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Is there a Federal Right to a Minimum Education?

Martha M. McCarthy *

The public school is “the symbol of our democracy and the most persuasive means for promoting our common destiny.”¹

INTRODUCTION

Many years ago in my doctoral dissertation I developed an argument that the U.S. Supreme Court was wrong in *Rodriguez v. San Antonio Independent School District*.² The Court in *Rodriguez* rejected an Equal Protection Clause challenge to Texas’s school funding system, despite huge fiscal disparities across the state’s school districts.³ By a one-vote margin, the Court declared that there is no federal fundamental right to an education and that wealth is not a suspect classification. Therefore, the stringent equal protection test, strict scrutiny, was not triggered to assess the challenge to the state’s school funding system.⁴ Justice Powell, writing for the five-member majority, stated: “Education . . . 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.”⁵ Although the claim in *Rodriguez* was based on the gross inequities across districts, the Court majority seemed to reject the equal protection claim primarily because the plaintiffs failed to prove that Texas did not provide a minimally adequate

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1 *McCullum v. Bd. of Educ.*, 333 U.S. 203, 231 (Frankfurter, J., concurring).

2 Martha M. McCarthy, *A Review of Judicial Precedent Concerning an Individual’s Right to a Public Education Under the United States Constitution* (doctoral dissertation, University of Florida, 1975), available at Xerox University Microfilms, Ann Arbor, MI.

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

4 *Id.* at 38-40.

5 *Id.* at 35.

education for all Texas schoolchildren. The Court left ajar whether there is some amount of education constitutionally required, and if so, what it entails.⁶

This topic has attracted renewed national attention because of a 2020 Sixth Circuit panel decision in *Gary B. v. Whitmer*, finding a Fourteenth Amendment substantive due process right to a minimum education that provides students the opportunity to acquire literacy.⁷ State defendants and the plaintiffs quickly reached a settlement agreement, and the Sixth Circuit en banc vacated the panel decision pending its review. The full court subsequently held that the appeal was moot due to the settlement, which foreclosed future appeals.⁸ Mark Rosenbaum, representing the plaintiffs in *Gary B.*, said that although the case “was over,” the judge’s words “will last. . . forever.”⁹ Thus, despite the panel decision having no precedential value, its arguments and conclusions nonetheless are important to examine as they are influencing other litigation currently in progress.¹⁰

This article first reviews the Sixth Circuit panel decision, settlement agreement, and en banc appellate court action. Then, it explores related recent cases that also address a constitutional right to some level of education. The final section analyzes the viability of arguments asserting a federal right to access to a minimum education under the Fourteenth Amendment and implications of establishing such a federal right.

I. GARY B. V WHITMER: LITIGATIVE HISTORY

The lawsuit is “the major weapon in the arsenal of those who wish to change American public schools.”¹¹

⁶ *Id.* at 36-37.

⁷ 957 F.3d 616 (6th Cir. 2020).

⁸ 958 F.3d 1216 (6th Cir. 2020) (*rehearing en banc granted, opinion vacated*).

⁹ Mark Rosenbaum, quoted by John Wisely, *Michigan Right to Literacy Settlement Stands as Court Rejects Legislature’s Appeal*, DETROIT FREE PRESS, June 10, 2020, available at <https://www.freep.com/story/news/education/2020/06/10/right-literacy-ruling-stands-court-rejects-legislatures-appeal/5337778002/>.

¹⁰ See Mark Walsh, *Full Federal Appeals Court to Reconsider Ruling on Right of Access to Literacy*, School Law, EDUC. WK. blog, May 18, 2020, available at https://blogs.edweek.org/edweek/school_law/2020/05/full_federal_appeals_court.htm; Nat’l Sch. Bds. Ass’n, *Sixth Circuit Vacates Its Panel Decision in Detroit Public Schools Literacy Suit*, LEGAL CLIPS, June 5, 2020; see also *infra* text accompanying note 68.

¹¹ Stephen Sugarman, *Accountability Through the Courts*, SCH. REV. (Feb. 1974), at 235.

A. Federal District Court Ruling

The plaintiffs who initiated the lawsuit were students in five Detroit public schools, including two charter schools, who sued state officials over the deplorable conditions in their schools, asserting that the state of Michigan denied them their Fourteenth Amendment fundamental right to a minimal level of education by which they can attain literacy. They alleged that these schools . . . “wholly lack the capacity to deliver basic access to literacy, functionally delivering no education at all.”¹² Plaintiffs contended that the schools lack qualified teachers; entail slum-like facilities that do not satisfy minimum state health and safety standards; report appalling educational outcomes; and have overcrowded classrooms with inadequate materials and supplies.¹³

The Michigan federal district court had found the state to be an appropriate defendant because of the state’s heavy involvement with the Detroit schools over time, recognizing that “state actors effectively control the schools, at least in part.”¹⁴ The district court also held that the state could not plead Eleventh Amendment immunity because plaintiffs sought prospective relief from the challenged state practices.¹⁵ However, the district court rejected the federal constitutional claims, concluding that there is no fundamental right to a basic level of education.¹⁶

B. Sixth Circuit Panel Decision

On April 23, 2020, the Sixth Circuit panel attracted national attention when it affirmed, by a single vote, the lower court’s opinion in part and reversed in part.¹⁷ The two substantive claims were that the state is the proper defendant and there is a federal constitutional right to access to literacy. Agreeing with the trial court that the state is the

¹² *Gary B.*, 957 F.3d at 624.

¹³ *Id.* at 624-27. Plaintiffs turned to federal court after not receiving relief from the state judiciary on their state constitutional claims.

¹⁴ 329 F. Supp. 3d 344, 354 (E.D. Mich. 2018).

¹⁵ *Id.* at 352-54. *See infra* text accompanying note 19.

¹⁶ *Id.* at 359-68. Although the schools at issue served predominantly students of color, the plaintiffs did not present evidence that schools with a different racial makeup received favorable treatment, so there were no finding of state intervention to exacerbate racial segregation, *id.* at 367-68.

¹⁷ 957 F.3d 616 (6th Cir. 2020).

proper defendant, the appeals court noted “state funding and oversight provisions place public schools ‘under the ultimate and immediate control of the state and its agents.’”¹⁸ It also recognized that the state repeatedly intervened in overseeing public education in Detroit from 1999 until after the complaint was filed. The panel rejected the assertion that the Eleventh Amendment bars the relief sought where the state contributes to ongoing deficiencies in a system established by the state. In short, if the state is part of creating the violation that continues to result in harm, it is obligated to provide a remedy.¹⁹

Regarding the constitutional right to access to literacy, the panel rejected several arguments but, unlike the federal district court, it upheld the substantive due process claim. The panel first rejected the argument that there is a federal right to access to literacy under the Fourteenth Amendment’s Equal Protection Clause.²⁰ It reasoned that the plaintiffs failed to identify specific state policies or procedures that treated them differently from students in other schools in terms of resources and school conditions.²¹ Noting that the Federal Constitution does not guarantee outcomes, the court declined to consider the performance data comparing student achievement in these schools to data from more affluent schools. The court recognized that in *Rodriguez*, the Supreme Court rejected the argument that education must be a fundamental right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote, as there is no guarantee of “effective” or “intelligent” utilization of these rights.²²

Concluding that one policy dealing with hiring noncertified teachers in Detroit schools only might present an equal protection violation, the panel reasoned that it was not tied to any disparity or specific action taken by defendants that caused differences in school conditions and resources.²³ The Sixth Circuit panel said that the plaintiffs

¹⁸ *Id.* at 622 (quoting Council of Orgs. & Others for Educ. about *Parochiaid v. Engler*, 566 N.W.2d 208, 216 (Mich. 1997)).

