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ABSTRACT

It is a tragic irony that a nation with enormous wealth will not provide the most basic of education rights to its citizens. Despite continual judicial and legislative measures to ensure access to education, or a facsimile thereof, no judicial or legislative body has taken the step to ensure that literacy is a fundamental right for the citizens of the United States. The issue has been, and continues to be, presented to both Congress and the courts. While Congress has passed legislation to some degree, both institutions have largely failed to ensure the population receives the fundamental right of literacy.

There is not much pushback to the argument that education and literacy are important. But questions remain: How much education is necessary to claim that literacy is a right? Is literacy important enough to shine brightly on the national consciousness?

AUTHOR'S NOTE

B.A. Amherst College; J.D. Candidate, 2021, University of Massachusetts School of Law. The author owes a great deal to Professors Jeremiah Ho and Frances Rudko for their feedback and guidance; without which, this paper would still be a fledgling idea, spinning around in his head. The author would like to acknowledge Mary Brigh Lavery and the entire *UMass Law Review* team for their tireless work. The author thanks his friends and family, especially Jeni, whose support gave him the fortitude to take on the challenge of law school, at this point in his life. Finally, the author would be remiss if he did not mention his partner in crime, the lawyer-dog, Harley.

LITERACY IS FUNDAMENTAL

Literacy is a fundamental requirement for the exercise of effective citizenship and the foundational building-blocks of a democratic society, yet it is not a right. How can this be? More importantly, how can it become one? "[B]asic literacy, is essential for a well-functioning democracy, and enhances citizenship and community."[1] Conversely, a lack of literacy has a negative impact on community and societal stability. "Illiteracy is perhaps the strongest common denominator among individuals in corrections."[2] Rates of literacy and education are directly correlated to crime, public assistance, and "higher payback in the form of sales, property, and state income taxes."[3] Education levels also have a "strong and significant" effect on health.[4]

Studies demonstrate that illiteracy negatively impacts academic, personal, and professional achievement, as well as mental health and social/emotional well-being. A child who is not reading proficiently in third grade is four times more likely to fail to graduate from high school on time.[5] As for the students who do graduate from high school with poor literacy skills, they are unprepared and ill-equipped to enter the workforce.[6]

This Note will argue that a right to literacy is a fundamental requirement for a citizenry to meaningfully exercise their rights. Additionally, it will be posited that since the federal system is disinclined to promote the right to literacy, an appropriate path may be through the lens of the theory of incrementalism. By following similar issues that gained national prominence after starting as a hodgepodge of state laws, this Note will argue that it is possible to thrust literacy

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1 Claudia Goldin, *A Brief History of Education in the United States* 1 (Nat'l Bureau of Econ. Research, Historical Working Paper No. 119, 1999).

2 William Drakeford, *The Impact of an Intensive Program to Increase the Literacy Skills of Youth Confined to Juvenile Corrections*, 53 J. CORRECTIONAL EDUC. 139, 139 (2002).

3 Michael Hout, *Social and Economic Returns to College Education in the United States*, 38 ANN. REV. SOC. 379, 392 (2012).

4 Adriana Lleras-Muney, *The Relationship Between Education and Adult Mortality in the United States*, 72 REV. ECON. STUD. 189, 189 (2005).

5 DONALD J. HERNANDEZ, DOUBLE JEOPARDY: HOW THIRD-GRADE READING SKILLS AND POVERTY INFLUENCE HIGH SCHOOL GRADUATION 3 (2011), http://files.eric.ed.gov/fulltext/ED518818.pdf [https://perma.cc/JW7C-K2TQ].

6 *See generally* Bob Wise, *High Schools at the Tipping Point*, EDUC. LEADERSHIP, May 2008, at 8.

onto the national stage to ensure equitable enforcement and, some may argue, moral equality.

Part I focuses on the history of education and literacy through a judicial and social lens. Part I also analyzes the crucial role that literacy plays in the preservation and fulfillment of other constitutional rights. Part II evaluates the theory of incrementalism, both its background and how it has applied to previous issues. Part III concludes with an analysis of how incrementalism could promulgate literacy, as a fundamental right, into the national consciousness.

I. THE HISTORY OF LITERACY & ITS IMPORTANCE

A. History

In 1642, Massachusetts Bay Colony passed the first law, in what would eventually become the United States, which required that children be taught to read and write.[7] The English Puritans who founded Massachusetts believed that the well-being of individuals, along with the success of the colony, depended on a literate citizenry to read both the Bible and the laws of the land that governed them.[8]

Many of the founding fathers regarded education and literacy as essential foundations to a healthy democracy. Thomas Jefferson regarded the freedom of the press as important, but not enough, on its own, to guarantee a healthy democracy.[9] In 1816, Jefferson wrote to Charles Yancey, a prominent Virginia legislator, "[w]here the press is free, *and every man is able to read*, all is safe."[10] John Adams, too, saw the need for a quality education and—sixty-seven years before the first law mandating compulsory education in the United States—he argued in favor of a system of publicly funded education:

> [T]he Whole People must take upon themselvs the Education of the Whole People and must be willing to bear the expences of it.

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7 *See* William E. Sparkman, *The Legal Foundations of Public School Finance*, 35 B.C. L. REV. 569, 570 (1994).

8 *Id.* "For example, the Massachusetts School Law of 1642, empowered town officials to hold all parents and masters accountable for their children's ability 'to read and understand the principles of religion and the capitall lawes [sic] of this country' by imposing 'fines upon such as shall refuse to render such accounts.'" *Id.* (quoting 1 EDUCATION IN THE UNITED STATES: A DOCUMENTARY HISTORY 393 (Sol Cohen ed. 1974)).

9 Letter from Thomas Jefferson to Colonel Charles Yancey (Jan. 6, 1816), *in* 11 THE WORKS OF THOMAS JEFFERSON 493, 497 (Paul Leicester Ford ed., 1905).

10 *Id.* (emphasis added).

> [T]here should not be a district of one Mile Square without a school in it, not founded by a Charitable individual but maintained at the expence of the People themselvs they must be taught to reverence themselvs instead of adoreing their servants their Generals Admirals Bishops and Statesmen [sic].[11]

Additionally, the relationship between education and the peoples' freedom to exercise political will was readily understood as crucial; as James Madison explained: "a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[12]

More recently, in 1965, with the passage of President Johnson's Elementary and Secondary Education Act, and its more well-known reauthorizations in 2001 and 2015, the federal government fully entrenched itself in the education of the nation's children.[13] However well-intentioned and effective these policies may be,[14] a simple truth remains. None of these Acts of Congress have given the American people a right to literacy.

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[11] Letter from John Adams to John Jebb (Sept. 10, 1785), https://founders.archives.gov/documents/Adams/06-17-02-0232 [https://perma.cc/936B-DAPT].

[12] THE COMPLETE MADISON: HIS BASIC WRITINGS 337 (Saul K. Padover ed., The Easton Press 1988).

[13] Elementary and Secondary Education Act of 1965 ("ESEA"), Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.). This Act provided federal funding to elementary and secondary education with particular emphasis on equal access to education, closing achievement gaps, and supporting impoverished children. Derek W. Black, *Abandoning the Federal Role in Education: The Every Student Succeeds Act*, 105 CALIF. L. REV. 1309, 1317–21 (2017) [hereinafter Black, *Abandoning the Federal Role in Education*]. Additionally, the No Child Left Behind Act of 2001 ("NCLB") reauthorized ESEA and furthered federal control in public education by conditioning funding on testing, progress reports, and teacher qualifications. *See* Derek W. Black, *The Congressional Failure to Enforce Equal Protection Through the Elementary and Secondary Education Act*, 90 B.U. L. REV. 313, 343–52 (2010). The Every Student Succeeds Act of 2015 ("ESSA") replaced NCLB's strict assessment protocols while reauthorizing ESEA's federal role in public education. Black, *Abandoning the Federal Role in Education* at 1311–12. ESSA retained the standardized testing requirement but returned the power to determine the academic standards of the tests to the states. *Id.*

[14] An analysis of ESEA, NCLB, and ESSA's effectiveness has been well debated and better left for another time. Notably, the teeth of the Acts—their accountability regulations—were knocked out in 2017. Elementary and Secondary Education Act of 1965, H.R.J. Res. 57, 115th Cong. (2017).

