SMU | Dedman School of Law

SMU Law Review

Volume 77 | Issue 4 Article 9

2024

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Recommended Citation
Cristina J. Mauldin, *At Least Make it Adequate: The Constitution Should Better Protect Public Education*, 77 SMU L. Rev. 933 (2024)

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At Least Make It Adequate: The Constitution Should Better Protect Public Education

*Cristina Jenae Mauldin**

ABSTRACT

Public education lacks adequate constitutional protection. The COVID-19 pandemic highlighted pre-existing issues in the public education system, such as poor literacy rates, chronic absenteeism, and disparities in students' post-secondary college and career readiness.[1] *Additionally, recent changes in educational policies have often been part of legislative schemes*[2] *passed by lawmakers who, on average, are at least two generations removed from American students—these policy changes have not been driven by data in response to students' needs.*[3] *As a result, there is a serious lack of consistency in the quality of an American education that has contributed to disparities in students' learning and performance.*[4] *This lack of uniformity—along with the public education system's availability as a political tool—could be addressed on a national scale if the United States' public education system was offered higher constitutional protection and/or had a uniform, minimum standard for the quality of education. To help address these issues, I propose two alternative solutions: (1) public education should be recognized as a fundamental right protected by the Due Process Clause of the Fourteenth Amendment; or (2) a national standard should be set for a "minimally adequate education" (similar to the "Least Restrictive Environment" standard set by the IDEA) that requires states to provide students with historically accurate information and fosters students' self-sufficiency and civic participation.*

DOI: https://doi.org/10.25172/smulr.77.4.9

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1. *See Education in a Pandemic: The Disparate Impacts of COVID-19 on America's Students*, U.S. Dep't of Educ. I, iii-v (June 9, 2021), https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf [https://perma.cc/82QG-JQ3G].

2. *See Every Student Succeeds Act (ESSA)*, U.S. Dep't of Educ., https://www.ed.gov/laws-and-policy/laws-preschool-grade-12-education/every-student-succeeds-act (last reviewed Aug. 19, 2024) [https://perma.cc/7BAH-XMRC]; *Special Education Rules and Regulations*, Tex. Educ. Agency, https://tea.texas.gov/academics/special-student-populations/special-education/programs-and-services/special-education-rules-and-regulations [https://perma.cc/BST6-V83P].

3. Rebecca Beitsch, *In State Legislatures, Millennials Are Often Left Out*, Associated Press (Dec. 23, 2015, 12:00 AM), https://stateline.org/2015/12/23/in-state-legislatures-millennials-are-often-left-out/ [https://perma.cc/NW8P-UVQK].

4. *Mapping State Proficiency Standards Onto NAEP Scales: Results from the 2013 NAEP Reading and Mathematics Assessments*, Nat'l Ctr. for Educ. Stats. (2015), https://nces.ed.gov/nationsreportcard/subject/publications/studies/pdf/2015046.pdf [https://perma.cc/APW8-RA5H].

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I. INTRODUCTION

IN 1973, the Supreme Court decided that education is not a fundamental right under the United States Constitution.[5] This means that state education regulations are not subject to strict scrutiny review when brought before a court.[6] Strict scrutiny review would require states to have a compelling interest in a given education regulation and use narrowly tailored means to meet the ends of the compelling interest.[7] Instead, education regulations are subject to "the traditional standard of review"—rational basis review—"which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes."[8]

5. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973) ("We have carefully considered each of the arguments supportive of the District Court's finding that education is a fundamental right or liberty and have found those arguments unpersuasive.").

6. *Id.*

7. *Id.* at 16–17 ("[S]trict scrutiny means that the State's system is not entitled to the usual presumption of validity, that the State . . . must carry a 'heavy burden of justification,' that the State must demonstrate that its educational system has been structured with 'precision' and is 'tailored' narrowly to serve legitimate objectives and that it has selected the 'less drastic means' for effectuating its objectives." (quoting Dunn v. Blumstein, 405 U.S. 330, 343 (1972))).

8. *Id.* at 40.

Rational basis review is a lenient standard of review.[9] As a result, the legality of a state's education regulations may be challenged in court, but if a court can find that the state had a legitimate—or even a conceivable—state purpose, and that the state's means are rationally related to that purpose, that state's regulation will pass the constitutional test.[10]

How does this impact education across the nation? First, the Supreme Court's decision not to consider education a fundamental right means that state education regulations are subject to a lenient standard of review if brought before a court.[11] Consequently, states can enact education regulations based on conceivable legitimate interests when in reality, a state's true interests have a weak relationship to legitimate educational ends.[12] For example, State A could enact an education regulation that students must purchase Manufacturer A's book covers and use them on all school textbooks. State A's conceivable interest here would be to protect the textbooks it purchases for schools. However, State A's true interest could be its financial partnership with Manufacturer A, through which State A receives 15% of Manufacturer A's book cover profits as part of Manufacturer A's education donation program. Despite State A's true interest being the direct profits from book cover sales, State A's conceivable interest in protecting books would be enough for the education regulation to pass rational basis review if the regulation was brought to court because the book covers were notoriously poor.

This topic is important to current scholarship because with the COVID-19 pandemic exacerbating some of the existing problems in public education, such a lenient standard of review for state and federal action that directly impacts public education may not be enough to protect students.[13] Students' education may be subject to laws and policies meant to serve political agendas or eliminate programs and federal agencies, like the Department of Education, that were created to equip students with the ability to leverage their education as a tool for their college and career success.[14] Legal scholars have explored the idea of education as a fundamental right for more than a decade.[15]

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9. *Id.* at 98 (Marshall, J., dissenting) ("[T]he Texas scheme must be tested by . . . that lenient standard of rationality.").

10. *Id.* at 40 (majority opinion).

11. *Id.* at 98 (Marshall, J., dissenting).

12. *See* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 490 (1955) ("[T]he legislature might conclude that to regulate one effectively it would have to regulate the other. Or it might conclude . . . .").

13. *See generally Education in a Pandemic: The Disparate Impacts of COVID-19 on America's Students*, *supra* note 1.

14. Lindsey M. Burke, *Department of Education*, *in* Mandate for Leadership: The Conservative Promise 319, 319 (Paul Dans & Steven Groves eds., 2023), https://static.project2025.org/2025_MandateForLeadership_CHAPTER-11.pdf [https://perma.cc/CT2K-QEK7] ("[T]he federal Department of Education should be eliminated."); *An Overview of the U.S. Department of Education*, U.S. Dep't of Educ. (Sept. 2010), https://www.ed.gov/about/ed-overview/an-overview-of-the-us-department-of-education—pg-1 [https://perma.cc/BY3F-EYZV] (stating the Department of Education's purpose).

15. *See* Brooke Wilkins, *Should Public Education be a Federal Fundamental Right?*, 2005 BYU Educ. & L.J. 261, 261–62 (2005); William R. Blanchette, *Sufficiently Fundamental: Searching for a Constitutional Right to Literacy Education*, 64 B.C. L. Rev. 377, 379 (2023).

Part II of this paper examines the limited constitutional protection afforded to public education. Part III discusses the history and development of substantive due process and fundamental rights, as well as the varying levels of review afforded to fundamental versus non-fundamental rights. Part IV will examine the nation's historical treatment and regard of public education and the Supreme Court's decision not to afford public education the status as a fundamental right. Part V will discuss alternative methods of further protecting public education from state regulations that threaten to lower the quality of education that the nation's students receive.