¹⁹ 957 F.3d at 633 (citing *Millikin v. Bradley*, 433 U.S. 267, 289 (1977), requiring the state to fund remedial education reflects the “prospective-compliance exception” from Eleventh Amendment immunity); *see also infra* note 61.

²⁰ 957 F.3d at 636-37.

²¹ *Id.* The plaintiffs on appeal did not base their equal protection argument on racial discrimination even though the students were almost entirely low-income children of color.

²² *Id.* at 646 (quoting *Rodriguez*, 411 U.S. at 35-36).

²³ *Id.* at 636.

on remand should be given the opportunity to amend their complaint if they could identify specific state decisions treating them differently from students attending other schools in the state.²⁴

The Sixth Circuit panel also rejected the compulsory attendance argument that due process liberty rights were abridged because students were required to attend school without being provided a meaningful education. It reasoned that plaintiffs did not sufficiently argue how this liberty right had been violated.²⁵ The court recognized that compulsory school attendance is a restraint on freedom of movement, but this deprivation of liberty contained in compulsory education always has been justified by the need for an educated citizenry. However, if children were forced to attend school and received no education at all, the court concluded that such forced detention would abridge due process rights. Again, the panel suggested that plaintiffs could amend their complaint on remand to correct the deficiencies in arguing that the education provided does not justify the restraint imposed by compulsory education.²⁶

The key finding of the appeals panel was that the operation of the five target schools violated the U.S. Constitution because the schools' dismal conditions and inferior staffing resulted in poor learning conditions, thus depriving the students of their Fourteenth Amendment substantive due process right to access to meaningful educational opportunities that could lead to literacy. Plaintiffs successfully argued that "the Constitution provides a fundamental right to a basic minimum education."²⁷ Recognizing that the Fourteenth Amendment's Due Process Clause usually is viewed as providing procedural protections, the appellate panel acknowledged 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."²⁸ The panel discussed at length the historical importance of education in our nation from the time even before the Constitution was adopted, and recognized that access to literacy "is fundamental because it is necessary for even the most limited participation in our country's democracy."²⁹ Thus, the panel concluded that the right to a basic

²⁴ *Id.* at 637-38.

²⁵ *Id.* at 638.

²⁶ *Id.* at 642.

²⁷ *Id.*

²⁸ *Id.* at 643.

²⁹ *Id.* at 652.

education providing access to literacy is so “deeply rooted in this Nation’s history and tradition” that like other recognized substantive due process rights, access to literacy is “implicit in the concept of ordered liberty.”³⁰

The court also relied on Supreme Court decisions acknowledging other fundamental rights that are not expressly mentioned in the U.S. Constitution, such as the right to vote, marry, and have access to counsel in criminal proceedings.³¹ The court rejected the argument that only negative rights (constraints on governmental action) are guaranteed by the Due Process Clause, citing those mentioned above as implied positive rights that are not expressly stated in the Constitution.

Noting that the Supreme Court has repeatedly declined to decide whether there is a fundamental right to a minimum level of education, the Sixth Circuit panel cited the Court’s decisions recognizing the vital significance of education to the individual and to our democratic system of government.³² Rejecting the defendants’ argument that the remedy for the alleged inadequate education is the legislative process, the panel reasoned that if students are simply warehoused with no meaningful education, they are denied even a plausible chance to attain the tools needed to acquire political power.³³ Indeed, the panel emphasized that since all interaction between the individual and the government depend on literacy to some degree, being literate “is necessary for essentially *any* political participation.”³⁴

While the Constitution does not guarantee literacy, the panel reasoned that the state cannot foreclose the *opportunity to gain literacy* without violating constitutional rights.³⁵ The majority emphasized the need for at least basic conditions to allow students to attain

30 *Id.* at 652-53 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997)). Of the forty-five amicus briefs submitted to the appellate court in *Gary B.*, most were on behalf of the children’s right to access to literacy. See Jennifer Chambers, *Federal Court Upholds Detroit Literacy Settlement*, DETROIT NEWS, June 10, 2020, available at <https://www.detroitnews.com/story/news/education/2020/06/10/federal-court-upholds-detroit-literacy-settlement-dismisses-appeal/5337575002/>.

31 957 F.3d at 653, 656. See *infra* text accompanying notes 78-82.

32 *Id.* at 644-51. See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), *infra* text accompanying notes 96, 98, and 103.

33 957 F.3d at 652.

34 *Id.* at 652-53.

35 Access to literacy differs from a right to literacy; the latter is an outcome, whereas “access” is an opportunity. See *Gary B.*, 329 F. Supp. 3d at 354.

literacy but left it to the trial court to use expert testimony in determining precisely what this minimum would be.³⁶ The court recognized that facilities, resources, and teaching affect the right being asserted, which are fact-sensitive issues that must be addressed on remand in further proceedings consistent with the panel's decision.³⁷

The one panel judge who dissented would have affirmed the district court's opinion.³⁸ He said the plaintiffs were seeking a subsidy for unprecedented rights, noting that education is not a right afforded explicit protection under the U.S. Constitution. Relying on the *Rodriguez* precedent,³⁹ the dissenting judge opined that even if there is a fundamental right to a minimum level of education, courts have never asked the state to fund fundamental rights identified.⁴⁰ He cited *Ambach v. Norwick* in which the Supreme Court in a footnote recognized that the Federal Constitution does not guarantee access to education.⁴¹ He argued that the Fourteenth Amendment sets limits on governmental intrusions on private rights and does not protect positive rights such as a minimum education. He further contended that the panel ruling violated states' rights to determine their own educational policies and practices. The dissenting judge worried that the majority's recognition of a federal right to a minimum education would "immerse federal courts in a host of education disputes far outside our constitutionally assigned role to interpret legal texts."⁴²

C. Settlement Agreement

On May 14, 2020, the state of Michigan and the plaintiffs reached an agreement. Community organizers were at the table to devise the settlement soon after the panel ruling in hopes of reaching an agreement before an appeal of the case to the full Sixth Circuit could be launched.⁴³ The settlement recognizes the right of access to literacy for Detroit students who face obstacles in school that keep

³⁶ 957 F.3d at 661-62.

