⁰ To let this process commence, the theory states that the government must protect all speech so that society itself may discern the good ideas from the bad.⁷¹

Political Discourse Theory functions similarly to the Marketplace of Ideas Theory but is limited to the confines of politics.⁷² It is much more democratic in nature and has a principle of equity that postulates that all speakers must be given a chance to speak so that even the most outlandish ideas are given the

dissenting) (proclaiming that the First Amendment stands for the proposition that the “the best test of truth is the power of the thought to get itself accepted in the competition of the market”); *Am. C.L. Union v. Alvarez*, 679 F.3d 583, 610 (7th Cir. 2012) (Posner, J., dissenting) (maintaining that the original intention of the First Amendment was that it merely banned prior restraint).

⁶⁹ See Lawrence Byard Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 69–71 (1989) (explaining the metaphor of the marketplace of ideas); see also *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) (discussing the Marketplace of Ideas Theory broadly).

⁷⁰ See Solum, *supra* note 69, at 69–70 (explaining the mechanics of the marketplace of ideas).

⁷¹ See *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) (describing why government ought to protect all speech to let the marketplace of ideas play out). Not all speech is protected equally, however. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (holding that there has never been a Constitutional issue in regulating speech that fits into certain categories that have such slight social value). Courts have labelled some categories of speech as “less protected.” See *id.* (creating categories of less protected speech). True threats, incitements, fighting words, and obscenity are commonly recognized as some of the categories that the Supreme Court has recognized deserve less protection than other kinds of speech. See *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (per curiam) (creating the test by which speech may be classified as incitement and regulated by the government); *Counterman v. Colorado*, 143 S. Ct. 2106, 2111–12 (2023) (establishing recklessness as the mens rea for which someone could be criminally liable for a threat); *Miller v. California*, 413 U.S. 15, 23–24 (1973) (establishing the test by which obscenity is distinguished from other pornographic content and may be regulated by the state). The Supreme Court has declined to recognize other categories of speech as less protected that some people intuitively believe should be less protected, including profanity, violent speech, defamation, and non-obscene pornography. See *Cohen v. California*, 403 U.S. 15, 25 (1971) (holding that because “one man’s vulgarity is another’s lyric,” profanity does not generally fall into the categories of less protected speech); *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 797–99 (2011) (declining to create a new category of less protected speech for violent speech); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269–70 (1964) (holding that libelous speech is protected under the First Amendment and malicious intent must be proven in a cause of action for libel); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 84 (1973) (Brennan, J., dissenting) (arguing that obscene speech ought to have the same protections that non-obscene sexual speech does). Although states are generally free to regulate the less-protected categories, they are still subject to some restrictions. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389–90 (1992) (holding that even if a speech regulation is confined to a less protected category, that regulation cannot be based on viewpoint). They cannot regulate those categories in a manner that is biased on the basis of viewpoint. *Id.*

⁷² See Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 258–60 (1992) (explaining the political discourse theory of free speech broadly); *Whitney*, 274 U.S. at 375–76 (Brandeis, J., concurring) (explaining the political motivations for protection of free speech).

opportunity to experience open debate.⁷³ It is only through this process of open debate in society that one can truly find the ideas that are beneficial and the ideas that are harmful.⁷⁴

These theories can demonstrate how the right to education is vital to the First Amendment.⁷⁵ The First Amendment does not only stand for the proposition that the government should not interfere in speech, rather it is a pronouncement of societal progress and civilizational growth; it is a statement that society progresses best when all citizens are free to speak their mind and do so to get closer to objective truth.⁷⁶ If the theoretical justification for the First Amendment is societal progress through the free and open exchange of ideas, then, as Marshall explained in his dissent in *Rodriguez*, surely education is not only a mere supplement in that process, it is absolutely necessary.⁷⁷ Marshall argued that an educational guarantee gives all persons the opportunity to reach their full potential and thus contribute everything they can to the marketplace of ideas.⁷⁸ Education rights advocates argue that the First Amendment's stance, not just against censorship but for growth and progress, leads to the conclusion that the right to education lives within its bounds.⁷⁹

⁷³ See generally Alexander Meiklejohn, *What Does the First Amendment Mean?*, 20 U. CHI. L. REV. 461, 471–74 (1953) (explaining the democratic motivations for free speech). A famous illustration of the Political Discourse Theory is Norman Rockwell's painting "Freedom of Speech." *Norman Rockwell's Four Freedoms*, NORMAN ROCKWELL MUS., <https://www.nrm.org/2012/10/collections-four-freedoms/> [<https://perma.cc/7DNW-R7LH>]. Depicting a man rising to speak at a New England-style town meeting, Rockwell painted the piece as part of a World War II era series called the "Four Freedoms." *Id.* In an era where civil rights were under existential threat, the painting depicts the courage of a man willing to stand up for his principles in a democratic forum so that his ideas may be heard and debated in the light of day. See *id.* (showing a man standing up at a town meeting while others look on).

⁷⁴ See Meiklejohn, *supra* note 73, at 468 (endorsing the Madisonian process of open debate).

⁷⁵ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 112–13 (1973) (Marshall, J., dissenting) (explaining the First Amendment interest in a right to education).

⁷⁶ See *Whitney*, 274 U.S. at 375–76 (Brandeis, J., concurring) (contending that the First Amendment's protection of free speech is justified by the open search for political truth); *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) (arguing that the First Amendment is justified by the theory that the "the best test of truth is the power of the thought to get itself accepted in the competition of the market").

⁷⁷ See *Whitney*, 274 U.S. at 375–76 (Brandeis, J., concurring) (arguing that the First Amendment is justified by a search for objective political truth); *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) (arguing that the First Amendment stands for the proposition that all ideas should be tested in a marketplace rather than suppressed by the government); *Rodriguez*, 411 U.S. at 112–13 (Marshall, J., dissenting) (explaining why the interests protected by the First Amendment lead to a fundamental right to education).

⁷⁸ See *Rodriguez*, 411 U.S. at 112–13 (Marshall, J., dissenting) (asserting that a guarantee of education allows individuals to reach their full potential to exercise the First Amendment).

⁷⁹ See *id.* (explaining the First Amendment connection to a right to education); *Whitney*, 274 U.S. at 375–76 (Brandeis, J., concurring) (contending the First Amendment stands for the principal that the search for political truth should not be constrained); *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) (arguing that all ideas should be tested in a marketplace of ideas).

C. *The Right to Education in the Right to Vote*

Unlike the First Amendment and the Due Process Clause of the Fourteenth Amendment, the right to vote is not specifically enumerated in the Constitution.⁸⁰ Nevertheless, in 1964, in *Reynolds v. Sims*, the United States Supreme Court held that there is an unequivocal right to vote in both federal and state elections.⁸¹ In the decades since *Reynolds*, the Court has continued to hold that the right to vote is essential to the function of a democratic society and a representative form of government.⁸²

Scholars have grappled with the question of whether education is fundamental to the right to vote; one does not need an education to perform the physical act of voting.⁸³ Without presuming whether the quality of candidates chosen improves as voters become more educated, research indicates that the more people are educated, the more likely they are to participate in democracy.⁸⁴ One of the basic theories underlying democracy is that collective decision-making results in the best outcomes; therefore, the more people contribute to the decision-making process, the better the outcomes will be.⁸⁵ Thus, scholars argue that education is vital to the functioning of democracy as a decision-making process, not necessarily because people will make better decisions, but because they will be more likely to participate in the process.⁸⁶

The idea that education functions as a factor in voting is already ingrained in the Constitution.⁸⁷ Although there is not an explicit educational requirement, the Constitution requires that voters be at least eighteen years of age.⁸⁸ This does not necessarily speak to literal knowledge on the part of the voter, but society has determined that there is a level of maturity and life experience necessary to take part in our democracy.⁸⁹ Thus, advocates argue that we must consider at-

⁸⁰ See Bitensky, *supra* note 7, at 603 (explaining that the right to vote is not expressly enumerated anywhere in the Constitution).

⁸¹ See 377 U.S. 533, 554 (1964) (holding explicitly that the Constitution guarantees the right to vote in both state and federal elections). *But see Rodriguez*, 411 U.S. at 35 n.78 (asserting in dicta that the right to vote is not a per se constitutional right); Plyler v. Doe, 457 U.S. 202, 217 n.15 (1982) (citing *Rodriguez*'s assertion that there is no constitutional right to vote).

⁸² See 377 U.S. at 555 (holding that the right to vote is essential for a functioning democratic society); see, e.g., Gill v. Whitford, 138 S. Ct. 1916, 1929–30 (2018) (re-affirming the right to vote); Bush v. Gore, 531 U.S. 98, 104–05 (2000) (same).

⁸³ See Bitensky, *supra* note 7, at 603 (asking whether the right to vote “is merely the mechanical act of pulling a lever” or whether it means something more).

⁸⁴ See *Rodriguez*, 411 U.S. at 114–15 (Marshall, J., dissenting) (stating that electoral participation in democracy increases as the population becomes more educated).

⁸⁵ See Bitensky, *supra* note 7, at 604–06 (discussing the impact of education on democracy).

⁸⁶ See *id.* (concluding that education is vital to democracy); *Rodriguez*, 411 U.S. at 114–15 (Marshall, J., dissenting) (concluding that education is vital to a democratic society).

⁸⁷ See U.S. CONST. amend. XXVI § 1 (establishing the minimum voting age at eighteen).

⁸⁸ *Id.*

⁸⁹ See *id.* (establishing the voting age at eighteen).

tainment and voting rights as at least somewhat attached such that the right to education can be seen as a foundational element to the right to vote.⁹⁰

Thus, although scholars have formulated some strong arguments in favor of the right to education, the Supreme Court has so far not reconsidered their merit since *Rodriguez*.⁹¹

II. BACKGROUND TO *CARSON V. MAKIN*

This Part discusses the factual and legal background of *Carson v. Makin*.⁹² Section A discusses the statutory scheme behind the case and the cause of action brought by the plaintiff.⁹³ Section B discusses the reasoning and holding of the case.⁹⁴

A. The Statutory Scheme and Cause of Action

In 2022, in *Carson*, the United States Supreme Court held that Maine's requirement that limited its tuition assistance program to "nonsectarian" secondary schools violated the Free Exercise Clause of the Constitution.⁹⁵ This holding was consistent with the direction of the Court's jurisprudence in the previous five years, but was remarkable because it concerned state funding of schools.⁹⁶ Although the Court has generally allowed some religious symbols and expressions to seep into public institutions, one could have assumed that

⁹⁰ See *Rodriguez*, 411 U.S. at 114–15 (Marshall, J., dissenting) (discussing the relationship between education and democracy).

⁹¹ *Id.* at 4–6 (rejecting the fundamental right to education).

⁹² See *infra* notes 93–142 and accompanying text.

⁹³ See *infra* notes 95–120 and accompanying text.

⁹⁴ See *infra* notes 121–142 and accompanying text.

⁹⁵ See U.S. CONST. amend. I (establishing the freedom of religious exercise); *Carson v. Makin*, 142 S. Ct. 1987, 2002 (2022) (holding that Maine's nonsectarian requirement was unconstitutional). Nonsectarian is generally defined as "[n]ot affiliated with or limited to any particular religious group or its beliefs." *Nonsectarian*, BLACK'S LAW DICTIONARY (12th ed. 2024). Maine law defines a nonsectarian school as a "school in accordance with the First Amendment of the United States Constitution." ME. STAT. tit. 20-A, § 2951 (2025).