The Supreme Court has considered the education issue in some form or another, but it too has not found a constitutional right to literacy, or education for that matter.[15] The seminal education decision in the nation's history came in *Brown v. Board of Education*.[16] The *Brown* Court mandated equal access to education and the end to the evil of segregation.[17] While declaring education as "perhaps the most important function of state and local governments" and of great "importance . . . to our democratic society," the Court stopped short of mandating education or holding that literacy was a right.[18] The belief in the importance of education that underlies the holding in *Brown* has surfaced in other cases, but those cases have limited their decision to the scope of unconstitutional restrictions on *access* to education.[19] Other cases at the federal level have also failed to build upon the, albeit indirect, success of *Brown*, *Plyler*, and *Davis* in attempting to establish a right to education and/or literacy.[20]

The Supreme Court has, in the past, been willing to recognize some affirmative rights, but a recent swing towards judicial restraint

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15 *See*, *e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33–35 (1973) (refusing to apply strict scrutiny where the system of school financing resulted in disproportionate expenses for children hailing from different districts).

16 347 U.S. 483 (1954). In *Brown*, plaintiffs sought admission to the public schools of their respective communities. *Id.* at 487. Each were denied entry to schools that white children were allowed to attend. *Id.* at 488. They sought protection from discriminatory segregation under the protections afforded them by the Fourteenth Amendment. *Id.*

17 *Id.* at 495.

18 *Id.* at 493.

19 *See* Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 650 (1999) (holding that school boards may be liable to Title IX claims if pervasive harassment of students effectively bars their access to education); Plyler v. Doe, 457 U.S. 202, 230 (1982) (holding that children of illegal immigrants are entitled to access to education).

20 *See* Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 460 (1988) (rejecting the *Plyler* standard of heightened review); Papasan v. Allain, 478 U.S. 265, 285–86 (1986) (comparing the holdings in *Plyler* and *Rodriguez* and concluding that without the designation of education as a fundamental right, the rational basis test would be used). *See generally* Gary B. v. Snyder, 329 F. Supp. 3d 344, 368 (E.D. Mich. 2018) (applying the rational basis test); Foster v. Tupelo Pub. Sch. Dist., 569 F. Supp. 2d 667, 674 (N.D. Miss. 2008) (applying the rational basis test).

has crippled its ability to cure the nation's ills.[21] The Court has, on several occasions, though often only in dicta or dissent, espoused the notion that education is a crucial element to the civic and economic health of the nation.[22] However, coupled with the historic precedent of relegating educational policy to the states, the refusal to recognize a right to education or literacy, and the modern Court's trend towards judicial restraint, it is unlikely that much or any headway can be made at the federal level to realize this right.

Even if every state had the hypothetical duty to provide a *Rodriguez*-ian basic quantum of education,[23] it would be a patchwork of disparate standards and uneven enforcement. As it stands, every state *does* have its own individual constitutional mandate, which—at a minimum—sets forth a system to provide a free public education.[24] The Massachusetts Declaration of Rights goes well beyond simply establishing a public education system and sets out a broad and wide-ranging mandate for education in the Commonwealth:

> Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the

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[21] *See* Ian Millhiser, *What Happens to a Dream Deferred?: Cleansing the Taint of* San Antonio Independent School District v. Rodriguez, 55 DUKE L.J. 405, 407 (2005).

[22] United States v. Lopez, 514 U.S. 549, 620, 629 (1995) (Breyer, J., dissenting) (Education is "inextricably intertwined with the Nation's economy . . . . These expenditures enable schools to provide a valuable service—namely, to equip students with the skills they need to survive in life and, more specifically, in the workplace."); Ambach v. Norwick, 441 U.S. 68, 76 (1979) ("The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions . . . ."); *Brown*, 347 U.S. at 493 ("[Education] 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.").

[23] The Supreme Court did not "foreclose the possibility 'that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either [the right to speak or the right to vote].'" *Papasan*, 478 U.S. at 284 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 36 (1973)).

[24] To view each state's educational mandates, see *Education - State Laws*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/table_education [https://perma.cc/8HUV-FXWX].

> sciences, and all seminaries of them; . . . to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humor, and all social affections, and generous sentiments among the people.[25]

This clause has been interpreted by the Massachusetts Supreme Judicial Court to mean that the Commonwealth has a duty to provide its citizens with more than mere access to an education; it must furnish them with an "adequate" level of education in the pursuit of an enlightened and just citizenry.[26] Other states' constitutions are far less prescriptive in their imposition of a duty to provide an equitable, adequate, and accountable education to their citizens.[27] Massachusetts

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[25] MASS. CONST. pt. 2, ch. 5, § 2.

[26] Doe v. Sec'y of Educ., 95 N.E.3d 241, 253 (Mass. 2018). Education is a means to the following ends:

> (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable students to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation . . . .

Id. at 253 n.23 (quoting McDuffy v. Sec'y of the Exec. Office of Educ., 615 N.E.2d 516, 554 (Mass. 1993)).

[27] Legal scholar William E. Thro uses a system of categorization to identify the disparate duties of states' educational obligations in their constitutions. William E. Thro, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1661–68 (1989). While Thro's analysis was done in the light of financial obligations owed by the states, it is applicable to this discussion as well: "Category I education clauses provide for a system of free public schools and nothing more . . . ." *Id.* at 1662 (footnote omitted). "Category II education clauses . . . mandate . . . a certain minimum standard of quality . . . ." *Id.* at 1663 (footnote omitted). "Category III education clauses [provide] . . . 'stronger and more specific education mandate[s]' and 'purposive preambles.'" *Id.* at 1668 (footnotes omitted). "Category IV clauses impose the greatest obligation . . . . Typically, they provide that education is 'fundamental,' 'primary,' or 'paramount.'" *Id.* at 1667–68 (footnotes omitted). *See, e.g.*, N.Y. CONST. art. 11, § 1 (as a Category I clause: "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."). It is worth noting that the New York Assembly has pending legislation that would propel this provision to a Category II: "The legislature shall provide for the maintenance and support of a system of free *and quality education from prekindergarten through the undergraduate degrees or certification programs offered in post secondary schools*, wherein all pupils of

has been the legal "tip of the spear" on many social issues. In an August 28th statement, Senator Edward Markey described Massachusetts as being "at the forefront of the challenges of our time — universal health care [and] same sex marriage . . . ."[28] Why then should a right to literacy not begin at the state level, where the first educational laws were passed? Historically, it has been at the state level where other social norms have bloomed from state-based policy into a national discourse—why should a right to literacy not take this same path?

B. Literacy and Freedom of Expression

The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[29] It "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society."[30] The Supreme Court has repeatedly reaffirmed the need for unfettered access to manifestations of "press."[31] These rights regarding unfettered distribution of information, however, are only one side of the story.[32] There must be someone on the other side to receive the information, because there can be no true exchange without mutual give and take.[33]

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this state may be educated." 2019 N.Y. Assemb. B. No. 8738, 242d Leg. Sess. (N.Y. 2019) (emphasis added).

28 Chris Lisinski, *As Kennedy Considers Run, Markey Touts Endorsements of 116 Lawmakers*, TAUNTON DAILY GAZETTE (Aug. 27, 2019, 6:20 PM), https://www.tauntongazette.com/news/20190827/as-kennedy-considers-run-markey-touts-endorsements-of-116-lawmakers [https://perma.cc/Z2HJ-AD4A] (last updated Aug 28, 2019, 11:34 AM).

29 Roth v. United States, 354 U.S. 476, 484 (1957).

30 Associated Press v. United States, 326 U.S. 1, 20 (1945).

31 *See* Virgina State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 755–57 (1976) (discussing the right to receive commercial advertising); Lamont v. Postmaster Gen., 381 U.S. 301, 305–07 (1965) (discussing the right to receive foreign political publications).

