COMMENT

TAKING A BROAD VIEW TO RECOGNIZE A NARROW RIGHT: HOW A HOLISTIC ANALYSIS OF LITERACY'S ROLE IN AMERICAN SOCIETY DEMONSTRATES THAT IT IS A FUNDAMENTAL RIGHT

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Supreme Court jurisprudence holds that there is no fundamental right to education, but it leaves open the question of whether a right exists to some basic minimum education. In Gary B. v. Whitmer*, a Sixth Circuit panel held that such a right does exist and defined it as access to literacy. Although the Sixth Circuit subsequently granted en banc hearing of the case, voiding any precedential value of the panel decision, the court's analysis provides compelling support for recognizing access to literacy as a fundamental right.*

Using the Supreme Court's established two prong method of analysis, this Comment expands on the Sixth Circuit's opinion in arguing that access to literacy is a fundamental right. Before the Court will recognize a right as fundamental, it must first establish that the right has deep ties in the nation's history. Unlike previous Supreme Court cases considering a right to education, the Sixth Circuit

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opinion did not limit its analysis to the history of public education. By also examining the nation's history of refusing education, and specifically literacy, to Black people and other minorities, the Sixth Circuit established a more complete history of access to literacy. This Comment argues that this holistic analysis is the proper way to consider this right and concludes that recognizing access to literacy as a fundamental right is a judicial imperative.

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"By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation."

—Justice William J. Brennan Jr.[1]

1. Plyler v. Doe, 457 U.S. 202, 223 (1982).

"[T]he history of public education in this country, as with many things, is inextricably tied to race."
—Circuit Judge Eric L. Clay[2]

INTRODUCTION

In 1740, the South Carolina General Assembly passed the Negro Act, declaring, "the having of Slaves taught to write or suffering them to be employed in writing may be attended with great Inconveniences."[3] This legislation codified the denial of literacy to a discrete subset of colonial America inhabitants and marked the start of a legacy in the United States of preventing access to literacy, and subsequently freedom and political power, to enslaved peoples and their descendants.[4]

The pervasive denial of literacy, though no longer explicitly codified, still significantly impacts Black Americans.[5] A history of racist housing policies has led to segregated neighborhoods and, subsequently, "racially isolated" schools, with vastly different racial compositions in schools on either side of district lines.[6] Currently, half of the country's schoolchildren live in districts that are either at least 75% white or at

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2. Gary B. v. Whitmer, 957 F.3d 616, 645 (6th Cir. 2020), *reh'g en banc granted*, 958 F.3d 1216 (6th Cir. 2020).

3. An Act for the Better Ordering and Governing of Negroes and Other Slaves in This Province, Acts of the South Carolina General Assembly, 1740 S.C. Acts 670; *see* Birgit Brander Rasmussen, *"Attended with Great Inconveniences": Slave Literacy and the 1740 South Carolina Negro Act*, PMLA Vol. 125, No. 1, 201, 201 (Jan. 2010) (explaining how the Stono Rebellion in 1739 led to the 1740 South Carolina Negro Act, a restrictive measure which imposed a fine of $100 on anyone caught teaching a slave to read or write).

4. *See* Rasmussen, *supra* note 3, at 202 (highlighting subsequent similar legislation in other colonies and states); Peter Blackmer, *White Supremacy & the Denial of Literacy: The History Behind Detroit's Right to Literacy Case*, DETROIT EQUITY ACTION LAB at 1, https://docs.google.com/document/d/1iEPQPGTZJeZ2ws6exZaNPHfxr5YzW-4230bEtqWvuKA/edit [https://perma.cc/J3V8-EPE8] (asserting that "without literacy individuals cannot practice the full rights of citizenship in this country, let alone be expected to achieve any semblance of economic, social, and political equity" and discussing the nexus between the denial of literacy and centuries of oppression and racial violence).

5. *See* Blackmer, *supra* note 4, at 10 (arguing that the evolution from de jure segregation to de facto or institutional racism has not changed its impact).

6. *See Photos: Where the Kids Across Town Grow up with Very Different Schools*, NPR (July 25, 2019, 11:06 AM), https://www.npr.org/2019/07/25/739494351/separate-and-unequal-schools [https://perma.cc/F7S4-AASV] (providing visual comparisons of schools located on opposite sides of district lines).

least 75% non-white, resulting in schools that are essentially segregated.[7] The Supreme Court's decision in *Milliken v. Bradley*[8] contributed significantly to this de facto segregation. By holding that desegregation did not have to cross school district lines,[9] the ruling created fractured communities and similarly fractured school funding.[10]

Detroit is home to one such segregated school district: 97% of the city's public school students are people of color.[11] It is no surprise, then, that Detroit was the setting for *Gary B. v. Whitmer*,[12] in which the plaintiffs, all low-income minority schoolchildren in underperforming Detroit schools, made the novel argument that a fundamental right to literacy should exist because it is impossible to function in society without this basic minimum education.[13] The Sixth Circuit agreed and

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7. *See Why U.S. Schools Are Still Segregated—And One Idea to Help Change that*, NPR (July 7, 2020, 6:58 PM), https://www.npr.org/transcripts/888469809 [https://perma.cc/J3GN-EBB5] (discussing the work of nonprofit EdBuild, which researches school funding and has proposed remedying educational disparities between school districts by "busing" property tax funds to lower income districts, rather than transporting students from disadvantaged districts to schools with more resources).

8. 418 U.S. 717 (1974).

9. *Id.* at 745.

10. *See supra* note 7 and accompanying text. When COVID-19 forced schools to close in the spring of 2020 the already-existing disparities between school districts became even more pronounced. *See* Dana Goldstein et al., *As School Moves Online, Many Students Stay Logged out*, N.Y. TIMES (Apr. 8, 2020), https://www.nytimes.com/2020/04/06/us/coronavirus-schools-attendance-absent.html [https://perma.cc/TVP7-4YK2]. For example, while chronic absenteeism was an issue before the pandemic—particularly in low-income districts—technological challenges caused some students to essentially become unreachable. *Id.* While higher income districts could effectively provide live instruction via online tools, lower-income districts were forced to utilize a wide variety of methods to reach students, even printing work packets to distribute in-person. *See* Benjamin Herold, *The Disparities in Remote Learning Under Coronavirus (in Charts)*, EDUC. WK. (Apr. 10, 2020), https://www.edweek.org/ew/articles/2020/04/10/the-disparities-in-remote-learning-under-coronavirus.html [https://perma.cc/WSW4-WVQ2]. In districts where low-income students comprise 25% or less of the student body, only 22% of teachers reported printing materials for in-person distribution, compared to 49% of teachers in districts with more than 75% low-income students. *Id.* Similarly, teachers with a high percentage of low-income students were more than twice as likely to resort to personal phone calls and text messages to communicate with their students. *Id.*

11. Colette Coleman, *As People Finally Rally for Black Lives, We Need to Ensure Black Education Matters, Too*, UPWORTHY (July 7, 2020) https://www.upworthy.com/black-education-matters-too [https://perma.cc/CHQ9-NKZ8].

12. 957 F.3d 616 (6th Cir. 2020), *reh'g en banc granted*, 958 F.3d 1216 (6th Cir. 2020).

13. Complaint at 15, 30, Gary B. v. Snyder, 329 F. Supp. 3d 344 (E.D. Mich. 2018) (No. 16-CV-13292) ("The U.S. Supreme Court has repeatedly recognized that literacy

issued a decision recognizing a fundamental right to *literacy* under the Constitution,[14] despite the fact that the Supreme Court has repeatedly denied that a fundamental right to *education* exists.[15] While denying a fundamental right to education in *San Antonio Independent School District v. Rodriguez*,[16] the Supreme Court acknowledged that a right might exist to "some identifiable quantum of education," leaving the opportunity for such claims in the future.[17] The Sixth Circuit subsequently granted an en banc hearing of the case, voiding any precedential value of the panel decision.[18] Nonetheless, the court's opinion provides a roadmap for future cases to make the same assertion—that all students should be guaranteed a basic minimum education, specifically defined as access to literacy, in order to participate in society.[19] Recognition of this fundamental right is necessary to begin addressing this country's history of slavery, enforced illiteracy, and segregation, which has led to incredible disparities in public education and created a cycle of disadvantage for many Black and minority communities.[20]

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lies at the foundation of citizenship and participation in democratic society."). For the purposes of this Comment, access to literacy *is* a basic minimum education.

14. *Gary B. v. Whitmer*, 957 F.3d at 662.

15. Papasan v. Allain, 478 U.S. 265, 284 (1986) ("[T]he Court recognized the importance of public education but noted that education 'is not among the rights afforded explicit protection under our Federal Constitution.'" (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973))); *see also* Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 338 (2006) (observing that the Supreme Court's refusal to recognize fundamental rights to government services such as "education, welfare, and other government aid" has led to a belief that the government does not have particular obligations in the provision of such services).

16. 411 U.S. 1, 35 (1973).

17. *Id.* at 36.

18. Gary B. v. Whitmer, 958 F.3d 1216 (6th Cir. 2020).

19. *See* Koby Levin, *Detroit Literacy Lawsuit Ends Without a "Right to Read" Precedent. Advocates Say They'll Keep Fighting*, CHALKBEAT DETROIT (June 10, 2020, 7:48 PM), https://detroit.chalkbeat.org/2020/6/10/21287272/detroit-lawsuit-ends-without-right-read-precedent [https://perma.cc/FA32-7WWQ] (observing that future plaintiffs will likely follow the lead of the plaintiffs in *Gary B.* by asserting a right of access to literacy).

20. *See This American Life: The Problem We All Live with–Part One*, CHI. PUB. RADIO (July 31, 2015), https://www.thisamericanlife.org/562/the-problem-we-all-live-with-part-one [https://perma.cc/B2T2-XX6C] (arguing that integration is the only effective way to address the achievement gap between white and minority students); *see also* Coleman, *supra* note 11 ("Equal schooling and, thus, equal opportunity are an integral component of antiracism.").

This Comment argues that a basic minimum education, specifically access to literacy, is a fundamental right under the Due Process Clause of the Fourteenth Amendment because it satisfies the Supreme Court's two-prong fundamental right test. Part I lays out existing Supreme Court jurisprudence regarding fundamental rights under substantive due process before going on to discuss significant Supreme Court cases about education and the historical importance of both providing and preventing education in the United States. Part I then delves into the Sixth Circuit case *Gary B. v. Whitmer*, in which the court applied a holistic historical analysis to the plaintiffs' novel argument that access to literacy is a fundamental right. Part II demonstrates how access to literacy meets the Supreme Court's established criteria for recognizing a fundamental right. Expanding on the Sixth Circuit opinion in *Gary B.*, Part II explores the history of public education in the United States, particularly examining the history of depriving literacy to Black Americans. Part II also discusses the lasting impact of enforced illiteracy and the role of literacy in civic engagement and proposes a careful description of the right in question. This Comment concludes that the Court has a duty to recognize access to literacy as a fundamental right after centuries of depriving that right to Black people.

I. BACKGROUND: SUBSTANTIVE DUE PROCESS, EDUCATION, AND *GARY B.*

The Fourteenth Amendment guarantees rights in two separate clauses: the Due Process Clause and the Equal Protection Clause.[21] The Due Process Clause protects liberty on "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints."[22] Claims made under the Equal Protection Clause, on the other hand, specifically concern disparate treatment of different groups.[23] The Court evaluates equal protection arguments under one of three levels of review ranging from strict scrutiny, the most stringent standard,[24] to rational basis, the

21. U.S. CONST. amend. XIV.

22. Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

23. *See* Brian T. Fitzpatrick & Theodore M. Shaw, *Common Interpretation: The Equal Protection Clause*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xiv/clauses/702 [https://perma.cc/2AB4-E4P6] (noting that while the original intent was to protect formerly enslaved people from discrimination, all racial discrimination is now considered unconstitutional).

24. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16–17 (1973) (defining strict scrutiny as requiring the government to demonstrate that it has a compelling interest and the policy in question is narrowly tailored to meet that

standard most deferential to state interests.[25] The Court has also applied an intermediate level of "heightened" scrutiny almost exclusively to cases that involve discrimination based on sex or illegitimacy.[26] If the Supreme Court were to recognize access to literacy as a fundamental right, as this Comment argues its own standards obligate it to do, then the Court would apply strict scrutiny when considering subsequent education cases.[27] As a result, even if plaintiffs cannot bring a claim under the Equal Protection Clause because they do not comprise a specific racial or ethnic group, courts could still apply strict scrutiny to their claim under the Due Process Clause.[28] This would provide students in under-resourced schools with an additional avenue to relief by affording courts more power to hold legislatures accountable to their duty to educate, regardless of whether the plaintiffs are a protected class.[29]

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interest). Courts only apply strict scrutiny when a fundamental right is implicated, or plaintiffs are members of a protected class based on race, national origin, or ancestry. *See* Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 457–58 (1988).

25. *See Kadrmas*, 487 U.S. at 457–58 (explaining that in cases where the plaintiff is not a member of a protected class, the Court will apply only rational basis review, thus putting the burden on the plaintiff to demonstrate that there is no rational relationship between a legitimate government interest and the policy in question).

26. *Id.* at 459 (noting plaintiffs' invocation of *Plyler v. Doe*, 457 U.S. 202 (1982), as an example of a case in which the Court applied heightened scrutiny even though neither sex nor illegitimacy was the basis for plaintiffs' discrimination claims); *see also* Craig v. Boren 429 U.S. 190, 197 (1976) (defining intermediate scrutiny as requiring that the government prove its policy is substantially related to achieving an important government objective).