⁹⁶ See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017) (holding that a law that conferred a benefit only on non-religious institutions for no reason other than their sectarian nature violated the Free Exercise Clause of the First Amendment); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021) (holding that a city's refusal to authorize a sectarian adoption agency that refused to certify same-sex parents violated the Free Exercise Clause of the First Amendment); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2432–33 (2022) (finding that a school's discipline of a football coach that held a prayer on the middle of the field following games violated the Free Exercise Clause of the First Amendment); see also *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971) (overruling a statutory scheme that sought to use public funds to reimburse teachers at religious schools), *overruled by Bremerton*, 142 S. Ct. 2407; *Bremerton*, 142 S. Ct. at 2442 (Sotomayor, J., dissenting) (stating that "[t]he Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools" (quoting *Edwards v. Aguillard*, 482 U.S. 578, 583–84 (1987))).

schools were a red line that the Court would not allow religion to cross.⁹⁷ With the holding in *Carson*, that is no longer the case.⁹⁸

1. Maine's Statutory Scheme

Maine is one of the most rural states in the Union.⁹⁹ As a result, it chooses not to provide secondary schools for many rural townships.¹⁰⁰ Nevertheless, as Maine guarantees an education to every child, it chooses to provide that education to rural townships through generally available tuition assistance.¹⁰¹ The tuition assistance is available to all students for attendance at a qualifying private secondary school so long as they are accepted.¹⁰² Schools are not limited by location; they can be located in another state, or even another country.¹⁰³ Prior to 1981, tuition assistance was available to those who wished to attend any school, so long as it met basic educational standards.¹⁰⁴ Schools could be religious or nonsectarian.¹⁰⁵

In 1981, citing the belief that the tuition assistance payments that went toward religious secondary schools violated the Establishment Clause of the First Amendment, Maine amended the tuition scheme.¹⁰⁶ The amendment required that students could only receive tuition assistance to attend “nonsectarian” schools.¹⁰⁷

⁹⁷ See *Van Orden v. Perry*, 545 U.S. 677, 691–92 (2005) (permitting a monument to the Ten Commandments to stay up on public land outside the Texas capitol building); *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2090 (2019) (allowing a war monument in the shape of a cross to stay up on public land); *Lemon*, 403 U.S. at 625 (overruling a statute that aimed to use public funds to reimburse teachers for expenses at religious schools), *overruled by Bremerton*, 142 S. Ct. 2407; *Ep-person v. Arkansas*, 393 U.S. 97, 106 (1968) (stating that the prohibition on the mixing of religion and public schools “is absolute”).

⁹⁸ 142 S. Ct. at 2002 (allowing states to fund religious schools through generally available tuition assistant).

⁹⁹ *Id.* at 1993.

¹⁰⁰ See *id.* (explaining that of Maine’s 260 school districts, fewer than half directly operate a secondary school).

¹⁰¹ See ME. CONST. art. VIII, pt. 1, § 1 (establishing that the legislature must require the several towns of Maine to provide public schools for the citizens of Maine); ME. STAT. tit. 20-A, § 2 (2025) (establishing that all persons shall have the opportunity to receive a free public education in accordance with the Constitution of Maine); *id.* § 5204 (establishing the general tuition assistance scheme).

¹⁰² See ME. STAT. tit. 20-A, § 2951 (establishing the requirements for a school under the tuition assistance program, including the nonsectarian requirement); *Carson*, 142 S. Ct. at 1993 (explaining that there are basic requirements for a school to be eligible for the tuition assistance program).

¹⁰³ See ME. STAT. tit. 20-A, § 2951 (establishing that a school must only be incorporated under the laws of Maine to be eligible); *Carson*, 142 S. Ct. at 1994 (explaining that there are no geographic limitations on the tuition assistance program).

¹⁰⁴ *Carson*, 142 S. Ct. at 1994.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

2. The Claim

Plaintiffs David and Amy Carson and Troy and Angela Nelson each lived in a school district that did not provide a public secondary school.¹⁰⁸ Each family wished to send their child to a sectarian secondary school.¹⁰⁹ The Carsons wished to send their daughter to Bangor Christian Schools.¹¹⁰ The Nelsons sent their son to Temple Academy without tuition assistance, and as a result could not afford to send their daughter to the same school.¹¹¹

Both families brought suit in federal court, asserting that the “nonsectarian” requirement violated the Free Exercise Clause of the First Amendment.¹¹² The plaintiffs argued that the restriction preventing them from attending a religious private school with the aid of tuition assistance was unconstitutional.¹¹³ In other words, because the claimants could not exercise their religion through attendance at a religious school with tuition assistance, Maine had burdened that right.¹¹⁴

This type of claim is not new.¹¹⁵ In 2017, in *Trinity Lutheran Church of Columbia v. Comer*, the Supreme Court held that when a government entity confers a benefit only onto non-religious institutions, excluding religious institutions for no other reason than their sectarian nature, the government violates the Free Exercise Clause of the First Amendment.¹¹⁶ In *Trinity Lutheran*, the Court ruled on a Missouri program that provided rubber surfacing to local playgrounds.¹¹⁷ The plaintiffs, a church that owned a local playground, brought suit because the state excluded playgrounds that were owned by religious institutions.¹¹⁸ The Court ruled that the denial of this benefit, as small as it was, constituted a burden of the church’s free exercise, holding that the statute in effect said “[n]o churches need apply.”¹¹⁹

¹⁰⁸ *Id.* at 1994–95.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1994.

¹¹¹ *Id.* at 1994–95.

¹¹² *Id.* at 1995. The Plaintiffs also alleged a violation of the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, but neither claim was considered by the Supreme Court. *Id.*

¹¹³ *See id.* (explaining the Plaintiffs’ claims).

¹¹⁴ *See id.* (explaining the inability to acquire a benefit otherwise available to non-religious people violates the Free Exercise Clause of the First Amendment).

¹¹⁵ *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024–25 (2017) (holding that a law that conferred a benefit only on non-religious institutions solely because of their religious nature violated the Free Exercise Clause of the First Amendment).

¹¹⁶ *Id.* at 2024–25; *see* U.S. CONST. amend. I (establishing the freedom of religious exercise).

¹¹⁷ 137 S. Ct. at 2017.

¹¹⁸ *See id.* at 2017–18 (explaining the process by which playgrounds were chosen for the grant to receive the rubber surfacing and how Trinity Lutheran’s playground was disqualified because Trinity Lutheran is a religious organization).

¹¹⁹ *See id.* at 2023–24 (holding that Trinity Lutheran had to choose between being a church and receiving a government benefit).

In *Carson*, the Court had to determine whether the case was analogous to *Trinity Lutheran*, and if it was, whether the special place education occupies in American society warranted further scrutiny or deference to the government for a scheme that sought to eliminate any possible Establishment Clause violation in publicly funded schooling.¹²⁰

B. Carson's Reasoning and Holding

The first question that *Carson* answered was whether discrimination on the basis of religion as a whole amounts to a violation of the Exercise Clause.¹²¹ In 1990, in *Employment Division v. Smith*, the Supreme Court held that a facially neutral, generally applicable law that has incidental effects on religious expression is subject only to rational basis review rather than strict scrutiny.¹²² This precedent has slowly been hollowed out since its holding over thirty years ago; the Court has created many exceptions to *Smith*, subjecting more statutes to strict scrutiny.¹²³ Of interest in *Trinity Lutheran* and *Carson*,

¹²⁰ *Carson*, 142 S. Ct. at 1996 (determining whether the precedent set in *Trinity Lutheran* applies).

¹²¹ See U.S. CONST. amend. I (establishing the freedom of religious exercise); *Carson*, 142 S. Ct. at 2000–02 (holding that distinguishing between sectarian and nonsectarian schools is a distinction on the basis of religious exercise).

¹²² See 494 U.S. 872, 890 (1990) (holding that a facially neutral generally applicable law that incidentally burdens religious exercise is subject to rational basis review). It is important to note that this legal framework mirrors the way the Equal Protection Clause of the Fourteenth Amendment treats statutes that have a disparate impact on race. See U.S. CONST. amend. XIV § 1 (establishing that all citizens are entitled to equal protection of the laws); see also *Washington v. Davis*, 426 U.S. 229, 244–46 (1976) (establishing that when a law merely has incidental disparate impacts on different races it is only subject to rational basis review). Rational basis review is the basic standard of review when a claimant challenges a government regulation. Meghan Boone, *Perverse & Irrational*, 16 HARV. L. & POL'Y REV. 393, 394–95 (2022). The theory of differing standards of scrutiny has its origins in *United States v. Carolene Products* footnote four. 304 U.S. 144, 153 n.4 (1938). The footnote outlines two different standards of review, a default lower standard, and a higher standard. *Id.* The higher standard of review is commonly known as strict scrutiny. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268–70 (2007). When a statute is found to burden a fundamental right, like freedom of speech, the Court applies strict scrutiny, asking whether the government has a compelling interest in violating that right, and whether the statute in question is narrowly tailored to that interest. *Id.* When a fundamental right is not burdened by a government regulation, but a claimant is challenging its constitutionality anyway, the Court employs the default standard, rational basis review. Boone, *supra*, at 394–95. In rational basis review, the Court merely asks whether there is a legitimate state interest in question, and whether there is a rational basis between the interest and the policy the government seeks to employ. *Id.* Some commentators have remarked that strict scrutiny is “‘strict’ in theory,” but “‘fatal in fact” whereas rational basis review employs “minimal scrutiny in theory and virtually none in fact.” Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

¹²³ See *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993) (holding that when lawmakers target a particular religion's conduct, the statute should not be considered neutral or generally applicable and therefore receives strict scrutiny); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1732 (2018) (finding that one biased decision-maker renders the statute not generally applicable as applied to the plaintiff and thus receives strict scrutiny); *Trinity Lutheran*, 137 S. Ct. at 2024 (holding that the denial of a benefit that could otherwise be received if not for religious

was whether a classification of all religions should be considered facially neutral.¹²⁴ The Court held in *Trinity Lutheran* that such classification was not facially neutral, and the Court did not so much as pretend that *Smith* applied in *Carson*; the case was not even cited.¹²⁵

In *Carson*, the Court found that the statute clearly violated the Exercise Clause and was subject to strict scrutiny.¹²⁶ Thus, the key issue was the status of education as a service provided by the government.¹²⁷ At the time of the Court's opinion in *Carson*, and still today, education is not a right under the United States Constitution.¹²⁸ Although many states treat it as a right under their respective state constitutions, as a matter of federal law, it is the state's choice whether to offer an education to its citizens.¹²⁹ As far as the United States Constitution is concerned, the education that Maine provides its citizens is no different than any other benefit conferred on the citizens of Maine.¹³⁰ In other words, an education may as well be rubber surfacing on a playground, a contract to help foster children find adoptive parents, or any other subsidy or benefit.¹³¹

The dissent disagreed.¹³² Justice Breyer argued that education's special place in society should distinguish *Carson* from *Trinity Lutheran*.¹³³ To con-

exercise constitutes a burden of the Free Exercise Clause); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021) (holding that the government must show a compelling interest to enforce the statute against the particular plaintiff, and not only to society as a whole).

¹²⁴ See *Trinity Lutheran*, 137 S. Ct. at 2021 (finding a law may not discriminate against "some or all religious beliefs" (quoting *Church of Lukumi Babalu Aye*, 508 U.S. at 532)).

¹²⁵ See *Smith*, 494 U.S. at 890 (holding that a facially neutral, generally applicable law that burdens religious exercise is only subject to rational basis review, not strict scrutiny); *Trinity Lutheran*, 137 S. Ct. at 2024–25 (holding that the statute discriminates on the basis of religion because it religious on the basis of religious character in general); *Carson*, 142 S. Ct. at 2002 (demonstrating that the Court did not apply the *Smith* framework anywhere in the opinion).

¹²⁶ 142 S. Ct. at 1997 (applying strict scrutiny).

¹²⁷ See *id.* at 2003–04 (Breyer, J., dissenting) (noting that the Establishment Clause concerns implicated because this service provided is public education).

¹²⁸ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37–38 (1973) (holding that education is not a fundamental right under the United States Constitution).

¹²⁹ See ME. CONST. art. VIII, pt. 1, § 1 (establishing that the legislature must require the several towns of Maine to provide public schools for the citizens of Maine); *Carson*, 142 S. Ct. at 2000 (holding that Maine "may provide a strictly secular education") (emphasis added).

¹³⁰ See *Carson*, 142 S. Ct. at 2000–01 (holding that the benefit conferred by Maine in *Carson* is the same as the benefit conferred by Missouri in *Trinity Lutheran*). But see *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (implying that education's status as a benefit is afforded greater weight than a basic social welfare benefit).

¹³¹ See *Carson*, 142 S. Ct. at 2000–01 (holding that the inability to receive tuition assistance to attend a religious private secondary school constitutes a burden for the purposes of the Exercise Clause); *Trinity Lutheran*, 137 S. Ct. at 2021–22 (holding that the inability to receive rubber surfacing for a playground constitutes burden for the purposes of the Exercise Clause); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021) (holding that the inability to receive a contract to connect foster children with potential adoptive parents constitutes a burden for the purposes of the Exercise Clause).

¹³² See *Carson*, 142 S. Ct. at 2003 (Breyer, J., dissenting) (stating that the prohibition on aiding religion in schools "is absolute" (quoting *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968))).

sider education as having the same import as rubber surfacing would trivialize the most important service the state of Maine provides its citizens.¹³⁴ Yet, in spite of the towering importance of education, the Court ruled that education occupied no special place in this case, at least not one special enough to overcome the Exercise Clause concerns.¹³⁵

From the majority's point of view, if Maine wanted to provide public, secular education, it must provide that education itself.¹³⁶ There is no means by which Maine may provide tuition assistance only to secular schools.¹³⁷ Nevertheless, the Court did distinguish between the religious character of the school and the religious character of the education as provided to the students.¹³⁸ If Maine had instead proscribed that the actual pedagogy as provided to students must be secular, and evaluated schools on that basis rather than the religious

¹³³ See *id.* at 2004–05 (describing how there is “play in the joints” between the Establishment and Free Expression Clauses that enables the Court to take a special view of education when it comes to religious issues (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 669 (1970))).

