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Reimagining the Right to Public Education

Logan Miller, UCLA School of Law

INTRODUCTION

Critiques of the United States public education system abound.¹ Many of these critiques expose the reality that the public school system regularly fails to do what it purports to do. Others discuss how the public school system in fact achieves some of its more insidious purposes.² When the reality of the public schooling experience – especially for students from marginalized communities – is juxtaposed with the lofty rhetoric surrounding public education, a substantial disjuncture is evident: there is a gap between the idealized notions of public education and the actual learning environments and outcomes for many public school students. For these students, schools are all too often experienced as little more than impoverished holding facilities that perpetuate inequality.³ To address this disjuncture and the failures and inequities in public schooling, scholars, advocates, families,

¹ See, e.g., Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 *Geo. Wash. L. Rev.* 92, 93 (2013) (“By all accounts the American system of primary and secondary education is in terrible shape. Not only are there rampant inequalities, the system is deserving even its median and often its best students.”) (citing *WAITING FOR “SUPERMAN”: HOW WE CAN SAVE AMERICA’S FAILING PUBLIC SCHOOLS* 3-5 (Karl Weber ed., 2010)); Derek W. Black, *Unlocking the Power of State Constitutions With Equal Protection: The First Step Toward Education as a Federally Protected Right*, 51 *Wm. & Mary L. Rev.* 1343, 1352-57 (2010); Areto A. Imoukuede, *Education Rights and the New Due Process*, 47 *Ind. L. Rev.* 467 (2014) (“...the U.S. is in the midst of what some, including myself, have characterized as ‘a national education crisis.’” (citing Dennis J. Condon & Vincent J. Roscigno, *Disparities Within: Unequal Spending and Achievement in an Urban School District*, 76 *Soc. Educ.* 1, 20 (2003))).

² See *infra* note 116. As an example, see Kenneth J. Fasching-Varner et al., *Beyond School-to-Prison Pipeline and Toward an Educational and Penal Realism*, 47 *Equity & Excellence in Educ.* 410 (2014) (stating that the education system “is functioning as it was intended—to disenfranchise many (predominately people of color) for the benefit of some (mostly white), based on economic principals of the free market.”).

³ *Zelman v. Simmons-Harris*, 536 U.S. 639, 676, 681-82 (2002) (Thomas, J., concurring) (“Today many of our inner-city public schools deny emancipation to urban minority students . . . urban children have been forced into a system that continually fails them . . . Although one of

and students have often sought remedies through the legal system.⁴ Courts have regularly engaged with the process of determining what the right to education consists of,⁵ and scholars have exerted influence on this process.⁶

However, this Comment argues that courts, advocates, and scholars have not gone far enough in their analysis of pedagogy or their definition of public education. Despite the promise of increased funding and resources for public schools, the fundamental nature of many students' schooling experience remains effectively unchanged. In court decisions and scholarship, the general structure and operation of public schooling often goes unquestioned. For many of the students for whom the existing public schooling system is ineffective or inadequate, the right to public education advanced by scholars, and, to a lesser degree, recognized by courts, is insufficient. While important progress has been made, little has been done to alter the status quo that public education is synonymous with conventional public schooling.⁷ This unnecessarily limits the meaning of public education, and, thus, educational opportunities for students, especially those

the purposes of public schools was to promote democracy and a more egalitarian culture, failing urban public schools disproportionately affect minority children most in need of educational opportunity... the promise of public school education has failed poor inner-city blacks...."); Gary B. v. Whitmer, 957 F.3d 616, 638-39 (6th Cir. 2020), reh'g en banc granted, opinion vacated, 958 F.3d 1216 (6th Cir. 2020) (noting that the plaintiffs argued that they were detained in schools "in name only," which were characterized as little more than warehouses).

⁴ There is a significant history of education rights litigation including, most notably, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Other notable Supreme Court cases include *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Plyler v. Doe*, 457 U.S. 202 (1982); and *Papasan v. Allain*, 478 U.S. 265 (1986). Several notable state court cases are discussed below, *infra* Part II(b). See also Black, *supra* note 1 at 1349 (characterizing the state court education reform litigation of recent decades as an "educational revolution in the states."); Michael A. Rebell, *The Right to Comprehensive Educational Opportunity*, 47 HARV. C.R.-C.L. L. REV. 47, 82 (2012) (discussing education reform litigation in state courts).

⁵ *Id.*

⁶ For instance, numerous legal scholars, including Martha Minow, Barry Friedman, Sara Solow, and Michael Rebell, authored amicus briefs in the recent 6th Circuit case *Gary B. v. Whitmer*, advocating for the recognition of a federal right to public education. For the full list of amicus briefs submitted in support of the plaintiffs, see [RIGHT TO LITERACY DETROIT](https://www.detroit-accessstoliteracy.org/key-documents/), <https://www.detroit-accessstoliteracy.org/key-documents/> (last visited Feb. 15, 2022).

⁷ The term "conventional public schooling" is used in this paper to describe the dominant pedagogical model in which students are assigned to – and spend most of their time in – classrooms, follow a standard curriculum that is presented and facilitated by one or more teachers, and are evaluated according to predetermined objectives set by adults. I contrast this to "self-directed education" and other alternative educational models. See Part III, *infra*.

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from disadvantaged communities and families.⁸

This limitation is indicative of a broader oversight in the mainstream legal and political discourse on public education, which, in general, uncritically accepts and privileges the practice of conventional public schooling to the exclusion of alternative educational options. But the implications of the reasoning used by scholars and courts when discussing the right to education – most notably the underlying justifications for the provision of and access to public education – demand a broader conception of public education that includes equitable access to a variety of educational options. In particular, I focus on those educational alternatives with demonstrated effectiveness and feasibility, such as models of self-directed education, including democratic schools, learning centers, and unschooling.⁹ Recent research has demonstrated that these alternatives are effective for a substantial number of students.¹⁰ Moreover, I focus on these alternatives because they are consistent with the legal reasoning and justifications found in case law and scholarship addressing public education, such as the importance of preparing students for democratic engagement and promoting individual development.¹¹

To further expand the meaning of public education and the populations it benefits, this Comment draws a distinction between public

⁸ Venus Taylor, Behind the trend: Increases in homeschooling among African American families, in *HOME SCHOOLING IN FULL VIEW: A READER* 121–33 (B.S. Cooper ed., 2005) (“The legacy of the Brown decision is not only about access but is also about options. We African Americans owe it to our children to exercise all available opportunities to ensure their current and future success. We are not obligated to wait for schools to improve to better meet our needs; we are obligated to provide our children the best education available.”).

⁹ Self-directed education can be broadly defined as “education that derives from the self-chosen activities and life experiences of the learner, whether or not those activities were chosen deliberately for the purpose of education.” It is often contrasted to coercive schooling, as regularly occurs in conventional schools, and “refers to the educational approach of young people and those supporting them as they take charge of their education.” What is Self-Directed Education?, *ALL FOR SELF-DIRECTED EDUC.*, <https://www.self-directed.org/sde/> (last visited Sep. 24, 2021). Examples of self-directed education include democratic schools and unschooling. For a more detailed discussion of these alternatives, see Part III, *infra*.

¹⁰ See Part III, *infra*, discussing this evidence and its limitations.

¹¹ These educational alternatives have the potential to operate as enhancers of democracy. Students in these alternatives learning environments have more autonomy and control over their education, and, especially in democratic schools, students actively participate in self-governance and democratic processes. Thus, these less restrictive educational structures are more compatible with the Jeffersonian justifications for democratic preparation and contribute to more equitable access to education for marginalized students and families. See Part III, *infra*.

“schooling” and “education,” and argues that the latter should be conceived more broadly, to include a continuum of publicly accessible learning environments.¹² There are several normative and legal reasons for adopting a broader conception of public education. One consequence of the conceptual limitation of equating education with conventional public schooling is that many students and families with insufficient resources to seek alternatives are unable to realize a more robust right to education – one that would include equitable and accessible educational alternatives – and are suffering as a result.¹³ These students and families are compelled to participate in a conventional public schooling system, regardless of whether it meets their educational needs or reflects their beliefs or values.¹⁴ Stepping back to seriously examine the reality of public schooling in the United States allows one to see how it conflicts with the idealized rhetoric surrounding public education, which opens the space for reimagining the meaning of public education.

Recent scholarship and court decisions have begun to define what a “basic minimum education” consists of,¹⁵ and have laid the foundation for an expanded meaning of the right to education. However, these discussions frequently overlook alternative models of learning. While courts and scholars have begun the process of critically considering pedagogy and quality of educational resources, the scope of their analysis is unnecessarily limited.¹⁶ The right to education is not satisfied by existing proposals in a way that respects the

¹² Of course, courts need not consider every possible educational alternative; students do not have a right to every option. For example, even if a school in which every student has a horse and private tutor produces excellent educational outcomes, that is not going to be realistic to implement for a significant number of public-school students. Therefore, courts ought to consider evidence regarding which types of learning environments are effective and the costs associated with those alternatives. Self-directed education is appealing and the central focus of this Comment because it generally produces positive educational outcomes, it appears relatively cost effective and accessible, and it is consistent with commonly asserted justifications for public education.

¹³ Black, *supra* note 1 at 1352–53 (noting that “...our schools do an excellent job preparing some students, but an abysmal job preparing masses of others” and that “we spend the least money on the students who need it the most.”).

¹⁴ See STEPHEN ARONS, *COMPPELLING BELIEF: THE CULTURE OF AMERICAN SCHOOLING* 98, 198 (1983).

¹⁵ See Part II, *infra*.

¹⁶ See, e.g., *Gary B. v. Whitmer*, 957 F.3d 616, 638-39 (6th Cir. 2020), *reh’g en banc granted*, opinion vacated, 958 F.3d 1216 (6th Cir. 2020) (“Beyond simply recognizing the existence of a right to a basic minimum education, it is also important to define its contours.”) However, the court did note that due to the early stage of the litigation and the lack of evidence, it

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full potential of the educational rights of students; more is required. Through examining other educational options, including self-directed learning, it becomes clear that an education system which supports more flexible and self-directed educational experiences may be precisely what many marginalized students (many of whom are being failed by conventional public schools) need.¹⁷ Further, because of the ways in which conventional public schooling harms marginalized families – for example, by restricting their educational options and compelling attendance in under-resourced schools – an expanded right to educational options may better protect their fundamental liberty interests.¹⁸

We now know that the existing public schooling system is not adequately working for many students;¹⁹ that there are educational alternatives which *do* work for many students;²⁰ and that access to

would be difficult to define the exact limits of what constitutes such a basic minimum education, and that the task is better suited for the trial court. *Id.*

¹⁷ See *infra* notes 219–225 and accompanying text (discussing the experiences of Black unschoolers and homeschoolers).

¹⁸ In addition to considering the liberty interests of students, the liberty interests of families – especially families from marginalized populations – should be recognized. Stephen Arons and Charles Lawrence III, for example, have argued that the public schooling system may violate the First Amendment interests of certain parents: “We have created a system of school finance that provides free choice for the rich and compulsory socialization for the poor and working class. The present method of financing and controlling American public schooling discriminates against the poor and working class, and even a large part of the middle class, by conditioning the exercise of first amendment rights of school choice upon an ability to pay, while simultaneously eroding that ability to pay through the regressive collection of taxes used exclusively for public schools...Children whose families cannot exercise their constitutional right to obtain alternative education have no escape from the values of the public school they must attend...children who wish to succeed in school are forced to confess belief in the dominant school ideology.” Stephen Arons & Charles Lawrence III, *The Manipulation of Consciousness: A First Amendment Critique of Schooling*, 15 HARV. C.R.-C.L. L. REV. 309, 326-28 (1980). Arons and Lawrence suggest that compulsory public schools are overly restrictive in the sense that they forcibly inculcate majoritarian values and leave families and students with no meaningful alternatives. An expanded right to education that provides access to a variety of educational environments could – for some families – provide a reasonable solution to this problem.

¹⁹ See *supra* note 1.

²⁰ A growing body of evidence from recent decades is challenging long-held assumptions about what “effective education” must consist of. Many students have demonstrated the ability to learn and prepare for successful democratic and economic participation in learning environments that intentionally lack any imposed curriculum, testing, or coercion. And many of the students who thrive in these environments are the same students who struggle in and are marginalized by conventional schooling. See *infra*, Part III; see generally PETER GRAY, *FREE TO LEARN: WHY UNLEASHING THE INSTINCT TO PLAY WILL MAKE OUR CHILDREN HAPPIER, MORE SELF-RELIANT, AND BETTER*

those options is practically foreclosed to many students who have been deprived of the necessary resources.²¹ In order to realize the promises of public education, and to protect the educational and liberty rights of students and families, publicly funded and accessible educational alternatives should be included in conversations about the right to education. The right to public education should be redefined to include a continuum of options. This expanded right can be grounded in the reasoning and analysis of recent scholarship and jurisprudence.

This Comment argues that courts should adopt a broader definition of the right to education. It is appropriate for courts to be involved in this determination because fundamental liberty interests are implicated.²² When this reasoning is juxtaposed with the reality

STUDENTS FOR LIFE (2013) (discussing evidence showing the effectiveness of homeschooling, un-schooling, democratic education, and a variety of alternative models of non-restrictive learning). However, we must acknowledge the limits of this evidence and the existence of a skewed sample and selection bias effect in studies on outcomes of self-directed education. This tension between showing the benefits of alternative education and making the opportunities accessible is significant. A common position is that policy decisions shouldn't rely on existing evidence from alternative education because that evidence may be skewed toward the more educated and privileged. But there is limited empirical grounding for this assumption. And it amounts to saying that since we can't be sure that the data doesn't skew towards more educated or well-resourced families, the better course is to leave the children of economically vulnerable parents in failing public schools or educational situations that they didn't choose and can't opt out of. Moreover, this is a paternalistic approach – suggesting that because it is uncertain whether the outcomes for those who pursue less-restrictive options will be objectively satisfactory, those options shouldn't be made available in the first place. Or, in other words, it amounts to concluding that until there is robust data on the alternative educational outcomes of children from disadvantaged backgrounds, the best option is to keep them in schools where it is certain they are likely to fail. One possible counterargument is that the risk of diverting public funding away from traditional public schools outweighs these considerations. But this debate need not be settled here. It is enough to recognize its parameters and focus on the fact that these alternatives could be made available – regardless of whether they should, or how exactly that would operate in practice.

²¹ For example, homeschooling and alternative private education are often cost-prohibitive for low-income families.

²² See, e.g., *Gary B. v. Whitmer*, 957 F.3d 616, 638-39 (6th Cir. 2020), reh'g en banc granted, opinion vacated, 958 F.3d 1216 (6th Cir. 2020) (“The affected group—students and families of students without access to literacy—is especially vulnerable and faces a built-in disadvantage at seeking political recourse. The lack of literacy of which they complain is exactly what prevents them from obtaining a basic minimal education through the normal political process. This double bind provides increased justification for heightened judicial scrutiny and the recognition of the right as fundamental.”); see also Arons, *supra* note 14, at 199–206 (discussing First Amendment interests).

