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Access to Literacy Under the United States Constitution

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INTRODUCTION

In Detroit, Michigan, a fourth-grade student can maintain a perfect attendance record, complete her homework every day, consistently raise her hand in class, seek out extra credit opportunities, and serve as a role model to fellow classmates, yet still read significantly below her grade level. This student has done everything expected of her, and more. But at the end of the day, she is not guaranteed the right to the education or literacy capabilities she so eagerly seeks. In Detroit, only five percent of the city's fourth-graders and seven percent of the city's eighth-graders can read at or above a proficient level.¹ This is their reality

† J.D., 2020, University at Buffalo School of Law; Executive Publications Editor, *Buffalo Law Review*. I would like to thank the members of the *Buffalo Law Review* for their hard work editing this Comment. Additionally, I am forever grateful for the unconditional support of my parents, sisters, friends, and former teaching colleagues.

1. Lori Higgins, *Detroit's Schools Score Worst in the Nation Again, But Vitti Vows That Will Change*, DETROIT FREE PRESS (Apr. 10, 2018, 12:01 AM), <https://www.freep.com/story/news/education/2018/04/10/detroit-schools-again-worst-nation-rigorous-national-exam-while-michigan-overall-sees-no-significant/493893002>; *We Are Ten Steps Behind: Detroit Students Seek Fair Access to Literacy*, CBS NEWS (Sept. 18, 2018, 8:21 AM), <https://www.cbsnews.com/news/school-matters-detroit-students-lawsuit-claims-schools-denied-them-access-to-literacy/>.

because the United States of America, a global twenty-first century leader, recognizes no federal right to an education.²

In fact, there is no federal right for any American citizen to receive even a minimally adequate education or sufficient literacy instruction, as the Constitution fails to mention the words “education” or “literacy.”³ The nation also continues to face an ever-widening educational opportunity gap, which some refer to as the “civil rights issue of our time.”⁴ At least ten million students in low-income neighborhoods and millions of minority students face suboptimal educational opportunities.⁵ Unsurprisingly, then, the United States is facing a literacy crisis.⁶ According to the U.S. Department of

2. Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 93 (2013).

3. *See id.* at 111.

4. Kimberly Jenkins Robinson, *Disrupting Education Federalism*, 92 WASH. U. L. REV. 959, 963 (2015); John B. King Jr., *Education Remains the Civil Rights Issue of Our Time*, THE EDUCATION TRUST (May 17, 2017), <https://edtrust.org/the-equity-line/education-remains-civil-rights-issue-time/>. There is a recent, growing effort amongst education experts and organizations to stop using the phrase “achievement gap” when referring to the disparity in academic outcomes between lower-income students and their affluent peers. “Opportunity gap” refers to the fact that certain arbitrary circumstances in which people are born, such as their race, ethnicity, ZIP code, and socioeconomic status, determine their opportunities in life, rather than differences in capability or character. “Achievement gap” is a misnomer that inherently speaks of academic outcomes, instead of the conditions that led to those outcomes. The phrase “opportunity gap” thus does not place responsibility on students for systemic injustices. *See* Theresa Mooney, *Why We Say ‘Opportunity Gap’ Instead of ‘Achievement Gap,’* TEACH FOR AMERICA (May 11, 2018), <https://www.teachforamerica.org/stories/why-we-say-opportunity-gap-instead-of-achievement-gap/>; *see also* Camika Royal, *Please Stop Using the Phrase ‘Achievement Gap,’* GOOD (Nov. 10, 2012), <https://www.good.is/articles/please-stop-using-the-phrase-achievement-gap/>.

5. Robinson, *supra* note 4, at 961. As the wealth gap has increased between low-income and high-income families, the opportunity gap between children in low-income and high-income families has also widened. *Id.* at 962.

6. Rui Diemart, *32 Million American Adults Can’t Read: Why Literacy is the Key to Growth*, MEDIUM (Feb. 16, 2018), https://medium.com/@OneYoungWorld_/32-million-american-adults-cant-read-why-literacy-is-the-key-to-growth-818996739523; The Editorial Team, *Crisis Point: The State of Literacy in America*, RESILIENT EDUCATOR (last visited July 10, 2020), <https://resilienteducator.com/news/illiteracy-in-america/>.

Education and the National Institute of Literacy, approximately thirty-two million adults in the United States cannot read.⁷ The children of parents who have low literacy levels are especially vulnerable, as those students have a seventy-two percent chance of reading at the lowest levels themselves.⁸ Furthermore, seventy-five percent of state prison inmates can be classified as low literate.⁹

Teachers and school administrators will not exclusively solve this literacy crisis within the classroom. State legislatures and political majorities will also not solve these issues alone, as they have proven inept at urgently addressing this educational crisis.¹⁰ Rather, solving this problem requires merging the worlds of education policy and judicial reform. A recent civil lawsuit stemming out of poor school conditions in Detroit Public Schools sought to provide a legal solution to the problem. This case, *Gary B. v. Snyder*, serves as a starting point to the issue of whether access to literacy is a fundamental right.

Given the absence of federal precedent regarding a right to literacy, *Gary B. v. Snyder* raised a novel issue.¹¹ The seven student plaintiffs in this class action suit argued that decades of deliberate indifference to Detroit schools denied them and other children access to literacy, the most basic

7. Diemart, *supra* note 6.

8. The Editorial Team, *supra* note 6.

9. *Id.*

10. See Nancy Kaffer, *Whitmer Settled the Detroit Literacy Lawsuit. What That Means (and What it Doesn't)*, DETROIT FREE PRESS (May 15, 2020, 6:00 AM), <https://www.freep.com/story/opinion/columnists/nancy-kaffer/2020/05/15/detroit-schools-right-read-literacy-lawsuit/5191807002/> (“But these are the justifications that enabled Detroit schools’ long decline: The idea that Detroit schools’ failures are the moral failings of individual Detroiters, students, and parents, and not the predictable result of a system designed to fail—a school system in which none of the state lawmakers responsible for that design would enroll their own children.”).

11. Jacey Fortin, “*Access to Literacy*” Is Not a Constitutional Right, Judge in *Detroit Rules*, N.Y. TIMES (July 4, 2018), <https://www.nytimes.com/2018/07/04/education/detroit-public-schools-education.html>.

building block of education.¹² When the plaintiffs originally filed the lawsuit in 2016, the defendants in this suit were various government officials, including former Michigan Governor Rick Snyder and members of the Michigan State Board of Education.¹³

On June 29, 2018, the United States District Court for the Eastern District of Michigan granted the defendants' motion to dismiss and held that the students at poorly performing public schools in Detroit lacked a fundamental right of access to literacy under the Constitution.¹⁴ Judge Stephen Murphy's decision¹⁵ agreed that state officials bore some responsibility for the dismal quality of education in the district.¹⁶ The court also agreed that giving students the opportunity to read was necessary for voting, applying for a job, and securing a place to live.¹⁷ Nonetheless, according to the decision, "those points do not necessarily make access to literacy a fundamental right."¹⁸

When the plaintiffs appealed the result to the Sixth Circuit Court of Appeals, Governor Snyder's successor, Gretchen Whitmer, became the new named defendant. On April 23, 2020, in a groundbreaking decision, a three-judge Sixth Circuit panel recognized a fundamental right to access to literacy.¹⁹ This marked the first time in history a federal court acknowledged a right to a basic minimum education. However, the result was short-lived, as a majority of Sixth

12. Gary B. v. Snyder, 313 F. Supp. 3d 852, 856 (E.D. Mich. 2018).

13. *Id.* at 856.

14. *Id.* at 857.

15. Although this case occurred within the Sixth Circuit, the arguments in this Comment are applicable to and may help federal court litigants and judges in other circuits.

16. *See Snyder*, 313 F. Supp. 3d at 872–73.

17. *Id.* at 873.

18. *Id.*

19. Gary B. v. Whitmer, 957 F.3d 616, 649 (6th Cir. 2020), *vacated en banc*, 958 F.3d 1216 (6th Cir. 2020) (mem).

Circuit judges voted to rehear the case en banc, effectively vacating the panel decision. As a result, there is once again no binding precedent establishing a right to access literacy.

This Comment argues that the United States Constitution guarantees the opportunity to become literate. Specifically, this Comment shows how the District Court's analysis faltered, and presents arguments future litigants should consider. Part I discusses the crucial Supreme Court precedents that set the stage for current education litigation. Part I also presents a realistic federal standard for access to literacy that diverts from the standard the *Gary B.* litigants proposed to the District Court. Part II of this Comment argues that the Due Process Clause guarantees access to literacy because Supreme Court precedent has repeatedly emphasized literacy's importance to society, and literacy is a significant piece of American history and tradition. Finally, Part III discusses the judicial implications of recognizing a right to access literacy, and the repercussions that would result in federal courts and state legislatures throughout the nation.

Disadvantaged communities are in need of legal intervention. Otherwise, the policies of state legislatures and political majorities will continue to dictate the educational opportunities of these communities, and will continue to fail our students and their families.²⁰ The right to literacy is a natural extension of existing Supreme Court educational policy concerns. The Court's repeated emphasis on education's importance suggests "an openness to extending some level of constitutional protection to education or, at least, an unwillingness to foreclose the possibility."²¹ Now is the time to extend the possibility the Court has already acknowledged. This Comment shows how this possibility may become a reality.

20. Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 739 (2018) [hereinafter *Constitutional Compromise*].

21. *Id.* at 740.

I. SETTING THE STAGE FOR ACCESS TO LITERACY

Part I lays out the crucial education cases that set the stage for the ongoing right to literacy litigation. These cases open the door to establishing a fundamental right to access to literacy. In fact, as the District Court in the *Gary B.* case reasoned, “the Supreme Court has neither confirmed nor denied that access to literacy is a fundamental right. The Court must therefore cautiously take up the task.”²² Part I also discusses the *Gary B.* litigation and addresses why the federal government is better equipped than state and local governments to answer the question whether access to literacy is a fundamental right. Finally, Part I shows how litigants must clearly define a uniform, federal standard of education, as none currently exists. This Part argues that literacy access should be the federal floor of educational quality, and argues that adequate school infrastructure should not be part of a federal literacy standard.

A. *How we got here: The Supreme Court’s right-to-education precedent*

In order to establish a federal right to access to literacy, it is necessary to examine a series of Supreme Court cases that shaped how courts evaluate constitutional claims concerning state-provided education. The Equal Protection Clause dominates most of this education law precedent, which leaves “ample space” for the Supreme Court to find a right to access to literacy within the Due Process Clause.²³ The Sixth Circuit and the District Court in *Gary B.* heavily discussed and relied upon this precedent in arriving at a decision.²⁴ Both courts used this Supreme Court precedent as evidence that a right to a general education is distinct from a right to a minimally adequate education, and that the

22. *Snyder*, 313 F. Supp. 3d at 871.

23. Friedman & Solow, *supra* note 2, at 117.

24. See *Whitmer*, 957 F.3d at 634; *Snyder*, 313 F. Supp. 3d at 868–71.

Supreme Court has never determined whether a minimally adequate education is a fundamental right.²⁵ Despite this shared reliance upon Supreme Court precedent, the courts arrived at opposite conclusions, as the Sixth Circuit ultimately recognized a fundamental right to access literacy, while the District Court disagreed with the plaintiffs' claims.

The case of *San Antonio Independent School District v. Rodriguez*²⁶ remains one of the most consequential cases within the realm of education and constitutional law.²⁷ As a result of *Rodriguez*, the Supreme Court essentially punted authority for educational funding back to the states.²⁸ Going forward, the legal presumption in federal courts would be that the state's actions regarding educational funding were constitutional.²⁹ Nearly fifty years after the Court decided *Rodriguez*, ongoing education litigation continues to feel the repercussions of the decision. The holding reflected the Supreme Court's discomfort with prioritizing equal protection concerns over a state's interest in local control over education.³⁰ The decision asserted the importance of local control, and set up a roadblock to bringing federal claims of educational inequity.³¹ It ultimately took litigators out of the business of going to federal court to resolve

25. See *Whitmer*, 957 F.3d at 644; *Snyder*, 313 F. Supp. 3d at 868–71.

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

27. See PAUL A. SRACIC, *SAN ANTONIO V. RODRIGUEZ AND THE PURSUIT OF EQUAL EDUCATION: THE DEBATE OVER DISCRIMINATION AND SCHOOL FUNDING 2* (Peter Charles Hoffer & N.E.H. Hull eds., 2006) ("What stands out about *Rodriguez*, however, is not just that it addresses the subjects of education, politics, wealth, and race, but rather the curious way in which all four of these topics interact within the case. In fact, it is the way that the Supreme Court ultimately understands this relationship that makes *Rodriguez* a landmark case in U.S. law and society.").

28. *Id.* at 141.

