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Access to Literacy: The Narrow Path Toward Recognizing Education as a Fundamental Right

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ACCESS TO LITERACY: THE NARROW PATH TOWARDS RECOGNIZING EDUCATION AS A FUNDAMENTAL RIGHT

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"I, for one, am unsatisfied with the hope of an ultimate 'political' solution sometime in the indefinite future while, in the meantime, countless children unjustifiably receive inferior educations that may affect their hearts and minds in a way unlikely ever to be undone." – Justice Thurgood Marshall[1]

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[1] San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 71–72 (1972) (dissent) (quoting Brown v. Bd. of Ed., 349 U.S. 483, 494 (1955)).

INTRODUCTION

Almost 50 years ago, Justice Thurgood Marshall wrote about the irreversible harms that children in underfunded schools face. He wrote these words in his dissent in *San Antonio v. Rodriguez*, where the majority held that education is not a fundamental right protected by the U.S. Constitution.[2] As a result of *Rodriguez*, right-to-education cases brought under the Fourteenth Amendment only need be afforded the lowest level of judicial scrutiny. Today Justice Marshall's dissatisfaction with the hope for a solution in "the indefinite future" still rings true. Students of color, students in poverty, and students in rural areas oftentimes are still condemned to attend schools that lack funding, advanced coursework, highly qualified teachers, and even safe buildings. Because of the holding in *Rodriguez*, federal courts have refused to address the inequality which is still pervasive across American schools.

In more recent years, however, state and lower federal courts have begun to redefine the right to an education in a way that might be constitutionally protected even in a post-*Rodriguez* world. The most recent of these cases, and the inspiration for this comment, is a Sixth Circuit case styled *Gary B. v. Whitmer*.[3] The case was brought by students from Detroit, Michigan, who claimed they had been "deprived of access to literacy" in violation of their rights under the U.S. Constitution.[4] The *Gary B.* Court was asked to determine whether the plaintiffs had a fundamental right to a basic minimum education that provides access to literacy using the substantive due process

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[2] *Id*. at 35.

[3] Gary B. v. Whitmer, 957 F.3d 616, 621 (6th Cir. 2020).

[4] *Id*.

framework of the Fourteenth Amendment.[5] A panel of the Sixth Circuit agreed with the students, holding that the students had been denied access to literacy as a result of their systemically poor education, and thus had been denied a fundamental right to a *minimally adequate* education.[6] That decision was later vacated *en banc*.[7]

The disagreement among the *Gary B.* panel and the Sixth Circuit as a whole exposed a significant legal issue with immense implications for public education in this country. Had the full Sixth Circuit agreed that the *Gary B.* students had a federal right to education, even one that is more narrowly defined than in *Rodriguez*, other plaintiffs could bring similar claims at the federal level, gaining access to broader remedies and providing relief to more students in a timelier manner. Protecting even a more narrowly defined right to an education would likely be a more satisfying solution to Justice Marshall, advocates for education, and most importantly the students demanding an adequate education.

In this comment I argue that the *Gary B.* panel was correct to find that an education so deficient as to deny students access to basic literacy is a violation of those students' substantive due process rights to a *minimally adequate* education. I begin with a brief description of the state of education in the United States today. The education that is available to Black and Brown students, students living in poverty, and students residing in rural areas is inadequate compared to that provided to white students, middle- and upper-class students, and students living in suburban and urban settings. Next, in Part II, I discuss the development of federal jurisprudence concerning the right to an education. To ensure more protection at the federal level, advocates must find a way to narrowly define a right to an education that federal courts consider fundamental under the Fourteenth Amendment's equal protection and substantial due process frameworks. In Part III, I address state right-to-education laws, focusing mostly on North Carolina but also looking at lessons from other states where courts have defined a state right to an education. Although these cases are operating under state constitutional guidance, they provide insight on how a federal right to an education might be narrowly defined. Finally in Part IV, I discuss how a legally adequate education should be defined as a federal right considering the state and

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[5] *Id*. at 642.

[6] *Id*. at 662.

[7] Gary B. v. Whitmer, 958 F.3d 1216 (2020) (en banc).

federal caselaw described in Parts II and III. Education advocates should focus their efforts on funding, physical building conditions, and educational outcomes when narrowing their claims for an adequate education that is constitutionally protected.

I. BRIEF DESCRIPTION OF THE STATE OF EDUCATION

Students in the United States have vastly unequal access to quality public education. Of the approximately 50.7 million students enrolled in public elementary and secondary schools, 52% are not white,[8] 18% are living in poverty,[9] and 21% live in rural locales.[10] Each of these demographic factors affects educational access. And although the demographic statistics that follow do not paint the full picture of these students' lived experiences, nor are they representative of all disadvantaged students, these particular demographics are a helpful starting point in discussing the importance of a federally recognized right to an education.

To begin, it is necessary to start with race because it is along racial lines that young people have been denied education for so long.[11] Despite the groundbreaking holding in *Brown v. Board of Education*[12], which ended *de jure* segregation in American public schools, students today continue to learn in classrooms that are racially segregated. Across the country, many white students learn in environments that are overwhelmingly populated only by other white students.[13] Fifty eight percent of Black students, 60% of Hispanic students, and 39% of American Indian students attend schools in which 75% of the student body is not white.[14] By contrast, just 6% of white students

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[8] Bill Hussar, *The Condition of Education 2020*, U.S. DEP'T OF EDUC.: NAT'L CTR. FOR EDUC. STATS., 32 (May 2020).

[9] *Id*. at 5.

[10] Stephen Provasnik, *Status of Education in Rural America*, U.S. DEP'T OF EDUC.: NAT'L CTR. FOR EDUC. STATS., 8 (July 2007).

[11] While much of what is written about educational inequality focuses on Black children in relation to their white peers, many of the same trends appear for other groups of non-white students. Here, I will focus on Black, Hispanic, and American Indian student groups because they are each heavily represented, and face unique obstacles. When I am discussing these three groups as a whole I will use the term "students of color," otherwise I will reference them individually.

[12] Brown v. Bd. of Ed., 347 U.S. 483 (1954).

[13] *See* Hussar*, supra* note 8, at 33.

[14] *Id.*

attend schools in which 75% of the student body is not white.[15] This statistic illustrates how segregated schools continue to be.[16]

Racial segregation has an impact on students' access to college prep and Advanced Placement classes.[17] White students at demographically white-dominated schools are more likely to have access to a fuller range of course offerings, particularly in the areas of math and science.[18] Approximately one fourth of the schools with the highest percentage of Black and Hispanic students do not offer Algebra II and one third do not offer Chemistry.[19] Additionally, fewer than half of American Indian high school students have access to the full range of math and science courses.[20] The same disparities are evident if measured by educational outcomes. White students were roughly twice as likely as students of color to meet SAT benchmarks as defined by the CollegeBoard.[21]

Race is not the only predictor of educational access in the United States. Students living in poverty and attending high-poverty schools are also frequently represented in cases about equitable access to education and would benefit from a federally recognized right to an education. On one level, that is because race and socioeconomic status often overlap a great deal. Families of color are two to three times as likely as white families to live in poverty.[22] But poverty affects educational access and academic success as well. Only 29% of low-income students take calculus in high school, compared to 42% of higher income students.[23] Less than one third of students receiving SAT fee waivers met both SAT benchmarks according to the CollegeBoard.[24] The number of students who met both SAT benchmarks jumps to nearly 50% for

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[15] *Id.*

[16] *Id.*

[17] *See generally*, U.S. DEP'T OF EDUC., *Office for Civil Rights, Civil Rights Data Collection Data Snapshot: College and Career Readiness* (Mar. 2014).

