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THE GREAT (UN)EQUALIZER: EDUCATION AS A FUNDAMENTAL RIGHT

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I. INTRODUCTION

For students in Detroit public schools, literacy is a luxury.[1] Students who attended the Plaintiffs' schools in the 2020 Sixth Circuit Court of Appeals case *Gary B. v. Whitmer* exhibited proficiency rates of "near zero in nearly all subject areas."[2] Their schools lacked resources and were routinely understaffed.[3] Even worse, the Plaintiffs attended schools with decrepit conditions: "[m]ice, cockroaches and other vermin" regularly infest the schools, drinking water is unsafe, playground equipment routinely causes injuries and schools lack regulation fire safety equipment.[4] The disparity in public school funding across Michigan and nationwide only serves to disadvantage already subjugated groups. In *Gary B. v. Whitmer*, students filed suit alleging that the State of Michigan's treatment of disadvantaged school districts like Detroit's violated their rights under the Fourteenth Amendment of the United States Constitution.[5]

Education has not been explicitly recognized as a fundamental right protected under the federal Constitution despite being brought before the Court on numerous occasions.[6] In *Gary B.*, the Sixth Circuit accepted the Plaintiffs' argument that a basic minimum access to education in the form of literacy was protected as a fundamental right under the Constitution.[7] The Sixth Circuit subsequently voted for rehearing en banc *sua sponte*.[8] This decision was followed by a settlement between the parties and a subsequent dismissal by the Sixth Circuit on mootness grounds.[9] As a result of the *Gary B.* litigation, the question of whether the Constitution provides a basic minimum education still remains unanswered.[10]

1. Gary B. v. Whitmer, 957 F.3d 616, 620-21 (6th Cir. 2020).
2. *Id.* at 627 (emphasis omitted).
3. *Id.* at 624-27.
4. *Id.* at 626.
5. *Id.* at 621.
6. San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (holding "[e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected").
7. *Gary B.*, 957 F.3d at 616.
8. Gary B. v. Whitmer, 958 F.3d 1216, 1216 (6th Cir. 2020). Rehearing en banc vacates the previous decision of the 6th Circuit's three judge panel which held that there was a basic minimum level of education (literacy) as a fundamental right under the Constitution. *Id.*
9. Gary B. v. Whitmer, 2020 U.S. App. LEXIS 18312.
10. Colter Paulson, *Sixth Circuit Vacates Right-to-Literacy Ruling*, NAT'L L. REV. (June 11, 2020), www.natlawreview.com/article/sixth-circuit-vacates-right-to-literacy-ruling [perma.cc/6FHN-EQHT].

This case note will analyze the Sixth Circuit's landmark ruling in *Gary B. v. Whitmer*, which recognized that a basic minimum level of education (literacy) was a fundamental right under the United States Constitution. While no longer Sixth Circuit precedent,[11] the court laid out the requisite qualities for a case seeking to establish education as a fundamental right.[12] Most notably, enshrinement among the fundamental rights afforded to all Americans would mean that in a deprivation of that right, the government must meet strict scrutiny, the strictest standard imposed by the Court.

I will begin Part II by discussing the relevant Supreme Court precedent leading up to the *Gary B.* litigation. Next, I will discuss the factual background of the *Gary B.* case. In Part III, I will break down the Sixth Circuit's majority and dissenting opinions. Finally, in Part IV, I will analyze the legacy of *Gary B.*, including a discussion on ways to establish fundamental rights, ultimately proposing that future "education as a fundamental right" cases consider the Privileges and Immunities Clause of the Fourteenth Amendment.

II. BACKGROUND

There are four major Supreme Court cases specifically addressing the question of whether education is a fundamental right under the United States Constitution.[13] I will begin by discussing each in chronological order. Then, I will establish the factual background for the *Gary B.* case. In the following Supreme Court cases, the ways in which the plaintiffs characterize the asserted fundamental right to education is in many ways evolutionary to *Gary B.'s* ultimate characterization.[14]

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

12. *Gary B.*, 957 F.3d at 616.

13. *Rodriguez*, 411 U.S. at 1 (1973); Plyler v. Doe, 457 U.S. 202 (1982); Papasan v. Allain, 478 U.S. 265 (1986); Kadrmas v. Dickinson, 487 U.S. 450 (1988); *See also* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (providing important context to both the historical tradition of public education in America as well as prevailing attitudes towards the importance of education in our contemporary society, stating that "education is perhaps the most important function of state and local governments" and "[i]t is required in the performance of our most basic public responsibilities").

14. *Compare Rodriguez*, 411 U.S. at 35 (holding that "[e]ducation . . . is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected"), *with* Papasan, 478 U.S. at 284 (explaining that the *Rodriguez* "Court did not, however foreclose the possibility 'that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either [the right to speak or the right to vote]'") (quoting *Rodriguez*, 411 U.S. at 36).

A. Supreme Court Precedent

1. San Antonio Independent School District v. Rodriguez

In 1973, the United States Supreme Court decided *San Antonio Independent School District v. Rodriguez*, which held that there was no fundamental right to education—express nor implied—under the Constitution.[15] The Court categorized public educational funding as socio-economic legislation which the State is better suited to address.[16] Additionally, by characterizing the legislative action as socio-economic and not implicating a fundamental right at stake, the Court effectively established that fundamental right to education cases should be reviewed under the most deferential standard of review for governmental action, the rational basis standard.[17]

In *Rodriguez*, the plaintiffs filed a class action suit on behalf of schoolchildren who were members of minority groups, resided in lower income areas, or both.[18] They alleged that the public school finance system set up by the state of Texas—wherein the funding of public schools was in large part determinative by a percentage of property tax levied on the residents within the district—violated the Equal Protection Clause.[19] As a result of living in impoverished areas, members of the class attended schools which received significantly less state funding than wealthier districts in the state.[20] The plaintiffs alleged that they had a fundamental right to education and that the funding system employed by the state of Texas "operates to the disadvantage of [a] suspect class."[21]

The Court declined to recognize the plaintiffs as a suspect group,[22] reasoning that there was insufficient evidence to prove that the financing system discriminated against an identifiable group of people. In other words, wealth-based classifications were not suspect.[23] The discriminatory effects of the system were largely inconsequential.[24] Next, the Court determined that the importance of public education was not a liberty interest and has no bearing on its fundamentality for purposes of establishing an equal protection

15. *Rodriguez*, 411 U.S. at 35.
16. *Id.* at 30.
17. *Id.* at 40.
18. *Id.* at 5.
19. *Id.* at 9.
20. *Id.* at 12-13. (noting the disparities between San Antonio's most affluent district and its least affluent district). As a result of racial demographics and differing property values, the court noted that the least affluent district (where the plaintiffs resided) spent about $356 per student on public education compared with $594 per student in the most affluent district. *Id.*
21. *Id.* at 17.
22. *See Rodriguez*, 411 U.S. at 61 (Stewart, J., concurring).
23. *Id.* at 25.
24. *Id.*

claim.[25] Consequently, the Court reasoned that it was not the job of the Court to create rights to guarantee equal protection under the law.[26] Rather, the Court's duty was to determine whether the right is deemed fundamental on the basis that it is guaranteed implicitly or explicitly by the text of the Constitution.[27] The Court determined that there was no explicit protection of education within the expressly enumerated rights in the Constitution and declined to establish education as an implied fundamental right.[28] Since the right was not fundamental, nor were the plaintiffs part of a discrete class that the Court deemed suspect, the Court declined to apply strict scrutiny, opting instead for the highly deferential rational basis test.[29] Under the rational basis test, the Court found a compelling state interest in the employed public education funding scheme.[30] Finally, to satisfy the rational basis test, the Court concluded that the compelling state interest in funding the State's public schools was rationally related to the state's interest.[31]

Ultimately, the Court deferred to the state legislatures finding that this case presented issues of educational financing policy, an "area in which [the Court lacking] specialized knowledge and experience counsels against premature interference with the

25 *Id.* at 30. (stating that "the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause").

26. *Id.* at 33.

27. *Id.* (citing *Eisenstadt v. Baird*, 405 U.S. 438 (1972)).

28. *Rodriguez*, 411 U.S. at 35.

29. *Id.* at 40 (holding that "[a] century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes). Of note, as the Court points out, the State of Texas conceded that its financing system would be unable to withstand strict scrutiny had the Court found education to be a fundamental right of the plaintiffs to be part of a suspect classification. *Id.* at 16. Strict scrutiny requires that the government prove that there exists a compelling governmental interest and that the regulation/governmental action in question is the least restrictive means of achieving that governmental interest. *See id.* at 16-17 (holding that "scrutiny means that the State's system is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a 'heavy burden of justification,' that the State must demonstrate that its educational system has been structured with 'precision,' and is 'tailored' narrowly to serve legitimate objectives and that it has selected the 'less drastic means' for effectuating its objectives"); Alternatively, the rational basis test merely ensures that the government has a rational basis for implementing a statute or policy objective. *See id.* at 103-04 (Marshall, J., dissenting).

30. *Id.* at 55 (finding that Texas' plan is "rooted in decades of experience in Texas and elsewhere, and in major part is the product of responsible studies by qualified people").

31. *Id.* ("The constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest. We hold that the Texas plan abundantly satisfies that standard" (citation omitted)).

informed judgments made at the state and local levels."[32] As previously mentioned, however, the Court specifically left open the possibility that there existed some basic minimum level of education guaranteed by the Constitution.[33]

2. Plyler v. Doe

Following *Rodriguez* was another case from the State of Texas, *Plyler v. Doe*, decided by the Supreme Court almost a decade later.[34] The relevant distinction in *Plyler* was that the State of Texas was completely withholding free public education to undocumented immigrant children.[35] The *Plyler* decision reflected the Court's concern explained in *Rodriguez*: that complete deprivation of education was unconstitutional and that there may be some basic minimum level of education.[36]

The *Plyler* case addressed the question of whether a state may deprive undocumented immigrant children of an education.[37] In *Plyler*, the plaintiffs were challenging an amendment to Texas' education laws which entirely withheld state educational funding from undocumented immigrant children and allowed local school districts to deny enrollment entirely to those undocumented students.[38] The plaintiffs advanced an equal protection claim alleging that their exclusion from public schooling was in violation of the Equal Protection Clause of the Fourteenth Amendment.[39] The Court first ruled on the issue of whether undocumented immigrants were even included in the class of people protected by the Fourteenth Amendment—holding that they were.[40]

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32 *Id.* at 42.

33. *Id.* 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 [freedom of speech or the right to vote], we have no indication that the present levels of educational expenditures in Texas provide an education that falls short.").

34. *Plyler*, 457 U.S. at 202.

35. *Id.* at 206.

36. *Id.* at 221-22 (stating that the "denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit"). "Paradoxically, by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority." *Id.*

37. *Id.* at 205.

38. *Id.*

39. *Id.* at 205.

40. *Id.* at 210 (stating that the Fourteenth Amendment provides "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"). U.S. CONST. amend. XIV. The State of Texas argued that foreign aliens were not persons within their jurisdiction and thus the claim brought by the plaintiffs was not protected by the Fourteenth Amendment. *Plyler*, 547 U.S. at 210. The Court reasoned that the plain meaning of the word "person" in the text

Next, the Court turned to the applicable standard of review.[41] In reaffirming the Court's holding from *Rodriguez* (that education is not a right guaranteed under the Constitution) the Court nevertheless asserted that "education has a fundamental role in maintaining the fabric of our society" and noted there are "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 rest."[42] In noting its limitations upon establishing the undocumented students as a suspect class, the Court vaguely established the applicable standard of review as requiring the furtherance of some "substantial goal of the state."[43] In an examination of whether there existed some "substantial goal of the state" in the discrimination against undocumented children, the Court denied the State's arguments that the immigrant children imposed a significant burden on State educational resources and that the discrimination is in the State's interest of "protect[ing] itself from an influx of illegal immigrants."[44] In sum, the *Plyler* Court struck down the Texas legislation, but rejected the claim that education was a fundamental right under the Constitution.[45]

3. Papasan v. Allain

In the 1986 case Papsan v. Allain, the plaintiffs, a class of school officials and schoolchildren from 23 counties in northern Mississippi, alleged that a specific statute in Mississippi, which provided for public school funding, unequally distributed funds across the state and thus violated the Equal Protection Clause.[46]

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of the amendment makes no allowance for the exceptions of undocumented immigrants and that anyone who is subject to the laws of the state they are in is afforded Fourteenth Amendment protections. *Id.* at 215.

41. *Id.* at 218.

42. *Id.* at 221 (The Court further elaborated on the idea of education as a so called "great equalizer:" "denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers based on individual merit"). Paradoxically, by depriving children of any disfavored group of an education, we foreclose the means by which that group may raise the level of esteem in which it is held by the majority." *Id.* at 222.