29. *Id.*

30. *Id.*

31. See *A Right to Learn?: Improving Educational Outcomes Through Substantive Due Process*, 120 HARV. L. REV. 1323, 1326 (2007) [hereinafter *Improving Educational Outcomes*].

educational quality issues.³² Litigants thus looked for a solution within state constitutions and brought claims based on state education and equal protection clauses.³³

In *Rodriguez*, plaintiff parents brought a class action suit on behalf of their children, and disputed Texas's funding method for public schools.³⁴ Every state in the nation except Hawaii used local funding and local property taxes to pay for education, but in districts with higher property values, schools were predictably funded at significantly higher rates than other districts.³⁵ States' heavy reliance on property taxes when funding school districts has often led to a vast difference between what the richest and poorest school districts receive.³⁶ As a result, students from one of the lowest-funded school districts argued the funding scheme violated the Equal Protection Clause.³⁷

The Supreme Court disagreed and, in a 5-4 decision, turned away the student plaintiffs' claims.³⁸ First, the Court applied rational basis review rather than strict scrutiny, because education is not a fundamental right and wealth is

32. Carter G. Phillips, *A Class Action Lawsuit for the Right to a Minimum Education in Detroit*, 15 *Nw. J. L. & Soc. POL'Y* 412, 414 (2020).

33. See *Improving Educational Outcomes*, *supra* note 31, at 1326 ("The theories behind these lawsuits have varied, with litigants seeking either the equalization of resources or sufficient funding to provide an adequate level of education. Results have been mixed . . .").

34. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 8-17 (1973); Friedman & Solow, *supra* note 2, at 117.

35. *Gary B. v. Snyder*, 313 F. Supp. 3d 852, 868 (E.D. Mich. 2018); SRACIC, *supra* note 27, at 1.

36. Friedman & Solow, *supra* note 2, at 117.

37. See *Rodriguez*, 411 U.S. at 8-17; *Snyder*, 313 F. Supp. 3d at 868; SRACIC, *supra* note 27, at 2 (describing how in the *Rodriguez* case, Demetrio Rodriguez and six other parents of children who attended school in the poor, overwhelmingly Mexican-American Edgewood section of San Antonio filed suit in federal court arguing that the Texas funding system violated the Equal Protection Clause of the Fourteenth Amendment).

38. *Rodriguez*, 411 U.S. at 41.

not a suspect classification.³⁹ The author of the majority opinion, Justice Louis Powell,⁴⁰ emphasized the fact that the plaintiffs articulated a positive right,⁴¹ not a negative one, and stated: “[e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution.”⁴² Then, the Court reaffirmed that the state had a legitimate interest in ensuring that local governments maintained the power and flexibility to devise their own taxation schemes.⁴³ The Court therefore concluded that the state’s school-funding system was rationally related to that legitimate interest.⁴⁴

However, when the Court decided *Rodriguez* in 1973, it failed to determine whether the deprivation of literacy access would violate the Due Process Clause.⁴⁵ The *Rodriguez* Court never answered the question whether there was a federal

39. *Id.* at 40–44; *Snyder*, 313 F. Supp. 3d at 868.

40. Justice Powell, the author of the majority opinion in *Rodriguez*, was raised in an aristocratic family in the South. Powell attended Washington and Lee University in Lexington, Virginia. Lexington is in the midst of the old Confederacy, and the remains of the University’s namesake, General Robert E. Lee, can be found there. SRACIC, *supra* note 27, at 111.

41. *See infra* Part III.

42. *Rodriguez*, 411 U.S. at 35; Friedman & Solow, *supra* note 2, at 117–18.

43. *Rodriguez*, 411 U.S. at 55 (“We are unwilling to assume for ourselves a level of wisdom superior to that of legislators, scholars, and educational authorities in 50 States, especially where the alternatives proposed are only recently conceived and nowhere yet tested.”); *Snyder*, 313 F. Supp. 3d at 868.

44. *Rodriguez*, 411 U.S. at 55. Notably, the most prominent dissent came from an expected author: Justice Thurgood Marshall. Part II of this Comment discusses Justice Marshall’s dissent in greater detail. Justice Marshall interpreted this case very differently than the majority. He wrote, “The Court’s suggestions of legislative redress and experimentation will doubtless be of great comfort to the schoolchildren of Texas’s disadvantaged districts, but considering the vested interests of wealthy school districts in the preservation of the status quo, they are worth little more.” *Id.* at 132 (Marshall, J., dissenting); SRACIC, *supra* note 27, at 110.

45. *See Rodriguez*, 411 U.S. at 36–37 (“Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditures in Texas provide an education that falls short.”); *see also Snyder*, 313 F. Supp. 3d at 870.

right to an education of a minimum level of quality.⁴⁶ The plaintiffs in the *Gary B.* case sought an answer to this question.⁴⁷ *Gary B.* thus focused on this crucial gap in Supreme Court doctrine: the question of whether there is a federal constitutional floor regarding educational quality.⁴⁸ The *Gary B.* plaintiffs argued there *is* a bare minimum level of education which must be provided, and that substantive floor is access to literacy.⁴⁹ The plaintiffs' theory also largely relied on the Court's subsequent decision in *Plyler v. Doe*.⁵⁰

Nine years after *Rodriguez*, the Court considered *Plyler v. Doe*, another case from Texas.⁵¹ *Plyler* indicated that the Court is uncomfortable with completely denying education to a class of children.⁵² In fact, the plaintiffs in *Gary B.* primarily relied on the *Plyler* decision specifically because the holding left the door open to recognizing some sort of constitutional floor of adequate education.⁵³ In *Plyler*, the

46. *Rodriguez*, 411 U.S. at 35. See Kristine L. Bowman, *Education Reform and Detroit's Right to Literacy Litigation*, 75 WASH & LEE L. REV. 61, 63 (2018).

47. See Class Action Compl. at 23–25, *Gary B. v. Snyder*, 313 F. Supp. 3d 852 (E.D. Mich. 2018) (No. 16-CV-13292); Bowman, *supra* note 46, at 62.

48. Bowman, *supra* note 46, at 63.

49. See *id.*

50. *Id.* at 64.

51. *Plyler v. Doe*, 457 U.S. 202 (1982).

52. See *id.* at 221–23 (holding that the school district could not exclude undocumented immigrant students because to do so would deny those children “the means and skills” necessary to become productive members of society and thus create a “permanent underclass”); *Improving Educational Outcomes*, *supra* note 31, at 1326.

53. See Class Action Compl., *supra* note 47, at 14–16. The plaintiffs in the Michigan *Gary B.* case contended that the basic holding of *Plyler* “stands apart from the fact that the children denied access to basic education lacked lawful immigration status.” According to the *Gary B.* plaintiffs, if the Court acknowledged that undocumented children could not be barred from receiving a basic education, there should be an even stronger basis for acknowledging that American citizens could not be barred from receiving a basic education. See *id.* At oral argument before the District Court in the *Gary B.* case, the plaintiffs' counsel argued they were making an analogous claim to the *Plyler* plaintiffs. The *Gary B.* plaintiffs alleged that “having a system that does not provide teachers, books, courses, and the conditions conducive to learning fails even a rational basis

Court addressed the constitutional implications of an absolute denial of public education.⁵⁴ This case involved a challenge to a Texas law denying children of undocumented immigrants access to public schools.⁵⁵ The Court held that the Texas statute's absolute denial of education was unconstitutional.⁵⁶ The Court reasoned "[the statute] imposes a lifetime hardship 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."⁵⁷ Despite finding the statute violated the Equal Protection Clause, the Court cited *Rodriguez* and reiterated that "public education is not a 'right' granted to individuals by the Constitution."⁵⁸ Nevertheless, even though the *Plyler* Court declined to hold that education is a fundamental right under its equal protection jurisprudence, this holding suggested that a minimally adequate education might be constitutionally required.⁵⁹

test." *Snyder*, 313 F. Supp. 3d at 870. However, the District Court did not agree with this analysis, because the *Gary B.* plaintiffs were not challenging a specific Michigan statute in the same way that the *Plyler* plaintiffs challenged a Texas statute. *See id.* at 870–71. The District Court thus distinguished the *Gary B.* and *Plyler* plaintiffs because the *Gary B.* plaintiffs reached their conclusion by alleging that the defendants had not done *enough* to provide a basic education. *See id.* at 870. On the other hand, the District Court reasoned that the *Plyler* plaintiffs showed that the defendants had not provided them with even a basic, minimal education. *Id.*

54. *See Plyler*, 457 U.S. at 202; *see also Improving Educational Outcomes*, *supra* note 31, at 1325–26.

55. In *Plyler*, the Court struck down a statute that denied public school enrollment to children of undocumented immigrants. *Plyler*, 457 U.S. at 230; *see Friedman & Solow*, *supra* note 2, at 118.

56. *Plyler*, 457 U.S. at 230; *Improving Educational Outcomes*, *supra* note 31, at 1326.

57. *See Plyler*, 457 U.S. at 223; *Improving Educational Outcomes*, *supra* note 31, at 1326.

58. *Plyler*, 457 U.S. at 221, 230; *Friedman & Solow*, *supra* note 2, at 118.

59. *Improving Educational Outcomes*, *supra* note 31, at 1326.

Four years later, the Court decided *Papasan v. Allain*, a case from Mississippi.⁶⁰ The *Papasan* decision continued to show the Court's inability to definitively answer the constitutional questions concerning a minimally adequate education. In *Papasan*, the Court framed the question like this: "Given that the State has title to assets granted to it by the Federal Government for the use of the State's schools, does the Equal Protection Clause permit it to distribute the benefit of these assets unequally among the school districts as it now does?"⁶¹ Ultimately, the Court in *Papasan* remanded the case, and the terms of the Court's remand prevented a holding on the equal protection claim.⁶² However, the *Papasan* Court notably stated, "[the 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."⁶³ *Papasan* is further proof that the Supreme Court has had a difficult time "closing the book on a right to education."⁶⁴

Similarly, *Kadrmas v. Dickinson Public Schools*⁶⁵ continued to leave open the question whether there is a fundamental right to a minimally adequate education. In *Kadrmas*, the Court upheld a state law permitting school districts to require parents to pay part of the cost of transporting their kids to school.⁶⁶ At the time, North Dakota permitted some school districts to charge a user fee for bus transportation.⁶⁷ A student of modest means refused to pay

60. *Papasan v. Allain*, 478 U.S. 265 (1986).

61. *Id.* at 289.

62. *See id.* at 285–86; *Snyder*, 313 F. Supp. 3d at 871.

63. *Papasan*, 478 U.S. at 285.

64. Friedman & Solow, *supra* note 2, at 118.

65. *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450 (1988).

66. *Id.* at 452.

67. *Id.* at 453.

the transportation fee and claimed the law violated the Equal Protection Clause because it deprived students who could not afford to pay the fee “minimum access to education.”⁶⁸ In response, the Supreme Court explained, “[i]t is difficult to imagine why choosing to offer the service should entail a constitutional obligation to offer it for free.”⁶⁹ The Court reasoned that the student was not denied access to education, but rather she was merely burdened in securing it.⁷⁰ The Court concluded that the North Dakota statute neither discriminated against a suspect class nor interfered with a fundamental right.⁷¹ Therefore, the Court determined the statute was not subject to strict scrutiny and satisfied rational basis review.⁷²

Thus, the question of whether access to literacy is a fundamental right remains a question the Supreme Court has neither confirmed nor denied.⁷³ Notably, Justice Marshall’s *Kadrmas* dissent cited the *Rodriguez, Plyler*, and *Papasan* cases upon which the Court had relied.⁷⁴ Justice Marshall stated:

[t]he Court therefore does not address the question whether a State constitutionally could deny a child access to a minimally adequate education. In prior cases, this Court explicitly has left open the question whether such a deprivation of access would violate a fundamental constitutional right. That question remains open today.⁷⁵

68. *Id.* at 458; Gary B. v. Snyder, 313 F. Supp. 3d 852, 869 (E.D. Mich. 2018).

69. *Kadrmas*, 487 U.S. at 462.

70. *Id.* at 458; *Snyder*, 313 F. Supp. 3d at 871.

71. *Kadrmas*, 487 U.S. at 465.

72. *Id.*

73. See Gary B. v. Whitmer, 957 F.3d 616, 642 (6th Cir. 2020), *vacated en banc*, 958 F.3d 1216 (6th Cir. 2020) (mem); *Snyder*, 313 F. Supp. 3d at 871.

74. *Kadrmas*, 487 U.S. at 466 n.1 (Marshall, J., dissenting); *Snyder*, 313 F. Supp. 3d at 870.

75. *Kadrmas*, 487 U.S. at 466 n.1 (Marshall, J., dissenting) (citations omitted).

B. *The Gary B. Litigation*

The *Gary B.* litigation illustrates how it is possible for litigants bringing this novel constitutional issue to be successful before federal courts, yet the issue of whether a minimally adequate education is a fundamental right is far from resolved. The Sixth Circuit's decision to rehear the case en banc and vacate the panel decision may encourage courts within other circuits to follow the District Court and the panel dissent's reasoning, which did not find a right to access literacy. Furthermore, the settlement agreement between the student plaintiffs and Governor Whitmer is a temporary solution that will likely not serve long-term student interests.