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that the existing public schooling system is failing many students, it becomes clear that the current means of education need to be critically examined; they must be justified legally and normatively. Courts and scholars have begun this process. This Comment continues that project and simultaneously challenges the current discourse surrounding educational practices – which has largely been limited to the existing paradigm of public schooling – by suggesting that the process of defining adequate public education should include consideration of publicly funded educational alternatives, such as self-directed learning, and how to make those accessible on an equitable basis.²³

This Comment is motivated by several concerns: the urgent need for alternative pedagogical models in public education, for equity in education, and for addressing the impacts of the COVID-19 pandemic on public education.²⁴ First, the insight that many children thrive in alternative and far less restrictive learning environments²⁵ calls into question the operation of the current system of public

²³ Of course, I do not conceive of this solution as a panacea to the challenges of social inequality or of accessing quality public education. See, e.g., Tony DeCesare, Re-Thinking the Conceptual and Normative Implications of the “Capability to Be Educated”: Children and the Pursuit of Educational Equality, 48 PHIL. STUD. IN EDUC. 74 (2017) (stating that “simply equalizing formal access to educational opportunities (e.g., access to a school and other educational resources) is an impoverished view of equal educational opportunity[.]” DeCesare argues that other factors, such as caring for siblings, poverty, etc., can diminish the capacity of a young person to access education. In other words, it is not only about the opportunities, but also about how those opportunities are accessed and made use of; equal resources alone are an insufficient measure.)

²⁴ For example, during the COVID-19 pandemic, homeschool registration rates have soared, as many families have realized that alternative educational methods serve their children better than conventional public school. This is especially true for Black families and families with children with disabilities – populations who are frequently underserved by public schooling. See David Crary, Sparked by pandemic fallout, homeschooling surges across US, ASSOCIATED PRESS, (July 25, 2021), <https://apnews.com/article/coronavirus-pandemic-homeschooling-2f0ac73aa4b9fbfc5f2179103f1a14c4> (noting that national homeschool rates doubled during 2020, and that Black households saw a jump in homeschooling rates from 3.3% to 16.1% during the pandemic, with some parents expressing appreciation at the “opportunity to take ownership of our children’s education.”). See also Megan Brenan, K-12 Parents’ Satisfaction With Child’s Education Slips, GALLUP (Aug. 25, 2020), <https://news.gallup.com/poll/317852/parents-satisfaction-child-education-slips.aspx>.

At the same time, the pandemic has exacerbated and exposed inequalities in the public schooling system and wider society. See generally Ben Williamson et al., *Pandemic politics, pedagogies and practices: digital technologies and distance education during the coronavirus emergency*, 45 LEARNING, MEDIA & TECH. 107 (2020) (discussing, among other issues, digital inequality and how this impedes access to education, especially in marginalized populations).

²⁵ See Part III, *infra* (discussing research documenting the benefits of self-directed education).

schooling, which fails to meet the educational needs of many students. Second, equity concerns must remain central to these conversations. Alternative forms of education are unavailable to many students and families lacking the resources to access different options.²⁶ In other words, existing policy has the practical effect of limiting the educational opportunities for many students – especially those from disadvantaged backgrounds – thus perpetuating different *and* unequal access to education.²⁷ Therefore, an expanded right to education – including a continuum of options – must be made available on an equitable basis. Finally, the COVID-19 pandemic has exposed and emphasized troubling inequities in public schooling,²⁸ while simultaneously galvanizing an increase in homeschooling.²⁹ Thus, this Comment attempts to contribute to the development of more equitable access to public education, while building on the momentum that has been generated in the homeschooling and self-directed education communities.

This Comment will inform ongoing discourse surrounding the right to education in several significant respects. To date, most scholarship addressing the fundamental right to education generally appears to take for granted the idea that public education is synonymous with conventional public schooling.³⁰ This discourse could be informed by considerations of alternative models of education presented in this Comment, including self-directed learning. This Comment will also provide another perspective on the issue of equitable access to educational options. Currently, one popular approach to this problem is the defense of private school choice and vouchers.³¹ However, these programs are often still rooted in conventional schooling

²⁶ At the same time, it is important to challenge the overly broad application of this assumption and narrative. The narrative that low-income families cannot or will not access alternative modes of learning often reinforces and perpetuates those patterns and creates unnecessary barriers to entry. In fact, many families and communities that are typically considered “less privileged” have found innovative ways to make alternative education possible for their children. See generally AKILAH S. RICHARDS, *RAISING FREE PEOPLE: UNSCHOOLING AS LIBERATION AND HEALING WORK* (2020). Still, the fact remains that for many families, additional publicly funded resources would make the transition to alternative education more practical and more accessible.

²⁷ See, e.g., Arons & Lawrence, *supra* note 18.

²⁸ See generally Williamson et al., *supra* note 24.

²⁹ See Crary, *supra* note 24.

³⁰ See, e.g., Derek W. Black, *The Fundamental Right to Education*, 94 *NOTRE DAME L. REV.* 1059 (2018); Friedman & Solow, *supra* note 1, at 92; Alexis M. Piazza, *The Right to Education After Obergefell*, 43 *N.Y.U REV. L. & SOC. CHANGE* 62 (2019).

³¹ See generally Chelsea Lauren Chicosky, *Restructuring the Modern Education System in*

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pedagogy. Moreover, they have been rejected by many because of inequitable results and concerns about the commodification of education,³² as well as the redirection of public school funds away from the students who are most in-need.³³ In short, private, market-based vouchers are not an adequate solution.³⁴ Instead, this Comment advances the view that the right to public education ought to be defined more broadly. To this end, advocacy and legal analysis surrounding public education should consider equitable access to publicly funded educational alternatives beyond conventional public schooling; and courts should expand the right accordingly.³⁵

Scholars and courts have advanced many justifications for the equitable provision of, and the right to, public education. These include civic and political preparation, facilitation of liberty and autonomy, development of the child's potential, and equity concerns. But when this reasoning is compared with the realities of both conventional public schooling and the evidence demonstrating effectiveness of educational alternatives, it becomes apparent that, for many students, these justifications could be realized through alternative and

the United States: A Look at the Value of Compulsory Education Laws, *BYU EDUC. & L.J.* 1 (2015).

³² It might also be argued that compulsory schooling itself represents the commodification of education. See IVAN ILLICH, *DESCHOOLING SOCIETY* 29 (1971) (asserting that standardized curriculum becomes a commodity).

³³ See, e.g., SABINA E. VAUGHT, *RACISM, PUBLIC SCHOOLING, AND THE ENTRENCHMENT OF WHITE SUPREMACY: A CRITICAL RACE ETHNOGRAPHY* 90 (2011) ("Choice fails locally because not all children can choose... it leaves children behind...It ensures a system of winners and losers, and it releases...states and the federal government of responsibility to students and communities...Compulsory education becomes compulsory undereducation, and Black children are commodified into the currency that buys White educational property.").

³⁴ JOHN F. WITTE, *THE MARKET APPROACH TO EDUCATION: AN ANALYSIS OF AMERICA'S FIRST VOUCHER PROGRAM* 203 (2000) ("It is difficult for me to see how a market model of choice would do anything but accelerate the growing balkanization of our schools and country.").

³⁵ For examples of educational alternatives, see Part III, *infra*. Additionally, the implications of this Comment suggest that perhaps children and families committed to unschooling and homeschooling ought to receive public support and resources. However, there are significant equity concerns associated with this position. For example, while cash subsidies could be provided directly to students or parents who wish to homeschool or unschool, that may create similar risks to those discussed in debates surrounding market-based vouchers. However, rather than the explicitly market-based structure of private school vouchers, this solution would provide resources directly to the families who need them, allowing families and students to create their own educational opportunities and environments. This proposal could result in direct investment of resources into families and communities of color who too often have systematically been denied the right to pursue education in a way that is meaningful to them. Regardless, a detailed discussion of implementation is beyond the scope of this Comment.

less restrictive means.

This Comment asks: What is the normative and legal case for the status quo in public schooling? Why are courts and scholars not more actively considering alternative educational models? What is the source of the sanctity of the schoolhouse? I aim to present examples of viable alternatives and articulate the legal and normative reasons why those alternatives – and self-directed education in particular – ought to be considered when defining the right to public education.

This Comment proceeds as follows. Part II examines relevant scholarship and jurisprudence on the right to education. It discusses the reasoning that scholars and courts have used to make the case for the right to education and shows how these analyses often miss the larger problems inherent in the modern public school system. Part III briefly introduces viable alternative educational options – with a focus on self-directed education – in order to ground the legal argument in concrete examples. Selected models include unschooling (a form of homeschooling³⁶), democratic education, and self-directed learning centers.³⁷ Part IV introduces the substantive arguments for an expanded right to access educational options.³⁸ I show how the principles and justifications found in relevant case law and scholarship can be extended and applied to support an expanded right to education. In Part V, I discuss practical implications of this argument and propose a list of factors that courts might consider when redefining and expanding the right to education. Finally, common concerns, assumptions, and misconceptions about self-directed educational alternatives will be addressed.³⁹

³⁶ For a discussion of the positive aspects of homeschooling, see Tanya K. Dumas et al., *Evidence for Homeschooling: Constitutional Analysis in Light of Social Science Research*, 16 WIDENER L. REV. 63 (2010). For a discussion of the state's obligations towards homeschooling families and children, see Sonia M. Muscatine, *Homeschooling and the Right to Education: Are States Fulfilling Their Constitutional Obligations to Homeschooled Students?*, 49 J.L. & EDUC. 67 (2020). But see also Elizabeth Bartholet, *Homeschooling: Parent Rights Absolutism vs. Child Rights to Education & Protection*, 62 ARIZ. L. REV. 1 (2020) (raising objections to home schooling).

³⁷ See Part III, *infra*.

³⁸ However, I will not be addressing the paternalistic problem of deciding which student receives – or has access to – which specific educational option. Rather, I focus on introducing the right to less restrictive, publicly funded educational options into the legal and policy discourse surrounding education. Until this right – or at least its possibility – is recognized and discussed, concerns over implementation will remain largely irrelevant.

³⁹ However, I choose to largely avoid issues of choice and the child's interests, and how child autonomy interacts with parental and state concerns. This discussion would necessarily engage complex issues of autonomy and allocation of decision-making power and is beyond the

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I. THE RIGHT TO PUBLIC EDUCATION: JUSTIFICATIONS, SOURCES, AND THE DISJUNCTURE

The right to public education is grounded in various justifications advanced in legal scholarship, state law, and jurisprudence. This section reviews relevant scholarship and case law addressing the right to education. It seeks to identify the rhetorical justifications for public education, the legal reasoning underlying the right, and the doctrinal sources of the right where it has been recognized by courts and legislatures. It then compares the justifications and rhetoric to the reality of public schooling, concluding that a disjuncture exists. This suggests that a different approach is needed.

A. Literature Review: Approaches to Finding the Right to Public Education

A significant body of legal scholarship has evolved to articulate robust and enforceable rights to public education. Scholars have attempted to address shortcomings of public education by focusing efforts on finding a fundamental right to education in the federal Constitution and defining what an “adequate education” consists of. This section discusses several common approaches advanced by scholars: education as implicit in ordered liberty and necessary for democratic participation; education as essential to children’s and parents’ liberty interests and to children’s development as individuals; and education as a means of achieving equity.

1. Education as a Fundamental Right Implicit in Ordered Liberty and Necessary for the Demands of Democratic Participation

Susan Bitensky contends that the right to education is implicit in the notion of liberty and freedom for individuals.⁴⁰ Bitensky explores numerous possible sources of the right to education including:

scope of this Comment. I will reserve a more comprehensive exploration of this topic for future work. For an example of scholarship addressing some of these issues, see generally Samantha Godwin, *Children’s Oppression, Rights, and Liberation*, 4 NW. INTERDISC. L. REV. 247 (2011).

⁴⁰ Susan H. Bitensky, *Theoretical foundations for a right to education under the US Constitution: a beginning to the end of the national education crisis*, 86 NW. UNIV. L. REV. 550 (1991) (citing BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 104 (2000)).

“[F]rom the Free Speech Clause of the First Amendment,⁴¹ the Due Process Clause and the Privileges or Immunities Clause of the Fourteenth Amendment, and, indirectly, from the Constitution’s references to elections and voting.”⁴² Bitensky’s proposed content of the right takes language from *San Antonio v. Rodriguez* as a starting point: a right to an education “to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.”⁴³

Friedman and Solow outline a federal right to a minimally adequate education grounded in a textual and historical analysis that centers the importance of civic preparation and the prevalence of public schools in early America.⁴⁴ They argue that the right provides a constitutional floor, and marks the beginning, rather than the end, of a discussion about its contours.⁴⁵ Derek Black’s work expands on this approach and locates the right to education in an originalist theory, noting the prevalence and importance of public education as critical to the demands of citizenship at the time of the ratification of the Fourteenth Amendment.⁴⁶ After finding textualist evidence for a fundamental right to education, Black examined the scope of the right. Black noted that courts have been reluctant to engage with the scope of the right because it “involves complex and substantive judgments,”⁴⁷ but that state supreme courts have made strides in recent decades to define the right.⁴⁸ Black’s definition of education is focused on preparation for democratic citizenship.⁴⁹ Black argues that the historical practices and traditions – and their intended purposes with respect to education – at the time of the ratification of the Fourteenth Amendment provide guidance as to the scope of the right.⁵⁰ Black articulates the standard as: “a fundamental right to education requires the state to provide individuals with the skills to comprehend the political discourse of the day, evaluate its merits, and then act thoughtfully

⁴¹ Id. at 597 (arguing that “the full extent of the Free Speech Clause... necessarily encompasses an implied positive right to elementary and secondary education.”)

⁴² Piazza, *supra* note 30, at 79 (citing Bitensky, *supra* note 40, at 553).

⁴³ Bitensky, *supra* note 40, at 553 (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36–37 (1973)).

⁴⁴ Friedman & Solow, *supra* note 1, at 93.

⁴⁵ Id. at 155–56.

⁴⁶ Black, *supra* note 30, at 1059.

⁴⁷ Id. at 1059, 1095.

⁴⁸ Id. at 1096.

⁴⁹ Id. at 1097.

⁵⁰ Id. at 1096–97 (citing *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008)).

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through the ballot and other means of accountability.”⁵¹

2. Liberty Interests and Development of the Child

Bitensky also offers another substantive proposal: “to recognize a federal constitutional right to the minimum quantum of education necessary to enable the development of children’s mental abilities to their fullest potential.”⁵² Bitensky claims that “[i]f the federal government truly committed itself to providing the sort of resources and involvement necessary to enable each child to reach his or her fullest intellectual potential, it is conceivable that the education crisis would finally begin to relent even in the nation’s most beleaguered school systems.”⁵³

A liberty-based approach to the fundamental right to education was recently explored by Alexis Piazza, who advanced an interpretation in which the liberty-equality synthesis of *Obergefell v. Hodges* could be the source of greater recognition of the right to education.⁵⁴ As to the scope of the right, Piazza posits that an “adequate education [is one that] facilitates the exercise of liberty, because it provides children with greater autonomy and life choices, and prepares citizens to participate effectively and intelligently in our open political system.”⁵⁵ This definition is notable for its explicit reference to the exercise of liberty, autonomy, and choice.

First Amendment liberty interests are also implicated in definitions of public education. Stephen Arons has argued that the First Amendment protects the right to pursue knowledge and form beliefs, but that the modern compulsory school system arguably violates this

⁵¹ Black, *supra* note 30, at 1109.

⁵² Bitensky, *supra* note 40, at 639 (Bitensky cites numerous sources, including the Universal Declaration of Human Rights’ and the United Nations Convention on the Rights of the Child, emphasizing the full development and dignity of the individual as the purpose of education. Bitensky notes that the “norm that children should be educated to enable them to reach their fullest potential, then, has...been embraced by the international community for over forty years in some of its loftiest and most well-accepted statements of human rights.” Bitensky recognizes that domestic educational policy statements and agreements have recognized this aim of education as well).