43. *Id.* at 224; *See also Kadrmas*, 487 U.S. at 459 (noting that the circumstances in *Plyler* constitute "unique circumstances" for "a heightened level of equal protection scrutiny"). In noting the undocumented students' illegal presence in the country, the Court was unwilling to accept them as a suspect class. *Id.* at 223. In spite of this, the Court was sympathetic to their own agency in their undocumented circumstance: "Their 'parents have the ability to conform their conduct to societal norms,' . . . but the children who are plaintiffs in these cases 'can affect neither their parents' conduct nor their own status.'" *Id.* at 220 (citing Trimble v. Gordon, 430 U.S. 762, 770 (1977)).

44. *Plyler*, 547 U.S. at 228-29.

45. *Id.* at 230.

46. *Papasan*, 478 U.S. at 267, 273. The land was formerly held by the Chicksaw Indian Nation had been ceded to the United States through the Treaty of Pontitoc Creek in 1832. *Id.* at 271. Under state law, this land was held

The plaintiffs in *Papsan* articulated many of the same claims that the plaintiffs did in both *Rodriguez* and *Plyler* with one key distinction—they alleged that "a minimally adequate education is a fundamental right."[47] The Court ultimately deemed that the plaintiffs failed to allege sufficient facts in their complaint, thereby leaving the question unanswered.[48] The case was dismissed in part and remanded in part on the plaintiffs' equal protection claim after the Court deemed that the plaintiffs had failed to adequately allege that they were deprived of "a minimally adequate education."[49]

4. Kadrmas v. Dickinson

The most recent case before the Supreme Court addressing the issue of "a minimally adequate education" was brought in 1988.[50] In *Kadrmas v. Dickinson*, plaintiffs filed an equal protection claim challenging a North Dakota statute which allowed local school districts to charge a fee for bus transportation.[51] The plaintiffs in *Kadrmas* alleged that the bus transportation fee "unconstitutionally deprive[d] those who cannot afford to pay for it of 'minimum access to education.'"[52] The Court noted that the fact that the plaintiffs continued to attend school despite one of the plaintiffs' family's inability to pay proved that there was no actual deprivation.[53] Rather, the transportation fee merely imposed "a greater obstacle to education in the path of the poor than it does in

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in trust for the benefit of the public and therefore the distribution of state funds is implicated by different practice than the rest of the state. *Id.* at 273 (citing MISS. CODE ANN. § 29-3-1(1)). The separate practice in school funding amounted to the schools in the former Chicksaw land to receive state funding of $0.63 per student compared to $75.34 for the rest of the state. *Id.* at 273.

47. *Id.* at 232.

48. *Id.* at 232. "Nor does this case require resolution of these issues [of whether a "minimally adequate level of education is fundamental" *Id.* at 286. The *Papasan* Court noted that the plaintiffs in that case failed to allege that they "are not taught to read or write" or that they are deprived of "the educational basics." *Id. See also* Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 559 U.S. 662 (2009) (holding that the notice pleading standard requires that the plaintiff allege sufficient facts to establish a claim which is "plausible on its face").

49. *Papasan*, 478 U.S. at 286, 292. Plaintiffs likely needed to specifically allege that the education provided by the state was of an insufficient level for them to receive a "minimally adequate education.; merely alleging funding disparities was determined to be insufficient by the Court. *See id.* at 288.

50. *Kadrmas*, 487 U.S. at 450.

51. *Id.* at 454; *see also* N.D. CENT CODE § 15-34.2-06.1 (1981 and Supp. 1987). The North Dakota statute set a limit on the fees to the estimated cost of providing the service, however the Court reiterated the District Court's finding that the fee scheme of $97 per year for one child and $150 per year for two children only "covered approximately 11% of the cost of providing the bus service, and the remainder was provided from state and local tax revenues." *Kadrmas*, 487 U.S. at 453-54.

52. *Kadrmas* 487 at 458.

53. *Id.*

the path of wealthier families."[54] The Court therefore declined to apply strict scrutiny on the basis that wealth is not a suspect classification requiring heightened scrutiny.[55] According to the Court, the more appropriate standard of review was rational basis, evidenced by its reluctance to "accept the proposition that education is a 'fundamental right.'"[56]

The Court was unwilling to accept the attenuated argument that the plaintiffs' refusal to pay a transportation fee had an impact on the "perpetuation of a subclass of illiterates . . . adding to the problems and costs of unemployment, welfare, and crime."[57] In applying the rational basis test, the Court held that the Constitution does not require a state to offer transportation to school and, therefore, it certainly does not require a State to offer such a service for free.[58] Accordingly, the Court found that providing school bus service was a legitimate state interest and that the collection of a fee to subsidize the service is rational in relation to that interest.[59] While the Court upheld the North Dakota statute and declined to apply a heightened level of scrutiny, it still never answered the more generalized question of whether a minimally adequate level of education is a fundamental right.[60]

B. Gary B. v. Whitmer

1. Complaint

On September 13, 2016, Plaintiffs filed a class action complaint in the Eastern District of Michigan, Southern Division.[61] Plaintiffs

54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 459 (quoting *Plyler*, 457 U.S. at 230).
58. *Id.* at 462.
59. *Id.*
60. *Id.* The Court merely recognizes that the relationship between the asserted liberty interest in a minimally adequate education and the imposition of a fee on school bus service is attenuated enough that it bears no rational relationship between the deprivation of the asserted right. *See generally id.* at 458. There is no explicit denouncement that a minimally adequate education is not a fundamental right under the constitution. *Id.*
61. Class Action Comp. at 1, *Gary B. v. Snyder*, 313 F. Supp. 3d 852 (E.D. Mich. 2018) (No. 16-CV-13292) [hereinafter "Plaintiffs' Class Action Complaint"]. Plaintiffs originally filed against then Governor Richard D. Snyder among other state officials. *Id.* Snyder was the governor of Michigan from 2011-2019. *Former Governors of Michigan*, MICHIGAN.GOV, www.michigan.gov/formergovernors/recent/snyder (last visited June 19, 2022) [perma.cc/CV7D-UEZJ]. As Michigan's state constitution caps gubernatorial term limits at two four-year terms, Snyder was ineligible to seek reelection and was succeeded by current governor Gretchen Whitmer. MICH. CONS. art. V, § 30. As a result, the litigation changed case names to account for the change in office from *Gary B. v. Snyder* to *Gary B. v. Whitmer*. *See Governor Whitmer and Plaintiffs Announce Settlement in Landmark Gary B. Literacy Case*, MICHIGAN.GOV (May 14, 2020),

alleged that the conditions in their schools deprived them of a basic minimum level of education guaranteed by the Fourteenth Amendment of the United States Constitution; that the State of Michigan violated the protections of the Fourteenth Amendment by depriving the Plaintiffs of equivalent access to literacy as provided in other public school districts in Michigan; that the State of Michigan failed to protect the Plaintiffs from the dangerous conditions in their schools; that the State impermissibly discriminated or acted with deliberate indifference to the exclusion of the class of student on the basis of race; and finally, that the State maintained Plaintiffs' schools in such a manner that violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.[62] All claims with the exception of the Title VI claim were filed under a violation of 42 U.S.C. § 1983.[63]

The Plaintiffs, students residing in Detroit, Michigan, alleged that their public schools deprived them of their ability to access literacy.[64] According to the Plaintiffs' complaint, the proficiency rates in schools "hover near zero in nearly all subject areas."[65] In elementary schools, less than ten percent of third-grade students "scored proficient or above on the State of Michigan's 2015-16 English assessment test, compared with 46.0% of third-grade students statewide."[66] The complaint alleged that this amounted to a functional deprivation of access to literacy.[67]

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www.michigan.gov/whitmer/news/press-releases/2020/05/14/governor-whitmer-and-plaintiffs-announce-settlement-in-landmark-gary-b--literacy-case [perma.cc/KV96-S6EG].

62. Plaintiffs' Class Action Complaint, *supra* note 61 at 123-127.

63. *Id.* The Plaintiffs would later voluntarily dismiss their Title VI claim and their claim that the State's action or inaction failed to protect the plaintiffs from the dangerous conditions in their schools. *Gary B. v. Snyder*, 313 F. Supp. 3d 852, 857 (E.D. Mich. 2018); *see also* 42 U.S.C. § 1983 (stating "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress []"). Section 1983 claims act as the vehicle through which citizens may bring suit to allege that a state official's acts are in violation of their Constitutional rights. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978); U.S. CONST. amend. XIV (stating in pertinent part "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

64. Plaintiffs' Class Action Complaint, *supra* note 61, at 17-20.

65. *Id.* at 4.

66. *Id.* at 5. Complaint further notes that in the Plaintiffs' high schools, "12.5% of eleventh-graders scored proficient in English in 2014-15 compared with 49.2% statewide." *Id.* at 6.

67. *See id.* at 5. Complaint also notes that the only books in third-grade classrooms were picture books, and some students cannot sound out letters. *Id.*

Plaintiffs alleged a lack of resources in their classrooms, noting that they further lacked appropriate textbooks for the grade level and subject matter.[68] When classrooms did have textbooks, the textbooks were severely outdated and there were not enough textbooks for the class size.[69] Teachers expended "thousands of dollars of their personal funds" to ensure their classrooms and schools were stocked with basic necessities such as pens, pencils, cleaning supplies and even toilet paper.[70] Plaintiffs further alleged that class sizes contained as many as fifty students at a time.[71]

In addition to lack of resources, Plaintiffs alleged dangerous conditions in their schools, such that they functionally deprived the Plaintiffs of any meaningful way to achieve literacy.[72] Classroom temperatures often exceeded 90 degrees in the summer and in the winter, were frequently cold enough that students and teachers had to wear winter clothing indoors.[73] The schools were so regularly infested by "[m]ice, cockroaches and other vermin" that the teachers' daily morning tasks often included cleaning rodent feces and dead bugs from the floors of their classrooms.[74] Schools often had unsafe drinking water and unkempt bathrooms; "sinks d[id] not work; toilet stalls lack[ed] doors and toilet paper;" and the roofs would often leak.[75] Playground equipment was unsafe and routinely caused injuries, taboo items such as bullets, used condoms, and even sex toys were often found on school grounds, and schools lacked regulation fire safety equipment.[76] Yet, school officials failed to repair the decrepit conditions.[77]

In addition to the physical defects in the school property and lack of materials, the schools were routinely understaffed.[78] The Plaintiffs' schools often had a high staff turnover due to the "appalling school conditions, insufficient materials, and uncompetitive salaries."[79] As a result of the high turnover, classes were often taught by unqualified paraprofessionals or in an extreme

68. *Id.* at 8.

69. *Id.* "[Textbooks] are often long out of date, torn and beyond repair, or marked up to be unreadable in places." *Id.* "In multiple classes, students were forced to share a single book in groups of four or more during class periods and were not able to take books home." *Id.*

70. *Id.*

71. *Id.* at 9.

72. *Id.*

73. *Id.*

74. *Id.* at 10; *see also id.* at 85-86 (Figure 13 depicts Cockroaches at one of Plaintiffs' schools).

75. *Id.*

76. *Id.* (describing the "taboo items" routinely found on school grounds near the playground as alleged by Plaintiffs include: "bullets, used condoms, and sex toys").

77. *Id.* at 93-94; *see also* Figure 15, Plaintiffs'; Class Action Complaint, *supra* note 61, at 94 (depicting buckets used in hallways to collect water leaking from ceiling).

78. *Id.* at 12.

79. *Id.*

case, older students.[80]

Plaintiffs alleged that literacy is a fundamental right.[81] In support of their claim, they argued literacy was essential to success later in life, and a deprivation of access to literacy degrades one's ability to participate in our democracy.[82] Plaintiffs contended that "[l]iteracy is a prerequisite to constitutionally protected participation in the political process," and that literacy was necessary for participation in military service or to obtain government entitlements.[83] Finally, Plaintiffs posited that illiteracy functionally precluded them from access to the judicial system and that participation in our judicial system (such as serving as a juror) would be precluded by the State's failure to provide basic minimum access to education in the form of literacy.[84]

Plaintiffs argued that the State's "deliberate disinvestment and indifference to the needs of Detroit school children" impeded the Plaintiffs' abilities to access literacy.[85] The complaint noted that students in Detroit Public Schools are predominantly low-income students of color.[86] As a result of the poor educational outcomes in Plaintiffs' schools, many students failed to matriculate to higher education.[87]

In summation, Plaintiffs alleged that access to literacy was a fundamental right under the Fourteenth Amendment to the United States Constitution.[88] Plaintiffs also alleged that the lack of materials, decrepit condition of their school facilities, and lack of qualified teachers meaningfully deprived them of any reasonable access to attain a basic minimum level of education.[89]

2. Procedural History

At the district court level, the "court found that the Defendants were in fact the proper parties to sue" but dismissed the

80. *Id.* at 12-13. Complaint alleges that this issue was "further exacerbated . . . by passing legislation permitting non-certified instructors to teach in [Detroit Public] schools" which does not apply to other school districts. *Id.* at 13. Plaintiffs allege that this legislation "singles out the children of Detroit—the vast majority of whom are children of color—for separate and inferior treatment." *Id.*

81. *Id.* at 24.