II. THE DEVELOPMENT OF FUNDAMENTAL RIGHTS AND STANDARDS OF REVIEW

The Due Process Clause of the Fourteenth Amendment states "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."[16] "[D]ue process of law" can refer to the procedural protections afforded by the Constitution to United States citizens: notice and an opportunity to be heard.[17] "[D]ue process of law" can also refer to substantive due process rights.[18] Substantive due process rights are unenumerated individual liberties implicit in the "liberty" found in the Due Process Clause.[19] Beyond the mere "liberty" from physical imprisonment, the Due Process Clause gives rise to fundamental rights that states are prohibited from infringing upon without a compelling interest and narrowly tailored means of infringement.[20]

Whether a right is "fundamental" depends on whether it is "of the very essence of a scheme of ordered liberty," and deeply rooted in the nation's history and tradition.[21] Historically, fundamental rights have included the freedom to contract;[22] parents' freedom of choice in child-rearing;[23] the right to marry regardless of race;[24] the right to get married;[25] the right to get married to a person of the same sex;[26] the right to have intimate relationships;[27] the right to contraception for married and unmarried people;[28] the right

16. U.S. CONST. amend. XIV, § 1.
17. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).
18. *See* Harrah Indep. Sch. Dist. v. Martin, 440 U.S. 194, 196–97 (1979) (per curium).
19. *Id.* at 197.
20. *See* Lawrence v. Texas, 539 U.S. 558, 593 (2003).
21. Palko v. Connecticut, 302 U.S. 319, 325 (1937) (describing fundamental rights as "of the very essence of a scheme of ordered liberty" and as "principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934))).
22. Lochner v. New York, 198 U.S. 45, 57 (1905).
23. Meyer v. Nebraska, 262 U.S. 390, 400 (1923).
24. Loving v. Virginia, 388 U.S. 1, 12 (1967).
25. Obergefell v. Hodges, 576 U.S. 644, 675 (2015).
26. *Id.*
27. *Id.* at 646.
28. Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

against forced sterilization;[29] the right to procreate;[30] etc. Each of these fundamental rights relates to the individual's right to privacy and freedom to find their place in society without intrusion from their state, unless their state has a compelling interest and employs necessary and narrowly tailored means to support its interest.[31]

While the Supreme Court protects fundamental rights related to the liberty of individuals to privacy and to find their places in society, the Court has refused—both historically and recently—to find a fundamental right an act that involves a threat to life or potential life.[32] In such cases where it is asserted that there is a fundamental right for an act involving a threat to life or potential life, the Court has required a "careful description" of the right allegedly involved.[33] If the carefully described right is not "deeply rooted in this Nation's history and tradition" or found in the essence of a "scheme of ordered liberty," the Court has held that it is not a fundamental right.[34] Consequentially, state regulations governing an act involving a threat to life or potential life are afforded a '"strong presumption of validity'" and subject to lenient rational basis review.[35] This is the exact scenario that played out in *Washington v. Glucksberg*, in which the Court decided whether there is a fundamental right to physician-assisted suicide (a threat to life).[36] There, the Court held that (the carefully described right to) physician-assisted suicide is not a fundamental right because it is not deeply rooted in the nation's history and tradition.[37] Thus, there is no fundamental right to physician-assisted suicide,[38] and state regulations on physician-assisted suicide are subject to rational basis review.[39] Because states have "an unqualified interest in the preservation of human life," rational basis review is difficult to overcome.[40]

A right to a public education—or carefully described, a right to a public education with lessons based on accurate, factual information—does not involve an act that is a threat to life or potential life. Such a right is more similar to fundamental rights related to individual liberties to find one's place in society.[41] In fact, education lays the foundation for students to understand and interact with the society they live in and to act based on

29. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).
30. *Id.*
31. *See* Lawrence v. Texas, 539 U.S. 558, 593 (2003).
32. Washington v. Glucksberg, 521 U.S. 702, 728 (1997); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).
33. *Glucksberg*, 521 U.S. at 721 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).
34. *Id.* at 721, 728 (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)); *Dobbs*, 597 U.S. at 237, 240 (quoting Timbs v. Indiana, 586 U.S. 146, 149 (2019)).
35. *Dobbs*, 597 U.S. at 301 (quoting Heller v. Doe, 509 U.S. 312, 319 (1993)).
36. *Glucksberg*, 531 U.S. at 724.
37. *Id.* at 728.
38. *Id.*
39. *Id.*
40. *Id.* (quoting Cruzan v. Dir., Missouri Dep't of Health, 497 U.S. 261, 282 (1990)).
41. *See* Obergefell v. Hodges, 576 U.S. 644, 675 (2015).

their fundamental rights.[42] The Supreme Court has held a similar belief for over a century.[43] In *Meyer v. Nebraska*, the Court stated:

> The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. The Ordinance of 1787 declares: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[44]

However, the Supreme Court has held that education is not a fundamental right deserving of the protection offered by strict scrutiny.[45]

III. HISTORY AND TRADITION OF PUBLIC EDUCATION

A fundamental right is "of the very essence of a scheme of ordered liberty,"[46] and "must be 'objectively, deeply rooted in this Nation's history and tradition.'"[47] Public education is arguably both. The Founding Fathers have expressed that education is essential to society and the foundation of good governance.[48] Benjamin Franklin himself stated, "A Bible and newspaper in every house, a good school in every district—all studied and appreciated as they merit—are the principal support of virtue, morality, and civil liberty."[49] Education was also woven into the foundations of the United States as new states were admitted to the Union.[50] The Northwest Ordinance of 1787 states: "necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[51] Usually, to determine whether a right is deeply rooted in the nation's history and tradition, the Supreme Court evaluates diverse historical sources, all of which highlight the fundamental nature of public education.[52]

A. At the Time the Fourteenth Amendment was Ratified

The Court usually begins its exploration of the nation's history and tradition with an evaluation of the law at the time the Fourteenth Amendment

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42. *See* Meyer v. Nebraska, 262 U.S. 390, 400 (1923).
43. *See id.*
44. *Id.*
45. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37–38 (1973).
46. Palko v. Connecticut, 302 U.S. 319, 325 (1937).
47. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 239 (2022) (quoting Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997)).
48. Eleanor Stratton, *Founding Fathers on Education*, U.S. Constitution.net (June 10, 2024) https://www.usconstitution.net/founding-fathers-on-education/ [https://perma.cc/95U6-XRBK].
49. *Quote of the Day*, Forbes Quotes, https://www.forbes.com/quotes/1071/ [https://perma.cc/CQU4-TSMH].
50. *See Northwest Ordinance, 1787: Supporting Public Education*, U.S. Capitol Visitor Ctr., https://www.visitthecapitol.gov/artifact/northwest-ordinance-1787 [https://perma.cc/2UPW-ALNE].
51. *Northwest Ordinance (1787)*, Nat'l Archives, https://www.archives.gov/milestone-documents/northwest-ordinance [https://perma.cc/85AD-ZD2B].
52. *See* McDonald v. City of Chicago, 561 U.S. 742, 770–78 (2010).

was ratified.[53] In regard to education, the Court has concluded that the nation's history at the time the Fourteenth Amendment was adopted is "inconclusive" because the public education system had yet to gain its footing in the United States.[54] Thus, public education must be considered "in the light of its full development and its present place in American life throughout the Nation."[55]

B. Supreme Court Opinions

The Supreme Court has recognized "the importance of education to our democratic society" for over a century.[56] This concept, "expressing an abiding respect for the vital role of education in a free society, may be found in numerous [Supreme Court] opinions."[57] In 1923, the Court stated, "Without [a] doubt, [the Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right of the individual to . . . acquire useful knowledge."[58] In regard to educators themselves, the Court feels that "[t]he calling always has been regarded as useful and honorable, essential, indeed, to the public welfare."[59] Moreover, the Court has long recognized the vital role that public education plays as "the most powerful agency for promoting cohesion among a heterogenous democratic people,"[60] and to "preserv[ing] a democratic system of government."[61] Public education is so important, in fact, that "[p]roviding public schools ranks at the very apex of the function of a State[,]"[62] and "the absolute deprivation of education should trigger strict judicial scrutiny."[63]

C. Statutory Education Law: Compulsory Education, No Child Left Behind, and Individuals with Disabilities Education Act

The importance of public education has also been highlighted in statutory law—such as compulsory education laws, No Child Left Behind, and the Individuals with Disabilities Education Act—throughout United States history. Education has been legally required in certain states since the mid-1800s through compulsory education programs.[64] A compulsory education

53. *See* Loving v. Virginia, 388 U.S. 1, 9–10 (1967); Brown v. Bd. of Educ., 347 U.S. 483, 489 (1954).
54. *Brown*, 347 U.S. at 489.
55. *Id.* at 492–93.
56. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 30 (1973) (quoting *Brown*, 347 U.S. at 493).
57. *Id.*
58. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
59. *Id.* at 400.
60. Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 216 (1948).
61. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring).
62. Wisconsin v. Yoder, 406 U.S. 205, 213 (1972).
63. Plyler v. Doe, 457 U.S. 202, 209 (1982) (quoting *In re* Alien Child. Educ. Litig., 501 F. Supp. 544, 582 (S.D. Tex. 1980)).
64. Lynne Graziano, Alex Spurrier & Juliet Squire, A History of Public Education and the Assembly of Services 7 (2022), https://bellwether.org/wp-content/uploads/2022/08/AssemblyOfServices_BetaByBellwether_August2022_FINAL.pdf [https://perma.cc/H9PC-P4YK].