¹³⁴ See *id.* at 2006–07 (discussing whether rubber surfacing should be considered the same as the state in effect paying the salary of a teacher at a religious school); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (holding that education is the most important service provided by state and local governments); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (holding that public schools are the apex function of states); *Plyler*, 457 U.S. at 221 (holding that education as a service should be considered more important by the Court than a basic government benefit).

¹³⁵ See *Carson*, 142 S. Ct. at 2002 (holding that Maine's nonsectarian requirement and the lack of rubber surfacing in *Trinity Lutheran* each placed an equal burden on exercise).

¹³⁶ See *id.* at 2000 (stating that Maine may offer a strictly secular education in its public schools instead of the current scheme).

¹³⁷ See *id.* (noting that if Maine uses a tuition funding scheme, it is subject to the exercise clause and may not deny funds on the basis of religious exercise).

¹³⁸ See *id.* at 1996–2000 (distinguishing between Maine's requiring that the *school* be secular in nature versus requiring that the *education* be secular in nature). The majority seemed to imply that Maine's failure to write educational requirements into the statute, but yet still require that the school must be non-sectarian, reeked of religious discrimination. See *id.* (explaining how Maine had very little educational requirements in the statutory scheme). In other words, if Maine had been serious about providing a quality, secular education to its citizens, it would have had a stronger accreditation process and meaningful educational quality standards that would have ensured the schools were providing a quality education to their students. *Id.* The only meaningful requirement that the state imposed on schools was that they be non-sectarian. *Id.* To the Court, this may have felt like the decision in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* in which the Court held that one decision-maker's comments that were hostile to religion as a whole rendered the decision-making body non-neutral. 138 S. Ct. 1719, 1732 (2018); see *Carson*, 142 S. Ct. at 1998 (discussing how Maine did not make a good faith effort to ensure that its students were receiving a public school-like education, and rather focused solely on the religious character of the private school). That ruling brought the statute as applied to *Masterpiece Cakeshop* outside the protection of the *Smith* test that ordinarily calls for rational basis review, and up to strict scrutiny. *Masterpiece Cakeshop*, 138 S. Ct. at 1732. Although not stating specifically that this was the motivation for why the statute in *Carson* was struck down, the state's failure to ensure quality education via other standards but take great pains to make sure students could not attend a religious private school likely seemed to the Court as similar to the facts in *Masterpiece Cakeshop*. See *Carson*, 142 S. Ct. at 1996–2000 (describing the Maine statutory scheme as possessing few qualifying standards except for the requirement that the school be non-sectarian).

character of the schools, the Court may have decided the case differently.¹³⁹ Nevertheless, that was not the case in *Carson*.¹⁴⁰

In the end, *Carson* was a rather simple case after the holding in *Trinity Lutheran*.¹⁴¹ Although one can certainly argue that the bounds of the Establishment Clause should extend further where education is concerned, the Court did not agree, and the Exercise Clause prohibited the statutory scheme at issue in *Carson*.¹⁴²

III. MANDATED FUNDING OF RELIGIOUS SCHOOLS

Carson has opened the door for a revisitation of *Rodriguez*.¹⁴³ If the right to education can lead to mandated government funding of religious education, religious conservatives are a brand-new constituency that may support overturning *Rodriguez*.¹⁴⁴ Religious conservatives have had some serious muscle in determining the direction of the Court.¹⁴⁵ This Part discusses how the right to

¹³⁹ See *Carson*, 142 S. Ct. at 1996 (holding that withholding funding based on the religious character of the school triggered Exercise Clause protections).

¹⁴⁰ See *id.* (concluding that this case was determined because the statute looked at the religious character of the school and not the religious nature of the education provided).

¹⁴¹ See *id.* (explaining that the precedent in *Trinity Lutheran* applies); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024–25 (2017) (holding that a benefit denied to a group based on religious affiliation violates the Exercise Clause of the First Amendment).

¹⁴² See *Carson*, 142 S. Ct. at 2004 (Breyer, J., dissenting) (arguing that there is “play in the joints” between the Exercise Clause and the Establishment Clause and that where education is concerned, Establishment Clause concerns should be prioritized (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 669 (1970)); *id.* at 2002 (majority opinion) (holding that Maine is under no obligation to fund tuition assistance schemes and therefore is subject to the Exercise Clause).

Maine did not let the holding in *Carson* stand as written. *St. Dominic Acad. v. Makin*, 744 F. Supp. 3d 43, 52 (D. Me. 2024). While *Carson* was pending, the Maine legislature amended the Maine Human Rights Act (MHRA) to prohibit educational institutions that receive funding from Maine from discriminating between religions. *Id.* In 2023, a number of Catholic schools sued the state of Maine in the U.S. District Court for the District of Maine claiming that this new scheme violated the schools’ freedom of expression. *Id.* at 49. The District Court concluded that Maine’s law was not generally applicable, putting it outside the *Smith* test and requiring strict scrutiny. *Id.* at 69–70 (“[T]he Court concludes that the challenged provisions of the MHRA are neutral, but not generally applicable, making them subject to strict scrutiny.”). Judge Woodcock recognized Maine’s interest in eliminating discrimination as compelling, and denied the plaintiffs’ request for a preliminary injunction, holding that the law survived strict scrutiny. *Id.* at 78–79. The Plaintiffs have appealed the ruling to the U.S. Court of Appeals for the First Circuit where it remains pending as of the publication of this Note. *St. Dominic Academy v. Makin*, ACLU, <https://www.aclu.org/cases/st-dominic-academy-v-makin> [<https://perma.cc/5K3F-J29T>] (Nov. 14, 2024).

¹⁴³ See *Carson v. Makin*, 142 S. Ct. 1987, 2002 (2022) (holding that government funding of religious schools, if indirect, is not necessarily a violation of the Establishment Clause).

¹⁴⁴ See *id.* (holding that government funding of religious education is sometimes permissible).

¹⁴⁵ See Ruth Graham, *The Court Delivers Another Reassuring Decision for Religious Conservatives*, N.Y. TIMES (June 30, 2023), <https://www.nytimes.com/2023/06/30/us/politics/religious-conservatives-supreme-court.html> [<https://perma.cc/PTH4-Y6RT>] (explaining how recent Supreme Court decisions have disproportionately favored the interests of religious conservatives); Marci A. Hamilton & Leslie C. Griffin, *How Did Six Conservative Catholics Become Supreme Court Justices Together?*, VERDICT

education as found by a conservative Supreme Court could differ from the right found by a liberal Court and examines the Free Exercise claim that could be brought by the religious parents of a child after that right has been found.¹⁴⁶ Section A reviews the differing types of education rights.¹⁴⁷ Section B evaluates a potential claim brought by a religious parent after a right to education has been found by the Court.¹⁴⁸

A. The Types of Rights to Education

With *Carson* opening the gateway to an overturning of *Rodriguez*, there is still the question of what the education right as found by a conservative Court looks like, or rather, what it would guarantee to Americans.¹⁴⁹ For example, in 1965, in *Griswold v. Connecticut*, the Supreme Court held that the right to contraception was fundamental but limited that right to married couples.¹⁵⁰ Only seven years later did the Court expand that right to all persons in *Eisenstadt v. Baird*.¹⁵¹ If the Court found the right to education, it could be limited in any number of ways.¹⁵² The type of education right is likely to vary wildly depending on the Court that finds such a right.¹⁵³

(May 3, 2023), <https://verdict.justia.com/2023/05/03/how-did-six-conservative-catholics-become-supreme-court-justices-together> [<https://perma.cc/NP4A-WB7U>] (illustrating how religious conservatives have gotten their preferred Justices appointed to the Supreme Court).

¹⁴⁶ See *infra* notes 146–243 and accompanying text.

¹⁴⁷ See *infra* notes 149–202 and accompanying text.

¹⁴⁸ See *infra* notes 203–243 and accompanying text.

¹⁴⁹ Compare *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 111–13 (1973) (Marshall, J., dissenting) (arguing for a secular right to education so that children may experience the freedom to enjoy the rights to speech, expression, and to exercise their civic and political rights), with *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925) (framing the right to educational choice as the parental right rather than the child’s right), *Wisconsin v. Yoder*, 406 U.S. 205, 215–16 (1972) (describing the right of a child to not be subject to a compulsory secondary education law as the parent’s right to set broad educational objectives for their child), and *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2432–33 (2022) (holding that schools do not need to remain completely secular in all respects, so long as a reasonable person would not feel coerced by the religious display).

¹⁵⁰ See 381 U.S. 479, 485–86 (1965) (limiting the fundamental right to contraception to married persons).

¹⁵¹ See 405 U.S. 438, 453 (1972) (holding that the right to be free from governmental intrusion into the decision of whether to bear or beget a child did not depend on whether the claimant was married or single).

¹⁵² See *Pierce*, 268 U.S. at 533–34 (emphasizing a parental right to raise children and determine their educational choices); *Yoder*, 406 U.S. at 215–16 (holding that parents may have broad reasons, including religion, to set educational objectives for their children).

¹⁵³ See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 663–76 (2015) (describing the right to gay marriage as being found under a right to marriage, rather than an infringement on the Equal Protection Clause and the recognition of sexual orientation as a suspect class); see also Kent Greenfield & Adam Winkler, Opinion, *Without Kennedy, the Future of Gay Rights Is Fragile*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/2018/06/28/opinion/kennedy-gay-rights-same-sex-marriage.html> [<https://perma.cc/D24X-97F5>] (discussing how the Court or individual author of an opinion can drastically change how a particular right is framed and viewed in the law).

In his 1976 dissent in *San Antonio Independent School District v. Rodriguez*, Justice Marshall spelled out clearly what type of education right he would have found.¹⁵⁴ Much of the dissent was focused on the civic benefits of education.¹⁵⁵ In addition, for all his discussion of the First Amendment's influence on a right to education, he focused entirely on the Speech Clause, and did not once mention education's role in a person's ability to worship according to their own beliefs under the Exercise Clause.¹⁵⁶ Justice Marshall argued for a secular, civic-minded education, so that citizens could be free to fully exercise their right to vote, their right to life, and their rights to free speech and expression.¹⁵⁷

It is likely that the Supreme Court in 2025 would not find the same type of right to education that Justice Marshall would have.¹⁵⁸ This Court is much

¹⁵⁴ See 411 U.S. at 110–17 (finding that the basis for the right to education includes the right to participate in the marketplace of ideas, to participate in democracy, and to make decisions about matters that the Supreme Court had previously declared to be fundamental, including the right to procreate). *Rodriguez* was a five-four decision, with Justice Harry Blackmun arguably casting the deciding vote. *Id.* at 2–3. Justice Blackmun was appointed to the bench to replace Justice Abe Fortas who was forced to resign in 1969 after a scandal over speaking fees. *Justice Abe Fortas*, JUSTIA, <https://supreme.justia.com/justices/abe-fortas/> [<https://perma.cc/7NVL-4GC9>]. It is likely that had he still been on the bench seven years later, Justice Fortas would have voted with Justice Marshall in *Rodriguez*; his opinions in *Epperson v. Arkansas* and *Tinker v. Des Moines Independent Community School District* suggest strong support for both the importance of education and public schools as an institution. See *Epperson v. Arkansas*, 393 U.S. 97, 107–09 (1968) (Fortas, J.) (holding that a law banning the teaching of evolution was unconstitutional); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506–07 (1969) (Fortas, J.) (concluding that students and teachers maintain their rights to speech and expression in public schools). Justice Fortas's forced resignation is a “what-if” that still haunts liberals over half a century later. See John P. MacKenzie, *The Supreme Court Justice Who Resigned in Disgrace Over His Finances*, WASH. POST (Apr. 17, 2023), <https://www.washingtonpost.com/history/2023/04/17/supreme-court-clarence-thomas-abe-fortas/> [<https://perma.cc/KWZ2-LDMT>] (explaining how President Nixon used Justice Fortas's resignation as an opportunity to appoint more activist conservative Justices).

¹⁵⁵ See *Rodriguez*, 411 U.S. at 113–15 (explaining the effect of education on the civic and political participation of citizens).

¹⁵⁶ See *id.* at 112–13 (discussing the classroom as the “marketplace of ideas” and discussing education as vital to the freedoms of speech and association although declining to mention its importance to the freedom of exercise).