32 *See* Kleindienst v. Mandel, 408 U.S. 753, 763–64 (1972). "It is now well established that the Constitution protects the right to receive information and ideas. 'This freedom (of speech and press) . . . necessarily protects the right to receive.'" *Id.* at 762–63 (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969)).

33 *See Virginia State Bd. of Pharmacy*, 425 U.S. at 756 ("Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here,

In order to have a true and meaningful exercise of speech and press, the exchange of information must be received by a populous that can interpret, decipher, and understand the information it is receiving.[34]

> 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, whatever interests he may pursue in life . . . . The opportunity for formal education . . . . may enhance the individual's enjoyment of those rights . . . . Thus . . . "the pivotal position of education to success in American society and its essential role in opening up to the individual the central experiences of our culture lend it an importance that is undeniable."[35]

A people denied an affirmative right to literacy are curtailed from freely and fully exercising their First Amendment rights and will be stunted in their ability to participate in our democratic society.[36]

C. Literacy and the Right to Exercise Political Will

There can be no question that there is "a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."[37] That "right to vote in federal elections is conferred by Art. I, s 2, and the Seventeenth Amendment of the Constitution, and access to the state franchise has been afforded special protection because it is 'preservative of other basic civil and political rights.'"[38]

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the protection afforded is to the communication, to its source and to its recipients both.").

34 UNESCO, THE PLURALITY OF LITERACY AND ITS IMPLICATIONS FOR POLICIES AND PROGRAMMES 13 (2004), http://unesdoc.unesco.org/images/0013/001362/136246e.pdf [https://perma.cc/BEE4-4QM3].

35 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 112–13 (1973) (Marshall, J., dissenting) (quoting Note, *Equal Protection*, 82 HARV. L. REV. 1065, 1129 (1969)).

36 *See generally* Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 47 (2004). In his discussion of the evolution of free speech in the digital age, Balkin addresses the importance of participating in a democracy, through "interactivity, mass participation, and the ability to modify and transform culture." *Id.* at 1. He points to education as one of the ways in which a democracy "promote[s] free speech values." *Id.* at 47.

37 Dunn v. Blumstein, 405 U.S. 330, 336 (1972).

38 *Rodriguez*, 411 U.S. at 114 (Marshall, J., dissenting) (quoting Reynolds v. Sims, 377 U.S. 533, 562 (1964)).

In order to have meaningful participation in the political process, access to the participation must be free from prohibitive barriers.[39]

Illiteracy can bar meaningful participation in the political process in two ways. First, ballots are written documents that must be read—a person who cannot read or understand the ballot cannot meaningfully participate in the political process.[40] Second, just as illiteracy hampers engagement in First Amendment expression, so too does it bar "the free discussion of governmental affairs."[41] In order to have meaningful participation in the political process, "voters must be free to obtain information from diverse sources in order to determine how to cast their votes."[42] For these reasons, it is essential that voters are equipped to make an intelligent decision in the ballot box.[43]

D. Opposition to Literacy as a Right

Historically, education has been a function of the state and the Supreme Court has been unwilling to expand the reach of the federal government into local matters.[44] "[T]he ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them."[45] Those who oppose the idea of literacy as a fundamental right generally also oppose the idea of judicially-created rights and the recognition of positive rights outside of those enumerated in the Constitution.[46]

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39 *See* Schuette v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. by Any Means Necessary, 572 U.S. 291, 368 (2014) (Sotomayor, J., dissenting).

40 *See Rodriguez*, 411 U.S. at 36 ("[A] voter cannot cast his ballot intelligently unless his reading skills and thought processes have been adequately developed.").

41 Mills v. Alabama, 384 U.S. 214, 218 (1966).

42 Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 341 (2010).

43 *See Rodriguez*, 411 U.S. at 113–14. (Marshall, J., dissenting).

44 Ambach v. Norwick, 441 U.S. 68, 76 (1979). "Today, education is perhaps the most important function of state and local governments." *Id.* (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)); Milliken v. Bradley, 418 U.S. 717, 741 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools . . . ."); United States v. Lopez, 514 U.S. 549, 564 (1995) (stating that education is an area where states have historically been sovereign).

45 *Rodriguez*, 411 U.S. at 59.

46 *See, e.g.*, DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 195–96 (1989) (declining to hold that the Due Process Clause grants an affirmative

This federalist argument for a more restricted role of the federal judiciary is as old as the country itself.[47] It contends that judges are not the best vehicle for implementing social change, especially in regards to something as intricate and state/municipality-specific as education and literacy.[48] "The central insight of *Rodriguez* is that 'the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues.'"[49] This line of thought additionally discourages the Court against interceding into political theater by creating policy.[50] "The greatest threat to judicial independence occurs when the courts flout the basis for their independence by exceeding their constitutionally limited role and the bounds of their expertise by engaging in policymaking committed to the elected branches or the states."[51] When taken in the context of this Note, the Constitution does not provide for a positive right to either education or literacy.[52] "Not even the broadest reading of the due

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right to governmental aid); Harris v. McRae, 448 U.S. 297, 317–18 (1980) ("Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference . . . it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom."); Gary B. v. Snyder, 329 F. Supp. 3d 344, 364 (E.D. Mich. 2018) ("Even when the Supreme Court has ventured to recognize a right as fundamental, it has typically limited them to 'negative rights' . . . ."). *See also* John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1221 (1993) (arguing that a disciplined approach to standing is one example of "judicial self-restraint").

47 *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

48 Greg Weiner, *Literacy Is a Good, Not a Right*, LAW & LIBERTY (July 11, 2018), https://www.lawliberty.org/2018/07/11/literacy-is-a-good-not-a-right/ [https://perma.cc/7KDJ-E43Z].

49 Millhiser, *supra* note 21, at 407 (quoting *Rodriguez*, 411 U.S. at 41).

50 Weiner, *supra* note 48.

51 John G. Roberts, Jr., Draft Article on Judicial Restraint 3 (undated) (on file with the National Archives and Records Administration), https://www.archives.gov/files/news/john-roberts/accession-60-89-0372/doc006.pdf [https://perma.cc/6UZH-MTAV]. "A second means by which courts arrogate to themselves functions reserved to the legislative branch or the states is through so-called 'fundamental rights' and 'suspect class' analyses, both of which invite broad judicial scrutiny of the essentially legislative task of classification." *Id.* at 4.

52 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973). *See* Gary B. v. Snyder, 329 F. Supp. 3d 344, 363 (E.D. Mich. 2018) ("The Court is left to conclude that the Supreme Court has neither confirmed nor denied that access to literacy is a fundamental right."). In *Gary B.*, the district court concluded that the Due Process Clause does not demand a State to affirmatively provide a right

process or equal protection clauses of the Fourteenth Amendment can establish a right to literacy . . . . [T]here is no case under the federal constitution here."[53] Essentially, this policy of judicial restraint boils down to a basic proposition: just because something is "stupid" does not mean that it is unconstitutional.[54] Inversely, a valid and desirable social good does not make it a fundamental right.

E. Literacy is Testable, Justiciable, & Remediable

Countering the argument against judicial recognition of a right to literacy is the important consideration that courts have adequate measuring and remedying tools at their disposal to decide an issue. The evolution of the national education system, the introduction of federal and state testing, and additional mandated standards make it entirely possible today.[55] Without the data that is available today, plaintiffs had no ability to demonstrate to courts how much education

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to literacy. *Id.* at 366; *see also* Roberts, *supra* note 51, at 5 ("When confronting constitutional problems in the context of the administration of state institutions [like schools], courts must be particularly cognizant of their lack of expertise . . . .").