In 2016, students at several of Detroit's worst-performing public schools sued several Michigan state officials, who they argued were responsible for the abysmal conditions in their schools.⁷⁶ The student plaintiffs credited this substandard performance to poor conditions within their classrooms, including missing or unqualified teachers, physically dangerous facilities, and inadequate books and materials.⁷⁷ The students argued these conditions deprived them of a basic minimum education, meaning one that provides a chance at foundational literacy, and brought forth three claims. First, the plaintiffs argued that while other Michigan students receive an adequate education, the students in plaintiffs' schools do not, which is a violation of the Equal Protection Clause.⁷⁸ Secondly, they argued that the schools they are forced to attend are schools in name only, and so the state cannot justify the restriction on their liberty imposed by compulsory attendance.⁷⁹ Finally, the plaintiffs asked the District Court to recognize a

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

77. *Id.* at 863.

78. *Id.* at 875.

79. *Id.* at 873.

fundamental right to access to literacy under the Due Process Clause.⁸⁰ In response, the defendants argued access to literacy is a proxy for a right to education, which has been rejected as a fundamental right.⁸¹

While the District Court agreed the defendants were the proper parties to sue, it dismissed the plaintiffs' complaint on the merits.⁸² The court found the plaintiffs had not alleged a proper comparator for their equal protection claim, nor had they highlighted any state policy or action that was not supported by a rational basis.⁸³ It also found the plaintiffs did not sufficiently plead their compulsory attendance theory.⁸⁴ When the court addressed the plaintiffs' due process claim, it ultimately found there was no fundamental right to access to literacy and granted the defendants' motion to dismiss.⁸⁵

On appeal to a three-judge panel of the Sixth Circuit, the court affirmed in part and reversed in part the District Court's decision and remanded the case for further proceedings.⁸⁶ On April 23, 2020, in a 2-1 decision, the Sixth Circuit agreed the plaintiffs failed to adequately plead their equal protection and compulsory attendance claims, but disagreed with the lower court's reasoning concerning the plaintiffs' due process claim.⁸⁷ As a result, the court recognized a fundamental right to access to literacy.⁸⁸ The court described this as a "limited right," which promised only

80. *Id.* at 856.

81. *See id.* at 856–57.

82. *Id.* at 857.

83. *Id.* at 876–77.

84. Gary B. v. Whitmer, 957 F.3d 616, 621 (6th Cir. 2020), *vacated en banc*, 958 F.3d 1216 (6th Cir. 2020) (mem).

85. *Snyder*, 313 F. Supp. 3d at 875–77.

86. *Whitmer*, 957 F.3d at 621.

87. *Id.*

88. *Id.* at 662.

an education sufficient to provide “basic” access to literacy.⁸⁹ In addition to recognizing a right to access literacy, the court held the plaintiffs had “plausibly been deprived of an education that could provide access to literacy.”⁹⁰ Even though the plaintiffs still faced the burden of proving their factual contentions at trial, under the standards governing a motion to dismiss, this was enough “to get them through the courthouse doors.”⁹¹ Judge Eric Clay delivered the court’s opinion in which Judge Jane Stranch joined, and Judge Eric Murphy delivered a separate dissenting opinion.⁹²

The appellate court’s two main points regarding the due process claim were that the state provision of a basic minimum education has a longstanding presence in our history and tradition, and is essential to our concept of ordered constitutional liberty.⁹³ The court discussed how the history of American public education reveals a longstanding practice of free state-sponsored schools, because at the time of the Fourteenth Amendment’s adoption, schools were ubiquitous.⁹⁴ The court also reasoned that basic literacy education is essential to the exercise of other fundamental rights, such as rights of speech, press, and participation in the political process.⁹⁵ The court also considered the unique role of public education as a source of opportunity separate from the means of a child’s parents.⁹⁶ According to the court, this unique role creates a heightened social burden to provide at least a minimal education, and thus, “the

89. *Id.* at 660.

90. *Id.* at 661.

91. *Id.* at 662.

92. *Id.* at 620.

93. *Id.* at 649. This overview of the *Gary B.* litigation focuses on the plaintiffs’ substantive due process claim, instead of their equal protection and compulsory attendance claims.

94. *Id.* at 648.

95. *Id.* at 649, 653.

96. *Id.* at 649.

exclusion of a child from a meaningful education by no fault of her own should be viewed as especially suspect.”⁹⁷

Furthermore, the court addressed some arguments against recognizing this fundamental right.⁹⁸ The court characterized these arguments of the defendants and the dissent as “classic” arguments against extending substantive due process.⁹⁹ The court acknowledged the counterargument that political branches are better equipped to address general social wrongs, and courts must not act as super-legislatures.¹⁰⁰ In response, the court reasoned the affected group—students and families of students without access to literacy—is especially vulnerable and faces a built-in disadvantage at seeking political recourse.¹⁰¹ This lack of literacy is what prevents them from obtaining a basic minimal education through the normal political process, which increases the justification for the recognition of the right as fundamental.¹⁰² The court also addressed the argument that the Due Process Clause provides only negative, not positive rights.¹⁰³ In response, the Sixth Circuit focused on how the Supreme Court has recognized affirmative fundamental rights.¹⁰⁴ The court reasoned that one affirmative right repeatedly endorsed by the Court is the fundamental right to marry.¹⁰⁵ At the very least, the recognition of marriage as a state-provided right shows that the Constitution does not categorically rule out the existence of positive rights.¹⁰⁶

97. *Id.*

98. *Id.* at 655.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 656.

103. *Id.* at 655–56.

104. *Id.* at 656.

105. *Id.* at 656–57.

106. *Id.* at 657

Nevertheless, Judge Eric Murphy delivered a dissenting opinion. The dissent argued the state legislature and local school boards are better equipped than federal courts to address serious educational problems.¹⁰⁷ The dissent also described access to literacy as a “nebulous” right, and stated that public education is not a right granted to individuals by the Constitution.¹⁰⁸ The dissent also reasoned a positive right to a minimum education will jumble the separation of powers.¹⁰⁹ As a result, this would impede upon the states’ ability to experiment with diverse solutions to challenging policy problems.¹¹⁰ Thus, the dissent would have affirmed the lower court’s judgment.

After over four years of litigation, on May 14, 2020, the student plaintiffs reached a settlement agreement with Governor Whitmer.¹¹¹ Even though this settlement will directly benefit the seven individual student plaintiffs, it is unclear whether the agreement will impact more students and ensure long-term access to literacy. The settlement agreed to provide \$280,000 to the seven plaintiffs to access a high-quality literacy program or otherwise further their education.¹¹² The agreement also created two Detroit-based task forces to monitor the quality of education in Detroit and advise the governor.¹¹³ The Detroit Literacy Equity Task Force will operate outside state government, conducting yearly evaluations around literacy in Detroit and providing state-level policy recommendations to the governor.¹¹⁴

107. *Id.* at 662 (Murphy, J., dissenting).

108. *Id.* at 663.

109. *Id.*

110. *Id.*

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

112. *Id.* at 3.

113. *Id.* at 4–5.

114. *Id.* at 4.

Students, parents, literacy experts, teachers, a paraprofessional, and other community members will serve on the task force.¹¹⁵ The Detroit Educational Policy Committee will focus on the stability and quality of the overall educational ecosystem in Detroit, accessibility of quality schools for all children in Detroit, and improvements in facilities, teaching, and educational materials.¹¹⁶

Yet, instead of fostering significant, long-term change within Detroit, the settlement will likely only have a temporary impact. For example, the terms of the agreement specifically state the Governor will diligently propose and support legislation before the end of her first term in office and, “if the legislation is not enacted and *if* she is re-elected to a second term, also during her second term of office.”¹¹⁷ If enacted, the legislation would provide the Detroit Public School Community District with at least \$94.4 million of funding for literacy-related programs and initiatives.¹¹⁸ While this funding would certainly have a significant impact on student literacy opportunities, the Governor’s support does not guarantee an approval from Michigan’s Republican-led legislature. After all, this is the same legislature that asked the Sixth Circuit to reconsider the *Gary B. v. Whitmer* decision.¹¹⁹ The legislature called the decision a “precedent-setting error of grave and exceptional public importance.”¹²⁰ There is a serious possibility the legislation will never be enacted, even if Governor Whitmer is elected to a second term. Thus, the settlement has yet to prove to be an effective, long-lasting solution in addressing the literacy crisis.

115. *Id.*

116. *Id.* at 5.

117. *Id.* at 2 (emphasis added).

118. *Id.*

119. Koby Levin, *GOP Lawmakers Want Judges to Review Detroit Literacy Case*, CHALKBEAT (May 13, 2020, 6:13 PM), <https://detroit.chalkbeat.org/2020/5/13/21257962/gop-lawmakers-review-detroit-literacy-case>.

120. *Id.*

In addition to the uncertainties surrounding the settlement, a majority of Sixth Circuit judges voted to rehear the *Gary B. v. Whitmer* case. This decision to rehear the case en banc creates an even greater sense of urgency to recognize literacy as a fundamental right, both within and outside the Sixth Circuit. As a result of initiating the en banc procedure, the *Whitmer* decision is now vacated, and is no longer binding precedent.¹²¹ The en banc court essentially reversed the panel decision, a devastating result for students, who are once again denied the guarantee of a minimum quality education. This decision did not impact the settlement agreement between the Governor and the individual plaintiffs, but it completely abolished the legal precedent that was set by the earlier panel decision. Furthermore, on June 10, 2020, the en banc Sixth Circuit dismissed the case as moot, based on the settlement agreement.¹²² Even though this dismissal marks the end of the *Gary B.* litigation, litigants in other federal circuits should continue to bring similar “right to access literacy” cases. Even though the recognition of this right in the Sixth Circuit was short lived, the well-reasoned, thorough panel decision reveals it is possible for litigants to achieve victory in federal court.

C. The federal government is better equipped than local and state governments to answer the question of whether access to literacy is a fundamental right

The federal government must shoulder greater responsibility over education to address the opportunity gap and the national literacy crisis, as it has already increased its influence in the educational sphere. In the United States, state and local governments have exercised much more

121. Koby Levin et al., *In a Blow to the 'Right to Read,' Full Appeals Court Will Review Detroit Literacy Lawsuit*, CHALKBEAT (May 19, 2020, 7:10 PM), <https://detroit.chalkbeat.org/2020/5/19/21264371/appeals-court-will-review-detroit-lawsuit>.

122. *Gary B. v. Whitmer*, Nos. 18-1855/1871, 2020 U.S. App. LEXIS 18312, at *10 (6th Cir. June 10, 2020).

control over public schools than the federal government.¹²³ The reason for this limited federal role is because of the Constitution's Tenth Amendment, which states that "the powers not delegated to the United States by the Constitution . . . are reserved to the States respectively."¹²⁴ However, the Supreme Court relies on evolving federal practice to identify due process rights and "discern commitments so deeply engrained in American consciousness that they must be recognized as de facto constitutional."¹²⁵ Thus, the primary responsibility for education has shifted in important ways to the federal government, with support from both Democratic and Republican administrations.¹²⁶ In addition, there has been increased public belief that the federal government must protect the right to education.¹²⁷ In fact, the United States

123. Robinson, *supra* note 4, at 968–69 (arguing that a strengthening of the federal role in education will reduce some forms of state and local control over education, but will also provide states and localities new forms of control); see U.S. Department of Education, *The Federal Role in Education*, <https://www2.ed.gov/about/overview/fed/role.html> (explaining how state and local governments are primarily responsible for education in the United States).

124. Robinson, *supra* note 4, at 969; Brendan Pelsue, *When it Comes to Education, the Federal Government is in Charge of...Um, What?*, HARV. ED. MAG., <https://www.gse.harvard.edu/news/ed/17/08/when-it-comes-education-federal-government-charge-um-what>.

125. Friedman & Solow, *supra* note 2, at 133.

126. *Id.* See Derek Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally Protected Right*, 51 WM. & MARY L. REV. 1343, 1344 (2010) [hereinafter *Unlocking the Power of State Constitutions*] (arguing that given states' weakened ability to enforce equal protection rights, the future of education equity depends on federal intervention).

127. Friedman & Solow, *supra* note 2, at 133; *Unlocking the Power of State Constitutions*, *supra* note 126, at 1346–47 (emphasizing that many Americans already assume that education is a constitutional or civil right protected by the federal government, even though this is not our current reality). See, e.g., Ting Yu, *Searching for a Third Way to Measure Success*, TEACH FOR AMERICA (Feb. 27, 2019), https://www.teachforamerica.org/stories/searching-for-a-third-way-to-measure-success?utm_source=email_mktg_email&utm_medium=Owned&utm_campaign=MKTG_2019.02.28_MP_WinterOneDayEmail_Alumni&utm_term=02.28.2019&utm_content=BeyondMathArticleTitle ("Without broad access to the sciences, civics, arts, world languages, computer science, and the habits of critical

stands apart from most other countries, where the responsibility for education does not lie at the local level.¹²⁸

Over the last few decades, the federal role in education has grown significantly.¹²⁹ In 1965, after the *Brown v. Board of Education* decision,¹³⁰ Congress passed the Elementary and Secondary Education Act (“ESEA”), which increased federal responsibility for equal educational opportunity.¹³¹ Congress further expanded the federal role in education through the passage of No Child Left Behind (“NCLB”) and Race to the Top (“RTTT”), which encouraged higher standards and greater accountability for the education of all children.¹³² NCLB received bipartisan support, despite its significant federal involvement in public schools.¹³³ According to one scholar, “passage of the NCLB occurred because both [the Democratic and Republican] parties and the American public now realize that substantial federal

thinking, will students truly be prepared for the work force of the future? And if not, are intensive efforts to raise math and reading scores doing enough to advance this fundamental civil right?”).