³⁷ *Id.*

³⁸ *Id.* at 662 (Murphy, J., dissenting).

³⁹ *Id.* at 664-65.

⁴⁰ *Id.* at 663, 665.

⁴¹ *Id.* at 665 (citing *Ambach v. Norwick*, 441 U.S. 68, 77, n.7 (1979)).

⁴² *Id.* at 662.

⁴³ See Koby Levin, *Inside the Detroit Right to Read Case: How a Settlement Came Together and a Groundbreaking Precedent Fell Apart*, CHALKBEAT DETROIT, May 21, 2020, available at <https://detroit.chalkbeat.org/2020/5/21/21266971/inside-detroit-literacy-case-settlement-precedent>.

them from obtaining an education. In essence, it acknowledged that the students have been denied the basic minimum education to allow them to attain literacy required to become fully engaged citizens.⁴⁴ In the settlement, Governor Whitmer agreed to provide the Detroit Public Schools Community District \$2.7 million and to propose legislation of \$94.4 million in additional funding to support literacy programs. The governor also agreed to provide \$280,000 to the seven students, who were named in the suit, for them to participate in high-quality literacy programs or to further their education with funds from the Detroit Public Schools Foundation. The settlement calls for creation of the Detroit Literacy Equity Task Force made up of all constituents outside state government to conduct annual evaluations and make recommendations about literacy in Detroit.⁴⁵ Another task force, the Detroit Educational Policy Committee, will focus on the Detroit educational ecosystem to ensure access to a high quality education for all children in the district.⁴⁶

D. *Sixth Circuit En Banc Action*

Five days after the settlement agreement was signed, the full Sixth Circuit voted to rehear the case en banc.⁴⁷ The Republican controlled Michigan legislature had requested a full Sixth Circuit review, calling the idea of a right to read an error of “grave and exceptional public importance.”⁴⁸ The legislature argued that the panel decision impaired legislative authority to set education policy. Ten other states also asked the Sixth Circuit to review the case, arguing that the panel decision abridged the separation of powers between the state and federal governments.⁴⁹ A majority of the judges on the Sixth Circuit decided to review the panel decision, so the panel opinion was

⁴⁴ However, the funds for the settlement will have to be appropriated by the legislature, which currently is controlled by Republicans, so such appropriations are not assured and may be further complicated by the budgetary shortfalls due to the coronavirus pandemic.

⁴⁵ See Jennifer Chambers & Beth LeBlanc, *Settlement for Detroit Literacy Lawsuit Eyes Nearly 100M in Funding*, DETROIT NEWS, May 14, 2020, available at <https://www.detroit-news.com/story/news/local/michigan/2020/05/14/whitmer-announces-late-night-settlement-detroit-right-literacy-case/5189089002/>.

⁴⁶ *Id.*

⁴⁷ 958 F.3d 1216 (6th Cir. 2020).

⁴⁸ Levin, *supra* note 43.

⁴⁹ Nat'l Sch. Bds. Ass'n, *State of Michigan Reaches Settlement with Group of Detroit Public Schools Students in Right to Literacy Suit*, LEGAL CLIPS, June 5, 2020.

vacated, and the mandates were stayed pending deliberations by the full appellate court.

On June 10, 2020 the unanimous Sixth Circuit held that the appeal was moot based on the settlement agreement and dismissed the appeal with prejudice.⁵⁰ Thus, the full Sixth Circuit did not render a decision on the merits of the claim, the panel decision remains vacated, and the case is closed to future appeals.

II. LITIGATION IN OTHER STATES

It is tempting to conclude that this is not an appropriate time to reconsider the *Rodriquez* holding, given the solid conservative majority on the current Supreme Court. However, a couple of recent decisions suggest that the Court may be open to an educational ruling to ensure equity and justice. For example, the Court struck down the manner that the Trump administration rescinded the Deferred Action for Childhood Arrivals program as unreasonable in violation of the federal Administrative Procedures Act.⁵¹ In another case, the Court ruled for the first time that gender identity and sexual orientation are protected elements of "sex" under Title VII of the Civil Rights Act of 1964, shielding employees from job discrimination based on these traits.⁵² Neither of these rulings can be considered conservative decisions. Moreover, the twin pandemics of the coronavirus and racial injustice have put educational inequities in the spotlight.⁵³ Thus, perhaps it is an appropriate time to reconsider whether the U.S. Constitution affords a right to a minimum education that provides at least the opportunity for individuals to become literate.

Several cases in addition to *Gary B.* suggest that interest in this topic is growing in various parts of the nation. This section briefly reviews recent litigation in California, Mississippi, and Rhode Island. A related Connecticut case also is addressed, even though the relief sought differs from the other three cases.

⁵⁰ 958 F.3d 1216 (6th Cir. 2020). *See Wisely, supra* note 9. When a case is dismissed with prejudice, it is dismissed based on the merits of the case after a judgment has been issued. The plaintiff is barred from filing a future lawsuit on the same issue. BLACK'S LAW DICTIONARY (11th ed. 2019).

⁵¹ *Dep't of Homeland Security v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020).

⁵² *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731 (2020). Granted, the Court's composition has changed since these two decisions, with a stronger conservative block now.

⁵³ *See Christina A. Samuels, A Clear-Eyed View of the Inequities in Schools*, EDUC. WK., Mar. 4, 2020, at 2-3, *infra* text accompanying note 138.

A. *Ella T. v. California*

The claim in *Ella T.* was very similar to *Gary B.* in asserting a constitutional right for all students to have access to literacy, except that *Ella T.* focused on the California Constitution rather than the Fourteenth Amendment.⁵⁴ In 2017, students in three low-performing elementary schools brought the suit against the California Board of Education, the State Superintendent of Public Instruction, and the California Department of Education, asserting a deprivation of the right to literacy because these children's education was not equal to the education provided students in other parts of California. State assessments revealed that less than half of the students in third, fourth, and fifth grades at these schools met the state's literacy standard. The suit sought "evidence-based literacy instruction at the elementary and secondary level; a stable, supported and appropriately trained teaching staff; opportunities for their parents and families to engage in students' literacy education; and school conditions that promote readiness for learning."⁵⁵

In a settlement approved by a California superior court in 2020, the state recognized that literacy is a right guaranteed under the state constitution and agreed to establish a \$50 million block grant program to be used over three years by the state's seventy-five lowest-performing elementary schools.⁵⁶ Although the state did not admit any wrongdoing, the settlement is designed to involve stakeholders in identifying causes of poor academic performance and in developing high-quality literacy programs. The settlement provides money for literacy resources, including literacy coaches, aids, bilingual reading specialists, culturally responsive curriculums, less punitive disciplinary approaches, evidence-based professional development in delivering literacy instruction, before and after school programs, an expanded school day, research-based social-emotional learning approaches, trauma-informed practices, and literacy training and

⁵⁴ *Ella T. v. California*, No. BC685730 (Cal. Super Ct. July 18, 2018). See *Judge Rules that Lawsuit Seeking Right to Literacy for All California Students Can Proceed*, Public Counsel, LLP, July 23, 1028, available at www.publiccounsel.org/stories?id=0255; *In Lawsuit Settlement, California Agrees to Spend Millions On Literacy*, LA REPORT, Feb. 20, 2020, available at <https://laist.com/latest/post/20200220/california-literacy-lawsuit-ella-t-public-education>.