53 Weiner, *supra* note 48.

54 Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG., Oct. 4, 2013, http://nymag.com/news/features/antonin-scalia-2013-10/ [https://perma.cc/4BAW-EXQU]. *See also* Lawrence v. Texas, 539 U.S. 558, 605 (2003) (Thomas, J., dissenting). "[T]he law before the Court today 'is . . . uncommonly silly.' If I were a member of the Texas Legislature, I would vote to repeal [the law punishing same sex activity] . . . . Notwithstanding this, I recognize that as a Member of this Court I am not empowered to help petitioners and others similarly situated." *Id.* (quoting Griswold v. Connecticut 381 U.S. 479, 527 (1965) (Stewart, J., dissenting)); *Griswold*, 381 U.S. at 507 (Black, J., dissenting) ("I do not . . . base my view that this . . . law is constitutional on a belief that [it] is wise or that its policy is a good one . . . . [T]he law is every bit as offensive to me as it is my Brethren of the majority . . . .").

55 *See generally* No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.) (requiring state-mandated expansion of standardized testing for primary school students); DAVID P. GARDNER ET AL., NAT'L COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM (1983), http://files.eric.ed.gov/fulltext/ED226006.pdf [https://perma.cc/764H-ZA2Q] (advocating for the expansion of standardized testing at the primary and secondary school levels); *History of Standardized Testing in the United States*, NAT'L EDUC. ASS'N, http://www.nea.org/home/66139.htm [https://perma.cc/H4LU-ZPW2] (describing standardized testing's now-widespread application) [hereinafter *History of Standardized Testing*].

was required for students to fully exercise constitutional rights. Similarly, data could not illustrate the level of education required to effectively participate in the political process, or furthermore, to assess what schools did or did not do to meet a minimum bar—because that data was non-existent.

When *Rodriguez* was decided in 1964, there were little to no nation-wide assessment tools and (rightfully, or not) the courts would have been ill-equipped to find a remedy or baseline for a literacy test.[56] Today, there are multiple literacy assessment tools which are supported by pedagogy and utilized nationally. The Flesch-Kincaid reading assessment was developed in the 1970s by J. Peter Kincaid.[57] It is widely used by state and federal agencies to ensure that important official documents are accessible, via their readability, to their citizens.[58] Additionally, the Lexile Framework is a linguistic-based assessment that is currently used in every state to measure reading standards set by the federally initiated 'Common Core' requirements.[59] Moreover, twenty-five states report Lexile measures on their year-end assessments.[60]

The academic literature strongly supports the validity of the methods used by assessments like Flesch-Kincaid and Lexile.[61] Their use by government agencies and their reliance by educators throughout the country could provide reliable methods to the courts for assessing and quantifying what specific levels of literacy are necessary to be able to understand any given text. With national and state reliance on standardized testing, courts also have usable and persuasive data to

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56 *History of Standardized Testing*, *supra* note 55.

57 WILLIAM DUBAY, *THE PRINCIPLES OF READABILITY* 21–22 (2004), https://files.eric.ed.gov/fulltext/ED490073.pdf [https://perma.cc/3FEK-9J2M]. Kincaid's reading grade level assessment was designed to measure the grade-level readability of technical materials for the U.S. Navy. *Id.*

58 *See, e.g.*, Readable Language in Insurance Policies, FLA. STAT. § 627.4145(1)(a) (2003).

59 *States That Use Lexile Measures*, LEXILE FRAMEWORK FOR READING, https://lexile.com/departments-of-education/states-that-use-lexile/ [https://perma.cc/9WQN-9PLS].

60 *Id.*

61 *See generally* Sheida White & John Clement, *Assessing the Lexile Framework: Results of a Panel Meeting* (Nat'l Ctr. for Educ. Statistics, Working Paper No. 2001-08, 2001), https://nces.ed.gov/pubs2001/200108.pdf [https://perma.cc/U5BG-AZU3].

determine whether certain students, schools, municipalities, or states are attaining the appropriate level of literacy.[62]

II. INCREMENTALISM

A. Background & Theory

The incremental model is a policymaking process attributed to Yale University political scientist Charles Lindblom. According to Lindblom, policymakers work through a process of "continually building out from the current situation, step-by-step and by small degrees."[63] Alternatively, "[d]ecisions thus arrived at are usually only marginally different from those that exist; in other words, the changes from the *status quo* are incremental."[64] Before Lindblom, the prevailing notion of policymaking featured methodical attempts to achieve all-encompassing solutions by identifying all relevant objectives, ranking them, and then coming up with potential solutions.[65] Policymakers would then compare every one of the policy alternatives, decide which best achieved the goals, and implement the viable policy.[66]

Lindblom questioned the classic model of policymaking because he thought it relied upon unrealistic assumptions about our ability to analyze complex issues.[67] While it may appear to be a theoretically rational approach, the classic model could never be applied to real-world, complex problems.[68] Even if decisionmakers could identify the myriad objectives and values to be considered, they would likely disagree about their relative importance and find conflicts and contradictions among them.[69] Additionally, collecting and processing every effect of every possibility would be a herculean and impossible

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62 *See supra* text accompanying note 13.

63 Charles E. Lindblom, *The Science of "Muddling Through,"* 19 PUB. ADMIN. REV. 79, 81 (1959).

64 MICHAEL HOWLETT & M. RAMESH, STUDYING PUBLIC POLICY: POLICY CYCLES AND POLICY SUBSYSTEMS 142 (1995).

65 Lindblom, *The Science of "Muddling Through," supra* note 63, at 79.

66 *Id.*

67 *Id.* at 80.

68 Charles E. Lindblom, *Still Muddling, Not Yet Through*, 39 PUB. ADMIN. REV. 517, 519 (1979).

69 Lindblom, *The Science of "Muddling Through," supra* note 63, at 81–82.

undertaking.[70] The classic model "assumes intellectual capacities and sources of information" that we do not have.[71] Lindblom recognized that the classic model of decision-making is impossible in practice and decreed that "every administrator faced with a sufficiently complex problem must find ways drastically to simplify."[72]

Under Lindblom's theory, policymakers should institute policy in an incremental fashion—by "muddling through" as best they can.[73] Policy, according to Lindblom, "does not move in leaps and bounds," but instead it morphs and evolves "almost entirely through incremental adjustments" being "made and re-made endlessly."[74]

Lindblom discussed incremental policymaking both descriptively and normatively. He asserted that it is actually how policy is implemented in the real world.[75] Incrementalism breaks down large problems into more manageable tasks.[76] It allows for gradual change with less risk, and allows for decentralized control which results in more grass-roots decision making over policy formation.[77] Incrementalism "will be superior to any other decision-making method available for complex problems in many circumstances, certainly superior to a futile attempt at superhuman comprehensiveness."[78]

The United States, given its pluralistic political and economic makeup amongst the hodgepodge of its states, is a pure reflection of the inevitability of Lindblom's incrementalistic theory within a democracy.[79] Accordingly, it is regarded "as the standard—indeed almost ubiquitous—mode of policy enactment in the United States."[80]

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70 Lindblom, *Still Muddling, Not Yet Through*, *supra* note 68, at 518.

71 Lindblom, *The Science of "Muddling Through," supra* note 63, at 80.

72 *Id.* at 84.

73 *Id.* at 80–83; Lindblom, *Still Muddling, Not Yet Through*, *supra* note 68, at 517.

74 Lindblom, *The Science of "Muddling Through," supra* note 63, at 84, 86.

75 *Id.* at 88.

76 *Id.* at 85.

77 *Id.* at 85–86.

78 *Id.* at 88.

79 Samuel Levey & James Hill, *Universal Health Insurance: Incrementalism or Comprehensive Reform?*, 3 STAN. L. & POL'Y REV. 189, 192 (1991).