82. *Id.* at 24, 30.

83. *Id.* at 31-32. Complaint further notes that illiterate persons cannot "comply with mandatory government requirements such as filing tax forms or selective service registration." *Id.* at 32.

84. *Id.* at 33.

85. *Id.* at 59.

86. *Id.* at 59-60 (noting that of Plaintiffs' schools, between 74.4% and 99.7% of students were eligible for free or reduced lunch and more than 90% of students were students of color).

87. *Id.* at 70-72.

88. *Id.* at 24.

89. *Id.* at 123-24.

Plaintiffs' complaint on the merits.[90] The district court found that 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."[91] Further, the district court reasoned that the Constitution did not affirmatively establish that there was a right to a basic minimum education.[92] Plaintiffs and Defendants both appealed to the Sixth Circuit Court of Appeals.[93]

III. COURT'S ANALYSIS

On appeal to the Sixth Circuit, the Plaintiffs alleged that the district court was incorrect in its determination that there was no fundamental right to education in the form of literacy under the Constitution.[94] In support, Plaintiffs argued that state-provided education is "deeply rooted in our nation's history and tradition" and that state-provided education is "implicit in the concept of ordered liberty."[95] Plaintiffs also argued that the Due Process Clause bars compulsory attendance where children attend schools which fail to provide access to literacy.[96] Plaintiffs alleged that by state compulsion to attend schools which failed to provide access to literacy, the state arbitrarily detained them without due process.[97] Finally, Plaintiffs asserted an equal protection claim, arguing that the State's denial of access to literacy in the Plaintiffs' schools denied them equal protection under the law as "they are functionally excluded from the State system of education."[98]

Defendants argued that Plaintiffs' claims were moot since they

90. *Gary B.*, 957 F.3d at 621.

91. Id.

92. *Gary B.*, 313 F. Supp. 3d at 875.

93. *Gary B.*, 975 F.3d at 616.

94. Brief of Appellants at 35-37, Gary B., v. Whitmer, 957 F.3d 616 (6th Cir. 2020) (No. 18-1855) [hereinafter "Brief for the Plaintiffs"] (arguing the district court's assertion that the "Supreme Court has unambiguously rejected the claim that education is a fundamental right" was "incorrect" as the Court has left open the question of "'some identifiable quantum or education' sufficient to provide children with the 'basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process'") (quoting *Rodriguez*, 411 U.S. at 36-37).

95. Brief for the Plaintiffs at 37-42 (applying the *Glucksberg* test "the Due Process Clause specially protects those fundamental rights and liberties, which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they are sacrificed" (quoting Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997)).

96. Brief for the Plaintiffs at 47 (substantively, Plaintiffs argue that the "confinement of students in buildings that are schools in name only, without offering the concomitant benefit of access to literacy, violates the Fourteenth Amendment").

97. *Id.*

98. *Id.* at 54.

were seeking retroactive relief which is barred under the Eleventh Amendment.[99] In support of their mootness argument, the Defendants argued that they no longer had the control of Plaintiffs' schools that they did at the commencement of litigation.[100] Defendants alleged that any remaining claims were barred by the Eleventh Amendment's sovereign immunity protections.[101] Further, Defendants rebutted the Plaintiffs' fundamental right claim, Plaintiffs' compulsory attendance claim, and finally, Plaintiffs' equal protection claim.[102]

A. Majority Opinion

1. Standard of Review

The majority began by establishing the standard of review as de novo.[103] Since the district court granted the Defendants' motion to dismiss, the appellate court must "accept the factual allegations in the complaint as true and construe the complaint in the light most favorable to the plaintiff."[104] The court emphasized that in accordance with *Twombly*, "the plaintiff must allege facts that are sufficient to state a claim to relief that is plausible on its face."[105]

99. Corrected Brief of Defendants-Appellees at 40, Gary B., v. Whitmer, 957 F.3d 616 (6th Cir. 2020) (No. 18-1855) [hereinafter "Brief for the Defendants"]; *see also* U.S. CONST. amend. XI; *see* Ex Parte Young, 209 U.S. 123 (1908) (holding that the Eleventh Amendment prohibits citizens from suing a state as a state, however a citizen may sue an officer of the state in their official capacity); *see also* Edelman v. Jordan, 415 U.S. 651 (1974) (narrowing the *Ex Parte Young* holding by only permitting suits against state officials where the plaintiff seeks prospective injunctive relief or declaratory relief as opposed to retroactive injunctive relief; the latter, the Court reasoned, would be effectively an award of damages against the State as it would be paid out by the state treasury and thus would effectively be a monetary judgment against the state).

100. Brief for the Defendants, at 41 [hereinafter "Brief for the Defendants."] ("As a legal matter, the locally elected DPSCD [Detroit Public Schools Community District] Board of Education and its superintendent now have direct control over the operation of the schools in the district").

101. *Id.* at 45; *see also Ex Parte Young*, 209 U.S. 123 (holding that the Eleventh Amendment prohibits citizens from suing a state as a state, however a citizen may sue an officer of the state in their official capacity); *see also Edelman*, 415 U.S. 651 (narrowing the *Ex Parte Young* holding by only permitting suits against state officials where the plaintiff seeks prospective injunctive relief or declaratory relief as opposed to retroactive injunctive relief; the latter, the Court reasoned, would be effectively an award of damages against the State as it would be paid out by the state treasury and thus would effectively be a monetary judgment against the state).

102. Brief for the Defendants at 50-85 (arguing against Plaintiffs' assertions and further arguing that the district court correctly applied rational basis review and heightened scrutiny is improper).

103. *Gary B.* 957 F.3d at 630.

104. *Id.* (citation omitted).

105. *Id.* (citing *Twombly*, 550 U.S. at 570; *see also Iqbal*, 556 U.S. at 678 (holding that "[a] claim has factual plausibility if the plaintiff pleads factual content that allows the court to draw the reasonable inference that the

2. Defendants' Mootness and Sovereign Immunity Claims

As previously mentioned, Defendants argued that the Plaintiffs' claims were barred both on mootness and sovereign immunity grounds.[106] On their mootness claim, Defendants argued that they have since relinquished control of the Plaintiffs' schools to local school boards.[107] As a result of this transfer of administrative authority, they alleged that this suit would amount to "retroactive monetary relief," thus "run[ning] afoul of the Eleventh Amendment's grant of sovereign immunity."[108] The majority reasoned that the state officer's supervisory authority still makes them the proper party to sue.[109] The court held that "Defendants misconstrue Plaintiffs' central claim in this case, which is that the state—as the primary authority for public schools in Michigan—has failed to provide them with a basic minimum education;" the subsequent delegation of power back to local school boards does not obviate the issue that the State itself is still the "primary authority" for funding public schools within the state.[110] Further, the court clarified that "[a] defendant's 'voluntary cessation of a challenged practice' does not moot a case."[111]

Turning to the Defendants' sovereign immunity claim, the court once again posited that Defendants' arguments "misstated both Plaintiffs' requested remedy and the law."[112] The court said that the Plaintiffs' request for "affirmative injunctive relief . . . 'fits squarely within the prospective-compliance exception to the Eleventh Amendment.'"[113] The majority concluded that the state

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defendant is liable for the misconduct alleged").

106. Brief for Defendants at 40.

107. *Id.* at 41.

108. *Gary B.*, 957 F.3d at 631 (relying in large part on *Ex Parte Young*'s prohibition of lawsuits against states in federal court); *see also Ex Parte Young*, 209 U.S. 123; *Edelman*, 415 U.S. 651.

109. *Gary B.*, 957 F.3d at 631; *see also* Russell v. Lundergan-Grimes, 784 F.3d 1037, 1048-49 (6th Cir. 2015); Doe v. DeWine, 910 F.3d 842, 848-49 (6th Cir. 2018) (both cited by the court in support of its position).

110. *Gary B.*, 957 F.3d at 631. (noting that under Michigan's Constitution, "the state board of education has '[l]eadership and general supervision over all public education.'" *Id.* at 632 (citing MICH. CONST. art. VIII, § 3)).

111. *Gary B.*, 957 F.3d at 632. (relying on League of Women Voters v. Brunner, 548 F.3d 463, 473 (6th Cir. 2008)) (quoting Ammex, Inc. v. Cox, 351 F.3d 697, 704 (6th Cir. 2003)). The Court further notes an exception where "subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Akers v. McGinnis, 352 F.3d 1030, 1035 (6th Cir. 2003).

112. *Gary B.*, 957 F.3d at 633.

113. *Id.* (quoting Milliken v. Bradley, 433 U.S. 267, 289 (1977); relying on *Edelman*, 415 U.S. at 668 (holding "[i]f the prospective relief sought is 'measured in terms of a monetary loss resulting from a past breach of a legal duty,' it is the functional equivalent of money damages and *Ex parte Young* does not apply")).

officers being sued here are "proper defendants . . . under *Ex parte Young*, and the transfer of some control back to local officials does not render th[e] lawsuit moot."[114]

3. Plaintiffs' Equal Protection Claim

The court first analyzed the Plaintiffs' equal protection claim; substantively, that "the Defendants discriminated against the Plaintiffs by failing to provide the same access to literacy that they give to other Michigan students."[115] The Plaintiffs argued that under *Plyler*, they were afforded heightened scrutiny.[116] In addition, Plaintiffs further alleged that even if rational basis review were the correct standard, the Defendants' deprivation of access to literacy cannot withstand this more deferential scrutiny.[117]

The court began by explaining the significance of the Equal Protection Clause.[118] The majority reasoned that to adequately allege an equal protection claim, a plaintiff must "make two showings: first, that the defendants treated them differently from other similarly situated persons, and second, that this difference in treatment is not supported by a sufficiently strong governmental interest."[119] Should a government policy discriminate on an immutable characteristic such as race, strict scrutiny is the proper standard of review.[120] Conversely, if a regulation is social or economic and does not "concern a protected class," rational basis review is proper.[121] As the court noted, however, *Plyler* obfuscates this analysis. Although it reasoned that wealth was not a suspect class and education was not a fundamental right, the *Plyler* Court seemingly applied a heightened form of scrutiny.[122] As a result, the majority gathered that *Plyler*'s holding indicated that "when a discrete group of children is denied basic public education, such a

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114. *Gary B.*, 957 F.3d at 633.

115. *Id.*

116. *Id.*; *see* Brief for the Plaintiffs at 62; *see Plyler*, 457 U.S. 202, 230 (stating "[i]f the State is to deny a discrete group of innocent children the free publication that it offers to other children within its borders, that denial must be justified by a showing that it furthers some substantial state interest").

117. Brief for the Plaintiffs at 65.

118. *Gary B.*, 957 F.3d at 634 (holding that "[w]hen a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment" and "at its core, the [Equal Protection] Clause says that all persons similarly situated should be treated alike." Zobel v. Williams, 457 U.S. 55, 60 (1982); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985)).

119. *Gary B.*, 957 F.3d at 634 (citations omitted).

120. *Id.* (Under strict scrutiny, policy or legislation will only be upheld if it "furthers a 'compelling state interest' and is narrowly tailored in doing so." *Id.* (quoting *Cleburne*, 473 U.S. at 440)).

121. *Gary B.*, 957 F.3d at 634 (relying on *Cleburne*, 473 U.S. at 440).