27. *See Kadrmas*, 487 U.S. at 458. *But see* Derek W. Black, *Implying a Federal Constitutional Right to Education*, *in* A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY 135, 146 (Kimberly Jenkins Robinson ed., 2019) (discussing the Court's decision in *Plyler* as falling short of establishing a doctrine for applying heightened scrutiny in education cases).

28. *See* Black, *supra* note 27, at 139 (examining when to apply different levels of scrutiny); *cf.* Martha I. Morgan, *Fundamental State Rights: A New Basis for Strict Scrutiny in Federal Equal Protection Review*, 17 GA. L. REV. 77, 77–78 (1982) (proposing that federal courts apply strict scrutiny when states have recognized a fundamental right to education under state law).

29. *See* Gary B. v. Whitmer, 957 F.3d 616, 637, 642 (6th Cir. 2020) (rejecting plaintiffs' equal protection claim because of a failure to adequately assert race-based discrimination but accepting their claim for relief based on a fundamental right), *reh'g en banc granted*, 958 F.3d 1216 (6th Cir. 2020).

Initially, due process was considered a safeguard of the procedural rights that the Constitution specifically guarantees to the people.[30] Over time, however, jurists developed an understanding of substantive due process that recognized some rights as simply inherent or "fundamental."[31] Education lawsuits reflect this evolution in understanding, with plaintiffs bringing different types of claims as they saw new opportunities for relief. While plaintiffs in early education cases brought federal lawsuits claiming disparate treatment under the Equal Protection Clause, more recent plaintiffs have focused on educational adequacy rather than equality in lawsuits at the state level.[32] New federal lawsuits, including *Gary B.*, have followed the adequacy route, with plaintiffs invoking the Due Process Clause to assert a fundamental right to a basic minimum education.[33]

A. Rights Under Substantive Due Process

Since the adoption of the Fourteenth Amendment, the Supreme Court's interpretation of the Due Process Clause has evolved from protecting only rights the Founders explicitly included in the Constitution to recognizing "fundamental" rights.[34] Over time, the Court developed a two-prong

30. *See, e.g.*, U.S. CONST. amend. VI ("[T]he accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . to be informed of the nature and cause of the accusation; to be confronted with the witness against him . . . and to have the Assistance of Counsel for his defence.").

31. *See* Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) ("Despite arguments to the contrary . . . it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to . . . procedure. Thus, all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States."). The court in *Gary B.* followed this reasoning, noting that "the Clause has also been read to recognize that *certain interests are so substantial that no process is enough to allow the government to restrict them*, at least absent a compelling state interest." *Gary B. v. Whitmer*, 957 F.3d at 643 (emphasis added).

32. *See* Lauren Nicole Gillespie, Note, *The Fourth Wave of Educational Finance Litigation: Pursuing a Federal Right to an Adequate Education*, 95 CORNELL L. REV. 989, 991 (2010) (delineating education litigation by whether plaintiffs based their claims on the inequality or inadequacy of their educational experience).

33. *See* Christie Geter, *Let's Try This Again, Separate Educational Facilities Are Inherently Unequal: Why Minnesota Should Issue a Desegregation Order and Define Adequacy in* Cruz-Guzman v. State, 38 LAW & INEQ. 165, 175 (2020) (distinguishing the newest wave of litigation from previous equality-based lawsuits).

34. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992).

analysis for defining those rights.[35] In recognizing rights as "fundamental," the Court has generally been more reluctant to acknowledge positive rights than negative ones,[36] citing separation of powers and judicial restraint as reasons for this reluctance.[37] In cases dealing with complicated issues such as education, the Court has been particularly keen to avoid the appearance of legislating.[38]

The first prong of the Supreme Court's fundamental rights analysis looks to whether the right in question is deeply tied to "this Nation's history and tradition" and is "implicit in the concept of ordered liberty."[39] Different justices have taken different approaches when considering the history and tradition of a particular right.[40] Justice Scalia, for example, favored a restrictive approach that considers whether the Court would have recognized the right at the time Congress adopted the Fourteenth Amendment.[41] The majority in *Obergefell v.*

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35. *See* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (describing the first prong as establishing whether the right is "deeply rooted in this Nation's history and tradition" and the second prong as identifying a careful description of the right (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion))). *But cf. Gary B. v. Whitmer*, 957 F.3d at 644 (noting that the historic standing of the right and its importance to liberty "are sometimes tied together").

36. *See, e.g.*, *Casey*, 505 U.S. at 847 (explaining a negative right as "a promise of the Constitution that there is a realm of personal liberty which the government may not enter").

37. *See* Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) ("[T]he Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field."); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 31, 33 (1973) (observing that the Court would be improperly taking on the role of legislating by recognizing a fundamental right, even if it were doing so in the interest of equal protection).

38. *See Rodriguez*, 411 U.S. at 42, 58 (observing that "[e]ducation, perhaps even more than welfare assistance, presents a myriad of 'intractable economic, social, and even philosophical problems'" (quoting Dandridge v. Williams, 397 U.S. 471, 487 (1970))).

39. *Glucksberg*, 521 U.S. at 720–21 (first quoting *Moore*, 431 U.S. at 503 (plurality opinion); and then quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

40. *Compare* Obergefell v. Hodges, 576 U.S. 644, 663–64 (2015) ("History and tradition guide and discipline this inquiry but do not set its outer boundaries."), *with id.* at 716–17 (Scalia, J., dissenting) (criticizing the Court's majority for focusing on their own views of the Constitution's principles and traditions "rather than focusing on *the People's* understanding of 'liberty'").

41. *Id.* at 715 (Scalia, J., dissenting) (arguing that in 1868, every state defined marriage as a union between a man and a woman, and that fact was sufficient to determine that such restrictions on marriage were valid). As the Supreme Court's (and the nation's) foremost "originalist," Justice Scalia viewed the Constitution as a "dead"

Hodges,[42] however, recognized that because "[t]he nature of injustice is that we may not always see it in our own times," fundamental rights should change over time to reflect societal progress.[43] In this broader approach, the "liberty" aspect of the first prong takes on a more significant role, allowing the Court to recognize a fundamental right even where one has not explicitly existed historically.[44]

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document, preferring to interpret the meaning at the time of its adoption rather than its meaning in current society. *Originalism: A Primer on Scalia's Constitutional Philosophy*, NPR (Feb. 14, 2016, 5:41 PM), https://www.npr.org/2016/02/14/466744465/originalism-a-primer-on-scalias-constitutional-philosophy [https://perma.cc/Y9U2-4XSD]. This approach, according to Justice Scalia and other originalists, avoids judicial activism and preserves the democratic process of lawmaking. Edward Gary Spitko, Note, *A Critique of Justice Antonin Scalia's Approach to Fundamental Rights Adjudication*, 1990 DUKE L.J. 1337, 1343 (1990). Justice Scalia defined his approach to a fundamental rights analysis as applying the most specific tradition relevant when determining if the right in question had a basis in the country's history. Michael H. v. Gerald G., 491 U.S. 110, 127 n.6 (1989) (plurality opinion). In *Michael H.*, for example, Justice Scalia considered the traditional rights attributed to the natural father of a child whose mother was married to someone else, rather than the traditional rights attributed to a parent. *Id.* This narrow approach to a fundamental rights analysis leaves little room for interpretation as societal norms change over time. Joseph Thai, *Honey (Said Justice Scalia) I Shrunk the Constitution*, AM. CONST. SOC'Y: EXPERT F. (Feb. 22, 2016), https://www.acslaw.org/expertforum/honey-said-justice-scalia-i-shrunk-the-constitution [https://perma.cc/BX43-QF78].

42. 576 U.S. 644 (2015).

43. *Id.* at 664 ("The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.").

44. Gary B. v. Whitmer, 957 F.3d 616, 644 (6th Cir. 2020) ("Even if a specific iteration of a right lacks substantial historical roots, this alone is not enough to foreclose recognition under the Due Process Clause."), *reh'g en banc granted*, 958 F.3d 1216 (6th Cir. 2020); *see* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 951 (1992) (Rehnquist, C.J., concurring in part) (citing rights the Court protected despite their absence from the Constitution, for example, a right to marriage as recognized in *Loving v. Virginia*, 388 U.S. 1, 12 (1967)); *see also* Griswold v. Connecticut, 381 U.S. 479, 490 (1965) (Goldberg, J., concurring) (explaining that a right to privacy within marriage exists because "the Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people"); Meyer v. Nebraska, 262 U.S. 390, 401, 403 (1923) (holding that parents have a right to determine their children's education when the state has no compelling interest for its restrictions because "the individual has certain fundamental rights which must be respected").

The second prong of a fundamental rights analysis explores whether the Court can identify the right with a "careful description."[45] By looking to the complaint, the Court can identify the specific right that a plaintiff is asserting.[46] As the Court observed in *Obergefell*, however, the necessary degree of specificity in the description may vary with the asserted right.[47] For example, in *Moore v. City of East Cleveland*,[48] the plurality of the Court held that the city could not define a family unit, utilizing the broad protection afforded by the negative right to keep the government out of "the private realm of family life" instead of narrowly-defining a positive right for a grandmother to raise her two grandchildren.[49] Similarly, in *Meyer v. Nebraska*,[50] the Court considered parents' interests in controlling their children's upbringing without government interference to be a sufficiently-defined negative right, rather than basing its holding on the specific positive right of a teacher to provide instruction in German.[51] On the other hand, in *Washington v. Glucksberg*,[52] the Court refused to recognize a fundamental right to physician-assisted suicide at least in part because the plaintiffs did not define that right with enough specificity in the complaint.[53] Generally,

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45. Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)) (first citing Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992); and then citing Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 277–78 (1990)).

46. *See Collins*, 503 U.S. at 125 (noting that the Court's reluctance to expand fundamental rights makes it crucial to evaluate the complaint to specifically identify the right the plaintiff is alleging); *see also Flores*, 507 U.S. at 302 (distinguishing that the plaintiff's asserted right was related to custody rather than freedom from restraint); Bowers v. Hardwick, 478 U.S. 186, 195–96 (1985) (addressing plaintiff's claim that a right could depend on the distinction between conduct that occurs in public and conduct that occurs in the home).

47. Obergefell v. Hodges, 576 U.S. 644, 671 (2015) (acknowledging that "liberty under the Due Process Clause must be defined in a most circumscribed manner," but noting that the Court requires more specificity for an issue such as physician-assisted suicide compared to that required in issues of marriage or intimacy).

48. 431 U.S. 494 (1977) (plurality opinion).

49. *Id.* at 499 (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

50. 262 U.S. 390 (1923).

51. *See id.* at 401–03 (balancing the interests of the state in instilling certain values and skills in its citizens against the fundamental right of individuals to speak languages other than English).

52. 521 U.S. 702 (1997).

53. *Id.* at 722–23 (describing how the complaint's use of a variety of phrases did not adequately identify the asserted right). The plaintiffs in this case sought recognition of a right to a positive intervention—namely physician-assisted suicide. *Id.* at 707. The Court was very careful to distinguish this asserted positive right from the

the defined right's specificity reflects the Court's preference for negative rights: where the right in question is a negative right the definition may be broad, while a positive right tends to require a more specific description.

B. Supreme Court Education Cases

Nearly all of the Supreme Court's decisions supporting education rights have been based on principles of equal protection instead of due process.[54] While the Supreme Court has thus far refused to recognize a fundamental right to education under substantive due process, an open question remains as to "whether a *minimally adequate* education is a fundamental right."[55]

The Supreme Court discussed fundamental rights in the context of education in several early twentieth-century cases. In *Meyer*, a teacher challenged a state law that prohibited him from teaching students in any language other than English.[56] The Court held that, while the state's interest in promoting homogeny among its people was understandable, certain rights are fundamental.[57] In this case, the "fundamental rights" of parents to control their children's education outweighed the state's interest in mandating restrictions on that education.[58] The Court reached a similar conclusion in *Pierce v. Society of Sisters*[59] when parents challenged a state law that required them to send their children to public schools rather than private ones.[60] Following the reasoning in *Meyer*, the Court held that the Fourteenth Amendment protects the rights of parents and guardians to determine

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negative right to refuse medical intervention that it recognized in *Cruzan v. Director, Missouri Department of Health*. *Id.* at 724–25 (citing Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990)). Indeed, the Court asserted in *Glucksberg* that its opinion in *Cruzan* was actually quite specific, referring to a "constitutionally protected right to refuse lifesaving hydration and nutrition." *Id.* at 723 (quoting *Cruzan*, 497 U.S. at 279).

54. Gary B. v. Whitmer, 957 F.3d 616, 675 (6th Cir. 2020) (Murphy, J., dissenting) (arguing that the majority's finding of a fundamental right to literacy is based on cases that relied on equal protection arguments), *reh'g en banc granted*, 958 F.3d 1216 (6th Cir. 2020).

55. Papasan v. Allain, 478 U.S. 265, 285–86 (1986) (emphasis added) (describing a minimally adequate education as including basic things such as learning to read and write or receiving instruction on the "educational basics").

56. 262 U.S. at 396.

57. *Id.* at 401–02.

58. *Id.* at 401–03.

59. 268 U.S. 510 (1925).