¹⁵⁷ See *id.* at 110–17 (discussing only the civic benefits of education and declining to argue for any benefits a right to education would give a person in their exercise of the freedom of religious exercise).

¹⁵⁸ Compare *id.* (discussing the right to education within the confines of a secular, civic-minded education that did not mention the parental interest in a right to education, or the possible Exercise Clause influence on such a right), with *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2423 (2022) (quoting *Tinker*, 393 U.S. at 506) (holding that teachers and students do not shed their right to freedom of exercise at the schoolhouse gate); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 533–34 (1925) (framing the right to educational choice as the parental right rather than the child's right); *Wisconsin v. Yoder*, 406 U.S. 205, 215–16 (1972) (describing the right of a child to not be subject to a compulsory secondary education law as the parent's right to determine their child's broad educational objectives). Justice Gorsuch directly quoted *Tinker v. Des Moines Independent Community School District* in *Kennedy v. Bremerton School District*. *Bremerton*, 142 S. Ct. at 2423 (stating that neither teachers

more conservative, both in its view of religion, and in its view of substantive due process.¹⁵⁹ If it is religious conservatives who are pushing for the proposed right, the right to education would likely vary from Justice Marshall's proposed version in three respects.¹⁶⁰ First, it would be much more limited in which levels of education are considered fundamental, relying in large part on Justice Scalia's framework for the finding of due process rights in *Michael H. v. Gerald D.*¹⁶¹ Second, it would add a religious component to that right, because this Court is far less fearful of Establishment Clause violations than Justice Marshall was.¹⁶² Third, this Court is likely to be much more protective of the rights of parents to choose their child's education.¹⁶³ Although the right to education would still be viewed from the point of view of the child, it would

nor students "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (quoting *Tinker*, 393 U.S. at 506)). *Bremerton* involved a teacher's right to free exercise within the confines of a school, rather than non-religious speech or expression. *Id.* at 2415–16. *Tinker* referred only to the right to "speech or expression," which Justice Gorsuch assumed included the right to free exercise. 393 U.S. at 506; see *Bremerton*, 142 S. Ct. at 2423 (stating that the Constitution's extension of protection to a teacher's speech or expression inside the schoolhouse gate must include exercise as well).

¹⁵⁹ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2246 (2022) (finding that a fundamental right must be based in "history and tradition" to be recognized under the Constitution, rather than considered an interest that has historically found important by American society); *Carson v. Makin*, 142 S. Ct. 1987, 2002 (2022) (holding that indirect funding of religious schools through a generally available tuition assistance scheme violated the Exercise Clause of the First Amendment, but did not violate the Establishment Clause).

¹⁶⁰ See *Yoder*, 406 U.S. at 215–16 (framing a right to education as a parental right to choose broad educational objectives for their child). Compare *Rodriguez*, 411 U.S. at 110–17 (discussing a potential right to education as the child's right, implying it would be secular in nature and include both primary and secondary schools), with *Bremerton*, 142 S. Ct. at 2423 (holding that neither students nor teachers shed their right to freedom of exercise at the schoolhouse gate).

¹⁶¹ See 491 U.S. 110, 127 n.6 (1989) (explaining that in order for a right to be recognized as "fundamental" under the doctrine of substantive due process, it must be based in American history and tradition and viewed at the highest level of specificity).

¹⁶² Compare *Bremerton*, 142 S. Ct. at 2432–33 (expanding the horizon of the Exercise Clause to protect conduct that previously would have been unconstitutional under the Establishment Clause), and *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (creating the *Lemon* test that was disfavored in *Bremerton*), overruled by *Bremerton*, 142 S. Ct. 2407, with *County of Allegheny v. Am. C.L. Union Greater Pittsburgh Ch.*, 492 U.S. 573, 645–46 (1989) (Brennan, J., dissenting) (arguing in a dissent that Justice Marshall joined that a government's public display of the Christmas tree and menorah were violations of the Establishment Clause).

¹⁶³ Compare *Pierce*, 268 U.S. at 533–34 (framing the right to educational choice as the parental right to choose for their child rather than a child's right), and *Yoder*, 406 U.S. at 215–16 (describing the right of a child to not be subject to a compulsory secondary education law as the parent's right to determine their child's educational objectives), with *Rodriguez*, 411 U.S. at 112–13 (Marshall, J., dissenting) (framing the right to education as emanating from a child's right to exercise their First Amendment right to freedom of speech).

still be subject to a parent's right to choose the child's education, so long as that education meets a baseline level.¹⁶⁴

Subsection 1 discusses the level of education that would be protected by a conservative court.¹⁶⁵ Subsection 2 examines how religion and education could be intertwined in the conservative education right.¹⁶⁶ Subsection 3 discusses the potential strength of the parental right to choose their child's education in contrast to a child's right to be educated.¹⁶⁷

1. The Level of Education to Be Protected

In recent decisions such as *Glucksberg* and *Dobbs*, conservative Justices have resolutely held true to Justice Scalia's framework for substantive due process as articulated in *Michael H.*¹⁶⁸ Justice Scalia argued that in order for an interest to be constitutionally protected under the doctrine of substantive due process, it had to be legally protected in American history and tradition.¹⁶⁹

One can successfully argue for the right to education using Justice Scalia's framework.¹⁷⁰ Massachusetts was the first state to pass a compulsory education law in 1852, requiring attendance by children ages eight to fourteen.¹⁷¹ Other states followed suit in the nineteenth century.¹⁷² Education was not just a

¹⁶⁴ See *Yoder*, 406 U.S. at 215 (acknowledging the governmental interest in ensuring that a child is adequately educated but holding that the parental interest to choose the child's education takes over at a certain point).

¹⁶⁵ See *infra* notes 168–185 and accompanying text.

¹⁶⁶ See *infra* notes 186–193 and accompanying text.

¹⁶⁷ See *infra* notes 194–202 and accompanying text.

¹⁶⁸ See *Dep't of State v. Muñoz*, 144 S. Ct. 1812, 1817–18 (2024) (holding that Justice Scalia's framework for substantive due process applied to an immigrant who claimed a fundamental "right to bring her noncitizen spouse to the United States"); *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2246 (2022) (holding that due process rights must be deeply rooted in American history and tradition); *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (following generally Justice Scalia's framework for substantive due process in *Michael H.* by holding that the Due Process Clause only protects liberties that are rooted deeply in American history and tradition); *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (plurality opinion) (stating that in order for an interest to be considered fundamental for the Due Process Clause of the Fourteenth Amendment, it has to be traditionally legally protected by American society, and the interest must be viewed at the most specific level).

¹⁶⁹ *Michael H.*, 491 U.S. at 127 n.6.

¹⁷⁰ See Bitensky, *supra* note 7, at 586–90 (explaining the argument for a right to education using Justice Scalia's framework); Emily Barbour, *Separate and Invisible: Alternative Education Programs and Our Educational Rights*, 50 B.C. L. REV. 197, 225–28 (2009) (arguing that education has been legally protected under American history and tradition).

¹⁷¹ See Anjaleck Flowers, *The Implied Promise of a Guaranteed Education in the United States and How the Failure to Deliver It Equitably Perpetuates Generational Poverty*, 45 MITCHELL HAMLINE L. REV. 1, 5–6 (2019) (discussing the 1852 Massachusetts compulsory education law and its text).

¹⁷² See Bitensky, *supra* note 7, at 587–88 (discussing how thirty-eight states adopted compulsory education laws in the nineteenth century and every state had a compulsory education law by 1918).

service provided optionally to the people; it was something that all children had a legally protected right to.¹⁷³

Nevertheless, Justice Scalia's framework does not stop at just asking whether an interest has been protected in American tradition.¹⁷⁴ His framework also required that the right must be viewed from the most specific level of generality.¹⁷⁵ This runs in sharp contrast to how the Warren Court expanded rights.¹⁷⁶ The Warren Court held that the right to "life" in the Fourteenth Amendment meant the right to procreation in *Skinner v. Oklahoma* in 1942.¹⁷⁷ It then viewed the right to procreate at a broader level of generality with the holdings in *Griswold*, *Eisenstadt*, and *Roe v. Wade*, expanding it from just a protection against castration to affirmative protections of birth control in marriage, out of marriage, and finally abortion.¹⁷⁸ Justice Scalia's framework took aim at the Court's previous habit of expanding the level of generality to encompass more and more interests.¹⁷⁹ He wrote in *Michael H.* that if there were an interest that had been traditionally legally protected in American society, its protection must be contained to the most specific level of generality to prevent an irresponsible expansions of rights.¹⁸⁰

When applied to education, it is easy to see what the history and traditionalists on the Court might argue.¹⁸¹ The original Massachusetts law protect-

¹⁷³ See *id.* at 568–88 (noting children's access to education through American history).

¹⁷⁴ See *Michael H.*, 491 U.S. at 127 n.6 (stating that in addition to asking whether a specific right is based in history and tradition, it must be viewed from the most specific level so as to avoid an arbitrary decision on what level of generality to view the right in question from).

¹⁷⁵ *Id.*

¹⁷⁶ See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (holding that the right to procreate could be viewed more generally to include a right to procreation); *Skinner v. Oklahoma*, 316 U.S. 535, 541–42 (1942) (finding the fundamental right to procreate).

¹⁷⁷ 316 U.S. at 541–42.

¹⁷⁸ See *id.* (establishing that the right to procreate is a fundamental right under the Due Process Clause of the Fourteenth Amendment); *Griswold v. Connecticut*, 381 U.S. 479, 484–85 (1965) (expanding the right to procreate to include the right to contraception in marriage); *Eisenstadt*, 405 U.S. at 453 (expanding the right to contraception in marriage to include the right to contraception regardless of marital status); *Roe v. Wade*, 410 U.S. 113, 164 (1973) (expanding the right to contraception to include the right to abortion), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284–85 (2022).

¹⁷⁹ See *Michael H.*, 491 U.S. at 127 n.6 (stating that an interest must be viewed from the most specific level, resulting in the recognition of fewer interests as fundamental).

¹⁸⁰ *Id.* Viewing this formula at work in *Michael H.*, Justice Scalia wrote that if there was no tradition to consult either way regarding the natural fathers of children conceived adulterously, then the Court could refer back to the tradition regarding natural fathers in general. *Id.* Because there was a tradition regarding biological fathers of children conceived adulterously, however, the Court had to consult that tradition to determine how to articulate the right in question for the purposes of the Fourteenth Amendment. *Id.*

¹⁸¹ See Bitensky, *supra* note 7, at 586–90 (presenting the argument for a fundamental right to education using the framework of history and tradition); Barbour, *supra* note 170, at 225–28 (advocating for a fundamental right to education through its protection in American history and tradition);

ed only six years of education.¹⁸² A complete secondary education is still not compulsory in many states.¹⁸³ Thus, the Court could very well hold that although a *primary education* might be traditionally legally protected and fulfill all the requirements under the doctrine of substantive due process, because the right must be viewed at its most specific level, legal protection must stop at primary education.¹⁸⁴ Secondary education has not been protected in the same ways that primary education has been, and thus could be distinguished by the Court.¹⁸⁵

2. The Education Right and Religion

Religion and education have long been linked.¹⁸⁶ Secular public education is a modern phenomenon.¹⁸⁷ Thus, the education right that this Court would find could be vastly different in its relationship with religion.¹⁸⁸

That is not to say that the Court would mandate or even allow the government to provide religious public schools itself; the Establishment Clause is

Flowers, *supra* note 171, at 5–6 (explaining the history of compulsory education laws in the United States).

¹⁸² See Flowers, *supra* note 171, at 5 n.14 (explaining that the original Massachusetts compulsory education law only required children to be in school between the ages of eight and fourteen).

¹⁸³ See *id.* at 6–7 (describing the variation between states in how long school remains compulsory for its citizens).

¹⁸⁴ See *Michael H.*, 491 U.S. at 127 n.6 (finding that an interest under the doctrine of substantive due process must be viewed at the most specific level when recognized as fundamental); Flowers, *supra* note 171, at 6–7 (describing the differences in compulsory secondary education laws between different states).

¹⁸⁵ See Bitensky, *supra* note 7, at 586 (discussing the argument for a right to education using Justice Scalia’s framework in *Michael H.*); Flowers, *supra* note 171, at 6–7 (noting how compulsory secondary education laws are not as strict as compulsory primary education laws).

¹⁸⁶ See *Carson v. Makin*, 142 S. Ct. 1987, 1994–95 (2022) (finding that religious education can be part of a “sincerely held religious belief”); *Wisconsin v. Yoder*, 406 U.S. 205, 215–16 (1972) (finding a religious interest in education); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 533–34 (1925) (acknowledging a parental interest in religious education).