⁵³ *Id.* at 640 (in defense of the practicality of this proposal, Bitensky notes the relative success of the implementation of the “Education for the Handicapped Act” – now the Individuals with Disabilities Education Act (IDEA)—and its use of individualized education programs (IEPs)).

⁵⁴ Piazza, *supra* note 30, at 78.

⁵⁵ *Id.*

right, especially for economically vulnerable students and families who are unable to opt out of the public schooling system and access alternatives.⁵⁶ This is compounded by a standardized curriculum which renders the marginalized dissenting student or family an unwilling yet captive recipient of the dominant ideology; it is "compelled belief."⁵⁷ Put simply, Arons argues that, to the extent that educational alternatives are not made accessible, conventional public schooling may violate students' and parent's First Amendment rights. This suggests that a robust right to education would provide for the meaningful exercise of First Amendment rights.

3. Equity Concerns

While many courts have been reluctant to engage with the determination of the scope of the right, Kristen Safier contends that because some state legislatures clearly fail to meet the needs of children to be educated by the state, this is precisely the type of issue that courts must engage with: "Courts may, should and have involved themselves in defining the standards of a constitutionally mandated educational system."⁵⁸ Safier suggests looking to state education reform litigation to assist a federal judiciary in defining a fundamental right to education.⁵⁹ Safier points to state court decisions defining adequacy through the provision of certain educational services,⁶⁰ and outlines specific requirements that the right should include, such as safe buildings, current instructional materials, the ability to provide basic literacy skills, and the ability to provide civic and scientific knowledge.⁶¹

Similarly, Michael A. Rebell proposes a right to comprehensive educational opportunity, stating that "strong bases exist for legal initiatives to seek recognition of this right in both the state and federal courts."⁶² Rebell notes that many state courts have insisted that states provide students with educations that will equip them to participate

⁵⁶ Arons, *supra* note 14, at 199–205.

⁵⁷ *Id.*; see also Arons & Lawrence, *supra* note 18, at 326–28.

⁵⁸ Kristen Safier, Comment, The Question of a Fundamental Right to a Minimally Adequate Education, 69 UNIV. CIN. L. REV. 993, 1015 (2001) (quoting *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 210 (Ky. 1989)).

⁵⁹ *Id.* at 1016.

⁶⁰ *Id.* at 1019.

⁶¹ *Id.* at 1020.

⁶² Rebell, *supra* note 4, at 111.

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in society.⁶³ Rebell also cites state court cases that hold that there is an “obligation on the state to create an education that overcomes the effects of poverty.”⁶⁴ Rebell states:

The right that I am proposing would require states to adopt a comprehensive approach to educational opportunity that ensures disadvantaged students the services and support most critical for school success. These resources include traditional educational resources like high-quality teaching, a rich and rigorous curriculum, adequate facilities, and sufficient, up-to-date learning materials. In addition, they must include supplemental resources needed to overcome the impediments to educational achievement imposed by the conditions of poverty.⁶⁵

Rebell also argues that children from backgrounds of poverty should have early childhood education from birth, and after-school and summer school programs⁶⁶ in an “attempt to replicate the enriched home learning environments, lessons, activities, access to cultural events, quality health care, and stable, supportive home environments that middle class children generally experience as a matter of course.”⁶⁷ In his amicus brief in *Gary B.*, Rebell advanced a similar argument, urging

⁶³ Id. at 82 (“See, e.g., *Conn. Coal. for Just. in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 253 (Conn. 2010) (holding that the state constitution requires the state to provide ‘an education suitable to give [students] the opportunity to be responsible citizens able to participate fully in democratic institutions, such as jury service and voting ... [and to be] prepared to progress to institutions of higher education, or to attain productive employment and otherwise contribute to the state’s economy’”); *Robinson v. Cahill*, 303 A.2d 273, 295 (N.J. 1973) (defining the state constitutional requirement as “that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market”); *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 332 (N.Y. 2003) (defining “sound basic education” in terms of providing students with a “meaningful high school education” that will prepare them to “function productively as civic participants”); *Campbell Cnty. Sch. Dist. v. State*, 907 P.2d 1238, 1259 (Wyo. 1995) (defining the core state constitutional requirement in terms of providing students with “a uniform opportunity to become equipped for their future roles as citizens, participants in the political system, and competitors both economically and intellectually”).

⁶⁴ Rebell, *supra* note 4, 62 at 86–87 (citing *Abbeville Cnty. Sch. Dist. v. State*, No. 31-0169, slip op. at 157 (S.C. Ct. Com. Pl. Dec. 29, 2005); *Hoke Cnty. Bd. of Educ. v. State*, 599 S.E.2d 365, 392 (N.C. 2004)).

⁶⁵ Id. at 53.

⁶⁶ Id.

⁶⁷ Id. at 54.

the court to recognize that preparation for citizenship requires more than access to basic literacy skills.⁶⁸

Finally, *Rebell* discusses the implications of the Individuals with Disabilities Education Act (IDEA), arguing that “it is illogical and inequitable for Congress and the state legislatures to provide students disadvantaged by physical, mental, and emotional disabilities with ‘special education and related services designed to meet their unique needs,’ while refusing to provide analogous services to meet the unique needs of students who are educationally disadvantaged by poverty.”⁶⁹ *Rebell* states: “access to meaningful, individualized support services should now be extended to students disadvantaged by conditions of poverty,”⁷⁰ and that we must “ensure meaningful educational opportunity for all children.”⁷¹

B. Legal Sources of the Right to Education

1. Underlying Justifications for Public Education

Courts and legislatures have long advanced justifications for the maintenance and promotion of public schooling. These include the

⁶⁸ Brief for Petitioner-Appellant at 10, *Gary B. v. Whitmer*, 957 F.3d 616, 661 (6th Cir. 2020), reh’g en banc granted, opinion vacated, 958 F.3d 1216 (6th Cir. 2020). Available at: <https://www.detroit-accesstoliteracy.org/wp-content/uploads/2018/11/Professor-Michael-Rebell-6th-Circuit-Amicus-Brief.pdf>.

⁶⁹ *Rebell*, supra note 62, at 84 (citing 20 U.S.C. § 1400(d)(1)(A) (2006) and noting that under IDEA, “students have a right not merely to access public education, but to receive ‘a free appropriate public education that emphasizes special education and related services designed to meet their unique needs.’”).

⁷⁰ *Id.* at 115.

⁷¹ *Id.* at 116.

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preservation of the republic⁷² and preparation of citizens for the demands of democracy.⁷³ A related set of justifications is concerned with

⁷² *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (noting that Thomas Jefferson stated 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.”); BLACK, *supra* note 30, at 1099 (citing state constitution provisions: “ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; COLO. CONST. art. IX, § 2; HAW. CONST. of 1959, art. IX, § 1; IDAHO CONST. art. IX, § 1 (mandating “a general, uniform and thorough system of public, free common schools” to further “[t]he stability of a republican form of government”); MONT. CONST. of 1889, art. XI, §§ 1, 7; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, §§ 1, 2; N.M. CONST. art. XII, § 1; N.D. CONST. art. VIII, § 147; OKLA. CONST. art. XIII, § 1; S.D. CONST. art. VIII, § 1 (mandating an education system as a necessity of a republican form of government); UTAH CONST. art. X, § 1; WASH. CONST. art. IX, §§ 1, 2; WYO. CONST. art. VII, § 1); ARK. CONST. art. XIV, § 1 (ratified 1874) (mandating education because “[i]ntelligence and virtue [are] the safeguards of liberty and the bulwark of a free and good government”); IND. CONST. of 1816, art. IX, § 1 (“Knowledge and learning, generally diffused through a community . . . [are] essential to the preservation of a free government . . .”); MINN. CONST. art. VIII, § 1 (ratified 1857) (“The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the Legislature to establish a general and uniform system of public schools.”); N.H. CONST. pt. II, art. LXXXIII (ratified 1784) (“Knowledge and learning . . . [are] essential to the preservation of a free government . . .”); N.D. CONST. art. VIII, § 1 (ratified 1889) (mandating education because “[a] high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people being necessary in order to insure the continuance of that government”).); see also *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 205–06 (Ky. 1989) (positing that Kentucky’s constitutional convention of 1890 justified the education clause as essential to freedom, developing patriotism, and understanding government)).

⁷³ *Brown v. Bd. of Ed.*, 347 U.S. 483, 493 (1954) (“Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. 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.”).

social issues and the wellbeing of children;⁷⁴ the development of children;⁷⁵ exposure to diversity;⁷⁶ socialization; and social equality and access to opportunity.⁷⁷

Many of the justifications advanced by legislatures and courts are utilitarian in nature. Public schooling is repeatedly emphasized as a means to achieve one or more ends – for example, the preservation of the republic. This suggests that, because this rhetoric often implicitly and explicitly subordinates the interests of children to the interests of the state, courts should be scrutinizing the effectiveness of public schooling in achieving these justifications. In other words, courts should be carefully examining the *means* of education, and whether they appear tailored to the purported ends. It is this issue of pedagogical methods, and their nexus with commonly asserted justifications, which is the focus of Parts III and IV.

2. Establishing the Right to Public Education

While the right to public education is recognized in state constitutions and many state court decisions, the U.S. Supreme Court has yet to recognize a fundamental right to education under the federal constitution. However, in the recent and notable case *Gary B. v. Whitmer*, the Sixth Circuit examined the Supreme Court’s education precedents and held that a basic minimum education is a fundamental right under the U.S. Constitution.⁷⁸ This recognition is especially significant in light

⁷⁴ J. Rapp, 3 Education Law § 8.03 (2020) (“the practical underpinnings of compulsory attendance are founded in social needs. In large part, compulsory education laws were intended to face social concerns about child labor and employment opportunities.”); *Yoder*, 406 U.S. 205, 228 (1972).

⁷⁵ *Yoder*, 406 U.S. 205, 239 (1972) (noting that the State is not “concerned with the maintenance of an educational system as an end in itself, it is rather attempting to nurture and develop the human potential of its children...to expand their knowledge, broaden their sensibilities, kindle their imagination, foster a spirit of free inquiry, and increase their human understanding and tolerance.”).

⁷⁶ Michael Rebell, Preparation for capable citizenship: The schools’ primary responsibility, 100 PHI DELTA KAPPAN 18, 21 (2018) (“...schools continue to be the main institutional setting in our society where people from diverse political and social backgrounds can come together in a venue that can promote and reward rational discussion and tolerance for differing views.”).

⁷⁷ *Gary B. v. Whitmer*, 957 F.3d 616, 654 (6th Cir. 2020), reh’g en banc granted, opinion vacated, 958 F.3d 1216 (6th Cir. 2020) (citing *Hunnicut v. Burge*, 356 F. Supp. 1227, 1237 (M.D. Ga. 1973) (“[T]hat education is a means of achieving equality in our society” is a belief “that has persisted in this country since the days of Thomas Jefferson.”); see also *Plyler v. Doe*, 457 U.S. 202, 221–22 (1982).

⁷⁸ *Gary B.*, 957 F.3d 616 at 621. It is important to note that the decision was vacated, and

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of Supreme Court precedents. Most notably, in *Rodriguez*, the Court declined to recognize a fundamental right to education, yet the Court left open the possibility of a future recognition of the right in situations where a “basic minimum” education is practically denied to students.⁷⁹ The *Gary B.* decision engaged in the process of determining what a “basic minimum” education consists of, drawing upon education case law and scholarship. It synthesized many of the common underlying justifications for public education discussed above, and thus offers a valuable departure point for the argument advanced in this Comment.

To determine whether the asserted right to education was fundamental, the Sixth Circuit applied the Supreme Court’s two-prong substantive due process analysis.⁸⁰ Under the first prong, the Supreme Court considers whether the right or liberty is “deeply rooted in the Nation’s history and tradition.”⁸¹ This historical analysis approach is applied holistically, considering “the evolution of an asserted right through or even beyond the history of our country.”⁸² Several Justices have instead adopted a narrower test, “looking to whether the right in question would have been recognized as a protected interest at the

the case was subsequently settled. See John Wisely, *Despite settlement, Detroit literacy lawsuit heads back to court*, DETROIT FREE PRESS (May 20, 2020, 12:46 PM), <https://www.freep.com/story/news/education/2020/05/19/federalappeals-court-returns-detroit-literacy-lawsuit-ruling/5225188002/> (discussing how the Republican-controlled Michigan legislature asked to intervene in the case, arguing that the ruling infringed on federalism, and how the Sixth Circuit agreed to rehear the case en banc, and vacated the original panel’s opinion). However, the Sixth Circuit never issued an en banc opinion, so while there is no longer a precedent in the Sixth Circuit holding that there is a constitutional right to literacy, *Gary B.* was not explicitly overruled.

⁷⁹ “Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditures in Texas provide an education that falls short. Whatever merit appellees’ argument might have if a State’s financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.” *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36–37 (1973) (emphasis added).

⁸⁰ *Gary B.*, 957 F.3d 616 at 643.

⁸¹ *Id.* at 643 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)).

⁸² *Gary B.*, 957 F.3d 616 at 643–44 (quoting *Obergefell v. Hodges*, 576 U.S. 644, 651–62 (2015)).

time the Fourteenth Amendment was adopted.”⁸³ However, even if a specific right lacks substantial historical roots, this alone does not necessarily foreclose recognition under the Due Process Clause.⁸⁴ The second prong of the inquiry considers “whether the asserted right is ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’”⁸⁵

Having established the framework for analyzing a fundamental right, the Sixth Circuit examined the Supreme Court’s education cases.⁸⁶ In doing so, it considered important justifications for public education – including the exercise of individual liberties and the preservation of the democratic republic – yet noted that the Supreme Court has yet to recognize the fundamental right.⁸⁷

Applying a substantive due process analysis, the Sixth Circuit defined the right as “one that plausibly provides access to literacy”⁸⁸ – an “education sufficient to provide access to a foundational level of literacy.”⁸⁹ In finding the sources of this right, the court first noted the tradition and “longstanding practice of free state-sponsored schools” which have been ubiquitous since before the Fourteenth Amendment.⁹⁰ To support this finding, the court cited numerous Supreme Court decisions emphasizing the ubiquity and importance of education in United States history.⁹¹ The Sixth Circuit emphasized the history of racial discrimination in education, further underscoring the political and social importance of access to education – and literacy in

⁸³ Gary B., 957 F.3d 616 at 644 (quoting *Obergefell*, 576 U.S. 644, 715 (2015) (Scalia, J., dissenting)).

⁸⁴ Gary B., 957 F.3d 616 at 644. See also *Obergefell*, 576 U.S. 644, 664 (2015) (“History 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.”).

⁸⁵ Gary B., 957 F.3d 616 at 644 (quoting *Glucksberg*, 521 U.S. at 721).

⁸⁶ Gary B., 957 F.3d 616 at 644. The court reviewed *Brown v. Bd. of Educ.* 347 U.S. 483 (1954); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Plyler v. Doe*, 457 U.S. 202 (1982); and *Papasan v. Allain*, 478 U.S. 265 (1986).

⁸⁷ Gary B., 957 F.3d 616 at 644–48.

⁸⁸ *Id.* at 648.

⁸⁹ *Id.* at 659. The court elaborated on the requirement, stating that the education must be of a quality sufficient for students to “plausibly attain literacy within the educational system at issue.”