60. *Id.* at 530.

their children's upbringing when the state does not have a compelling interest to the contrary.[61]

Nearly half a century later, the Supreme Court extended the rights of parents to be free of government interference in raising their children. In *Wisconsin v. Yoder*,[62] Amish parents challenged a statute that compelled students to attend school through age sixteen.[63] Even though the Court recognized that one of the highest duties of the state is to provide access to public schools, it determined that the state's interest in compulsory attendance was not so compelling that it outweighed parents' interests in taking their children out of school after eighth grade because of their religious and cultural beliefs.[64]

Following *Meyer* and *Pierce*, the Supreme Court continued to emphasize the importance and scope of public education in its opinions. The Court's landmark decision in *Brown v. Board of Education*[65] held that school segregation was unconstitutional.[66] With its unanimous decision, the Supreme Court unequivocally stated, "in the field of public education the doctrine of 'separate but equal' has no place."[67] Although the decision was based on principles of equal protection, subsequent decisions have discussed the *Brown* opinion in considering both equal protection and due process arguments.[68] The Court was particularly eloquent in its discussion of the importance of education, which later opinions have often quoted.[69]

Even after the Court mandated integration in *Brown*, schools remained stubbornly segregated.[70] In the case commonly referred to

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61. *Id.* at 534–35.
62. 406 U.S. 205 (1972).
63. *Id.* at 207.
64. *Id.* at 213–14, 234.
65. 347 U.S. 483 (1954).
66. *Id.* at 495.
67. *Id.*
68. *See* Plyler v. Doe, 457 U.S. 202, 222–23, 238 (1982) (holding that, in part due to the importance of education emphasized in *Brown*, a heightened level of scrutiny should apply even though plaintiffs in the case were not a suspect class and education was not a fundamental right).
69. *See, e.g.*, *id.* at 222–23 ("Today, education is perhaps the most important function of state and local governments . . . . It is required in the performance of our most basic public responsibilities . . . . It is the very foundation of good citizenship." (quoting *Brown*, 347 U.S. at 493)).
70. Ed Gordon, *Schools and Segregation, 50 Years After 'Brown 2'*, NPR (May 31, 2005, 12:00 AM), https://www.npr.org/templates/story/story.php?storyId=4673367 [https://perma.cc/3GJ9-GYR8].

as *Brown II*,[71] the Court ordered that the states comply with its desegregation orders from the year before "with all deliberate speed," while acknowledging that the logistics of doing so would take time.[72] Nearly two decades later, in *Milliken v. Bradley*,[73] the Court considered whether remedies to de facto segregation could cross school district boundaries.[74] The Court held that minority students in Detroit did not have a right to attend schools that were not de facto racially segregated unless there was intentional discrimination in the individual districts.[75] Justice White dissented, accusing the majority of crippling the Court's ability to remedy the effects of historical segregation by placing the state's interest in ease of administration above the interests of students to attend non-segregated schools.[76]

Since *Brown*, the Court has not always been as receptive to Equal Protection arguments. In *San Antonio Independent School District v. Rodriguez*, parents of Mexican-American students argued that basing school funding on property taxes created disparities in education that violated the Equal Protection Clause.[77] The parents claimed disparate treatment based on wealth, but the Court determined that wealth was not a characteristic that defined a suspect class and thus did not apply strict scrutiny.[78] The Court acknowledged the importance of public education but refused to find that the importance of a government-provided service correlated to recognizing that service as a fundamental right.[79] In reaching its conclusion, the Court discussed other cases in

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71. Brown v. Bd. of Educ. of Topeka, 349 U.S. 294 (1955).

72. *Id.* at 300–01. This vague timeline undermined *Brown*'s mandate and allowed schools to delay integration. *See* Geter, *supra* note 31, at 172.

73. 418 U.S. 717 (1974).

74. *Id.* at 721–22.

75. *Id.* at 746–47. The Court determined that the lower courts erred by ignoring the district lines and considering the racial makeup of the schools in the entire Detroit metropolitan area rather than just the city itself. *Id.* at 738–41.

76. *Id.* at 762–64 (White, J., dissenting). Justice Marshall also emphasized the need to remedy historical segregation, acknowledging that while it might be a complicated feat to undo a history of racism, difficulty is an insufficient reason to avoid taking the necessary steps to do so. *Id.* at 814–15 (Marshall, J., dissenting).

77. 411 U.S. 1, 17 (1973).

78. *Id.* at 28 ("[A]ppellees' suit asks this Court to extend its most exacting scrutiny to review a system that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts."); *see supra* note 24 and accompanying text.

79. *Rodriguez*, 411 U.S. at 30 ("Nothing this Court holds today in any way detracts from our historic dedication to public education.").

which it had upheld or identified a right to a particular service.[80] The Court carefully distinguished situations in which a service was completely unattainable from those in which the service could be obtained, albeit with some degree of hardship.[81] While the appellees contended that certain protected rights, such as free speech and the ability to vote, are virtually meaningless without an education, the Court asserted that the Constitution does not guarantee "the most effective speech or the most informed electoral choice."[82] The Court did, however, concede that "some identifiable quantum of education" is potentially "a constitutionally protected prerequisite to the meaningful exercise of either right," leaving the door open for future assertions of a right to a minimum education.[83]

The Court continued to hear education cases that were not strictly based on disparate treatment of a suspect class when it conceded that a right to some minimal amount of education *might* be constitutionally protected. *Plyler v. Doe*[84] was one such case, and it provided a partial victory for those asserting a fundamental right to education.[85] Plaintiffs, a group of undocumented schoolchildren,[86] brought an Equal Protection challenge against a Texas statute that withheld funds from school districts that provided children of illegal immigrants with a free public education.[87] The Court reasoned that the rational basis test was not sufficient for all circumstances, instead applying heightened scrutiny to situations disadvantaging a "suspect class" or infringing on a "fundamental right."[88]

Writing for the majority, Justice Brennan acknowledged that strict scrutiny did not apply because undocumented immigrants are not a

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80. *Id.* at 20–22 (noting that indigent defendants are provided with counsel when they would otherwise be completely unable to procure it, but that the same benefit does not apply to those who may only be able to afford lower quality representation).

81. *Id.*

82. *Id.* at 36.

83. *Id.* at 36–37. The Court went on to observe that while the appellees' arguments might have merit if there was a *complete* denial of educational opportunities, their argument based on funding disparities resulting in *lower quality* education did not carry the same weight. *Id.* at 37.

84. 457 U.S. 202 (1982).

85. *Id.* at 221–23.

86. *Id.* at 206. *Plyler v. Doe* was a class action lawsuit with a class comprised of "all undocumented school-age children of Mexican origin" living in the Tyler Independent School District. *Id.*

87. *Id.* at 205.

88. *Id.* at 216–17; *see supra* note 23 and accompanying text.

suspect class and education is not a fundamental right.[89] However, the Court simultaneously asserted that the policies in question had such negative impacts on the individual students, and society as a whole, that the statute would have to serve a truly substantial state interest for the Court to deem it "rational," which the Court did not.[90] The opinion discussed those negative impacts at length, noting that illegal immigration creates a large, perpetually disadvantaged population, before distinguishing the particular plight of the children who are condemned to these circumstances through no actions of their own.[91] While the Court conceded that public education is not a right explicitly guaranteed in the Constitution, it asserted that education is also more than a mere government benefit such as welfare.[92] The Court stressed the importance of education in preparing citizens to actively engage in the political process, thereby preserving a democratic society.[93] The Court determined that this "unique" set of circumstances allowed it to invoke heightened scrutiny instead of employing rational basis review.[94]

The Court has avoided definitively resolving whether the Constitution protects some minimum education as a fundamental right. *Papasan v. Allain*[95] continued the dialogue around this issue.[96] In *Papasan*, the plaintiffs alleged that Mississippi officials violated the Equal Protection Clause and their substantive due process rights by selling lands set aside for Chickasaw Cession public schools, leading to disparate spending that negatively impacted the schoolchildren of the Chickasaw nation.[97] The Court acknowledged that it "ha[d] not yet definitively settled the question whether a minimally adequate education is a fundamental right."[98] However, it did not reach the question, instead

89. *Plyler*, 457 U.S. at 223–24.

90. *Id.* at 223–24, 230 (concluding that "[i]f the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest").

91. *Id.* at 219 (noting, with respect to "undocumented resident aliens," that "[t]he existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law").

92. *Id.* at 221.

93. *Id.* ("[S]ome degree of education is necessary . . . if we are to preserve freedom and independence.").

94. *Id.* at 239; *see supra* notes 24–26 and accompanying text.

95. 478 U.S. 265 (1986).

96. *Id.* at 285.

97. *Id.* at 274.

98. *Id.* at 285.

dismissing the case because the court of appeals and the parties had insufficiently addressed the equal protection issue.[99] This acknowledgement, and refusal to make a determination, continues to leave the door open for future plaintiffs to make the case for a right to access some minimum level of education.

Since the dual-argument in *Papasan*, plaintiffs have frequently invoked both Equal Protection and Due Process arguments when asserting their right to an education. Two years after *Papasan*, the plaintiffs in *Kadrmas v. Dickinson Public Schools*[100] also made this blended argument. The school district charged a bus fee for transporting students; the plaintiffs transported their student privately and sought to enjoin the school district from collecting the fee.[101] The plaintiffs argued that allowing the district to collect such a fee violated the Equal Protection Clause because it discriminated based on wealth.[102] In addition, they argued that the fee denied lower-income families "minimum access to education."[103]

Neither argument persuaded the Court; it upheld the statute under rational basis review instead of invoking strict scrutiny because it determined that poverty is not a protected class and education is not a fundamental right.[104] The Court also considered the plaintiffs' argument that they were being denied "minimum access to education," but determined that there was no true denial of access because the bus fee represented only an increased difficulty in accessing education.[105]

Finally, the Court addressed plaintiffs' contention that it should apply an intermediate level of "heightened scrutiny" as it had in *Plyler*.[106] The Court declined to do so, drawing distinctions between the

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99. *See id.* at 289 (finding that the parties and district court ignored the key issue of whether the Equal Protection Clause permitted the government to unequally distribute federal assets to different school districts).

100. 487 U.S. 450 (1988).

101. *Id.* at 450.

102. *Id.*

103. *Id.* at 458.

104. *Id.*; *see supra* note 24 and accompanying text (explaining that plaintiffs alleging a violation of the Equal Protection Clause must demonstrate they belong to a protected class to invoke strict scrutiny).

105. *Kadrmas*, 487 U.S. at 458; *see supra* notes 80–81 and accompanying text (discussing how the Court in *Rodriguez* distinguished instances in which a service was completely unobtainable from instances in which the service merely required hardship to obtain).

106. *Kadrmas*, 487 U.S. at 459 (noting that the "unique circumstances" in *Plyler*, in which the state penalized children of undocumented immigrants, elevated the Court's

situations in each case.[107] While the illegal actions of their parents caused the disparate treatment of the students in *Plyler*,[108] that was not the case here.[109] Further, the student in *Kadrmas* was not denied access to education; rather, her parents simply chose to find an alternative method of transportation.[110] Without the compounded "unique circumstances" present in *Plyler*,[111] the Court did not deem it necessary to extend heightened scrutiny to this case.[112] In spite of the Court's refusal to apply heightened scrutiny in *Kadrmas*, future plaintiffs can still argue that heightened scrutiny is the appropriate level of review for education cases because "unique circumstances" had previously justified it in *Plyler*.

C. The History of Public Education, the Denial of Education, and the Court

Although the Constitution does not mention education, all three branches of the federal government have emphasized the importance of public education since the country's founding. The first presidents wrote and spoke about the necessity of an educated populace to the success of the republic,[113] even though public schools were not prevalent

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analysis from rational basis review (quoting Plyler v. Doe, 457 U.S. 202, 239 (1982) (Powell, J., concurring))); *see supra* text accompanying notes 84–94.

107. *Kadrmas*, 487 U.S. at 459 (finding a meaningful distinction between penalizing the children in *Plyler* for the illegal conduct of their parents and penalizing the children in *Kadrmas* because their parents refused to pay a transportation fee).

108. *See* Plyler v. Doe, 457 U.S. 202, 220 (1982) (discussing the injustice of punishing children for their parents' illegal actions).

109. *See Kadrmas*, 487 U.S. at 459 (distinguishing the plaintiff's parents' refusal to pay the bus fee, a choice they could legally make, from the choice of the parents in *Plyler* to enter the country illegally).

110. *Id.* Indeed, the right of parents to make choices about their children's education *is* considered fundamental. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) (finding that parents' religious and cultural interests in choosing not to send their children to public schools outweighed the state's interest in compulsory attendance); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (clarifying that the state could not restrict parents' fundamental right to choose to send their children to private school); Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (holding that parents' fundamental right to control their children's education trumped the state's interest in promoting homogeny among its citizens).

111. See *Kadrmas*, 487 U.S. at 459–60 (discussing that the Court applied heightened scrutiny in *Plyler* because the government had punished students for their parents' illegal actions and created a perpetually disadvantaged group by denying students an education).

112. *Id.* at 459.

113. *See* Derek W. Black, *The Fundamental Right to an Education*, 94 NOTRE DAME L. REV. 1059, 1081–83 (2019) (citing addresses by George Washington and Thomas

at the time.[114] Even before states ratified the Constitution, Congress explicitly stated the importance of education in the Ordinance of 1787, which decreed, "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[115] The Supreme Court has also referenced the historical importance of education in American society throughout its education cases.[116]

Just as the importance of education was evident at the country's inception, so too was the systemic deprivation of literacy to a very specific portion of the population.[117] Both pre- and post-Revolution, states adopted various legislation that prohibited teaching enslaved persons to read, in order to prevent them from learning, communicating, and participating in society.[118] Some states still had these laws in place when the federal government adopted the Fourteenth Amendment; even outside of those states, educational opportunities for Black people were

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Jefferson that emphasized how the need for well-informed voters made education important).