128. Friedman & Solow, *supra* note 2, at 133.

129. Robinson, *supra* note 4, at 969.

130. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954) (requiring equality in education when the state has chosen to provide education).

131. See Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27; Robinson, *supra* note 4, at 969; see also Kristi L. Bowman, *The Failure of Education Federalism*, 51 U. MICH. J.L. REFORM 1, 42 (2017) (“The federal government’s broadest regulation of education remains the 1965 Elementary and Secondary Education Act (ESEA). Since its enactment, ESEA has been reauthorized and amended roughly every five years. . . . The most well-known rendition of the law may be the 2001 variation, the No Child Left Behind Act (NCLB).”).

132. Robinson, *supra* note 4, at 969.

133. See Friedman & Solow, *supra* note 2, at 135 n.251; see also Kimberly Jenkins Robinson, *Resurrecting the Promise of Brown: Understanding and Remediating How the Supreme Court Reconstitutionalized Segregated Schools*, 88 N.C. L. REV. 787, 793 (2010). But see John Oliver, *Standardized Testing: Last Week Tonight with John Oliver* (HBO), YOUTUBE (May 3, 2015), <https://www.youtube.com/watch?v=J6lyURyVz7k> (“Voting against ‘No Child Left Behind’ is like voting against ‘No Puppy Left Un-Snuggled.’ What monster would do that?”).

action will be necessary to improve the nation's schools."¹³⁴ It is clear that federal influence in education has increased in substantial ways to local classrooms.

Local school district governance also suffers from low community participation.¹³⁵ In fact, some scholars contend that "local control no longer exists within American education," because of the growing federal and state influence over education.¹³⁶ For example, in low-income communities, community participation results in decreased levels of influence due to residents' lack of political power and financial means.¹³⁷ It is also difficult for parents to choose their child's school, due to practical limitations like distance and transportation.¹³⁸

In addition, the motivations of those in power at the local level have not always been honorable.¹³⁹ Religious animosities, racism, and fears about curricular control fueled local politics.¹⁴⁰ Even though state constitutions contain an education clause, states continue to fail to provide equal access to the funding needed to provide all students access to an excellent education.¹⁴¹ Today, there is evidence that local control over education is receding:¹⁴²

As control over education's content, delivery, and funding increasingly comes from the federal government—through, for example, grants conditioned on meeting federal standards—school districts and states not only are losing the monopoly over education, but also their legitimacy in the public consciousness as the sole

134. Friedman & Solow, *supra* note 2, at 135 n.251 (quoting Robinson).

135. Robinson, *supra* note 4, at 974.

136. *Id.*

137. *Id.* at 974–75.

138. *See id.* at 975.

139. Friedman & Solow, *supra* note 2, at 134.

140. *Id.*

141. Ogletree et al., *Rodriguez Reconsidered: Is There a Federal Constitutional Right to Education?*, EDUC. NEXT, Spring 2017, at 71, 72–73.

142. Friedman & Solow, *supra* note 2, at 134.

guarantors of the education right.¹⁴³

As a result, Americans increasingly believe the federal government must exert more substantial influence over improving educational quality in our schools.¹⁴⁴ The federal government should exert this substantial influence by recognizing a federal right to a minimally adequate education. Recognizing this right would allow the federal government to hold states accountable for ensuring students have access to basic resources they need to be successful in school. The nation is thus poised for a stronger federal response to recognize substantive education rights such as a basic level of literacy. Education advocates should pursue federal litigation as a strategy for improving educational quality and equity.

Federal courts should take on a greater role in serving as a venue for litigating educational quality. Even though state courts have been the predominant place to bring equal protection claims or challenge educational disparities, this option is not nearly as effective as it has been in the past.¹⁴⁵ Though every state's constitution contains an education clause guaranteeing the right to free public elementary and secondary education, state courts are increasingly rejecting school quality challenges.¹⁴⁶ According to Professor Derek Black, "Even in those instances in which plaintiffs have won since the recession, legislatures have simply defied the courts, refusing to comply with judicial remedies. Thus, even when plaintiffs have received favorable judicial opinions, they have struggled to secure victory outside court."¹⁴⁷ This

143. *Id.*

144. *Id.* at 134–35.

145. Bowman, *supra* note 131, at 10.

146. *Id.*

147. Derek W. Black, *Averting Educational Crisis: Funding Cuts, Teacher Shortages, and the Dwindling Commitment to Public Education*, 94 WASH. U. L. REV. 423, 427 (2016) (footnote omitted) (discussing recognition and enforcement of rights to education); Bowman, *supra* note 131, at 10–11 (quoting Black).

alarming trend of “judicial abdication” along with “legislative inertia” and “executive inaction” at the state level is substantially decreasing the effectiveness of state courts in addressing issues of educational quality.¹⁴⁸ This “minimal government” will undoubtedly continue to increase inequality in American public schools.¹⁴⁹

While the solution of education reform via the federal courts is imperfect, federal courts must step in because the political process has failed to address the literacy crisis with urgency. According to Professor Kristine Bowman, common-law change may be the most viable option for short-term progress:¹⁵⁰ “While courts are the backstop for legislative and executive (and lower court) action gone awry, unlike legislatures, they hear only issues brought to them and opine about cases and controversies.”¹⁵¹ Changing federal common law is difficult, but the benefits may be worth the struggle because “when constitutional change is accomplished, it is applicable nationwide and profoundly difficult to undo.”¹⁵² It would be exceptionally difficult to pursue other solutions, such as amending the Constitution to allow for a right to access to literacy, because Congress cannot do this alone. Ratification of a proposed amendment requires approval by three-quarters of the state legislatures or state conventions. In today’s highly politicized environment, it is completely

148. See Bowman, *supra* note 131, at 10–11.

149. *Id.* at 11.

150. *Id.* at 45. Notably, one of the ironies of the *Rodriguez* decision is that by the time the case reached the Supreme Court, the San Antonio School District had been dismissed as a defendant and filed a brief in support of the plaintiffs-appellees. The District reversed course and advocated in favor of equal educational opportunity for all students, instead of local control over schools. Friedman & Solow, *supra* note 2, at 134; see also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). Their brief argued, “Education is a fundamental interest in every sense of the words.” *Id.* The Supreme Court’s failure to recognize education as a fundamental right in *Rodriguez* was a missed opportunity to see substantive education reform via the federal courts.

151. Bowman, *supra* note 131, at 45–46.

152. *Id.* at 46.

unrealistic to imagine a federal constitutional amendment regarding an issue over which states have exercised a profound amount of authority.¹⁵³ Even Justice Marshall, in his *Rodriguez* dissent, expressed dissatisfaction with the ability of the political process to solve issues of inequality in education.¹⁵⁴ This is where judicial intervention is far more likely to succeed than an amendment through ratification. In particular, the Court's jurisprudence has left open the possibility of recognizing the fundamental right to access to literacy in substantive due process.¹⁵⁵

D. *Access to literacy should be the federal floor of educational quality*

It is clear that the Supreme Court has never definitively answered whether students have a constitutional right to receive an education of a certain minimum level of quality.¹⁵⁶ In addition, the opposite conclusions from the Sixth Circuit

153. *Id.*

154. *See Rodriguez*, 411 U.S. at 71–72 (Marshall, J., dissenting). Justice Marshall argued that the majority's holding could only be seen as a “retreat” from a commitment to equality of educational opportunity and as “unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens.” *Id.* at 70–71. He continued:

Nor can I accept the notion that it is sufficient to remit these appellees to the vagaries of the political process which, contrary to the majority's suggestion, has proved singularly unsuited to the task of providing a remedy for this discrimination. I, for one, am unsatisfied with the hope of an ultimate “political” solution sometime in the indefinite future while, in the meantime, countless children unjustifiably receive inferior educations that “may affect their hearts and minds in a way unlikely to ever be undone.” I must therefore respectfully dissent.

Id. at 71–72 (footnote omitted) (citation omitted).

155. *See Bowman*, *supra* note 131, at 46; *see also infra* Part II (discussing this substantive due process argument).

156. *See Gary B. v. Snyder*, 313 F. Supp. 3d 852, 871 (E.D. Mich. 2018) (“The Court is left to conclude that the Supreme Court has neither confirmed nor denied that access to literacy if [sic] a fundamental right.”); *Bowman*, *supra* note 46, at 63 (“This is why *Gary B.* focuses on a small and incredibly important gap in Supreme Court doctrine: The question whether there is a federal constitutional floor regarding educational quality.”).

panel and the District Court show how both federal and state courts have struggled to determine exactly what a “minimum quality education” or an “adequate education” means.

A crucial step in evaluating education litigation at both the federal and state level is simply to understand what a court or litigant means when saying students are entitled to an adequate education.¹⁵⁷ Policymakers and academic experts have struggled with this task for years, so it is doubtful judges would easily find a solution.¹⁵⁸ “Adequate education” is analogous to a “particular qualitative level of education.”¹⁵⁹ Yet, these are both equally vague definitions. There is no uniform, consistent answer to the question of what an adequate education looks like.¹⁶⁰ Given the lack of an education clause in the Constitution, federal courts have struggled to define the exact meaning of an adequate education.¹⁶¹ Without the benefit of any federal constitutional text to better understand the term “adequate education,” a federal court’s attempt to define the term would be completely novel.¹⁶²

In addition, state courts have not provided a consistent answer by using a wide variety of terms to define an adequate education.¹⁶³ For example, the North Carolina Supreme Court and the New York Court of Appeals identified the guaranteed level of education as being a “sound

157. See *Unlocking the Power of State Constitutions*, *supra* note 126, at 1366.

158. See Note, *The Misguided Appeal of a Minimally Adequate Education*, 130 HARV. L. REV. 1458, 1468 (2017) [hereinafter *Misguided Appeal*] (“[I]t is well settled that courts should tread lightly when asked to exercise ‘nonjudicial discretion’ or otherwise ‘express[] lack of the respect due coordinate branches of government.’”) (alteration in original).

159. *Unlocking the Power of State Constitutions*, *supra* note 126, at 1366.

160. See *id.* at 1366–67.

161. See Ogletree et al., *supra* note 141, at 73; *Unlocking the Power of State Constitutions*, *supra* note 126, at 1386–87.

162. See Ogletree et al., *supra* note 141, at 73.

163. See *Unlocking the Power of State Constitutions*, *supra* note 126, at 1366–67.

basic education,” whereas New Jersey has defined it as “thorough and efficient education,” and South Carolina a “minimally adequate education.”¹⁶⁴ Colorado requires a “thorough and uniform system of free schools,” while Georgia guarantees “an adequate education for the citizens of Georgia.”¹⁶⁵ Ohio mandates “a thorough and efficient system of common schools”; Oregon identifies “a uniform, and general system of Common schools”; Idaho requires “a general, uniform and thorough system of public, free common schools”; and Arizona guarantees “a general and uniform public school system.”¹⁶⁶ The Supreme Court of Kentucky has defined “adequate education” in equally ambiguous terms, including providing each student with “sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization.”¹⁶⁷

These vague standards lack clear meaning, and their interpretation depends entirely upon whatever court defines and applies them.¹⁶⁸ All that courts have been able to

164. *Id.* at 1367 (first quoting *Bd. of Educ. v. Nyquist*, 439 N.E.2d 359, 369 (N.Y. 1982); *Leandro v. State*, 488 S.E.2d 249, 254 (N.C. 1997); then quoting *Robinson v. Cahill*, 303 A.2d 273, 295 (N.J. 1973); and then quoting *Abbeville Cty. Sch. Dist. v. State*, 515 S.E.2d 535, 540 (S.C. 1999)). Specifically, the New York Court of Appeals has defined “sound basic education” as “consist[ing] of the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury.” *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661, 666 (N.Y. 1995), and as providing “the opportunity for a meaningful high school education, one which prepares them to function productively as civic participants.” *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 332 (N.Y. 2003); *Misguided Appeal*, *supra* note 158, at 1468–69.

165. *Nyquist*, 439 N.E.2d at 369 n.8 (first quoting *Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005, 1017 (Colo. 1982); and then quoting *McDaniel v. Thomas*, 285 S.E.2d 156, 162 (Ga. 1981)).

166. *Id.* (first quoting *Bd. of Educ. v. Walter*, 390 N.E.2d 813, 825 (Ohio 1979); then quoting *Olsen v. State*, 554 P.2d 139, 148 (Or. 1976); then quoting *Thompson v. Engelking*, 537 P.2d 635, 636 (Idaho 1975); and then quoting *Shofstall v. Hollins*, 515 P.2d 590, 592 (Ariz. 1973)).

167. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989); *Misguided Appeal*, *supra* note 158, at 1469.

168. *See Misguided Appeal*, *supra* note 158, at 1469.

articulate is “a standard that is general and requires intensive factual analysis to apply.”¹⁶⁹ At the very least, however, federal courts should recognize the one indispensable thread that connects these varying standards together: literacy. There is no comprehensible way that state courts or a state constitution would ever envision a minimally adequate education as one that fails to equip students with age-appropriate literacy skills. State legislators would be hard pressed to explain how a “sound basic education” does not allow students to receive proper access to literacy resources. Federal courts must therefore define a minimum standard of education to mean a curriculum that teaches students basic literacy skills.