⁹⁰ *Id.*

⁹¹ *Id.* at 649–50, 653 (citing *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (“[t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance”); *Papasan*, 478 U.S. 265, 268–69 (1986); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (“[p]roviding public schools ranks at the very apex of the function of a State”); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

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particular.⁹² Thus, the court concluded that even under an originalist view,⁹³ a basic minimum public education should be recognized as a fundamental right rooted in history and tradition.⁹⁴

The Sixth Circuit also found that access to literacy is “implicit in the concept of ordered liberty.”⁹⁵ The opinion noted that literacy is essential to the exercise of other fundamental rights and participation in democracy, emphasizing education as vital to effective participation in the political system and economy.⁹⁶ Moreover, nearly every aspect of citizen-government interaction depends on literacy: voting, taxes, jury duty, and the legal system. Finally, the Sixth Circuit also invoked the vision of education as a “great equalizer” and a means of achieving equality and economic productivity in society.⁹⁷ Its reference to the Supreme Court’s desegregation cases makes clear that:

[S]tate-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.⁹⁸

Through the analysis of history and tradition, the finding that education is implicit in the concept of ordered liberty, and the need to address past racial discrimination and achieve equitable outcomes, the court held that plausible access to literacy is a fundamental right.⁹⁹

3. Defining the Right to Public Education

In describing a fundamental right, the “description does not need to circumscribe the outer-most limit of the right, but must at least define the extent of the right needed to resolve the matter at

⁹² Gary B., 957 F.3d 616 at 650-652.

⁹³ See generally Black, *supra* note 30.

⁹⁴ Gary B., 957 F.3d 616 at 650.

⁹⁵ Id. at 652 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

⁹⁶ Id. at 650, 652.

⁹⁷ Id. at 654.

⁹⁸ Id.

⁹⁹ Id. at 655.

hand.”¹⁰⁰ The Sixth Circuit’s opinion in *Gary B.* defined the right narrowly: “... the education needed to provide access to skills that are essential for the basic exercise of other fundamental rights and liberties, most importantly participation in our political system [...] this amounts to an education sufficient to provide access to a foundational level of literacy—the degree of comprehension needed for participation in our democracy.”¹⁰¹

While the Sixth Circuit declined to define the exact limits of the right – due to the early stage of the litigation, among other reasons – several principles were discussed.¹⁰² First, the right should be limited to opportunity and access to infrastructure – not outcomes.¹⁰³ Second, this infrastructure would likely include three basic components: facilities, teaching, and educational materials of a quality sufficient for the plausible attainment of literacy.¹⁰⁴ Third, courts should examine these factors holistically in order to determine whether students are provided with a fair shot at literacy.¹⁰⁵

State court cases have also attempted to define the contours of an adequate education. These rulings may provide insight as to the scope of the right to education and perhaps provide a doctrinal basis for expanding the right. In *Rose v. Council for Better Education*, the Kentucky Supreme Court defined educational adequacy by examining the educational services provided by the state and requiring seven core capacities.¹⁰⁶ Other state courts have held that equity concerns must be remedied. For example, the New Jersey Supreme Court ordered that students in the state’s poorest urban districts be provided additional resources, beyond the level currently enjoyed by students in affluent suburbs, because:¹⁰⁷

[T]he educational needs of students in poorer urban districts vastly exceed those of others, especially those from richer districts. The difference is monumental, no matter how it is measured. Those needs go beyond educational needs; they include food, clothing and

¹⁰⁰ Id. at 659 (citing *Obergefell v. Hodges*, 576 U.S. 644, 671 (2015)).

¹⁰¹ *Gary B.*, 957 F.3d 616 at 659.

¹⁰² Id.

¹⁰³ Id. at 659–60.

¹⁰⁴ Id. at 660.

¹⁰⁵ Id.

¹⁰⁶ *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 212 (Ky. 1989).

¹⁰⁷ *Rebell*, supra note 62, at 84.

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shelter, and extend to lack of close family and community ties and support, and lack of helpful role models. They include the needs that arise from a life led in an environment of violence, poverty, and despair. . .The goal is to motivate them, to wipe out their disadvantages as much as a school district can, and to give them an educational opportunity that will enable them to use their innate ability.¹⁰⁸

In short, the court found that suitable remedies for inequitable conditions require more resources. It also found that this investment must go beyond the walls of the conventional classroom in order to help children realize their innate potential.

C. The Disjuncture: Why a Different Approach is Needed

Scholarship addressing the right to education has largely accomplished what it set out to do. It has clearly articulated numerous sources for a fundamental right to education under the United States Constitution, as well as within states. This reasoning is reflected in state court decisions guaranteeing the right to education and was recently incorporated into the *Gary B.* decision which recognized a minimum floor for this right. But a disjuncture remains. There is a vast gap between the rhetoric and the reality of modern public schooling for far too many students.¹⁰⁹

The purported justifications for state-funded public schooling are wide-ranging and pervade both mainstream discourse and case law regarding public education in the United States. Yet these high-minded rhetorical justifications are frequently not reflected in the reality experienced by students. The disjuncture demonstrates that the current public schooling system does not meaningfully live up to or

¹⁰⁸ *Abbott v. Burke*, 575 A.2d 359, 400 (N.J. 1990)

¹⁰⁹ Scholars have noted this disjuncture between rhetoric and reality. For example, Bitensky writes: “Yet, in spite of these real achievements and the strong sentiments that inspired them, something has gone terribly wrong. Unacceptable numbers of children have been emerging from the public schools undereducated and frequently unprepared to join the work force even in low-level jobs. An unmistakable phenomenon has surfaced: the public schools are ailing and ailing profoundly—not just in this or that hamlet, but across the country. There is a crisis in public education of such menacing proportions that not only is the national self-concept of a free and independent people imperiled, but the very economic and political pre-eminence of the nation has been jeopardized.” Bitensky, *supra* note 40.

reflect its purported justifications.¹¹⁰ The existing conventional public schooling system is failing too many students in unacceptable ways.

There are several notable examples of the disjuncture in public education: the goal of preparation for civic participation has fallen flat in recent decades;¹¹¹ the achievement gap and inequality of educational and economic outcomes have in many ways persisted or worsened;¹¹² many students suffer psychological and social trauma in schools;¹¹³ and many individual students have learning styles that are simply incompatible with the standardized instruction methods of conventional public schooling.¹¹⁴

A more searching analysis may also call into question the legitimacy of some of the justifications and motivations underlying the public schooling system.¹¹⁵ Specifically, some of these critiques explore public schooling's ongoing role in the perpetuation of racist and oppressive systems.¹¹⁶ Thus, to address ongoing systemic injustices in

¹¹⁰ This disjuncture will be explored more fully in future work, which will examine the negative due process and liberty interests of students to be free from arbitrary confinement.

¹¹¹ *Rebell*, supra note 76, at 18–23 (noting that America's youngest voters have moved toward less engagement over time, as 18- to 24-year-olds' voting rates have dropped from 50.9% in 1964 to 38.0% in 2012).

¹¹² Derek W. Black, *Freedom, Democracy, and the Right to Education*, 116 *NW. UNIV. L. REV.* 1031, 1032 (2022); Sean F. Reardon, *The widening academic achievement gap between the rich and the poor*, 24 *CMTY. INVS.* 19 (2012) (discussing a 2012 analysis of many studies showed that the gap in achievement test scores between students from the richest 10% of families and the poorest 10% grew by 40 to 50 percent between the mid-1970s and the early 2000s).

¹¹³ Julia Moeller, et al., *High school students' feelings: Discoveries from a large national survey and an experience sampling study*, 66 *LEARNING AND INSTRUCTION* 101301 (2020) (A nationwide survey of 21,678 U.S. high school students found that nearly 75% of the students' self-reported feelings related to school were negative – most often reporting feeling tired, bored, and stressed).

¹¹⁴ See generally *GRAY*, supra note 20.

¹¹⁵ A robust discussion of these critiques is beyond the scope of this Comment and will be undertaken in future work. However, it is enough to note here that some of the motives and ideologies that have influenced modern schooling were derived from implicitly and explicitly classist, racist, and settler-colonist assumptions and structures. For a discussion of how religious indoctrination, industrialization, and assimilation of immigrants and Native Americans shaped the public schooling system, see generally CARL F. KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780-1860* (1983).

¹¹⁶ For discussion of the intersections of racial hierarchy and oppression with public schooling, see generally Kenneth J. Fasching-Varner et al., *Beyond School-to-Prison Pipeline and Toward an Educational and Penal Realism*, 47 *EQUITY & EXCELLENCE IN EDUC.* 410 (2014); LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 20 (2002) (“Our premise is that current institutional arrangements do not work for

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public education, the provision of more – or different – educational resources and options may be required.

Previous scholarship has attempted to address the disjuncture by suggesting a variety of ways to reconceptualize the right to education and pointing to various sources of that right. However, according to Derek Black, many of the conventional arguments for establishing the right to education “tend to narrowly define the nature of the right to education in terms of school quality and learning outcomes[.]”¹¹⁷ This Comment expands that work by contending that there are broader, more inclusive ways of conceiving of the right to public education. It builds upon the reasoning used in relevant scholarship and jurisprudence to argue that publicly accessible educational alternatives may be required to properly realize the right to public education. Put slightly differently, this disjuncture critique suggests that the definition of the right to public education ought to be expanded to include educational alternatives to conventional public schooling, in order to better meet the needs of students who are currently being failed by the existing system.

This Comment strives to compare the justifications for the right to education – including civic and political preparation, facilitation of liberty and autonomy, development of the child’s potential, and equity – to the realities of both conventional public schooling and the evidence demonstrating effectiveness of educational alternatives. I posit that these justifications could be realized through alternative and less restrictive means.

II.EFFECTIVE EDUCATIONAL ALTERNATIVES EXIST

A. Overview and Introduction to Self-Directed Education

Alternatives to conventional public schooling that are evidence-based and less restrictive than the status quo are available, and have

people of Color, and that it is not possible to address the present racial hierarchy without addressing these institutional arrangements.”); VAUGHT, *supra* note 33, at 100 (noting that educational inequality for Black and brown children is rampant and widespread); ERICA R. MEINERS, *FOR THE CHILDREN?: PROTECTING INNOCENCE IN A CARCERAL STATE* 7 (2016) (emphasizing “the intertwined centrality of capitalism, heteropatriarchy, colonialism, ableism, and white supremacy to the work of public education...”); Damien M. Sojoyner, *Black radicals make for bad citizens: Undoing the myth of the school to prison pipeline*, 4 *BERKELEY REV. OF EDUC.* 241 (2013).

¹¹⁷ Black, *supra* note 112, at 1036.

been demonstrated to be effective for a substantial number of students. While the specifics of implementation – and the paternalistic issues raised by that problem – are beyond the scope of this Comment, it is nonetheless important to discuss some of the existing educational alternatives, so that other possibilities can be imagined. Moreover, these concrete examples of educational alternatives will ground the argument for expanding the right to public education, discussed in Part IV. Once the contours of possible alternative models are understood, it will be easier to connect specific alternatives to the legal sources of the right to public education.

Of course, I do not purport to consider every possible educational alternative. Nor should (or could) courts undertake such an inquiry. Rather, I focus on educational models that appear relatively feasible; have demonstrated effectiveness; and are consistent with the reasoning and justifications underlying the right to public education. To be sure, there are alternatives that I do not discuss in this Comment, and which might satisfy these criteria. Additionally, some might disagree as to whether self-directed education meets these standards. But the purpose of this discussion is not to show that one or more of these methods should be imposed. Rather, it is to demonstrate that some existing self-directed educational alternatives appear feasible and effective, and should therefore be considered as viable options. Thus, this Comment is intended as the beginning of a broader conversation. At the same time, I also advance normative reasons why self-directed education is particularly well-suited for consideration. This section will provide an overview of self-directed education; examine several relatively common and well-documented educational alternatives within this broad designation; and advance normative reasons as to why less restrictive educational models should be considered as viable policy options.

There are already many existing educational alternatives to conventional public schooling throughout the United States. Some of these alternatives (e.g., Montessori and Waldorf schools, homeschooling, etc.) are relatively well-known. Others, like unschooling and democratic education, are less familiar to most, but are increasing in popularity and prominence.¹¹⁸ It is also important to note that this

¹¹⁸ According to early adopters of democratic education, several decades ago, democratic schools and learning communities were exceedingly rare in the United States. See generally DANIEL GREENBERG & MIMSY SADOFSKY, *LEGACY OF TRUST: LIFE AFTER THE SUDBURY VALLEY SCHOOL EXPERIENCE* (1992) In recent decades, democratic education has expanded rapidly. For a current directory of self-directed learning communities throughout the United States, see *ALLIANCE FOR*

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broader conception of publicly accessible and self-directed education, and its increasing visibility, is possible largely due to a long tradition of people from marginalized communities demanding and creating educational alternatives that better serve themselves and their children – and especially the work of Black and brown women.¹¹⁹

For the purposes of this Comment, I will focus on self-directed models of education because they represent less restrictive forms of education that are both consistent with the legal justifications for public education and appear feasible in terms of costs and implementation. Collectively, these fall under the ambit of “Self-Directed Education” (SDE).¹²⁰ SDE is a term that is increasingly being used for the educational practice of people who call themselves “unschoolers” or who attend schools or learning centers specifically designed to support self-direction, with no imposed curriculum. Such schools or centers are variously referred to as democratic schools, Agile Learning Centers,¹²¹ or “free schools,”¹²² among other monikers.

Self-directed education differs from the progressive educational philosophies originally advanced by educators like John Dewey and Maria Montessori in several important respects. While both philosophies emphasize the growth of the whole person, intrinsic motivation, and play, there is a core difference in how each school of thought claims such education occurs.¹²³ Progressive educators note

SELF-DIRECTED EDUCATION, “SDE Communities,” <https://www.self-directed.org/resources/communities#US> (last visited Dec. 17, 2020). Moreover, unschooling is becoming more widely known as a viable educational option. For examples of recent media coverage in mainstream news outlets and university education departments, see, e.g., Molly Worthen, When You Get Into Unschooling, It’s Almost Like a Religion, N.Y. TIMES (Sep. 25, 2020), <https://www.nytimes.com/2020/09/25/opinion/sunday/unschooling-homeschooling-remote-learning.html>; Beth Harpaz, Could ‘Unschooling’ Be the Future of Education?, CUNY SUM (Nov. 10, 2020), <https://sum.cuny.edu/unschooling-education-future-school-hunter-college/>.

¹¹⁹ See, e.g., VAUGHT, *supra* note 33 (proposing “extending teaching beyond the atomized, isolated and White walls of the traditional classroom. In many ways, I am describing longstanding traditions of organization and action that operate in communities of Color.”); RACHEL DEVLIN, *A GIRL STANDS AT THE DOOR: THE GENERATION OF YOUNG WOMEN WHO DESEGREGATED AMERICA’S SCHOOLS* (2018); RICHARDS, *supra* note 26.

¹²⁰ Peter Gray, Self-Directed Education—Unschooling and Democratic Schooling, in *OXFORD RSCH. ENCYCLOPEDIA OF EDUC.* (2017).

¹²¹ AGILE LEARNING CENTERS, <https://agilelearningcenters.org/> (last visited Nov. 24, 2020).

¹²² Peter Gray, Differences Between Self-Directed and Progressive Education, PSYCH. TODAY-FREEDOM TO LEARN BLOG (Jun. 27, 2017), <https://www.psychologytoday.com/us/blog/freedom-learn/201706/differences-between-self-directed-and-progressive-education>.