122. *Id.* at 634-635; *see also Plyler*, 457 U.S. at 223-24 (stating that "the discrimination contained in [Texas's policy] can hardly be considered rational *unless it furthers some substantial goal of the state*.") (emphasis added).

policy can survive only if 'it furthers some substantial state interest.'"[123]

Applied to the facts of the Plaintiffs' claims, the majority held that the "Plaintiffs' complaint fails to demonstrate disparate treatment" between Plaintiffs' schools and other schools that were receiving access to literacy.[124] The majority held that Plaintiffs' allegations of disparate treatment were inadequate to support an equal protection claim; the court held that "the Constitution cannot guarantee educational outcomes."[125] Essentially, Plaintiffs did not adequately allege any state policy or action for which the court could assess the constitutionality of alleging solely disparities in educational outcomes. While possibly insightful, it is not helpful in the establishment of Plaintiffs' equal protection claim.[126] As a result, the court affirmed the district court's dismissal of the equal protection claim.[127] The affirmation of the district court's dismissal of the equal protection claim, however, would not necessarily be precluded from later amendment. The court noted that under Fed. R. Civ. P. 15(a)(2), the district court may grant leave to amend should "justice so require."[128]

4. Plaintiffs' Compulsory Attendance Claim

Plaintiffs' alleged that by forcing their attendance at "schools in name only," the state arbitrarily detained them and violated their substantive due process rights.[129] In support, Plaintiffs cited *Youngberg v. Romeo*, a case where a man with severe intellectual disabilities was injured and physically restrained while detained in a state sponsored mental health facility.[130] The man brought suit against the state under the Fourteenth Amendment alleging "that the state failed to protect his liberty interests in 'safety, freedom of

123. *Id.* at 635; *see also Plyler*, 457 U.S. at 223-24 (holding that the appropriate standard of review is a type of intermediate scrutiny). The rational basis test burdens the plaintiff with proving that the governmental action is both irrational and the governmental action is not rationally related to a governmental interest. *Id.* Strict scrutiny places the burden of proof on the government to establish that there is a compelling governmental interest and that the governmental action is the least restrictive means in accomplishing that governmental interest. *Id*. Here, a "substantial state interest" lies between the extremes of standards of review *Id.*

124. *Gary B.*, 957 F.3d at 635 (holding that Plaintiffs' complaint "focuses on school conditions and inadequately alleges state policies or actions that caused those conditions within Plaintiffs' schools and not in others").

125. *Id.*

126. *Id.* at 635-37.

127. *Id.* at 637.

128. *Id.* at 638.

129. *Id.*; *see id.* at 640 (explaining: "forcing students to attend a 'school' in which they are simply warehoused and provided no education at all would run afoul of the Due Process Clause's protections").

130. *Id.*; *see* Youngberg v. Romeo, 457 U.S. 307 (1982).

movement, and training within the institution.'"[131]

The Sixth Circuit reasoned that compulsory attendance laws were a sufficient restraint on Plaintiffs' liberty interests to implicate protections under the Due Process Clause.[132] Therefore, the State's interest in restraining that liberty interest must be balanced such that "the relevant state interest [must] outweigh any deprivation of liberty."[133] The State's interest in educating its citizens is widely recognized by the Supreme Court.[134] The Sixth Circuit, however, noted that "forcing students to attend a 'school' in which they are simply warehoused and provided no education at all would run afoul of the Due Process Clause's protections."[135]

As applied to the Plaintiffs' claims, the Sixth Circuit reasoned that while well rooted in the law and argued in their brief on appeal, the compulsory attendance claim was not present in the Plaintiffs' complaint.[136] The court noted that the Plaintiffs' briefly mentioned compulsory attendance but did not assert that that claim was in any way related to a deprivation of their constitutional rights.[137] Accordingly, the court dismissed the Plaintiffs' compulsory attendance claim on the grounds that the complaint was insufficient to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."[138] To establish a compulsory attendance claim, the Sixth Circuit held that (in addition to sufficiently pleading the claim in the complaint pursuant to *Twombly* and *Iqbal*) the "Plaintiffs would have to show that the degree of restraint imposed on them cannot be justified by whatever education, however negligible, they are receiving."[139] Similar to the equal protection claim, the court explained that Plaintiffs on remand could seek leave to amend to sufficiently plead their compulsory attendance claim.[140]

131. *Youngberg*, 457 U.S. at 310-11, 314-15, 317, 320 (reasoning that right to personal security is a "historic liberty interest" and is therefore protected by the Due Process Clause). Accordingly, the Court held that there existed a balancing test between an individual's liberty interest and a State's interest in restraining the liberty of the individual. *Id.*

132. *Gary B.*, 957 F.3d at 640.

133. *Id.*

134. *Id.* (citing Wisconsin v. Yoder, 406 U.S. 205, 213 (1972); Prince v. Massachusetts, 321 U.S. 158, 172 (1944); Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 535-36 (1925); Meyer v. Nebraska, 262 U.S. 390, 402 (1923)).

135. *Id.*

136. *Id.* at 641.

137. *Id.*

138. *Id.* at 641-42 (quoting Erickson v. Pardus, 551 U.S. 89, 93 (2007) and *Twombly*, 550 U.S. at 555).

139. *Gary B.*, 957 F.3d at 642.

140. *Id.*

5. Fundamental Right to Basic Minimum Education

Finally, Plaintiffs in *Gary B.* attempted to characterize a fundamental right to education in the form of access to literacy.[141] The Sixth Circuit began by analyzing the Due Process Clause's applicability to the establishment of fundamental rights.[142] While those rights explicitly recognized in the Constitution and the Bill of Rights are "deemed to be 'incorporated' into the Due Process Clause," rights implicitly protected may also be deemed "fundamental."[143]

Washington v. Glucksberg set forth a two-pronged test to determine whether an asserted liberty interest is fundamental under the due process approach.[144] The first prong seeks to determine whether the asserted liberty interest is "deeply rooted in this Nation's history and tradition."[145] The historical tradition prong of the *Glucksberg* test has been applied both narrowly and more broadly. Originalist Justices like Justice Antonin Scalia have applied the test more narrowly when seeking to determine whether the liberty interest was protected at the adoption of the Fourteenth Amendment.[146] Alternatively, other Justices have been willing to apply the historical test more holistically and consider evolutionary factors.[147] Recent Supreme Court decisions have lent more deference towards broadly construing the historical tradition in an attempt to achieve more equitable results rooted in the Fourteenth Amendment's underlying principles.[148] The second prong of the

141. Brief for the Plaintiffs at 26.

142. *Gary B.*, 957 F.3d 642-43. (recognizing that "the Clause has [] been read to recognize that certain interests are so substantial that no process is enough to allow the government to restrict them, at least absent a compelling state interest." *Id.* (citing *Glucksberg*, 521 U.S. at 719-21; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Colling v. City of Harker Heights 503 U.S. 115, 125 (1992)).

143. *Id.* at 643 (citing *Casey*, 505 U.S. at 847, 849; *Meyer*, 262 U.S. at 399).

144. *Id.* at 643.

145. *Glucksberg*, 521 U.S. at 720-21.

146. *See* Obergefell v. Hodges, 576 U.S. 644, 715-16 (2015) (Scalia, J., dissenting) (arguing "[w]hen it comes to determining the meaning of a vague constitutional provision—such as "due process of law" or "equal protection of the laws"—it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification").

147. *See Obergefell*, 576 U.S. at 671. (arguing "[i]f rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied). This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians." (citing Loving v. Virginia, 388 U.S. 1, 12 (1967); Lawrence v. Texas, 539 U.S. 588, 566-67 (2003)).

148. *See Casey*, 505 U.S. at 847 (holding that such a narrow approach to historical tradition is "inconsistent with our law."); *see also Obergefell*, 576 U.S. at 664 (holding that "[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present." (citation omitted)).

Glucksberg test determines whether the asserted liberty interest is "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."[149]

The Sixth Circuit looked towards the relevant Supreme Court jurisprudence on the fundamental right to education.[150] In the opinion, the court noted that *Rodriguez* made clear that there exists "no broad, general right to education;" that the Supreme Court in *Papasan* specifically left open the question of "whether a minimally adequate education is a fundamental right;" that education is important in the maintenance of "our basic institutions" and *Plyler* established that its denial to a discrete group "must be justified by showing that it furthers some substantial state interest;" and that there is extensive history of a link between racial discrimination in education in America.[151]

First, the court noted the relevant background that the Supreme Court's landmark decision in *Brown v. Board of Education* (1954) provides in an implied fundamental rights analysis under *Glucksberg*.[152] The Warren Court in *Brown* stressed the importance of education in American society:

> education is perhaps the most important function of state and local governments. . . . It is required in the performance of our most basic public responsibilities. . . . It is the very foundation of good citizenship. . . . 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 on all equal terms.[153]

Coupled with Supreme Court dicta from *Brown* and the more explicit fundamental right to education cases, the Sixth Circuit reasoned that under a substantive due process analysis, there existed an implied fundamental right to a basic minimum education in the form of literacy.[154] Ultimately, the relevant distinction between a generalized fundamental right to education and fundamental right to a basic minimum education in the form of literacy lies in the penumbra of the *Plyler* decision.[155] The

149. *Glucksberg*, 521 U.S. at 721. (internal quotation omitted).

150. *Gary B.*, 957 F.3d 644; *see Rodriguez*, 411 U.S. at 33-39; *Papasan*, 478 U.S. at 285; *Plyler*, 457 U.S. at 221-24.

151. *Id.* at 644-45; *see Rodriguez*, 411 U.S. at 33-39; *Papasan*, 478 U.S. at 285; *Plyler*, 457 U.S. at 221-24.

152. *Gary B.*, 957 F.3d at 645 (noting that although *Brown* was decided on equal protection grounds rather than substantive due process grounds, it is still instructive in the *Glucksberg* analysis).

153. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

154. *Gary B.*, 957 F.3d at 648.

155. *See Rodriguez*, 411 U.S. at 36-37 (holding, [e]ven if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right [freedom of speech or the right to vote], we have no indication that the present levels of educational expenditures in Texas provide an education that falls short"); *Plyler*, 547 U.S.

fundamental right to a basic minimum education seems to provide a more quantifiable means by which to measure deprivation and thus is a more attractive candidate for fundamentality than a fundamental right to education more generally.

a. Historical tradition of public education in America

The Sixth Circuit started by acknowledging that America has "a longstanding practice of free state-sponsored schools, which were ubiquitous at the time of the Fourteenth Amendment's adoption."[156] The majority reasoned that Americans "take [state sponsored education] for granted" and have come to expect that it will be provided as a right.[157] Further, the majority acknowledged that education, as a great equalizer in American society, could be used as a tool to deprive African American students of a meaningful education and subject them to greater discrimination.[158] In *Wisconsin v. Yoder* (1972), the Supreme Court recognized Thomas Jefferson's explication of the essential nature education held in American society.[159] The Court asserted that even under an originalist view, the historical tradition prong of the *Glucksberg* test was met. In fact, at the adoption of the Fourteenth Amendment, thirty-six of thirty-seven states "imposed a duty in their [state] constitutions . . . to provide a public school education."[160] The Supreme Court in *Brown* insisted, however, that "we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted. . . .We must consider public education in the light of its full development and its present place in American life throughout the Nation."[161] *Brown* is further instructive because it provides context to the ways that deprivation of education has been used as a tool to suppress disfavored groups.[162] Important historical context recognizes that by "[w]ithholding [access to literacy], slaveholders and segregationists used the deprivation of education as a weapon,

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at 202 (holding that "denial of education to some isolated group of children poses and affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis or individual merit). Paradoxically, by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority." *Id.*

156. *Rodriguez* 411 U.S. at 36-37

157. *Id.*

158. *Id.*

159. *Yoder*, 406 U.S. at 221; *see also Meyer*, 262 U.S. at 400 (noting that "[t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance").

160. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 108 (2008).

161. *Brown*, 347 U.S. at 492-93.

162. *Gary B.*, 957 F.3d at 650.

preventing African Americans from obtaining the political power needed to achieve liberty and equality."[163]

The court gathered that such historical tradition "establishes that education has held paramount importance in American history and tradition, such that the denial of education has long been viewed as a particularly serious injustice."[164] In reaching this conclusion, the court determined there was a longstanding history to show that there is a cognizable connection between the acquisition of education "as a prerequisite to the exercise of political power."[165] Additionally, the majority reasoned there was an extensive history to show that disfavored groups have had to turn to the court to seek relief for denials of state sponsored public education.[166] Such reliance on the judiciary is in and of itself a recognition that without literacy subjugated groups will have a difficult time advocating for themselves in pursuit of establishing a viable remedy to obtain literacy.[167] Accordingly, the Sixth Circuit held that the first element of the *Glucksberg* test ("that the right to a basic minimum education—access to literacy—is so 'deeply rooted in this Nation's history and tradition'") was met.[168]

b. Is a basic minimum education "implicit in the concept of ordered liberty?"[169]

In analyzing the second prong of the *Glucksberg* test, the court

163. *Id.* In support, the majority notes that teaching slaves to read was previously a crime. *Id.* (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 387-88 (1978) (Marshall, J., concurring in part and dissenting in part); South Carolina v. Katzenbach, 383 U.S. 301, 311 n.10 1966)). Further, the historical tradition points towards targeted campaigns by segregationist groups like the Ku Klux Klan: "Klansman targeted schoolteachers for violent retribution and Black parents who sent their children to school frequently 'received visits from white men eager to reinforce the nuances of the established racial order.'" *Id.* at 651 (citing Amicus Br. of ACLU of Mich. At 19-22 (quoting GEORGE C. RABLE, *BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION* 97 (2007))). Further, Supreme Court precedent like *Plessy v. Ferguson*, established the infamous "separate but equal" doctrine, a doctrine upheld for 58 years until being overruled by *Brown*. *See* Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by Brown*, 347 U.S. 483. Even in overturning *Brown*, states were resistant to desegregating their schools as the Court's instruction to desegregate "with all deliberate speed," in *Brown v. Bd. Of Educ. (Brown II)*, 349 U.S. 294, 301 (1955) was not specific enough that desegregation cases continued to be brought before the court for some twenty years later. *See* Milliken v. Bradley, 418 U.S. 717 (1974) (coming before the court from the State of Michigan where plaintiff brought suit against the governor of Michigan (Bradley) alleging unconstitutional segregation in Detroit public schools).