⁵⁵ *Literacy in California: Ella T. v. State of California*, Morrison & Foerster, LLP (undated), available at www.mofo.com/special-content/ca-literacy/.

⁵⁶ See *In Lawsuit Settlement*, *supra* note 54.

education for parents and caregivers. An additional \$3 million is earmarked to hire a statewide literacy leader to oversee the program.⁵⁷

B. Williams v. Reeves

In April 2020, the Fifth Circuit rendered a decision in a Mississippi case brought by low-income African-American women whose children attend public schools in the state.⁵⁸ The plaintiffs argued that state lawmakers “have diluted” the state constitution’s education clause because schools serving primarily African-American students are chronically underperforming and do not have the necessary resources to provide a high quality education. The suit alleged that these students lack books, supplies, experienced teachers, extracurricular opportunities, tutoring, etc. that are available in some other schools in the state.

Plaintiffs contended that the current state constitution violates the ‘school rights and privileges’ provision of the Mississippi Readmission Act, enacted after the Civil War, which conditioned readmission to the union on several fundamental restrictions, including the mandate that the newly adopted state constitution shall never be amended to deprive any citizen of the school rights and privileges it secures.⁵⁹ The latest amendment to the Mississippi Constitution’s education clause (1987) does not stipulate a “uniform system of free public schools” as the earlier version did.⁶⁰ Plaintiffs alleged that this amendment abridges the Mississippi Readmission Act by omitting the uniformity requirement, which has resulted in wide disparities in performance, resources, facilities, and teachers that continue to cause harm

⁵⁷ *Ella T. v. California Settlement Term Sheet*, sf-4148732, Dec. 19, 2019, available at <https://www.documentcloud.org/documents/6781871-Ella-T-Literacy-Lawsuit-Settlement-Feb-20-2020.html>.

⁵⁸ *Williams v. Reeves*, 954 F.3d 729 (5th Cir. 2020).

⁵⁹ It also stipulated that the constitution could not be amended to deprive any citizen of the right to vote and made it unlawful to deprive any citizen on account of race, color, or previous servitude of the right to hold public office, 16 Stat. 67, 68 (1870). The education provision of the 1869 constitution stipulated: As the stability of a republican form of government depends mainly upon the intelligence and virtue of the people, it shall be the duty of the legislature to encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement, by establishing a uniform system of free public schools, by taxation or otherwise, for all children between the ages of five and twenty-one years, and shall, as soon as practicable, establish schools of higher grade. MISS. CONST., art. VIII, §1.

⁶⁰ The current education clause stipulates that the “Legislature shall, by general law, provide for the establishment, maintenance and support of free public schools upon such conditions and limitations as the Legislature may prescribe.” MISS CONST., art. VIII, §201.

by disadvantaging certain children.⁶¹ Even though the lower court decision was affirmed in part and the case seeking prospective relief for the violation of the Readmission Act was allowed to proceed, the Fifth Circuit did not rule on the merits of the claim in its 2020 ruling.⁶²

C. *A.C. v. Raimondo*

On October 14, 2020, Rhode Island's federal district court rejected a claim by fourteen students from preschool to high school, who alleged that the state was not providing an adequate education to enable them to exercise their constitutional right to vote, serve on juries, make informed decisions, and otherwise participate in civic activities in our democracy.⁶³ The complaint alleged that the state's systemic and deliberate failure to deliver instruction and tools essential for an adequate education deprives students of a chance to become productive citizens.⁶⁴ Recognizing the desirability of civics education, the judge nonetheless relied on *Rodriguez* in concluding that education is not a fundamental right under the U.S. Constitution.⁶⁵ The judge felt compelled to apply the easily satisfied rational basis test since neither a fundamental right nor a suspect classification was at issue. The judge noted that the crack left open by *Rodriguez* to find a federal

⁶¹ 954 F.3d at 736-39. In *Ex parte Young*, 209 U.S. 123 (1908), the Supreme Court recognized an exception to Eleventh Amendment immunity in that state officials can be sued for prospective relief for ongoing violations of federal law. The Supreme Court in a subsequent school case, *Papasian v. Allain*, 478 U.S. 265 (1986), reiterated that under *Ex parte Young*, state officials can be sued in federal court for continuing federal violations.

⁶² Although not asserting a federal right to access to literacy, a Delaware lawsuit alleging that the state sends more funds to schools with affluent students in contrast to those with students living in poverty has resulted in a settlement agreement. In the settlement, the governor has agreed to propose budgetary changes that will funnel more money to schools with concentrations of high-need students, including English learners and low-income children. Also, the General Assembly will be asked to expand K-3 special education funding, as current funding starts in grade four, to increase funding for early childhood education, and to assess how to make other equity and efficiency improvements. Nat'l Sch. Bds. Ass'n, *Settlement of Delaware's Education Suit Promises 'Historic Changes'*, LEGAL CLIPS, Oct. 15, 2020.

⁶³ *A.C. v. Raimondo*, C.A. No. 18-645 WES, Oct. 13, 2020, at 2. See Tim White, "American Democracy Is in Peril:" RI Federal Judge Dismisses Civics Lawsuit, Oct. 13, 2020, available at <https://www.wpri.com/target-12/American-democracy-is-in-peril-ri-federal-judge-dismisses-civics-lawsuit/>; Linda Jacobson, *Rhode Island Student: "I Don't Have Civics Education"*, EDUCATIONDIVE, Dec. 6, 2019, available at <https://www.educationdive.com/news/rhode-island-student-i-dont-have-civics-education/568585/>. The governor, Education Commissioner, and State Board of Education filed motions to dismiss the case, C.A. No. 18-645 WES, at 1, n.1.

⁶⁴ C.A. No. 18-645 WES, at 2-5.

⁶⁵ *Id.* at 45 (citing *Rodriguez*, 411 U.S. 1 (1973)).

constitutional entitlement to a minimum education would apply to the complete denial of education or to the provision of education that is totally inadequate.⁶⁶

Despite the judge finding no federal right to civics education, his fifty-five page decision lauded the plaintiffs for putting this critical problem before policymakers.⁶⁷ The judge also voiced admiration for the *Gary B.* panel decision, quoting from it at length. He claimed that “*Gary B.* should stand as a significant articulation of the importance of education to our society.”⁶⁸ Commending the Rhode Island plaintiffs for bringing their lawsuit, he opined: “It highlights a deep flaw in our national education priorities and policies. The Court cannot provide the remedy Plaintiffs seek, but in denying that relief, the Court adds its voice to Plaintiffs’ in calling attention to their plea.”⁶⁹ The Rhode Island decision is being appealed and directly confronts the Supreme Court’s 1973 holding in *Rodriquez*.⁷⁰ On appeal, plaintiffs will seek a declaration of a federal right to education to remedy their deficient education and preparation for citizenship.