114. *See* Jill Lepore, *Is Education a Fundamental Right?*, NEW YORKER (Sept. 3, 2018), https://www.newyorker.com/magazine/2018/09/10/is-education-a-fundamental-right [https://perma.cc/L393-E2H8] (noting that by 1868, twenty-eight of the thirty-two states included free public education in their constitutions).

115. Ordinance of 1787: The Northwest Territorial Government, art. III (1787).

116. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29–30 (1973) (emphasizing that the Court's denial of a fundamental right to education should not detract from its recognition of the significant role of education in society). Even in *Wisconsin v. Yoder*, where the Court held that parents could not be compelled to send their children to high school, it asserted that providing public education was one of the most crucial functions of the state. 406 U.S. 205, 213 (1972).

117. Jeffrey Shulman, *A Right to Literacy as the "Pathway from Slavery to Freedom"?*, CONST. DAILY (Aug. 3, 2018), https://constitutioncenter.org/blog/a-right-to-literacy-as-the-pathway-from-slavery-to-freedom [https://perma.cc/BPN4-KU6U] (citing to slave codes in various states to conclude that "[t]here is a longstanding and intimate connection between slavery and enforced illiteracy").

118. *See* Rasmussen, *supra* note 3, at 201–02 (noting that South Carolina, Georgia, and Virginia were among the states that adopted such laws). The South Carolina Negro Act of 1740 was the earliest of these laws. *Id.* at 201. South Carolina's legislature drafted the Act after the Stono Rebellion, which, at the time, was the largest slave uprising in the British colonies. *Id.* The Spanish colonies promised freedom to escaped slaves; because a literate slave could read written notices advertising this fact, literacy represented a threat to slaveholders. *Id.* at 201–02. The ability to read was also associated with superiority of intellect; by preventing enslaved people from attaining literacy, the slaveholders could perpetuate the erroneous concept that enslaved people were somehow inferior to their white captors. *Id.* at 202.

limited.[119] During Reconstruction, freedmen and women fought for education in what W.E.B. Du Bois referred to as "the first great movement for public education at the expense of the state."[120] The movement met violent opposition, with groups such as the Ku Klux Klan responding by murdering teachers, intimidating parents, and burning down schools to prevent the education of Black students.[121] Although Congress enacted legislation to support and protect the teachers,[122] Supreme Court holdings at the time undermined the movement's strides toward education, equality, and political empowerment.[123]

In the mid-twentieth century, the Supreme Court's chief impact on education was establishing a right to equal education based on the Equal Protection Clause.[124] The process, however, was an uneven one. After striking down intentional racial segregation in public schools in *Brown*, the Court held in *Milliken* that de facto segregation in schools did not violate the Constitution.[125] Similarly, despite ordering in *Brown*

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119. *See* Brown v. Bd. of Educ., 347 U.S. 483, 489–90 (1954) (observing that at the time the Fourteenth Amendment was adopted, white children in the South primarily attended private schools and Black children were almost entirely uneducated).

120. Blackmer, *supra* note 4, at 3.

121. *Id.* at 3–6 (discussing widespread incidents of violence against teachers of Black students).

122. *Id.* at 5–7 (explaining the "Enforcement Acts" Congress passed to empower the federal government to protect Black citizens when states refused to do so).

123. *See* J. Morgan Kousser, *Separate but Not Equal: The Supreme Court's First Decision on Racial Discrimination in Schools*, 46 J. S. HIST. 17, 36 (1980) (highlighting cases that failed to support the rights of Black Americans following the adoption of the Fourteenth Amendment). For example, in *United States v. Cruikshank*, the Court refused to uphold the convictions of the white defendants who had killed scores of Black men over a political dispute. 92 U.S. 542, 555–57 (1875); *see* Blackmer, *supra* note 4, at 6–7 (observing that the Court's decision in *Cruikshank* was particularly troubling because it seemed like an endorsement of Ku Klux Klan violence).

124. *See* Geter, *supra* note 33, at 172–75 (identifying the four waves of education litigation: (1) federal cases asserting a right under the Equal Protection Clause; (2) state cases for equal education based on state constitutions; (3) state cases based on the *adequacy* of public education; and (4) the current wave of federal cases based on the right to an adequate education). Prior to *Brown*, the Court upheld the rights of state and local governments to require segregated schools and to refuse Black students a public education. *See, e.g.*, Berea Coll. V. Kentucky, 211 U.S. 45, 51–54, 58 (1908) (allowing a state to require that private schools be segregated); Cumming v. Richmond Cnty. Bd. of Educ., 175 U.S. 528, 544 (1899) (allowing a local school board to close a Black high school and redistribute the funds to a white high school).

125. Milliken v. Bradley, 418 U.S. 717, 740 (1974) (restating that desegregation, as a constitutional remedial measure, "does not require any particular racial balance" (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 24 (1971))); *see* Kaela

II (a year after *Brown*) that desegregation should proceed "with all deliberate speed,"[126] it was nearly a decade later in *Griffin v. City School Board*[127] that the Court observed "the time for mere 'deliberate speed' has run out."[128] From the mid-sixties through the late eighties, the Court's actions led to drastic changes in the racial makeup of schools and a measurable narrowing of the achievement gap.[129] However, once districts were released from the Court's desegregation decrees, schools began to re-segregate based on wealth as well as race.[130] As a result, the most significant achievement gaps developed between socioeconomic groups.[131] Although the Court has refused to define a protected class based on poverty to invoke strict scrutiny under equal protection principles, by recognizing a fundamental right to literacy, it can still extend protection to this vulnerable and disadvantaged population.[132]

D. Gary B. *and the Case for a Fundamental Right to Literacy*

In 2016, a group of public school students in poorly performing Detroit schools brought a lawsuit in the Eastern District of Michigan

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King, Note, *Schools in Name Only: The Role of the Federal Judiciary in Remedying Our Nation's Unconstitutional Schools*, 80 OHIO ST. L.J. 1055, 1061–62 (2019) (explaining how *Milliken* narrowed *Brown* by holding that de facto segregation was constitutionally permissible and only de jure segregation caused by an "overtly discriminatory" state law violated the Equal Protection Clause).

126. 349 U.S. 294, 300–01 (1955).

127. 377 U.S. 218 (1964).

128. *Id.* at 234.

129. King, *supra* note 125, at 1068.

130. *See id.* at 1069–72 (noting that more than one hundred districts achieved "unitary" status and were released from desegregation decrees between 1991 and 2009).

131. *Id.* at 1073. High poverty schools are more likely to have unqualified teachers and high rates of teacher turnover. *Id.* at 1072. These are two of the elements the plaintiffs in *Gary B.* highlighted to demonstrate the inadequacy of the education the state was providing. Complaint, *supra* note 13, at 12.

132. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28–29 (1973) (reversing a district court decision that applied strict scrutiny to a government program challenged by a class of economically "disadvantaged" individuals). *But. cf.* Plyler v. Doe, 457 U.S. 202, 223–24 (1982) (invoking intermediate scrutiny to protect a vulnerable population that did not qualify as a discrete class to prompt strict scrutiny). The Court's holding in *Milliken v. Bradley* made it impossible for equal protection claims to succeed in the absence of intentional segregation, leaving recognition of the fundamental right to a basic minimum education as the best way for the courts to protect vulnerable students. *See* King, *supra* note 125, at 1061–64 (discussing the limiting impact of *Milliken* on *Brown*'s holding and narrowing opportunities for future plaintiffs to succeed).

alleging that the state of Michigan was denying them a basic minimum education.[133] The plaintiffs' argument was based on the premise that a combination of factors—dismal facilities, unqualified teachers, and insufficient materials—prevented students from obtaining access to literacy.[134] In perhaps the most appalling example of unqualified instruction, an eighth-grade student taught all the seventh and eighth grade math classes at Hamilton Academy, a charter school, for a month after the teacher left and the initial replacements (a paraprofessional and a special education teacher) were incapable of covering the material.[135] The learning outcomes for the plaintiffs' schools reflected the impact of the alleged inadequacies, with more than 90% of students unable to meet state standards.[136]

The Eastern District of Michigan rejected the plaintiffs' Due Process claims, noting the Supreme Court's reluctance to recognize positive rights and asserting that states do not need to "affirmatively provide each child with a defined, minimum level of education by which the child can attain literacy" because "the Supreme Court has neither confirmed nor denied that access to literacy is a fundamental right."[137]

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133. Gary B. v. Whitmer, 957 F.3d 616, 620–21 (6th Cir. 2020), *reh'g en banc granted*, 958 F.3d 1216 (6th Cir. 2020). Plaintiffs also made claims based on equal protection principles (asserting that students in other Michigan school districts receive an adequate education) and restriction of liberty (arguing that compulsory attendance laws force them to be present in unreasonably dismal schools). *Id.* at 621.

134. *Id.* at 624. The complaint describes in detail the horrendous conditions the plaintiffs encountered in their schools: textbooks were drastically outdated, falling apart, and in such short supply that students could not take them home because several students had to share a single copy in class. Complaint, *supra* note 13, at 83. Vermin infestations were constant, classroom ceilings leaked and even collapsed, and one school had a non-functioning fire alarm system. *Id.* at 88–89, 92–96. Insufficient heating and cooling systems left students able to see their breath indoors during the winter and sweltering in 100-degree classrooms during the spring; the extreme temperatures also disrupted learning by necessitating early dismissals. *Id.* at 90–92. The schools encountered many staffing challenges and relied heavily on Teach for America instructors, which contributed to high turnover rates and a large percentage of classes being taught by uncertified teachers with no expertise in the subject matter. *Id.* at 101–02.

135. Complaint, *supra* note 13, at 2, 99–100.

136. Gary B. v. Whitmer, 957 F.3d 616, 627 (6th Cir. 2020), *reh'g en banc granted*, 958 F.3d 1216 (6th Cir. 2020).

137. Gary B. v. Snyder, 329 F. Supp. 3d at 363, 366 (E.D. Mich. 2018), *aff'd in part, rev'd in part sub nom.* Gary B. v. Whitmer, 957 F.3d 616, 620–21 (6th Cir. 2020), *reh'g en banc granted*, 958 F.3d 1216 (6th Cir. 2020). The district court considered the equal protection claims but determined they were inadequate because they presented a comparison with all Michigan schools rather than with other schools where the state had intervened in the education process, as it had in Detroit. *Gary B. v. Whitmer*, 957

On appeal, the Sixth Circuit's three judge panel reversed the district court's decision, holding that the plaintiffs did in fact have a fundamental right to literacy.[138] The circuit court opinion observed that the Supreme Court had often discussed the possible existence of a fundamental right to a minimum education but had yet to decide whether it existed.[139]

1. Negative rights argument

The Eastern District of Michigan dismissed the public school students' race-based equal protection claim on the merits under rational basis review,[140] and declined to consider the compulsory attendance claim altogether.[141] It reasoned that because the plaintiffs were trying to obtain a positive intervention instead of seeking to avoid government interference, it would focus on their positive rights argument rather than the compulsory attendance argument based on negative rights.[142] However, the appeals court considered the compulsory attendance claim, classifying it as a "negative" rights claim and distinguishing between substantive due process claims based on "negative" rights and those asserting "fundamental" rights.[143]

The plaintiffs' compulsory attendance argument was based on the principles of freedom of movement and freedom from state custody, both premised on the idea that individuals have a right to be free from

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F.3d at 629. The court also rejected the plaintiffs' claim of disparate treatment based on race because they failed to assert an instance of the state intervening in a school with a different racial composition and treating that school differently. *Gary B. v. Snyder*, 329 F. Supp. 3d at 367–68.

138. *Gary B. v. Whitmer*, 957 F.3d at 661–62. Judge Clay wrote the circuit court's two-to-one decision, with Judge Murphy dissenting. *Id.* at 620. The Sixth Circuit agreed with the district court when it dismissed the claims based on equal protection and compulsory attendance. *Id.* at 637, 642. The plaintiffs argued for the heightened scrutiny level of *Plyler*, leading the court to discuss that case at length in its opinion. *Id.* at 633–35. It acknowledged the intermediate level of scrutiny used in *Plyler*, despite the lack of a protected class or a fundamental right and described it as "throw[ing] a wrench" in the typical concept of rational basis review. *Id.* at 634–35. While the circuit court held that the equal protection claim was insufficient because the complaint did not compare a specific instance in which the state treated a differently comprised school in a disparate manner, it granted plaintiffs leave to amend their complaint because of Plyler's precedent for intermediate review. *Id.* at 637–38.

139. *Id.* at 634–35.

140. *Id.* at 629.

141. *Gary B. v. Snyder*, 329 F. Supp. 3d at 364–65.

142. *Id.*

143. *Gary B. v. Whitmer*, 957 F.3d at 638.

government interference.[144] They asserted that the decrepit nature of the district's buildings rendered them "schools in name only,"[145] and that by compelling their attendance in these buildings the state was violating their rights.[146] While the Sixth Circuit ultimately dismissed the argument as inadequately pleaded, it nonetheless explored the legal theory behind the claim.[147] The court noted that a negative rights argument generally involves balancing the interests of the state against those of the individual.[148] In this case, the rights of the students to freedom of movement would be balanced against the State's interest in providing education.[149]

While not explicitly ruling on this point, the court nonetheless reasoned that the state would be violating the plaintiffs' due process if it were requiring their attendance in schools where *no* education was taking place.[150] Once again, a court considered a right under substantive Due Process as a matter of degrees: *some* education might justify *some* restraint, while *no* education would not.[151]

2. The central issue: access to literacy

The Sixth Circuit identified the central issue in *Gary B.* as whether a fundamental right exists to a basic minimum education, or more specifically, access to literacy.[152] After exploring Supreme Court jurisprudence regarding fundamental rights under substantive due process and evaluating the Court's history with the issue of education, the Sixth Circuit determined that a right to a basic minimum education

144. *Id.*; *see* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992) (recognizing that "personal liberty" is a broader concept than the rights enumerated in the Constitution).