164. *Gary B.*, 957 F.3d at 648.

165. *Id.* at 652.

166. *Id.*

167. *Id.*

168. *Id.* (quoting *Glucksberg*, 521 U.S. at 720-21).

169. *Glucksberg*, 521 U.S. 721.

had to "exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect."[170] In the court's analysis of this element, the Sixth Circuit majority looked again to *Yoder*, which established the Supreme Court's recognition of literacy as foundational to participation in our political process and society.[171] The Sixth Circuit distinguished the liberty interest characterized in this case from previously rejected liberty interests, such as in *Rodriguez*. "[T]he right asserted by Plaintiffs in this case is more fundamental. The degree of education they sought though this lawsuit—namely, access to basic literacy—is necessary for *any* political participation."[172] The court determined that "access to literacy 'is required in the performance of our most basic public responsibilities.'"[173] Invoking a penumbral approach to implied fundamental rights analysis, the court noted that "[a]ccess to literacy also 'draws meaning from related rights,' further indicating that it must be protected."[174] Literacy is therefore fundamental because in order to participate in other fundamental rights, one must first have been provided access to literacy.[175]

The Defendants argued that access to literacy fails the second prong of the *Glucksberg* test because "at the time of the adoption of the U.S. Constitution, public education that went beyond rudimentary local cooperation was nonexistent."[176] The majority was not persuaded by this argument because "the practices of the 1700s cannot be the benchmark for what a democratic society requires." Additionally, the majority cited *Obergefell v. Hodges,* in which the Court recognized that "[t]he nature of injustice is that we may not always see it in our own times."[177]

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170. *Gary B.*, 957 F.3d at 652; *Obergefell*, 576 U.S. at 623-24.

171. *Gary B.*, 957 F.3d at 652; *Yoder*, 406 U.S. at 221 (noting that "some 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").

172. *Gary B.*, 957 F.3d at 652 (noting that "[e]ffectively every interaction between a citizen and her government depends on literacy. Voting, taxes, the legal system, jury duty—all of these are predicated on the ability to read and comprehend written thoughts. Without literacy, how can someone understand and complete a voter registration form? Comply with a summons sent to them through the mail? Or afford a defendant due process when sitting as a juror in his case, especially if documents are used as evidence against him?").

173. *Id.* (quoting *Brown*, 347 U.S. at 493).

174. *Id.* at 653 (quoting *Obergefell*, 576 U.S. at 667); *see also* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (holding that the First, Third, Fourth and Fifth Amendments to the constitution "have penumbras, formed by emanations from those guarantees that help give them life and substance." Essentially, implied fundamental rights can be derived from the underlying principles of the constitutional text that one could reasonably apply those principles to more novel circumstances.)

175. *Gary B.*, 957 F.3d at 653.

176. *Id.* (citing Brief for Defendants, *supra* note 100 at 51-52).

177. *Id.*; *Obergefell*, 576 U.S. at 664 (continuing "The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to

The Sixth Circuit majority also pointed out the existence of a historical understanding of education as a "great equalizer" in society.[178] *Plyler* lends credence to this notion, explaining:

> education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all . . . denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers present on the basis of individual merit.[179]

The Court takes a progressive view on correcting past discrimination:

> [t]he Supreme Court's desegregation cases make it clear that state-provided public education is important not just to provide a shot at achievement in the face of inequalities of wealth and power, but specifically as a means of addressing past racial discrimination that restricted educational opportunities, and of course to maintain as best we can whatever equal opportunity has already been achieved.[180]

Accordingly, the Sixth Circuit found that the second prong of the *Glucksberg* test was met; "[p]roviding a basic minimum education is necessary to prevent such an arbitrary denial, and so is essential to our concept of ordered liberty."[181] As both prongs of the *Glucksberg* test were met, the majority determined that access to a basic minimum education—access to literacy—was a fundamental right which is protected by the Fourteenth Amendment to the Constitution.[182]

c. Contours to the fundamental right to a basic minimum education under the majority's holding

Part of the analysis under *Glucksberg* is that the Court must present "a careful description of the asserted fundamental liberty interest."[183] *Obergefell* interpreted this language to "at least define the extent of the right needed to resolve the matter at hand."[184] The Sixth Circuit narrowly defined the fundamental right of access to literacy here. The right does not guarantee the quality of education the American public expects.[185] The holding merely guaranteed

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future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning). When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed." *Id.*

178. *Gary B.*, 957 F.3d at 654 (discussing the "great equalizer concept" that "regardless of the circumstances of a child's birth, a minimum education provides some chance of success according to that child's innate abilities").

179. *Plyler*, 457 U.S. at 221-22.

180. *Gary B.*, 957 F.3d 654.

181. *Id.* at 655.

182. *Id.*

183. *Glucksberg*, 521 U.S. at 721.

184. *Gary B.*, 957 F.3d at 659 (interpreting *Obergefell*, 576 U.S. at 671).

185. *Id.*

"access to skills that are essential for the basic exercise of other fundamental rights and liberties, most importantly participation in our political system."[186] When this case reached the Sixth Circuit at the motion to dismiss stage, the court was not the proper fact finder to determine with exact specificity what level must be required by the State of Michigan, but it provided a contour for the district court to consider on remand.[187]

The majority noted that specific educational outcomes cannot be prescribed constitutionally.[188] Rather, the holding of the court mandated that the state provide "at least a rudimentary educational infrastructure, such that it is plausible to attain literacy within that system."[189] Three basic components are involved in this determination according to the majority: facilities, teaching, and educational materials.[190] The quality provided by the state in each of these categories must be reasonably sufficient that students have a plausible chance of becoming literate.[191]

d. Do Plaintiffs plausibly allege that they were deprived of such an education?

Finally, as a procedural manner, the court discussed whether, under *Iqbal*, the Plaintiffs plausibly alleged that they were deprived of the education described above.[192] The court reasoned that should Plaintiffs' allegations be factually confirmed, they "would demonstrate that they have been deprived of an education providing access to literacy."[193] As Defendants merely argued that

186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.* at 660.
190. *Id.*
191. *Id.*
192. *Id.* at 661; *see also Iqbal*, 556 US. At 678 (holding that "a claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged").
193. *Gary B.*, 957 F.3d at 661 (Plaintiffs adequately allege that they attend schools which are "functionally incapable of delivering access to literacy"). Plaintiffs' Class Action Complaint, *supra* note 61 at 4, 19. The court determines that in accordance with *Iqbal* and *Twombly*, plaintiffs' allegations that their schools have "significant teacher shortages;" "unqualified instructors;" "dangerous and distracting conditions" ("including extreme temperatures, overcrowding and lack of hygiene"); and "a dearth of textbooks and other school supplies" reasonably leads to an inference that Plaintiffs' schools cannot provide an access to literacy. *Gary B.*, 957 F.3d at 661; *see also Iqbal*, 556 U.S. at 677-78; *Twombly*, 550 U.S. at 555-57. Although outcomes are not constitutionally guaranteed, statistical data cited by the Plaintiffs showing rates of proficiency hovering around zero further support their claims. *Gary B.*, 957 F.3d at 661. As this case is on appeal at the motion to dismiss stage where the appellate court must construe all the allegations by the plaintiff as true, the court reasons that the Plaintiffs adequately allege that their schools deprive them of the fundamental right to access literacy previously defined by the court. *Id.*

there existed no fundamental right and the court has now found otherwise, there was no reason to analyze whether the "deprivation is narrowly tailored to advance a compelling state interest" at this stage of the litigation.[194] As such, the district court's dismissal of plaintiffs' fundamental rights claim was reversed and remanded, meaning that the Sixth Circuit recognized a fundamental right to literacy, thereby compelling the use of strict scrutiny for deprivations of the newly-minted right.[195]

B. Dissent

In dissent, Justice Murphy of the Sixth Circuit mainly cited the legislative branch as the proper decisionmaker for which to correct this "socioeconomic ill."[196] The dissent preferred to apply *Rodriguez,* which expressly states "education 'is not among the rights afforded explicit protection under our Federal Constitution'" as compared to *Plyler*.[197]

1. Fundamental Right to a Basic Minimum Education

The dissent began by discussing the Plaintiffs' claim that a basic minimum education was an implied fundamental right under the United States Constitution.[198] It noted that cases like *Rodriguez* signal the Supreme Court's unwillingness to grant education as a fundamental right.[199] In refuting the Plaintiffs' narrower claim that some basic minimum level of education was fundamental, as suggested in *Papasan*, the dissent argued that "[s]ubstantive due process has never compelled states to provide their residents with the funds they need to exercise fundamental rights."[200]

First, the dissent argued that the majority's holding is counter to the prevailing line of Supreme Court precedent; cases like *Kadrmas*, *Papasan*, *Plyler*, and *Rodriguez* all decline to recognize

194. *Gary B.*, 957 F.3d at 661 (citing *Glucksberg*, 521 U.S. at 721 (additional citation omitted)).

195. *Id.* at 662.

196. *Gary B.*, 957 F.3d at 662 (Murphy, J., dissenting) (arguing that the United States Constitution "does not give federal courts a roving power to redress 'every social and economic ill'" (quoting Lindsey v. Normet, 405 U.S. 56, 74 (1972))).

197. *Id.* (citing *Rodriguez*, 411 U.S. at 35).

198. *Id.* at 664.

199. *Id.*

200. *Id.* (Dissent argues that Plaintiffs' insistence on state provided basic minimum education to allow them to exercise other rights which are deemed fundamental amounts to "an unprecedented subsidy for an unprecedented right"). It is uncomfortable with the imposition of a new positive right which effectively compels a state to provide governmental aid; such a holding conflicts with caselaw both under the substantive due process context, but also more generally in the cases before the court which previously addressed the question of education as a fundamental right. *Id.*; *see also Papasan*, 478 U.S. at 285.

education as a fundamental right.[201] Further, the more tailored argument presented by the Plaintiffs was not persuasive.[202] Regardless, the dissent argued that the Sixth Circuit need not even address the question of whether a "minimally adequate" education is fundamental, noting "[e]ven if the Constitution contains this implied right, the plaintiffs' substantive-due-process claim must fail for a more rudimentary reason."[203]

The dissent found a relevant distinction in negative rights versus positive rights, which the majority glossed over.[204] According to the dissent, just because the Plaintiffs require literacy to participate in the democratic process or in the exercise of other fundamental rights, this does not compel the state to affirmatively offer literacy to ensure their ability to participate in the exercise of these rights.[205]

The dissent relied on the language of the Due Process Clause.[206] It concluded that the language of the Due Process Clause is "phrased in the negative," effectively prohibiting a state from "depriving" individuals of "life, liberty, or property."[207] Analysis of the text's meaning concludes that the clause acts "as a limit on the state's power to intrude on private rights" as opposed to being used to "compel Congress to offer public services."[208]

After setting the stage for its due process analysis, the dissent reasoned that the Plaintiffs never asserted the "State of Michigan has 'take[n] away' their liberty to obtain a minimum education of their choice."[209] Plaintiffs claimed "that the state has *deprived* them of an education because the state has not *provided* them with an education" does not pass due process muster.[210] Additionally, the

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201. *Gary B.*, 957 F.3d at 664 (Murphy, J. dissenting) (arguing that the Circuit court is not in a position to rule against such definitive Supreme Court precedent).

202. *Id.*

203. *Id.*

204. *Id.* (arguing "[t]he Supreme Court has long recognized a 'basic' constitutional difference between a state's use of its coercive power to regulate its residents and the state's refusal to sue its spending power to give them things"). (citing Maher v. Roe, 432 U.S. 464, 475 (1977). In support, the dissent provides a free speech example: "[j]ust because the Free Speech Clause bars a state from banning its citizens' political speech, does not mean that the clause requires the state to give them the funds they need to engage in that speech." *Id.* (citing Eu v. San Francisco Cty. Democratic Cent. Comm., 489 U.S. 214, 222-23 (1989); Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 364 (2009)).