[18] *Id*.

[19] *Id.* at 1.

[20] *Id*.

[21] COLLEGEBOARD, *SAT Suite of Assessments Annual Report*, 3 (2019).

[22] Hussar, *supra* note 8, at 5.

[23] Paula Olszewski-Kubilius and Susan Corwith, *Poverty, Academic Achievement, and Giftedness: a Literature* Review, 62 GIFTED CHILD Q. 37, 41 (2018).

[24] COLLEGEBOARD, *supra* note 21, at 3.

students who do not use or qualify for a fee waiver.[25] Finally, students in poverty have lower high school graduation rates, lower college attendance rates, and lower college graduation rates.[26]

A third segment of students who would benefit from a federal guarantee of access to quality education are students living in rural communities. Approximately one half of all U.S. school districts are rural and one fifth of students attend rural schools.[27] Poverty in rural communities tends to be deep—meaning that families are living at below half of the federal poverty level.[28] Poverty in rural communities is also persistent, meaning that poverty rates in these areas of the country have been above 20% for the past 30 years.[29] Despite fewer significant differences in overall educational outcomes between cities and rural communities, only 69% of rural schools offer Advanced Placement classes.[30] The percentages are much higher for city (93%) and suburban (96%) schools. Additionally, although rural students are more likely to complete high school than students in urban settings, they are less likely to attend and graduate college.[31] Rural districts also struggle with high teacher turnover rates, high levels of consolidation, strained budgets, and a lack of attention from lawmakers.[32]

Free, high-quality, public education which is accessible to all students lies at the heart of American economic, political, and societal ideals. Public education remains a pathway for a child born into poverty to move themselves and their family into the middle and upper classes. On a broader scale, public education prepares young people to participate in the job market in a wide variety of careers and occupations. Further, public education prepares students to participate in our democratic system by being informed voters, voicing their opinions, and holding elected officials accountable. In *Brown*, the Court wrote that public education "is the very foundation of good citizenship."[33] Finally, a high-quality public education helps build individual

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[25] *Id*.

[26] Caroline Ratcliffe, *Child Poverty and Adult Success*, URB. INST., 3 (Sept. 2015).

[27] Provasnik, *supra* note 10, at 91.

[28] Megan Lavelley, *Out of the Loop*, CTR FOR PUB. EDUC., 4 (Jan 2018).

[29] *Id*.

[30] Provasnik, *supra* note 10, at 91.

[31] Lavelley, *supra* note 28, at 12.

[32] *See generally id*. at 17–26.

[33] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

students' perceptions of self-worth, personal satisfaction, and motivation for learning.[34]

While students of color, poor, and rural students are by no means the only groups facing disparate outcomes in education, a snapshot of each of these three demographics provides a view of the larger challenges associated with a lack of access to equitable public education today in America.

II. FEDERAL LAW

The U.S. Constitution does not explicitly create, nor has the Supreme Court ever interpreted the Constitution as guaranteeing a fundamental right to an education. Right-to-education cases are almost always brought under the Fourteenth Amendment which includes two relevant clauses: the Equal Protection Clause and the Due Process Clause.[35] Under an equal protection claim, plaintiffs must show that the government treated similarly situated people disparately and that the disparate treatment burdens a fundamental right, targets a suspect class, or has no rational basis.[36] Similarly, under a

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[34] Brief for Appellants at 9, Brown v. Bd. of Educ., 347 U.S. 483 (1954) 1952 WL 47265, *9. Counsel for the Appellants outlined the individual harm by a segregated education system with a laundry list of negative outcomes from such a system that they had proven in prior testimony: "The testimony further developed the fact that the enforcement of segregation under law denies to the Negro status, power and privilege; interferes with his motivation for learning; and instills in him a feeling of inferiority resulting in a personal insecurity, confusion and frustration that condemns him to an ineffective role as a citizen and member of society. Moreover, it was demonstrated that racial segregation is supported by the myth of the Negro's inferiority, and where, as here, the state enforces segregation, the community at large is supported in or converted to the belief that this myth has substance in fact. It was testified that because of the peculiar educational system in Kansas that requires segregation only in the lower grades, there is an additional injury in that segregation occurring at an early age is greater in its impact and more permanent in its effects even though there is a change to integrated schools at the upper levels.".

[35] U.S. Const. amend. XIV. For the purpose of this comment, I will focus on the substantive due process requirement of the Due Process Clause and not procedural due process.

[36] *See* U.S. v. Carolene Products, 304 U.S. 144, 152 n4 (1938); *see also Brown*, 347 U.S. at 495; *see also* San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 19 (1972). The focus of this comment is on the fundamental right analysis, but it is of note that federal law also does not currently support equal protection claims brought on the theory that education is less available or robust for students of on account of their socioeconomic status or the relative wealth of their school district. That is because only disparities based on suspect

substantive due process claim, a plaintiff must show that a government action has burdened a right which is fundamental or that the government action has no rational basis.[37] Thus, showing that the right being burdened is fundamental would satisfy claims both under the Equal Protection Clause and the Due Process Clause.

When determining if a right is fundamental, the courts look at both this history of the right and its relationship to enumerated rights. The courts ask if the right is objectively "deeply rooted in this Nation's history and tradition" and if the right is "implicit in the concept of ordered liberty" where "neither liberty not justice would exist" without it.[38] If a plaintiff can show that the government's action burdens a fundamental right, regardless of if the claim is made under the Equal Protection Clause or the Due Process Clause, the court will then apply strict scrutiny rather than the lower standard of rational basis.[39] The government is required to meet a higher level of judicial scrutiny when a plaintiff can show that the right being burdened is fundamental.

Now that I have provided an overview of the analysis required by federal law for questions involving fundamental rights under the Fourteenth Amendment, I will next review how federal courts have analyzed education as a potential fundamental right. I begin with *Brown v. Board of Education*, the transformational civil rights case that required schools across the country to desegregate. After *Brown*, the U.S. Supreme Court seemed to be on its way to recognizing education as a fundamental right guaranteed by the U.S. Constitution. By 1973, however, the Court reversed course in *San Antonio Independent School District v. Rodriguez*. Yet more contemporary cases indicate that there is room for interpretation in the U.S. Constitution, even under *Rodriguez*'s limiting logic. To this end, I explore the recent Sixth Circuit case, *Gary B. v. Whitmer*, which explores the possibility of a minimally adequate education as a fundamental right guaranteed by the Due Process Clause of the Fourteenth Amendment. Finally, I conclude with an overview of other federal cases which attempted to narrowly define an education that would be protected as a fundamental right.

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classifications, such as race, are reviewed by federal courts with strict scrutiny. *Rodriguez*, at 28–29.

[37] *See* Washington v. Glucksberg, 521 U.S. 702, 719–720 (1997); *see* Obergefell v. Hodges, 576 U.S. 644, 675–76 (2015).