¹⁸⁷ See Flowers, *supra* note 171, at 5–6 (discussing the history of public education in the United States).

¹⁸⁸ See *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2432–33 (2022) (allowing for a greater religious presence in public schools); *Carson*, 142 S. Ct. at 2000 (allowing for government to indirectly subsidize religious education). *Bremerton* concerned a public high school football coach who wished to hold an optional group prayer on center of the football field after each football game. 142 S. Ct. at 2415–18. Under previous precedent, the Court should have considered whether the prayer endorsed religion. *Id.* at 2420. The Court overturned this standard in *Bremerton*, however, instead setting the standard of Establishment Clause violations to be whether a reasonable person would feel coerced by the display. *Id.* The Court ruled that the coach did not coerce the players to join and upheld his right to pray in such a manner. *Id.* at 2432–33.

The Court may also consider whether a state may directly fund a religious charter school but has not arrived at a precedent-setting judgment as of the publication of this Note. See *infra* note 192 (discussing *St. Isidore of Seville Catholic Virtual School v. Drummond* and its implications).

clear that the government cannot provide religious schools itself.¹⁸⁹ Based on its jurisprudence in cases like *Kennedy v. Bremerton School District*, and *Carson v. Makin*, however, the current Supreme Court does not view the existence of religion in schools with the same fear that Justice Marshall did.¹⁹⁰ In fact, it is likely that many Justices on the Court see religious education as having a positive influence on America's youth.¹⁹¹

Thus, the Court would likely find that a child attending a religious private school rather than a secular public school would be sufficient for fulfilling that child's right to an education.¹⁹² Where Justice Marshall might inquire into whether the influences of religion in school would impact that child's right to a secular education, this Court might only ask whether the quality of the education given to the child is sufficient to meet the baseline set by the Court, ignoring the presence of any religious influences in the education itself.¹⁹³

¹⁸⁹ See U.S. CONST. amend. I (preventing the government from respecting establishment of a religion); *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968) (stating that the "prohibition" on mixing public school and religion "is absolute").

¹⁹⁰ Compare *Bremerton*, 142 S. Ct. at 2432–33 (expanding the horizon of the Exercise Clause to protect conduct that previously would have been unconstitutional under the Establishment Clause), and *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (creating the *Lemon* test that was disfavored in *Bremerton*), overruled by *Bremerton*, 142 S. Ct. 2407, with *County of Allegheny v. Am. C.L. Union Greater Pittsburgh Ch.*, 492 U.S. 573, 645–46 (1989) (Brennan, J., dissenting) (arguing in a dissent in which Justice Marshall joined that a government's public display of the Christmas tree and menorah were violations of the Establishment Clause).

¹⁹¹ See, e.g., KEN FOSKETT, JUDGING THOMAS: THE LIFE AND TIMES OF CLARENCE THOMAS 88–91, 95–97 (2004) (discussing generally the role religious education has played in the life of Justice Clarence Thomas); Bryn Stole, *Amy Coney Barrett: Mother of 7, Metairie Native, Solid Conservative . . . Next Supreme Court Justice?*, NEW ORLEANS ADVOC. (July 6, 2018), https://www.nola.com/article_d71cb604-ae33-5892-8848-04d2113bd7a6.html [<https://perma.cc/J4SG-7DHE>] (noting Justice Amy Coney Barrett's education at an all-girls Roman Catholic secondary school and Notre Dame). Justice Barrett had to recuse herself from *St. Isidore of Seville Catholic Virtual School v. Drummond* due to her connections to the religious charter school that was the petitioner in the case. Greg Stohr, *Supreme Court Splits 4-4 in Setback to Religious Charter School*, BLOOMBERG LAW (May 22, 2025), <https://news.bloomberglaw.com/us-law-week/supreme-court-splits-4-4-in-setback-to-religious-charter-school> [<https://perma.cc/PG9L-SVJC>].

¹⁹² See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 533–34 (1925) (holding that a state could not compel attendance of a child to a public school and ban private schooling, permitting that child to attend a religious private school); *Wisconsin v. Yoder*, 406 U.S. 205, 215–16 (1972) (finding that compelling a child to attend public secondary school could be an infringement on religious exercise).

As this Note goes to publication, the Court declined to rule on another case with implications for religious schools. Adam Liptak, *Supreme Court Seems Open to a Religious Charter School in Oklahoma*, N.Y. TIMES (Apr. 30, 2025), <https://www.nytimes.com/2025/04/30/us/politics/supreme-court-charter-school.html> [<https://perma.cc/F5U6-U4FK>]; Stohr, *supra* note 191. In *St. Isidore of Seville Catholic Virtual School v. Drummond*, the Court was asked to decide whether a state may issue funds to religious charter schools. Liptak, *supra*. The Court affirmed the decision of the Court of Appeals in a four-four tie after Justice Barrett recused herself. Stohr, *supra* note 191. The decision was a setback for religious charter schools who want state funding, but it is likely the Court will hear a similar case in the future with the full complement of Justices present. *Id.*

¹⁹³ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 72 (1973) (Marshall, J., dissenting) (arguing that a disparity in educational quality between two school districts is enough to trigger a

3. The Parent's Right vs. the Child's Right

Finally, the Court must determine who the right belongs to.¹⁹⁴ Is it the parent's right to make sure their child receives an adequate free education from the government, or is it the child's right to receive an adequate education so that they may start life on a relatively equal footing with the rest of society?¹⁹⁵

Justice Marshall's dissent in *Rodriguez* argued that the right lives within the child.¹⁹⁶ It is the child's right to ensure that they are able to utilize their freedom of speech and expression, as well as exercise their right to vote and other civic duties.¹⁹⁷ When he introduced the substantive due process cases, he implied that there is an aspect of a parental right to education, but he never clearly stated that the right to education lies solely in the parental right to ensure their child receive an education.¹⁹⁸

This Court would also likely refer to *Pierce v. Society of Sisters* as holding ultimate weight.¹⁹⁹ Parents would not be able to decide that their child

violation of a potential fundamental right to education); *id.* at 112–13 (implying that the right to education would be secular in nature through a government provided service in compliance with the Establishment Clause); Bitensky, *supra* note 7, at 566–67 (contending that *Rodriguez* may have come out differently on the question of education as a fundamental right if Texas were not providing a basic minimum level of education to a portion of its citizens, rather than merely varying the levels in quality between them above that basic level); see also Gary B. v. Whitmer, 957 F.3d 616, 644 (6th Cir.) (discussing how *Rodriguez* left the door open for the Court to find a fundamental right to a basic minimum education), *vacated en banc*, 958 F.3d 1216 (6th. Cir. 2020).

¹⁹⁴ Compare *Pierce*, 268 U.S. at 533–34 (framing the right to educational choice as the parental right to choose for their child rather than a child's right), and *Yoder*, 406 U.S. at 215–16 (describing the right of a child to not be subject to a compulsory secondary education law as the parent's right to determine their child's broad educational objectives), with *Rodriguez*, 411 U.S. at 112–13 (Marshall, J., dissenting) (framing the right to education as emanating from a child's right to exercise their First Amendment right to freedom of speech).

¹⁹⁵ Compare *Pierce*, 268 U.S. at 533–34 (framing the right to educational choice as a parental right for their child), and *Yoder*, 406 U.S. at 215–16 (describing a parent's right to determine broad educational objectives for their child), with *Rodriguez*, 411 U.S. at 112–13 (Marshall, J., dissenting) (framing the right to education as from the point of view of the child and their right to exercise their First Amendment right to freedom of speech).

¹⁹⁶ See 411 U.S. at 112–13 (Marshall, J., dissenting) (describing the right to education as a child's right to fully exercise their First Amendment right to free speech, as well as the right to study, inquire, and evaluate ideas); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion) (describing a right of students to inquire, study, and evaluate ideas free from suspicion and mistrust, or else American civilization would decay).

¹⁹⁷ See *Rodriguez*, 411 U.S. at 112–13 (Marshall, J., dissenting) (arguing for a right to education so that all citizens may fully exercise their fundamental rights to free speech and expression, as well as their right to vote and participate in government).

¹⁹⁸ See *id.* at 100–01 (dissenting that in the same way *Skinner v. Oklahoma* and *Roe v. Wade* found fundamental rights that are not expressly enumerated in the Constitution, one can find a right to education under the same theory of substantive due process).

¹⁹⁹ See 268 U.S. at 533–34 (discussing the importance of education within the context of a parental right). To the extent that the genealogy of twentieth century cases matters in the Court's analysis, *Pierce* does not stand for the proposition that *children* have a right to education, but rather that *parents* have a plenary right to determine their child's education. *Id.* If the Court's political motivations

could not attend school, but they would hold the ultimate decision-making authority in deciding *where* the child would attend school.²⁰⁰ Thus, the current Court may agree with Justice Marshall that the right lives with the child, but would articulate a broader right for parents than Justice Marshall would have.²⁰¹ The current Court would likely conclude that all children have a fundamental right to education, but where they receive that education is of no interest to the government, and should be determined only by the child's parent(s).²⁰²

B. Articulating the Claim

If the current Supreme Court found a right to education as described in the previous section, a citizen could attempt to bring a claim to require the government to pay to send their child to a religious private school.²⁰³ A plaintiff's claim would rest on the argument that freedom of expression requires that the state provide a funding stream for alternative religious schooling.²⁰⁴

The Exercise Clause of the First Amendment states that "Congress shall make no law prohibiting the free exercise [of religion]."²⁰⁵ To secure their government provided funding stream, the claimant must initially argue that the act of attending a religious institution is a function of free exercise.²⁰⁶ Next,

cause it to require the government to provide the funding stream so the claimant can attend a religious school, it can use *Pierce* as support. *See id.* (discussing the scope of the parental right); *Yoder*, 406 U.S. at 215–16 (describing the right of a parent to direct broad educational goals for their child).

²⁰⁰ *See Pierce*, 268 U.S. at 533–34 (finding that laws requiring that all children attend public schools (rather than a school in general) are unconstitutional); *Yoder*, 406 U.S. at 215–16 (1972) (holding that a law requiring compulsory attendance of a child to secondary school was unconstitutional).

²⁰¹ *See Rodriguez*, 411 U.S. at 112–13 (Marshall, J., dissenting) (discussing the child's interest in their own education); *Brown v. Bd. of Ed.*, 347 U.S. 483, 493 (1954) (stating that education is the most vital function of state governments); *Yoder*, 406 U.S. at 213 (holding that public schools are the apex function of states). *See generally* Barbour, *supra* note 170, at 219–24 (discussing the parental right in education); Carden, *supra* note 29, at 717–21 (exploring a possible right to education through a negative right against arbitrary confinement).

²⁰² *See Pierce*, 268 U.S. at 533–34 (discussing the importance of education but holding that parents should determine where a child receives it); *Yoder*, 406 U.S. at 213 (holding that although education is the apex function of states, the state interest in educating children itself is not without limits).

²⁰³ *See Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (stating that rights should be considered fundamental from the most specific level of generality); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2432–33 (2022) (holding that religion may permeate into education in certain circumstances); *Carson v. Makin*, 142 S. Ct. 1987, 2000–02 (2022) (holding that the prohibition on religion in public education is no longer absolute); *id.* at 2006 (Breyer, J., dissenting) (suggesting that *Carson* may lead to a right for children to attend religious schools instead of public schools with state funds); *Yoder*, 406 U.S. at 215–16 (holding that parental right to set their child's education was stronger than the government interest in ensuring that the child receives an education).

²⁰⁴ *See Carson*, 142 S. Ct. at 1998–99 (holding that the *benefit* in question must conform to the Exercise Clause).

²⁰⁵ U.S. CONST. amend. I.

²⁰⁶ *See Carson*, 142 S. Ct. at 1996 (holding that determining which school a person could send their child to using a generally available tuition assistance funding scheme was a function of religious

they must argue that the government's refusal to provide a funding stream to attend a religious institution is a burden on that right to free exercise.²⁰⁷ Lastly, the claimant must argue that such a funding stream would not infringe on the Establishment Clause.²⁰⁸ Subsection 1 discusses the Exercise Clause issues with this claim.²⁰⁹ Subsection 2 discusses the Establishment Clause concerns with the possible government funding stream.²¹⁰

1. Exercise Clause Implications

It is generally accepted that schooling is a function of religious exercise.²¹¹ Assuming that the plaintiff's beliefs are sincerely held, attendance at school is absolutely a function of freedom of exercise.²¹² The analysis does not stop there, however.²¹³ Plaintiffs must prove that the right to freedom of expression is bur-

exercise); *Yoder*, 406 U.S. at 215–16 (determining that the act of not attending school was, in this circumstance, an act of religious expression).