205. *Id.*

206. *Gary B.*, 957 F.3d at 665-66; *see also* U.S. CONST. amend. XIV, § 1 (stating in pertinent part "nor shall any state deprive any person of life, liberty, or property, without due process of law").

207. *Id.* at 666 (citing Archie v. City of Racine, 847 F.2d 1211, 1220 (7th Cir. 1988)).

208. *Id.* (quoting David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 865-66 (1986)).

209. *Id.*

210. *Id.* (noting that "[o]nly in an area where 'process' equals 'substance' could 'deprive' equal 'provide'").

dissent noted that at the adoption of the Fourteenth Amendment, it was never read to affirmatively compel state-sponsored public schooling.[211]

Next, the dissent turned to an analysis of the nature of the Supreme Court's substantive due process decisions, namely the connection these cases have on state spending power.[212] Here, the dissent argued the majority is effectively compelling state spending through its decision: "[the Plaintiffs' due process] claim must fail . . . [because] [t]he Due Process Clause 'confer[s] no affirmative right to governmental aid.'"[213]

The dissent then turns to the implication of federalism in our country. By recognizing a new fundamental right to a basic minimum education, the majority "undercut[s] the people's interest in local decisionmaking [sic] whenever they nationalize new extratextual rights."[214] As public education is traditionally reserved to the states the majority intervened in an area best left to state and local legislatures by providing a new nationalized extratextual right.[215] The dissent argued that each state is in a better position than Congress or the federal judiciary to determine how best to address "'intractable economic, social, and even philosophical problems' associated with this issue."[216] Additionally, while no positive right to education exists in the Constitution, the diseent noted many states have created this positive right in their own state constitutions.[217] The majority's holding therefore foreclosed on the "political liberty" of the people of each state to determine the scope

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211. *Id.* (noting that reading the Fourteenth Amendment in this way would effectively "have meant that Congress had been violating the Fifth Amendment for decades" as they had not established a national public school system"); *see also* U.S. CONST. amend. V (stating in pertinent part "No person shall…be deprived of life, liberty, or property, without due process of law. . ."). Essentially, the dissent argues that as the Fourteenth Amendment in large part confers the protections of the Fifth Amendment to further protect against state action, by reading the Fourteenth Amendment to provide a positive right to public education is incompatible without an understanding that the Fifth Amendment imposes the same thing on the federal government. *See Gary B.*, 957 F.3d at 666 (Murphy, J. dissenting).

212. *Gary B.*, 957 F.3d at 667 (Murphy, J. dissenting).

213. *Id.* (quoting DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 486 U.S. 189, 196 (1989)) (holding that on substantive due process grounds, a state has no affirmative duty to intervene in a deprivation of a person's rights protected under the Fourteenth Amendment where that deprivation is perpetrated by private actors).

214. *Id.* at 668 (arguing that the nationwide expansion "place[s] the matter outside the arena of public debate and legislative action' within each state." *Id.* (quoting *Glucksberg*, 521 U.S. 702, 720)).

215. *Id.* at 669.

216. *Id.* (quoting *Rodriguez*, 411 U.S. at 42) (arguing that the states act as "laboratories for experimentation" to determine how best to distribute state funds to address educational funding issues).

217. *Id.* at 669-70 (citing Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education*, 2014 MICH. ST. L. REV. 429, 450-54 & nn.97-126 (2015)).

of educational rights provided by their own state constitutions.[218]

Finally, under its due process analysis, the dissent looked to the federal judiciary's own place in making this type of determination.[219] According to the dissent, the federal judiciary has "the authority to interpret the law; [but] . . . possess[es] neither the expertise nor the prerogative to make policy judgments."[220] Accordingly, the dissent reasoned that the court is to tread carefully to avoid using the Due Process Clause to impose policy preferences of the court.[221] The dissent is concerned that the majority's holding would create an avalanche of cases before the courts about policy controversies as related to a state's failure in providing a basic minimum education—the so-called "slippery slope."[222] The dissent was deferential to state and local policy makers in this case.[223] Finally, the dissent concluded that federal judicial power lacks the expertise and knowledge to competently decide educational policies; such policy judgments are therefore better left to the states.[224]

2. The Majority's Glucksberg Analysis Still Does Not Permit an Imposition of a Positive Right to Education

Next, the dissent turned to analyzing the majority's *Glucksberg* analysis.[225] It asserted that reliance on "analogies to other allegedly 'positive rights,' . . . dicta in the Supreme Court's education decisions" and history of racial discrimination in education is misplaced; it argued "[n]one of these points permits the positive right to education that the majority finds in the Due Process Clause."[226]

First, the dissent argued that the *Glucksberg* test for finding implied fundamental rights does not apply where it would compel a state to provide government aid.[227] Because *Glucksberg*'s test was formulated in the context of determining the constitutionality of assisted suicide, it was not related to policy decisions compelling

218. *Id.* (citation omitted).

219. *Id.*

220. *Id.* (quoting Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 538 (2012)).

221. *Id.* (citing *Glucksberg*, 521 U.S. at 720).

222. *Id.*

223. *Id.* at 671 (reasoning that "[f]ederal courts are not equipped to determine personnel policies or teacher-certification rules for the schools across this country").

224. *Id.*

225. *Id.*

226. *Id. See also* Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 ALB. L. REV. 1459, 1462 (2010) (explaining that positive rights are rights which impose affirmative obligations on the government whereas negative rights provide freedom to the people from governmental action).

227. *Gary B.*, 957 F.3d at 671 (Murphy, J. dissenting).

state spending.[228] Explicitly, the dissent argued that the *Glucksberg* test "should not even enter the field when a plaintiff challenges a state's alleged failure to provide a public service (as in this case), as opposed to its deprivation of a liberty or property interest."[229]

Even if *Glucksberg* did apply, the dissent further found that Plaintiffs' due process claim would not satisfy the test.[230] Justice Murphy was not persuaded that the Plaintiffs' characterization of their liberty interest in the more narrow sense (fundamental right to a basic minimum education) was any different from that put forth in other Supreme Court cases like *Rodriguez*.[231] The distinction between a "right to literacy" and a generalized right to education complicates the historical tradition prong of the *Glucksberg* test.[232] The support cited by the Plaintiffs to establish a historical tradition is not narrowly tailored to a "right to literacy."[233] Further, the *Glucksberg* court specifically cautioned that establishment of new fundamental rights should be done carefully.[234] The dissent was concerned that the Plaintiffs' claim to a "right to literacy" was too broad such that it "would mandate far more day-to-day federal oversight of the states' schools."[235] The dissent accused the Plaintiffs of merely "relabeling" the liberty interest, which was rejected by the Supreme Court's previous education cases.[236]

Next, the dissent addressed the Plaintiffs' assertions accepted by the majority that cases like *Rodriguez* and *Papasan* specifically left open: the question of whether there existed some basic minimum education.[237] In refuting this question, the dissent noted that these cases were decided in an equal protection context and did not involve substantive due process.[238] Instead, the dissent

228. *Id.*

229. *Id.* at 672 (noting the distinction between applications of the *Glucksberg* test in cases like *Glucksberg* or *Casey*); *see also Glucksberg*, 521 U.S. at 702; *Casey*, 505 U.S. at 833. The dissent analogizes the majority's reliance on "*Glucksberg* to find a right to a taxpayer-funded education is like relying on *Roe v. Wade* to find a right to a taxpayer funded abortion." *Id.*; *see also* Roe v. Wade, 410 U.S. 113 (1973).

230. *Gary B.*, 957 F.3d at 672 (Murphy, J. dissenting).

231. *Id.*

232. *Id.*; *see also Glucksberg*, 521 U.S. at 721; *Gary B.*, 957 F.3d at 649-52 (Majority's analysis of the historical tradition under *Glucksberg*).

233. *Gary B.*, 957 F.3d at 672 (Murphy, J. dissenting).

234. *Glucksberg*, 521 U.S. at 721.

235. *Gary B.*, 957 F.3d at 673 (Murphy, J. dissenting).

236. *Id.*

237. *Id.*; *see also Rodriguez*, 411 U.S. at 36-37 (stating "[e]ven 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 Papasan*, 478 U.S. at 285 (interpreting the language of the previous sentence in *San Antonio Indep. Sch. Dist. v. Rodriguez* to leave open the requisite question of "whether a minimally adequate education is a fundamental right").

238. *Gary B.*, 957 F.3d at 675 (Murphy, J. dissenting).

reconciled this case with *DeShaney v. Winnebago County* by arguing that *DeShaney*'s default rule, which established that substantive due process cannot compel state spending, applied in this instance.[239] The dissent noted that the Equal Protection Clause, in some cases, can compel public spending to require a state to provide resources equally.[240] Alternatively, the dissent characterized *Papasan*'s explicit question—read by the Plaintiffs and majority to leave open the question of a basic minimum education—to instead "reserve only 'whether a statute alleged to discriminatorily infringe that [potential] right should be accorded heightened equal protection review.'"[241] In its analysis, the dissent did not foreclose the possibility that the Plaintiffs could seek a remedy under equal protection grounds, however, it, like the majority, felt that the Plaintiffs failed to adequately plead a valid equal protection claim.[242] As the dissent thought the majority and Plaintiffs impermissibly married Supreme Court education precedent under the Equal Protection Clause, Plaintiffs' claim should fail.[243]

Finally, the dissent disagreed with the majority that America's history of racial discrimination in education supports the establishment of the right to literacy in this case.[244] It argued that the Fourteenth Amendment does not create a substantive right to a minimum level of education, but instead created a right for equality where the state chooses to provide for education.[245] In discussing *Brown's* relevance in this case, the dissent seemingly argued that the Fourteenth Amendment (as supported by *Brown*) merely regulates that should the state provide for education, it must do so equally.[246] To the dissent, however, "equal" seems to mean that the state cannot impermissibly discriminate on the basis of race; "equal" does not in this case seem to apply for equal distribution of resources as the Plaintiffs allege.[247]

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239. *Id.*; *see also DeShaney*, 486 U.S. at 189 (1989) (holding that on substantive due process grounds, a state has no affirmative duty to intervene in a deprivation of a person's rights protected under the Fourteenth Amendment where that deprivation is perpetrated by private actors).

240. *Gary B.*, 957 F.3d at 675 (Murphy, J. dissenting).

241. *Id.* (quoting *Papasan*, 478 U.S. at 285).

242. *Id.* at 676.

243. *Id.* (arguing that the Plaintiffs "seek something quite novel: heightened scrutiny under substantive due process for Michigan's failure to properly subsidize their alleged fundamental right to a minimum education. The Supreme Court's equal-protection cases do not support that substantive-due-process request"). *Id.*

244. *Id.*

245. *Id.*; *see also* U.S. CONST. amend. XIV (stating in pertinent part "[n]o State shall make or enforcce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

246. *Gary B.*, 957 F.3d at 677-78 (Murphy, J. dissenting).

247. *Id.*

3. Plaintiffs' Compulsory Attendance Claim

Finally, the dissent concurred that the Plaintiffs' failed to adequately plead the compulsory attendance claim in their complaint and thus have forfeited it on appeal. However, it disagreed with the majority's conclusion that this claim has support in the law, should they be able to seek leave to amend on remand.[248] The dissent argued that the *Youngberg* exception relied on by the Plaintiffs and majority, which provides that the state is under a duty to provide public aid where an individual is under strict state control, does not apply here.[249] It argued that students are not sufficiently constrained to "raise a school's common law obligation to the rank of a *constitutional* duty."[250] Accordingly, the dissent found no support in Plaintiffs' compulsory attendance claim, even if it had been adequately plead.[251] In sum, the dissent would have affirmed the holdings of the district court.[252]

IV. PERSONAL ANALYSIS

Plaintiffs in *Gary B.* presented a due process and equal protection argument to attempt to establish a fundamental right to education. In this section, I will analyze the methods by which prospective plaintiffs may attempt to establish a fundamental right to education. I will explore the deficiencies of the due process and equal protection approach that has been unsuccessful before the Supreme Court, and instead posit a new approach—through the Privileges and Immunities Clause of the Fourteenth Amendment. Finally, I will briefly examine a more recent fundamental right to education case on the federal docket and examine the possible qualities which may more effectively establish a fundamental right to education.

While the majority in *Gary B.* accepted a substantive due process approach to establishing a fundamental right to education, the fundamental right can be established many different ways.[253] Plaintiffs fail on a second route to establish literacy as a fundamental right—under equal protection grounds—though the court noted that on remand they may seek to amend their equal

248. *Id.* at 678.

249. *Id.* (citing *Youngberg*, 457 U.S. at 317).

250. *Id.* (quoting Doe v. Claiborne County, 103 F.3d 495, 510 (6th Cir. 1996) (holding that although there exists a common law duty to provide a safe environment, that duty is not a constitutional duty). The dissent further argues that if a constitutional duty has been rejected in the context of a "safe" learning environment, surely that decision would not be usurped by a claim seeking to establish a constitutional duty in an "adequate" learning environment. *Id.*

251. *Id.* at 679.