145. Complaint, *supra* note 13, at 4.

146. *Gary B. v. Whitmer*, 957 F.3d at 638.

147. *Id.*

148. *Id.* at 639 (citing Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990)). In *Cruzan*, the Court considered an individual's right to refuse medical care. 497 U.S. at 265. In that case, the Court weighed the right of the individual to be free from government interference against the interest of the state in protecting the lives of its citizens. *Id.* at 279.

149. *See Gary B. v. Whitmer*, 957 F.3d at 640–41 (finding that, "given the important governmental interest in educating its citizens," the Supreme Court typically allows states to deprive students of their freedom of movement).

150. *Id.*

151. *Id.* at 642.

152. *Id.* at 648.

did exist.[153] The court reversed the district court's decision, providing a significant victory for the plaintiffs.[154]

The Sixth Circuit reviewed the Supreme Court precedents relating to fundamental rights and education and applied the two-prong fundamental rights analysis.[155] After conducting a historical analysis of the role of public education in the United States, the court concluded that "free state-sponsored schools" were abundant at the time the Fourteenth Amendment was adopted.[156] Citing Supreme Court education cases, the Sixth Circuit went back further in the nation's history, noting references to the importance of education during the eighteenth century.[157] The court contended that even under Justice Scalia's restrictive view of historical analysis,[158] education should still satisfy the required historical importance of a fundamental right.[159]

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153. *Id.*

154. *Id.* By drawing a distinction between a fundamental right to literacy and a broader fundamental right to education, the court avoided the roadblock of Supreme Court jurisprudence rejecting a right to the latter and instead created a precedent affirming the right to a minimum education, which the Court had thus far avoided addressing. *See* Papasan v. Allain, 478 U.S. 265, 284, 298 (1986) (acknowledging that the Court had not previously determined whether a fundamental right to some minimum level of education exists); *see also* Alia Wong, *Students in Detroit Are Suing the State Because They Weren't Taught to Read*, ATLANTIC (July 6, 2018), https://www.theatlantic.com/education/archive/2018/07/no-right-become-literate/564545/ [https://perma.cc/8P5Z-W848] (discussing the novel argument for a right to *literacy* based on the fact that "other rights in the Constitution necessarily require the ability to read").

155. *Gary B. v. Whitmer*, 957 F.3d at 642–55.

156. *Id.* at 648. In addition to observing the ubiquitous nature of public education, the court emphasized the correlation between access to education and access to power, highlighting the fact that a comprehensive analysis of the history of education in the United States must include the history of depriving access to education for people of color. *Id.* Denying access to education, the court asserted, "has long been viewed as a particularly serious injustice." *Id.*

157. *Id.* at 649. The court referred to *Wisconsin v. Yoder*, which acknowledged that at the country's founding, Thomas Jefferson recognized the importance of education to maintaining an engaged citizenry. 406 U.S. 205, 221 (1972). Emphasis on the importance of education continued during the country's westward expansion: in *Meyer v. Nebraska*, the Court quoted the Ordinance of 1787, one of the most important acts of the Confederation Congress, which proclaimed, "schools and the means of education shall forever be encouraged." 262 U.S. 390, 400 (1923).

158. *See supra* note 41 and accompanying text.

159. *See Gary B. v. Whitmer*, 957 F.3d at 649–50 (citing Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 108 (2008)) (noting that all but one state at the time of the Fourteenth

The Sixth Circuit then turned from the history of public education to examining the parallel history of denying access to education and literacy.[160] It pointed out that at the time of the country's founding, laws in many states prohibited teaching enslaved peoples to read.[161] Continuing its historical analysis, the court discussed the violence associated with educating Black students during Reconstruction[162] and the subsequent policies and legislation that furthered segregation.[163] The court noted that before *Brown*, a number of Supreme Court decisions supported states' efforts to segregate schools and restrict Black students' access to education.[164] Even after *Brown*, the court observed, there were still decades of school segregation cases making their way to the Supreme Court.[165] From its analysis, the court concluded that access to literacy satisfied the first prong of the substantive Due Process test because it was clearly "deeply rooted in this Nation's history and tradition."[166]

Amendment's ratification required in their constitutions that their governments provide publicly-funded education). After addressing the originalist position that a historical analysis should be limited to the time of the law's adoption, the court went on to discuss the development and expansion of public education over time, referencing *Brown* in its assertion that the American people have come to expect and rely on public education due to its ubiquity. *Id.* at 650 (citing Brown v. Bd. of Educ., 347 U.S. 483, 492–93 (1954)).

160. *Id.* at 649.

161. *Id.* at 650 (citing South Carolina v. Katzenbach, 383 U.S. 301, 311 n.10 (1966)). This prohibition was based on the fear that literate slaves would be more prone to rebellion. *Id.* (citing United States v. Rhodes, 27 F. Cas. 785, 793 (C.C.D. Ky. 1866)).

162. *Id.* at 651 (quoting Frederick Douglass Bicentennial Commission Act, Pub. L. No. 115-77, § 2(3), 131 Stat. 1251, 1251 (2017)) (discussing intimidation tactics the Klan and others employed against schoolteachers and parents of Black students).

163. *Id.* (citing *Katzenbach*, 383 U.S. at 310–13, 311 n.10) (noting that, while the federal government passed civil rights legislation, Southern states quickly adopted policies aimed at limiting the education—and subsequently the political power—of Black people).

164. *Id.* (first citing Cumming v. Bd. of Educ., 175 U.S. 528, 544 (1899); then citing Berea Coll. v. Kentucky, 211 U.S. 45, 51–54, 58 (1908); and then citing Lum v. Rice, 275 U.S. 78, 85–87 (1927)); *see* cases cited *supra* note 124.

165. *Gary B. v. Whitmer*, 957 F.3d at 651 (citing Milliken v. Bradley, 418 U.S. 717, 721–23 (1974)); *see supra* note 70 and accompanying text.

166. Gary B. v. Whitmer, 957 F.3d at 652 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)). The court's ultimate conclusion rested on several components. First, access to education was intrinsically tied with political power. *Id.* at 651–52. Second, the courts have historically played a key role in confirming access to education for disenfranchised populations. *Id.* at 652. Finally, the frequent presence of the courts in these disputes is further evidence of the value of literacy in American society. *Id.* In

After considering the history of public education in the United States, the court went on to determine whether a basic minimum education "is implicit in the concept of ordered liberty."[167] On this element, too, the court determined that a basic minimum education satisfied the requirements of a fundamental right.[168] Instead of basing its analysis purely on the *importance* of education, the Sixth Circuit considered how "fundamental" access to literacy was "for even the most limited participation in our country's democracy."[169] This basic participation, the court noted, could be as simple as the ability to read road signs and thereby comply with the law.[170] The court acknowledged the Supreme Court's admonishment in *Rodriguez* that the importance of a state service does not determine whether it is a fundamental right; however, the court emphasized that literacy was not just *important* but actually *necessary* to the exercise of other rights.[171]

The Sixth Circuit also drew on history in this component of its analysis, considering the connection between literacy and political

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his dissent, Judge Murphy agreed that education is an important policy issue but denied that it is a constitutional issue the federal judiciary should address. *Id.* at 662 (Murphy, J., dissenting). He drew a distinction between *a right to be free from* state interference and *a right to* state assistance, *id.* at 664–65, and discussed the Fourteenth Amendment as explicitly dealing with equal rights, not fundamental ones. *Id.* at 676–78. Judge Murphy also emphasized the federalist intent of the Constitution and argued that establishing a national right to education would interfere with the states' ability to allocate funds and experiment with policies. *Id.* at 668–71.

167. *Id.* at 652 (majority opinion) (quoting *Glucksberg*, 521 U.S. at 721). The court also cited *Obergefell* to emphasize the court's role in determining which rights are "so fundamental" that the state must recognize them. *Id.* (quoting Obergefell v. Hodges, 576 U.S. 644, 664 (2015)).

168. *Id.* at 649. The court framed the right to literacy in terms of its relation to rights guaranteed in the Constitution, such as freedom of speech. *Id.* at 653. Without being literate, it would be impossible to participate in the "marketplace of ideas" and engage with the rights guaranteed by the First Amendment. *Id.* (first citing Bd. of Educ. v. Pico, 457 U.S. 853, 867 (1982); and then citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973)).

169. *Id.* at 652.

170. *Id.* at 653. The court observed that nearly every interaction between citizens and government requires basic literacy, from paying taxes to performing jury duty. *Id.* at 652. In doing so, it cited several Supreme Court education cases. In *Yoder*, for example, the Court acknowledged that "some degree of education" was necessary to prepare citizens to participate in society. Wisconsin v. Yoder, 406 U.S. 205, 221 (1972). By recognizing these bare minimum interactions, the Sixth Circuit also distinguished the *Gary B.* plaintiffs' argument from the one the Supreme Court rejected in *Rodriguez*. *See supra* text accompanying note 82.

171. *Gary B. v. Whitmer*, 957 F.3d at 653.

power over time.[172] It acknowledged, but quickly dismissed, the defendants' argument that access to literacy should not be considered fundamental because public education was not widespread at the country's founding and therefore could not be implicit in the concept of "ordered liberty."[173] Instead, the court argued that education has long been considered the "great equalizer" in terms of providing opportunity for advancement in society.[174] Quoting *Brown*, the court observed, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[175] Finally, the court again pointed to the country's history of denying access to education as a way to limit the political power of the Black population.[176] This history, and the Supreme Court desegregation cases addressing it, confirmed for the court the crucial role that public education must play in preventing societal inequity and providing equal opportunity for all students.[177]

The Sixth Circuit discussed the second prong of its fundamental rights analysis with much more brevity. Beyond analyzing the history and importance of the proposed right, the court acknowledged that it must also describe the right in question specifically enough to settle the case at hand.[178] The court took pains to specify that the right it was establishing was narrow and "only guarantees the education needed to provide access to skills that are essential for the basic exercise of other fundamental rights and liberties, most importantly participation in our political system."[179] First, the court specified that a right to literacy

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172. *Id.* at 650–52.

173. *Id.* at 653–54. The court quoted *Obergefell*, observing, "[t]he nature of injustice is that we may not always see it in our own times." *Id.* (quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015)).

174. *Id.* at 654 (first citing David Rhode et al., *The Decline of the "Great Equalizer"*, ATLANTIC (Dec. 19, 2012), https://www.theatlantic.com/business/archive/2012/12/the-decline-of-the-great-equalizer/266455/ [https://perma.cc/8P5Z-W848]; and then citing Roslin Growe & Paula S. Montgomery, *Educational Equity in America: Is Education the Great Equalizer?*, PROF. EDUCATOR, Spring 2003, at 23). The court invoked the equal protection arguments of *Plyler* and *Brown* in asserting that denying an education to a particular population of schoolchildren represented an affront to the Constitution by placing barriers in the way of their advancement in society. *Id.* (citing Plyler v. Doe, 457 U.S. 202, 221–22 (1982)).

175. *Id.* at 654 (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).

176. *Id.*

177. *Id.* at 654–55.

178. *Id.* at 659.

179. *Id.*

would require the state to provide the basic infrastructure through which students could plausibly achieve literacy.[180] The court then acknowledged that measurements of learning outcomes, such as literacy rates, cannot alone determine whether access exists.[181] Instead, the court echoed the complaint in its assertion that elements such as school buildings, teachers, and educational materials comprise the infrastructure necessary for achieving literacy.[182] The quantity and quality of these various elements, the court determined, should be evaluated at the trial court level to determine if they adequately provided access to literacy.[183] The court stressed that there was no set requirement for any of these elements, rather it would be left to the state to determine the holistic composition of elements that could plausibly impart literacy.[184]

3. Why "adding" a fundamental right is appropriate

The concept of "adding" a fundamental right is controversial within the judiciary, leading the Sixth Circuit to spend a considerable portion of its *Gary B.* opinion addressing the arguments against doing so. First, the court acknowledged the concern that having judges establish such rights, rather than doing so through legislation, is anti-democratic.[185] The court quickly dismissed this concern, explaining that the argument has little value when the population seeking redress is particularly vulnerable.[186] In this case, the court noted, heightened scrutiny was appropriate because the population in question, students without access to literacy, were particularly disadvantaged in the political process, leaving the courts as their best opportunity for relief.[187]

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180. *Id.* at 660. The court compared this required infrastructure to a defendant's right to counsel, stressing that the latter does not equate to a right to an acquittal. *Id.* at 660 n.22.

181. *Id.* at 659–60 (noting that such metrics might be used to compare districts and determine what educational infrastructure did support access to literacy, but that there was no guarantee that access necessarily translated to performance).

182. *Id.* at 660.

183. *Id.*

184. *Id.* (describing factors that may affect but not necessarily define the right, including facility conditions, the state of textbooks, and the number of teachers per students).

185. *See id.* at 655 (noting the impropriety of favoring the policy judgments of unelected judges versus those of elected representatives).

186. *Id.* (pointing out that the affected group—"students and families of students without access to literacy"—faces a built-in disadvantage when seeking political redress).

187. *Id.* at 655–56.