program is one that legally requires children within a certain age or grade range to attend school.[65] The first compulsory education law was passed in 1852 by Massachusetts.[66] This law required children between the ages of eight and fourteen to attend school.[67] By 1918, every other state had passed similar legislation.[68] Today, all fifty states continue to legally mandate school attendance for children of specified age ranges.[69] Additionally, a parent's failure to ensure their child's school attendance—if their child is within the mandatory age range—can give rise to legal consequences.[70] In forty states, these consequences take the form of a fine.[71]

The critical nature of education has also been emphasized by different presidents through legislation they pushed during their terms. President George W. Bush signed the No Child Left Behind Act (NCLB) into law in 2002.[72] Spawned from a desire to keep the nation's schools competitive on a global scale, NCLB "significantly increased the federal role in holding schools responsible for the academic progress of all students."[73] "[I]t put a special focus on ensuring that states and schools boost the performance of certain groups of students . . . whose achievement, on average, trails their peers."[74] Progress was tracked via standardized tests and tied to federal funding.[75] The NCLB also required "states to ensure their teachers [were] 'highly qualified,' which generally [meant] that they had a bachelor's degree in the subject they [were] teaching and state certification."[76] President Obama updated the NCLB—now called the Every Student Succeeds Act (ESSA)—in 2015.[77] The values and goals are the same as those of the NCLB, but ESSA returns power to the states in setting and achieving high standards of education.[78] Both of these programs are improvements and updates to the Elementary and Secondary Education Act (ESEA), which

65. *Compulsory Education*, UNESCO, https://learningportal.iiep.unesco.org/en/glossary/compulsory-education [https://perma.cc/4U5V-WDVM].

66. Hayley Glatter, *Throwback Thursday: Massachusetts Passes the Nation's First Compulsory Education Law*, Bos. Mag. (May 17, 2018, 7:30 AM), https://www.bostonmagazine.com/education/2018/05/17/tbt-compulsory-education-massachusetts/ [https://perma.cc/MA7R-B5GA].

67. *See id.*

68. *See id.*

69. *State Education Practices (SEP)*, Nat'l Ctr. For Educ. Stats., https://nces.ed.gov/programs/statereform/tab5_1.asp [https://perma.cc/37U9-32HU].

70. Nadja Popovich, *Do U.S. Laws That Punish Parents for Truancy Keep Their Kids In School?*, Guardian (Jun 23, 2014, 11:59 AM), https://www.theguardian.com/education/2014/jun/23/-sp-school-truancy-fines-jail-parents-punishment-children [https://perma.cc/RLT8-Q28A].

71. *Id.*

72. Alyson Klein, *No Child Left Behind: An Overview*, Educ. Wk. (Apr. 10, 2015), https://www.edweek.org/policy-politics/no-child-left-behind-an-overview/2015/04 [https://perma.cc/MSL8-5B9B].

73. *Id.*

74. *Id.*

75. *See id.*

76. *Id.*

77. Alyson Klein, *The Every Student Succeeds Act: An Overview*, Educ. Wk. (Mar. 31, 2016), https://www.edweek.org/policy-politics/the-every-student-succeeds-act-an-essa-overview/2016/03 [https://perma.cc/KQY7-XS9W].

78. *See id.*

was signed into law by President Lyndon B. Johnson, "who believed that 'full educational opportunity' should be 'our first national goal.'"[79]

The Individuals with Disabilities Education Act (IDEA) is a federal law that has been in effect since 1975.[80] IDEA "makes available a free appropriate public education to eligible children with disabilities throughout the nation and ensures special education and related services to those children."[81] This law ensures that, beginning after birth, students receive early intervention services and special education and related services and authorizes grants to states to support intervention and special education programs.[82] "IDEA requires that each public school provide services to eligible special education students in the least restrictive environment (LRE) and in accordance with each student's individualized education program (IEP)."[83]

Education is deeply rooted in the nation's history and tradition, as shown through the diverse avenues through which it has been emphasized, mandated, and reformed for the majority of the time the United States has been an independent nation.

IV. CURRENT STATE OF THE LAW

Today, the Supreme Court's decision in *Rodriguez*, which deemed education not a fundamental right, has yet to be overturned and is thus still good law.[84] A full understanding of the current state of the law regarding education as a non-fundamental right comes from three major Supreme Court cases from the twentieth century: *Brown v. Board of Education*,[85] *San Antonio Independent School District v. Rodriguez*,[86] and *Plyler v. Doe*.[87] Although these cases come from the fundamental rights branch of the Equal Protection Clause, the Court's analyses are relevant to the argument that education should be regarded as a fundamental right under the Due Process Clause because under both clauses, fundamental rights are afforded heightened scrutiny, which is what this paper advocates that public education should have.[88] It is also worth noting that the Supreme Court

79. *Every Student Succeeds Act (ESSA)*, U.S. Dep't of Educ., https://www.ed.gov/laws-and-policy/laws-preschool-grade-12-education/every-student-succeeds-act (last reviewed Aug. 19, 2024) [https://perma.cc/75SE-XHLD] (quoting Lyndon B. Johnson, Message to Congress on Education (Jan. 12, 1965)).

80. *See About IDEA*, U.S. Dep't of Educ., https://sites.ed.gov/idea/about-idea/ [https://perma.cc/D8PR-A434].

81. *Id.*

82. *Id.*

83. *Special Education Rules and Regulations*, Tex. Educ. Agency, https://tea.texas.gov/academics/special-student-populations/special-education/programs-and-services/special-education-rules-and-regulations [https://perma.cc/37HV-CFW4].

84. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37–38 (1973).

85. 347 U.S. 483, 493 (1954).

86. 411 U.S. at 37–38.

87. 457 U.S. 202, 221 (1982).

88. *See Plyler*, 457 U.S. at 216–17.

has not rejected the idea of public education as a fundamental right for purposes of Due Process Clause protection.[89]

A. *Brown v. Board of Education*

In *Brown v. Board of Education*, the following question was presented to the Supreme Court: "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?"[90] The Court concluded that "in the field of public education[,] the doctrine of 'separate but equal' has no place."[91] "Separate educational facilities are inherently unequal."[92] In drawing its conclusion, the Court emphasized the extreme importance of public education in the following passage, which is cited in several subsequent decisions touching on the right to public education:

> 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.[93]

Although the Court did not declare education a fundamental right in this case, the Court emphasized the importance and centrality of education in the exercise of other constitutional rights; but even this was not enough to prevent future infringements on public education.[94]

B. *San Antonio Independent School District v. Rodriguez*

Almost twenty years after *Brown* was decided, the Supreme Court was directly confronted with the question of whether education is a fundamental right in *San Antonio Independent School District v. Rodriguez*.[95] This case involved a class action lawsuit "initiated by Mexican-American parents whose children attended elementary and secondary schools in the Edgewood Independent School District, an urban school district in San Antonio, Texas."[96] The class action was brought "on behalf of schoolchildren throughout the State who [were] members of minority groups or

89. *See Brown*, 347 U.S. at 495; *see also Rodriguez*, 411 U.S. at 40; *see also Plyler*, 457 U.S. at 214–17.
90. *Brown*, 347 U.S. at 493.
91. *Id.* at 495.
92. *Id.*
93. *Id.* at 493.
94. *See id.*; *see also* Plyler v. Doe, 457 U.S. 202, 206 (1982).
95. 411 U.S. 1, 33 (1973).
96. *Id.* at 4–5.

who [were] poor and resid[ed] in school districts [with] a low property tax base."[97] The problem—and the cause of the class-action lawsuit—came about due to Texas's education funding scheme.[98]

In the early 1940s, the Texas legislature "recogniz[ed] the need for increased state funding to help offset disparities in local spending and to meet Texas'[s] changing educational requirements," and evaluated its current funding scheme "with an eye toward major reform."[99] In 1947, an eighteen-member committee, composed of educators and legislators, contributed to the establishment of the Texas Minimum Foundation School Program (Program), a new funding scheme that provided money for education expenditures from both the state and school districts.[100] Under said scheme, the State provided 80% of education funding while counties and school districts provided the other 20%.[101] The districts' share was "first divided among Texas'[s] 254 counties pursuant to a complicated economic index that takes into account the relative value of each county's contribution to the State's total income from manufacturing, mining, and agricultural activities."[102] "It also consider[ed] each county's relative share of all payrolls paid within the State and . . . consider[ed] each county's share of all property in the State."[103] Each county's assigned contribution was then "divided among its school districts [based on] each district's share of assessable property within the county," and the district financed its share of its assigned contribution "out of revenues from local property taxation."[104]