¹²³ *Id.*

the value of the child's intrinsic interests and the importance of play; but for progressives, it is generally the wise and benevolent teacher who guides and interprets the interests and play in ways that are designed to realize certain pre-established educational and societal goals.¹²⁴ In contrast, SDE maintains that it is the *child*, not the teacher, who enables education. Instead of relying on supremely competent educators and carefully designed learning exercises, SDE simply requires that children are provided with an environment that allows their natural educative instincts to operate effectively.¹²⁵ Whereas progressive education is closely tied to conventional public schooling, and differs mainly in pedagogical degree, SDE typically represents a significant departure from conventional schooling.¹²⁶ Like the existing legal discourse surrounding the right to education, progressive educational philosophies tend to operate within a given set of assumptions and beliefs about what education is and must be. Contemporary education scholarship and progressive education reform both seek to improve a conventional, standardized schooling system that may be structurally and fundamentally incompatible with the justifications underlying public education and the interests of students.

However, it is possible that some of the goals of SDE could be achieved within the conventional public schooling framework. Hybrid forms of SDE may be realistic ways to begin implementing a broader right to education using existing public school infrastructure. For example, spaces can be created within the structure of traditional schooling to give students more autonomy over their learning. Or, within a public school district, a given school could be designed with the purpose of facilitating student-centered learning.¹²⁷ Of course, for some students, the limitations of a conventional public school environment may prove incompatible with genuine self-directed education. For instance, if a student were required to adhere to a certain set of predetermined learning goals, it may undermine important aspects of SDE, such as the development of autonomy and discovery of one's own interests. For some students, SDE is preferable to a conventional public school setting; and research conducted to date suggests that

¹²⁴ *Id.*

¹²⁵ *Id.* See also KERRY McDONALD, UNSCHOOLED: RAISING CURIOUS, WELL-EDUCATED CHILDREN OUTSIDE THE CONVENTIONAL CLASSROOM 150–51 (2019).

¹²⁶ *Id.*

¹²⁷ See, e.g., KENNETH DANFORD, LEARNING IS NATURAL, SCHOOL IS OPTIONAL 183–84 (2019) (discussing San Juan Union School District's "UnSchool" (now known as "Meraki High School"), which is modeled after self-directed learning environments, and promotes independent and project-based learning).

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SDE experiences are at least as effective as conventional public schooling in preparing many young people for adult life.¹²⁸ While much of this research has been conducted in the past few decades, there is also evidence of the success of less restrictive learning environments from more distant history.¹²⁹

B. Examples of Self-Directed Educational Models

1. Democratic Schools

The first, and perhaps most prominent, example of SDE is the democratic school model. The oldest and most well-known democratic school in the United States is the Sudbury Valley School. Sudbury Valley was founded in 1968 “as a place where each student could be trusted fully to make every decision about how to grow from a child into an adult, seeking such advice as he or she wished.”¹³⁰ The school

¹²⁸ *Id.* at 141–65 (describing alumni outcomes from the North Star Learning Center, showing high levels of engagement and satisfaction among teenagers who left conventional public school to attend North Star); see generally PETER GRAY, *Mother nature’s pedagogy: How children educate themselves*, in THE PALGRAVE INTERNATIONAL HANDBOOK OF ALTERNATIVE EDUCATION (Helen E. Lees & Nel Noddings eds., 2016).

¹²⁹ See, e.g., Peter Gray, *When Less Is More: The Case for Teaching Less Math in School*, PSYCH. TODAY FREEDOM TO LEARN BLOG (Mar. 18, 2010), <https://www.psychologytoday.com/us/blog/freedom-learn/201003/when-less-is-more-the-case-teaching-less-math-in-school> (citing Louis Paul Benezet, *The Teaching of Arithmetic: The Story of an Experiment*, 1 HUMANISTIC MATHEMATICS NETWORK J. 2 (originally published in *Journal of the National Education Association* in three parts. Vol. 24, #8, pp 241-244; Vol. 24, #9, p 301-303; & Vol. 25, #1, pp 7-8) (describing an experiment conducted by the superintendent of schools in Manchester, New Hampshire, in the late 1920s and early ‘30s: “He altered the curriculum for half of the schoolchildren in the poorest schools in his district, so they would not be taught arithmetic until 6th grade. He found that those children, at the beginning of 6th grade, before they had received any arithmetic instruction at all, performed much better than the others on math story problems...by the end of 6th grade, those in the experimental classes had completely caught up on [the standard math problems] and were still way ahead of the others on story problems....This was all the more remarkable because of the fact that those who received just one year of training were from the poorest neighborhoods—the neighborhoods that had previously produced the poorest test results.”)); see also Herbert D. Williams, *Experiment in Self-Directed Education*, 31 SCH. & SOC’Y 715 (1930) (describing another experiment involving delinquent, trouble-making boys. They were given a room and allowed to do whatever they wanted and the freedom to engage in other non-classroom activities. At the end of the year, they showed huge gains in standardized testing relative to other students.); see also, generally GRAY, *supra* note 20 (explaining how, for millennia, children in hunter-gatherer societies learned complex skills through free play by gradually assuming greater responsibilities).

¹³⁰ GREENBERG & SADOFSKY, *supra* note 118, at 5.

functions as a participatory democratic community where each student assumes full responsibility for governance while pursuing their own interests.¹³¹ The students “are continuously free to do what they want, as long as they don’t break any of the school rules,” which are created democratically by students and staff at the weekly meeting, and are enforced by a judicial system modeled after the United States judicial system.¹³² A major purpose of the school is to “help people prepare for the opportunities and responsibilities of democratic citizenship” by giving students those opportunities and responsibilities in an educational environment that reflects a democratic society.¹³³

The educational philosophy of the school is that “if young people have ample opportunity to play, explore, and follow their own interests, in an environment rich in educational opportunities, they will learn what they must for success in their culture.”¹³⁴ Accordingly, there are no tests, no imposed curriculum, and no attempts by school staff to motivate learning.¹³⁵ Notably, the evidence indicates that a person’s attendance at Sudbury Valley has few to no adverse effects on the options available to that person later in life.¹³⁶ Surveys indicate that former students of Sudbury Valley enjoy, at the very least, the full range of life choices available to the vast majority of young people going out into the world.¹³⁷ For example, one study found that at least 75% of the respondents pursued higher education.¹³⁸ Today, there are dozens of schools modeled after Sudbury Valley,¹³⁹ and dozens more that are democratic in nature, though guided by a different self-directed educational philosophy. Additionally, compared to most private schools, these institutions all charge low tuition, many have sliding tuition scales, and students come from a wide variety of backgrounds and income levels.¹⁴⁰

¹³¹ *Id.*

¹³² GRAY, *supra* note 128, at 52.

¹³³ GRAY, *supra* note 20, at 87.

¹³⁴ PETER GRAY, *Children’s Natural Ways of Educating Themselves Still Work: Even for the three Rs*, in *EVOLUTIONARY PERSPECTIVES ON CHILD DEVELOPMENT AND EDUCATION* 67, 76 (2016).

¹³⁵ *Id.*

¹³⁶ GREENBERG & SADOFSKY, *supra* note 118130 at 250.

¹³⁷ *Id.*

¹³⁸ GRAY, *supra* note 134 (citing Peter Gray & David Chanoff, *Democratic Schooling: What Happens to Young People Who Have Charge of Their Own Education?* 94 *AM. J. EDUC.* 182 (1986)).

¹³⁹ GRAY, *supra* note 128, at 53.

¹⁴⁰ *Id.*

2. Learning Centers

Another iteration of SDE has been the rise of learning centers.¹⁴¹ Popular models include “Agile Learning Centers”¹⁴² and “Liberated Learners”¹⁴³ centers. While there is significant diversity among the types of educational environments that could be considered “learning centers,” many of these share some common characteristics, including: empowering young people to control their choices; minimizing adult influence and control; access to learning and play resources; access to adult mentors or support staff; and flexible (or non-existent) attendance policies.¹⁴⁴ Whereas democratic and free schools typically operate as schools in the sense that they require attendance and participation in at least some activities (like judicial council), many learning centers are simply open spaces with educational resources that students can use when they wish.¹⁴⁵ The specific requirements and structures of governance are flexible and vary based on the needs of the community and young people, but generally these learning centers provide unrestricted free play and age mixing; no mandatory testing or curriculum; and meaningful relationships with adults based on mutual respect.¹⁴⁶

¹⁴¹ It is worth noting that relatively little scholarly research has been undertaken on the educational experiences and outcomes of students who attended learning centers. Nevertheless, surveys and anecdotal evidence suggest that learning centers have resulted in excellent outcomes for perhaps thousands of students over the course of several decades and are a legitimate educational model, in terms of rigor and student achievement. See, e.g., Danford, *supra* note 127, at 141–65 (discussing overwhelmingly positive alumni outcomes for hundreds of former students, with many going on to higher education at competitive universities); see also McDonald, *supra* note 125, at 145 (discussing the Open Communications learning center in Pennsylvania, which has “flourished for forty years”).

¹⁴² AGILE LEARNING CENTERS, *supra* note 121. *See also The ALC Learning Network*, AGILE LEARNING CENTERS, <https://agilelearningcenters.org/#map> (last visited Mar. 29, 2022) (showing the locations of numerous learning centers throughout the United States).

¹⁴³ LIBERATED LEARNERS, <https://liberatedlearners.net/> (last visited Mar. 27, 2022) (noting that learning centers patterned after the “liberated learners” model are operating in seven different U.S. states); see also MCDONALD, *supra* note 125, at 150–51 (explaining that, since its inception in 1996, the Liberated Learners network has worked with hundreds of teenagers as an alternative to traditional coercive schooling, and many have gone on to successful and fulfilling lives and careers).

¹⁴⁴ Blake Boles, Agile Learning Centers, Liberated Learners, and Sudbury Schools: What’s the Difference?, ALL FOR SELF-DIRECTED EDUC. (Dec. 6, 2018), <https://www.self-directed.org/tp/three-popular-models/>.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

3. Unschooling¹⁴⁷

Another version of alternative education is unschooling. “Unschoolers” are young people who do not attend school at all.¹⁴⁸ They are usually officially registered as homeschoolers, but “are not subjected to any curriculum or tests at home because their parents subscribe to the philosophy that children learn best when they pursue their own interests in their own chosen ways.” Instead of school- or classroom-based learning, “unschoolers learn primarily through everyday life experiences – experiences that they choose and that therefore automatically match their abilities, interests, and learning styles.”¹⁴⁹

It is conservatively estimated that at least 10% of all homeschoolers in the United States practice some form of unschooling.¹⁵⁰ Like many other educational alternatives, unschooling as a practice is difficult to pinpoint and varies widely. Some common characteristics of unschooling generally include that it is noncoercive; it rejects the common prototype of schooling as education; it is based on trusting children’s propensity to learn by following their innate curiosities when surrounded by adequate resources and opportunities; and it respects and values children’s freedom and autonomy.¹⁵¹ The primary difference between homeschoolers and unschoolers is the degree of

¹⁴⁷ There is little legal scholarship on this topic. Kimberly A. Yuracko mentions unschooling briefly in an article advocating for government oversight of homeschooling. Kimberly A. Yuracko, *Education Off the Grid: Constitutional Constraints on Homeschooling*, 96 CAL. L. REV. 123 (2008). And in a more recent article, Sonia M. Muscatine discusses unschooling in some detail, also in an article arguing for increased state oversight. Muscatine contends that because children engaged in unschooling can follow unpredictable educational paths, it is sometimes incompatible with traditional regulation and oversight. Thus, Muscatine asserts that states must seek more reliable information on how well unschooling works. MUSCATINE, *supra* note 36, at 94. An interesting corollary of this argument would be that if states were to honor parents’ rights to unschool their children, and simultaneously try to ensure that the children were receiving an “adequate” education, states may have to adopt more qualitative and long-term methods of evaluating educational outcomes.

¹⁴⁸ GRAY, *supra* note 134, at 78.

¹⁴⁹ MUSCATINE, *supra* note 36, at 92–93 (citing Peter Gray & Gina Riley, *The Challenges and Benefits of Unschooling, According to 232 Families Who Have Chosen that Route*, 7 J. UNSCHOOLING & ALT. LEARNING 1, 2 (2013)).

¹⁵⁰ GRAY, *supra* note 20, at 228.

¹⁵¹ McDONALD, *supra* note 125, at 26–27.

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structure.¹⁵² Additionally, common reasons parents choose to un-school their children include negative experiences with public schools, such as bullying, authoritarian structure of the school and classroom, and/or boredom.¹⁵³

While unschooling appears to be a promising option for many children and families, and one that is growing in popularity, relatively little rigorous research on unschooling is available. Although several important qualitative studies of unschoolers have been completed in recent years, a robust body of research has yet to appear. Moreover, there is a selection bias issue; the students and families who choose unschooling, and who choose to respond to surveys, are typically those most likely to find unschooling a suitable form of education. Thus, the conclusions that we can draw from evidence on unschooling are limited and somewhat tentative. Nevertheless, there is evidence suggesting that unschooling is an effective option for many children and families.

In qualitative studies, parents have noted many advantages of unschooling, including: “greater learning efficiency and attitude in their children; more practical learning; happier, less stressed children; family closeness; and freer schedules.”¹⁵⁴ Adult unschoolers report advantages of their unschooling education which include: “time to pursue their interests, independence, improved learning, self-motivation, strong sense of responsibility, continued interest in learning, self-confidence, time with family, less stress, avoiding burn out, smooth transition to adulthood, head start in college or career, and exposure to a broader cross section of people of all ages.”¹⁵⁵ Surveys of adults who had been unschooled yielded similar results to surveys of Sudbury Valley graduates:

They believed that they were more self-directed, more responsible, and more motivated to continue learning than they would have been had they been schooled. Those who had gone on to higher education had no

¹⁵² MUSCATINE, *supra* note 36, at 93 (citing Ari Neuman & Oz Guterman, *Structured and Unstructured Homeschooling: A Proposal for Broadening the Taxonomy*, 47 CAMBRIDGE J. EDUC. 355, 356 (2017)).

¹⁵³ GRAY & RILEY, *supra* note 149, at 9–10.

¹⁵⁴ MUSCATINE, *supra* note 36, at 95 (citing Peter Gray & Gina Riley, *The Challenges and Benefits of Unschooling, According to 232 Families Who Have Chosen that Route*, 7 J. UNSCHOOLING & ALT. LEARNING 1, 16-17 (2013)).

¹⁵⁵ *Id.* at 96 (citing Peter Gray & Gina Riley, *Grown Unschoolers' Evaluations of Their Unschooling Experiences: Report I on a Survey of 75 Unschooling Adults*, 4 OTHER EDUC. 8, 21 (2015)).

particular difficulties getting into colleges and universities or doing well there. They had gone on to a wide variety of careers, which in many cases were direct extensions of their childhood play.¹⁵⁶

Moreover, 83% of respondents went on to formal higher education.¹⁵⁷ Of course, unschooling may not work for all families, especially those without sufficient resources,¹⁵⁸ but “for those who embrace it and have the social and psychological means to provide ample educational opportunities, it apparently works well.”¹⁵⁹

The point of these examples is not to prescribe a specific vision of public education, nor to limit the range of possibilities that could be discussed. Rather, it is intended to illustrate models of educational options that appear promising and effective, as well as to underscore the need for adaptability and flexibility in educational jurisprudence. Greater awareness and knowledge of viable, less restrictive educational alternatives will inform conversations about the conditions of public schooling and the evaluation of various pedagogical methods.¹⁶⁰ In turn, this information could, and ought to, guide future deci-

¹⁵⁶ McDONALD, *supra* note 125, at 26–27 (citing Peter Gray & Gina Riley, *Grown Unschoolers’ Evaluations of Their Unschooling Experiences: Report I on a Survey of 75 Unschooling Adults*, 4 *OTHER EDUC.* 8 (2015)); Gina Riley & Peter Gray, *Grown Unschoolers’ Experiences with Higher Education and Employment: Report II on a Survey of 75 Unschooling Adults*, 4 *OTHER EDUC.* 33 (2015).