²⁰⁷ See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2023–24 (2017) (concluding that restricting which recipients are eligible for a government benefit on the basis of religious exercise is a violation of the Exercise Clause); *Carson*, 142 S. Ct. at 1997–98 (holding that when the benefit is restricted in use on the basis of religious exercise, there is a violation of the Exercise Clause).

²⁰⁸ See *Carson*, 142 S. Ct. at 1997–98 (finding that when states fund religious schools there is no violation of the Establishment Clause so long as the government is not choosing the target of the funds). Another important holding of *Trinity Lutheran* was that if a state wishes to comply with the Establishment Clause through policies requiring the disentanglement of government and religion more than the Constitution requires, that cannot serve as a compelling interest when undertaking strict scrutiny for an Exercise Clause violation. *Trinity Lutheran*, 137 S. Ct. at 2024. Because the Exercise Clause begins where the Establishment Clause ends, one cannot use “extra” compliance with the Establishment Clause as a compelling interest in suppressing the exercise rights of a citizen or a group of citizens. *Id.* Thus, it would not be enough to argue here that states may prevent such a funding scheme simply out of fear that there *may* be an Establishment Clause violation. See *id.* (holding that complying with Establishment Clause more than necessary does not serve as a compelling interest). They must prove that there is in fact an Establishment Clause violation, which, since *Bremerton*, has proven increasingly difficult. See *id.* (holding that there must be in fact an Establishment Clause violation in order to claim its protection from the obligations required by Exercise Clause); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2420–21 (2022) (abandoning the *Lemon* test for Establishment Clause violations).

²⁰⁹ See *infra* notes 211–230 and accompanying text.

²¹⁰ See *infra* notes 231–243 and accompanying text.

²¹¹ See *Carson*, 142 S. Ct. at 1994–95 (holding that determining which school their child should go to was a function of their sincerely held religious beliefs); *Yoder*, 406 U.S. at 215–16 (holding that school attendance is a function of religious exercise).

²¹² See *Carson*, 142 S. Ct. at 1994–95 (holding that school choice is a function of their sincerely held religious beliefs); *Yoder*, 406 U.S. at 215–16 (holding that determining which school a person's child attends is a function of religious exercise).

²¹³ See *Trinity Lutheran*, 137 S. Ct. at 2031 (Sotomayor, J., dissenting) (arguing that although the plaintiff's religious beliefs were sincerely held, the government policy in question had not burdened those beliefs).

dened by the state's failure to provide access to religious schools to the plaintiffs.²¹⁴

From one perspective, the case law on burdens to the freedom of exercise is extremely favorable to the plaintiffs in this case.²¹⁵ *Carson* and *Trinity Lutheran Church of Columbia v. Comer* both held that a benefit denied on the basis of religious exercise as a whole (not just burdening one religion's exercise), constitutes a burden of the Free Exercise Clause.²¹⁶ In *Carson*, the benefit denied was a funding stream that restricted where the receivers of the funds could spend it on the basis of religious exercise.²¹⁷ In *Trinity Lutheran*, the reception of the benefit, the rubber surfacing, was granted or denied on the basis of religious exercise itself.²¹⁸

A claimant arguing for a funding stream to attend religious school must argue that a restriction on the basis of religious exercise is the same, regardless of whether it restricts the exercise of a fundamental right or the use of an ordinary benefit.²¹⁹ In other words, the religious parents in *Carson* had just as much of a right to the funding stream as did secular parents, unlike the church in *Trinity Lutheran* that was restricted from receiving the benefit at all on the basis of religious exercise.²²⁰ Alternatively, the religious parents in *Carson* ar-

²¹⁴ See *id.* (arguing that even though the Free Exercise Clause was implicated by the plaintiffs, that alone did not mean that the government had burdened their rights).

²¹⁵ See *Carson*, 142 S. Ct. at 1997–98 (holding that when a benefit is distributed to the people, its target, as chosen by the recipient, cannot be restricted by religious exercise); *Trinity Lutheran*, 137 S. Ct. at 2023–24 (holding that applicants to a government benefit cannot be restricted by religious exercise).

²¹⁶ See *Carson*, 142 S. Ct. at 1997–98 (holding that Maine's "non-sectarian" requirement discriminated against religion because it discriminated against all religions even though it did not target a particular faith); *Trinity Lutheran*, 137 S. Ct. at 2023–24 (holding that restricting the reception of a government benefit on the basis of religion as a whole was a violation of the Exercise Clause even though the restriction did not specifically target one religion).

²¹⁷ See 142 S. Ct. at 1997–98 (holding that although the recipients of the funds (the parents) were not restricted based on religious exercise, *where* they could spend the funds was restricted based on religious exercise and that restriction alone amounted to a violation of the Exercise Clause of the First Amendment).

²¹⁸ See 137 S. Ct. at 2023–24 (holding that a restriction on who can receive a government benefit on the basis of religious exercise as a whole, rather than restrictions on one particular faith, amounted to a violation of the Exercise Clause of the First Amendment).

²¹⁹ See *Carson*, 142 S. Ct. at 1997–98 (holding that a restriction in how one can use a benefit on the basis of religious exercise is a violation of religious exercise). The claimant would have to argue that the right to education is analogous to a funding stream provided by the government. See Transcript of Oral Argument at 47, *Vidal v. Elster*, 144 S. Ct. 1507 (2024) (No. 22-704) (suggesting that all government benefits boil down to money at the end of the day). If all benefits can be boiled down to a cash benefit as Justice Sotomayor suggested, then the law should treat a restriction on where one can spend a literal cash subsidy no different than a restriction on where one can "spend" their right to education. *Id.*

²²⁰ See *Carson*, 142 S. Ct. at 1994–95 (stating that one of the plaintiffs received funds and used them to send their child to a sectarian secondary school).

gued that they were essentially denied a benefit because they could not use that funding stream as they wanted in accordance with their religious exercise.²²¹

A claimant arguing for the right to a government funding stream for religious education must argue similarly.²²² They must argue that although they have access to the same schools as a secular parent, that secular parent is able to fully exercise their right to religious exercise (or lack thereof) through their child's attendance of a secular public school.²²³ The religious parent on the other hand can claim no such thing.²²⁴ Of course, they have access to the same secular school, but if the Supreme Court has held that the right to education is not limited just to a secular education, but to a religious education as well, the calculus changes.²²⁵ The claimant's religious exercise is burdened because they are not able to utilize a generally available government benefit to exercise religion to the same extent as a secular parent.²²⁶

From another perspective, one must ask why this scheme could not be applied to public schools as they stand in 2025.²²⁷ *Carson* makes clear the distinction; a take-it-or-leave-it service does not have to conform to religious exercise in the same ways that a generally available funding stream does.²²⁸

²²¹ See *id.* (describing the plaintiffs' argument that the state had violated their free exercise rights by restricting their ability to spend the government subsidy on a non-sectarian school, not that they had been completely denied the funds).

²²² See *id.* at 1995–96 (finding that a benefit restricted on the basis of religious exercise violates the Exercise Clause of the First Amendment).

²²³ See *id.* at 1994–95 (explaining that secular parents were able to fully exercise their rights to free exercise because they were able to send their child to a school using public funds that matched their religious affiliation).

²²⁴ See *id.* (stating that although all parents, regardless of religious affiliation, were able to receive funds, there was still a violation of the Exercise Clause because religious parents did not have the same freedom to send their child to the school they wanted to because of their religious affiliation).

²²⁵ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 110–13 (1973) (Marshall, J., dissenting) (advocating for a secular right to education). If the right to education were limited to a secular education, that right would be completely fulfilled through the government's providing secular, public schools to all citizens. *Id.* If the Supreme Court included the right to a religious education, however, the government cannot provide such an education because of the Establishment Clause. See *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968) (stating that although a state program may fund the study of religion as part of a holistic secular education, the prohibition on state funds aiding or opposing any religion “is absolute”).

²²⁶ See *Carson*, 142 S. Ct. at 1994–95 (holding that a restriction on a recipient's ability to use a government benefit as they wish in accordance with their religious beliefs amounts to a violation of the Free Exercise Clause of the First Amendment).

²²⁷ See *id.* at 2000–02 (holding that a benefit distributed to the people limited in any way on the basis of religious exercise violates the Exercise Clause of the First Amendment).

²²⁸ See *id.* at 2000 (finding that if Maine did not want to provide any assistance to religious schools, it had several options, including expanding public schools, providing state-funded transportation, remote learning, or permitting partial attendance, among other solutions). Because Maine is not currently under an *obligation* to provide public schooling to its citizens as a matter of federal law, it may choose the means of distributing it. *Id.* If it chooses to provide that schooling through a generalized tuition assistance scheme, however, it must conform to the confines of the Exercise Clause in doing so. *Id.*

Once the education right is introduced, including the fact that the right is not limited to just a secular education, the only possible solution is that parents have a right to a non-secular education and because it is a fundamental right, the government must fund it.²²⁹ The right to education would then get treated like the funding stream in *Carson*, because it is not a take-it-or-leave-it service that the government may customize at will; it is a benefit that the people have an affirmative right to and cannot be restricted on the basis of religious exercise.²³⁰

²²⁹ See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2023–24 (2017) (holding that a citizen (or institution) has an affirmative right to a benefit once any requirements are met that do not implicate any constitutional issues); *Obergefell v. Hodges*, 576 U.S. 644, 656–63 (2015) (holding that a person can have an affirmative right to receive a benefit from the government).

²³⁰ See *Carson*, 142 S. Ct. at 2000 (explaining that states are under no obligation to provide education to their citizens); *Rodriguez*, 411 U.S. at 112–13 (Marshall, J., dissenting) (arguing that there is an affirmative right to education within the Due Process Clause of the Fourteenth Amendment); *Brown v. Bd. of Ed.*, 347 U.S. 483, 493 (1954) (holding that education is the most important function of state and local government); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (holding that education is the apex function of states).

There is another way to read *Carson*. See 142 S. Ct. at 1997 (framing the issue in *Carson* as discriminating against religious *schools* rather than religious *parents*, that religious schools were the institutions that denied the legal benefit because parents had to spend their tuition assistance on non-sectarian private schools). It is possible that this restriction actually burdened religious *schools* rather than religious *parents*. See *id.* (describing the victims of Maine's statute as the religious schools rather than the recipients of the subsidy). The schools were the parties that missed out on attendance from lower class religious students because those students could only afford to attend schools that were eligible to receive the government funding stream. *Id.* From this point of view, the schools are much more equivalent to the church-run daycare in *Trinity Lutheran*. See *id.* (directly comparing the situation in *Carson* with that in *Trinity Lutheran*). Maine denied the religious school a benefit based entirely on the school's religion; the school was not merely restricted in how it could use the benefit depending on the religious nature of the benefit's target, unlike the parents in *Carson*. See *id.* (holding that disqualifying an institution from receiving a benefit because the institution is religious penalizes religious exercises). As far as the schools were concerned, the statute had a sign that read "no religious schools need apply." See *Trinity Lutheran*, 137 S. Ct. at 2023–24 (describing the statutory scheme in question as the government essentially displaying a sign saying "[n]o churches need apply"); *Carson*, 142 S. Ct. at 1997 (comparing *Carson* with *Trinity Lutheran*). Once it is determined the government targeted a particular religion, or religion as a whole, strict scrutiny applies rather than rational basis review. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). The Court held that strict scrutiny could not justify this statutory scheme. *Carson*, 142 S. Ct. at 1997–98.