[38] *Glucksberg*, 521 U.S. at 720–21; *see also Rodriguez*, 411 U.S. at 33–34.

[39] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 857–58 (Rachel Barkow et al. eds., 6th ed. 2019).

A. Brown *to* Rodriguez*: the Expansion and Foreclosure of a Right*

Although the claims in *Brown v. Board of Education* were made both under the Equal Protection Clause and the Due Process Clause, the decision itself focuses almost entirely on the former.[40] Despite the fact that the Court chose to only decide on the basis of Equal Protection, which would not necessitate holding that education is a fundamental right, the Court wrote the following recognizing the importance of 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 v*ery 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. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[41]

Rather than declaring education to be a fundamental right, the equal protection violation found in *Brown* is based on the of fact that school segregation was taking place "solely on the basis of race" – a suspect classification.[42]

Ten years later, the Supreme Court, in *Griffin v. County School Board of Prince Edward County*,[43] continued to refer to education as a right protected by the U.S. Constitution. "The time for mere 'deliberate speed' has run out," Justice Black wrote for a 7-2 Court, "and that phrase can no longer justify denying these . . . school children their *constitutional rights to an education*

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[40] *Brown*, 347 U.S. at 495.

[41] *Id*. at 493 (emphasis added).

[42] *Id.* at 495.

[43] 377 U.S. 218 (1964).

equal to that afforded by the public schools in the other parts of Virginia."[44] *Griffin*, however was decided under the Equal Protection Clause as the state's action had a disparate impact on Black schoolchildren, again a suspect classification, rather than being decided as a denial of a fundamental right.[45]

In *Swann v. Charlotte-Mecklenburg*[46] the Supreme Court again reaffirmed that segregated schools violated the Equal Protection Clause – and added that federal district courts have substantial power to remedy such violations.[47] Although much of the language in *Swann* focused on the violation caused by school segregation, the Court repeatedly used language that references education as a right which is constitutionally protected.[48] In one such example, the Court stated: "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."[49] Again, the Court did not explicitly discuss education as being a fundamental right, however the broader remedy and outcome of this case point to that conclusion. As a result of the *Brown-Swann* line of cases, plaintiffs were more effectively gaining equal access to educational opportunities that had previously been denied on the basis of race.[50]

After decades of decisions pushing towards further access, *San Antonio Independent School District v. Rodriguez* not only reversed this trend, but also purported to make clear that education was not a fundamental right which could also be protected under the Fourteenth Amendment. In *Rodriguez*, the Court was asked to consider the Texas system of financing public education that resulted in a vast funding disparity between school districts.[51] Despite quoting some of the language from *Brown* about the

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[44] *Id.* at 234 (emphasis added).

[45] *Id*. at 229–230.

[46] 402 U.S. 1 (1971).

[47] *Id*. at 15.

[48] *Id*.

[49] *Id*.

[50] This trend even predates *Brown* whereby in *Sweatt v. Painter*, the Court held "[i]n accordance with these cases, petitioner may claim his full constitutional right: legal education equivalent to that offered by the State to students of the other races." 339 U.S. 629, 636 (1950) (referencing Sipuel v. Board of Regents, 332 U.S. 631 (1948); Fisher v. Hurst, 333 U.S. 147 (1948); and State of Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938), three earlier cases regarding equal access to schools for Black students).

[51] San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1972).

importance of education,[52] the *Rodriguez* Court reasoned that fundamental rights are not determined by their importance, but instead by whether they are explicitly or implicitly guaranteed in the Constitution.[53] Thus the Court stated: "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."[54]

To come to this conclusion, the Court in *Rodriguez* held that even the importance of education in ensuring an informed citizenry did not justify straying from rational basis review.[55] Although the *Rodriguez* Court recognized the importance of effective speech and critical thought to vote, the Court was concerned that guaranteeing such outcomes would amount to government intrusion.[56] Further, the Court deemed unpersuasive the argument about the "nexus" between free speech and education.[57] The Court in *Rodriguez* concluded by holding that, absent a reason to apply strict scrutiny, Texas's school financing plan was only subject to the traditional rational basis review.[58] Thus, the state's burden was only to show that their school financing system was rationally related to a legitimate state interest, and the Court held that the state met this burden.[59]

San Antonio v. Rodriguez marked a turning point in federal litigation efforts to both integrate and to improve the quality of schools. By holding that education is not a fundamental right under the Constitution, the *Rodriguez* Court made it more difficult to make judicial right-to-education claims under both the Equal Protection Clause and the Due Process Clause. This is first because the Court refused to recognize poverty as a suspect class and second, to the heart of this comment, because the Court refused to recognize education as a fundamental right.[60] In the years that followed

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[52] *Id*. at 30.

[53] *Id*. at 33.

[54] *Id*. at 35.

[55] *Id*. at 36–37.

[56] *See id*.

[57] *Id*. at 37.

[58] *Id*. at 40.

[59] *Id.* at 55.

[60] Avidan Y. Cover, *Is "Adequacy" a more "Political Question" than "Equality"?: The Effect of Standards-Based Education on Judicial Standards for Education Finance*, 11 CORNELL J. OF L. AND PUB. POL'Y 403, 409 (2002).

Rodriguez, school desegregation advocates experienced a rollback of the victories won by *Brown* and its progeny.[61]

The *Rodriguez* decision, however, was not unanimous and Justice Marshall's dissent is illustrative of the overall disagreement on the Court.[62] Justice Marshall reasoned that education rises to the level of a fundamental right protected by the U.S. Constitution.[63] Citing other cases in which the Supreme Court expanded the doctrine of fundamental rights, Justice Marshall reasoned that the realm of fundamental rights is not as narrow as the *Rodriguez* majority held.[64] Although Marshall conceded that free public education had never before been required by the Constitution, he maintained that the importance of education and its closeness to other constitutional values should have compelled the Court to "recognize the fundamentality of education."[65] Stated another way, Justice Marshall would require a higher level of scrutiny when access to education is denied, even when the denial is not on the basis of a suspect class. While Justice Marshall's dissent did not win over the majority, it provides a useful framework for advocates who are still seeking to have education recognized as a fundamental constitutional right.

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[61] *Id*. at 408.

[62] The first part of Justice Marshall's dissent focused on the discriminatory impact of the school funding scheme from Texas. Justice Marshall reasoned that the funding disparities led to a decreased educational opportunity for school children of property-poor districts, which he considered a suspect class under the equal protection analysis. *See Rodriguez*, 411 U.S. at 72-97. In the middle part of this argument, Justice Marshall is clear that the question is not whether there is some level of "adequate" education that schools can achieve in order to be exempt from the Equal Protection Clause. Instead, Justice Marshall argues it is the "inequality–not some notion of gross inadequacy–of educational opportunity" that violates the Constitution. *Id*. at 90. Despite Justice Marshall's reasoning and the similarities between poverty and other protected classes, poverty has not been recognized as a suspect classification. *See* Lindsey v. Normet*,* 405 U.S. 56, 74 (1972); *see also* Dandridge v. Williams*,* 397 U.S. 471, 487 (1970).

[63] *Rodriguez*, 411 U.S. at 97.