D. *Martinez v. Malloy*

Connecticut plaintiffs alleged that children, primarily of color, are forced to attend substandard underperforming inner-city schools, noting a huge achievement gap between these schools and those serving primarily white students from higher income families.⁷¹ The state offers charter and magnet schools and a choice option to attend out-of-district traditional public schools, but the plaintiffs asserted that these options are not available to poor and minority children, denying them their fundamental right to an equitable education and to a minimally adequate education under the Fourteenth Amendment’s Equal Protection and Due Process Clauses. Plaintiffs were primarily interested in securing options for their children, so this case is not as

⁶⁶ *Id.* at 36-37. The provision of totally inadequate education is precisely the allegation made in *Gary B.* See *supra* text accompanying note 12.

⁶⁷ *Id.* at 7-11. See White, *supra* note 63. This case was brought in federal court as the Rhode Island Supreme Court twice ruled against the plaintiffs in previous proceedings. See Alia Wong, *The Students Suing for a Constitutional Right to Education*, THE ATLANTIC, Nov. 28, 2018, available at <https://www.theatlantic.com/education/archive/2018/11/lawsuit-constitutional-right-education/576901/>.

⁶⁸ C.A. No. 18-645 WES, at 46.

⁶⁹ *Id.* at 55.

⁷⁰ 411 U.S. 1 (1973), *supra* text accompany note 3.

⁷¹ *Martinez v. Malloy*, 350 F. Supp. 3d 74 (D. Conn. 2018).

pertinent in establishing a federal right to a minimum education as are the other cases cited above. However, like these cases, this lawsuit contended that children are forced to attend failing schools where they cannot acquire the skills necessary to become productive citizens. The suit sought to lift the moratorium on new magnet schools, increase funding of charter schools, and change the open-choice program that places additional financial burdens on districts accepting open-choice students. The federal district court rejected the argument that the Eleventh Amendment precluded the suit given that the plaintiffs alleged an ongoing violation.⁷² Yet, the court relied on the *Rodriguez* rationale in declaring that there is no fundamental right to an education under either the Equal Protection or Due Process Clauses of the Fourteenth Amendment.⁷³ The court declined to apply heightened scrutiny and held that the contested laws satisfy the rational basis test and do not abridge any liberty right.⁷⁴

III. DISCUSSION

Because illiterate children will face insurmountable obstacles compared to their literate counterparts in cognitive functioning, economic mobility, healthy living, and political speech and expression, they will enter an ‘underclass [that] presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.’⁷⁵

The *Gary B.* panel decision has little precedential *value*, but at least it was the first federal appellate court to recognize a federal constitutional right for children to have access to literacy, which certainly attracted widespread attention. It provided a roadmap, and along with the cases already initiated in other states, may stimulate litigation in additional jurisdictions. This section elaborates on the argument that there *is* a federal right to at least a minimum education

⁷² *Id.* at 88-89. *See supra* note 61.

⁷³ *Id.* at 90 (citing *Rodriguez*, 411 U.S. 1, 37 (1973)).

⁷⁴ All claims were dismissed except for the claim that defendants did not address regarding an alleged duty of public administration. Defendants were given leave to file a supplemental motion to dismiss this claim. 350 F.3d at 94.

⁷⁵ Malhar Shah, *The Fundamental Right to Literacy: Relitigating the Fundamental Right to Education after Rodriguez and Plyler* (quoting *Plyler v. Doe*, 457 U.S. at 219), NAT.LAWYERS GUILD REV., available at <https://www.nlg.org/nlg-review/article/the-fundamental-right-to-literacy-relitigating-the-fundamental-right-to-education-after-rodriguez-and-plyler/>.

under various provisions of the Fourteenth Amendment. I agree with the Sixth Circuit panel regarding the substantive due process right and further contend that there is a fundamental right under the Equal Protection Clause and a state-created property right to education that requires procedural due process before being denied.

It is important to remember that the U.S. is an outlier among nations in not recognizing such a federal right. Indeed, a large majority of countries, about 135 countries total and practically all developed nations, specify a federal right to education, although the number of years of education varies greatly from five to fifteen.⁷⁶ For the countries that do not specifically guarantee education, the United Nation's *Treaty on Children's Rights* specifies educational rights, which most nations have signed. However, the U.S. has not ratified this treaty.⁷⁷ While the guarantee of a right to education does not necessarily mean that there is sufficient follow through to protect this right and ensure that educational opportunities are adequate and equitable, the recognition of a federal right is an important step in this direction.

A. Identifying Fundamental Rights

A fundamental right in the U.S. can be found either directly or implied in the Federal Constitution. The classic fundamental rights are those natural rights enumerated in the Constitution, such as the right to free expression. More controversial are the implicit rights that are not stated in the Constitution but are considered essential to the citizenry. These include the right to travel,⁷⁸ the right to direct the upbringing of one's children,⁷⁹ fulfillment of voting rights,⁸⁰ the right to

⁷⁶ See *India Joins List of 135 Countries in Making Education a Right*, THE HINDU (Nov. 12, 2016), available at <https://www.thehindu.com/news/national/India-joins-list-of-135-countries-in-making-education-a-right/article13666115.ece>; Global Education Monitoring Report Team, *Reaching the Marginalized: EFA Global Monitoring Report*, UNESCO (2010), at 332, available at <https://unesdoc.unesco.org/ark:/48223/pf0000186606>.

⁷⁷ Wong, *supra* note 67.

⁷⁸ See *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (finding that a state residency requirement for aid to needy families violated the right to travel under the Fourteenth Amendment); *United States v. Guest*, 383 U.S. 745 (1966) (recognizing the right to interstate travel to be constitutionally protected).

⁷⁹ See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), *infra* text accompanying note 94.

⁸⁰ See *Harper v. State Bd. of Elections*, 383 U.S. 663, 667 (1966) (finding a poll tax unconstitutional as violating a citizen's fundamental right to vote).

marry,⁸¹ and expanded privacy rights.⁸² I contend that education is one of these implicit constitutional rights, the exercise of which is necessary for other rights to be realized, such as voting in state elections and fully exercising free speech rights.