¹⁵⁷ *Id.*

¹⁵⁸ It is important to note these limitations of unschooling within the existing system – a system in which economically vulnerable families may be unable to access unschooling due to economic or social constraints. This Comment proposes that these limitations could be overcome through the provision of public funding or support. Of course, issues of funding, especially when they involve alternative and/or private education, are always fraught. But the challenges associated with funding and implementation need not be a sticking point at this early juncture; it is enough to note that (a) it is a complex issue that will continue to be debated, and (b) there are many ways in which resources could be provided to families that need them. Options could include providing direct financial assistance to unschooling families and students; creating community-based learning centers where unschooling could take place and students could access educational resources; or creating spaces and opportunities within existing conventional public schools for students who wish to have a more self-directed experience.

¹⁵⁹ GRAY, *supra* note 128, at 55.

¹⁶⁰ For example, future conversations and scholarship will need to address various tensions among the common justifications for public education. One notable tension we must nav-

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sions about the definition of the right to public education. The following discussion explains how alternative educational models, including self-directed education, are supported, and perhaps even required, by relevant case law and scholarship.

III. AN EXPANDED RIGHT TO ACCESS EDUCATIONAL OPTIONS IS SUPPORTED BY THE REASONING IN PREVIOUS SCHOLARSHIP AND CASE LAW

Courts and scholars have begun the process of defining the scope of the right to education, examining the quality and content of pedagogical methods. Recognition of the obligation to scrutinize the methods of public education has significant implications, including the possibility of an obligation to consider educational alternatives to conventional public schooling. This section outlines how an expanded right to a variety of publicly accessible learning environments (PALEs), including self-directed and less restrictive educational models, could find support in historical and doctrinal sources. The expansion of the right to education is vital because, for many students, there are viable alternatives to conventional public schooling which are normatively desirable but are currently inaccessible due to economic, legal, and structural barriers. Educational alternatives outside conventional public schooling do exist; but are only available to those with the resources to access them. If the right to education were expanded, the government might be obligated to provide the resources needed to facilitate equitable access to educational alternatives.

Prior case law and previous scholarship have advanced arguments in favor of recognizing a fundamental right to education and articulated various descriptions of the scope of that right.¹⁶¹ Drawing upon the reasoning found in these sources, I contend that an expanded right – one that includes access to educational alternatives – would be more consistent with the history and tradition of American

igate is this: there is both a negative right to education free from state interference, and a positive right to state-provided access to education. See Black, *supra* note 112, at 1031. For economically vulnerable families in particular, the negative right is too often rendered practically meaningless. The model proposed in this Comment could help balance these competing concerns by ensuring state-provided resources and access to education, while also protecting the rights of students and families to pursue education options that meet their needs and allow them to form and express their individual beliefs. See Arons, *supra* note 14.

¹⁶¹ See Part II, *supra*.

education. Moreover, the purposes of and justifications for public education – including principles of individual liberty, democratic preparation, exercise of fundamental rights, children’s rights to development, and equity – support consideration of a continuum of educational options. And the reasoning underlying these arguments for finding a right to education is compatible with expanding the conception of public education to include self-directed educational alternatives.

A. Educational Quality and Options Are Foundational to Democracy and the Exercise of Fundamental Liberty Interests

Courts have repeatedly emphasized the unparalleled value of education to participation in democracy.¹⁶² The importance of education to principles of liberty and democracy has also been extolled by the United States Supreme Court in numerous cases.¹⁶³ The ability to think independently and seek out and analyze the information needed to make responsible decisions as a citizen is the foundation of an informed democracy. Educational alternatives, including self-directed education, create the conditions in which students may develop these foundational skills by allowing more independence and access to information. Thus, if education is so vital to preserving democratic principles and institutions, we should be open to facilitating access to a wider variety of educational methods, including self-directed education.

As discussed in Part II, *supra*, scholars have sought to define the right to education in various ways. Some scholars, including Derek Black and Friedman and Solow, have argued for a federal right to a minimally adequate education based on textual and historical analyses that center the importance of education for civic preparation and

¹⁶² *Supra* notes 90–97 and accompanying text; see also *Gary B. v. Whitmer*, 957 F.3d 616, 654 (6th Cir. 2020), reh'g en banc granted, opinion vacated, 958 F.3d 1216 (6th Cir. 2020) (noting that *Rodriguez* indicated that the right to education might consist of the “basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process” (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36–37 (1973))).

¹⁶³ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (recognizing public education as “the very foundation of good citizenship” and “perhaps the most important function” of the state); *Rodriguez*, 411 U.S. 1, 29–30 (1973) (noting the country’s “historic dedication to public education” and the “grave significance of education both to the individual and to our society”); *Plyler v. Doe*, 457 U.S. 202, 222 (1982) (noting the importance of education to the preservation of democratic society).

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democratic participation, as well as the prevalence and prominence of public schools in early American life.¹⁶⁴ Derek Black's definition of a fundamental right to education is significant because it emphasizes "critical literacy – which entails both high-level reading and critical thinking."¹⁶⁵ In contrast, by creating a constitutional floor, the court in *Gary B.* stopped at plausible access to basic literacy.

This Comment proposes a more dynamic standard: a right to education that includes the right to access a variety of educational options, including learning environments providing more autonomy to students. This proposed model could provide students and families with access to educational resources and the freedom to explore options. Of course, this type of solution would involve its own set of challenges, including issues of accountability and measuring the effectiveness of a given educational model.¹⁶⁶ But the benefits could be

¹⁶⁴ See Part II(a), *supra*.

¹⁶⁵ Black, *supra* note 30, at 1111.

¹⁶⁶ There are several outstanding questions to be resolved if public funding is to be used to provide access to educational alternatives. For instance, how will states ensure that a given educational option adheres to the state's minimum standards for an adequate education? And how might states measure whether various alternative educational options are "effective"? Several observations can be made in response to these questions. First, issues of accountability, standards, and measurement of student outcomes in public education have generated controversy for decades. They are complex debates that implicate fundamental questions about the purposes of education and arise in many discussions involving accountability and public education. They are not unique to self-directed education, and, thus, shouldn't dissuade us from considering educational alternatives. Second, in many states, families and students are already exempt from accountability for educational outcomes – provided the families opt out of standardized testing or can afford homeschooling or private schooling. See, e.g., Homeschool Laws by States, HOMESCHOOL LEGAL DEF. ASS'N, <https://hslda.org/legal> (last visited Apr. 3, 2022) (showing that 11 states require no notice and "low regulation" of homeschooling, while 22 states have "low regulation" of homeschooling). Third, while it would certainly require imagination, there are a range of possible approaches when it comes to measuring "effectiveness" and outcomes of alternative education, including self-directed education. For example, qualitative surveys and assessments have been used to measure outcomes of unschooling and self-directed education. See, e.g., Gray & Riley, *supra* note 155. These could be adapted to include quantitative assessments, although any evaluation of self-directed education should be designed and undertaken by people with experience researching and/or practicing self-directed learning. Alternatively, access-based standards could be applied: states could ensure that each self-directed learning center – or even each family, in the case of unschooling – had sufficient educational resources to pursue a basic minimum level of educational freedom. To be sure, these responses perhaps raise more questions than they answer (e.g., what about students who refuse to complete outcome surveys? What exactly is educational freedom, and what kinds of resources are required to pursue it?). But the main points are that (a) possible solutions exist, and (b) because we are dealing with public education, they will always be controversial. The decisions need to

significant: if students and families were provided with the options and resources to engage in more self-directed and student-led democratic learning, students would not just abstractly study – but could learn through experience – the democratic process, as well as how to be engaged, critically-thinking citizens. Thus, this expanded right would be more consistent with the democratic preparation justifications in case law, and in Black’s conception of the right to education.

Taking a slightly different approach, the liberty-based fundamental right to education advanced by Piazza contemplates a right to education that facilitates the exercise of liberty and autonomy, as well as preparation for political participation.¹⁶⁷ Providing children with access to self-directed and similar alternative learning environments would increase their autonomy and agency in the educational context, which would more closely reflect the reality of participating in an open democracy.¹⁶⁸ Thus, an expanded right to access educational options is compatible with a theory of facilitating the exercise of liberty and autonomy, especially in the context of democratic participation. Finally, an expanded right to education would be more compatible with the First Amendment liberty interests articulated by Arons and Lawrence – by providing students and families with the opportunity to pursue knowledge and develop their individual beliefs and opinions.¹⁶⁹

be reached through conversation and mutual agreement among students, families involved, local communities, and public schools. In sum, I agree with Carl F. Kaestle’s observation that, “[Public school systems need to be] more open to different teaching and learning styles, different cultural content, different parental preferences, and different community needs. [...] We must be imaginative about the control of schools.” Kaestle, *supra* note 115, at 224.

¹⁶⁷ Piazza, *supra* note 30, at 78.

¹⁶⁸ Some may counter that children’s exercise of autonomy can only be achieved through the imposition of control and the subsequent “education” that takes place. This position is articulated in the “Kantian Paradox.” A detailed analysis of this issue is beyond the scope of this Comment, but I do recognize the objection. However, the paternalistic reasoning raises serious questions. For example: How does one measure “autonomy?” At what point does a child have enough autonomy to decide how or what to learn? Should a child be allowed this autonomy? Who makes that decision? How do we account for the differences between individual students? Is this not inconsistent with the position that adults lacking capacity still have autonomy in many situations? For a full discussion of this last issue, see Samantha Godwin, *Children’s Capacities and Paternalism*, 24 J. ETHICS 307 (2020).

¹⁶⁹ Arons & Lawrence, *supra* note 18, at 326–28; Arons, *supra* note 14, at 205–07 (“Eliminating family educational choice [...] renders individual expression, self-fulfillment, and personal development meaningless. So long as individual dignity matters, the individual ought to control his own education[.]”).

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B. A Continuum of Educational Alternatives is Consistent with History and Tradition

Establishing a fundamental right requires determining whether the right is “deeply rooted in the Nation’s history and tradition.”¹⁷⁰ An expanded conception of public education – one that embraces a wider variety of learning alternatives – would be consistent with educational history and tradition in the United States, especially during the founding years. By this, I do not mean to minimize the historical and ongoing injustices of inequitable access to education in the United States. However, it seems likely that the relatively restrictive and standardized model of public schooling we take for granted today would have been unthinkable and even detestable to many of the framers. For example, Ben Franklin – who began working as an apprentice at age 12 and read voraciously on his own time – would likely have been appalled at the prospect of being relegated to a standardized schooling experience until he turned 18.¹⁷¹ At the same time, the fact that certain framers wouldn’t have liked aspects of the current public schooling system does not in itself suggest that it needs to be reimagined. Rather, the relevant concern is that the current public schooling system limits educational options and autonomy in ways that arguably undermine some of the values it was intended to promote, such as “the importance of education to human freedom.”¹⁷² Public schooling has changed dramatically (and often for the better), reflecting the popular American belief that common public schools that respect the rights of all children equally are the best solution to many social problems.¹⁷³ But in this process, certain valuable aspects of education have been sacrificed at the expense of others.

In *Wisconsin v. Yoder*, the Court noted: “When Thomas Jefferson emphasized the need for education as a bulwark of a free people against tyranny, there is nothing to indicate he had in mind compulsory education through any fixed age...”¹⁷⁴ and that the “requirement

¹⁷⁰ Gary B. v. Whitmer, 957 F.3d 616, 643 (6th Cir. 2020), reh’g en banc granted, opinion vacated, 958 F.3d 1216 (6th Cir. 2020) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)).

¹⁷¹ BARBARA BENNETT WOODHOUSE, *HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN’S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE* 112–20 (2010).

¹⁷² Black, *supra* note 112, at 1036.

¹⁷³ Kaestle, *supra* note 115, at 222.

¹⁷⁴ *Wisconsin v. Yoder*, 406 U.S. 205, 225 (1972).

for compulsory education beyond the eighth grade is a relatively recent development in our history.”¹⁷⁵ Indeed, the first compulsory attendance law in the United States wasn’t enacted until 1852 in Massachusetts, and even after that, many states faced significant opposition when attempting to enact these statutes.¹⁷⁶ This evidence demonstrates that while public education has long been an integral part of American democratic society, the current model of standardized compulsory schooling is not as firmly established in history and tradition. For example, in cases addressing homeschooling, courts have discussed the purpose of compulsory schooling laws, finding that: “...the object is that all children shall be educated, not that they shall be educated in any particular manner or place.”¹⁷⁷ Educational diversity is reflected in American history and tradition because courts have long protected educational freedom.¹⁷⁸ Thus, an expanded right to educational options is consistent with history and tradition.

The point of this is not to romanticize historical periods when many children were often forced into slavery or to labor long hours in unsafe conditions instead of going to school or otherwise accessing an education. Nor is it to undermine the claim that public education has long been considered a fundamental right by states and families – a right that has been fought for by many marginalized communities.¹⁷⁹ It is, rather, to acknowledge that, historically, Americans have intensely valued the right to independent thought;¹⁸⁰ to educate oneself

¹⁷⁵ *Id.* at 226.

¹⁷⁶ WALTER S. DEFFENBAUGH & WARD W. KEESECKER, *COMPULSORY SCHOOL ATTENDANCE LAWS AND THEIR ADMINISTRATION* 8 (1935).

¹⁷⁷ See, e.g., *People v. Levisen*, 90 N.E.2d 213, 215 (1950). See also *Com. v. Roberts*, 34 N.E. 402, 403 (1893) (“The great object of these provisions of the statutes has been that all the children shall be educated, not that they shall be educated in any particular way. To this end public schools are established, so that all children may be sent to them, unless other sufficient means of education are provided for them.”)

¹⁷⁸ Black, *supra* note 112, at 1031 (noting that, during Reconstruction, “education was first and foremost about freedom.”).

¹⁷⁹ *Id.*

¹⁸⁰ See, e.g., BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 104 (2000) (“We are free only if we know, and so in proportion to our knowledge. There is no freedom without choice, and there is no choice without knowledge-or none that is not illusory. Implicit, therefore, in the very notion of liberty is the liberty of the mind to absorb and to beget.”). However, it is important to note that these rights were long denied to non-white Americans and continue to be denied, or inaccessible, to many marginalized students, families, and communities.