No matter how a court or constitution defines an “adequate education,” literacy is the constant that is inherently present in each definition. Literacy is not only the ability to read and write. Literacy encompasses the ability to speak and listen “at a level that enables people to express and understand ideas and opinions, to make decisions and solve problems, to achieve their goals, and to participate fully in their community and in wider society.”¹⁷⁰ It is tied to everything we do. Literacy is the basic foundation to build essential skills to perform better in school, and it has a direct impact on one’s personal growth, economic welfare, and long-term well-being.¹⁷¹ Amongst educators of all content areas, the ability to read well is considered the single most

169. *Id.*

170. *Defining Literacy*, MAMHOUSTON.ORG, <https://www.mamhouston.org/literacyadvance#:~:text=Defining%20Literacy&text=Literacy%20is%20the%20ability%20to,community%20and%20in%20wider%20society> (last visited June 14, 2020); *see also* Lea Shaver, *The Right to Read*, 54 COLUM. J. TRANSNAT’L L. 1, 30 (2015) (“Literacy is the ability to identify, understand, interpret, create, communicate, [and] compute, using printed and written materials associated with varying contexts. Literacy involves a continuum of learning in enabling individuals to achieve their goals, to develop their knowledge and potential, and to participate fully in their community and wider society.”).

171. Diemart, *supra* note 6.

important skill of the educated citizen.¹⁷²

E. *Adequate school infrastructure should not be part of a federal literacy standard*

Courts, legislatures, and executive agencies must intervene immediately to find appropriate solutions to address deteriorating school facilities within American schools. However, “adequate school facilities” should not be part of a federal standard for literacy. Simply put, an “access to literacy” definition that includes “adequate school facilities” is trying to solve too many problems at once. Therefore, litigants in other circuits who are eager to bring similar constitutional claims should not argue that “access to literacy” requires school districts or states to “intervene” to address deplorable school conditions. A federal standard for literacy and plaintiffs’ requested relief should not include any mention of school infrastructure or school facilities. This standard would be too broad, and may make courts hesitant to grant such expansive relief.

In an attempt to more clearly define a standard for literacy, the plaintiffs in the *Gary B.* litigation argued that “access to literacy” requires several components.¹⁷³ As part of their requested injunctive relief, the plaintiffs asked that defendants and their officers, agents, and employees implement evidence-based programs for literacy instruction and intervention, and establish a system of statewide accountability to ensure plaintiffs have the opportunity to attain literacy.¹⁷⁴ The plaintiffs’ proposed system of statewide accountability would have required the state to “*monitor*[] conditions that deny access to literacy, taking into account the identified conditions antithetical to literacy instruction in Plaintiffs’ schools, such as insufficient teacher

172. DOUG LEMOV, *TEACH LIKE A CHAMPION: 62 TECHNIQUES THAT PUT STUDENTS ON THE PATH TO COLLEGE* 181 (Uncommon Schools ed., 2d ed. 2015).

173. See *Class Action Compl.*, *supra* note 47, at 128–29.

174. *Id.*

capacity, deplorable school conditions, and failure to promote learning readiness through trauma-informed practices.”¹⁷⁵ This proposed system of accountability would have also required the state to “*intervene* in a timely manner to address identified conditions that deny access to literacy.”¹⁷⁶

The plaintiffs’ 133-page complaint described the deplorable conditions of Detroit Public Schools in great detail. The complaint addressed everything from damaged, out-of-date textbooks to malfunctioning heating and air-conditioning systems and broken playground equipment.¹⁷⁷ The complaint also alleged insufficient instructional materials and technology, an absence of the resources necessary to address student trauma and social-emotional health, a shortage of full-time teachers, and a lack of targeted remediation instruction for students who have failed to achieve basic literacy skills.¹⁷⁸ In particular, the plaintiffs emphasized Detroit Public Schools’ insufficient and inappropriate school facilities, including how the physical conditions of school buildings are decrepit and dangerous.¹⁷⁹ For example, school buildings have broken windows and doors, fire alarms remain broken for long periods of time, students drink from unsafe water fountains, playground equipment is frequently broken and not age appropriate, students find bullets and dead vermin on the playground, hallway floors are littered with fallen ceiling tiles, water leaks from hallway ceilings, potholes riddle school parking lots, and mold grows in classrooms.¹⁸⁰ It is unacceptable that in 2020, these conditions are the everyday reality of thousands of students in the United States. These deplorable school conditions are not illustrative of a safe or comfortable

175. *Id.* at 129 (emphasis added).

176. *Id.* (emphasis added).

177. *Id.* at 78, 87–90.

178. *Id.* at 75–80, 95–96, 98–99.

179. *Id.* at 89.

180. *Id.* at 89–94.

learning environment.

Even though the Sixth Circuit originally recognized a right to access literacy, the court did not define the right's exact parameters. At that stage of the litigation—a motion to dismiss in which no evidence had been discovered or presented—the court reasoned it would be difficult to define the limits of what constitutes a basic minimum education sufficient to provide such access.¹⁸¹ Nevertheless, the court provided a guide for the parties and the district court if litigation continued.¹⁸² The court explained that the educational infrastructure seems to include at least three basic components: facilities, teaching, and educational materials such as books.¹⁸³ The court did not mandate these components be included in a federal literacy standard, and explained this was still a question of fact entrusted to the trial court.¹⁸⁴ However, as the parties settled the *Gary B.* litigation, the lower court will not have this opportunity to define the exact “access to literacy” parameters, which leaves this question open for all federal courts.

School infrastructure should not be part of a federal standard for literacy because crumbling school facilities have already proven to be an entirely separate, highly expensive issue.¹⁸⁵ Detroit Public Schools faces nearly \$543 million in

181. *Gary B. v. Whitmer*, 957 F.3d 616, 659 (6th Cir. 2020), *vacated en banc*, 958 F.3d 1216 (6th Cir. 2020) (mem).

182. *Id.* at 659–60.

183. *Id.* at 660.

184. *Id.*

185. See, e.g., AMERICAN SOCIETY OF CIVIL ENGINEERS, 2017 INFRASTRUCTURE REPORT CARD: A COMPREHENSIVE ASSESSMENT OF AMERICAN'S INFRASTRUCTURE, <https://www.infrastructurereportcard.org/wp-content/uploads/2016/10/2017-Infrastructure-Report-Card.pdf>; Jennifer Chambers, *Detroit Schools Face Tough Choices with Too Many Repairs, Not Enough Money*, THE DETROIT NEWS (Apr. 30, 2019, 10:45 PM), <https://www.detroitnews.com/story/news/local/detroit-city/2019/04/29/detroit-schools-face-tough-choices-too-many-repairs-not-enough-money/3232674002/>; Erin Einhorn, *Crumbling Detroit School Buildings Will Cost \$500 Million to Repair. It's Money the District Doesn't Have*, CHALKBEAT (June 22, 2018, 12:38 PM), <https://www.chalkbeat.org/posts/detroit/2018/06/22/>

repairs, and waiting a few more years to deal with the poor building conditions will only cause the price to increase to nearly \$1.5 billion.¹⁸⁶ Detroit is not the only city currently facing crumbling school infrastructure. Baltimore students have faced freezing classroom temperatures, and it will take years to fix the schools of Puerto Rico in the aftermath of Hurricane Maria.¹⁸⁷ A recent assessment by the American Society of Civil Engineers (“ASCE”), confirms that American public schools are falling apart.¹⁸⁸ The ASCE gave the country’s school infrastructure a D+ grade on its Infrastructure Report Card, and found that more than fifty-three percent of schools would need to make investments towards repairs, renovations, and modernizations to be considered in “good” condition.¹⁸⁹

Furthermore, school funding varies widely by state, but the federal government contributes little to no funding for the nation’s K-12 educational facilities.¹⁹⁰ Even though school districts collectively invested around \$49 billion per

crumbling-detroit-school-buildings-will-cost-500-million-to-repair-its-money-the-district-doesnt-have/; Lori Higgins, *Cost to Fix Detroit School Buildings: \$500 Million*, DETROIT FREE PRESS (June 22, 2018, 12:00 PM), <https://www.freep.com/story/news/education/2018/06/22/detroit-school-building-conditions-cost/724970002/>; Todd Kominiak, *America’s School Buildings are Failing. Here’s How to Make the Case for Change*, TRUST ED. (Mar. 14, 2017), <https://www.k12insight.com/trusted/americas-school-buildings-infrastructure/>; Laura Jimenez, *The Case for Federal Funding for School Infrastructure*, CENTER FOR AMERICAN PROGRESS (Feb. 12, 2019), <https://www.americanprogress.org/issues/education-k-12/reports/2019/02/12/466104/case-federal-funding-school-infrastructure/>.

186. Chambers, *supra* note 185. This \$1.5 billion figure is based off an assessment by the engineering consulting firm OHM Advisors. *Id.*

187. John Bacon, *Outrage in Baltimore After Kids Huddle in Freezing Classrooms*, USA TODAY (Jan. 4, 2018, 3:33 PM), <https://www.usatoday.com/story/news/nation/2018/01/04/outrage-baltimore-after-kids-huddle-freezing-classrooms/1004530001/>; Merrit Kennedy, *The Monumental Task of Reopening Puerto Rico’s Schools*, NPR (Oct. 12, 2017, 9:41 AM), <https://www.npr.org/sections/ed/2017/10/12/556953509/puerto-rico-s-secretary-of-education-says-its-schools-are-connecting-communities>.

188. See AMERICAN SOCIETY OF CIVIL ENGINEERS, *supra* note 185, at 81–82.

189. *Id.*

190. *Id.* at 82.

year in school facilities from 2011 to 2013, it is estimated that the nation should be spending \$87 billion per year to renew facilities, leaving a \$38 billion annual investment gap.¹⁹¹ Federal infrastructure conversations tend to focus on transportation and energy, and often ignore K-12 public schools, which represent the nation's second-largest infrastructure sector.¹⁹² According to the ASCE, school districts' ability to fund maintenance has been constricted, contributing to the accelerating deterioration of heating, cooling, and lighting systems.¹⁹³ Decisions to defer maintenance and pursue less expensive, temporary fixes ultimately end up costing school districts more money in the long term, and prevent long-term solutions to this infrastructure problem.¹⁹⁴

Fortunately, the current Congress has proposed a solution to tackle the nation's infrastructure challenges, possibly serving as an alternative to including adequate facilities in a federal literacy standard.¹⁹⁵ Speaker of the house, Nancy Pelosi, announced after the 2018 midterm elections that infrastructure would be one of the House's top priorities.¹⁹⁶ Shortly after this announcement, Representative Bobby Scott, chair of the House Education and Labor Committee,¹⁹⁷ introduced the "Rebuild America's Schools Act" to invest \$100 billion for schools through two

191. *Id.*

192. Jimenez, *supra* note 185, at 1; see also Lauren Camera, *Will Trump Help Rebuild America's Schools?*, U.S. NEWS (Jan. 31, 2018, 11:46 AM), <https://www.usnews.com/news/the-report/articles/2018-01-31/infrastructure-spending-for-schools-if-history-repeats-itself-no>.

193. AMERICAN SOCIETY OF CIVIL ENGINEERS, *supra* note 185, at 82.

194. *Id.*

195. See Sara Friedman, *House Democrats Introduce \$100B School Infrastructure Bill*, THE JOURNAL (Jan. 31, 2019), <https://thejournal.com/articles/2019/01/31/house-democrats-introduce-100b-school-infrastructure-bill.aspx?m=1>.

196. Jimenez, *supra* note 185, at 2.

197. EDUCATION AND LABOR COMMITTEE, CHAIRMAN BOBBY SCOTT, <https://edlabor.house.gov> (last visited June 15, 2020).

programs designed to meet the needs of school facilities that pose health and safety risks.¹⁹⁸ This legislation creates a \$70 billion grant program and a \$30 billion tax credit bond program specifically targeted to schools across the country with decades-old infrastructure issues.¹⁹⁹ The bill has 152 cosponsors in the House, and is an important step towards addressing national infrastructure challenges.²⁰⁰ According to the House and Education Labor Committee, the legislation would also leverage federal, state, and local resources for an overall investment of \$107 billion, and would create 1.9 million jobs.²⁰¹ A solution through federal legislation will provide a steady source of federal funds to help local school districts such as Detroit Public Schools. A federal district court would be stepping into a complex, additional issue if it required local school districts to “intervene” in fixing all school buildings without the support of federal funds. This form of requested relief is too expansive, and litigants should not include “adequate facilities” as part of a judicial remedy for literacy access.

Instead, litigants should focus on the aspects of literacy that most closely relate to students’ abilities to grow as readers. Litigants should argue that access to literacy requires consistent, evidence-based literacy instruction at the elementary and secondary level. This evidence-based literacy instruction would include a system of regular assessment to monitor individual student reading levels, intervention for students who read below their grade level, basic instructional materials such as up-to-date textbooks, teacher access to curricular materials such as lesson plans and pacing guides, and an appropriately trained teaching staff. These are essential components to ensuring proper

198. Rebuild America’s Schools Act, H.R. 2475, 116th Cong. (2019); *see also* Friedman, *supra* note 195; Jimenez, *supra* note 185, at 2.