The Program increased state and local expenditures for education, but it did not eradicate the disparities in spending between wealthier and poorer districts or between majority-white and majority-minority districts.[105] Comparisons between Alamo Heights Independent School District (Alamo Heights) and Edgewood Independent School District (Edgewood)—the most and least wealthy districts in San Antonio, respectively—were used to illustrate the disparities between dollars spent per student in property-wealthy districts versus property-poor districts.[106] Edgewood, a predominantly Mexican-American district, was "situated in the core-city sector of San Antonio in a residential neighborhood that has little commercial or industrial property" with an average assessed property value per pupil of $5,960.[107] Alamo Heights, a predominantly white district, was "situated in a residential community quite unlike the Edgewood District" with an assessed property value per pupil over $49,000.[108] In Edgewood, $356

97. *Id.* at 5.
98. *Id.* at 11–16.
99. *Id.* at 9.
100. *Id.*
101. *Id.*
102. *Id.* at 10.
103. *Id.*
104. *Id.*
105. *Id.* at 11–14.
106. *See id.*
107. *Id.* at 12.
108. *Id.* at 12–14.

was spent per pupil, and in Alamo Heights, $594 was spent per pupil.[109] These disparities were "largely attributable to differences in the amounts of money collected through local property taxation," which "led the District Court to conclude that Texas'[s] dual system of public school financing violated the Equal Protection Clause."[110] Texas appealed, and the appellees (the families who brought the original class action) argued both that education is a fundamental right and wealth is a suspect class, which would require Texas's education funding scheme to pass strict scrutiny, a standard Texas virtually conceded its scheme could not pass.[111]

The issue before the Supreme Court was "whether the Texas system of financing public education operate[d] to the disadvantage of some suspect class or impinge[d] upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny."[112] The Court answered no to both.[113]

The Court began its analysis of whether education was a fundamental right by acknowledging its importance as discussed in *Brown v. Board of Education*.[114] The Court stated, "In *Brown v. Board of Education*, a unanimous Court recognized that 'education is perhaps the most important function of state and local governments.' What was said there in the context of racial discrimination has lost none of its vitality with the passage of time."[115] The Court then clarified that its holding in *Rodriguez* did not detract from its "historic dedication to public education," and that it did not doubt the "grave significance of education both to the individual and to our society."[116] However, "the importance of a service performed by the State does not determine whether it must be regarded as fundamental."[117] The Court provided the following standard for determining whether public education is a fundamental right:

> [T]he key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.[118]

The appellees argued that education is a fundamental right because "it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote."[119] Moreover, according to the

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109. *Id.*
110. *Id.* at 16.
111. *Id.* at 16, 19–20.
112. *Id.* at 17.
113. *Id.* at 18.
114. *Id.* at 29.
115. *Id.* (quoting 347 U.S. 483, 493 (1954)).
116. *Id.* at 30 (quoting Rodriguez v. San Antonio Indep. Sch. Dist., 337 F. Supp. 280, 283 (W.D. Tex. 1971)).
117. *Id.*
118. *Id.* at 33.
119. *Id.* at 35.

appellees, "[t]he 'marketplace of ideas' is an empty forum for those lacking basic communicative tools," and "[t]he electoral process. . . depends on an informed electorate: a voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed [through education]."[120]

The Court "carefully considered" the arguments supporting the "District Court's finding that education is a fundamental right[,]" and found the "arguments unpersuasive."[121] Moreover, the Court pointed out that even if education was a "constitutionally protected prerequisite to the meaningful exercise of [freedom of speech or the right to vote, there was] no indication that the present levels of educational expenditure in Texas provide[d] an education that [fell] short" because the Texas funding scheme still provided "each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and full participation in the political process."[122] The Court also noted that this case did not involve a full denial of public education.[123]

In addition to finding the appellees' arguments unpersuasive, the Court also refused to find that education is a fundamental right due to separation of powers and federalism concerns.[124] The Court indicated that "if the degree of judicial scrutiny of state legislation fluctuated, depending on a majority's view of the importance of the interest affected, we would have gone 'far toward making this Court a super-legislature.'"[125] The Court did not want to infringe on Congress's or state legislatures' power to set educational standards by declaring education a fundamental right subject to strict scrutiny, should the judiciary need to get involved.[126]

Justice Stewart concurred, finding that the Texas funding scheme did not violate the Constitution.[127] He found that the Texas system did not create "objectively identifiable classes" cognizable under the Equal Protection Clause, and that even if such classes existed, they were "in no sense based upon constitutionally 'suspect' criteria."[128] He also found that the Texas system passed rational basis review.[129] Finally, Justice Stewart found that "the Texas system impinge[d] upon no substantive constitutional rights or liberties," and thus, the district court judgment had to be reversed.[130]

Justice Brennan dissented.[131] He opined that "'fundamentality' is, in large measure, a function of the right's importance in terms of the effectuation of those rights which are in fact constitutionally guaranteed."[132]

120. *Id.* at 35–37.
121. *Id.* at 37.
122. *Id.* at 36–37.
123. *See id.* at 37.
124. *See id.* at 31.
125. *Id.* (quoting Shapiro v. Thompson, 349 U.S. 618, 661 (1969) (Harlan, J., dissenting)).
126. *See id.*
127. *See id.* at 59 (Stewart, J., concurring).
128. *Id.* at 62.
129. *Id.* at 60.
130. *Id.* at 62.
131. *Id.* (Brennan, J., dissenting).
132. *Id.*

Justice Brennan then suggested that "[a]s the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed [upon should be] adjusted accordingly."[133] Essentially, Justice Brennan proposed that the level of judicial scrutiny be adjusted using a nexus test for the closeness of the relationship between a constitutional guarantee, such as freedom of speech, and a non-constitutional interest, such as education.[134]

Justice White, joined by Justices Douglas and Brennan, also dissented.[135] He found that the Texas funding scheme did not pass rational basis review and thus, the District Court's holding should have been affirmed.[136]

Justice Marshall, joined by Justice Douglas, wrote an extremely detailed, powerful dissent.[137] He rejected "the majority's labored efforts to demonstrate that fundamental interests, which call for strict scrutiny [], encompass only established rights which we are somehow bound to recognize from the text of the Constitution itself."[138] According to Marshall, whether a right is fundamental is not always determined by whether that interest is a right "'explicitly or implicitly guaranteed by the Constitution.'"[139] For example, as Justice Marshall pointed out, the Constitution does not mention certain guarantees like the right to procreate, to vote in state elections, or to appeal from a criminal conviction, yet each of these rights have been deemed fundamental.[140] "These are instances in which, due to the importance of the interests at stake, the Court has displayed a strong concern with the existence of discriminatory state treatment. But the Court has never said or indicated that these are interests which independently enjoy full-blown constitutional protection."[141] Justice Marshall thought the determination of which rights are fundamental "should be firmly rooted in the text of the Constitution."[142] Like Justice Brennan, he described that the process should be as follows:

> The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental, and the degree of judicial scrutiny applied when the interest is infringed [upon should be] adjusted accordingly.[143]

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133. *Id.* at 62–63 (Brennan, J., dissenting) (quoting Justice Marshall's dissent, *id.* at 102–03).
134. *See id.*
135. *Id.* (White, J., dissenting).
136. *See id.* at 67–69.
137. *Id.* at 70 (Marshall, J., dissenting).
138. *Id.* at 99.
139. *Id.* at 100.
140. *Id.*
141. *Id.*
142. *Id.* at 102.
143. *Id.* at 102–103.

Justice Marshall felt that education is such a fundamental right because of the "unique status accorded public education by our society" and "the substantial relationship which education bears to guarantees of our Constitution."[144]

> Education directly affects the ability of a child to exercise his First Amendment rights, both as a source and as a receiver of information and ideas . . . [and] serves the essential function of instilling in our young an understanding of and appreciation for the principles and operation of our governmental processes.[145]

Education passes Justice Marshall's nexus test, and according to him, should be considered a fundamental right.[146]

C. *Plyler v. Doe*

Plyler v. Doe is a case that resulted from a class action filed on behalf of school-age children in Smith County, Texas, who could not establish that they had been legally admitted into the United States and thus, were excluded from public schools in the Tyler Independent School District.[147] The question presented was "whether . . . Texas [could] deny to undocumented school-age children the free public education that it provides to children who are citizens of the United States or legally admitted aliens."[148] The Court answered no for two main reasons: (1) the group being deprived of the right to public education, undocumented children, was a vulnerable group with no control over its status; and (2) education is extremely important.[149] The Court stated, "[o]bviously, no child is responsible for his birth and penalizing . . . the child [by denying them a free public education due to their status as an illegal immigrant] is an ineffectual—as well as unjust—way of deterring the parent."[150] Because the Texas law was directed against children and imposed a discriminatory burden on the basis of a legal characteristic over which children have no control, the Court found it "difficult to conceive of a rational justification for penalizing these children for their presence within the United States . . . [which] appear[ed] to be precisely the effect of [the Texas law]."[151] The Court then emphasized the "supreme importance"[152] of public education:

> The "American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance." We have recognized "the public schools as a most vital civic institution for the preservation of a democratic system of government," and as the primary vehicle for transmitting "the values on which our society rests."