[64] *See id*. at 98–102. This list of other such rights includes the right to procreation as a result of its necessity to the "survival of the race," the right to vote because it is "preservative of all rights," and the right to appellate review. *Id*.

[65] *Id*. at 116.

B. Gary B.: A Right Redefined and a Question Reconsidered

In early 2020, a Sixth Circuit panel held in *Gary B. v. Whitmer* that the state of Michigan had been so negligent towards the education of Detroit students that they had been deprived their access to literacy.[66] While the panel acknowledged that the plaintiffs did not have a fundamental right to education generally under the majority holding in *Rodriguez*, the Sixth Circuit panel nevertheless determined that the plaintiffs had a fundamental right to a *minimally adequate* education, one that provided access to literacy.[67]

The Sixth Circuit's panel decision was supported by the traditional two-pronged substantive due process framework.[68] First, the Sixth Circuit panel discussed the extensive history that free state-sponsored schools have in the United States.[69] With the exception of the earliest years of the country, public schools have and continue to be "ubiquitous" throughout American history.[70] In addition to the long-standing history that public education has in our country, the panel noted that access to education, and thus access to literacy, has also long been limited in order to subjugate enslaved people and later freed people pushing for equality. [71] The Sixth Circuit panel summarized this history in part by writing: "access to literacy was viewed as a prerequisite to the exercise of political power, with a strong correlation between those who were viewed as equal citizens entitled to self-governance and those who were provided access to education by the state."[72]

Second, the Sixth Circuit panel reasoned that a basic minimum education is "implicit in the concept of ordered liberty."[73] The Sixth Circuit panel distinguished the plaintiffs in *Gary B*. from those in *Rodriguez*, by saying the

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[66] Dana Goldstein, *Detroit Students Have a Constitutional right to Literacy, Court Rules*, N.Y. TIMES (Updated Ap. 28, 2020) https://www.nytimes.com/2020/04/27/us/detroit-literacy-lawsuit-schools.html.

[67] Gary B. v. Whitmer, 957 F.3d 616, 662 (6th Cir. 2020).

[68] *Id*. at 642–44.

[69] *Id*. at 648.

[70] *Id*. at 649. Additionally, the court notes that at the time of the ratification of the Fourteenth Amendment, 36 of the 37 state constitutions imposed a duty on the state to provide a public school education. *Id.* at 649–50.

[71] *See id.* at 650–51.

[72] *Id*. at 651–52.

[73] *Id.* at 652, 655 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

right being asserted in *Gary B*. is "more fundamental."[74] The court stated: "[t]he degree of education they seek through this lawsuit – namely access to basic literacy – is necessary for essentially *any* political participation."[75] Put another way the Sixth Circuit panel held that providing public schools is "the very apex of the function of a state"[76] because it allows citizens to vote, pay taxes, participate in and avoid the legal system, and is necessary for the enjoyment of other fundamental rights.[77] The panel added that education has long been the "great equalizer" allowing children some chance of economic success regardless of their circumstances at birth.[78] "Providing a basic minimum education is necessary to prevent such an arbitrary denial, and so is essential to our concept of ordered liberty."[79]

Important in its holding, the panel in *Gary B*. began to define a minimally basic education. First, the court noted that the fundamental right defined in *Gary B*. was narrow – including only "the education needed to provide access to skills that are essential for the basic exercise of other fundamental rights and liberties."[80] The panel's decision made clear that this was a limited opinion, and that the newly-defined fundamental right does not guarantee "an education at the quality that most have come to expect in today's America."[81] The panel specifically stated it cannot proscribe specific educational outcomes.[82] Instead the court focused on what it calls the "rudimentary educational infrastructure" including, at minimum, facilities, teaching, and educational materials.[83] Finally, the court acknowledged that the precise contours of this inquiry cannot be determined on appeal, but were better left to trial courts.[84] The panel stated that the question was essentially: "whether

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[74] *Id*. Here the court effectively conceded that while it does not have the power to ensure fully advantaged nor the most effective nor intelligent civic participation, that degree of education is beyond the level for which these plaintiffs are asking.

[75] *Id*.

[76] *Id*. at 653 (citing Wisconsin v. Yoder, 406 U.S. 205, 213 (1972)).

[77] *Id*. at 652-53.

[78] *Id*. at 654.

[79] *Id*. at 655.

[80] *Id*. at 659.

[81] *Id*.

[82] *Id*.

[83] *Id*. at 660.

[84] *Id*.

the education the state offers a student – when taken as a whole – can plausibly give [a student] the ability to learn how to read."[85]

The *Gary B.* holding from the Sixth Circuit panel was ultimately vacated by an *en banc* hearing in which no reasoning was given.[86] Thus, federal courts have still not upheld a federal right to a minimally basic education. Despite the reversal of the Sixth Circuit's panel, *Gary B.* made headlines across the country as a potential signal of change in American right-to-education jurisprudence.[87] Some wondered if more federal courts might hear similar cases and make similar rulings.

C. Plyler*,* Papasan*, and* Kadrmas*: the Federal History of a Basic Minimum Education*

Although *Gary B.* received national attention as a potential reversal of previous federal precedent, it relied on prior federal cases which had already chipped away at the armor of *Rodriguez* blocking claims for a federally recognized right to education. The court in *Gary B*. cited a series of cases decided since *Rodriguez* in which the Supreme Court ruled in favor of plaintiff students taking action against schools that had not provided them with a "basic minimum education."[88] These cases were distinguishable from *Rodriguez* because, rather than focusing on a general right to education, they focused on a specific aspect of education such as literacy rights for undocumented students, unequal distribution of school land funds, and charging a bus fee.[89] These three successful federal cases, the Sixth Circuit panel in *Gary B.* reasoned, illustrate that *Rodriguez*'s holding is not so broad as to deny all possibility of a fundamental right to an education, particularly one that is narrowly defined through adequacy or literacy.

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[85] *Id*.

[86] Gary B. v. Whitmer, 958 F.3d 1216 (6th Cir. 2020) (en banc).

[87] Goldstein, *supra* note 66.

[88] *Gary B*., 957 F.3d at 647–48.

[89] *Id*.

1. Plyler *Recognizes Education as More Than "Some Governmental Benefit"*

In *Plyler v. Doe*,[90] the Supreme Court was presented with the question whether, under the Equal Protection Clause of the Fourteenth Amendment, Texas could deny free public education to undocumented school aged children.[91] Despite the fact that the Court neither found immigration status to be a suspect classification nor education to be a fundamental right, the Court held that the Texas legislature's bar on undocumented children from the state's public school was a violation because the state failed to meet even a rational basis of review.[92]

In the discussion regarding education, the Court upheld *Rodriguez*, but argued that education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation."[93] Additionally, the Court cited education's importance from its status as "the most vital civic institution for the preservation of the democratic system of government," to its place in our nation's history, to the modern socioeconomic benefits it provides.[94] The Court took this simple importance argument a step further and argued that the denial of a public education to children is "an affront to one of the goals of the Equal Protection Clause."[95] By depriving children the right of an education, the Court held, the state was effectively denying the children their future livelihoods, ability to live a self-sufficient life, and causing harm to their psychological well-being.[96] The Court ended this argument by quoting a familiar line from *Brown*: "Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[97]

Although the Court in *Plyler* did not recognize education as a fundamental right, it made clear that education was more important than other benefits provided by the state. The Majority opinion stated it was applying a

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[90] 457 U.S. 202 (1982).