252. *Id.*

253. *See id.* at 642.

protection claim.[254] Both of these routes, while effective, ignore the Privileges and Immunities Clause of Article IV and the Fourteenth Amendment.[255] While the majority discusses the historical tradition as part of their substantive due process approach under the *Glucksberg* test, it may be easier to establish a fundamental right to literacy under the theoretical idea of the "lived constitution."[256] The exclusion of the right among those explicitly enumerated is of no consequence; the Ninth Amendment safeguards those implied rights which the people deem necessary to protect.[257] In conjunction with the Fourteenth Amendment, the Ninth Amendment aids in establishing rights which are so common in our society that they should be, or contemporarily are believed to be protected by, our federal constitution.[258]

The establishment of a right to education in all fifty states in addition to the judicially recognized fundamental right to education in some states signals a ratification by the people that state-funded education is indeed *fundamental* to their own lives.[259] As such, a fundamental right to literacy may reasonably be derived from the Privileges and Immunities Clause of the Fourteenth Amendment. While the federal constitution is not meant to protect against every "social and economic ill," it should provide recourse where the government effectively excludes a subjugated class from any reasonable access to becoming literate.[260]

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254. *Id.* at 637.

255. U.S. CONST. amend. XIV (stating in pertinent part "*[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States*; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (emphasis added)).

256. AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION 95 (2012) (arguing that there exists an unwritten "lived constitution" which underlies and supplements our written constitution). Applied here, Americans' lived experiences have come to expect government funded public schooling to the extent that a functional deprivation of it runs afoul of both the state and federal constitutions.

257. *See* U.S. CONST. amend. IX (stating "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people").

258. *See,* Griswold v. Connecticut, 381 U.S. 479 (1965).

259. *See* Trish Brennan-Gac, *Educational Rights in the States*, ABA HUM. RTS. MAG., www.americanbar.org/groups/crsj/publications/human_rights_magazinm_home/2014_vol_40/vol_40_no_2_civil_rights/educational_rights_states/ (last visited July 15, 2022) [www.perma.cc/6L3M-CZMR]

] (recognizing that as of 2014, twenty-two states (Wyoming, North Carolina, Maryland, California, Connecticut, Washington, West Virginia, Mississippi, Oklahoma, Wisconsin, Kentucky, Alabama, Minnesota, New Hampshire, Tennessee, North Dakota, Virginia, Arkansas, Montana, New Jersey, South Carolina, and Vermont) recognize education as a fundamental right).

260. *Gary B.*, 957 F.3d at 662 (Murphy, J., dissenting) (arguing that the United States Constitution "does not give federal courts a roving power to redress 'every social and economic ill'" (quoting Lindsey v. Normet, 405 U.S. 56,

Finally, in settling this case, the Plaintiffs were unable to answer the question of whether a fundamental right to literacy exists under our federal Constitution.[261] As such, I look ahead to current pending litigation to determine the plausibility that the Supreme Court may soon consider the generalized question of whether education is a fundamental right.

A. Establishing a Fundamental Right to Education Through Traditional Due Process and Equal Protection Analysis Can be an Arduous Process

The discourse between current Supreme Court jurisprudence and the interplay between the majority and dissent in *Gary B.* show that reasonable minds may disagree about the analysis of education as a fundamental right both under due process and equal protection analyses. *Rodriguez, Plyler, Papasan* and *Kadrmas* are instructive on the difficulty of sustaining an equal protection claim. The only case where Plaintiffs succeed is *Plyler*, and only where the state blatantly deprives a discrete class of students from participating in public education.[262] Similarly, Plaintiffs in *Gary B.* fail to adequately allege sufficient facts that they are treated any differently than other schoolchildren in the state.[263] Separate and apart from their inability to adequately allege disparate treatment, a showing of discriminatory intent is often required to establish the plaintiffs as a suspect classification, as equal protection is more concerned with prohibiting discrimination by the government than it is with safeguarding equal results.[264] While discriminatory purpose may often exist, there are evidentiary problems in specifically alleging discriminatory intent absent a congressional record indicating discriminatory intent.[265] Where there exists a history of purposeful racial discrimination (as is the case here with America's history of public school segregation), "unconscious racism . . . underlies much of the racially disproportionate impact of governmental policy."[266] Constitutional law scholar and University

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74 (1972)).

261. Gary B. v. Whitmer, No. 18-1855, 2020 U.S. App. LEXIS 18312 (6th Cir. June 10, 2020).

262. *See Rodriguez*, 411 U.S. at 1; *Plyler*, 457 U.S. at 202; *Papasan*, 478 U.S. at 265; *Kadrmas*, 487 U.S. at 450.

263. *Gary B.*, 957 F.3d at 635 (holding that Plaintiffs' complaint "focuses on school conditions and inadequately alleges state policies or actions that caused those conditions within Plaintiffs' schools and not in others").

264. *See* Washington v. Davis, 426 U.S. 229, 240 (1976) (holding that "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced back to a racially discriminatory purpose").

265. *See* Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989).

266. Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 355 (1987).

of Chicago Law School Professor David Strauss argues that where such history of racial discrimination exists, there is a reasonable presumption that laws which have a discriminatory impact likely stemmed from a discriminatory purpose.[267] Thus, even if the Plaintiffs in *Gary B.* were able to seek leave to amend and file a factually sufficient equal protection claim, it would be unlikely that they would be able to establish their class as suspect to receive heightened scrutiny. An analysis under the rational basis test will likely defeat the Plaintiffs' case.

Establishing the fundamental right under due process presents different challenges. Although the majority in *Gary B.* provided a well-reasoned *Glucksberg* analysis and concluded that education is a fundamental right, there may be an easier way. First, the Due Process Clause by itself implies that no matter how fundamental the right, there exists some level of process which allows the government to infringe and possibly deprive one of that right.[268]

Likewise, constitutional law scholar and Yale Law School Professor Akhil Amar discusses Justice Harlan's "substantive due process" established in *Griswold* as oxymoronic.[269] Amar opines that the underlying concept of substantive due process evolved out of many of the most repugnant Supreme Court decisions to date—*Dred Scott v. Sanford* [270] and *Lochner v. New York*.[271] Amar instead suggests that in applying implied rights under the Constitution, the

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267. *See* David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935 (1989). David A. Strauss is the Gerald Ratner Distinguished Professor of Law at The University of Chicago Law School. *David A. Strauss*, U. CHI. L. SCH., www.law.uchicago.edu/faculty/strauss [perma.cc/8FTZ-TA3Y] (last visited June 19, 2022).

268. *See* U.S. CONST. amend. XIV (stating in pertinent part "nor shall any State deprive any person of life, liberty, or property, *without due process of law*" (emphasis added)); *see also* Korematsu v. United States, 323 U.S. 214 (1944) (holding that strict scrutiny applied to governmental orders to relocate Japanese Americans during World War II to internment camps, but that there existed "a pressing public necessity" which made governmental action constitutional) *overruled by* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

269. Amar, *supra* note 256, at 119 (arguing that Justice Harlan's groundbreaking opinion in *Griswold* where he pens the phrase "substantive due process" "borders on an oxymoron. Substance and process are typically understood as opposites"). Akhil Reed Amar is Sterling Professor of Law and Political Science at Yale College and Yale Law School. *Akhil Reed Amar*, YALE L. SCH., www.law.yale.edu/akhil-reed-amar. [perma.cc/XJE5-D28P] (last accessed June 19, 2022).

270. Dred Scott v. Sandford, 60 U.S. 393 (1857) (holding that under the Fifth Amendment Due Process Clause, people of African descent brought to America as slaves were not considered citizens of the United States and therefore were not protected by the Constitution of the United States) (effectively overruled by U.S. CONST. amend. XIII; U.S. CONST. amend. XIV; U.S. CONST. amend. XV).

271. Amar, *supra* note 256, at 119; *see also* Lochner v. New York, 198 U.S. 45 (1905) (holding unconstitutional state regulation of working hours mutually agreed upon by employer and employee as a violation of freedom to contract under the Fourteenth Amendment's Due Process Clause).

approach championed by Justice Harlan in *Griswold* would be better established though "the overlooked privileges-or-immunities clause" as opposed to "the overworked due-process clause."[272]

B. The Right to Literacy is a Fundamental Right Under America's "Lived Constitution"

In *America's Unwritten Constitution*, Amar dedicates an entire chapter to a theory which he describes as "America's Lived Constitution."[273] For Amar, the idea is that implications of popular sovereignty play into any extratextual interpretation of the Constitution.[274] Amar opines that "[t]he Ninth and Fourteenth Amendments . . . invite [us] to root [our] claim of right directly in the principles of truth, justice, and the American way as understood and practiced by the American people."[275] Such a reading of the Constitution is still consistent with the text. For one, in the context of a fundamental right to literacy, its establishment is wholly compatible with the Preamble to our Constitution.[276] It is our lived experience that for many people in America, the only way to reasonably attain literacy is through government funded public education. To deduce that the public schooling system does not guarantee reasonable access to literacy is an affront to the values of justice, welfare and liberty espoused in our Constitution.[277]

1. The Ninth Amendment's Role in Establishing Unenumerated Rights

The Ninth Amendment states in pertinent part: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by *the people*."[278] In "echoing the Preamble," the Ninth Amendment invites the interpreter to determine the role of popular sovereignty in their

272. Amar, *supra* note 256, at 121.

273. *Id.* at 95.

274. *Id.* at 103 (arguing "We must also consider *lived* rights. Simply put, many of the Ninth Amendment rights of the people and the Fourteenth Amendment privileges and immunities of citizens may be found in everyday American life—in the practices of ordinary Americans as they go about their affairs and in the patterns of laws and customs across the land). The rights of *the people* include various rights that the people themselves live out; the fundamental privileges and immunities *of citizens* encompass those things that the citizens themselves treat as fundamental in their rhythms and routines").

275. *Id.*

276. *Id.*; *see also* U.S. CONST. pmbl. (stating "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America).

277. U.S. CONST. pmbl.

278. U.S. CONST. amend. IX (emphasis added).

understanding of unenumerated rights. Only where the people "have in some way or another endorsed, embraced, enacted or embodied" the specific right should it be among those rights retained through the Ninth Amendment.[279]

In *Griswold*, Justice Harlan, writing for the majority, briefly mentioned the Ninth Amendment in establishing a fundamental right to privacy through his "penumbral approach."[280] More explicitly, in concurrence, Justice Goldberg wrote to "emphasize the relevance of [the Ninth] Amendment to the Court's holding.[281] While Justice Harlan advocated for the penumbral approach on its own, Justice Goldberg advocated for the penumbral approach espoused by the majority in conjunction with the Ninth Amendment.[282] Similarly, Amar advocates for the Ninth Amendment in strengthening a Fourteenth Amendment claim of an implied or unenumerated right under the lived constitution theory.[283] In his analysis, he considers two plausible methods of interpreting the Ninth Amendment: to read the word "retained" to suggest that the rights were held at the adoption of the Ninth Amendment or to read "retained" to encompass natural rights—those that existed prior to the institution of formalized government.[284] The latter reading, Amar reasons, allows the Constitution to be more flexibly applied.[285]

2. Establishment of Fundamental Right to Literacy Under the Privileges and Immunities Clause of the Fourteenth Amendment

The Privileges and Immunities Clause, unlike the Due Process Clause, is derived from the Constitution itself.[286] There is no common law interpretation of the Privileges and Immunities Clause, whereas due process jurisprudence has evolved to encompass far more than just "process."[287] In this respect, establishing the right to literacy through the Privileges and Immunities Clause finds legitimacy in the fact that the people ratified the express language of the Constitution.[288]

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279. Amar, *supra* note 256, at 103.

280. *Griswold*, 381 U.S. at 484 (holding that a "zone[] of privacy" existed among the penumbras of the Bill of Rights).

281. *Griswold*, 381 U.S. at 487 (1965) (Goldberg, J. concurring).

282. *Id.* at 493 (arguing "the Ninth Amendment simply lends strong support to the view that the 'liberty' protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments").

283. Amar, *supra* note 256, at 103.

284. *Id.* at 108-09.

285. *Id.*

286. U.S. CONST. art. IV, § 2, cl. 1; U.S. CONST. amend. XIV, § 1; *see also Glucksberg*, 521 U.S. at 702.

287. *See* Amar, *supra* note 256.