Varied judicial interpretations of the Constitution led the Sixth Circuit to extensively discuss the contrast between negative liberties and positive rights. It acknowledged federal and Supreme Court jurisprudence defining the Constitution as "a charter of negative rather than positive liberties."[188] The court denied, however, that this meant *only* negative rights existed, and went on to highlight established positive rights both enumerated (the right to counsel) and unenumerated (the right to marry).[189] The court emphasized the right to marry in particular, drawing parallels to education because it is an affirmative act that states perform.[190] The court also highlighted the Supreme Court's failure to foreclose the possibility of a right to a "basic minimum education," despite having the opportunity to do so in previous cases.[191] The court briefly acknowledged the dissent's observation that previous Supreme Court cases dealt with Equal Protection rather than Due Process, but rejected the distinction, noting "a fundamental right is a fundamental right, regardless of which clause the claim is brought under."[192]

Finally, the Sixth Circuit addressed the dissent's assertion that education is no more a guaranteed right than other state-provided services, such as housing and healthcare.[193] It soundly rejected this assertion, noting both the history of state-provided public education and the dominance of the state in the field, observing "[w]e can think of no other area of day-to-day life that is so directly controlled by the state."[194] The court went on to conclude that such control necessarily imposes a level of responsibility on the state to provide access to literacy.[195]

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188. *Id.* at 656 (quoting Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983)). The court went on to note that fundamental rights cases such as *Casey* and *Obergefell*, despite ostensibly affirming positive rights, highlighted freedom of choice and personal liberty. *Id.*

189. *Id.* at 656–57 (first citing Strickland v. Washington, 466 U.S. 668, 684–86 (1984) (right to counsel); and then citing Loving v. Virginia, 388 U.S. 1, 12 (1967) (right to marry)).

190. *Id.*

191. *Id.* at 657.

192. *Id.* (citing Scarbrough v. Morgan Cnty. Bd. of Educ., 470 F.3d 250, 260–61 (6th Cir. 2006)).

193. *Id.* at 658.

194. *Id.*; *cf.* Deshaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 191–95, 197 (1989) (emphasizing that a state's failure to prevent a private sector actor from causing harm is not a violation of the Due Process Clause).

195. *Gary B. v. Whitmer*, 957 F.3d at 658. The court countered the dissent's argument that there is no constitutional right to food by arguing that a better analogy would be

4. The aftermath

Following the Sixth Circuit's ruling, the State of Michigan reached a settlement with the plaintiffs.[196] Michigan governor Gretchen Whitmer agreed that "every child in the State of Michigan should have access to an educational environment in which 'it is plausible to attain literacy.'"[197] Under the settlement agreement, the governor would immediately allocate $3 million to support the literacy of the named plaintiffs once the court dismissed the case with prejudice.[198] The governor also committed to supporting ongoing literacy initiatives in Detroit schools with an additional $94.4 million in literacy-specific funding, contingent on the legislature's approval.[199]

Independently, the Sixth Circuit granted en banc review of the case.[200] A majority of the panel voted on May 19, 2020 to rehear the matter, vacating the panel decision.[201] Ultimately, however, the court dismissed the case without rehearing since the parties had already settled.[202] Since there was no rehearing, the panel opinion remains the official opinion of the Sixth Circuit, but it does not carry precedential value.[203]

Even without establishing a binding precedent, the Sixth Circuit opinion in *Gary B.* provides the legal foundation for current and future plaintiffs to establish a fundamental right to a minimum education.[204] There has already been an increase in recent years in the number of

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if the state were entirely in control of access to food and left the grocery store shelves in one district bare. *Id.* at 658–59. The court concluded that the state would be responsible for placing the people of that district in a distinctly disadvantaged situation, just as it does when it fails to provide certain schools with access to literacy. *Id.*

196. *Terms for Settlement Agreement and Release Between All Plaintiffs and the Governor of the State of Michigan in* Gary B. et al. v. Whitmer et al., May 13, 2020, at 1.

197. *Id.*

198. *Id.* at 3.

199. *Id.* at 2–3. The settlement also established the Detroit Literacy Equity Task Force and the Detroit Education Policy Committee. *Id.* at 4–5.

200. Gary B. v. Whitmer, 958 F.3d 1216 (2020) (order granting en banc review).

201. *Id.*

202. *See* Gary B. v. Whitmer, Nos. 18-1855/1871, 2020 U.S. App. LEXIS 18312, at *10 (6th Cir. June 10, 2020) (granting the motion to dismiss because the settlement rendered the issue moot).

203. Sascha Raiyn, *Appeals Court Won't Re-Hear Detroit Schools "Right to Literacy" Case*, WDET (June 12, 2020), https://wdet.org/posts/2020/06/12/89716-appeals-court-wont-re-hear-detroit-schools-right-to-literacy-case [https://perma.cc/5J2W-9TSS].

204. *See* Wong, *supra* note 154 (observing that even if *Gary B.*'s novel argument is not successful for the plaintiffs, it represents a new chapter in education litigation and leads the way for plaintiffs bringing similar suits in the future).

state-level lawsuits over the quality of education schools provide students.[205] The return of education cases to federal courts is due not only to the history of the federal judiciary improving school conditions but also to the recent trend of state courts failing to protect plaintiffs' rights to education.[206] While past litigation focused on funding, the current wave of litigation is focused on adequacy and asserting a fundamental right to education.[207] *Gary B.* is a landmark case in this wave of federal education litigation based on adequacy.[208] The Sixth Circuit's holding that a fundamental right to literacy exists, in spite of its limited precedential value, is a victory for education advocates.[209] It also represents progress in the discussion around endemic racism and ways to address it.[210] As the plaintiffs' attorney in *Gary B.* observed

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205. Dana Goldstein, *How Do You Get Better Schools? Take the State to Court, More Advocates Say*, N.Y. TIMES (Aug. 21, 2018), https://www.nytimes.com/2018/08/21/us/school-segregation-funding-lawsuits.html [https://perma.cc/LX6L-GRX5] ("[T]he recent cases show a renewed energy for using the courts to fight for better education . . . ."); *see* Cruz-Guzman v. Minnesota, 916 N.W.2d 1, 4–5 (Minn. 2018) (arguing that claims that the state has failed to provide students with adequate education are justiciable); Gannon v. Kansas, 319 P.3d 1196, 1204 (Kan. 2014) (arguing that claims that the state underfunded K-12 public education, thereby violating Article 6 of the Kansas Constitution, are justiciable).

206. *See* King, *supra* note 125, at 1084–85 (observing that in the 1990s, state courts' decisions were more favorable to plaintiffs; however, recently, "political and economic pressures" have caused state judges to largely neglect constitutional issues pertaining to education).

207. *See* Geter, *supra* note 33, at 175. Per-pupil spending has not been shown to correspond to student performance; integration, rather than merely increased spending, is a more effective method of decreasing the achievement gap. *Id.* at 175–76. In fact, student outcomes post-integration have been positive outside of the classroom as well, with long-term improvements to health and employment compared with their peers in segregated schools. *See* King, *supra* note 125, at 1069 (citing *This American Life: The Problem We All Live with—Part One*, *supra* note 20).

208. *See* Kristine L. Bowman, *Education Reform and Detroit's Right to Literacy Litigation*, 75 WASH. & LEE L. REV. 61, 71 (2018) ("If we agree with plaintiffs' claim that a right of access to literacy is a necessary prerequisite for individuals to realize explicit fundamental rights, then access to literacy is also fundamental, and thus a proper subject of federal courts' attention.").

209. *See* Levin, *supra* note 19 (noting that the Sixth Circuit's opinion will "likely be cited in other cases" seeking to establish a "right to read").

210. *Id.*; *cf.* Wong, *supra* note 154 (quoting Matthew Patrick Shaw, an assistant law professor at Vanderbilt University, regarding the district court's dismissal of the case: "The court's premise . . . ignores everything we all know about how endemic racism is . . . in metro Detroit's housing and employment patterns, and the role the state has had in allowing school districts to assign, hire, fund, and operate in reliance on these patterns").

following the settlement, "[t]here's no precedent," but, "Judge Clay's words are going to live forever. Judges across the country will look to this opinion for its judgment and its wisdom and its understanding of how to address systemic racism."[211] Education must play a key role as the national discussion around systemic racism and inequality continues.[212]

II. ANALYSIS: ACCESS TO LITERACY IS A FUNDAMENTAL RIGHT

Thus far, Supreme Court jurisprudence has not determined whether a fundamental right to a basic minimum education exists.[213] That basic minimum education, specifically defined as access to literacy,[214] should be recognized as a fundamental right based on the two-prong analysis the Court uses to evaluate such rights.[215] The analysis must explore not

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211. Levin, *supra* note 19.

212. *A.C. v. Raimondo* is an example of a federal case that followed in the footsteps of *Gary B.* by asserting that students have a right to a basic civics education. A.C. v. Raimondo, No. 18-645 WES, 2020 U.S. Dist. LEXIS 188769, at *3 (D.R.I. Oct. 13, 2020). Because Rhode Island allows individual districts to decide whether to teach civics, there are great disparities in civics programs, generally based on the wealth of the districts. *See* Dana Goldstein, *Are Civics Lessons a Constitutional Right? This Student Is Suing for Them*, N.Y. TIMES (Nov. 28, 2018), https://www.nytimes.com/2018/11/28/us/civics-rhode-island-schools.html [https://perma.cc/B3PQ-W2PJ]. A civics education, like basic literacy, is necessary for individuals to become "conscientious jurors, true witnesses, incorruptible voters." *Id.* (quoting Horace Mann on the purpose of education). While most state constitutions do guarantee some form of education, only about half of the states require that education to involve civics instruction. *Id.* As with literacy for the students in *Gary B.*, this lack of education results in the neediest children not getting the necessary basic skills to participate in the political process, thereby perpetuating the underclass that concerned Justice Brennan in *Plyler*. *Id.*; *see* Plyler v. Doe, 457 U.S. 202, 234 (1982); *cf.* Growe & Montgomery, *supra* note 174, at 23 (asserting that education is "a great equalizer of conditions of men," and likening it to "the balance wheel of the social machinery." (quoting Horace Mann)); Wong, *supra* note 154 (quoting Michael Rebell, the attorney for student-plaintiffs in *Raimondo*, who observed that the attorney in *Gary B.* brought the lawsuit in Detroit precisely because the fundamental right to minimum education has been left open by the court).

213. Papasan v. Allain, 478 U.S. 265, 285 (1986) ("As *Rodriguez* and *Plyler* indicate, this Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review.").

214. *See* King, *supra* note 125, at 1058–59 (describing the novel approach taken by the plaintiffs' attorneys in *Gary B.* when they advocated for a narrowly-defined fundamental right of access to literacy instead of a broad right to education).

215. *See* Gary B. v. Whitmer, 957 F.3d 616, 621, 643 (6th Cir. 2020) ("A review of the Supreme Court's education cases, and an application of their principles to our substantive due process framework, demonstrates that we should recognize a basic minimum education to be a fundamental right.").

only the history of the asserted right, but also the ties between the right and the "concept of ordered liberty."[216] Finally, the Court must be able to establish a clear definition of the fundamental right in order to recognize it.[217] Access to literacy satisfies all the criteria of this analysis; therefore, the Fourteenth Amendment protects it.

A. First Prong: History and the "Concept of Ordered Liberty"

To determine whether access to literacy is a fundamental right, courts must first consider the entire history of education in this country, including the government's role in both providing and denying it. The historical component of a two-prong analysis of a fundamental right should comprise a holistic analysis of the role the right has historically held.[218] A right that is tied to history is not just one that the government explicitly recognized two-hundred years ago.[219] Thus, in considering a right to education, a court must consider not only the history of public education in the country, but also limitations on access to education as well as the role of the judiciary in limiting or enabling that access.[220]

The Constitution, in setting up a system of government that relies on an active citizenry, intrinsically established a need for adequate public education.[221] The Supreme Court has explicitly acknowledged that need by discussing the importance of education throughout its jurisprudence.[222] While cases such as *Meyer* and *Pierce* played foundational

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216. *See id.* at 652, 659 (placing particular emphasis on the idea that "a foundational level of literacy" is necessary to enable civic engagement).

217. *Id.* at 659.

218. *Id.* at 643–44; *see* Obergefell v. Hodges, 135 S. Ct. 2584, 2593–97 (2015) (discussing the importance and role of marriage in ancient societies before going on to address how societal views of same-sex couples changed through the twentieth century).

219. *See Obergefell*, 135 S. Ct. at 2602 ("If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.").

220. *See Gary B. v. Whitmer*, 957 F.3d at 648–52 (beginning the court's historical analysis with a discussion of the role of public education at the time of the country's founding before going on to explore the expansion of public education, laws restricting education for enslaved peoples, and court decisions perpetuating school segregation).

221. *See* Elizabeth Reilly, *Education and the Constitution: Shaping Each Other and the Next Century*, 34 AKRON L. REV. 1, 1 (2000) (observing that the nature of a democratic republic makes an educated citizenry necessary).