Various reasons are offered for education being considered a fundamental right. For example, everyone benefits from education, and it affects individuals over a lengthy period of time. All states compel at least ten years of education, and public school students often are confined to particular schools.⁸³ No other government service has such an impact on molding citizens. And other than prisons, “nothing in American society compares to public schools in establishing state-imposed control over a person’s life.”⁸⁴ Since compulsory schooling deprives students of their protected liberties, one would expect students at least to be provided basic education skills.⁸⁵ In cases where individuals have been involuntarily committed to mental institutions, the Supreme Court has recognized a right to adequate treatment.⁸⁶ Surely there should be a right to an adequate education in return for compelled school attendance. The argument also is made that education is necessary for individuals to compete in the economic marketplace and to participate fully in civic life.⁸⁷

Several commentators have offered various rationales for education to be considered a fundamental federal right. Barry Friedman and Sara Solow have argued that education should be considered fundamental under the Federal Constitution because of the state constitutional commitments to education and the increasing federal role in education over the past two centuries.⁸⁸ Goodwin Liu has asserted

81 See *Obergefell v. Hodges*, 576 U.S. 644 (2015) (upholding the right to same-sex marriage); *Loving v. Virginia*, 388 U.S. 1.12 (1967) (upholding the right to interracial marriage).

82 See *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down a state law prohibiting private, consensual sodomy); *Roe v. Wade*, 410 U.S. 113 (1973) (upholding the right for women to have abortions during the first trimester of pregnancy); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down a state law forbidding the use of contraceptives as impairing marital privacy rights).

83 See Brooke Wilkins, *Should Public Education Be a Federal Fundamental Right?* 2005 BYU EDUC. & L. J. 261, 279 (2005).

84 William Buss, *Due Process and School Discipline*, 119 U. PENN. L. REV. 545, 547 (1971).

85 See Gerson M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 823 (1985).

86 See, e.g., *Youngberg v. Romero*, 457 U.S. 307 (1982) (holding that people involuntarily committed to a mental institution are entitled to adequate treatment).

87 See, e.g., *A.C. v. Raimondo*, C.A. No. 18-645 WES, Oct. 13, 2020, *supra* text accompanying note 63; *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972), *infra* text accompanying note 98.

88 Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 82 GEO.

that education is one of the privileges and immunities of U.S. citizenship guaranteed by the first phrase of the Fourteenth Amendment, so this “national citizenship” does not have to rely on the Equal Protection and Due Process Clauses.⁸⁹ He has called on Congress to enact education legislation consistent with the constitutional guarantee of national citizenship.⁹⁰ Derek Black has developed an argument that those in Congress who enacted the Fourteenth Amendment believed that education “was inherent in a republican form of government” and thus they considered education to be a “core aspect of state citizenship.”⁹¹ According to Black, the Fourteenth Amendment assumed the fundamentality of education across states because those in the confederacy could not be readmitted into the Union until they ratified this amendment and developed new state constitutions that guaranteed free public education for all.⁹²

Historically, it seems like the Supreme Court has recognized the fundamentality of education under the U.S. Constitution, repossessed it, and then suggested that it might be reinstated.⁹³ As early as 1923 in *Meyer v. Nebraska*, the Court struck down a state law that prohibited teaching foreign languages before the eighth grade.⁹⁴ The state’s interest in acculturating its citizens did not outweigh parents’ right to direct the upbringing of their children, teachers’ right to pursue their profession, and the students’ right to acquire useful knowledge.⁹⁵ The Court in *Meyer* hinted at the fundamentality of educational rights, stating that “the individual has certain fundamental rights which must be

WASH. L. REV. 92 (2013).

⁸⁹ Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L. J. 330 (2006). Federal legislation is the route taken to establish some consistency across states in education rights for children with disabilities, as significant educational entitlements are specified in return for the receipt of modest federal aid under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.A. § 1412.

⁹⁰ For additional discussion of commentary on this topic, see Derek Black, *Implying a Federal Constitutional Right to Education*, in KIMBERLY J. ROBINSON (ed.), A FEDERAL RIGHT TO EDUCATION (New York Univ. Press, 2019), at 146-57.

⁹¹ See Derek Black, *The Constitutional Compromise to Guarantee Education*, 70 STANFORD L. REV. 735, 741, 744 (2018).

⁹² *Id.* at 741-44.

⁹³ It might even be argued that the framers of the U.S. Constitution did not need to include education in the Constitution as its fundamentality was assumed. After all, in the Northwest Ordinance (1787), land was set aside for schools in legislation stating that “religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.” *An Ordinance for the Government of the Territory of the United States, North-West of the River Ohio*, July 13, 1787, renewed by the Northwest Ordinance of 1789.

⁹⁴ 262 U.S. 390 (1923).

⁹⁵ *Id.* at 399.

respected," even though parents' right to hire teachers to instruct their children in German was recognized using rational basis scrutiny, which does not need a fundamental right at stake to invalidate the challenged state action.

In *Brown v. Board of Education*, the unanimous Supreme Court subsequently held that once a state undertakes to provide education it is "a right which must be made available to all on equal terms."⁹⁶ Striking down state-imposed racial segregation in public schools, the Court acknowledged that the provision of a bare minimum education would not satisfy equal protection requirements if children in some districts were getting a much higher quality education than students in other districts. The decision in *Brown* seemed to promise that federal courts would declare education to be a fundamental right, which would reduce educational disparities nationally.⁹⁷

Almost two decades later, in *Wisconsin v. Yoder*, the Supreme Court articulated that "some degree of education is necessary to prepare citizens to participate intelligently in our open political system if we are to preserve freedom and independence."⁹⁸ In this case, upholding the right of Amish youth to end their compelled education before high school, the Court reasoned that education of Amish children through the eighth grade would satisfy the state's interest in ensuring an educated citizenry.

However, the federal right seemingly articulated in these cases was apparently taken away in *Rodriguez*, where the five-member Court majority ruled in 1973 that there is no explicit or implicit federal constitutional right to an education.⁹⁹ Thus, gross fiscal inequities across school districts would be subject only to rational basis scrutiny, which is very easy for states to satisfy. The heavy reliance on local property taxes to fund education ensured that residents of property-poor districts could never raise the funds raised in property-rich districts even if they imposed a very high tax rate.¹⁰⁰ Nonetheless, the Court majority found no equal protection violation.

The majority did concede that "some identifiable quantum of

⁹⁶ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

⁹⁷ See Erwin Chemerinski, *The Deconstitutionalization of Education*, 36 LOY. U. CHIC. L. J. 111 (2004).

⁹⁸ *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

⁹⁹ 411 U.S. 1, 35 (1973).