144. *Id.* at 111–12.
145. *Id.* at 112–13.
146. *See id.*
147. Plyler v. Doe, 457 U.S. 202, 206 (1982).
148. *Id.* at 205.
149. *Id.* at 220–21.
150. *Id.* at 220.
151. *Id.*
152. *Id.* at 221.

> "[A]s . . . pointed out early in our history, . . . 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." And these historic "perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists." In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.[153]

The Court also highlighted the significant tie between education and the political power of a given group or class and the close relationship between education and self-sufficiency.[154] In light of the vulnerability of the affected class and the importance of education, the Court found the Texas law could "hardly be considered rational unless it further[ed] some substantial goal of the State."[155] Finding that it did not, the Court invalidated the Texas law.[156]

Justice Marshall concurred, once again advocating that "an individual's interest in education is fundamental, and that this view is amply supported 'by the unique status accorded public education by our society, and by the close relationship between education and some of our most basic constitutional values.'"[157] He believed that the facts of the case "demonstrate[d] the wisdom of . . . employing an approach that allows for varying levels of scrutiny depending upon 'the constitutional and societal importance of the interests adversely affected.'"[158]

The trio of *Brown*, *Rodriguez*, and *Plyler* provide the current state of the law regarding education as a fundamental right. In *Brown*, the Court emphasized the importance of education to democratic society.[159] Education carries such importance because it is necessary to perform civic responsibilities such as voting, serving in the armed forces, understanding the nation's cultural values, and being prepared for future professional training.[160] According to the Court, education is integral to success in life.[161]

In *Rodriguez*, the Court re-emphasized the importance of education, stating that nothing in its decision in *Rodriguez* was meant to detract from the centrality of education to society and success in life, as emphasized

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153. *Id.* (alterations in original) (first quoting Meyer v. Nebraska, 262 U.S. 390, 400 (1923); then quoting Abington Sch. Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring); then quoting Ambach v. Norwick, 441 U.S. 68, 76 (1979); then quoting Wisconsin v. Yoder, 406 U.S. 205, 221 (1972); and then quoting *Ambach*, 411 U.S. at 77)).

154. *Id.* at 222.

155. *Id.* at 224.

156. *Id.* at 230.

157. *Id.* at 230 (quoting San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 111 (1973) (Marshall, J., dissenting)).

158. *Id.* at 231 (quoting *Rodriguez*, 411 U.S. at 99 (Marshall, J., dissenting)).

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

160. *See id.*

161. *See id.*

in *Brown*.[162] However, the Court held that education is not a fundamental right because the Court did not find that "there is a right to education explicitly or implicitly guaranteed by the Constitution."[163] Additionally, the Court did not invalidate the Texas education funding scheme under review in the *Rodriguez* decision because "no charge fairly could be made that the system fail[ed] 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."[164] The Court also made note that the *Rodriguez* case did not involve a full denial of access to public education.[165] This suggests that access, not only to a public education but to a public education from which students "acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process," is required.[166]

Plyler involved a complete deprivation of public education from undocumented school-age children in the Tyler Independent School District due to a Texas law that required undocumented school-age children to pay full tuition to attend public schools, which most families could not afford, effectively denying the students a public education.[167] The Court applied a heightened standard of review, requiring the law to further some "substantial goal" of the state to be considered rational.[168] The Court employed this heightened standard in part because the children impacted were a vulnerable group with no control over their legal immigration status, and in part because of "the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child."[169] *Plyler* suggests that a full deprivation of a public education from a vulnerable group warrants heightened scrutiny of the education regulation under review.[170]

In sum, public education is currently not considered a fundamental right because the Court did not find explicit or implicit protection for public education in the Constitution back in 1973.[171] However, for nearly a century, the Court has acknowledged the fundamental importance of education due to its tie to the exercise and enjoyment of other constitutionally guaranteed rights, such as freedom of speech and the right to vote.[172] Public education is "perhaps the most important function of state and local governments."[173] Nevertheless, education regulations are usually subject to

162. *Rodriguez*, 411 U.S. at 29–30.
163. *Id.* at 33.
164. *Id.* at 37.
165. *See id.* at 36–37.
166. *See id.* at 37.
167. Plyler v. Doe, 457 U.S. 202, 206 (1982).
168. *Id.* at 223–24.
169. *See id.* at 221.
170. *See id.* at 221–22.
171. *Id.* at 33–37.
172. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954); San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 29–30 (1973); *Plyler*, 457 U.S. at 221–23.
173. *Brown*, 347 U.S. at 493.

rational basis review.[174] There is an exception to this rule in cases in which school-age children are denied access to a public education, especially those in vulnerable classes, like undocumented school-age children.[175] In such cases, the Court has applied heightened scrutiny, requiring a substantial government interest paired with rationally related means.[176] There may also be an exception if students are denied access to a public education from which students "acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process."[177] Although these rules were established through Equal Protection Clause jurisprudence, they are relevant to fundamental rights jurisprudence under the Due Process Clause of the Fourteenth Amendment. Under both clauses, regulations that infringe on fundamental rights are afforded heightened judicial scrutiny, regardless of which clause a claim is brought under.[178] Despite the Court's holding in *Rodriguez*, several justices—including Justice Brennan, Justice Marshall, and Justice Douglas—have suggested supplanting the current method of evaluating whether a right is implicitly or explicitly protected by the Constitution with a nexus test that increases the level of judicial scrutiny of regulations impacting rights like education and examines the importance of the right and the close relationship between the right and some of our most basic constitutional values, such as freedom of speech and exercising the right to vote.[179]

V. PROBLEMS IN PUBLIC EDUCATION AND ALTERNATIVE SOLUTIONS

Three major issues in public education in the United States include poor literacy rates, chronic absenteeism, and disparities in curriculum among states leading to disparities in college and career readiness.[180] Public school districts and state departments of education are state actors.[181] This means

174. *See Rodriguez*, 411 U.S. at 40.
175. *Plyler*, 457 U.S. at 223–24.
176. *See id.*
177. *See Rodriguez*, 411 U.S. at 37.
178. *See* Lawrence v. Texas, 539 U.S. 558, 593 (2003) (stating that infringement upon a fundamental right under the Due Process Clause is subject to strict scrutiny review); *Rodriguez*, 411 U.S. at 37–38 (stating that infringement upon a "fundamental personal right or liberty" under the Equal Protection Clause is subject to strict scrutiny).
179. *See Rodriguez*, 411 U.S. at 102–03 (Marshall, J., dissenting); *see also Plyler*, 457 U.S. at 231 (Marshall, J., concurring).
180. *See Literacy Statistics 2024-2025 (Where we are now)*, Nat'l Literacy Inst., https://www.thenationalliteracyinstitute.com/literacy-statistics [https://perma.cc/3T3W-PAH9]; Gabrielle Hays, *Chronic Absenteeism is up Across the Country. School Leaders are Trying to Address Why*, PBS News (Jan. 17, 2024, 5:23 PM), https://www.pbs.org/newshour/nation/chronic-absenteeism-is-up-across-the-country-school-leaders-are-trying-to-address-why [https://perma.cc/DR6D-D9BH]; Jade Yeban, *The Roles of Federal and State Governments in Education*, FindLaw, https://www.findlaw.com/education/curriculum-standards-school-funding/the-roles-of-federal-and-state-governments-in-education.html [https://perma.cc/4CW6-9KGX].
181. *Fourth Circuit Says Public Charter Schools Are State Actors, Supreme Court Declines to Weigh In*, Cong. Rsch. Serv. 1, 2 (July 19, 2023), https://crsreports.congress.gov/product/pdf/LSB/LSB10958#:~:text=Public%20schools%20are%20recognized%20as,do%20

that these entities are subject to constitutional protection, and the constitutionality of their actions can be subject to judicial review.[182]

A. Education Issues

The National Center for Education Statistics (NCES) is the primary federal entity for collecting and analyzing education data.[183] According to the NCES, "literacy" is "the ability to use printed and written information to function in society, to achieve one's goals, and to develop one's knowledge and potential."[184] In other words, literacy is an extension of the ability to read and write.[185] For many decades, the Supreme Court has recognized the importance of literacy to the exercise of one's constitutional rights.[186] Today, illiteracy has become a serious problem for both children and adults in the United States.[187] As of 2022, "21% of adults in the [United States] are illiterate."[188] "130 million adults are now unable to read a simple story to their children."[189] "Approximately 40% of students across the nation cannot read at a basic level."[190] Struggling readers suffer socially and emotionally.[191]

Literacy programs and educational enrichment programs throughout the nation offer various suggestions for improving literacy rates in schools, many of which include a suggestion to increase reading time and the number of books available to students.[192] Simultaneously, book banning is a phenomenon that has impacted the availability of books to public school children at an increased rate over the past few years.[193] A school book ban is described as follows:

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not%20provide%20public%20education [https://perma.cc/8MQ5-ZY7S] ("Public schools are recognized as state actors for purposes of Fourteenth Amendment liability.").