222. *See, e.g.*, *supra* notes 68–69 and accompanying text (noting the high level of importance placed on education by the judges in *Brown* and *Plyler*).

roles in establishing a fundamental right to privacy, they were decisions about education, demonstrating that the federal judiciary would not leave this topic in the exclusive domain of state and local authorities.[223]

Examining the government's role in depriving distinct portions of the populace of access to education[224] is just as crucial as considering the historical importance of education and the court's role in establishing a right to education.[225] As the 1740 South Carolina Negro Act demonstrates, Americans have always viewed literacy as a key to civic engagement.[226] Throughout the nation's history, governments, groups, and individuals have used tactics ranging from legislation to violence to deprive certain groups of access to education, thereby perpetuating systems of oppression.[227] In *Plyler*, the Court discussed the impact of this deprivation on an individual level, observing that illiteracy would harm the deprived schoolchildren throughout the rest of their lives.[228] The Court also observed that the damage to individuals would negatively impact society as a whole.[229] Between the extremes of the individual and the entire American populace lie the communities which bear the brunt of this history. As Peter Blackmer, a Research Fellow with the Detroit Equity Action Lab observed of *Gary B.*, "[i]t is

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223. Reilly, *supra* note 221, at 11. While *Meyer* struck down a statute prohibiting foreign language instruction, *Pierce* confirmed parents' rights to send their children to private schools rather than public ones. *Id.* at 11 nn.20–21 (first citing Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); and then citing Meyer v. Nebraska, 262 U.S. 390 (1923)).

224. *See* Blackmer, *supra* note 4, at 2 (observing that depriving slaves of access to literacy is the country's oldest historical tradition related to education).

225. *See* discussion *supra* Section I.C.2.

226. *See supra* note 118 and accompanying text (explaining that the slave codes prohibited education for enslaved persons because "having slaves taught to write . . . may be attended with great inconveniences" citing South Carolina Act of 1740)).

227. *See* Gary B. v. Whitmer, 957 F.3d 616, 648 (6th Cir. 2020) ("[T]he history of education . . . demonstrates a substantial relationship between access to education and access to economic and political power, one in which race-based restrictions on education have been used to subjugate African Americans and other people of color."); discussion *supra* Section I.C.2 (listing slavery, enforced illiteracy, segregation, racist housing policies, and "racially isolated" schools as a few of the tactics utilized to deprive certain groups of access to education).

228. Plyler v. Doe, 457 U.S. 202, 222 (1982).

229. *Id.* at 221. While the *Plyler* court was referring to the metaphorical fabric of society, there is also an argument that it is far less costly to invest in adequate education than to bear the expenses of an inadequately educated populace in the form of higher healthcare costs, increased public assistance, etc. *See* Geter, *supra* note 33, at 168 (citing Clive R. Belfield & Henry M. Levin, *The Education Attainment Gap: Who's Affected, How Much, and Why it Matters*, *in* THE PRICE WE PAY 1, 2 (Clive R. Belfield et al. eds., 2007)).

no accident that the denial of a right to literacy is taking place in a city like Detroit. The ongoing denial of educational rights in Detroit is deeply rooted in centuries of racial oppression and white supremacist violence in the United States."[230]

Considering whether a basic education is "implicit in the concept of ordered liberty," alongside the historical analysis, gives a more complete understanding of the role of literacy in society.[231] In *Gary B.* the court considered this a compelling component of the argument for a fundamental right to a basic minimum education because an individual's ability to participate in the political process is almost entirely dependent on literacy.[232] This premise echoed Justice Brennan's dissent in *Rodriguez*, where he asserted that certain First Amendment rights and participation in the electoral process were "inextricably linked" to education.[233] The Supreme Court has previously found certain rights to be implicit within others. For example, the right of public access to criminal trials established in *Richmond Newspapers, Inc. v. Virginia*[234] stems from an understanding that the right of access to information is implicit in other rights enumerated in First Amendment.[235]

Further, certain civic responsibilities, such as serving on a jury, require at least a minimum level of literacy. Federal jury requirements include a stipulation that the juror "be adequately proficient in English to satisfactorily complete the juror qualification form."[236] Jury service, the Supreme Court has stated, is an opportunity for all members of the

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230. Blackmer, *supra* note 4, at 1.

231. *See* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (describing both elements as necessary components of the first prong of a fundamental rights analysis).

232. Gary B. v. Whitmer, 957 F.3d 616, 652–55 (6th Cir. 2020), *reh'g en banc granted*, 958 F.3d 1216 (6th Cir. 2020).

233. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 63 (1973) (Brennan, J., dissenting).

234. 448 U.S. 555 (1980).

235. *See* Douglas E. Lee, *Courtroom Access*, FREEDOM FORUM INST. (updated Jan. 2009), https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-the-press/courtroom [https://perma.cc/UG6V-7P9R] ("[The right of public access to criminal trials], the Court said, is rooted in the historical tradition of openness in the judicial system."); *cf.* Press-Enter. Co. v. Super. Ct. of Ca., 46 U.S. 501 (1984) (holding that the First Amendment right to attend criminal trials includes the right to attend jury selection because a public right of access exists where there has been a tradition of access and where access serves a positive role in the judicial system).

236. *Juror Qualifications*, U.S. COURTS, https://www.uscourts.gov/services-forms/jury-service/juror-qualifications [https://perma.cc/TX2B-FLPS].

community to demonstrate "responsible citizenship" and "contribute to our civic life."[237] Other civic obligations that require literacy include paying taxes,[238] serving in the military,[239] and responding to the census.[240] A basic level of literacy is necessary to perform these obligations; thus access to basic literacy must be a fundamental right under Supreme Court jurisprudence because without it, members of society cannot "contribute" in these fundamental ways.[241]

Arguments against acknowledging positive fundamental rights generally involve reluctance to require that the state "provide" some service.[242] That reluctance, however, is not absolute: the Court admitted in *Kadrmas* that a case for a positive right might exist where the state's refusal to provide a particular service would completely eliminate the student's ability to access education.[243] With different elements requiring different levels of education, civic engagement encompasses a broad spectrum of rights and responsibilities. Serving

237. Powers v. Ohio, 499 U.S. 400, 402 (1991).

238. *See* 26 U.S.C. § 1 (2018) (requiring all individuals to file income taxes).

239. *See* 50 U.S.C. § 3802 (2012) (requiring men between the ages of eighteen and twenty-six to register for selective service, including immigrants and dual-citizens); *Learn How to Join*, U.S. ARMY, https://www.goarmy.com/learn/understanding-the-asvab.html [https://perma.cc/BTA2-FUPT] (explaining the ASVAB, a multiple choice test measuring skills in a variety of areas, including word knowledge and reading comprehension, which all potential recruits must pass in order to enlist); *cf.* William N. Eskridge, Jr., *The Relationship Between Obligations and Rights of Citizens*, 69 FORDHAM L. REV. 1721, 1735–36 (arguing that not requiring women to register for the draft infantilizes them and essentially relegates them to second-class citizenship).

240. *See* 13 U.S.C. § 221 (2018) (imposing a monetary penalty for failing to respond).

241. *See* Eskridge, Jr., *supra* note 239, at 1724, 1728 (discussing the connections between fundamental rights and the obligations of citizenship and observing that "[t]he principle of civic obligation helps us identify which interests are most fundamental and must be guarded with special care by the judiciary—mainly those imbricated with moral or legal obligations: jury service, voting, military service, and marriage.").

242. *See, e.g.*, Maher v. Roe, 432 U.S. 464, 475 (1977) (holding that a state does not have an obligation to provide state Medicaid benefits for a nontherapeutic abortion even if it does provide benefits for birth); *see also* Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 462 (1988) (noting that the state is under no constitutional obligation to provide transportation for its students).

243. *Kadrmas*, 487 U.S. at 460–61 (distinguishing the instant case from cases "involv[ing] a rule that barred indigent litigants from using the judicial process in circumstances where they had no alternative to that process").

on a jury, for example, requires basic literacy, while voting does not.[244] As the Court observed in *Rodriguez*, the state is not obligated to create the most informed or capable electorate.[245] Basic literacy is simply the minimum education necessary for an individual to fulfill duties that the government requires.[246]

Literacy satisfies the first prong of a fundamental rights analysis when considering the history of public education and the role of literacy in civic engagement. The ability to read is so closely tied to civic rights and responsibilities that it is necessary to the concept of ordered liberty, and public education certainly has a significant historical presence in the United States.[247] It would be entirely appropriate for the Court, whose impact on public education has been quite significant,[248] to intervene to achieve true equality through requiring access to a basic minimum education. When considered alongside the government's role in denying that access to portions of the population, judicial action to acknowledge the existence of this fundamental right becomes not just appropriate but an affirmative responsibility.

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244. *See Juror Qualifications*, *supra* note 236 (identifying a minimum proficiency in English as a requirement to serve on a jury); U.S. ELECTION ASSISTANCE COMM'N, 14 FACTS ABOUT VOTING IN FEDERAL ELECTIONS 3 (Aug. 8, 2017), https://www.eac.gov/sites/default/files/eac_assets/1/6/VotersGuide_508.pdf [https://perma.cc/BFC3-ZJWH] (noting that voters are allowed to bring someone to assist them if they cannot read or write). Basic literacy is one of the few requirements for serving on a jury. *See* Andrew Guthrie Ferguson, *Why Restrict Jury Duty to Citizens?*, ATLANTIC (May 9, 2013), https://www.theatlantic.com/national/archive/2013/05/why-restrict-jury-duty-to-citizens/275685 [https://perma.cc/4YDM-78FL] (explaining why jury service has been limited to citizens while specifying federal jury service simply requires the potential juror "be adequately proficient in English to satisfactorily complete the juror qualification form").

245. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35–36 (1973).

246. *See* U.S. Citizenship and Immigr. Servs., *Citizenship Rights and Responsibilities* (Apr. 23, 2020), https://www.uscis.gov/citizenship-resource-center/learn-about-citizenship/citizenship-and-naturalization/citizenship-rights-and-responsibilities [https://perma.cc/DG27-42AC] (listing among the responsibilities of new citizens "[s]tay[ing] informed of the issues affecting your community," "[r]espect[ing] and obey[ing] federal, state, and local laws," "[p]ay[ing] income and other taxes honestly, and on time," and "[d]efend[ing] the country if the need should arise.").

247. *See* discussion *supra* Section I.C.1 (contending that all three branches of the federal government emphasized the importance of public education since the country's founding).

248. *See* discussion *supra* Section I.B (asserting that the Supreme Court historically refused to recognize a fundamental right to education under substantive due process, but a question remains open as to "whether a *minimally adequate* education is a fundamental right").

B. Second Prong: A "Careful Description" of the Fundamental Right

The second prong of a fundamental rights analysis requires that the court identify the right in question with a "careful description."[249] Crafting a description begins with the court considering the right asserted in the complaint.[250] In defining access to literacy, a court should consider educational infrastructure and performance evaluation methods alongside existing legislatively-established standards.[251] The right's description should not hew so closely to the facts of the immediate case that it becomes inapplicable to other cases.[252] By avoiding minute specificity, the court can create a workable definition while avoiding the appearance of legislating.[253]

Creating a simple definition of the right to literacy would enable courts to more effectively execute their established role of instituting a framework for the legislature and providing enforcement if subsequent policies fail to follow that framework.[254] As the *Plyler* court demonstrated by applying intermediate scrutiny to the case's "unique" circumstances, there can be a degree of flexibility in the discussion.[255] The definition of the right to access literacy does not need to be minutely detailed.[256] Considering the importance of public education to society and the absence of a valid state interest opposing it, there should not be a rigid set of rules based on the facts of a single case;

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249. *See* discussion *supra* I.A.3.

250. *See supra* note 46 and accompanying text.

251. *See* discussion *supra* Section II.C.

252. *See supra* notes 47–51 and accompanying text (citing Meyers v. Nebraska, 262 U.S. 390 (1923), in which the Court considered parents' interests in controlling their children's upbringing without government interference a sufficiently defined negative right, rather than basing its holding on the more specific positive right of a teacher to provide instruction in German). *But see* Washington v. Glucksberg, 521 U.S. 702, 737–38 (1997) (refusing to recognize a fundamental right, in part, because the asserted positive right was not defined with enough specificity in the complaint).

253. *See supra* note 37 and accompanying text (discussing the doctrine of separation of powers and judicial self-restraint).

254. *See* Derek W. Black, *Taking Teacher Quality Seriously*, 57 WM. & MARY L. REV. 1597, 1602, 1604 (2015) (arguing that creating a definition of the right to literacy is appropriate for the courts, despite their reluctance to take on such a complex issue).

255. *See supra* text accompanying notes 88–94.

256. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015) (discussing several cases affirming a right to marriage and pointing out that each was based on the simple "right to marry" rather than a specific right in each individual's particular set of circumstances).

rather, future courts should determine whether access exists in each "unique" set of circumstances based on a constellation of factors.[257]

Creating a "careful description" can present a true challenge for the judiciary, particularly when considering a positive right.[258] As the *Gary B.* opinion discussed, arguments against positive fundamental rights often focus on separation of powers concerns.[259] In defining a fundamental right, then, the court must create a description that is "careful" without overstepping into the realm of legislating.[260]

A definition of the right to literacy should incorporate factors that predict and assess learning outcomes as tools to evaluate adequacy without setting specific testing standards. The facts of the complaint generally provide the foundation for defining a fundamental right.[261] In *Gary B.*, the Sixth Circuit looked to the facts the plaintiffs alleged in the complaint and distinguished those it considered useful for its definition.[262] The *Gary B.* court drew a distinction between educational infrastructure (such as buildings and teachers) and learning outcomes, allowing the former but not the latter to serve as an indicator of adequacy.[263] The court's rejection of learning outcomes as

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257. *See* Joshua E. Weishart, *Aligning Education Rights and Remedies*, 27 KAN. J.L. & PUB. POL'Y 346, 370, 390–91, 399 (2018) (discussing the necessary balance between specificity and broadness in order for a definition of basic education to be judicially enforceable); Black, *supra* note 254, at 1662 (arguing that courts are the appropriate branch to oversee distribution of school resources because doing so "efficiently" is a distinct structural obligation rather than a legislative policy decision).

258. *See supra* note 188 and accompanying text.