[91] *Id*. at 205.

[92] *See id*. at 230.

[93] *Id.* at 221.

[94] *Id*.

[95] *Id*. at 221–22.

[96] *Id*. at 222.

[97] *Id*. at 223 (internal quotations removed).

rational basis of review, yet still sought a "substantial state interest."[98] While the dissent and all three concurrences made note of this inconsistency, the Majority never clearly stated whether they were using a heightened level of scrutiny.[99] If the Court was applying a heightened level of scrutiny, this would be a major shift from *Rodriguez* where the Court refused to apply any sort of heightened scrutiny. If courts began to apply more than rational basis review for cases concerning education, defendants would have to show more justification for policies that are certain to result in inferior educational opportunities and experiences for groups of students.

2. Papasan *Challenges Rodriguez*

Another challenge to *Rodriguez* is found in *Papasan v. Allain*.[100] When lands formerly owned by the Chickasaw Indian Nation were sold by the state of Mississippi and the funds were improperly distributed to schools across the state rather than those in the area, school officials and schoolchildren filed a complaint against the Governor of Mississippi claiming that such actions constituted several violations of the Constitution including their Equal Protection rights.[101]

The plaintiffs in *Papasan* made two claims. The first was that plaintiffs were denied their fundamental right to a minimally adequate education, which they argued should be examined under strict scrutiny.[102] Although the defendants' motion to dismiss was granted on this claim, the Supreme Court maintained that the question of a right to a minimally adequate education was still left open even after *Rodriguez*.[103]

The next claim the plaintiffs made, and the one the Court substantively ruled on, was that as a result of the distribution of the monies from the sale of the Chickasaw Cession lands, the schools in question faced funding

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[98] *Id*. at 230.

[99] *See generally* Plyler v. Doe, 457 U.S. 202.

[100] 478 U.S. 265 (1986).

[101] *See generally* Papasan, 478 U.S. 265.

[102] *Id*. at 285–86. Because this case was before the Supreme Court on a motion to dismiss, the Court was being asked to determine if there was sufficient factual allegations for the case to move forward. The Court answered this question in the negative because the plaintiffs made legal allegations, which were that funding disparities had deprived them of a minimally adequate education, rather than providing factual allegations, such as being deprived the ability to read or write.

[103] *Id*. at 285.

disparities in violation of the Fourteenth Amendment.[104] While the Court acknowledged that rational basis of review was appropriate, the Supreme Court held that a narrower claim by the plaintiffs, such as the one made by the plaintiffs in *Papasan*, would require a narrower analysis of the state interest.[105] The Supreme Court remanded for such an inquiry to be made. Although the Court in *Papasan* did not apply strict scrutiny, neither did they require the traditionally lax rational basis review for all right-to-education claims.

3. Kadrmas *Adds to the Confusion at the Federal Level*

The third case at the federal level of note is *Kadrmas v. Dickinson Public Schools*,[106] in which the Court held constitutional a district requiring a transportation fee in order for students to ride the bus to school.[107] The Court in *Kadrmas* agreed that heightened scrutiny was applied in *Plyler*, but refused to apply the same standard, despite the similarities between the cases, and provided little reasoning for not doing so.[108] One possible distinction between *Kadrmas* and *Plyler* is that in *Kadrmas* the Court asked whether there is a right *to ride the bus* rather than a right to *education*.[109] This analysis is consistent with the concept that plaintiffs must clearly define the right they are asking the Court to protect. While education generally may not be a fundamental right, the right to a *minimally adequate* education may nonetheless represent an important right triggering some type of heightened scrutiny.

D. Remaining Considerations at the Federal Level

Gary B. and the three cases the panel in *Gary B.* relied on are not the only examples of novel claims being made at the federal level asking the courts to recognize a right to an education. In March of 2018, the U.S. District

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[104] *Id*. at 286.

[105] *See id*. at 288

[106] 487 U.S. 450 (1988).

[107] *Id*. at 454–55.

[108] *Id.* at 459. This is also interesting because the majority opinion in *Plyler* makes no mention of applying heightened scrutiny. This only becomes apparent via the concurring and dissenting opinions. *See generally Plyler v. Doe*, 457 U.S. 202 (1982) (Powell, J., concurring in part and dissenting in part).

[109] *Kadrmas*, 487 U.S. at 459.

Court in Arizona decided a case brought by nine students on the Havasupai Indian Reservation claiming that the Bureau of Indian Education failed to provide them with a general basic education.[110] This case does not provide much in the way of precedent, because federal jurisdiction was gained as a result of federal agency involvement, but this case does show that the federal courts can make determinations about a narrowly defined right to education. In October of 2020, students in Rhode Island filed a claim that both their equal protection and due process rights were violated when the state failed to provide them with "an education that is adequate to prepare them to function productively as civic participants capable of voting, serving on a jury, understanding economic, social, and political systems sufficiently to make informed decisions, and to participate effectively in civic activities."[111] The District Court held there is "no right to civics education in the Constitution"[112] and on appeal the First Circuit upheld the decision.[113] This case from Rhode Island is an example of the way in which a federal right to an education could be more narrowly defined, perhaps as one which includes a basic understanding for students to be able to understand American government and politics. Finally, the COVID-19 pandemic has brought up challenges concerning physical access to education.[114] Again, it is unclear what precedential value these cases could have, but it reinforces the fact that right-to-education cases at the federal level are not entirely foreclosed. Plaintiffs just may need to more narrowly define how their rights have been restricted.

Despite *Gary B*. and other federal cases seeming to signal the possibility of a fundamental right to education, no federal court has upheld such an

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[110] Stephen C. v. Bureau of Indian Educ., No. CV-17-08004-PCT-SPL, 2018 WL 1871457, at 1* (D. Ariz. Mar. 29, 2018).

[111] A.C. v. Raimondo, 494 F. Supp. 3d 170, 175 (D.R.I. 2020). On appeal the First Circuit Court clarified these facts by stating: "Rhode Island does not require any civics courses, although some high schools in more affluent districts offer elective civics courses, nor does the state mandate testing for civics knowledge at the high school level or report student performance in these subjects, unlike reading, math and science. Due to limited time and resources, schools thus focus on these mandatory subjects that are tested statewide." A.C. v. McKee, 2022 WL 10001, *1 (1st Cir. filed Jan. 25, 2021).

[112] *Raimondo*, 494 F. Supp. 3d at 194.

[113] *McKee*, 2022 WL 10001, at *1.

[114] Mark Walsh, *COVID-19 School Reopening Battle Moves to the Courts*, EDUCATIONWEEK (Aug. 22, 2020), https://www.edweek.org/policy-politics/covid-19-school-reopening-battle-moves-to-the-courts/2020/08.

outcome. Thus, *Rodriguez* remains good law at the federal level and a powerful tool for blocking litigation seeking any form of heightened scrutiny in education discrimination cases. Although, *Rodriguez* has effectively blocked such claims at the federal level, in the time since that holding, plaintiffs have found success at the state level which may be instructive for future federal claims.