80 JENNIFER L. HOCHSCHILD, THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL DESEGREGATION 9 (1984).

B. Opposition to Incrementalism as a Path Forward

One argument that challenges the incrementalistic theory suggests that some policy should be done in a wholesale fashion.[81] Jennifer Hochschild concluded that incrementalism was not an effective approach to desegregating public schools in the aftermath of *Brown*.[82] Rather than minimizing disruptions, building local support, and gaining flexibility to monitor and adapt, the incremental approach allowed for and even cultivated an opposition and resistance to integration.[83] Its muddling approach created a sense of uncertainty and a lack of commitment, which in turn created resistance.[84] Hochschild found that opposing forces could derail the local segregation progress if it was not implemented on the largest possible scale.[85]

Hochschild further argued that incremental efforts to desegregate schools were more harmful than remaining with the status quo.[86] "[H]alfhearted, restricted, timid" incremental changes caused racial resentment, residential segregation, and decreased minority self-esteem and achievement.[87] While an incrementalistic may view half measures as better than no measures, Hochschild surmised that this particular maxim may not have been true when it came to desegregation.[88]

C. Examples of Incremental Policymaking

1. Marriage Equality

Marriage equality, which began at a point of illegality, has faced a steeper and more challenging path than the process of literacy as a fundamental right ever will.[89] A complete history of legalized

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81 For purposes of this article, wholesale change refers to a nationwide mandate and incremental change concerns a state by state approach to adopting literacy as a right.

82 HOCHSCHILD, *supra* note 80, at 11–12.

83 *Id.* at 46–48.

84 *Id.* at 46–54 (explaining districts that went through fast change had greater success than those that took small steps over a longer period).

85 *Id.* at 54–70.

86 *Id.* at 91.

87 *Id.*

88 *Id.*

89 Juxtaposing the "starting points" of the two issues. Illegality of same sex marriage in DOMA vs. a 'social good' is not necessarily a right.

persecution and discrimination faced by same-sex couples is beyond the scope of this article, however a brief understanding of the how the United States went from The Defense of Marriage Act ("DOMA")[90] to *Obergefell v. Hodges* is useful.[91]

One of the first steps towards the path to marriage equality taken in the aftermath of DOMA was the Supreme Court of Vermont's decision in *Baker v. State*, which held that the exclusion of same-sex couples from constitutional protection was illegal.[92] The *Baker* Court, while not granting any positive rights, declared that same-sex couples were "entitled . . . to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples."[93] Following the *Baker* Court's suggestion that it lay within the "prerogatives of the Legislature" to suitably remedy the problem,[94] the Vermont legislature, in 2000, passed the first-in-the-nation state law allowing for civil unions for same-sex couples.[95] After eight years of state-endorsed civil unions, however, the Vermont legislature's Commission on Family Recognition and Protection detailed significant disparities and inequities in civil unions compared to marriage.[96] In 2009, the Marriage Equality Act became law and defined marriage as between "two people" as opposed to between a man and a woman.[97]

Massachusetts took a different approach to the DOMA-reality. It judicially recognized marriage equality in the courts, rather than the legislature, in the case of *Goodridge v. Department of Public Health*.[98] Unlike the court in Vermont, the Massachusetts Justices of the Supreme Judicial Court did not pass on the opportunity to create law

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90 1 U.S.C. § 7 (2012); 28 U.S.C. § 1738C (2012) (defining marriage for federal purposes as between a man and a woman and permitting states to refuse to recognize same-sex marriages legally granted by other states), *invalidated by* United States v. Windsor, 570 U.S. 744 (2013).

91 135 S. Ct. 2584 (2015).

92 744 A.2d 864, 866 (Vt. 1999).

93 *Id.*

94 *Id.*

95 *See* Jill Jourdan, *The Effects of Civil Unions on Vermont Children*, 28 VT. B.J. 32, 32 (2002).

96 THE OFFICE OF LEGISLATIVE COUNCIL, REPORT OF THE VERMONT COMMISSION ON FAMILY RECOGNITION AND PROTECTION 26–27 (2008), http://www.leg.state.vt.us/WorkGroups/FamilyCommission/VCFRP_Report.pdf [https://perma.cc/3NPD-VRLQ].

97 VT. STAT. ANN. tit. 15, § 8 (West 2009).

98 798 N.E.2d 941 (Mass. 2003).

defining marriage.[99] The decision in *Goodridge* established marriage as between "two persons" because "barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution."[100] The decision in *Goodridge*, and its implementation as law in 2004, made Massachusetts the first state to recognize marriage equality.

Following *Goodridge*, the Massachusetts legislature proposed a bill that would create civil unions for same sex couples that would allow them to "obtain the legal protections, benefits, rights and responsibilities associated with civil marriage, while preserving the traditional, historic nature and meaning of the institution of civil marriage."[101] The legislature submitted this bill to the Supreme Judicial Court for an Advisory Opinion, fearing "grave doubt as to the constitutionality" of whether marriage exclusively reserved for opposite sex couples and a separate caste of relationship available for same sex couples would pass muster.[102] In its opinion, the court soundly rejected the bill as unconstitutional.[103] The court rejected the legislature's attempt to make civil unions equal to marriage,[104] which would have "relegate[d] same-sex couples to a different status."[105] To the court, it was more than a "semantic" argument: "[t]he dissimilitude between the terms 'civil marriage' and 'civil union' is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status."[106] In the court's opinion, a civil union, even if indistinguishable from marriage, is decidedly unequal in the eyes of the law because its status as separate makes it decidedly not equal.[107]

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99 *Id.* at 969.

100 *Id*.

101 *In re* Ops. of the Justices to the Senate, 802 N.E.2d 565, 568 (Mass. 2004) (quoting An Act Relative to Civil Unions, S. No. 2175, § 1).

102 *Id.* at 566.

103 *Id.* at 572.

104 *Id.* at 568.

105 *Id.* at 569.

106 *Id.* at 570.

107 *Id.* at 569 ("The history of our nation has demonstrated that separate is seldom, if ever, equal.").

Other states also wrestled with the distinction between civil unions and marriage and the issues of definition and discrimination.[108] Suzanne Goldberg found that some states' justifications for a "separate but equal"[109] system of distinction were based on the history and tradition of marriage being between a man and a woman.[110] She discussed Connecticut's rationale as justifying "ongoing discrimination" by relying on "past practices."[111] The states of New Jersey and California similarly argued for keeping marriage between a man and a woman based on a historical narrative.[112]

The Office of the Attorney General in Maryland researched the state by state approach taken in regards to marriage equality in 2015.[113] In the ten years since the decision in *Goodridge*, thirty-one states had prohibited gay marriage, either by statute or constitutional amendment.[114] In the two years after the 2013 *Windsor* case held that DOMA's definition of marriage was unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment,[115] there had been a recent "encouraging trend" of states recognizing same-sex

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[108] Suzanne B. Goldberg, *Marriage as Monopoly: History, Tradition, Incrementalism, and the Marriage/Civil Union Distinction*, 41 CONN. L. REV. 1397, 1405 (2009).

[109] *Id.* at 1399.

[110] *Id.* at 1399–400.

[111] *Id.* at 1404. *See also* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 414 (Conn. 2008) ("The [State] also maintained that . . . since ancient times, marriage has been understood to be the union of a man and a woman, and . . . 'deeply rooted in this [n]ation's history and tradition . . . .'" (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997))).

[112] Goldberg, *supra* note 108, at 1404–05. "New Jersey defended its marriage law in a similar way, 'rest[ing] its case on age-old traditions, beliefs, and laws' . . . ." *Id.* (quoting Lewis v. Harris, 908 A.2d 196, 206 (N.J. 2006)). "California likewise advanced the argument that . . . 'the institution of marriage traditionally (both in California and throughout most of the world) has been limited to a union between a man and a woman.'" *Id.* (quoting *In re* Marriage Cases, 183 P.3d 384, 447–48 (Cal. 2008)).

[113] MD. OFFICE OF THE ATTORNEY GEN., THE STATE OF MARRIAGE EQUALITY IN AMERICA (2015). This is nineteen years after DOMA, twelve years after *Goodridge*, and immediately preceding the Court's decision in *Obergefell*.

[114] *Id.* at 1. Twenty-three of those state prohibitions took place within three years of the *Goodridge* decision. *Id.* at 8.