259. *See supra* text accompanying notes 185–87.

260. *See* Bowers v. Hardwick, 478 U.S. 186, 194 (1985) ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."). Somewhat paradoxically, it is often the court itself that determines whether it is crossing that line. In a Texas case about school financing, the court asserted that "[t]he judiciary is well-accustomed to applying substantive standards the crux of which is reasonableness . . . [l]itigation over the adequacy of public education may well invite judicial policy-making, but the invitation need not be accepted." Geter, *supra* note 33 (quoting Neeley v. West Orange-Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746, 778–79 (Tex. 2005)).

261. *See supra* note 46 and accompanying text.

262. Gary B. v. Whitmer, 957 F.3d 616, 660 (6th Cir. 2020), *reh'g en banc granted*, 958 F.3d 1216 (6th Cir. 2020).

263. *Id.* (determining that factors such as unqualified teachers and crumbling school buildings could be used to evaluate whether the school was providing access to literacy whereas educational outcomes such as test scores could not be); *see supra* text accompanying notes 180–82.

a metric, however, is an unhelpful restriction.[264] While a specific percentage of students reading at grade level might not provide an accurate definition of access to literacy, learning outcomes can be an important factor in assessing that access.[265]

Any careful description of a right to access literacy must also necessarily include teachers as a key component of facilitating that access.[266] One of the main elements of the *Gary B.* complaint was the lack of adequately-trained teachers,[267] which is a common problem in "impoverished and racially isolated" schools.[268] Teacher quality has proven to be the most important variable in student achievement, therefore "tools" to improve performance must include well-trained teachers.[269] Courts and legislatures have implemented myriad remedies for the problem of insufficient and underperforming teachers over the years, from limiting class sizes to mandating certifications to increasing salaries.[270] An increase in funding in a single area cannot solve this

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264. *See* Goldstein, *supra* note 205 (observing that testing data over the past decade has made shortcomings in education more obvious, and that use of that data in lawsuits has led to success for plaintiffs in state-level cases about education adequacy).

265. *See id. But see* James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1247, 1255–57 (2008) (suggesting that instead of relying on legislative testing standards, which could have the effect of incentivizing the legislature to lower those standards in order to achieve "adequacy," courts should determine if adequacy exists by comparing resource distribution between different districts).

266. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (asserting that learning is only possible when it is facilitated by a qualified teacher, and also deeming teaching an honorable profession necessary for public welfare). *But see* Black, *supra* note 254, at 1626 (observing that state supreme courts have very rarely discussed teachers when considering school equality and adequacy claims).

267. *See supra* note 134.

268. Growe & Montgomery, *supra* note 174, at 24; *see also* Black, *supra* note 254, at 1602–03, 1608 (discussing teacher quality as the most significant factor in student outcomes and emphasizing the prevalence of sub-standard and "out-of-field" teachers in schools with predominantly low-income and minority students).

269. *See* Growe & Montgomery, *supra* note 174, at 24, 25, 27 ("To increase the achievement levels of minority and low-income students, we need to focus on what really matters: high standards, a challenging curriculum, and good teachers."). While "improved performance" is not explicitly the goal of the court in providing access to literacy, the elements to improve performance necessarily coincide with those required to provide literacy. *See id.* at 26, 27.

270. *See* Black, *supra* note 254, at 1624–25 (observing that implementation of each policy has been premised on the idea that the specific remedy would be the "silver bullet," leading to dissatisfaction and resulting in the legislature enacting new policies when the original policy fails to deliver the desired outcome).

problem.[271] Teachers choose to work in particular schools based on the teaching environment as much as the salary; this creates an inextricable link between the seemingly disparate elements of educational infrastructure, namely teachers, facilities, and resources.[272]

School facilities and resources, then, are another key component of education that a court must include in a careful description of a minimally adequate education.[273] In making the narrow argument that they do not have access to literacy, plaintiffs must demonstrate that the state is not providing the resources to make literacy possible.[274] Comparing the provision of resources between "good" school systems and those that are underperforming could provide guidance for courts to determine whether the resources in a given district or school are adequate.[275] Regardless of how the court determines adequacy of resources, it is undeniable that literacy is inaccessible if students do not have access to a safe learning environment and enough textbooks. Further, inadequacy of resources (such as that described in *Gary B.*[276]) arguably violates students' fundamental right to access information.[277]

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271. *See id.* at 1616–17 (observing that while teachers are responsive to salary changes, a myriad of factors impact their decisions on whether and where to teach, and that salary may have the least impact on those decisions).

272. *Id.* at 1646.

273. *See id.* at 1624 (positing that "a quality teacher is an elusive concept because quality teaching primarily occurs when competent people are given the opportunity to teach under conducive conditions"). *But see* Christine M. Naassana, Comment, *Access to Literacy Under the United States Constitution*, 68 BUFF. L. REV. 1215, 1246–49 (2020) (arguing that infrastructure should not be part of the definition for adequate education because it is an extensive and complicated issue that the legislature should address separately).

274. *See* Kristen Safier, Comment, *The Question of a Fundamental Right to a Minimally Adequate Education*, 69 U. CIN. L. REV. 993, 1019 (2001) (distinguishing that a failure to *acquire* literacy would not be sufficient to demonstrate that the state did not provide the means to do so).

275. *See* Ryan, *supra* note 265, at 1251–52 (suggesting that courts could identify "good" school systems by a collection of factors such as test scores, facilities, and graduation rates, then determine if the resources at the plaintiff's school are comparable enough to those of the "good school" to qualify as adequate).

276. *See* Complaint, *supra* note 13, at 56, 82–83 (describing old books being thrown away and not replaced, a perpetually locked library, and multiple science courses being taught from a biology textbook because the schools did not have earth science or physics textbooks).

277. *See* Safier, *supra* note 274, at 1017 (citing Bd. of Educ. v. Pico, 457 U.S. 853, 867 (1982)) (arguing that the Court has found a link between the freedoms of the First Amendment and the existence of a right to acquire knowledge). The fundamental right to access information is outside the scope of this Comment.

State level cases can provide additional guidance for a federal court attempting to define adequate access to literacy. A North Carolina court held that a "sound basic education" included ten different factors, from the ability to read to knowledge of politics.[278] A Kentucky court was similarly specific, listing seven "capabilities" that an adequate education would provide, including oral and written communication skills, knowledge of government processes, and the ability to compete in the job market.[279] Several other states (Alabama, Massachusetts, New Hampshire, Ohio, and Kansas) have all adopted the elements that the Kentucky court established in *Rose v. City Council for Better Education, Inc.*[280] The Sixth Circuit's assertion that to provide access to literacy schools should have enough books and not be crumbling seems incredibly restrained compared to such extensive lists of requirements. The holding in *Gary B.* was more in keeping with the declaration of the Ohio Supreme Court, which specified that the "efficient system" called for in the state constitution "could not mean one in which part or any number of the school districts of the state lacked teachers, buildings or equipment."[281]

Though usually less specific than judicial holdings, state constitutions can also provide the federal judiciary with an indication of what legislative bodies consider to be the government's duties regarding education.[282] A court should consider the broad principles

278. *See* Geter, *supra* note 33 (citing Leandro v. State, 488 S.E.2d 249, 255 (N.C. 1997)) (identifying several other factors including the ability to write and speak English, and have sufficient knowledge of mathematics, science, history, geography, economics, and vocational skills).

279. *Id.* at 186 (quoting Rose v. City Council for Better Educ., Inc., 790 S.W.2d 186, 190–91 (Ky. 1989)) (determining that other necessary factors include knowledge of economic, social, and political systems, knowledge of his or her mental and physical wellness, grounding in the arts, and preparation for advanced training to pursue life work); *see also* Abbeville Cty. Sch. Dist. v. State, 515 S.E.2d 535, 539–40 (S.C. 1999) (following the *Rose* court's lead and defining the state constitution's requirement of providing "the maintenance and support of a system of free public schools" to include a number of components such as safe facilities and the opportunity to learn to read and write in English).

280. 790 S.W.2d 186 (Ky. 1989); Geter, *supra* note 33, at 187.

281. DeRolph v. State, 677 N.E.2d 733, 741 (Ohio 1997) (citing Miller v. Korns, 140 N.E. 773, 776 (Ohio 1923)).

282. *See* Molly A. Hunter, *State Constitution Education Clause Language*, EDUC. LAW CTR., https://edlawcenter.org/assets/files/pdfs/State%20Constitution%20Education%20Clause%20Language.pdf [https://perma.cc/DT6U-2ENJ] (listing key language from the education clauses for each state). All fifty states include education clauses in their state constitutions, though the contents of those clauses vary widely. *Id.* Michigan, for

often reflected in state constitutions when defining a fundamental right to basic education.[283] If the goal of education is ultimately to create capable and engaged members of society,[284] then basic literacy is the bare minimum of what public schools should provide.[285]

Finally, an effective definition must include socio-economic aspects of the school environment. Unlike education cases based on equal protection claims, cases based on education adequacy cannot rely on the disparate treatment of discrete groups. Much like in *Plyler*, the plaintiffs' equal protection claim failed in *Gary B.*: the uniform low-

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example, guarantees only that "[t]he legislature shall maintain and support a system of free public elementary and secondary schools as defined by law," while Oregon's constitution includes provisions requiring biannual reports on education quality and sufficiency of funding. *Id.* Disparities between state protections is a key reason why state constitutional guarantees are insufficient and a federal recognition of a fundamental right to a basic education is crucial. Additionally, education clauses in state constitutions do not protect all students. For example, the Bureau of Indian Education (BIE) oversees some schools in remote areas of reservations; because the BIE is a federal agency, students cannot use state constitutional protections to seek a judicial remedy for the inadequacy of these schools. *See* Alden Woods, *The Federal Government Gives Native Students an Inadequate Education, and Gets Away with It*, PROPUBLICA (Aug. 6, 2020, 9:00 AM), https://www.propublica.org/article/the-federal-government-gives-native-students-an-inadequate-education-and-gets-away-with-it?utm_source=sailthru&utm_mediu%E2%80%A6 [https://perma.cc/Z5FH-AP9B] (highlighting the complex nature of the BIE and its history of providing an inadequate educational experience).

283. *See, e.g.* TEX. CONST. art. VII, § 1 ("A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the state to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.").

284. *See* Growe & Montgomery, *supra* note 174, at 25 (identifying academic, vocational, social and civic, and personal development as the four broad goals of American education); Eli Savit, Note, *Can Courts Repair the Crumbling Foundation of Good Citizenship? An Examination of Potential Legal Challenges to Social Studies Cutbacks in Public Schools*, 107 MICH. L. REV. 1269, 1293–94 (2009) (detailing more than a dozen states with constitutional education provisions that specify the importance of education to the well-being of a democratic society).

285. *See* Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 156–57, 157 n.111 (1995) (noting that "[m]any students are neither equipped nor inclined to participate as citizens" and naming moral character, critical thinking, and cultural literacy as the minimum education schools should provide because literacy is so basic and uncontroversial a requirement that it need not even be mentioned); *see also* Wisconsin v. Yoder, 406 U.S. 205, 212 (1972) (recognizing that Amish parents have no objections to sending their children to public school through eighth grade because learning basic subjects is necessary for an individual to become a useful and engaged participant in society).

income nature of the plaintiffs did not invoke strict scrutiny.[286] While re-segregation based on race is certainly prevalent,[287] it is not the only factor creating discrepancies between schools. There is not a single achievement gap marking the disparity between districts: rather, there are multiple gaps and poverty, not race, is the most accurate predictor of student success.[288]

A definition of access to literacy should incorporate the basic infrastructure of education. Students have a fundamental right to receive a basic minimum education in schools that are safe environments with a sufficient number of properly trained teachers and quality resources. In order to ensure adequate access to literacy for all students, schools must (1) provide sufficient educational infrastructure in the form of qualified teachers, adequate materials, and safe buildings, (2) in a racially and socio-economically integrated environment,[289] and (3) be able to demonstrate the effectiveness of the access in a quantifiable manner.[290]

CONCLUSION

Access to literacy is a fundamental right under the Supreme Court's established two-prong method for recognizing substantive due process rights. The Sixth Circuit panel in *Gary B.* recognized this right, but its opinion has limited precedential value. Previously, federal courts have erroneously failed to apply the two-prong analysis in an expansive manner, considering only the historical role of public education in the United States, but not exploring the history of deprivation of access to adequate education, and the government's role in perpetuating that deprivation. When considered holistically, this history, combined with the key role that literacy plays in enabling civic engagement, more than satisfies the first prong of the analysis. A description of the right that provides for the basic structure of access to literacy without overstepping into legislating satisfies the second prong of the analysis. Access to literacy requires that schools (1) provide sufficient educational

286. *See supra* note 138.

287. *See supra* text accompanying notes 129–31.

288. *See* Growe & Montgomery, *supra* note 174, at 25–26 (recognizing several factors linked to achievement disparities, including socioeconomic status, race, and ethnicity).

289. *See* James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 308 (1999) (arguing that plaintiffs in education adequacy suits should seek racial and socioeconomic integration rather than increased spending because the former is a more effective way to ensure improved standards).

290. *See* discussion *supra* Section I.B.

infrastructure in the form of qualified teachers, appropriate materials, and safe buildings, (2) in a racially and socio-economically integrated environment, and (3) be able to demonstrate the effectiveness of the access in a quantifiable manner. When considered in this manner, a fundamental right to literacy is not just *appropriate* under the Supreme Court's two-prong analysis, it is vital. Accordingly, the Court has a fundamental responsibility to affirm a right to literacy as one step toward remedying centuries of injustice.