III. STATE LAW

While the U.S. Constitution does not mandate the creation of a public education system, all 50 states do in their state constitutions.[115] Though this language varies, the most common requirements include being free to the students, common or uniform across the state, and available to all students.[116] A significant number, though not the majority, include some language about the adequacy or level of education that needs to be provided.[117] Arizona details the level of schools to be provided. [118] Florida requires a "high-quality system."[119] Georgia requires "an adequate public education."[120] Illinois requires "[a]n efficient system of high-quality" schools.[121] Montana requires "[a] system of education which will develop the full educational potential of each person."[122] Pennsylvania requires that the school system "serve the needs of the Commonwealth."[123] Finally, Virginia requires that the Commonwealth "ensure that an educational program of high quality is established and continually maintained."[124]

Of course, federal courts are not required to follow state precedent in constitutional fundamental rights cases, but it can still be instructive for federal courts. In fact, throughout history federal courts have looked to earlier

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[115] Emily Parker, *50-State Review: Constitutional Obligations for Public Education*, EDUC. COMM'N OF THE STATES, 1, 1 (Mar. 2016), https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf.

[116] *See generally id.* at 5–22.

[117] *Id*.

[118] *Id.* at 5.

[119] *Id.* at 8.

[120] *Id.*

[121] *Id.* at 10.

[122] *Id.* at 14.

[123] *Id.* at 18.

[124] *Id.* at 20.

state decisions for guidance particularly when it comes to defending individual liberties.[125] For example, although *Brown v. Board of Education* may be the most well-known school integration case, numerous favorable state courts had already reached similar outcomes by the time of the *Brown* decision.[126] And what's more is the Court in *Brown* actually listened to and relied upon these prior state court holdings in concluding that segregation unconstitutionally harms Black schoolchildren.[127]

There is some debate about what the appropriate relationship between federal and state law should be when deciding federal constitutional questions.[128] Some view federal law as completely separate from state law, while others recognize and even encourage the influence and overlap that the two systems might have on one another.[129] A view that supports such influence is favorable when seeking to protect fundamental rights for several reasons. First, federal courts can benefit from the innovation at the state level.[130] Next, when federal courts follow the lead of state courts, this can lessen the assumption of power by the federal government.[131] Finally, the overlap between state and federal law allows for multiple layers of judicial review, such that if a harmful decision were rendered on one level, the other could still provide protection.[132]

In the remainder of this comment I will analyze what lessons from state law, federal courts could and should look towards in defining a fundamental right to an education. I will start with a case study of North Carolina ending with the state's leading case: *Leandro v. State*.[133] Then, I will examine successful claims in other state courts where plaintiffs argued for a state right

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[125] Goodwin Liu, *State Courts and Constitutional Structure*, 128 YALE L.J. 1304, 1345 (2019).

[126] *Id.* at 1352–55. Additionally, at least twenty-eight state court decisions actually rejected the legality of segregation by the time of the infamous *Plessy v. Ferguson* "separate, but equal" decision. *Id*. at 1350.

[127] *Id.* at 1360.

[128] *See generally*, Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues when Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025 (1985).

[129] *Id.* at 1027–29.

[130] Liu, *supra* note 125. at 1339.

[131] *Id.*

[132] *Id.* at 1338.

[133] 488 S.E.2d 249 (N.C. 1997).

to education. These examples provide guidance for a possible federal right in keeping with the shift in federal right-to-education jurisprudence discussed in the previous section.

A. North Carolina and a "Sound Basic Education"

Two separate clauses in the North Carolina Constitution provide for a state right to equal educational opportunities. The first is found in the Declaration of Rights and states "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right."[134] The second is found in the Article for education and requires that the General Assembly provide a "general and uniform system of free public schools . . . wherein equal opportunities shall be provided for all students."[135] Already the difference between the North Carolina Constitution and the U.S. Constitution, which makes no mention of education whatsoever, is stark.

North Carolina jurisprudence highlights two major lessons for creating a more narrowly defined right to an education. The first lesson is that a requirement for truly uniform or identical educational experiences is neither practical nor desirable. The other lesson concerns the elements courts should use to define what is necessary for a "minimal basic education."

1. "Uniform" Does Not Mean Identical

In the line of cases addressing the first lesson, the North Carolina courts consider what is meant by the constitutional mandate to provide a "general and uniform" school system. The first of these cases is *Britt v. N.C. State Board of Education*.[136] In *Britt*, the plaintiffs argued that the legislature's method of funding schools as well as the establishment of five separate districts in Robeson County created disparities so great that they violated the plaintiffs' right to a uniform educational experience.[137] In response the North Carolina Court of Appeals looked to the history of the Constitutional

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[134] N.C. CONST. art. I, § 15.

[135] N.C. CONST. art. IX, § 2(1).

[136] 357 S.E.2d 432 (N.C. Ct. App. 1987).

[137] *See id.* at 434. A very similar case to this one was decided in the same manner a year after *Leandro* in *Banks v. County of Buncombe*, 494 S.E.2d 791 (N.C. Ct. App. 1998).

mandates and found that "uniform" was only meant to be in regards to "race or other classification."[138] The court held:

> [I]f our Constitution demands that each child receive equality of opportunity in the sense argued by plaintiffs, only absolute equality between all systems across the State will satisfy the constitutional mandate. Any disparity between systems results in opportunities offered some students and denied others. Our Constitution clearly does not contemplate such absolute uniformity across the State.[139]

Not only was the plaintiffs' claim in *Britt* for uniformity denied, the court went a step further and held that such total uniformity was not envisioned by the state constitution.

The second case holding that North Carolina's constitution does not provide for a truly uniform system of education is *Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Board of Education*[140] local schools were sued for providing extended day care programming at a few of the elementary schools.[141] The North Carolina Court of Appeals cited previous cases that held "uniform" does not relate to individual "schools," but instead the system as a whole in which "every child[] is to have the same advantage, and be subject to the same rules and regulations."[142] The court in *Kiddie Korner* held: "The mandate does not require every school within every county or throughout the State to be identical in all respects. Such a mandate would be impossible to carry out as there are differences within a given school as the caliber of teacher and students differ."[143] Here, the court used

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[138] *Britt*, 357 S.E.2d. at 436.

[139] *Id*.

[140] 285 S.E.2d 110 (N.C. Ct. App. 1981).

[141] *Id*. at 112

[142] *Id*. at 113. *See also* Bd. of Educ. v. Bd. of Comm'rs of Granville Cnty., 93 S.E. 1001, 1002 (N.C. 1917) ("The term "uniform" here clearly does not relate to "schools," requiring that each and every school in the same or other district throughout the State shall be of the same fixed grade, regardless of the age or attainments of the pupils, but the term has reference to and qualifies the word "system" and is sufficiently complied with where, by statute or authorized regulation of the public-school authorities, provision is made for establishment of schools of like kind throughout all sections of the State and available to all of the school population of the territories contributing to their support.").

[143] *Kiddie Korner*, 285 S.E.2d at 113.

this reasoning to uphold the creation of day-care programming, but it could also conceivably be used to justify the offering of career and technical programs, alternate school calendars and schedules, the adoption of different assessment policies and overarching curricular framework. Accordingly, not only is true uniformity to the point of being identical not mandated by the North Carolina constitution, it may not even be a desirable outcome.