[115] United States v. Windsor, 570 U.S. 744, 769–71, 775 (2013).

marriage.[116] In 2015, thirty-five states had recognized a right to marriage for same-sex couples.[117]

This incremental trend toward equality resulted in a country that "look[ed] more like a checkerboard than one 'Nation, one people.'"[118] The Maryland Report concluded that "[t]o ask families and children to wait their turn until democratic majorities in their respective states decide to recognize their inherent human dignity is simply to ask too much."[119] In 2015, the Supreme Court held that the patchwork of rights, due to "years of litigation, legislation, referenda, and the discussions that attended these public acts, [that left] States . . . divided on the issue of same-sex marriage" was not sustainable.[120]

In extending the right to marry to same-sex couples, Justice Kennedy's opinion used a four-prong approach of "principles and traditions" to validate the decision—only three of which are relevant to this discussion.[121] First, the right is "inherent in the concept of individual autonomy" and therefore provides an avenue for other "freedoms, such as expression, intimacy, and spirituality."[122] Secondly, the right "safeguards children" by preventing them from feeling "the stigma of knowing their families are somehow lesser" through "harm and humiliat[ion]."[123] Finally, the right "is a keystone of [the nation's] social order.[124] Throughout history, marriage has been "the foundation of the family and of society, without which there would be neither civilization nor progress"[125] and "a great public institution, giving character to our whole civil polity"[126] that

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116 MD. OFFICE OF THE ATTORNEY GEN., *supra* note 113, at 3.

117 *Id.* Of the thirty-five, only eleven were done by statute and twenty-four had to be mandated by the courts. *Id.*

118 *Id.* at 20 (quoting Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 868 (2007) (Breyer, J., dissenting)).

119 *Id.* at 21.

120 Obergefell v. Hodges, 135 S. Ct. 2584, 2597 (2015).

121 *Id.* at 2599. The second of Justice Kennedy's principles, justifying the right to marry "because it supports a two-person union unlike any other in its importance to the committed individuals," is not directly relevant to this discussion. *Id.* His other three principles can be better related to the topic of literacy as a fundamental right.

122 *Id.*

123 *Id.* at 2600–601.

124 *Id.* at 2601.

125 *Id.* (quoting Maynard v. Hill, 125 U.S. 190, 211 (1888)).

126 *Id.* (quoting *Maynard*, 125 U.S. at 213).

"nourish[es] the union."[127] Putting such an emphasis on the "right by placing [it] at the center of so many facets of the legal and social order," Justice Kennedy concluded that the states themselves had bestowed upon it a "fundamental character" which cannot then be denied to its citizens.[128]

The incremental path taken by marriage equality has been studied and written about extensively.[129] The research conducted by Kees Waaldijk, William N. Eskridge, and Yuval Merin on the "theory of small change"[130] thoroughly examines the "evolutionary staircase with relatively specific steps" that has culminated in a national recognition of marriage equality for same-sex couples.[131] Their phased approach reflects a three-step, incremental approach to marriage equality: "(1) the decriminalization of consensual same-sex intimacy occurs first; (2) then anti-discrimination against sexual minorities is furthered; and (3) lastly, the relationships of same-sex couples are then legally recognized."[132] This incremental approach thrust the issue into the national spotlight. Yet by first normalizing the subject at the state level, "a great change" was prevented at the outset on the federal level, which "show[ed] the public that their fears about same-sex partnership and its potential negative effects on society [were] groundless."[133]

While there is still work to be done to guarantee lasting marriage equality rights, the incremental theory does provide a "helpful guide" to show how marriage equality grew from illegal, to a patch-work of legality, to normative action at the federal level.[134]

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127 *Id.*

128 *Id.* at 2601.

129 *See generally* Goldberg, *supra* note 108, at 1422–23 (attacking state invocation of incrementalism to justify the slow redressing of inequality); Jeremiah A. Ho, *Weather Permitting: Incrementalism, Animus, and the Art of Forecasting Marriage Equality After* U.S. v. Windsor, 62 CLEV. ST. L. REV. 1 (2014) (tracing the incremental steps that softened regulations as applicable to sexual minorities particularly given the Supreme Court's decision in *Windsor*) [hereinafter Ho, *Weather Permitting*].

130 Erez Aloni, *Incrementalism, Civil Unions, and the Possibility of Predicting Legal Recognition of Same-Sex Marriage*, 18 DUKE J. GENDER L. & POL'Y 105, 107 (2010).

131 Ho, *Weather Permitting, supra* note 129, at 7.

132 *Id.*

133 Aloni, *supra* note 130, at 107–08.

134 Ho, *Weather Permitting*, supra note 129, at 10; *see also* Jeremiah A. Ho, *Once We're Done Honeymooning:* Obergefell v. Hodges*, Incrementalism, and*

2. Marijuana Legalization

Another example of subject matter being thrust into the national spotlight through an incremental state-by-state approach is that of the legalization of marijuana.[135] This ongoing issue, while less settled than that of same-sex marriage, is nonetheless relevant to the discussion here. Specifically, its path from illegality to state-by-state forms of legality to the forecast of a potential legal national acceptance.[136]

Federally, cannabis has been classified as a Schedule I drug since the passage of the Controlled Substances Act ("CSA") in 1970.[137] The CSA made it illegal to grow, buy, or use marijuana (in any form), with no exception for medical use.[138] From 1970-2009 there was little movement at the federal level concerning marijuana.[139] In 2009, the *Ogden Memo* was released, softening the federal priority of enforcement and policing as it related to state laws regulating medical marijuana.[140] In 2014, the Rohrabacher-Farr Amendment prohibited the Justice Department from interfering with the implementation of state medical cannabis laws.[141] Congress is currently debating

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Advances for Sexual Orientation Anti-Discrimination, 104 KY. L.J. 207, 212 (2015).

135 *See* Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 100–02 (2015). This Note is not intended to be an in-depth analysis of marijuana laws. For simplicity's sake, this Note will be using "marijuana" and "cannabis" interchangeably.

136 Similar to the previous analysis of marriage equality, this Note is simply providing an annotated history of a longer journey.

137 Controlled Substances Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236, 1249 (codified as amended at 21 U.S.C. § 812 (c)(c)(10) (2018)).

138 21 U.S.C. §§ 812(b)(1), 812(c)(c)(10) (2018).

139 *See* Chemerinsky et al., *supra* note 135, at 84–87.

140 Memorandum from David W. Ogden, Deputy Attorney Gen., U.S. Dep't of Justice, to selected U.S. Attorneys (Oct. 19, 2009), https://www.justice.gov/archives/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states [https://perma.cc/G6AT-MRZE]. The new policy directed federal prosecutors to "not focus federal resources in [their] States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana." *Id.*

141 Consolidated and Further Continuing Appropriations Act, Pub. L. No. 113-235, § 538, 128 Stat. 2130 (2014) ("None of the funds made available in this Act to the Department of Justice may be used . . . to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.").

removing marijuana from the list of illicit substances enumerated in the CSA.[142]

State-level response to the federal ban of marijuana in the CSA has varied, ranging from legal medical uses to decriminalization to recreational legalization.[143] Beginning in 1996, states began to create their own policies for regulating marijuana, with California voters approving a state-wide referendum legalizing its use for medical purposes.[144] In 2009, the year that the *Ogden Memo* was released, thirteen states allowed some form of legalized medical marijuana use.[145] Today, more than half of the states and the District of Columbia have legalized medical marijuana, and eleven states and the District of Columbia have passed laws permitting its recreational use, with potentially more to come this year.[146]

This slow burn to national legitimacy has created tremendous disparity in the enforcement of criminal, banking, and tax law, as well as in the expenditure of public resources compared to other crimes.[147] The conflict between the states and the federal law "despite the DOJ's announced enforcement leniency . . . . significantly hampers . . . [b]anks, attorneys, insurance companies, potential investors, and others—justifiably concerned about breaking federal law . . . ."[148] Federally regulated banks are hesitant to do business with

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142 Tom Angell, *Vote to Federally Legalize Marijuana Planned in Congress*, FORBES (Nov. 16, 2019, 7:38 PM), https://www.forbes.com/sites/tomangell/2019/11/16/vote-to-federally-legalize-marijuana-planned-in-congress/#7b3deb78201b [https://perma.cc/3FP2-WR4N].