182. *See* 28 U.S.C. § 1257(c).

183. *About NCES*, Nat'l Ctr. For Educ. Stats., https://nces.ed.gov/about/ [https://perma.cc/EW6H-242X].

184. *National Assessment of Adult Literacy*, Nat'l Ctr. For Educ. Stats., https://nces.ed.gov/naal/fr_definition.asp [https://perma.cc/X62F-WUM9].

185. *See id.*

186. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 36 (1973) ("[A] voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed.").

187. *See Literacy Statistics 2024–2025 (Where we are now)*, *supra* note 180.

188. *Id.*

189. *Id.*

190. *Id.*

191. *See id.*

192. *See* Kathy Y. Stovall, *A Framework for Building Older Students' Literacy Skills*, Edutopia (Dec. 15, 2022), https://www.edutopia.org/article/improving-literacy-middle-school/ [https://perma.cc/D87U-4AVP]; Darri Stephens, *10 Teaching Strategies: How to Improve Students' Reading Skills*, Nearpod (Aug. 6, 2024), https://nearpod.com/blog/good-readers/ [https://perma.cc/7ZNP-BQWP]; *8+ Ways to Support Literacy Skills Development*, Teaching Strategies (Aug. 3, 2021), https://teachingstrategies.com/blog/8-ways-to-support-literacy-skills-development/ [https://perma.cc/JRA9-T4KL].

193. Kasey Meehan, Jonathan Friedman, Sabrina Baeta & Tasslyn Magnusson, *Banned in the USA: The Mounting Pressure to Censor*, PEN Am. (Sept. 1, 2023), https://pen.org/report/book-bans-pressure-to-censor/ [https://perma.cc/QPG8-5GR3].

> [A]ny action taken against a book based on its content and as a result of parent or community challenges, administrative decisions, or in response to direct or threatened action by lawmakers or other government officials, that leads to a previously accessible book being either completely removed from availability to students or [having restricted access to students].[194]

The number of banned books has increased every year since 2017, with the exception of the year 2020.[195] By decreasing the availability of books in public schools, book bans can have a negative impact on the literacy of public-school children.[196] In cases where teachers, school districts, state government officials, and other state actors are responsible for book bans, the Constitution could provide protection against the decreased availability of books by subjecting the removal of school-appropriate, literacy-developing books to strict scrutiny review.

Chronic absenteeism is a phrase used to describe students who are chronically absent—meaning they miss at least fifteen days of school in a year.[197] Because they miss a substantial amount of in-class instruction, chronically absent students are at serious risk of falling behind in school.[198] In the 2021–2022 school year, 29.7% of students were chronically absent.[199] State education agencies are responsible for creating and implementing policies to address chronic absenteeism.[200]

The Tenth Amendment gives states the authority to control public education.[201] The Tenth Amendment states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People."[202] Thus, the Tenth Amendment gives states—rather than the federal government—the ability to provide and set their own standards for public education.[203] The public school education curriculum in each state is created by state departments

194. *Id.*

195. Dimitrije Curcic, *Banned Books Statistics*, WordsRated (May 10, 2023), https://wordsrated.com/banned-books-statistics/ [https://perma.cc/U48A-N5U6].

196. Morgan Gilbard, *What You Need to Know About the Book Bans Sweeping the U.S.*, Tchrs. Coll., Colum. Univ. (Sept. 6, 2023), https://www.tc.columbia.edu/articles/2023/september/what-you-need-to-know-about-the-book-bans-sweeping-the-us/ [https://perma.cc/K5K5-JG98].

197. Valerie L. Marsh, *Understanding Chronic Absenteeism: What Research Tells Us About Poor Performance at School*, Am. Fed'n of Tchrs. (2019).

198. *Id.*

199. Evie Blad, *High Absenteeism Hits More Schools, Affecting Students with Strong Attendance, Too*, Educ. Wk. (Oct. 12, 2023), https://www.edweek.org/leadership/high-absenteeism-hits-more-schools-affecting-students-with-strong-attendance-too/2023/10 [https://perma.cc/EB3Y-7E5T].

200. *See* Yeban, *supra* note 180; Robert Balfanz & Vaughan Byrnes, The Importance of Being in School: A Report on Absenteeism in the Nation's Public Schools 8 (2012), https://new.every1graduates.org/wp-content/uploads/2012/05/FINALChronicAbsenteeismReport_May16.pdf [https://perma.cc/CTG2-P6GC].

201. *See Government 101: State Governments*, Vote Smart, https://votesmart.org/education/states#Powers_of_the_States [https://perma.cc/K7PE-NX59].

202. U.S. Const. amend. X.

203. *See id.*

of education with the assistance of teachers and other school officials.[204] "Consequently, all states have different standards and policies, [which] can impact the quality of education available."[205] The differences in educational standards and policies between states can lead to disparities in college and career readiness between students from different states whose education may or may not have been tailored to meet their specific needs and set them up for future success, and these disparities disproportionately impact students from minority groups.[206] ESSA (the nation's national education law) requires states to have "challenging" academic standards.[207] Each state department of education "creates education standards and curricula" that are then approved by the state board of education, and "many states have adopted some form of [ESSA's] Common Core standards."[208] However, "learning standards still vary widely."[209] "In a comparison of states' proficiency standards, the gap between states with the highest and lowest standards amounted to three to four grade levels of learning."[210] Comparisons like this one are important because as state standards shape state curricula, states with higher standards (and thus higher-quality curricula) naturally stand apart from those with lower standards (and thus lower-quality curricula).[211] "High-quality curricula are associated with higher academic achievement, and a strong curriculum has been shown to have a larger effect size than several other education reform efforts on student performance."[212] "Therefore, the disparities in the state standards and curricula can lead to inequality between states."[213] As most colleges and professions accept individuals from all fifty states, the disparities among state curricula can directly lead to disparities in students' college and career readiness.[214] For example, a student with a Texas public school education and a student with a Maryland public school education attending the same college or entering the same profession at the same time will likely enter said college or profession with different levels of education and thus,

204. *See* Yeban, *supra* note 180 (describing the authorities states have for education regarding funding, teacher qualifications, and special education programs).

205. *Id.*

206. *See* Eesha Pendharkar & Sarah D. Sparks, *New National Data Show Depth of Disparities in a Chaotic Year of Schooling*, EDUC. WK. (Nov. 15, 2023), https://www.edweek.org/leadership/new-national-data-show-depth-of-disparities-in-a-chaotic-year-of-schooling/2023/11 [https://perma.cc/U6R9-CH7R] ("About 5,500 public high schools serve 75 percent of more Black and Latino students, according to newly released federal civil rights data from 2020–21. These schools are significantly less likely to offer advanced math, physics, and computer science courses than are schools with low populations of students of color.").

207. Yifan Bai, Stephanie Straus & Markus Broer, *U.S. National and State Trends in Educational Inequality Due to Socioeconomic Status: Evidence From the 2003-17 NAEP* 7 (Am. Insts. for Rsch., Working Paper No. 2021-01, 2021), https://files.eric.ed.gov/fulltext/ED613568.pdf [https://perma.cc/HF3W-A3C6] (quoting 20 U.S.C. § 6315(b)).

208. *Id.*

209. *Id.*

210. *Id.*

211. *See id.*

212. *Id.* at 7–8.

213. *Id.* at 8.

214. *See id.* at 5–8.

different levels of preparedness for their college or career.[215] This can be a problem because certain students could quite literally be entering college or a career behind their peers entering at the same time, making their experience one involving both catching up and learning new material at the same.[216]

To help solve these problems and others like them, this paper proposes two alternative solutions: (1) a judicial solution of the Supreme Court declaring public education to be a fundamental right; and (2) a legislative solution of Congress setting a national standard for a minimally adequate education.