2. Minimal Basic Education

In another line of cases addressing the second lesson, and the one that closely mirrors the recent Sixth Circuit decision in *Gary B*., has to do with determining where the line is between an education that is constitutionally sufficient in North Carolina, and one that is constitutionally insufficient. The first of these cases is *Bridges v. Charlotte*,[144] in which the plaintiffs were suing the city of Charlotte for collecting additional taxes to contribute to the State Retirement Fund.[145] Not only did the North Carolina Supreme Court reference multiple times the importance of public education,[146] but it also held that the mandate set forth in the North Carolina Constitution was "not merely the bare necessity of instructional service."[147] Instead, the court held that necessary was relative and must be interpreted "consonant with the reasonable demands of social progress."[148]

Harris v. Board of Commissioners of Washington County,[149] the next case concerning a constitutionally sufficient system of education, allowed the Board of Commissioners of Washington County to increase property taxes in order to supplement the salaries of teachers in the public schools of the county.[150] The North Carolina Supreme Court held that the General Assembly, in establishing a general and uniform system of public schools, was not restricted by other provisions concerning the county commissioner's

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[144] 20 S.E.2d 825 (N.C. 1942).

[145] *Id*. at 828.

[146] *See id*. at 829. ("It is based not only upon the principle of justice to poorly paid State employees, but also upon the philosophy that a measure of freedom from apprehension of old age and disability will add to the immediate efficiency of those engaged in carrying on a work of first importance to society and the State.")

[147] *Id*. at 831.

[148] *Id*.

[149] 163 S.E.2d 387 (N.C. 1968).

[150] *Id*. at 389.

role in public schools.[151] Instead the court held: "This mandate contemplates a system of public schools sufficient to meet . . . the educational needs of the people of the State."[152]

The final two decisions concerning what is meant by a minimal basic education in North Carolina are procedurally related. In *Leandro v. State*, the plaintiffs included students from across the state in relatively poor school districts claiming that they did not receive an education meeting the minimal standard for a constitutionally adequate education.[153] Citing school facilities, low teacher salary supplements, and college admission as well as end-of-grade test results, plaintiffs alleged that there was a great disparity between the educational opportunities available in their districts and those in more wealthy districts.[154] In *Leandro* the North Carolina Supreme Court held that the state is required to provide equal access to a "sound basic education" for every child.[155] Further, the *Leandro* Court defined a sound basic education as follows:

> . . . [O]ne that will provide the student with at least: (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.[156]

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[151] *Id*. at 393.

[152] *Id*.

[153] *Leandro*, 488 S.E.2d 249, 252 (N.C. 1997).

[154] *Id*. *Leandro* also featured plaintiffs from rural districts as well as plaintiff-intervenors from urban districts each of whom made slightly different claims regarding the education being provided in their respective districts. *Id* at 252–53.

[155] *Id*. at 255.

[156] *Id.*

Three years later, when some of the plaintiffs from *Leandro* appeared again in front of the state supreme court, the court was asked in *Hoke County Board of Education v. State*[157] to determine whether the state had actually provided a sound basic education. To reach a conclusion, in *Hoke*, the court evaluated the funding levels as well as the educational outcomes of the plaintiff's schools and held that the plaintiffs had been denied their state constitutional right to a sound basic education as defined in *Leandro*.[158] In so holding, the *Hoke* Court gave a warning similar to Justice Marshall's quoted at the outset of this comment: "The children of North Carolina are our state's most valuable renewable resource. If inordinate numbers of them are wrongfully being denied their constitutional right to the opportunity for a sound basic education, our state courts cannot risk further and continued damage because the perfect civil action has proved elusive."[159] Just as Justice Marshall's warning has proven true, so too has the warning in *Hoke*.

Although the court in *Leandro* defined four broad standards for what is a sufficient education under the North Carolina State Constitution, North Carolina lawmakers were still left to determine exactly what should be done to ensure that all schools meet the *Leandro* standards. In the years that followed *Hoke*, the state's courts have held several hearings and issued reports, orders, and memoranda on the performance of high schools, the status of prekindergarten in North Carolina, and the needs of at-risk students.[160] In 2017, both the student-plaintiffs and the State agreed to use WestEd, an independent education consultant, to study the status of education in North Carolina and make recommendations on the ways the state can ensure a sound basic education for every child.[161] This report published by WestEd at the end of 2019 included eight major recommendations: funding reallocation; a more qualified, well-prepared, and diverse teaching workforce; more qualified and well-prepared principals; increasing access to early childhood education; better support available to high-poverty schools;

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[157] 599 S.E.2d 365 (N.C. 2004).

[158] *Id*. at 391.

[159] *Id*. at 377.

[160] *See* Ann McColl, *Everything You Need to Know About the Leandro Litigation*, EDNC (Feb. 17, 2020) https://www.ednc.org/leandro-litigation/.

[161] Alex Granados, *Court Finds 'Considerable, Systemic Work is Necessary to Deliver' on Leandro*, EDNC (Jan. 21, 2020) https://www.ednc.org/court-finds-considerable-systemic-work-is-necessary-to-deliver-on-leandro/.

a revitalized state assessment and school accountability system; establishment of a regional and statewide support system for school turnaround; and better monitoring of the state's compliance.[162]

In January of 2020, Wake County Superior Court Judge David Lee signed a consent order for the parties to develop a plan to move the state's schools towards meeting the *Leandro* standards based on the WestEd report by 2030.[163] In the consent order Judge Lee reiterated that North Carolina's public education was currently preventing thousands of students, mostly student of color and from economically disadvantaged backgrounds, from being able to participate in the economy and society.[164]

In June of 2021 Judge Lee signed an order to implement a Comprehensive Remedial Plan which had been set forth by the parties.[165] This plan included seven action items that roughly mirror the recommendations of the WestEd report.[166] In addition to the broad recommendations, the Comprehensive Remedial Plan includes discrete, individual, action steps, implementation timelines, responsible parties, and estimated State investment.[167] The court order stated that this plan is "necessary to remedy continuing constitutional violations and to provide the opportunity for a sound basic education to all public school children in North Carolina."[168] The order also stated that if North Carolina fails to implement the actions in the Comprehensive Remedial Plan, the court will enter a judgment granting declaratory relief and other such relief as needed to correct the wrong.[169]

At the time of publication of this comment, the North Carolina General Assembly remained in a standoff with Judge Lee and the plaintiffs on how to

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[162] *See* WESTED, SOUND BASIC EDUCATION FOR ALL: AN ACTION PLAN FOR NORTH CAROLINA, 33 (2019).

[163] Comprehensive Remedial Plan at 2, Hoke Cnty. Bd. of Educ. V. State, 599 S.E.2d 365 (2004) (No. 95-1158).

[164] *Id*.

[165] *See generally,* Order on Comprehensive Remedial Plan, Hoke Cnty Bd. of Educ. v. State, 599 S.E.2d 365 (2004) (95-CVS-1158).

[166] Comprehensive Remedial Plan, *supra* note 163, at 3–4.

[167] *Id*. at 5.

[168] Order on Comprehensive Remedial Plan, 7, Hoke Cnty Bd. of Educ. v. State, 599 S.E.2d 365 (2004) (No. 95-1158).