199. Friedman, *supra* note 195.

200. *Id.*

201. *Id.*

literacy instruction for students in all school districts, and could serve as the basic benchmark which federal courts would be required to enforce. Unlike the plaintiffs in *Gary B.*, who argued that the defendants violated various negative rights,²⁰² litigants should point exclusively to a positive-rights argument. By asserting that the constitutional standard is “access to literacy,” litigants would be making the positive-rights argument that students are entitled to a minimum level of instruction on learning to read.

While some may argue that “literacy” itself is a low standard, framing a constitutional standard in this way would have powerful results in struggling school districts such as Detroit. Defining the standard as “access to literacy” could improve the opportunities available to countless students, as districts such as Detroit Public Schools are of such poor quality that many children who attend these schools are functionally illiterate.²⁰³ It would also serve as a more specific, quantifiable standard, as opposed to vague definitions such as “access to education” or a “right to education.” Thus, federal court litigants should continue to argue that the proper standard for a constitutionally adequate education—a standard that has yet to be defined by the Supreme Court—lies in access to literacy.

202. *Gary B. v. Snyder*, 313 F. Supp. 3d 852, 873 (E.D. Mich. 2018) (“The Complaint alleges that each Plaintiff was *denied* access to literacy and repeatedly speaks of the *denial* of access to literacy. In a sense, the phrasing evokes the notion of a *barrier*: Defendants have kept Plaintiffs from accessing literacy and *but for* Defendants’ obstruction, Plaintiffs could and would have access. In other words, the allegations state the violation of a negative right.”) (emphasis added).

203. See Bowman, *supra* note 46, at 64, 69–70.

II. ACCESS TO LITERACY IS A FUNDAMENTAL RIGHT

This Part argues that the Due Process Clause²⁰⁴ and Citizenship Clause²⁰⁵ of the Fourteenth Amendment guarantee access to literacy as a fundamental right. Even though this right is not specifically enumerated in the Constitution, it is an implied fundamental right which courts must recognize. In determining whether a right is fundamental, courts do not rely on a clear-cut, consistent formula.²⁰⁶ There are various methods the Supreme Court has used to identify implied fundamental rights.²⁰⁷ The Court has recognized certain rights as fundamental because: (1) they are important; (2) they are implicitly guaranteed by the Constitution; (3) they are deeply rooted in the nation's history and tradition; (4) they provide necessary access to governmental processes; and (5) previous Supreme Court precedents so identify them.²⁰⁸ This Part will also show how access to literacy is not only an essential aspect of day-to-day life, but is also implicitly required to carry out citizenship rights.

A. *The Due Process Clause is an avenue for access to literacy*

Even though access to literacy is not specifically enumerated in the Constitution, federal court litigants should argue that it is an implied fundamental right, and substantive due process is a means by which courts may recognize this right. Through the Due Process Clause, the

204. U.S. CONST. amend. XIV, § 1.

205. *Id.*

206. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (“Due Process has not been reduced to any formula; its content cannot be determined by reference to any code.”); *see also* *Griswold v. Connecticut*, 318 U.S. 479, 501 (1965) (Harlan, J., concurring in the judgment).

207. Robert C. Farrell, *An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, 26 ST. LOUIS U. PUB. L. REV. 203, 216 (2007).

208. *Id.*

Supreme Court has imposed an affirmative duty on states to protect individual rights where the state has restrained an individual's liberty.²⁰⁹

The Due Process Clause of the Fourteenth Amendment states that, “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law.”²¹⁰ The clause has both procedural and substantive components.²¹¹ Under the doctrine of procedural due process, the state may not deprive any person of life, liberty, or property, without notice and a hearing.²¹² The doctrine of substantive due process imposes substantive limits on the government whenever an official action interferes with activity that is within a protected interest defined as “life,” “liberty,” or “property.” In the case of *Gary B. v. Snyder*, the plaintiffs raised a substantive, rather than procedural, due process argument.²¹³ Furthermore, government actions that burden the exercise of a fundamental right or liberty interest are subject to strict scrutiny, and will be upheld only when they are narrowly tailored to further a compelling governmental interest.²¹⁴

In order to understand how to make a strong substantive due process argument, it is necessary to evaluate how federal courts have recently responded to this argument. The *Gary B.* plaintiffs’ due process claim turned on whether access to

209. *Improving Educational Outcomes*, *supra* note 31, at 1324.

210. U.S. Const. amend. XIV, § 1.

211. *Gary B. v. Snyder*, 313 F. Supp. 3d 852, 871 (E.D. Mich. 2018) (quoting *Range v. Douglas*, 763 F.3d 573, 588 (6th Cir. 2014)).

212. *See, e.g.*, *Mathews v. Eldridge*, 424 U.S. 319, 332–33 (1976) (“Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. . . . This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest.”).

213. *Snyder*, 313 F. Supp. 3d at 871.

214. *Id.* at 871 (quoting *Seal v. Morgan*, 229 F.3d 567, 574 (6th Cir. 2000)).

literacy is a fundamental right.²¹⁵ In making this determination, the District Court first defined a “fundamental right” by turning to *Obergefell v. Hodges*.²¹⁶ In *Obergefell*, the Supreme Court explained:

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, has not been reduced to any formula. Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries.²¹⁷

This process of determining which interests are fundamental is clearly a difficult one.²¹⁸ In *Gary B.*, the District Court was reluctant to recognize access to literacy as a fundamental right out of concern that liberty interests protected by the Due Process Clause, however well intentioned, could be transformed into a court’s policy preferences.²¹⁹ However, the District Court’s overly cautious reasoning places little faith in the ability of judges and courts to responsibly recognize new rights. When judges must determine which rights are fundamental, they are not given limitless discretion to “decide cases in light of their personal and private notions.”²²⁰ Rather, “they must look to the ‘traditions and [collective] conscience of our people’ to

215. *Id.*

216. *See id.* at 871–72; *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

217. *Obergefell*, 135 S. Ct. at 2598 (citation omitted).

218. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 102 (1973) (Marshall, J., dissenting) (“The majority is, of course, correct when it suggests that the process of determining which interests are fundamental is a difficult one. But I do not think the problem is insurmountable.”).

219. *Snyder*, 313 F. Supp. 3d at 872 (first citing *Washington v. Glucksburg*, 521 U.S. 702, 720 (1997); and then citing *Moore v. City of E. Cleveland*, 431 U.S. 494, 501 (1977)).

220. *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring).

determine whether a principle is ‘so rooted [there] . . . as to be ranked as fundamental.’”²²¹ According to Justice Goldberg in his *Griswold v. Connecticut* concurring opinion, the inquiry is whether a right involved is “of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.”²²² Absent judicial protection of certain rights, legislatures might impose unjust laws, or fail to address certain evils.²²³ This is where judicial response is crucial. Even though the recognition of fundamental rights is rare, the Court has previously recognized implied rights when necessary. For example, the right to travel between states is inferred from the Constitution, and the right of freedom of association is implied from the First Amendment rights of speech, press, assembly, and petition.²²⁴ Therefore, the infrequency of courts recognizing fundamental rights should not serve as a main opposing factor in the recognition of access to literacy.

Justice Marshall also explained his own take on the process of recognizing fundamental rights. In his *Rodriguez* dissent, Justice Marshall stated, “I certainly do not accept the view that the process need necessarily degenerate into an unprincipled, subjective ‘picking-and-choosing’ between various interests”²²⁵ He also found that “the task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on

221. *Id.* (alteration in original) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

222. *Id.* (quoting *Powell v. Alabama*, 287 U.S. 45, 67 (1932)).

223. See BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 1527 (6th ed. 2015).

224. *Id.* at 1524.

225. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 102 (1973) (Marshall, J., dissenting). *But see* BREST ET AL., *supra* note 223, at 1527 (“Both Black and Stewart argue that however well intentioned judges may be, it will be difficult if not impossible for judges to articulate a conception of constitutional fidelity in these cases. Instead, they argue, judges will end up imposing their own visions of the good on the public.”).

interests not mentioned in the Constitution.”²²⁶ Nevertheless, even though Supreme Court precedent has recognized implied fundamental rights, there must be additional arguments to show that a particular right is fundamental.²²⁷ Here, access to literacy is an implied fundamental right because of literacy’s importance, its repeated emphasis in previous Supreme Court precedent, and its roots in American history and tradition.

1. Literacy is an implied fundamental right because of its importance

One of the reasons access to literacy is an implied fundamental right is because of its importance. Courts and litigants must afford due weight to controlling Supreme Court precedent, which expressly embraces importance in justifying rights to education. Courts have identified implied fundamental rights by simply asking: how important is the claimed right?²²⁸ In this case, literacy is an indispensable aspect of education and of life. Literacy is tied to everything we do and is essential to a child’s development.²²⁹ It is an “every-century skill” that educators across all content areas, including math, history, science, and art must factor into their classroom instruction.²³⁰ According to author Richard Vaca, “Adolescents entering the adult world in the twenty-first century will read and write more than at any other time in human history. They will need advanced levels of literacy to perform their jobs, run their households, act as citizens,

226. *Rodriguez*, 411 U.S. at 102.

227. BREST ET AL., *supra* note 223, at 1525.

228. Farrell, *supra* note 207, at 217.

229. Dr. Kirk Panneton, *The Importance of Literacy in a Child’s Development*, ALBANY BUSINESS REVIEW (Jan. 21, 2015, 1:29 PM), <https://www.bizjournals.com/albany/news/2015/01/21/the-importance-of-literacy-in-a-child-s.html>.

230. Rebecca Alber, *How Important is Teaching Literacy in All Content Areas?*, EDUTOPIA (Aug. 4, 2010), <https://www.edutopia.org/blog/literacy-instruction-across-curriculum-importance> (last updated Jan. 15, 2014).

and conduct their personal lives.”²³¹ Literacy is essential for individuals to perform well in school, maintain a healthy self-image, become sought-after employees, and support themselves financially and personally in the future.²³² Furthermore, Kofi Annan emphasized the importance of literacy to other goals and values when he stated, “Literacy is a bridge from misery to hope. It is a tool for daily life in modern society. It is a bulwark against poverty, and a building block of development, an essential complement to investments in roads, dams, clinics, and factories.”²³³

However, the *Gary B.* District Court disagreed with the plaintiffs’ argument and reasoned that the importance of a good or service does not determine whether it must be regarded as fundamental.²³⁴ The “importance” test failed to convince the District Court. In fact, the District Court analogized the plaintiffs’ argument to various federal cases that failed to recognize certain rights based on their “importance.”²³⁵ For example, the District Court cited *Lindsey v. Normet*,²³⁶ a case in which the Supreme Court did not consider decent, safe, and sanitary housing to be a fundamental right.²³⁷ In addition, the District Court cited *DeShaney v. Winnebago County Department of Social Services*,²³⁸ a Supreme Court case that rejected the notion that the Due Process Clause compelled a state to protect a

231. *Id.*

232. Panneton, *supra* note 229.

233. Shaver, *supra* note 170, at 30.

234. *See Gary B. v. Snyder*, 313 F. Supp. 3d 852, 873 (E.D. Mich. 2018) (first quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973); and then citing *Lindsey v. Normet*, 405 U.S. 56, 74 (1972)).

235. *See Snyder*, 313 F. Supp. 3d at 873–74.

236. *Normet*, 405 U.S. at 74.

237. *See id.* (“We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill.”).

238. *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189 (1989).

child from abuse by his father.²³⁹ The District Court also cited *Ransom v. Marrazzo*,²⁴⁰ a Third Circuit case that concluded there is no fundamental right to receive water and sewer service.²⁴¹ Furthermore, the District Court relied on *Stiles v. Grainger County*,²⁴² a Sixth Circuit case that rejected the notion of a due process right to be free from aggressive and physical bullying in school.²⁴³ By relying on this line of precedent in its analysis, the District Court for the Eastern District of Michigan failed to use literacy's importance as a means by which to recognize the fundamental right of access to literacy.²⁴⁴

Judge Eric Murphy's dissenting opinion in the Sixth Circuit's *Gary B.* decision also made similar analogies between literacy and other claimed rights.²⁴⁵ This is a common argument amongst attorneys and commentators who do not seek to establish a right to literacy.²⁴⁶ The dissent reasoned, "While minimum levels of food, housing, and

239. *See id.* at 197.

240. *Ransom v. Marrazzo*, 848 F.2d 398 (3d Cir. 1988).

241. *See id.* at 413.

242. *Stiles ex rel. D.S. v. Grainger Cty.*, 819 F.3d 834 (6th Cir. 2016).

243. *See id.* at 853.

244. The Supreme Court in the *Rodriguez* decision responded similarly. *See Constitutional Compromise*, *supra* note 20, at 755–56 ("In . . . *Rodriguez*, the plaintiffs theorized that education is a fundamental right because it is essential to the exercise of other constitutional rights such as voting and free speech. The Court responded that a right's importance alone does not determine whether it is fundamental. . . . The Court also expressed serious policy concerns with recognizing education as a fundamental right. Doing so might create a slippery slope for recognizing other new rights, alter the federalism balance between states and the federal government, and require the Court to make educational judgments beyond its expertise." (footnotes omitted)). Nevertheless, there have been many attempts via scholarly work and litigation to reverse or litigate around the *Rodriguez* decision.