B. Make Education a Fundamental Right

As previously stated, a fundamental right is a right that is "of the very essence of a scheme of ordered liberty," and deeply rooted in the nation's history and tradition.[217] Fundamental rights are afforded a higher degree of constitutional protection than regular, non-fundamental rights because government regulations of such rights are subject to strict scrutiny if brought before a court.[218] Strict scrutiny review requires states to have a compelling interest in a given regulation and use necessary and narrowly tailored means to meet the ends of the compelling interest.[219] As of 1973, the Supreme Court has held that there is no fundamental right to public education.[220] However, as previously mentioned, education can be considered "of the very essence of a scheme of ordered liberty," and deeply rooted in the nation's history and tradition.[221] The Supreme Court itself has stated that education is of vital importance to a scheme of ordered liberty because of the "close relationship between education and some of our most basic constitutional values," including voting, freedom of speech and expression, and working in one's chosen profession.[222] Education is also "deeply rooted in this Nation's history and tradition."[223] It has been mandatory in the United

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215. *See id.*

216. *See College Readiness*, U.S. News, https://www.usnews.com/news/best-states/rankings/education/prek-12/college-readiness [https://perma.cc/9MAX-T4RQ].

217. Palko v. Connecticut, 302 U.S. 319, 325 (1937) (describing fundamental rights as "of the very essence of a scheme of ordered liberty" and "principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934))).

218. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37–38 (1973).

219. *Id.* at 16–17 ("[S]trict scrutiny means that the State's system is not entitled to the usual presumption of validity, that the State . . . must carry a 'heavy burden of justification,' that the State must demonstrate that its educational system has been structured with 'precision' and is 'tailored' narrowly to serve legitimate objectives and that it has selected the 'less drastic means' for effectuating its objectives." (quoting Dunn v. Blumstein, 405 U.S. 330, 343 (1972))).

220. *Id.* at 33–38.

221. *See Palko*, 302 U.S. at 325.

222. *See Rodriguez*, 411 U.S. at 111 (Marshall, J., dissenting).

223. *See* Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).

States for more than a century, and the Supreme Court has reinforced its importance in pivotal decisions in United States history.[224]

The Supreme Court would have had a chance to declare at least a basic minimum education a fundamental right if an appeal was brought to it concerning the *Gary B. v. Whitmer* case decided by the Sixth Circuit, and if it had granted certiorari.[225] The central issue addressed in this case was "whether Plaintiffs [minor students attending public schools] have a fundamental right to a basic minimum education, meaning one that provides access to literacy."[226] The Sixth Circuit concluded that "the Constitution provides a fundamental right to a basic minimum education."[227] The Sixth Circuit reasoned that "[a]ccess to a foundational level of literacy—provided through public education—has an extensive historical legacy and is so central to our political and social system as to be 'implicit in the concept of ordered liberty[,]'" and "without the literacy provided by a basic minimum education, it is impossible to participate in our democracy."[228]

The Supreme Court never explicitly denied certiorari to the *Gary B. v. Whitmore* case. This is likely due to the fact that the Sixth Circuit distinguished its holding in this case from the holding in *Rodriguez* by declaring a fundamental right to "a basic minimum education," not a general fundamental right to a public education.[229] However, this decision was later vacated after the parties settled.[230] However, if the *Gary B. v. Whitmore* decision that there is a fundamental right to a basic minimum education that provides access to literacy had been affirmed by the Supreme Court—or if the Supreme Court affirms a similar future decision—several benefits would result.

First, there would be heightened protection for public education.[231] Any state education regulation found to decrease access to literacy that is brought before a court would have to pass strict scrutiny.[232] This means that states would need a compelling interest and narrowly tailored means for their regulation—that is detrimental to literacy—to pass constitutional muster.[233] For example, if a state decided to ban several school-appropriate, literacy-developing books, and a student's parent brought suit, the

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

225. Gary B. v. Whitmer, 957 F.3d 616, 616 (6th Cir.), *vacated*, 958 F.3d 1216, 1216 (6th Cir. 2020).

226. *Id.* at 642.

227. *Id.*

228. *Id.* at 642 (quoting Palko v. Connecticut, 302 U.S. 319, 325–26 (1937)).

229. *Compare id.* (holding that there is a fundamental right to a basic minimum education, meaning one that gives access to literacy), *with* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 38 (1973) (holding that there is no fundamental right to a public education).

230. Gary B. v. Whitmer, 958 F.3d 1216, 1216 (6th Cir. 2020) (vacating and granting rehearing en banc to the *Gary B.* case); Rocco E. Testani, *A Short-Lived Constitutional Right to Education*, EDUC. NEXT, https://www.educationnext.org/short-lived-constitutional-right-to-education-sixth-circuit-rehear-gary-b-whitmer/ [https://perma.cc/EJY5-G57N] (detailing the Sixth Circuit panel decision in *Gary B.*, as well as its subsequent vacatur by the Sixth Circuit en banc after the party settlement).

231. *See Rodriguez*, 411 U.S. at 37–38.

232. *See id.* at 16–17.

233. *See id.* at 17.

state would have a high burden to prove its book ban was constitutional. These determinations would need to be made on a case-by-case basis and would have to take the students' age, grade-level benchmarks, and literacy level into account. Each state could establish objective criteria for school-appropriate and literacy-developing books. The result would be that, if a given book was genuinely school-appropriate and literacy-developing, the state seeking to ban it would have to meet a high burden to successfully defend the ban. This could discourage frivolous book bans by states.

Second, the emphasis on a fundamental right not only to education, but to literacy, puts this important skill at the forefront of education. Like a public education, literacy is necessary for the exercise of constitutional rights like freedom of speech, freedom of expression, and the right to vote and participate in the political process.[234] Heightened protection for this critical skill would make it more difficult for states to pass education regulations that harm literacy and thus, would help to address the low literacy rates in public school districts across the country.[235]

Third—but certainly not last—declaring a fundamental right to a basic minimum education that provides access to literacy would benefit state education systems as a whole because a statement from the highest court in the country that a basic minimum education is not only important, but fundamental, would be a signal to the entire nation that education needs to be taken more seriously.[236] This could inspire states and public school districts to evaluate their standards and quality of education and potentially increase them to the level that a fundamental right deserves.

A fundamental right to a public education in general would take the benefits even further. Challenges to detrimental education laws could be brought to protect education in general, even without a tie to literacy. This would mean that state regulations that limit or remove access to public education, funding for public education, the development of accurate and high-quality curriculum for public education, critical materials for public education, etc., would have to pass strict scrutiny—the highest standard of constitutional review—to pass constitutional muster.[237] States would have a difficult time defending harmful education regulations against a constitutional claim. Such high protection could help address the current

234. *See* Plyer v. Doe, 457 U.S. 202, 222 (1982); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

235. See Alex Keiper, *Taking a Broad View to Recognize a Narrow Right: How a Holistic Analysis of Literacy's Role in American Society Demonstrates That it is a Fundamental Right*, 70 AM. U. L. REV. F. 157, 163 (2021).

236. Declaring a fundamental right to a basic minimum education that provides access to literacy would be a monumental first step in solving several issues in the public education system, including the ones mentioned in this paper. However, policy changes would need to take place in each state education system to increase literacy rates across the country and effectively help Americans to exercise other rights, such as the right to vote. BARBARA R. FOORMAN, STATE POLICY LEVERS FOR IMPROVING LITERACY 1–3 (2020), https://www.compcenternetwork.org/sites/default/files/archive/StatePolicyLeversforImprovingLiteracy.pdf [https://perma.cc/4KZ3-VFCQ] (discussing the potential policies state legislatures can adopt to improve literacy).

237. *See* Keiper, *supra* note 235, at 163.

problems in education concerning low literacy rates, low attendance, and disparities in state standards and curricula.[238] If the issue is brought before the Supreme Court, it would be in the best interest of public school students in the United States for the Court to declare public education a fundamental right—effectively reversing *Rodriguez* and requiring education regulations that are potentially harmful to students' educational needs to pass a higher, strict scrutiny standard to meet constitutional muster. It would also serve the interests of public school students for the Court to declare a fundamental right to a basic minimum education, which would put literacy at the forefront of the United States' public education system and combat the problem of increasing illiteracy that the nation currently faces.[239]

C. Declare a Standard for a Minimally Adequate Education

If the Supreme Court does not declare public education—or a right to a basic minimum education—a fundamental right, an alternative solution to current problems in public education—such as declining literacy rates, chronic absenteeism, and disparities in curriculum among states leading to disparities in college and career readiness—would be for Congress to set a national standard for a minimally adequate education that requires states to provide students with historically accurate information and fosters students' self-sufficiency and civic participation, in addition to the current Every Student Succeeds Act standards currently being implemented by states. Congressional committees such as the House Education and Workforce Committee and the Senate Committee on Health, Education, Labor, and Pensions could be involved in setting such a standard.[240] States would still be able to determine how they meet such a standard—which would address federalism concerns—but they would have to justify decisions such as banning certain books that are school-appropriate, literacy-developing, historically accurate, etc. from their curricula, because such decisions would directly conflict with the standard.