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and one's family; and to not be forcibly subordinated to a standardized curriculum or schooling regimen. As the Supreme Court noted in *West Virginia State Board of Education v. Barnette*: "Compulsory unification of opinion achieves only the unanimity of the graveyard."¹⁸¹

Thus, an expanded right to access educational options is rooted in the historical practices and purposes of education in America, precisely because it fosters independent thinkers and citizens, provides the foundation for a functioning democracy, and respects the historic deference afforded to the liberty interests of parents in raising their children.¹⁸²

Finally, because the history and tradition analysis can include "the evolution of an asserted right through or even beyond the history of our country,"¹⁸³ it is worth noting that, for thousands of years, children learned without school: the transition from childhood to adulthood occurred naturally through a process of play and experiential learning.¹⁸⁴ In other words, humans have evolved to learn through play and without coercion.¹⁸⁵ And evidence suggests that, even in a heavily technical information society, the model of education through

¹⁸¹ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640–41 (1943). Of course, it is often argued that compulsory education is in fact the best way of achieving diversity of opinion. But, like many other rhetorical justifications for compulsory education, this has largely failed to come to fruition, evidenced by, for instance, the resegregation of American schools. See, e.g., Black, *supra* note 112, at 1032 (2022); Julian T. Vasquez Heilig et al., Choice without Inclusion?: Comparing the Intensity of Racial Segregation in Charters and Public Schools at the Local, State and National Levels, 9 *EDUC. SCIS.* 1, 13 (2019) ("Our mired struggle to provide equitable and equal access to quality education for all children in the US continues to remain outside of our collective grasp. Despite our best efforts, and some progress in decades past, our nation's schools continue to be segregated not by the de jure segregation of pre-Brown, but by de facto segregation of choice post-Brown.").

¹⁸² *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (recognizing that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control..."); *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion) (the interest of parents in the "care, custody and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by th[e] Court."); *Wisconsin v. Yoder*, 406 U.S. 205, 213–14 (1972) ("...the values of parental direction of the...education of their children in their early and formative years have a high place in our society.").

¹⁸³ *Gary B. v. Whitmer*, 957 F.3d 616, 643–44 (6th Cir. 2020), reh'g en banc granted, opinion vacated, 958 F.3d 1216 (6th Cir. 2020) (quoting *Obergefell v. Hodges*, 576 U.S. 644, 651–62 (2015)).

¹⁸⁴ See generally *GRAY*, *supra* note 20.

¹⁸⁵ *Id.*

play remains effective.¹⁸⁶ The idea that education can and should involve access to a wide variety of experiences and learning environments is deeply rooted in ancient history. Thus, an expanded right to educational options finds its source in both national and ancient history and tradition.

C. Children's Development and Potential

Susan Bitensky proposes a fundamental right to education that ensures students can both acquire the basic minimal skills needed to participate in the political process *and* enables the development of the child's capacities to their fullest potential.¹⁸⁷ Recognition of this aspect of education can also be found in the Supreme Court's education case law:

In the present case, the State is not concerned with the maintenance of an educational system as an end in itself, it is rather attempting to nurture and develop the human potential of its children [...] to expand their knowledge, broaden their sensibilities, kindle their imagination, foster a spirit of free inquiry, and increase their human understanding and tolerance.¹⁸⁸

In short, courts and scholars agree that one significant purpose of public education is to develop the innate potential of children. But of course, no person or court can *ensure* full individual development. The state can, however, *enable* development to the fullest potential, by *ensuring access* to the environments that would facilitate this. Because different students likely require different learning environments to fully develop their potential, a system that promotes access to educational options may be better suited to achieving this objective. Moreover, because this issue directly implicates the *means* of education, it would be suited for discussion by courts. Therefore, to effectuate this aspect of the right to education, courts would need to ascertain whether the means are coercive and exclusionary, or empowering and readily accessible.

Additionally, it is worth noting that because of the Supreme

¹⁸⁶ *Id.*; see generally GÖKNUR KAPLAN AKILLI, Games and Simulations: A New Approach in Education, in GAMES AND SIMULATIONS IN ONLINE LEARNING: RESEARCH AND DEVELOPMENT FRAMEWORKS 1–20 (2007).

¹⁸⁷ See BITENSKY, *supra* notes 40–43 and accompanying text.

¹⁸⁸ *Wisconsin v. Yoder*, 406 U.S. 205, 239 (1972) (J. White, concurring).

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Court's reluctance to recognize even a basic, minimal right to education, it is highly unlikely that federal courts would adopt a more expansive right guaranteeing a child access to their "fullest potential." There are several possible responses to this problem. For instance, while federal courts have been reluctant to recognize expanded constitutional rights to education, state courts have been more willing to explore this expansion and could offer a path forward.¹⁸⁹

But it is also possible that the reluctance to find an expanded right – one that would include full development of a child's potential – is rooted in the rigidity of mainstream conceptions of education. Conceiving of education as limited to standardized public schooling restricts the possible ways in which a given child might "develop" to their full capacity. What educator is qualified to decide what an individual child's full capacity is? How could a standardized curriculum be created or implemented to accomplish the goal of "full development" of a unique person, in a way that doesn't simultaneously foreclose possibilities? What if an individual's path to their fullest development means departing from standardized public schooling? These questions underscore the inadequacy of the current public schooling system as it relates to the development of individual potential. In contrast, evidence suggests that some students are more likely to thrive and reach their fullest potential when provided with more autonomy and less restrictive learning environments, as in self-directed education.¹⁹⁰ Thus, this conception of the right – framed in terms of the full development of children's abilities and potential – is closely related to, and may even flow from, an expanded right to access more individualized learning options.

Children's innate potential aside, self-directed educational alternatives may be more *developmentally* appropriate for many children than conventional public schooling, specifically with respect to the issue of play. There is no shortage of literature and scholarship on the importance of play for the healthy development of children.¹⁹¹ In

¹⁸⁹ See *supra* Part II(b). See also KERN ALEXANDER & M. DAVID ALEXANDER, *AMERICAN PUBLIC SCHOOL LAW* 36 (6th ed. 2004) ("In interpreting their own state constitutions, the highest courts in several states have held that education is a fundamental right.").

¹⁹⁰ This view is consistent with evidence regarding the life outcomes and experiences of students who attended alternative, noninvasive educational institutions. By and large, students who attended these schools (or who unschooled) report very high levels of life and career satisfaction. For a detailed discussion of outcomes for students who attended democratic schools or who were unschooled, see GREENBERG & SADOFSKY, *supra* note 118 ; Peter Gray & Gina Riley, *Grown Unschooled: Evaluations of Their Unschooling Experiences: Report I on a Survey of 75 Unschooling Adults*, 4 *OTHER EDUC.* 8 (2015).

¹⁹¹ See generally, e.g., Kenneth R. Ginsburg, *The Importance of Play in Promoting Healthy*

fact, it is so important that it has been recognized by the United Nations High Commission for Human Rights as a right of every child.¹⁹² Yet, by and large, educational policy in the United States continues to restrict the opportunities for children to experience play in school by mandating ever-increasing standardization of curriculum, additional homework, decreased recess, and increased time in school overall.¹⁹³ SDE, including the learning alternatives discussed in this Comment, may provide a solution to this problem. Evidence from SDE demonstrates that providing children with more opportunities to engage in play is not only good for their social and psychological development, but is also an effective way to learn academic, cultural, and democratic skills.¹⁹⁴ Thus, an expanded right that encompasses self-directed options could be more consistent with development-related justifications for public education.

D. Equity in Education

The justifications for the right to education that center on education as a tool for achieving equity lead to similar inferences. The Sixth Circuit in *Gary B.* invoked the vision of education as a “great equalizer” and a means of promoting equity.¹⁹⁵ The court noted that education is important not only “to provide a shot at achievement in the face of inequalities of wealth and power,” but also “specifically as a means of addressing past racial discrimination that restricted educational opportunities[.]”¹⁹⁶ Scholars such as Michael A. Rebell have similarly proposed a right to education that includes comprehensive educational opportunities designed to achieve equity.¹⁹⁷

Expanding the right to education to include alternative learning

Child Development and Maintaining Strong Parent-Child Bonds, 119 *PEDIATRICS* 182 (2007); STUART LESTER & WENDY RUSSELL, *Children’s Right to Play: An Examination of the Importance of Play in the Lives of Children Worldwide*, in *WORKING PAPERS IN EARLY CHILDHOOD DEVELOPMENT* No. 57 (2010).

¹⁹² G.A. Res. 44/25, Convention on the Rights of the Child (Nov. 20, 1989).

¹⁹³ GRAY, *supra* note 20, at 11 (citing Sandra Hofferth, Changes in American children’s time, 1997-2003, 6 *INT’L J. TIME USE RSCH.* 26; SANDRA HOFFERTH & JOHN F. SANDBERG, Changes in American children’s time, 1981-1987, in *CHILDREN AT THE MILLENNIUM: WHERE HAVE WE COME FROM, WHERE ARE WE GOING?* (T. Owens & S.S. Hofferth eds., 2001)).

¹⁹⁴ See generally GRAY, *supra* note 20.

¹⁹⁵ *Gary B. v. Whitmer*, 957 F.3d 616, 654 (6th Cir. 2020), reh’g en banc granted, opinion vacated, 958 F.3d 1216 (6th Cir. 2020).

¹⁹⁶ *Id.*

¹⁹⁷ Rebell, *supra* note 62, at 111.

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models, like SDE, may better ensure that education serves its purpose of preparing all students to successfully participate in democratic institutions. A reimagined right could improve equity in access to education. Rather than conventional “educational resources” and a “rigorous curriculum,” one might see how alternative educational options, or a more flexible and individualized curriculum,¹⁹⁸ are exactly what some disadvantaged students who are failing in conventional public schools need most.¹⁹⁹ In other words, an expanded right to access educational options would perhaps track equity-centered reasoning and justifications more closely than simply bolstering the existing structure.²⁰⁰

Moreover, Rebell contends that children from backgrounds of poverty should have access to additional learning resources and supportive, enriching environments.²⁰¹ The insight behind Rebell’s contention is that education can and does occur outside of traditional school settings; that “education” is not necessarily synonymous with schooling; and that in order to provide meaningful access to educational opportunities for *all* students, it is imperative to provide all families with adequate support to access education. To the extent that these resources and supports could be made available to under-resourced families on their own terms, rather than only through a standardized compulsory school system, I would tend to agree. Providing impoverished families with additional support and resources so that all children might grow up in safe, educationally rich environments that reflect their cultural and community values is a worthy goal.²⁰²

¹⁹⁸ Scholars have previously made the argument that individualized learning services are needed. See Rebell, *supra* notes 70 and 71 (stating that “access to meaningful, individualized support services should now be extended to students disadvantaged by conditions of poverty...” and that we must “ensure meaningful educational opportunity for all children.”). However, for many students and families, meaningful educational opportunity implies alternatives – and the conventional public schooling system is inadequately positioned to ensure access to these.

¹⁹⁹ See Part V, *infra* (discussing the importance of educational alternatives to many marginalized families).

²⁰⁰ This is not to argue that money does not matter; it clearly does. See Black, *supra* note 1 (reviewing evidence that increased funding improves educational achievement). Rather, I argue that increased funding alone is not enough; marginal improvements in educational achievement still leave many students behind when the conventional pedagogical machinery is left intact.

²⁰¹ Rebell, *supra* note 62, at 53–54.

²⁰² While the goal of providing resources and support to families and communities is certainly a worthy one, the issues of implementation are complicated. How exactly might we provide support to families to access alternative education? What is the proper balance between the need for accountability for the use of public funding, and the need for individual freedom in

The expanded right to access a variety of educational options and less restrictive learning environments could be a part of this process.

In sum, it seems that an educational model designed to reflect and prepare students – especially those from disadvantaged backgrounds – for the democratic realities of society would favor *less* standardization and restrictions, and *more* freedom, diversity, and individualized support.²⁰³ Thus, based on these principles, the logical solution would be to consider a wider range of educational models and explore how to ensure equitable access to those alternatives.

E. Comprehensive Educational Solutions

State court decisions have helped to define a more robust fundamental right to education.²⁰⁴ These rulings have defined educational adequacy through the provision of certain educational services and outline specific requirements that the right should include, such as safe buildings; current instructional materials; the ability to provide basic literacy skills; and the ability to provide civic and scientific knowledge.²⁰⁵ In the context of state court litigation, one could imagine how a court might find that the right to education includes the provision of services that would provide families and students, including those who do not qualify for additional special education services, with a wider variety of educational options and less restrictive learning environments.

For instance, in *Rose v. Council for Better Education*, the comprehensive educational services required included seven core capacities.²⁰⁶ The specificity of these services suggests that state courts might be willing, in some circumstances, to provide additional services, such as a variety of educational options, if it were deemed necessary to achieve the goals of state education, such as democratic

educational decision-making? For additional discussion on this point, see note 158, *supra*.

²⁰³ However, decreasing the standardization and restrictions of public schooling could create new challenges when attempting to hold states accountable for providing robust educational opportunities. For instance, determining what an “adequate” educational opportunity consists of arguably becomes more complicated when “adequacy” involves evaluations of a student’s unique needs and subjective impressions, rather than relying on standardized test scores. These are not insurmountable challenges. But addressing them will require imagination and new approaches to assessment and accountability.

²⁰⁴ Safier, *supra* note 58, at 1019–20; see also Part II(b), *infra* (discussing state court case law).

²⁰⁵ *Id.*

²⁰⁶ *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 212 (Ky. 1989).

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preparation and development of the child's capacities.

And in *Abbot v. Burke*,²⁰⁷ the New Jersey Supreme Court held that, where poor students were subject to inequitable conditions, more resources were required, both in and outside of school, for the students to develop their potential.²⁰⁸ This reasoning is arguably consistent with the proposal that publicly funded access to educational options and less restrictive learning opportunities be made available to all students. Indeed, what better environment in which to use one's innate ability than a supportive environment in which one has the flexibility and resources to pursue one's own interests?

Moreover, in a subsequent decision, the New Jersey Supreme Court went even further, requiring the "state to provide low-income and minority students a range of specific comprehensive services, including after-school and summer supplemental programs, school-based health and social services, and preschool services for children ages three and four."²⁰⁹ A "range of...comprehensive services" begins to sound almost like a continuum of educational options, which could be the basis for an expanded right to public education. In short, state courts have already engaged in this process of expanding the right to education. The logical extension of this reasoning is to examine a range of learning environments, including self-directed education.

IV. IMPLICATIONS AND CONCERNS

A. Implications: How Might Courts Approach Expanding the Right?

To this point, I have attempted to make clear that the definition of the right to public education can and should be broader than conventional public schooling. Put bluntly: education need not equate with conventional schooling. I have engaged with multidisciplinary scholarship and research documenting effective educational alternatives – especially self-directed education. And I have argued that the reasoning used by courts and scholars when discussing the right to education supports an expanded right, and access to self-directed options in particular. My hope is that these insights will contribute to a broader discussion about the possibilities for public education and inform discourse surrounding the right to education. The legal impact,

²⁰⁷ *Abbott v. Burke*, 575 A.2d 359, 400 (N.J. 1990).

²⁰⁸ *Id.*

²⁰⁹ *Rebell*, supra note 62, at 84 (citing *Abbott v. Burke*, 710 A.2d 450 (N.J. 1998)).

in short, could be an expanded definition of the right to education that makes accessible a continuum of educational options.

However, this proposition has some complicated implications. For one, there is the issue of which educational alternatives should be provided, and how to make those decisions. Another significant set of concerns involves costs and implementation. Public schooling systems are already notoriously short on money and resources. Thus, advocating for a greater variety of educational options and resources may seem politically unfeasible. I have largely set aside these concerns for the purposes of this Comment, instead focusing on the initial discussion of the right to education and what that could possibly encompass. This is partly because the specifics of cost and implementation will need to be addressed on a case-by-case basis and will require more detailed discussions and broader participation than this Comment can provide. It is also because, at present, SDE is insufficiently recognized in current mainstream discourse about public education. Once SDE – and other alternatives – become a more significant part of this discourse, then we can begin to address the specific cost and implementation concerns.