143 Susan F. Mandiberg, *A Hybrid Approach to Marijuana Federalism*, 23 LEWIS & CLARK L. REV. 823, 824 (2019).

144 The Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (West 1996).

145 Chemerinsky et al., *supra* note 135, at 85–86.

146 *See* German Lopez, *You Can Now Legally Buy Marijuana in Illinois*, VOX (Jan. 2, 2020, 12:30 PM), https://www.vox.com/policy-and-politics/2020/1/2/21046592/illinois-marijuana-legalization-recreational-sales [https://perma.cc/5G6N-TU9D] (highlighting the commencement of Illinois' recreational marijuana sales in 2020); Audrey McNamara, *These States Now Have Legal Weed, and Which States Could Follow Suit in 2020*, CBS NEWS (Jan. 1, 2020, 3:55 PM), https://www.cbsnews.com/news/where-is-marijuana-legal-in-2020-illinois-joins-10-other-states-legalizing-recreational-pot-2020-01-01/ [https://perma.cc/8EU4-TWXB] (illustrating the "piecemeal" fashion in which states have adopted marijuana legalization and projected additions in 2020).

147 Chemerinsky et al., *supra* note 135, at 91–94.

148 *Id.* at 79. *See also* Carolyn Enciso Sieve, *Clarity for Employers in the Haze of Marijuana Legislation*, 61 ORANGE COUNTY LAW. 40, 41–42 (2019) (examining

state-legitimized marijuana businesses for fear of federal prosecution.[149] Federal tax law makes it "disadvantageous" to run a legitimate business if it violates federal drug law.[150]

The issues raised due to the current disparate nature of the marijuana situation have perhaps come to an unsustainable head.[151] It can be argued that the theory of incrementalism, as it pertains to the national legalization of marijuana, is working.[152] "Today, the states that have legalized marijuana are conducting a once-in-a-generation pressure test on the bounds of democratic experimentation permitted within our constitutional structure."[153] There are different states with different laws, some of which are in compliance with federal law and some of which are not.[154] The state-driven drive to legalization has made this a national concern while its local roots have resulted in a feeling by Americans that the issue is already moot.[155] "Marijuana legalization is *very* popular nationwide . . . . That's emboldening . . . lawmakers to take the issue far more seriously than in years past."[156] By breaking the national problem into state issues, allowing states to experiment (to see what works and what does not), and by giving local governments control of a traditionally local issue,

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the tightrope that employers and employees may have to walk, balancing disparate federal and state regulations).

149 Chemerinsky et al., *supra* note 135, at 91.

150 *Id.* at 94.

151 *Id.* at 90–91.

152 *See generally* Mandiberg, *supra* note 143, at 826 (arguing that a "one-size-fits-all" approach is ill-suited for marijuana legalization).

153 Brian M. Blumenfeld, *State Legalization of Marijuana and Our American System of Federalism: A Historio-Constitutional Primer*, 24 VA. J. SOC. POL'Y & L. 77, 96 (2017).

154 *See id.* at 79; Chemerinsky et al., *supra* note 135, at 90; Mandiberg, *supra* note 143, at 825–26.

155 *See* Chemerinsky et al., *supra* note 135, at 122 n.177 (citing evidence that a growing majority of Americans are in favor of legalizing marijuana).

156 German Lopez, *Marijuana Legalization is About to Have a Huge Year*, VOX (Jan. 23, 2020, 8:00 AM), https://www.vox.com/policy-and-politics/2020/1/23/21076978/marijuana-legalization-2020-ballot-initiatives [https://perma.cc/KW36-XU24] [hereinafter Lopez, *Marijuana Legalization*]. *See also* McNamara, *These States Now Have Legal Weed*, *supra* note 146 ("[S]upport for legal pot hit a new high in 2019, with 65% of U.S. adults saying marijuana should be legal.").

the legalization of marijuana has forced the issue into the national spotlight where it must be dealt with.[157]

III. AN INCREMENTAL PATH FOR LITERACY

A. Rejection from the Courts Is a Blessing

In the 1982 case of *Plyler v. Doe*, the Court found that a Texas law unconstitutionally withheld funds for the education of undocumented immigrant children.[158] The Court determined that the law's restriction on the opportunity to receive an education violated the right to equal protection.[159] While the Court fell short of declaring education a "fundamental right," it emphasized its importance.[160] Additionally, the Court spoke to the importance of literacy and its benefits:

> Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.[161]

In *Rodriguez*, the Court appeared to reverse the course it had set with cases like *Brown* and *Plyler* when it held that a policy of school funding which unequally distributed resources and thereby affected the quality of education did not require strict scrutiny as there is no fundamental right to a well-financed education.[162] In 1986, the Court reaffirmed the prior position it took in *Rodriguez*, "that education 'is not among the rights afforded explicit protection under our Federal Constitution.'"[163]

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157 *See* Chemerinsky et al., *supra* note 135, at 84–90; Mandiberg, *supra* note 143, at 838–39.

158 Plyler v. Doe, 457 U.S. 202, 222–23 (1982).

159 *Id.* at 224–25.

160 *Id.* at 221–24.

161 *Id.* at 222.

162 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 36–37 (1973).

163 Papasan v. Allain, 478 U.S. 265, 284 (1986) (quoting *Rodriguez*, 411 U.S. at 35). In *Papasan*, lands held in trust by the state were not being used for public schools, as was directed when the lands were granted to the state by the federal government. *Id.* at 274. Petitioners claimed that they were being denied an adequate education based on the state's disproportionate distribution of state

Although the Court in *Rodriguez* and *Papasan* did not recognize education as a fundamental right, it did acknowledge that there may be "some identifiable quantum of education [that] is a constitutionally protected prerequisite to the meaningful exercise of [other] right[s] . . . ."[164] Since the plaintiffs in *Rodriguez* and *Papasan* did not identify a failure to attain a specific "quantum of education" connected to the exercise of other constitutional rights, "no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimum skills necessary for the enjoyment of the rights of speech and of full participation in the political process."[165]

B. The Status of the States

Every state constitution includes at least one provision requiring the state to establish and support some type of public education system.[166] Some contain several provisions concerning the establishment, administration, and funding of public schools; these state constitutional education provisions reflect different commitments about how to provide educational services.[167] The language used by each state could dictate how easy it would be to establish a right to literacy within the respective state.[168] Some constitutions require a state to provide a "[g]eneral and uniform" education, others mandate

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resources. *Id.* While distinguishing from the facts in *Rodriguez* and clarifying its meaning—that not all disparate school funding was legal—the Court reaffirmed the application of a rational basis standard of review. *Id.* at 286–88.

164 *Rodriguez*, 411 U.S. at 36.

165 *Id.* at 36–37; *see also Papasan*, 478 U.S. at 286 ("The petitioners do not allege that schoolchildren . . . are not taught to read or write; they do not allege that they receive no instruction on even the educational basics; they allege no actual facts in support of their assertion that they have been deprived of a minimally adequate education [for the exercise of other constitutional rights].").

166 MOLLY A. HUNTER, EDUC. JUSTICE, STATE CONSTITUTION EDUCATION CLAUSE LANGUAGE (2011), https://edlawcenter.org/assets/files/pdfs/State%20Constitution%20Education%20Clause%20Language.pdf [https://perma.cc/EY97-QM84]; EMILY PARKER, EDUC. COMM'N, OF THE STATES, CONSTITUTIONAL OBLIGATIONS FOR PUBLIC EDUCATION: 50-STATE REVIEW 1 (2016), https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf [https://perma.cc/M5XQ-LCGN].

167 *See* Thro, *supra* note 27, at 1639; PARKER, *supra* note 166, at 1–2.