245. *Gary B. v. Whitmer*, 957 F.3d 616, 667 (6th Cir. 2020) (Murphy, J., dissenting), *vacated en banc*, 958 F.3d 1216 (6th Cir. 2020) (mem).

246. *See, e.g., Ogletree et al.*, *supra* note 141, at 73 ("Declaring education to be an implicit fundamental right would raise difficult constitutional questions about essentials such as food, shelter, and health care—none of which are mentioned in the federal Constitution.").

medical care are critical for human flourishing and for the exercise of constitutional rights, due process does not compel states to spend funds on these necessities of life.”²⁴⁷ The dissent claimed that *DeShaney* foreclosed any affirmative right to these other benefits.²⁴⁸

In response, the Sixth Circuit majority reasoned education is distinct from other claimed rights because of the state’s level of control over public education.²⁴⁹ According to the court, for the vast majority of students, public education is their only source of learning.²⁵⁰ State-provided education is expected by the public, as there is “no other area of day-to-day life that is so directly controlled by the state.”²⁵¹ As a result of this control, the court concluded the state has a responsibility to provide access to literacy.²⁵² The court also reached this conclusion by distinguishing between the facts of *Gary B.* and *DeShaney*.²⁵³ While *DeShaney* concerned the state’s failure to prevent harm caused by a private actor, *Gary B.* concerned the state’s failure to prevent harm caused by Detroit Public Schools as a public actor.²⁵⁴ Because *DeShaney* rested its holding on this public-private distinction, the Sixth Circuit reasoned it may recognize substantive due process claims when a public actor, such as a public school, causes harm.²⁵⁵

The District Court and Sixth Circuit dissent’s analyses conflated separate lines of fundamental rights cases and by doing so unjustifiably disregarded controlling Supreme Court precedents, which expressly embrace importance in

247. *Whitmer*, 957 F.3d at 667 (Murphy, J., dissenting).

248. *Id.* at 667–68.

249. *Id.* at 658.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.* at 658–59.

justifying the judicial protection of rights to education. Instead of analogizing literacy to various goods and services such as sewer service, sanitary housing, protection from child abuse, and freedom from bullying in school, the District Court and Judge Murphy's Sixth Circuit dissent could have placed greater emphasis on the importance Supreme Court precedent has placed on literacy and education. In a number of decisions, the Supreme Court has recognized, in dicta, the importance of a minimally adequate education.²⁵⁶ For example, in *Brown v. Board of Education*, the Supreme Court recognized "the importance of education to our democratic society."²⁵⁷ Most significantly, the Court stated:

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.²⁵⁸

It is clear that in Detroit, where five percent of the city's fourth-graders can read at or above a proficient level, students are not being provided the education that lives up to *Brown's* standards. By failing to recognize access to literacy, the arguable federal floor of educational quality,²⁵⁹ courts have abandoned the mandate of *Brown* and disregarded the importance that this landmark precedent placed on education.²⁶⁰

Similarly, in *Plyler*, the Court stressed education's "fundamental role in maintaining the fabric of our society"

256. *Constitutional Compromise*, *supra* note 20, at 757 n.105.

257. *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483, 493 (1954).

258. *Id.*

259. For a discussion regarding a federal floor of educational quality, see *supra* Part I.

260. See JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* 207 (2001) ("Sometimes I wonder if we really did the children and the nation a favor by taking this case to the Supreme Court. I know it was the right thing for my father and others to do then. But after nearly forty years we find the Court's ruling unfulfilled.").

and the “significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.”²⁶¹ Having thus emphasized the importance of education, the *Plyler* Court reasoned that, “[b]y 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.”²⁶² In fact, the *Plyler* Court noted that education was not simply some government benefit “indistinguishable from other forms of social welfare legislation.”²⁶³ Significantly, *Plyler* specifically reasoned that, “Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life.”²⁶⁴

Simply put, the Supreme Court has never articulated the importance of these other benefits in the same consistent way as it has articulated the importance of education. Furthermore, the Supreme Court has never reasoned that certain benefits such as sewer service, sanitary housing, protection from child abuse, and freedom from bullying in school are necessary for maintaining the fabric of our society. The *Gary B.* plaintiffs cited both *Brown* and *Plyler* in support of their “importance” argument, yet they failed to specifically distinguish literacy from other benefits. By distinguishing literacy from other benefits, litigants would be able to show how recognizing literacy would not lead to a “slippery slope” of recognizing “any” good or service that provides a benefit.

The Sixth Circuit may have distinguished between education and other claimed rights, but the court focused its reasoning on the state’s level of control over public education, and the distinction between public and private actors. Courts

261. *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

262. *Id.* at 223.

263. *Id.* at 221.

264. *Id.* at 222.

must go further and recognize that the Supreme Court has placed a heightened level of importance on education that it has never articulated concerning other claimed rights. The District Court even recognized the importance of literacy in its *Gary B.* decision, even though this decision ultimately held access to literacy was not a fundamental right. The District Court reasoned:

Plainly, literacy—and the opportunity to obtain it—is of incalculable importance. As Plaintiffs point out, voting, participating meaningfully in civic life, and accessing justice require some measure of literacy. Applying for a job, securing a place to live, and applying for government benefits routinely require the completion of written forms. Simply finding one’s way through many aspects of ordinary life stands as an obstacle to one who cannot read.²⁶⁵

The Supreme Court has never reasoned that other benefits such as sewer service or freedom from bullying in school maintain the same level of societal importance as literacy. Thus, by emphasizing the reasoning of Supreme Court precedent, the repeated value this precedent has placed on the importance of education and literacy, and the vast distinction between literacy and other claimed rights, litigants in other circuits may be able to successfully argue that access to literacy is a fundamental right.

2. Literacy is an implied fundamental right because it is a significant piece of American history and tradition

Another reason access to literacy is a fundamental right is because it is deeply reflected in American history and tradition. The Court has sometimes reasoned that the test for determining fundamental rights is to ask whether it is rooted in our nation’s history and traditions.²⁶⁶ In fact, Justice Scalia primarily relied upon this test as a way to discern fundamental rights under the Due Process Clause.²⁶⁷

265. *Gary B. v. Snyder*, 313 F. Supp. 3d 852, 873 (E.D. Mich. 2018).

266. Farrell, *supra* note 207, at 225.

267. *Id.*

Furthermore, according to *Griswold*, courts often turn to history and tradition to protect implied fundamental rights.²⁶⁸

For example, in *Washington v. Glucksberg*,²⁶⁹ the Court used tradition to reject claims of a fundamental right to assisted suicide. As Chief Justice Rehnquist reasoned, “the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition.”²⁷⁰ The Court then held that there could be no substantive due process right to assisted suicide because there was a “consistent and almost universal tradition” that had long rejected the right to choose the time and manner of one’s death.²⁷¹ This tradition continued to explicitly reject assisted suicide, even for terminally ill, mentally competent adults.²⁷²

Another example of the Court’s reliance on history and tradition in cases that involve substantive due process questions is *Lawrence v. Texas*.²⁷³ However, the Court applied the history and tradition approach in the opposite way it did in *Glucksberg*.²⁷⁴ In *Lawrence*, the Court struck down Texas’s criminal ban on same-sex sodomy.²⁷⁵ Texas argued there was an established tradition of prosecuting acts because of their homosexual character, but the Court reasoned that while history and tradition are the starting point, they are not always the ending point of the substantive

268. BREST ET AL., *supra* note 223, at 1533 (“Justice Cardozo argued in *Snyder v. Massachusetts*, 291 U.S. 97 (1934), that the Due Process Clause protects those liberties ‘so rooted in the traditions and conscience of our people as to be ranked as fundamental.’”).

269. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

270. *Id.* at 720–21 (citation omitted).

271. *Id.* at 723.

272. *Id.*

273. *Lawrence v. Texas*, 539 U.S. 558 (2003).

274. *Id.* at 568–71; BREST ET AL., *supra* note 223, at 1534.

275. *Lawrence*, 539 U.S. at 578–79.

due process inquiry.²⁷⁶

American history and tradition clearly indicate that access to literacy is a fundamental right. Scholars, most notably Professor Derek Black, have used the history of Reconstruction to argue for a fundamental right to education. The immediate aftermath of the Civil War presented numerous challenges, including high illiteracy rates and, in particular, the process of ensuring that freedmen and poor whites could fully participate in democracy.²⁷⁷ In addition, Congress was divided on whether it was appropriate to readmit Southern states with no conditions other than the abolition of slavery, or to require changes beyond abolition.²⁷⁸ Congress ultimately required Southern states to adopt the Fourteenth Amendment and rewrite their state constitutions to that of a republican form of government.²⁷⁹ When these Southern states rewrote their constitutions, Congress expected the states to guarantee education.²⁸⁰ States that did not follow this federal requirement would be refused readmission to the Union. Congress remained steadfast in this requirement and, as a result, by 1868, nine out of ten Southern states seeking admission rewrote their constitutions to guarantee education.²⁸¹

The *Gary B.* District Court also briefly grounded its reasoning in American history and tradition. The District Court reasoned there is no right to access literacy because there was a lack of an established public school system in the

276. *Id.* at 571–72, 577; BREST ET AL., *supra* note 223, at 1534.

277. Derek Black, *The Constitutional Right to Education is Long Overdue*, THE CONVERSATION (Dec. 4, 2017, 11:08 PM), <http://theconversation.com/the-constitutional-right-to-education-is-long-overdue-88445>.

278. *Constitutional Compromise*, *supra* note 20, at 775.

279. Black, *supra* note 277.

280. *Id.*

281. *Id.*

United States by 1830.²⁸² Specifically, the court stated:

[T]here was no federal or state-run school system anywhere in the United States as late as 1830. School districts at the time of the Constitution's ratification were formed when a group of farms came together and decided to construct a public building for schooling, where their children could gather and be taught reading, writing, and moral codes of instruction.²⁸³

The court reasoned this history reflects a deep American commitment to education, but does not support the idea that ordered society demands that a state provide an education.²⁸⁴

The Sixth Circuit panel relied upon American history and tradition much more heavily than the District Court. One of the reasons the Sixth Circuit held that access to literacy is a fundamental right is because a basic minimum education has a longstanding presence in history and tradition.²⁸⁵ The court reasoned state-provided education was “ubiquitous” throughout the earliest days of the nation, which today leads “citizens to expect a basic public education as of right.”²⁸⁶ The court also noted the Northwest Ordinance’s 1787 prescription that “schools and the means of education shall forever be encouraged.”²⁸⁷ In addition, the court pointed to our nation’s history of racial discrimination.²⁸⁸ The court discussed how “slaveholders and segregationists used the deprivation of education as a weapon, preventing African Americans from obtaining the political power needed to achieve liberty and equality.”²⁸⁹ For

282. Gary B. v. Snyder, 313 F. Supp. 3d 852, 874 (E.D. Mich. 2018) (first quoting Friedman & Solow, *supra* note 2, at 117; and then citing FREDERICK M. BINDER, *THE AGE OF THE COMMON SCHOOL: 1930-1865* 20 (1974)).

283. *Id.* (internal quotations omitted).

284. *Id.*

285. Gary B. v. Whitmer, 957 F.3d 616, 648–52 (6th Cir. 2020), *vacated en banc*, 958 F.3d 1216 (6th Cir. 2020) (mem).

286. *Id.* at 649.

287. *Id.*

288. *Id.* at 650.

289. *Id.*

example, Klansmen targeted schoolteachers and Black parents who sent their children to school, and the post-Reconstruction era “heralded legislative and policy efforts designed to limit the education of African Americans.”²⁹⁰ This reasoning ultimately led the Sixth Circuit panel to conclude that the right to access to literacy is deeply rooted in American history and tradition as to meet the historical prong of the Supreme Court’s substantive due process test.²⁹¹

However, the *Gary B.* District Court and Sixth Circuit panel decisions fail to account for the Reconstruction policies that show how American government was intent on addressing the literacy crisis and ensuring an educated citizenry. At the time of Reconstruction, Congress also funded the Freedmen’s Bureau, which expanded educational opportunities to African Americans and poor whites.²⁹² These Reconstruction policies aimed to equip all citizens to read, write, and participate in the political process.²⁹³ According to Lawrence Cremin, “the lion’s share of Reconstruction policy was essentially educational policy.”²⁹⁴ Without literacy, educational policy can never take root. It is essential to the flourishing of any educational growth.

Thus, history reflects Congress’s intent to vastly “expand and formalize” educational opportunity.²⁹⁵ The federal

290. *Id.* at 651.

291. *Id.* at 652.

292. *Constitutional Compromise*, *supra* note 20, at 782; Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1098–99 (2019). The Freedmen’s Bureau reflects the strong federal role in education during Reconstruction. “From 1866-1870, under the leadership of General Oliver Otis Howard, the Bureau spent over two-thirds of its funds and leveraged the resources of private charities to educate approximately 100,000 students each year. These efforts were substantial and had lasting significance, especially in higher education.” However, the Bureau left an ambiguous legacy in the development of federal responsibility for education. Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 371–72 (2006).