¹⁰⁰ See *infra* text accompanying note 131.

education [may be] a constitutionally protected prerequisite to the meaningful exercise” of other rights, but it found no evidence that the expenditures in Texas provided “an education that falls short.”¹⁰¹ And there was no absolute denial of education to the plaintiffs. Yet, as Justice Marshall declared in his *Rodriguez* dissent: “The Equal Protection Clause is not addressed to the minimal sufficiency but rather to the unjustifiable inequalities of state action. It mandates nothing less than that ‘all persons similarly circumscribed shall be treated alike.’”¹⁰²

A. Equal Protection Argument

The Supreme Court in *Plyler v. Doe* (1982) reiterated that education is not a right granted by the U.S. Constitution, but held that “neither is it merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation.”¹⁰³ Addressing the equal protection claim, the Court recognized that “education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.”¹⁰⁴ The Court acknowledged that illiteracy is an enduring disability and struck down the denial of public education to undocumented immigrant students in Texas.¹⁰⁵ By withholding free education from this class of students, Texas imposed “a lifetime hardship on a discrete class of children not accountable for their disabling status.”¹⁰⁶ Even though the Court did not apply the stringent strict scrutiny test, it concluded that heightened scrutiny, requiring justification by a substantial state interest, must be applied where a discrete group of innocent children were denied a free education. Recognizing that “education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all,”¹⁰⁷ the Court reasoned that “charging tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal

101 411 U.S. at 36-37.

102 *Id.* at 89 (Marshall, J., dissenting) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

103 457 U.S. 202, 221 (1982).

104 *Id.*

105 There was no evidence that the children moved from Mexico to Texas simply for educational reasons. *Id.* at 228.

106 *Id.* at 223-24.

107 *Id.* at 221.

immigration.”¹⁰⁸ The Court further stated in *Plyler* that “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.”¹⁰⁹ While the state action was assessed using middle level of scrutiny, classifications affecting the education of some children may not even satisfy the lenient rational basis test.¹¹⁰

An argument can be made that the children in *Gary B.* and similar cases are effectively denied an education akin to the denial of education in *Plyler*. After all, the undocumented students in Texas could attend school if they paid tuition so there was not an absolute denial. The children in *Gary B.* could have attended private schools, but in both instances the students were functionally denied an education because of the costs involved in securing an adequate education.

Prior to *Plyler*, the Supreme Court rendered *Lau v. Nichols*, which involved an equal protection argument although the case was settled based on Title VI of the Civil Rights Act of 1964 instead of the U.S. Constitution.¹¹¹ The Court reasoned that providing all students the same teachers and materials violates Title VI if some students cannot benefit from these resources because they do not speak English. The Court ruled that Chinese children in San Francisco had a right to special assistance in learning English skills, which “are at the very core” of what public school teach.¹¹² *Lau* stands for the premise that the state has an obligation to take affirmative steps to equalize educational opportunities even where the total denial of education is not at issue. Similarly, the plaintiffs in *Gary B.* were effectively denied an equal opportunity to have access to literacy, given the substandard resources they were provided.

In some ways, the equal protection argument seems easier to mount than the substantive due process argument as one can measure if facilities, materials, and teachers are equitable across school districts without assessing whether a minimum education is or is not provided. In other contexts, such as fair criminal procedures, the

¹⁰⁸ *Id.* at 228.

¹⁰⁹ *Id.* at 222.

¹¹⁰ See, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923), *supra* text accompanying note 94.

¹¹¹ 414 U.S. 563 (1974). Title VI bars discrimination against participants in or beneficiaries of federally assisted programs or activities on the basis of race, color, or national origin, 42 U.S.C. § 2000d.

¹¹² 414 U.S. at 566. *But see* *Horne v. Flores*, 557 U.S. 433 (2009) (allowing the reconsideration of consent decrees that require school districts to fund programs for English Learners).

Supreme Court has invalidated discrimination against an individual's federal right to criminal appellate review.¹¹³ Arguably, education affects an even more vulnerable group—children—so the equal protection right to equitable educational opportunities should be federally recognized as well.¹¹⁴

B. Due Process Arguments

In addition to the equal protection rationale, the substantive due process argument that the Sixth Circuit panel adopted in *Gary B.* should receive Supreme Court endorsement. Equal protection and due process arguments actually bleed into each other, so it is difficult to consider the claims as totally discreet. The Supreme Court has emphasized that both due process and equal protection requirements evolve over time, and they actually seem to come together as a declaration of a fundamental right affects them both.¹¹⁵ Recognizing the “synergy” between the two clauses, the Court in 2015 opined that “each concept—liberty and equal protection—leads to a stronger understanding of the other.”¹¹⁶ As Joshua Weishart observed, the right to education contains “both a positive claim to an adequate education. . . and negative immunity against inequitable distributions of educational opportunity.”¹¹⁷

Regarding the positive claim, children compelled to attend school -- and for many this means a public school -- have a valid expectation that they will be provided educational benefits. As emphasized previously, an education is necessary to become a productive citizen and participate in the political process.¹¹⁸ Also, the exercise of free speech cannot be fully realized without education.¹¹⁹ One can compare the right to education to the implied fundamental right to

113 See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 339-43 (1963) (upholding the right to counsel in criminal proceedings); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (striking down discrimination in the fundamental right to criminal appellate review).

114 See also *supra* text accompanying note 84.

115 See *Obergefell v. Hodges*, 576 U.S. 644, 645-47 (2015); *History of Equal Protection and the Levels of Review*, LAWshelf, available at <https://lawshelf.com/coursewarecontentview/history-of-equal-protection-and-the-levels-of-review/>.

116 *Obergefell*, 576 U.S. at 673.

117 Joshua E. Weishart, *Protecting a Federal Right to Educational Equality and Adequacy*, in ROBINSON, *supra* note 90, at 316.

118 See Kimberly J. Robinson, *An American Dream Deferred: A Federal Right to Education*, in ROBINSON, *supra* note 90, at 317-338; see also *supra* text accompanying note 87.

119 See *Rodriguez*, 411 U.S. at 35 (Marshall, J., dissenting).

vote.¹²⁰ “Access to the state franchise has been afforded special protection because it is ‘preservative of other basic civil and political rights,’” and there is a direct correlation between participation in elections and level of education.¹²¹ Surely our nation should be as protective of the right to access to literacy as the right to vote since schooling is compulsory whereas voting is not. Moreover, if uneducated, the individual’s right to vote “is not likely to benefit either that person or society in general.”¹²² The Supreme Court recognized in 2000 that the right to vote “can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”¹²³ Similarly, the functional exclusion of students from access to literacy can be as devastating as the total denial of an education. The Sixth Circuit panel in *Gary B.* noted that the right to education is implicit in the concept of ordered liberty in that neither liberty nor justice would exist if education were denied.¹²⁴ After all, barring literacy was used to dehumanize slaves, and more recently, illiteracy has been used to bar citizens from voting.¹²⁵

The contention that it is beyond current expertise to identify the elements of a minimum education necessary to provide all children access to literacy can be refuted. The state controls public education and can enact laws to establish minimums for educational facilities, resources, teacher qualifications, etc. and to eliminate inequities across school districts.¹²⁶ Increasingly, states have made strides in articulating the elements of an adequate education that must be available for all children. It is a legislative function to identify these elements, and it can be done. Indeed, over the past several decades, some states have been quite explicit in specifying detailed components of an adequate education. More than thirty years ago, the Kentucky Supreme Court recognized that the legislature has the expertise to outline what constitutes a minimally adequate education,

120 See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 669 (1966), *supra* note 80.

121 *Rodriguez*, 411 U.S. at 114 (Marshall, J., dissenting) (quoting *Reynolds v. Sims*, 377 U.S. at 562).