However, it may be helpful to suggest a starting point for discussions about which educational alternatives might be included or prioritized in an expanded right to education. I propose that, when courts are considering an expanded definition of the right to education (which would include a continuum of educational options), several guiding factors should be considered. First, to the extent that the negative due process liberty rights of students are recognized,²¹⁰ courts should consider the levels of restrictiveness and autonomy that students enjoy in a given educational environment, and favor environments that promote autonomy. When evaluating a given educational model, courts could also consider the following: cost, implementation feasibility, evidence of effectiveness, level of democratic participation, accessibility for low-income populations and students with disabilities, opportunities for play, opportunities for individualized learning, exposure to diverse viewpoints, access to peers, access to information, and access to technology.

The above list is not meant to be exhaustive, but, rather, a starting point for discussions about an expanded right to education – one that goes beyond conventional public schooling and explores the possibilities for a continuum of educational options. In sum, I wish to emphasize that self-directed education is just one possible paradigm of

²¹⁰ See *Gary B. v. Whitmer*, 957 F.3d 616, 640–41 (6th Cir. 2020), reh'g en banc granted, opinion vacated, 958 F.3d 1216 (6th Cir. 2020).

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alternative education. The factors I propose encourage flexibility so that local communities, school districts, and states can create and provide the learning environments best suited to their unique needs; and so that courts can continue to engage in the complicated process of defining an adequate education that works for *all* students.

B. Addressing Misconceptions and Concerns About Educational Alternatives

The ideas and assumptions that are foundational to SDE can initially be tremendously counter-intuitive to those who attended conventional public schools. The individualized, non-coercive, trust-based educational model is such a sharp departure from conventional thinking that it regularly provokes vehement and emotional objections. In this section, I identify and address several of the more common concerns and assumptions about these educational alternatives.

The first assumption is that children are incompetent and untrustworthy; that they need coercive, standardized schooling to shape them into functioning, sociable humans. As Peter Gray states: “People *believe* that compulsory, intrusive, curriculum-based schooling motivated by rewards and punishment is essential for children’s successful development to adulthood and that more such schooling is needed now than in the past.”²¹¹ However, evidence from decades of research on self-directed learning and unschooling is inconsistent with this popular misconception.²¹² The data indicates that, for many students, unstructured education results in outcomes similar to or better than conventional public schooling. While samples in some studies may be skewed, due to selection bias, the available data do not support the assumption that *all* children need pre-determined, standardized structure, or externally-imposed accountability, to “succeed” academically.

A related concern is that, given a self-directed environment, some students may not learn essential skills necessary for democratic participation – and that without state coercion and mandates for educational goals, these students will be unprepared for adult life. This concern illustrates an important tension between competing purposes of education. On one hand, education is seen as important for the development of individual autonomy, interests, and potential. On

²¹¹ See PETER GRAY, *Self-Directed Education—Unschooling and Democratic Schooling*, in OXFORD RESEARCH ENCYCLOPEDIA OF EDUCATION (G. Noblit ed., 2017).

²¹² See *supra*, notes 136–159 and accompanying text.

the other hand, it is often asserted that public education is supposed to prepare students for democratic participation by teaching them essential skills like literacy and civics. But what happens in an SDE environment if a student chooses not to learn about civics? What happens when a student's agency conflicts with the state's educational goals? More broadly: how can we balance individual autonomy in education with the public good?

There are several possible responses to this concern. First, SDE would remain an option – not a mandated imposition. Just like conventional public school, SDE may not be effective for every student. Students for whom SDE is not working would still have the option of conventional public school. Second, the question of autonomy versus state-mandated educational outcomes has already been settled in favor of students and families – but only for those with the resources to opt out of public schooling. In many states, families that choose homeschooling are no longer accountable to the state for demonstrating competency on predetermined standards. Of course, this is largely because public funding is not being used. But the fact remains that, for many students, states have already absolved themselves of the need to measure outcomes.

Another important point is that learning outcomes cannot be guaranteed, even when coerced. States may compel students to attend public schools, but, as the facts in *Gary B.* indicate, this does not always translate to learning. Thus, perhaps a better strategy would be to emphasize access to educational environments that students or families consider effective for meeting their needs, in order to maximize the chances of learning. Finally, widespread acceptance of SDE would in fact be a major paradigm shift in how the American public thinks about education. It would represent a significant increase in the amount of autonomy that children are afforded. And it would require adults to trust children's abilities to identify their own goals and interests, and to learn what they need in order to pursue those interests and participate in community and civic life. Fortunately, the evidence discussed in this Comment suggests that this trust would be well-founded.

A second, and related, set of assumptions is that if children are not forced, they might not learn how to read or perform other skills essential for participation in a modern economy and democratic society. And if they are given educational autonomy, children will play video games all day. The video game concern – that, given the choice, children will spend all their time playing video games and their development will be stunted – is perhaps the most common initial objection to SDE. Yet these imagined risks are largely unfounded. Studies show

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that, given a rich educational environment that facilitates play and exploration, and provided the proper supports for learning disabilities when present, most children will learn how to read without a structured curriculum.²¹³ And, while many (although certainly not all) students in SDE environments may tend to play video games more often than students in conventional public schools, studies have shown tremendous benefits associated with the playing of video games, including the development of social skills, communication, problem solving, and spatial cognition.²¹⁴ Playing video games has also been shown to improve working memory and critical thinking.²¹⁵ Further, there is growing evidence that children are now acquiring advanced literacy skills through online video games.²¹⁶ And, finally, many children currently play video games as an escape from the restrictive confines of the rest of their waking lives. Given more freedom to choose their daily activities, most children naturally gravitate towards a wide range of activities, as illustrated by the experiences of unschoolers and democratic school students.²¹⁷

A third assumption is that alternative education is the domain of rich, white families. Akilah S. Richards, an unschooling parent, podcaster, author, and a Black woman, regularly addresses this issue in her writing and podcast, which amplify voices of Black and brown families engaged in unschooling and self-directed learning.²¹⁸ While Black and brown children are still disproportionately underrepresented in alternative education, Richards and others have done much

²¹³ See, e.g., Gina Riley, Exploring Unschoolers' Experience in Learning to Read: How Reading Happens within the Self-Directed Learning Environment, 12 J. UNSCHOOLING & ALT. LEARNING 24, 27 (2018) ("... many times, reading can happen naturally, not unlike the way babies start walking and toddlers start talking...children, in most cases, do not need to be extrinsically motivated to read."). The exact percentage of students that succeed in learning to read in an SDE environment is an important and open question. But reports from SDE schools are very promising. For example, in decades of operation, the Sudbury Valley School reported that every single student learned to read, albeit on variable timetables. DANIEL GREENBERG, FREE AT LAST: THE SUDBURY VALLEY SCHOOL 31, 35 (1987).

²¹⁴ Jane Barnett & Mark Coulson, Virtually Real: A Psychological Perspective on Massively Multiplayer Online Games, 14 REV. OF GEN. PSYCH. 167 (2010); Ian Spence & Jing Feng, Video Games and Spatial Cognition, 14 REV. OF GEN. PSYCH 92 (2010).

²¹⁵ See Akilli, *supra* note 186

²¹⁶ Rebecca W. Black & Constance Steinkuehler, Literacy in Virtual Worlds, in HANDBOOK OF ADOLESCENT LITERACY RESEARCH 271 (2009).

²¹⁷ See generally GRAY, *supra* note 20.

²¹⁸ See generally RICHARDS, *supra* note 26; Akilah S. Richards, Fare of the Free Child Podcast, RAISING FREE PEOPLE (2020) (available at: <https://raisingfreepeople.com/podcast/>).

to dispel the notion that alternative education is a privilege exclusively afforded to wealthy, white families. However, Richards notes that the "transition out of conventional schooling is hard because in the U.S. there's been such a fight for educational equity[.]"²¹⁹ Still, Richards considers access to alternative educational options an evolution of that fight.²²⁰ Whereas, before, Black families wanted a seat at the table and access to the same schools, "[n]ow, we're saying all those same things and we're saying we can make all the educational choices we need that make sense for us, and sometimes that is not schooling."²²¹ Richards has also written that: "We believe that... Black children in particular are grossly underestimated and unfairly punished across American schools...Instead of trying to work within the system to lobby and hope for change, we are designing our own liberation."²²² As one scholar articulates:

The legacy of the Brown decision is not only about access but is also about options. We African Americans owe it to our children to exercise all available opportunities to ensure their current and future success. We are not obligated to wait for schools to improve to better meet our needs; we are obligated to provide our children the best education available.²²³

Moreover, many Black families have actively been pursuing alternative educational options in recent years: the number of Black youth homeschoolers tripled from 1999 to 2007.²²⁴ This trend has continued and even accelerated throughout the COVID-19 pandemic, as many families, initially forced to learn at home, found it a better educational

²¹⁹ "I am protecting them from whiteness": Why this mom chose to take her kids out of public school, CBC (Apr. 13, 2018, 11:35AM), <https://www.cbc.ca/radio/outintheopen/protection-1.4608124/i-am-protecting-them-from-whiteness-why-this-mom-chose-to-take-her-kids-out-of-public-school-1.4609054>.

²²⁰ Id.

²²¹ Id.

²²² Akilah S. Richards, The Freedom of Unschooling: Raising Liberated Black Children Without the Restrictions of School, STUDENT VOICES (Feb. 21, 2016), <https://mystudentvoices.com/the-freedom-of-unschooling-raising-liberated-black-children-without-the-restrictions-of-school-58347bf5919>.

²²³ TAYLOR, *supra* note 8.

²²⁴ Ama Mazama, African American homeschooling practices: Empirical evidence, 14 THEORY & RSCH. IN EDUC. 26 (2015).

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option.²²⁵ For many Black homeschoolers, “seizing control of their children’s schooling is an act of affirmation—a means of liberating themselves from the systemic racism embedded in so many of today’s schools and continuing the campaign for educational independence launched by their ancestors more than a century ago.”²²⁶

In addition to not being exclusively an experience for white people, SDE does not necessarily coincide with wealth. SDE, supported by a school or learning center designed for such education, works “especially well for poor families and children, precisely because it provides the kinds of self-directed learning opportunities and support that wealthier kids often have at home.”²²⁷ In fact, 22% of the unschooling families in one survey had a family income of \$25,000 or less.²²⁸ Experts in democratic schools from around the world have identified accessibility for all, with differences in family income being taken into account when determining school fees, as a common characteristic of democratic schools.²²⁹

A fourth assumption is that unschooling and homeschooling do not provide adequate socialization; that socialization is best accomplished through conventional public schooling. This has been a persistent misconception with which homeschoolers and unschoolers have had to routinely contend. Many people wonder, for example, whether the homeschooled or unschooled will learn to be tolerant or willing “to extend civil liberties to people who hold views with which one disagrees.”²³⁰ But researchers have found that “greater exposure to homeschooling is associated with more political tolerance.”²³¹ The

²²⁵ Crary, *supra* note 24 (noting that national homeschool rates doubled during 2020, and that Black households saw a jump in homeschooling rates from 3.3% to 16.1% during the pandemic, with some parents expressing appreciation at the “opportunity to take ownership of our children’s education”).

²²⁶ Melinda D. Anderson, *The Radical Self-Reliance of Black Homeschooling*, ATLANTIC (May 17, 2018), <https://www.theatlantic.com/education/archive/2018/05/black-homeschooling/560636/>.

²²⁷ Peter Gray, *Mend the Gap Between Rich and Poor in School Achievement*, PSYCH. TODAY FREEDOM TO LEARN BLOG (Sep. 20, 2017), <https://www.psychologytoday.com/us/blog/freedom-learn/201709/mend-the-gap-between-rich-and-poor-in-school-achievement>.

²²⁸ Rebecca Zellner Grunzke, *Pedagogues for a New Age: childrearing practices of unschooling parents* (Ph.D. dissertation, University of Florida) (2012) (on file with author).

²²⁹ Eylem Korkmaz & Münire Erden, *A Delphi Study: The Characteristics of Democratic Schools*, 107 J. EDUC. RSCH. 365, 367–71 (2014).

²³⁰ Albert Cheng, *Does Homeschooling or Private Schooling Promote Political Intolerance? Evidence From a Christian University*, 8 J. SCH. CHOICE: INT’L RSCH. & REFORM 49 (2014).

²³¹ *Id.*

data on the issue is clear: “There is no empirical evidence that adults who were home educated are somehow less able than those who attended institutional schools to civically interact with individuals and their communities.”²³² Put differently, there is little convincing research supporting the claim that homeschooling negatively impacts socialization.²³³

CONCLUSION

Many legal scholars have recognized problems with America’s public schooling system.²³⁴ The gravity of the situation “must provoke inquiry into whether all viable education reforms have been considered.”²³⁵ The discussion of what qualifies as a viable reform has gradually been expanding. Educational alternatives, including SDE, are slowly beginning to make their way into contemporary education and legal scholarship. Education scholars have claimed that there is a “social obligation to provide rich educational opportunities for every child, regardless of his or her family background or income,” specifically including non-coercive, self-directed models of education.²³⁶ This Comment has argued that it is not only a social and moral obligation; it may be a legal imperative which flows from the underlying legal justifications for the right to education.

Courts and scholars have laid the groundwork for this argument. In particular, in *Gary B.*, the Sixth Circuit found that children have a constitutional right to access a basic minimum level of public education, and that courts should determine what this minimum level of access must consist of. Despite these important findings, the existing conventional public schooling system – and the discourse surrounding it – continue to unjustly limit the educational options for some students and families. By failing to consider educational alternatives, advocates and courts have unnecessarily limited the possibilities of what public education can mean. In so doing, they deny many students (including many disadvantaged students) from accessing alternative educational opportunities. But nothing in the law prevents

²³² Richard G. Medlin, *Homeschooling and the Question of Socialization Revisited*, 88 PEABODY J. EDUC. 284 (2013).

²³³ Brian Ray, *African American Homeschool Parents’ Motivations for Homeschooling and Their Black Children’s Academic Achievement*, 9 J. SCH. CHOICE 71 (2015).

²³⁴ See *supra* note 1; see also BITENSKY, *supra* note 40, at 551–52 (noting that reforms have failed, and the inequality and failures of public education have persisted); Black, *supra* note 112, at 1032.

²³⁵ *Id.*

²³⁶ GRAY, *supra* note 20, at 233.

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equitable access to a continuum of less restrictive educational options from being considered as a viable policy option. In fact, the implications of relevant case law and scholarship suggest that the law may even require it. If we take the right to education seriously, we must ensure access to pedagogical methods that do what public education purports to do. For many students, self-directed education has been shown to be effective at achieving those goals – especially those including preparation for democratic participation, realization of the full potential of the individual, and the development of critical and independent thinking skills.

When faced with the realities and failures of conventional public schooling, as well as the evidence demonstrating the success of alternative educational models (including the fact that those alternatives are practically foreclosed to many disadvantaged students who might greatly benefit from them), courts would be obligated to uphold their duty to examine the effects of different models of schooling on individual students and consider the range of possible less-restrictive educational alternatives. In sum, scholars, advocates, and courts should begin the process of realizing an expanded right to public education: a right to access a variety of publicly funded educational alternatives, including self-directed education environments.