288. U.S. CONST. art. IV, § 2, cl. 1; U.S. CONST. amend. XIV, § 1.

The Fourteenth Amendment's Privileges and Immunities Clause states in pertinent part: "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[289] "The clause naturally directs interpreters to muse upon the wisdom of ordinary citizens rather than the case law of judges. Many of the privileges and immunities *of* citizens may be found by paying heed *to* citizens—what they do, what they say, what they believe."[290] Justice Harlan took a similar approach in *Griswold,* reasoning that citizens had almost universally come to expect that they had the privilege of marital privacy and access to contraceptives.[291] In the context of establishing an implied fundamental right to education, Americans have come to expect public education to be provided by the states. As previously noted, at the adoption of the Fourteenth Amendment, thirty-six of thirty-seven states had express provisions within their state constitutions providing for public education.[292] By 1960, Wyoming, Maryland and North Carolina had established education as a fundamental right under state law.[293] As of 2014, twenty-two states had established education as a fundamental right.[294] The trend of all fifty states providing public education and the growing trend of states establishing education as a fundamental right which may not be infringed upon shows that the democratic process indicates that Americans favor education as a right. This growing recognition of a fundamental right to education is therefore precisely the type of right which may be established under the combination of the Ninth and Fourteenth Amendments.

Deprivation of this right across different states serves to be a violation of the Privileges and Immunities Clause. As noted in *Corfield v. Coryell*, this clause protects

> privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every

289. U.S. CONST. amend. XIV.

290. Amar, *supra* note 256, at 119-20.

291. *Id.* at 120.

292. Calabresi & Agudo, *supra* note 160, at 108.

293. Brennan-Gac, *supra* note 259.

294. *Id.*; *see* also Serrano v. Priest, 557 P.2d 929 (Cal. 1977); Abbott v. Burke, 575 A.2d 359 (N.J. 1990); Tennessee Small School Systems v. McWherter, 851 S.W.2d 139 (Tenn. 1993); McDuffy v. Secretary of Education, 615 N.E.2d 516 (Mass. 1993); Rose v. Council for Better Education, 790 S.W.2d 186 (Ky. 1989); Edgewood Indep. School Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989) (all establishing a fundamental right to education under their own state constitutions).

> kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.[295]

A basic minimum education is a fundamental right which implicates the *Gary B.* Plaintiffs' "enjoyment of life and liberty" and their ability "to pursue and obtain happiness" and avoid undue restraint on the part of the government.[296] For a right as integral to success in our society as education, inequity is only exacerbated where some states provide for it as a fundamental right and others do not. Under the Privileges and Immunities Clause, the right to education is one which federal recourse should be available for those who are unjustly deprived of a reasonable opportunity to be educated.

Critics posit that establishment of a fundamental right to literacy or more generally, education, is better left to the legislative branches and the states.[297] Where the legislative branch does not undertake the responsibility to ensure its constituents rights are adequately protected, judicial review exists as a mechanism for redress.[298] As Americans, we have come to expect state-provided public education, such that a deprivation in quality to a discrete group of inner-city school children is an affront to the values espoused by our federal Constitution. The importance of literacy in today's society effectively compels states to provide literacy to schoolchildren whom they have undertaken a duty to teach. Literacy is, therefore, part of our "lived constitution."[299] As literacy reasonably facilitates public participation in the political process and enables an individual to be a productive member of our society, it equally meshes with the public policy values enshrined in our Preamble,[300] but has also become a privilege under the Fourteenth Amendment such that it should not be subject to arbitrary governmental deprivation. As the majority in *Gary B.* notes, "it is unsurprising that our political process, one in which participation is effectively predicated on literacy, would fail to address a lack of access to education that is endemic to a discrete population."[301] "The

295. Corfield v. Coryell, 6 F. Cas. 546, 551-52 (1823).

296. *Id.*

297. *Gary B.*, 957 F.3d at 662 (Murphy, J. dissenting).

298. *See generally* Amar, *supra* note 256, at 136 (arguing that "[s]ince the Fourteenth Amendment also envisioned judicial recognition of new rights to supplement Congress whenever Congress was asleep at the switch, overwhelmed with other business, or controlled by critics of Reconstruction, section 5 provides a better benchmark for judicial rights-finding than does Article V. Thus, judges should look for the same broad national support for a new right that would warrant a properly functioning Congress to recognize the right under its own authority."); *see also* U.S. Const. amend. XIV § 5 (stating "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article").

299. Amar *supra* note 256, at 95.

300. U.S. CONST. pmbl.

301. *Gary B.*, 957 F.3d at 655.

lack of literacy of which [Plaintiffs] complain is exactly what prevents them from obtaining a basic minimal education through the normal political process."[302]

Critics (including the dissent in *Gary B.*) further argue that Plaintiffs merely relabel the characterized liberty interest from a more generalized right to education to a more specific right to a basic minimum level of education.[303] What the dissent seemed to ignore, however, is that a basic minimum education is the *bare minimum*. As states and the federal judiciary have refused to provide a legal remedy for students like those in *Gary B.*, plaintiffs must resort to diluted liberty interests to better appeal to the leanings of the court. Such dilution only serves to hurt the country.

C. Looking Forward: A.C. v. Raimondo

Given that Plaintiffs in *Gary B.* subsequently settled with the State of Michigan following the Sixth Circuit's *sua sponte* decision to review its own decision en banc, the decision was vacated and no longer has any precedential value in the Sixth Circuit, nor will it ever reach the Supreme Court.[304] Shortly after *Gary B.*, a new case arguing for a fundamental right to a basic minimum education was filed in Rhode Island.[305]

In *A.C. v. Raimondo*, a class of students filed suit against the state of Rhode Island alleging that the state did not provide them with "an adequate civics education."[306] Similar to the *Gary B.* litigation, the Rhode Island class' claims are predicated on the deprivation of reasonable ability to participate in civic activities brought on by the deprivation of a minimum level of education.[307] Where Plaintiffs in *Gary B.* filed suit under due process and equal protection, plaintiffs in *A.C.* include a violation of the Privileges and Immunities Clause of the Fourteenth Amendment among their claims.[308] Plaintiffs in *A.C.* sought declaratory and injunctive relief—asking the Court to declare access to meaningful education a fundamental right and to prevent the state from enacting laws which interfere with access to receiving a meaningful education.[309]

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302. *Id.* at 655-56.

303. *Gary B.*, 957 F.3d at 673 (Murphy, J. dissenting).

304. *Gary B.*, No. 18-1855, 2020 U.S. App. LEXIS 18312 (6th Cir. June 10, 2020).

305. A.C. v. Raimondo, 2020 U.S. Dist. LEXIS 188769, at *3 (D.R.I. October 13, 2020.

306. *Id.* (stating that, "students allege that various public officials have failed to provide them and other similarly situated students with 'an education that is adequate to prepare them to function productively as civic participants capable of voting, serving on a jury, understanding economic, social, and political systems sufficiently to make informed choices, and to participate effectively in civic activities'").

307. *Id.*

308. *Id.*

309. *Id.* at 4 (providing "the students ask this Court to '[d]eclar[e] that all

While recognizing the *Gary B.* holding and pointing out the importance of civic education in the tumultuous political times we currently inhabit, the District Court was unwilling to "deliver or dictate the solution."[310]

The District Court of Rhode Island applauded the *Gary B.* court's efforts in establishing a fundamental right to literacy by "[standing] on the broad shoulders of Justice Marshall['s]" dissent in *Rodriguez*.[311] The court implied that its denial of a remedy in *A.C.* is not because it disagreed with the *Gary B.* court, but rather, because a right to literacy and a right to a civics education are distinguishable; the court notes that being literate is much more rudimentary to one's ability to participate in civic duties than a civic education would be.[312] The court in *A.C.* concluded the holding of the Sixth Circuit in *Gary B.*, even assuming it still held precedential value in the Sixth Circuit did not extend a basic minimum education to the context of a civics education.[313]

On plaintiffs' equal protection claim, the District Court reasoned that plaintiffs failed to allege sufficient facts to establish that they were part of some suspect class which would trigger heightened scrutiny.[314] Accordingly, the governmental actions were easily sustained under the rational basis test.[315]

While recognizing plaintiffs' privileges and immunities claim, the court does not analyze it in detail.[316] Because the court distinguishes *Gary B.*, it is likely that it would deem a right to a civics education to not be among those expected by the American public such that it effectively becomes a part of our "lived

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students in the United States have a right under the [Constitution] . . . to a meaningful educational opportunity' that will adequately prepare them to be 'capable' voters and jurors, as well as to exercise all of their constitutional rights and function as 'civic participants in a democratic society[.]' Plaintiffs also ask this Court to '[e]njoin[] the defendants . . . from failing to adopt such laws, regulations[,] policies and practices as are necessary to ensure' that those educational opportunities are provided"). (internal citations omitted).

310. *Id.* at 21-22 (holding that "[u]nfortunately, this Court cannot, for the reasons explained below, deliver or dictate the solution — but, in denying that relief, I hope I can at least call out the need for it").

311. *Id.* at 50; *see also* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 70 (1973) (Marshall, J., dissenting).

312. *A.C.* 2020 U.S. Dist. LEXIS 188769, at *51 (holding "[b]ut there is a difference. The examples cited by the court in *Gary B.* to illustrate why literacy is imperative for citizen participation in a functioning democracy — voting, taxes, jury duty, even reading road signs — are all indeed 'inaccessible without a basic level of literacy' — but they are not wholly inaccessible without civics education. So, while it is clearly desirable — and even essential, as I argue in the Introduction — for citizens to have a deeper grasp of our civic responsibilities and governing mechanisms and American history, this is not something the U.S. Constitution contemplates or mandates."). (internal citations omitted).

313. *Id.* at 52-53.

314. *Id.* at 57-58.

315. *Id.* at 58.

316. *See id.* at 3.

constitution."[317] Plaintiffs in *A.C.* therefore fell victim to many of the other fundamental right to education cases filed in federal court and their case was dismissed.[318]

In its public advocacy for a fundamental right to a basic minimum education, plaintiffs in *A.C.* established a website updating their litigation efforts.[319] On their website, attorneys for plaintiffs indicate their intent to appeal to the First Circuit Court of Appeals.[320] Whatever the fate of *A.C.* on appeal, students across the United States continue to voice concerns for the issues of equity in our public school systems. Even if the courts are unwilling to redress these concerns, the national spotlight on these issues can only serve to shed light where there is darkness.

V. CONCLUSION

While the Sixth Circuit briefly established a fundamental right to a basic minimum education in the form of literacy, its subsequent history demoted its precedential value to be merely persuasive. As opined by the District Court of Rhode Island in *A.C.*, "[the *Gary B.* opinion] makes a compelling argument grounded in history, precedent, constitutional interpretation, and public policy. It has the spirit of Justice Marshall's *Rodriguez* dissent in its sail . . . it stands as a significant articulation of the importance of education to our democracy."[321]

Unfortunately for Plaintiffs and the majority in *Gary B.*, the fight is not over. Disparities still exist in public education, placing some students in a better position to succeed than others. While unsuccessful, cases like *Gary B.* and *A.C.* provide important discourse on racial, social, and economic disparities in America today.[322] Establishment of a fundamental right to literacy is one small step on the journey towards establishing education as a fundamental right more generally. As eloquently explained by the District Court in *A.C.*:

> This case does not represent a wild-eyed effort to expand the reach of

317. *See id.* at 51 (holding "while it is clearly desirable — and even essential, as I argue in the Introduction — for citizens to have a deeper grasp of our civic responsibilities and governing mechanisms and American history, this is not something the U.S. Constitution contemplates or mandates").

318. *Id.* at 61.

319. *See Cook (A.C.) v. McKee: The Case to Establish a Right to Education Under the U.S. Constitution*, CTR. EDUC. EQUITY, www.cookvraimondo.info/ [perma.cc/5VPB-R9BH] (last visited June 19, 2022).

320. *Id.* (stating "Plaintiffs will appeal the case to the First Circuit. Judge Smith's decision has given them a road map for convincing the appeals court that judicial intervention is necessary to remedy the 'deep flaw' in our nation's education enterprise and remedy the educational adequacy and equity issues the case raises").

321. *A.C.*, 2020 U.S. Dist. LEXIS 188769, at *52.

322. *See id.*; *Gary B*, 957 F.3d at 616.

> substantive due process, but rather a cry for help from a generation of young people who are destined to inherit a country which we — the generation currently in charge — are not stewarding well. What these young people seem to recognize is that American democracy is in peril. Its survival, and their ability to reap the benefit of living in a country with robust freedoms and rights, a strong economy, and a moral center protected by the rule of law is something that citizens must cherish, protect, and constantly work for. We would do well to pay attention to their plea.[323]

Whatever the solution to America's educational equity problems, *Gary B.* and *A.C.* point the spotlight on issues of national importance. We would all benefit by taking a closer look.

323. *A.C.*, 2020 U.S. Dist. LEXIS 188769, at *7.