122 *Wilkins*, *supra* note 83, at 283 (citing *Rodriguez*, 411 U.S. 1, at 35-36).

123 *Bush v. Gore*, 531 U.S. 98, 105 (2000) (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).

124 *Gary B.*, 657 F.3d at 652-53, *supra* note 30.

125 See *Black*, *supra* note 91, at 746-48.

126 See Atanu Das, *An ‘Adequate’ Education Needs an ‘Adequate’ Approach to School Funding*, 12 PUB. INTEREST L. REP. 81 (2007).

which provides:

Each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices, (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in each academic or vocational fields so as to enable each child to choose and pursue work intelligently, and (vii) sufficient levels of academic or vocational skills to enable public school students compete favorably with their counterparts in surrounding states, in academics or in the job market."¹²⁷

In addition to equal protection and substantive due process arguments, a case can be made that children have a Fourteenth Amendment procedural due process right to access to literacy. All states require their legislative bodies to provide for a uniform, thorough and efficient, or adequate system of free public education. In *Goss v. Lopez* (1975), the U.S. Supreme Court recognized that this state-created property right to education cannot be denied for even a short period of time without due process of law. In *Goss*, depriving children of this property right in terms of brief suspensions from school without at least minimum due process was found to violate the Fourteenth Amendment. This state-created right to an education at least includes a minimally adequate education that would provide access for children to become literate – a minimal education that cannot be deprived without providing appropriate procedures. Even though the cases asserting a right to education have not relied on this argument to date, plaintiffs in the future may assert that their property right to

¹²⁷ *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 212 (Ky. 1989).

education is being denied without procedural due process.

C. *Implementing a Federal Right to Education*

In the absence of a federal right to education, a number of state courts have interpreted respective state constitutions as establishing a fundamental right to education. The California Supreme Court so ruled prior to the *Rodriguez* decision,¹²⁸ and the state judicial scoreboard has been mixed since then despite all state constitutions explicitly charging legislative bodies to provide for free public schooling. Some states with similar education clauses in their state constitutions have reached different conclusions as to the fundamentality of a right to education.¹²⁹ Declaration of a federal right would establish a national standard, and such variance in the status of education across states would be eliminated.

With recognition of a federal right to education, the fiscal disparities across school districts could be challenged under the U.S. Constitution, and a compelling governmental justification would be required to uphold such inequities. Challenges could be launched in federal courts, which traditionally have been considered more objective than state courts, where judges are often elected and subject to state politics. Plaintiffs would be more likely to obtain remedies from the federal judiciary. A federal constitutional right to access to literacy would further ensure “a right to some threshold level of education and to challenge inequities in access to it.”¹³⁰

As mentioned previously, the significant disparities in resources across school districts resulting from heavy reliance on local property taxes to fund public education means that property wealthy districts can tax at a lower rate than poor districts and still have a much higher yield.¹³¹ If all school revenues were considered state funds, regardless of where collected, the money could be distributed in an equitable manner across school districts. But the inequities will never be eliminated through the political process, as those with little

128 *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971).

129 For a discussion of school finance litigation cross states, see Perry Zirkel, *An Updated Tabular Overview of the School Finance Litigation*, 379 EDUC. L. REP. 453 (2020); William Thro, *Originalism and School Finance Litigation*, 335 EDUC. L. REP. 538 (2016); Wilkins, *supra* note 83.

130 Black, *supra* note 90, at 151.

131 See Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 WASH. L. REV. 93 (2003); *supra* text accompanying note 100.

power are the ones adversely affected. Even though Americans profess that they support equal educational opportunities, this value has not been realized.

However, an established federal right does not take anything away from the states in articulating the elements of a minimum education that will provide access to literacy. Declaration of a federal right does not necessarily mean federal control of education. It merely provides another legal avenue to challenge educational inequities and inadequacies. Since challenged legislative action affecting fundamental rights would be subject to strict judicial scrutiny, plaintiffs would have an important weapon to contest unfair educational policies and practices. The quality of a child's education should not depend on his or her class or zip code, so the federal government should collaborate with states in providing incentives to ensure educational equity and adequacy within and across jurisdictions. The federal government needs to become a full partner in this regard, altering its past practice of making educational demands on states but providing limited resources.¹³²

IV. CONCLUSION

Education is more critical now than ever, given that those without an education increasingly are economically and politically vulnerable.¹³³ I contend that we cannot leave the fate of education to legislative majorities that will always depress minority interests and will never equalize opportunities for poor and special-need children. Edwin Chemerinsky's observation in 2004 that "if courts do not equalize educational opportunity, no one will," remains true today.¹³⁴ Over time, courts have been the catalyst for social change whether it has involved school desegregation or protecting the right to marry.¹³⁵ The lawsuit is a major vehicle to improve American education and ensure that it is equitable and just for all children.

Given the lower court decisions addressed in this article, the

¹³² See Robinson, *supra* note 118, at 330. For example, under the IDEA, 20 U.S.C.A. § 1412, the federal government authorized funding up to 40 percent of the excess costs necessary to provide appropriate programs for children with disabilities, but the appropriated federal share has hovered around one-fourth of this amount.

¹³³ Wilkins, *supra* note 83, at 288.

¹³⁴ Chemerinsky, *supra* note 97, at 112.

¹³⁵ See, e.g., Obergefell v. Hodges, 576 U.S. 644 (2015), *supra* note 81; Brown v. Bd. of Educ., 347 U.S. 483 (1954), *supra* note 96.

Supreme Court conceivably will take a stand that education is an implied fundamental right under the U.S. Constitution, thus overturning the *Rodriguez* precedent. It is difficult to argue that the right to literacy is not necessary to exercise other rights, especially those involving expression, voting, and access to justice, or that the glaring educational inequities across school districts are justified. It is my sincere hope that the Supreme Court ultimately will do not only what is legally defensible but also what is right for the American citizenry. The past few decades have witnessed an increase in racial segregation in schools as well as achievement and wealth gaps between the haves and have-nots.¹³⁶ Currently, changes are taking place across the nation in response to the educational disparities highlighted by the coronavirus pandemic, which are disproportionately affecting children of color. Moreover, there is heightened sensitivity to racial injustices in our society, and it is not possible to eradicate racism in the U.S. without attending to the gross educational inequities that are continually increasing.¹³⁷ Perhaps in one of the cases currently in progress,¹³⁸ the time is right for a Supreme Court declaration of a right to the resources needed for all our citizens to become literate.

¹³⁶ See Black, *supra* note 90, at 738.

¹³⁷ See *supra* text accompanying note 53.

¹³⁸ The Rhode Island case that has been appealed to the First Circuit holds the most promise of reaching the Supreme Court in the near future. See *supra* text accompanying note 63.