293. *Constitutional Compromise*, *supra* note 20, at 782.

294. *Id.*

295. *Id.*

government clearly demanded that states provide their constituents with an education. As a result, the “access to literacy” litigation that may continue to come before federal courts offers an opportunity to continue this established American tradition in favor of a well-educated citizenry. The Sixth Circuit panel properly relied upon the ubiquity of public education in the earliest days of the nation, and the history of racial discrimination in America, but the decision could have gone further by recognizing the parallels between Reconstruction policy and educational policy. Litigants may therefore ground their arguments in history and tradition to recognize a fundamental right to access literacy.

B. *Literacy is an implied, peripheral right of American citizenship*

Federal courts must directly address an implied fundamental rights argument, because without the right to access literacy, citizenship rights will not truly be guaranteed. This is an additional approach to using the Due Process Clause as an avenue to access to literacy. As Justice Marshall expressed in his *Rodriguez* dissent, constitutionally guaranteed rights may be dependent on interests not mentioned in the Constitution.²⁹⁶ He recognized that interests such as procreation, the exercise of the state franchise, and access to criminal appellate processes are not fully guaranteed to citizens by our Constitution.²⁹⁷ Yet, these interests are fundamental rights because they are “interrelated” with guaranteed constitutional rights.²⁹⁸ He reasoned, “Only if we closely protect the related interests from state discrimination do we ultimately ensure the integrity of the constitutional guarantee itself.”²⁹⁹ Similarly,

296. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 102 (1973) (Marshall, J., dissenting).

297. *Id.* at 103.

298. *Id.*

299. *Id.*

the Supreme Court in *Griswold v. Connecticut* reasoned that, “Without those peripheral rights the specific rights would be less secure.”³⁰⁰ Justice Marshall and the Supreme Court thus emphasized the notion of implied fundamental rights. Without these implied, peripheral rights, specifically enumerated rights would not be ensured. It may therefore be argued that access to literacy is an implied, peripheral right of citizenship.

All American citizens enjoy rights of citizenship, and the American system of government relies on an active and engaged citizenry.³⁰¹ As former Supreme Court Justice Louis Brandeis once stated, “The only title in our democracy superior to that of President [is] the title of citizen.”³⁰² Some rights of American citizenship include the right to vote in elections for public officials, the right to a prompt, fair trial by jury, the right to apply for federal employment requiring American citizenship, and the right to run for elected office.³⁰³ All citizens also enjoy the right to own property, to conclude valid contracts, and the right to justice.³⁰⁴

Ultimately, “peripheral” literacy rights are necessary to ensure guaranteed citizenship rights. Citizenship requires basic literacy abilities to carry out duties such as voting, serving on a jury, participating in community affairs, and exercising the freedom of speech.³⁰⁵ Without literacy, students will not be able to participate in American civic institutions, such as the political process. Citizens will be unable to read about election candidates and will therefore

300. *Griswold v. Connecticut*, 381 U.S. 479, 482–83 (1965).

301. U.S. DEP’T OF HOMELAND SEC. & U.S. CITIZENSHIP AND IMMIGRATION SERVS., *THE CITIZEN’S ALMANAC* 2 (2014) [hereinafter *THE CITIZEN’S ALMANAC*]; U.S. DEP’T OF HOMELAND SEC. & U.S. CITIZENSHIP AND IMMIGRATION SERVS., *CITIZENSHIP RIGHTS AND RESPONSIBILITIES* (last visited July 13, 2020) [hereinafter *RIGHTS AND RESPONSIBILITIES*].

302. *THE CITIZEN’S ALMANAC*, *supra* note 301, at 2.

303. *RIGHTS AND RESPONSIBILITIES*, *supra* note 301.

304. Liu, *supra* note 292, at 342.

305. *Id.* at 345.

be prevented from voting for their preferred candidates.³⁰⁶ Even in *Brown v. Board of Education*, the Court stated that education, “is the very foundation of good citizenship.”³⁰⁷ In *Plyler*, the Court explained that “[b]y 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.”³⁰⁸ Literacy is therefore essential to carry out rights of citizenship.

The District Court in *Gary B.* explicitly acknowledged the *importance* of literacy in carrying out activities of citizenship.³⁰⁹ However, the District Court failed to recognize the *necessity* of literacy in carrying out these activities inherent in basic citizenship. Literacy is not only important, but also absolutely necessary to carry out activities involved in meaningful civic life. An illiterate individual is completely unable to vote, serve on a jury, or independently apply for government benefits. Even the Sixth Circuit panel embraced the dependency of a citizen’s interaction with the government on literacy.³¹⁰ The court held that access to

306. See *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 51–52 (1959) (citing *Franklin v. Harper*, 55 S.E.2d 221, 224 (Ga. 1949)) (“The ability to read and write . . . has some relation to standards designed to promote intelligent use of the ballot. . . . Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise.”).

307. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954).

308. *Plyler v. Doe*, 457 U.S. 202, 223 (1982); see also *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (“[S]ome degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.”).

309. *Gary B. v. Snyder*, 313 F. Supp. 3d 852, 873 (E.D. Mich. 2018) (“Plainly, literacy—and the opportunity to obtain it—is of incalculable importance. As Plaintiffs point out, voting, participating meaningfully in civic life, and accessing justice require some measure of literacy. Applying for a job, securing a place to live, and applying for government benefits routinely require the completion of written forms. Simply finding one’s way through many aspects of ordinary life stands as an obstacle to one who cannot read.”).

310. *Gary B. v. Whitmer*, 957 F.3d 616, 649 (6th Cir. 2020), *vacated en banc*, 958 F.3d 1216 (6th Cir. 2020) (mem).

literacy is implicit in the concept of ordered liberty, because it is necessary for even the most limited participation in our country's democracy.³¹¹ The court noted, “[t]he degree of education [the plaintiffs] seek through this lawsuit—namely, access to basic literacy—is necessary for essentially *any* political participation.”³¹² The court cited numerous examples of basic public responsibilities that require literacy, including completing a voter registration form, complying with a summons sent through the mail, and a juror's understanding of documents when used as evidence against a defendant.³¹³

Yet, the *Gary B.* plaintiffs failed to specifically argue that literacy access is an “implied, peripheral” right that leads to other rights. The plaintiffs also failed to cite federal precedent that recognizes implied fundamental rights. Federal courts must directly address this implied fundamental rights argument, or else citizenship rights will not truly be guaranteed. Litigants should also emphasize literacy's absolute necessity in carrying out basic aspects of American citizenship, and federal courts should recognize that illiteracy serves as a permanent roadblock to achieving meaningful citizenship.

311. *Id.*

312. *Id.* at 652.

313. *Id.* at 652–53.

III. JUDICIAL IMPLICATIONS: IMPORTANT CONSIDERATIONS
AND REPERCUSSIONS OF RECOGNIZING THE RIGHT TO ACCESS
TO LITERACY

Recognizing a constitutional right to access to literacy carries many questions, particularly policy concerns of enforcing this “positive right.”³¹⁴ If federal courts followed the panel decision’s reasoning in *Gary B.*, the alleged constitutional right would be a newly articulated one: access to literacy. Unlike the plaintiffs in *Gary B.* who framed their argument as a “negative right” (“denial” of access to literacy), litigants who bring similar claims in federal court should make a positive-right argument in their complaints. Litigants would argue that students are entitled to a minimum level of instruction on learning to read.³¹⁵

However, it may be argued that the policy concerns that would come with recognizing this right to literacy access would prove too burdensome.³¹⁶ For example, critics of recognizing positive rights have argued that judges are ill equipped to create and define the scope of positive rights.³¹⁷ There are those who argue that the federal judiciary lacks the capacity and expertise to solve problems like the opportunity gap from the bench.³¹⁸ Attorneys, commentators, and other contrarians who oppose federal means of achieving literate masses argue that advocates for a federal right to some level of education presume that federal judges would succeed where local policymakers have failed.³¹⁹ Another criticism is that if we recognize affirmative governmental

314. See Jenna MacNaughton, *Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune*, 3 U. PA. J. CONST. L. 750, 778–79 (2001); Ogletree et al., *supra* note 141, at 75, 77; Bowman, *supra* note 46, at 65–68.

315. This would not require a reversal of *Rodriguez* because the right to “access to literacy” is a different standard than the right to “education.”

316. See Ogletree et al., *supra* note 141, at 73, 75, 77.

317. MacNaughton, *supra* note 314, at 776–77.

318. Ogletree et al., *supra* note 141, at 77.

319. *Id.*

duties in some cases, we will be forced to recognize them in other cases, “creating havoc for lawmakers and administrators.”³²⁰ Once federal courts recognize a right to literacy, where would this end? Some argue that this recognition of a positive right will lead to a “slippery slope” of being forced to recognize other rights.³²¹

Notably, these criticisms of constitutional positive rights are all hypothetical.³²² Because the federal judiciary rarely recognizes positive rights claims, none of these predicted problems have even occurred.³²³ In fact, state courts and foreign countries have proven successful in enforcing positive rights.³²⁴

If federal courts recognized a constitutional right to literacy, there would have to be judicial dialogue with state legislatures.³²⁵ Instead of promulgating a “one-size-fits-all” remedy, federal courts should allow states to continue to serve as laboratories of experimentation and innovation that decide how best to provide the right to access literacy.³²⁶ For example, perhaps states could mandate that “evidence-based literacy instruction” requires maximum student class sizes of twenty students, or mental health counselors at every school. In addition, it would be necessary for courts to defer to the professional judgment of education experts and teachers. In fact, the Supreme Court and lower federal courts have repeatedly mentioned the need to defer to the judgment of professionals.³²⁷

320. MacNaughton, *supra* note 314, at 777.

321. See *supra* Part II Section A, which also acknowledges this “slippery slope” argument. Part II emphasizes the distinction between literacy and other benefits such as housing and sewer services.

322. MacNaughton, *supra* note 314, at 778–79.

323. *Id.*

324. *Id.* at 779.

325. *Id.* See Ogletree et al., *supra* note 141, at 76.

326. Ogletree et al., *supra* note 141, at 76.

327. *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982) (“[C]ourts must show

Ultimately, federal courts would need to establish clear guidelines and federal limits about what the right to access literacy requires, while also affording flexibility in how states implement it.³²⁸ This approach would strike the ideal balance between providing federal accountability and retaining state and local control over education. As a result, this balance would also serve as a check on state legislatures to prevent legislative inaction.³²⁹ Constant line drawing and neglect on the part of the federal judiciary will only lead to a continued national illiteracy crisis. Recognizing this essential right and establishing federal accountability would lead to a result our education system desperately needs: justice.

deference to the judgment exercised by a qualified professional.”); *id.* at 323 (“[T]he decision, if made by a professional, is presumptively valid.”); *id.* at 324 (“[D]ecisions made by the appropriate professional are entitled to a presumption of correctness.”).

328. Ogletree et al., *supra* note 141, at 76 (reasoning that while state and local control of education has been praised for experimentation and innovation, this level of control has also failed to eliminate the substandard schools that many children attend).

329. See MacNaughton, *supra* note 314, at 780–81.

CONCLUSION

As Frederick Douglass said, “Once you learn to read, you will be forever free.” Yet, the freedom of literacy is currently being denied to thirty-two million Americans. All the while, state legislatures have proven inept at finding meaningful solutions, and the federal judiciary continues to remain on the sidelines. Despite the en banc Sixth Circuit’s decision to vacate the panel decision, federal court litigants in other circuits must continue to bring claims advocating for a right to access to literacy.³³⁰ After all, the Supreme Court has never answered the question whether there is a federal right for students to receive a minimally adequate education. Thus, a school’s failure to provide an education of a certain quality violates the Constitution. In the meantime, the Sixth Circuit’s original panel decision serves as powerful guidance for litigants in other circuits who may wish to bring similar fundamental rights claims.

Courts must not be overly cautious out of fear of turning into a super-legislature. Once courts recognize a right to access literacy, it will be necessary to defer to the judgment of education experts and state legislatures, but to also maintain the check of federal accountability. A uniform level of accountability across the United States would allow the

330. In fact, litigants have recently brought a class action educational quality case before a federal court in Rhode Island, which falls within the First Circuit. The plaintiffs in the *Cook v. Raimondo* case went beyond literacy, and argued that the state is not providing students an adequate education for capable civic participation, as students are not receiving proper civics instruction. The complaint argued the state is not providing adequate civics instruction because of a lack of a civics course requirement, a vacant social studies coordinator position at the state level, and no professional development for teachers related to civics. Oral argument before the United States District Court for the District of Rhode Island took place on December 5, 2019, and a decision is still pending. Teachers College of Columbia University, *Cook v. Raimondo: The Case to Establish a Right to Education Under the U.S. Constitution*, THE CENTER FOR EDUCATIONAL EQUITY, <http://www.cookvraimondo.info/litigation-papers/>. If the First Circuit and the en banc Sixth Circuit ultimately arrive at different results, this circuit split would provide a compelling reason for the Supreme Court to address these constitutional issues. The result could forever change public education in America.

nation to take a step towards ending the literacy crisis, and allow all citizens to receive a right to which they are entitled. Perhaps the fourth-grade students of Detroit will finally receive the excellent education they so eagerly seek.