Viewing *Carson* in this way changes the Exercise Clause analysis of the present hypothetical case. See *id.* at 1997 (describing the religious schools as the victims of discrimination against religion rather than the parents). The fundamental right to education, religious in nature or not, is fulfilled by the state's education services, freshly bolstered by the federal guarantee. *Id.* If it is the schools in *Carson* whose religious exercise were infringed upon, they are unaffected by the finding of a right to education. See *id.* (implying that without the generally available tuition assistance funding scheme, religious private schools would have no cause of action against Maine simply because Maine chooses to provide secular public schools to its citizens at no cost). The students, or the parents of students, have exactly the same rights as before. See *id.* (describing the case as one that the religious schools had their freedom of exercise infringed upon, rather than the parents). If the Court were to then find a right to education, that right would likely only apply to parents, not to schools, and would therefore be unaffected by *Carson*. *Id.*

2. Establishment Clause Concerns

It is not enough that the claimant proves that their exercise right is burdened; they must also prove that the relief that they seek comports with the Establishment Clause.²³¹ It is well-founded that the Exercise Clause begins where the Establishment Clause ends, and that, with regard to certain areas of policy, there is “play in the joints” between them.²³²

The dissenting Justices in *Carson*, led by Justice Breyer, certainly believed that education was an area in which the “play in the joints” ought to favor the Establishment Clause over the Exercise Clause.²³³ In other words, if the right in question here were something other than education, it is less likely that an Establishment Clause issue would arise.²³⁴ Alternatively, because of the special role

The Court’s 1982 holding in *Plyler v. Doe* returns here as well. See 457 U.S. 202, 221 (1982) (holding that education was distinguishable as a benefit from other welfare benefits). The Court in *Plyler* held that education was distinguishable from other welfare benefits because of its importance to American existence. *Id.* This view perhaps changes the calculus before education is declared to be a fundamental right, because it is possible that public education currently is not viewed simply as a take-it-or-leave-it service that no person has a right to. See *id.* (holding that education is more important than other benefits). If education is somewhere between a basic benefit like rubber surfacing and a fundamental right, it is unclear how the Court would read the Exercise Clause in its application to this in-between benefit. *Id.* Nowhere else in its jurisprudence though has the Court endorsed this view, and the Court was clear in *Carson* that education was a take-it-or-leave-it service. *Carson*, 142 S. Ct. at 2000. If the Court does find that education is a fundamental right, it would be explicitly overturning its holding in *Rodriguez* and *Plyler*, so education’s current ambiguous place would not be of concern any further. See *Plyler*, 457 U.S. at 221 (rejecting the fundamental right to education); *Rodriguez*, 411 U.S. at 35 (same).

²³¹ See *Locke v. Davey*, 540 U.S. 712, 718–19 (2004) (holding that although a government policy may burden the Exercise Clause of the First Amendment, it may be permissible if complying with the Exercise Clause would violate the Establishment Clause, and that there is often “play in the joints” between the two clauses).

²³² See *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2431–33 (2022) (holding that because there was no Establishment Clause violation when a high school football coach held a prayer circle on the school’s football field after each football game, he was protected by the Exercise Clause of the First Amendment); *Town of Greece v. Galloway*, 572 U.S. 565, 591 (2014) (holding that because ceremonial prayer at the beginning of a local town meeting did not violate the Establishment Clause, it was protected under the Exercise Clause); see also *Walz v. Tax Comm’n*, 397 U.S. 664, 669 (1970) (holding that there is “play in the joints” between the Exercise Clause and the Establishment Clause); *Carson*, 142 S. Ct. at 2006 (Breyer, J., dissenting) (arguing that because there is “play in the joints” between the Exercise Clause and the Establishment Clause, funding of religious schools, whether direct or indirect, is an area where a state’s deference to the Establishment Clause should allow the funding scheme at issue).

²³³ See 142 S. Ct. at 2010 (Breyer, J., dissenting) (explaining that the inherent flexibility between the Establishment Clause and the Exercise Clause gives Maine the ability to determine the best methods by which it can provide its children with a secular education, and that its choice to use a generally available tuition assistance scheme available only for non-sectarian public schools is entirely within the flexibility of the Religion Clauses).

²³⁴ See *id.* (distinguishing between *Carson* and *Trinity Lutheran* because the latter did not involve schools, and that Maine’s conscious decision not to use public funds to promote religion through religious schools falls directly in the “play in the joints” between the Establishment Clause and the Exercise Clause); *Trinity Lutheran*, 137 S. Ct. at 2017 (stating that the destination of the benefit would be

that education plays in our society and the concerns that arise when the government either directly or indirectly funds religious schools, the state would likely claim in this case that the scheme proposed by the claimant whereby the state would be compelled to provide a funding stream for the claimant to attend a religious school would be a violation of the Establishment Clause.²³⁵

Nevertheless, the claimant would likely argue that the case law simply does not support such a proposition.²³⁶ First, the Court's holding in *Carson* is a demonstration that indirect funding of religious schools based on the choice of the recipient is not an Establishment Clause violation.²³⁷ Neither the state of Maine in *Carson*, nor any state after the enumeration of the right to education would provide statutory funding for religious schools; it would be distributed based on the choice of the citizen-recipient, not an appropriation by Congress or a state legislature.²³⁸ The Court in *Carson* was clear that when funds flow to private persons through a neutral benefit program that then distributes the money independently to religious organizations, the Establishment Clause is not offended.²³⁹

The state in turn could argue that the required distribution of funds here is not like the statutory program in *Carson*.²⁴⁰ As the Court stated repeatedly, it

various playgrounds around Missouri, some of which are owned by religious institutions); *Locke*, 540 U.S. at 719 (describing education as one of the areas that the "play in the joints" favors the Establishment Clause).

²³⁵ See *Carson*, 142 S. Ct. at 2010 (Breyer, J., dissenting) (arguing that because of the special place education occupies in society, the horizon of the Establishment Clause is larger where education is concerned); *Locke*, 540 U.S. at 719 (describing education as an area where the Establishment Clause is stronger); see also *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (holding that education is the most vital service provided by states); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (noting that public schools are the paramount function of any government).

²³⁶ See *Carson*, 142 S. Ct. at 2001–02 (stating that state funding of religious schools, if indirect, is not a violation of the Establishment Clause); *id.* at 2006 (Breyer, J., dissenting) (asking whether the holding in *Carson* requires that school districts pay for students to attend religious private schools as a substitute for public schools); *Bremerton*, 142 S. Ct. at 2432–33 (holding that there was no Establishment Clause violation when a high school football coach held a prayer circle on the school's football field after each football game).

²³⁷ See 142 S. Ct. at 1997–98 (holding that because the choice to fund religious schools is the choice of the parents rather than the government, there is no violation of the Establishment Clause); *id.* at 2006 (Breyer, J., dissenting) (suggesting that public-funded tuition vouchers for private religious schools may be a logical outcome of *Carson*).

²³⁸ See *id.* at 1997–98 (majority opinion) (finding that when a benefit is distributed to citizens who then use that benefit for a religious purpose, the Establishment Clause is not offended). It is possible that the funding scheme could be organized in a different fashion, with state governments choosing to fund religious schools directly based on how many pupils want to attend, but that could run up against potential Establishment Clause challenges. See *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971) (holding that public funds may not be paid directly to religious schools), overruled by *Bremerton*, 142 S. Ct. at 2432–33 (overruling the *Lemon* test for Establishment Clause violations).

²³⁹ 142 S. Ct. at 1997–98.

²⁴⁰ See *id.* (holding that it was Maine's decision to structure the generally available tuition assistance funding scheme in this manner, and that if it structured the benefit of "education" through the creation of public, secular secondary schools, it would be under no such obligation to conform that benefit to contours of the Exercise Clause).

was Maine's choice to structure its education system in such manner.²⁴¹ The state could have taken on the expense of offering a secular public school to each and every town in the state, but instead chose to create a generally available tuition assistance funding scheme.²⁴² There is no choice for states to adjust their education structure to avoid funding religious schools as far as this claim is concerned, they *must* provide indirect funding for religious schools.²⁴³

IV. PURSUIT OF EDUCATION

This Part discusses whether the Supreme Court must rule in favor of the claimant as discussed in Part III, and the political implications of such ruling.²⁴⁴ Section A posits that if the Supreme Court intends to hold true to *stare decisis*, it must rule in favor of the claimant.²⁴⁵ Section B argues that in spite of the potential damage to liberalism, liberals should still advocate for a right to education, even if found by a conservative Supreme Court.²⁴⁶

A. May or Must

One question the Court would have to grapple with in the wake of its hypothetical enumeration of education as a fundamental right is whether such decision commands that the government provide the funding stream that the claimant seeks a right to, or whether the Court may interpret the case law in either direction.²⁴⁷ If the Court is as wedded to *stare decisis* as it claims, then *Carson* and *Trinity Lutheran* clearly govern on the Exercise Clause questions.²⁴⁸ Unless the Court is willing to distinguish between a generally availa-

²⁴¹ See *id.* (emphasizing that this was Maine's decision to structure the distribution of education in this manner).

²⁴² See *id.* at 2000 (explaining the other options available to Maine if it did not want to indirectly fund religious private schools).

²⁴³ See *id.* at 1997–98 (holding that if a person has a right to a government benefit, then the government may not proscribe restrictions on that benefit that offends the Exercise Clause of the First Amendment). The Court was set to clarify some of the Establishment Clause ambiguities that this Note's proposed policy scheme relies upon in *St. Isidore of Seville Catholic Virtual School v. Drummond*. See Liptak, *supra* note 192 (describing the facts of the case and its potential legal consequences). However, the Court declined to issue a precedential ruling in the case and affirmed by an equally divided vote after Justice Barrett recused herself. Stohr, *supra* note 191.

²⁴⁴ See *infra* notes 244–289 and accompanying text.

²⁴⁵ See *infra* notes 247–265 and accompanying text.

²⁴⁶ See *infra* notes 266–289 and accompanying text.

²⁴⁷ See *Carson v. Makin*, 142 S. Ct. 1987, 1997–98 (2022) (holding that when the government structures a benefit as a generally available funding scheme, they may not restrict where the benefit may be directed on the basis of religious exercise).

²⁴⁸ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2278–79 (2022) (finding that *stare decisis* is an important factor in deciding a case, but that there are times when it may be abrogated); *Carson*, 142 S. Ct. at 2002 (holding that a benefit may not be restricted in where it can be directed on the basis of religious exercise); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct.

ble funding stream as propagated by a statute and a service to which a person has a fundamental right, the Court must rule in favor of the claimant on the Exercise Clause questions.²⁴⁹

The final respite for the state is the Establishment Clause.²⁵⁰ Once again, it is hard to see the distinction between *Carson* and the claim at issue here, where a family wants to send their child to a religious private school but cannot afford to do so.²⁵¹ The only clear difference is the level of compulsion forced on the state.²⁵² In *Carson*, Maine had a plethora of choices if it wanted to avoid giving any funding to religious schools through its tuition assistance program.²⁵³ It could have expanded secular public schools to each disparate town and village; it could have refused to fund public schools completely; or it could have provided centrally located boarding schools.²⁵⁴

States would have no such choices under the scheme the claimants argue for.²⁵⁵ States would be compelled to provide secular public education and provide funds for religious persons to attend the private school of their choice.²⁵⁶ There would be no alternative for the states, they must do both.²⁵⁷ It was the alternatives available to the state of Maine that allowed the Court to compel Maine to expand the tuition program in that manner.²⁵⁸ When no alternatives are available, the Court may not compel states in that way.²⁵⁹ Conversely, the Court has also held that compliance with the Establishment Clause beyond the bounds required by the Constitution is not a compelling interest to justify vio-

2012, 2023–24 (2017) (holding that a benefit may not be restricted in who receives it based on their religious exercise).

²⁴⁹ See *Carson*, 142 S. Ct. at 2002 (holding that a benefit may not be indirectly regulated on the basis of religious exercise); *Trinity Lutheran*, 137 S. Ct. at 2023–24 (explaining that a beneficiary of a benefit may not be disqualified on the basis of religious exercise).

²⁵⁰ See *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968) (stating that the prohibition on mixing public school and religion “is absolute”).

²⁵¹ See 142 S. Ct. at 2002 (noting that when the recipient of a government benefit directs the benefit to a religious organization, the Establishment Clause is not offended).

²⁵² See *id.* at 2000 (holding that Maine had several choices available to it to avoid indirectly directing public funds to religious institutions).

²⁵³ See *id.* (describing the different options open to Maine to avoid spending any public money to religious institutions).

²⁵⁴ *Id.*

²⁵⁵ See *id.* (describing different ways Maine can provide education to its citizens). See generally Bitensky, *supra* note 7, at 579–606 (describing the claim to an affirmative fundamental right to education).

²⁵⁶ See *Carson*, 142 S. Ct. at 2001–02 (holding that when a government benefit is distributed, it cannot be restricted in its direction on the basis of religious exercise).

²⁵⁷ See *id.* (holding that a government benefit cannot be directed only to non-sectarian institutions).

²⁵⁸ See *id.* at 2000 (explaining the other options available to Maine if it did not want to indirectly fund religious private schools).