168 *See* PARKER, *supra* note 166, at 5–22.

that the education be "thorough and efficient."[169] Perhaps the states with language in their constitutions that envision "education as a democratic imperative" would be those most likely, either through their courts or legislatures, to implement literacy as a fundamental right.[170]

C. Moving Forward by Taking Small Steps

The incremental theory posits that most policy changes are likely to be small before any large change in policy can or will be realized.[171] This Note has demonstrated that the path to marriage equality and legalized marijuana has not been one nationally-sweeping change, but rather changes made state-by-state, until eventually change was realized in the larger system.[172] Analogously, a similar path could, and should, be considered in the fight for literacy as a fundamental right. Rather than a national policy, where concerns of over-reaching can drag a debate into a quagmire, the incremental model makes more sense by allowing progress toward the ultimate goal:

> The incremental model views decision-making as a practical exercise concerned with solving problems at hand rather than achieving lofty goals. In this model the means chosen for solving problems are discovered through trial-and-error rather than through the comprehensive evaluation of all possible means. Decision-makers consider only a few familiar alternatives for appropriateness and stop the search when they believe an acceptable alternative has been found.[173]

Like the roads which led to marriage equality and marijuana legalization, a right to literacy must take small steps to ensure its foundation is secure before rising to the national level.[174] First, any change must be small; there cannot be a major sea-change all at

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169 HUNTER, *supra* note 166.

170 *Id.* (The report cites the following states: AR, CA, FL, IL, IN, ME, MA, MI, MN, MO, MT, NH, NC, ND, RI, SD, TN, TX).

171 Lindblom, *The Science of "Muddling Through," supra* note 63, at 81, 85.

172 *See* Ho, *Weather Permitting*, *supra* note 129, at 10–11; Mandiberg, *supra* note 143, at 849.

173 HOWLETT & RAMESH, *supra* note 64, at 142.

174 *Cf.* Ho, *Weather Permitting*, *supra* note 129, at 7 (using a phased approach, similar to that expressed in the works of Waaldijk, Eskridge, and Merin, to formulate a successful path for same-sex couples).

once.[175] Fortunately, there is already some duty of education owed by the states to their citizens and national standards of education, so adding a right to literacy would not be a dramatic shift from the status quo, both on the state and federal levels.[176] Specifically, the standard set by the Massachusetts Supreme Judicial Court could be viewed as simply a semantic degree of change from demanding a right to literacy in the Commonwealth:

> The Commonwealth's duty requires the Commonwealth to have a State public education plan to ensure that our children are educated in a manner so that they possess capabilities that "accord with our Constitution's emphasis on educating our children to become free citizens on whom the Commonwealth may rely" to ensure the functioning of our democracy and society.[177]

It is also worthy to note that the authors of the Massachusetts Constitution were aware that changes may become necessary and included a mandate to evolve, so if something like literacy became a fundamental necessity, it could be mandated.[178] If Massachusetts were to adopt a right to literacy, it would certainly pass Lindblom's requirement of keeping the change small.[179]

Second, normalizing literacy among the states would allow for local control and formation before rolling it out on a national level.[180] Adoption at the local level may "communicate to the federal government that the [policy] is not only workable but also beneficial . . . . Local initiatives . . . can offer potential benefits to the federal government in the form of direct evidence of both public opinion and the utility of [policies] not yet entered into law at the federal level."[181] If municipalities or states adopted a right to literacy,

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175 *See* Lindblom, *The Science of "Muddling Through," supra* note 63, at 86.

176 *See* PARKER, *supra* note 166; *supra* text accompanying note 13.

177 Doe v. Sec'y of Educ., 95 N.E.3d 241, 253 n.23 (Mass. 2018) (quoting McDuffy v. Sec'y of the Exec. Office of Educ., 615 N.E.2d 516, 555 (Mass. 1993)).

178 MASS. CONST. pt. 2, ch. 5, § 2. "[I]t shall be the duty of legislatures and magistrates, *in all future periods* of this commonwealth, to cherish the interests of literature . . . ." *Id.* (emphasis added). *See also Doe*, 95 N.E.3d at 253 n.23 ("Significantly, the capabilities *considered to be essential* 'necessarily will evolve together with our society.'" (quoting *McDuffy*, 615 N.E.2d at 555)).

179 *See* Lindblom, *The Science of "Muddling Through," supra* note 63, at 86.

180 *See id.* at 85–86.

181 Shanna Singh, *Brandeis's Happy Incident Revisited: U.S. Cities as the New Laboratories of International Law*, 37 GEO. WASH. INT'L L. REV. 537, 552–53 (2005) (explaining the hypothetical impact that local policy can have on framing larger discussions).

the potential benefits of increased civic engagement and the failures of additional lawsuits or a lack of progress in literacy rates would be more apparent and easier to fix.[182] This will minimize the risk of failure at the national level because of incrementalism's ability to fail on a small scale limits its exposure in the grand scheme.[183]

Finally, a gradual adoption by the states will allow its fundamental character[184] to become normalized within the national consciousness.[185] Similar to the decision in *Obergefell*, where the Court held that where the states had bestowed such importance on the fundamental nature of marriage that it could not be denied to certain classes, literacy is so important that its fundamental character must be recognized as a basic right for everyone.[186] While it is unclear if a *fundamental right* to literacy has popular support, "[f]ew would deny the importance of literacy in this society or the advantages enjoyed by those with advanced skills."[187] And like marijuana legalization, literacy's popular support is essential for its success in the incremental model.[188]

The incremental model provides an explanation as to how state-by-state acceptance, local restrictions and all, would be the best approach to put literacy on the national stage.[189]

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182 *Cf. id.*; Lindblom, *The Science of "Muddling Through," supra* note 63, at 85–86.

183 Lindblom, *The Science of "Muddling Through," supra* note 63, at 85–86.

184 *Cf.* Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015). This discussion's analogue would be that, similar to marriage, literacy promotes other fundamental rights, it is vital to an individual's autonomy, illiteracy promotes a feeling of less-than, and a literate society is key to a functioning democratic society.

185 *See* Aloni, *supra* note 130, at 161. For instances where the Supreme Court has deferred to national norms, see Lawrence v. Texas, 539 U.S. 558, 570 (2003) (striking down anti-sodomy laws because "[o]ver the course of the last decades, States with same-sex prohibitions have moved toward abolishing them"); Atkins v. Virginia, 536 U.S. 304, 315–16 (2002) (finding that a "large number of States prohibiting the execution of [intellectually disabled] persons . . . ." was justification to prohibit the practice nationally).

186 *Obergefell*, 135 S. Ct. at 2604–05.

187 IRWIN S. KIRSCH ET AL., ADULT LITERACY IN AMERICA: A FIRST LOOK AT THE FINDINGS OF THE NATIONAL ADULT LITERACY SURVEY 1 (2002), https://nces.ed.gov/pubs93/93275.pdf [https://perma.cc/5PUZ-RJ4U].

188 Lopez, *Marijuana Legalization*, *supra* note 156; *accord* Aloni, *supra* note 130, at 115.

189 *E.g.*, HOWLETT & RAMESH, *supra* note 64, at 142.

NEXT TIME WON'T YOU SING WITH ME

"It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[190] While Justice Brandeis was not referring to incrementalism specifically, his federalist mantra has parallels in the theory. Literacy is undoubtedly a fundamental requirement for both the citizens and the nation. The historical evidence, after examining the importance that literacy plays in our society, is undeniable.[191] The Court and Congress may have come close, but "close only counts in horseshoes and hand grenades." The theory of incrementalism, as seen through example, offers a viable method to propel literacy as a fundamental right into the national zeitgeist—evolving from an idea into a patchwork of state laws that culminates in a national policy.

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[190] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[191] *See generally* ABRAHAM BLINDERMAN, THREE EARLY CHAMPIONS OF EDUCATION: BENJAMIN FRANKLIN, BENJAMIN RUSH, AND NOAH WEBSTER 10–11 (1976); John E. Haubenreich, *Education and the Constitution*, 87 PEABODY J. EDUC. 436, 439 (2012).