In the *Rodriguez* decision, the Supreme Court left an opening for Congress to step in and set a national standard for a minimally adequate education.[241] In deciding not to find that a public education is a fundamental right, the Supreme Court pointed out that even if education was a "constitutionally protected prerequisite to the meaningful exercise of [freedom of speech or the right to vote, there was] no indication that the present levels of educational expenditures in Texas provide[d] an education that [fell] short" because the Texas funding scheme still provided each child "with an

238. *See id.*
239. *See id.*
240. Virginia Foxx, *Welcome Message*, Comm. on Educ. & the Workforce, https://edworkforce.house.gov/committee/welcomemessage.htm [https://perma.cc/N4VE-KBC6] (explaining the Committee's purpose to develop policies that promote high-quality education); *About*, Senate Comm. on Health, Educ., Lab. & Pensions, https://www.help.senate.gov/about [https://perma.cc/D25Y-KNJH] (explaining the Committee's purpose to develop legislation relating to education).
241. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 38 (1973).

opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process."[242] The Court also pointed out that the *Rodriguez* case did not involve a full denial of public education.[243] In the subsequent *Plyler* case, the Supreme Court made it clear that a full deprivation of a public education, especially from a vulnerable group, is unconstitutional.[244] However, according to the Supreme Court, if a full denial or deprivation of a public education is not taking place, there is no constitutional violation if children are provided "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."[245] What are the basic minimal skills necessary for the enjoyment of the rights of speech and full participation in the political process? The Supreme Court does not say. Without a current case or controversy, the Supreme Court cannot retroactively make a law setting such a standard, but as the legislative branch, Congress can, and Congress should.

Right now, the meaning of 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" is open to interpretation by states trying to develop educational standards and curricula that meet constitutional muster.[246] However, the current system has led to educational disparities amongst states, and illiteracy and low school attendance are still prominent issues in today's education systems.[247] If Congress were to set a national standard for a minimally adequate education that requires states to provide students with historically accurate information and fosters students' self-sufficiency and civic participation, this could both provide students 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."[248] Providing students with historically accurate information can help students to employ their freedom of speech using information that is factual and thus beneficial to their academic and career success.[249] Fostering self-sufficiency can also encourage students to seek out personal knowledge to further develop their use of their freedom of speech and participation in the political process.[250] Fostering civic engagement can also foster student participation in the political process by encouraging them to make an informed vote beginning when they are eighteen, and to be politically involved before age eighteen by doing activities such as volunteering for campaigns and discussing the political process with their parents. Thus,

242. *Id.* at 36–37.
243. *See id.* at 37.
244. *See* Plyler v. Doe, 457 U.S. 202, 223–24 (1982).
245. *See Rodriguez*, 411 U.S. at 37.
246. *See id.*
247. *See* National Literacy Institute, *supra* note 180; Marsh, *supra* note 197.
248. *See Rodriguez*, 411 U.S. at 37.
249. *See Advocating For Teaching Honest History: What Educators Can Do*, S. Poverty L. Ctr., https://www.learningforjustice.org/magazine/publications/advocating-for-teaching-honest-history-what-educators-can-do [https://perma.cc/2VYC-E7DK].
250. *See id.*

the standard proposed in this paper can clarify what it means to provide students 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" and gives states a sense of direction in providing their students with such an opportunity.[251] The proposed standard will also make it more difficult for states to create and implement education regulations and policies that contravene the national standard that would be set.[252] For example, a state education regulation banning historically accurate books would be viewed more critically if a national standard was set that requires states to provide historically accurate information to public school students, because such a book ban would work directly against the goals of that national standard.

An expected counterargument to Congress setting the proposed standard would be a federalism concern that having Congress set a national standard for a minimally adequate education would infringe on states' reserved power over public education.[253] However, because the proposed standard would be in addition to the current Every Student Succeeds Act, it would only require adding a standard to a system that states and the federal government have already subscribed to.[254] It would not be a removal of state power, but it would set the minimum standard for what states are constitutionally required to provide students, a standard currently provided by the Supreme Court, but not defined on a national scale by the Supreme Court.[255] If a state were to find that their education regulations and standards already meet the proposed standard, they would not need to make any changes.

Overall, a national standard for 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,"[256] set by Congress, would clarify what states must implement in their education programs to meet the standard and pass constitutional muster. Having a standard that requires states to provide students with historically accurate information and fosters students' self-sufficiency and civic participation would address some of the major problems in the current public education system, such as poor literacy rates, chronic absenteeism, and disparities in curriculum among states that lead to disparities in college and career readiness.[257] If such a standard was set as part of the ESSA, states could implement it without concern that their reserved powers are being restricted or taken away because it would be part of a national scheme that the states already participate in.[258] Thus, even if some might think the judicial solution proposed in this paper

251. *See Rodriguez*, 411 U.S. at 37.
252. *See* Klein, *supra* note 77 (explaining the ESSA provisions regarding state education standards states must set).
253. *See* Wilkins, *supra* note 15, at 288.
254. *See Every Student Succeeds Act (ESSA)*, *supra* note 79.
255. *See Rodriguez*, 411 U.S. at 37.
256. *See id.*
257. *See* Keiper, *supra* note 235.
258. *See Every Student Succeeds Act (ESSA)*, *supra* note 79.

would facilitate legislating from the bench, this legislative solution neutralizes that concern—it outlines something that Congress can do to fill in the gap left by *Rodriguez*.

D. Marshall's Nexus Test

It is also worth mentioning that, if the issue was once again brought before the Supreme Court, the Court could also find a fundamental right to education using Justice Marshall's nexus test. As previously stated, Justice Marshall thought the determination of which rights are fundamental "should be firmly rooted in the text of the Constitution."[259] Like Justice Brennan, he described what the process should be as follows:

> The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed [upon should be] adjusted accordingly.[260]

Justice Marshall felt that education is such a fundamental right because of its "unique status accorded public education by our society[,]" and "the substantial relationship which education bears to guarantees of our Constitution."[261] "Education directly affects the ability of a child to exercise his First Amendment rights, both as a source and as a receiver of information and ideas . . . [and] serves the essential function of instilling in our young an understanding of and appreciation for the principles and operation of our governmental processes."[262] Education passes Justice Marshall's nexus test, and according to him, should be considered a fundamental right.[263]

It would be an extremely difficult task to get the Supreme Court to implement the nexus test. The Supreme Court rejected the test in *Rodriguez*, so the case would probably have to be overturned for the nexus test to be implemented.[264] The Supreme Court has recently made a habit of overturning precedent, so this is not off the table, but it is still unlikely.[265] Another reason it would be difficult to get the nexus test implemented is because it would completely change the standard for recognizing fundamental rights; the current standard asks whether a right is of the "essence of a scheme of ordered liberty" and deeply rooted in the nation's history in tradition, and

259. *Rodriguez*, 411 U.S. at 102 (Marshall, J., dissenting).
260. *Id.* at 102–03.
261. *Id.* at 111–12.
262. *Id.* at 112–13.
263. *See id.* at 111.
264. *See id.* at 37 (majority opinion).
265. *See generally* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 302 (2022); Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll., 600 U.S. 181, 230–31 (2023); Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

has been the standard for decades.[266] However, the nexus test would be an alternative way to get public education recognized as a fundamental right and as a result, more constitutional protection against harmful regulations imposed by states.[267]

VI. CONCLUSION

Overall, public education is an entity of fundamental importance because it grants individuals access to the literacy and the skills they need to meaningfully exercise their constitutional rights. Public education is of the essence of a scheme of ordered liberty and deeply rooted in the nation's history and tradition. Although the chances of it happening in this decade are bleak, the Supreme Court declaring public education a fundamental right would give this important pillar of the nation's future heightened protection from detriment.

266. *See* Palko v. Connecticut, 302 U.S. 319, 325 (1937).
267. *See Rodriguez*, 411 U.S. at 102–03 (Marshall, J., dissenting).