²⁵⁹ See *id.* at 2001–02 (holding that when a government benefit is distributed, it cannot be restricted in its direction based on religious exercise because there are other options available to the state in question to avoid funding religious institutions indirectly).

lating the Exercise Clause.²⁶⁰ If the Exercise Clause commands that the government take an action, and it is not forbidden by the Establishment Clause, the Court is clear that the government must take that action.²⁶¹

A liberal Court might find that the play in the joints between the two clauses commands heightened compliance with the Establishment Clause when education is the subject at issue.²⁶² It is unlikely that we will see such a Court for the foreseeable future.²⁶³ The present Court would be unlikely to see education as requiring such heightened compliance with the Establishment Clause.²⁶⁴ If the Court that hears this claim is as right-leaning as the one currently occupying the bench, it almost certainly will rule in favor of the claimant.²⁶⁵

B. Is Education Still Worth Fighting For?

The last decade of Supreme Court jurisprudence has been an increasing nightmare for liberals.²⁶⁶ For those who wish to expand rights, rather than merely protect the ones previously found by the Court, it is difficult to find a time in the last century where hope has been harder to see.²⁶⁷ This Note provides a way by which that hope may be re-ignited.²⁶⁸

²⁶⁰ See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024–25 (2017) (holding that compliance with the Establishment Clause more than is required by the Constitution is not a compelling interest to violate the Exercise Clause).

²⁶¹ See *Carson*, 142 S. Ct. at 2001–02 (noting that the Exercise Clause commands that the government may not restrict how the recipient of a government benefit may direct that benefit on the basis of religious exercise and holding that there is no Establishment Clause violation in doing so).

²⁶² See *id.* at 2004 (Breyer, J., dissenting) (finding that because there is “play in the joints” between the Establishment Clause and the Exercise Clause and because education occupies a special place in American society, the Establishment Clause ought to be stronger where education is concerned (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 669 (1970))).

²⁶³ See Charles Cameron & Jonathan P. Kastellec, *Conservatives May Control the Supreme Court Until the 2050s*, WASH. POST (Dec. 14, 2021), <https://www.washingtonpost.com/politics/2021/12/14/supreme-court-roe-conservatives/> [<https://perma.cc/3WQ7-HBAX>] (describing how the Supreme Court may not have a liberal majority until the 2050s).

²⁶⁴ See *Carson*, 142 S. Ct. at 2001–02 (holding that educational interests present did not cause an Establishment Clause violation in the direction of government funds to religious schools).

²⁶⁵ See *id.* (holding that there is no Establishment Clause violation in indirectly funding religious schools, and that the Exercise Clause commands that funds may not be restricted based on the religious nature of the target so long as it is the recipient who is directing funds).

²⁶⁶ See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2284 (2022) (holding that abortion is no longer a fundamental right); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2431–33 (2022) (holding that school prayer is permissible if it does not coerce the listener); *West Virginia v. EPA*, 142 S. Ct. 2587, 2614–15 (2022) (creating a new legal rule that requires administrative agencies to acquire additional authorization from Congress when undertaking regulations that have significant impacts on Americans).

²⁶⁷ See *Skinner v. Oklahoma*, 316 U.S. 535, 542–43 (1942) (establishing the fundamental right to have children); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (finding the fundamental right to marry); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (finding the fundamental right to contraception); *Moore v. City of East Cleveland*, 431 U.S. 494, 504–06 (1977) (plurality opinion) (finding the fundamental right to choose one’s family); *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015) (expanding the funda-

Conservatives on the Supreme Court have demonstrated repeatedly that they are willing to set aside their jurisprudential convictions in order to further their political cause.²⁶⁹ Expansion of religious education is no doubt one of those causes.²⁷⁰ Liberals should encourage them to take the bait.²⁷¹

The expansion of rights is no small matter; it takes decades for these fights to be organized, fought, and won.²⁷² Missing in this Note thus far is an analysis of what powers the Federal government would gain if the Supreme Court did find such an education right.²⁷³ As the guarantor of fundamental rights through the Fourteenth Amendment, the federal government would be empowered to set truly national standards on education.²⁷⁴ The system could finally have federal oversight and ensure that all of America's children finally have the education that they deserve.²⁷⁵

Opponents, of course, will note that millions more children will be subject to a religious education at their parents' whim, without federal oversight, all on the taxpayer's dime.²⁷⁶ That would indeed be antithetical to liberal val-

mental right to marry to include a partner of the same sex); *Dobbs*, 142 S. Ct. at 2284 (declaring that a previously declared fundamental right (the right to an abortion) is no longer fundamental).

²⁶⁸ See *Carson*, 142 S. Ct. at 2001–02 (implying that because a generalized benefit may not be restricted in direction on the basis of religious exercise, a finding of the right to education would expand religious schooling); see also *ROGUE ONE* (Lucasfilm Ltd. 2016) (“Rebellions are built on hope!”).

²⁶⁹ See, e.g., *West Virginia v. EPA*, 142 S. Ct. at 2608–09 (citing *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc)) (holding that even though an administrative agency may be within its statutorily authorized jurisdiction, its actions may not be Constitutional and providing scant textual sources for such a claim); *Dobbs*, 142 S. Ct. at 2284 (overruling a previous case and ignoring *stare decisis*).

²⁷⁰ See *Carson*, 142 S. Ct. at 2001–02 (stating that states may indirectly fund religious schools under certain circumstances).

²⁷¹ See *id.* (holding that if a generally available benefit is restricted in where it may be spent on the basis of religious exercise, such a restriction is unconstitutional).

²⁷² See *Skinner*, 316 U.S. at 542–43 (finding the fundamental right to procreate); *Loving*, 388 U.S. at 12 (establishing the fundamental right to marry); *Eisenstadt*, 405 U.S. at 453 (establishing the fundamental right to contraception); *Moore*, 431 U.S. at 504–06 (plurality opinion) (establishing the fundamental right to choose one's family); *Obergefell*, 576 U.S. at 681 (expanding the fundamental right to marry to include marriage to a same-sex partner).

²⁷³ See *Flowers*, *supra* note 171, at 38–39 (generally discussing the educational policy improvements that could be achieved through the federalization of education).

²⁷⁴ See U.S. CONST. amend. XIV § 1 (establishing the federal government as the guarantor of fundamental rights).

²⁷⁵ See *id.* (expanding federal power to guarantee certain rights); *Flowers*, *supra* note 171, at 38–39 (discussing how the federal government could improve education nationally). Presumably these standards would be determined by Congress and the Department of Education, but the future of national education regulation is beyond the scope of this Note.

²⁷⁶ See *Carson*, 142 S. Ct. at 2001–02 (holding that under certain circumstances, the government may indirectly fund religious education). Children attending religious schools often do not have access “to a distinct package of educational goods” that includes health classes, controversial books, and science classes. See Ruth J. Wareham, *The Problem with Faith-Based Carve-Outs: RSE Policy, Religion and Educational Goods*, 56 J. PHIL. EDUC. 707, 707–08 (2022) (generally discussing the impact

ues.²⁷⁷ The benefits, however, outweigh the costs.²⁷⁸ If liberals are to see their policies enacted on a broad scale they will have to regain control over the Supreme Court at some point in the future.²⁷⁹ When they do, it will be easier for that Court to clarify its “endorsement” of religious education as a fundamental right, perhaps restating the fundamental right to education in more favorable terms.²⁸⁰ Building a coalition of justices to make that ruling will be much easier than finding a new fundamental right decades, or perhaps a century, after the last fundamental right was found.²⁸¹

Lastly, liberals ought to remember what their ideology truly means.²⁸² Even if one could successfully argue that the best outcome for the political success of the liberal movement was that the Court did not find a fundamental right to education, that would still be a bad reason to stop advocating for the right.²⁸³ Liberalism commands that all persons have the right to an education so that they may make autonomous decisions for themselves.²⁸⁴ If the Supreme Court found the

of religion-based carve-outs in the United Kingdom that allow religious schools to not provide pupils with certain curricula).

²⁷⁷ See NOAH FELDMAN, *DIVIDED BY GOD: AMERICA’S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* 29 (2006) (explaining how John Locke originated the concept of separating “the realm of government from the realm of religion”); see also U.S. CONST. amend. I (establishing the separation of church and state for the federal government).

²⁷⁸ See generally Flowers, *supra* note 171, at 38–39 (discussing the possible benefits of federalizing education).

²⁷⁹ See *West Virginia v. EPA*, 142 S. Ct. 2587, 2614–15 (2022) (placing a limit on the power of the administrative state); *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2284 (2022) (overturning the right to abortion).

²⁸⁰ See *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015) (restating the right to marriage to include same-sex couples); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (refusing to recognize a right to education under the doctrine of substantive due process); Cameron & Kastellec, *supra* note 263 (explaining how liberals may not control the Supreme Court until the 2050s).

²⁸¹ See *Michael H. v. Gerald D.*, 491 U.S. 110, 122–2 (1989) (plurality opinion) (refusing to recognize the constitutional right of the biological father to raise his child); *Obergefell*, 576 U.S. at 681 (Kennedy, J.) (expanding the fundamental right to marry to include a partner of the same sex). Justice Kennedy refused to recognize the fundamental right of the biological father in *Michael H.* joining Justice Scalia’s plurality opinion, but later wrote the opinion enshrining gay marriage as a fundamental right. *Michael H.*, 491 U.S. at 13 (plurality opinion); *Obergefell*, 576 U.S. at 650 (Kennedy, J.). A swing Justice changing their vote can greatly shift the course of the Court’s jurisprudence. See *Michael H.*, 491 U.S. at 113 (plurality opinion) (relying on Justice Kennedy as the swing vote); *Obergefell*, 576 U.S. at 650 (Kennedy, J.) (same).

²⁸² See Shane D. Courtland, Gerald Gaus & David Schmidt, *Liberalism* (explaining the importance of education to liberalism), in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., Spring 2022), <https://plato.stanford.edu/archives/spr2022/entries/liberalism/> [<https://perma.cc/VG6T-AVH5>].

²⁸³ See *Carson v. Makin*, 142 S. Ct. 1987, 2001–02 (2022) (holding that government funding of religious schools, if indirect, is sometimes permissible); Courtland et al., *supra* note 282 (discussing the importance of education in a liberal society).

²⁸⁴ See SHAUN YOUNG, *BEYOND RAWLS: AN ANALYSIS OF THE CONCEPT OF POLITICAL LIBERALISM* 45 (2002) (explaining how the concept of human autonomy is vital to liberalism); Courtland et al., *supra* note 282 (discussing the relationship between autonomy and liberalism).

right to education and ruled in favor of the claimant in this case, and as a result exactly one person gained access to a quality education that did not previously have it, that should be enough of a reason to support it.²⁸⁵ Liberalism's core principles do not rest on its success as an ideology; its principles rest on the autonomous decisions of persons.²⁸⁶ If one person gained such autonomy as a result of this case, even if it meant that millions became more conservative as a result, that should be sufficient to gain the support of liberals.²⁸⁷

Liberals ought to remember that they do not advocate for something because it will result in the success of their political movement, but because it is right.²⁸⁸ All persons have the fundamental right to education; therefore, liberals should support the Supreme Court finding such a right, regardless of the damage it may do to their movement in the long run.²⁸⁹

CONCLUSION

The foundation for the right to education was laid in the dissent in *Rodriguez v. San Antonio Independent School District* over fifty years ago. Now, *Carson v. Makin* has changed the contours of that right. *Carson* should cause religious conservatives to reconsider their support for the right to education. If the Supreme Court picks up Justice Marshall's dissent in *Rodriguez* and dusts it off, parents would have the right to send their child to any religious school they desire as a function of their right to religious exercise, all on the taxpayer's dime. Although the Establishment Clause may provide a respite for the state, nothing in the Court's recent jurisprudence suggests that the state would win such a case. Lastly, although it is likely that the country would become markedly more conservative because of this claim through millions of children attending religious schools, liberalism commands liberals to support the expansion of the fundamental right to education regardless of the damage it may do to their ideology.

JAKE N. TAMIR-PINSKY

²⁸⁵ See *Rodriguez*, 411 U.S. at 112–13 (Marshall, J., dissenting) (arguing how education is vital to the freedom to think); see Jackson et al., *supra* note 3, at 2 (finding a link between educational spending and poverty reduction).

²⁸⁶ See generally YOUNG, *supra* note 284, at 45 (discussing the concept of autonomy within a liberal framework); Courtland et al., *supra* note 282 (generally discussing the relationship between human autonomy and liberalism).

²⁸⁷ See Flowers, *supra* note 171, at 38–39 (discussing generally the educational policy improvements that could be achieved through the federalization of education).

²⁸⁸ See *Carson*, 142 S. Ct. at 2001–02 (holding that when it is part of a generally available benefit, the government may indirectly fund religious education).

²⁸⁹ See *Rodriguez*, 411 U.S. at 112–13 (Marshall, J., dissenting) (arguing the importance education is to ensuring children reach their full potential as citizens); *Carson*, 142 S. Ct. at 2001–02 (holding that under certain circumstances, the government may indirectly fund religious education).