[169] *Id.* at 6 (citing Leandro v. State, 346 N.C. 336, 357 (1997)). The court also put into place a reporting process so that progress towards benchmarks can be tracked. *Id*. at 7.

proceed. Republican leaders in the General Assembly maintain that appropriations, such as those needed to implement the Comprehensive Remedial Plan, are in the exclusive domain of the legislative branch.[170] Meanwhile, in a November 2021 order, Judge Lee held that the state constitutional mandate to provide a sound basic education includes the necessary funding, as provided by taxation and appropriations.[171] The order stated: "When the General Assembly fulfills its constitutional role through the normal (statutory) budget process, there is no need for judicial intervention to effectuate the constitutional right. As the foregoing findings of fact make plain, however, this Court must fulfill its constitutional duty to effect a remedy at this time."[172] The order required that the state make available $1.7 billion to fund the Comprehensive Remedial Plan.[173]

While the final outcome of the *Leandro* ruling is still not yet totally clear, the case provides an important state analogy to the *Gary B.* case in the Sixth Circuit. First, the claims are similar because the plaintiffs claimed the education they received was inadequate. In each case, the courts stressed the importance of an adequate education in such a way that highlighted its potential fundamental status. Finally, in each case the plaintiffs' success depended clearly and narrowly defining what an adequate education would provide. In *Leandro*, the plaintiff's successfully argued for a four-factor framework – including the ability to function in a rapidly changing society, make informed civic decisions, engage in further education or training, and compete for gainful employment – for how to define a constitutional right to an education. Although state cases are not binding in federal courts, cases such as *Leandro* could be used to inform and guide jurisprudence on defining an adequate education at the federal level.

Leandro is just one example of how claims for an adequate education can be decided at the state level. Below I will more briefly discuss other successful claims concerning a right to education at the state level in order to

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[170] Alex Granados, *Leandro Judge Says He is 'Very Close' to Giving up on Republican Lawmakers*, EdNC (Sept. 8, 2021), https://www.ednc.org/2021-09-08-leandro-judge-says-he-is-very-close-to-giving-up-on-republican-lawmakers/.

[171] Order at 16, Hoke Cnty Bd. of Educ. v. State, 599 S.E.2d 365 (2004) (No. 95-1158).

[172] *Id*.

[173] Alex Granados, *Leandro Judge Orders $1.7 Billion for Plan to Ensure Student Access to a Sound Basic Education*, EDNC (Nov. 2021), https://www.ednc.org/2021-11-10-leandro-judge-orders-1-7-billion-for-plan-to-ensure-student-access-to-a-sound-basic-education/.

better understand if, and how, a similar right could be recognized and defined at the federal level.

B. The Other 49 States and a Minimal, Basic, or Adequate Education

North Carolina is not the only state in which a basic right to an education has been protected. All 50 state constitutions protect such a right and while that fact alone does not require that federal courts find a federal right to an education, these cases can help guide federal courts in determining how to define such a right.[174] In analyzing successful right-to-education claims at the state level, three major trends appear. These cases tend to be based on funding, physical access to school, and learning outcomes of students. In looking for how to narrowly define a federal right to an education, these three areas may provide an answer.

1. Funding Levels

Since *Rodriguez*, many of the state right-to-education cases have centered on the issue of school funding. Around 60 percent of the time, courts have held that the school funding system was a constitutional violation.[175] The first of these cases is *Robinson v. Cahill*[176] where the New Jersey Supreme Court held that the state's school funding and taxation scheme did not and could not satisfy the constitutional obligation of the state.[177] The taxation scheme was similar to that in *Rodriguez* in that it resulted in low-wealth districts having a lower expenditure per student than wealthy districts.[178] Unlike *Rodriguez*, the court in *Robinson* held that the state's funding scheme did result in a state constitutional violation and required that the legislature change the distribution scheme for education funding.[179]

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[174] *See* Liu, *supra* note 125. At 1323.

[175] *Id*.

[176] 303 A.2d 273 (N.J. 1973).

[177] *Id*. at 519.

[178] *Id.* at 481. The difference in *Robinson* was that the statutory scheme also required the state to supplement the budgets of these low-wealth school districts in order to ensure proper funding – the court found that the state funding did "not operate substantially to equalize the sums available per pupil."

[179] *Id*. at 520–21.

Despite this ruling, New Jersey continues to be one of the worst offenders in funding disparities today.[180]

In a more recent case, *Gannon v. State*,[181] the Kansas Supreme Court ordered the state to address significant shortfalls in how its public schools are funded.[182] In Kansas school funding came from both state and local sources with an allocation for additional state monies to go to less wealthy districts.[183] The court held that that the state had failed their constitutional duties in both the areas of adequacy and equity.[184] To come to this conclusion, the court held that the test for adequacy included numerous factors, which were statutorily codified in K.S.A. 2013 Supp. 72-1127, and is met when the education financing system is reasonably calculated to have all Kansas public education student meet or exceed those standards.[185] Likewise, the court set

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[180] *See* Sarah Mervosh, *How Much Wealthier Are White School Districts Than Nonwhite Ones? $23 Billion, Report Says*, N.Y. TIMES (Feb. 27, 2019), https://www.nytimes.com/2019/02/27/education/school-districts-funding-white-minorities.html.

[181] 319 P.3d 1196 (Kan. 2014).

[182] Emily Richmond, *Can a Court Decision Help Close the Achievement Gap?* THE ATLANTIC (Mar. 8, 2017), https://www.theatlantic.com/education/archive/2017/03/can-a-court-decision-help-close-the-achievement-gap/518859/.

[183] *Gannon*, 319 P.3d at 1205.

[184] *See generally id.*

[185] *Id*. at 1237. K.S.A. 2013 Supp. 72-1127 has since been recodified as K.S.A. 72-3218 and the requirements are as follows:

> Subjects and areas of instruction shall be designed by the state board of education to achieve the goal established by the legislature of providing each and every child with at least the following capacities:
>
> (1) Sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;
>
> (2) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;
>
> (3) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;
>
> (4) sufficient self-knowledge and knowledge of his or her mental and physical wellness;
>
> (5) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;
>
> (6) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and

forth a rule that when the legislative actions exacerbate the wealth-based disparities between districts, the school financing scheme will fall short of the equity standard set by the Kansas Constitution.[186] In addition to having fairly clear tests for adequacy and equity, the Kansas Supreme Court also gave guidance for the state legislature on a timeline to meet these minimum standards for education in the state.[187]

2. Physical Conditions and Access

Another aspect of education that state plaintiffs focus on is the physical conditions of and actual physical access to the school building.[188] Although these claims oftentimes are a result of funding, the following cases will be ones in which the plaintiffs' arguments focus on the physical conditions of the school.[189]

In *Campaign for Fiscal Equity v. State of New York*,[190] plaintiffs brought a claim against the State of New York arguing that "minimally acceptable educational services and facilities [were] not being provided."[191] The New York Court of Appeals defined a sound basic education as one that should "consist of basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury."[192] In this case, the court held that if the physical facilities were inadequate for children to obtain these skills, the State did not

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> (7) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

K.S.A. 72-3218 (c).

[186] *Gannon*, 319 P.3d at 1238–1239.

[187] *See generally id.* at 1251–52.

[188] One of the first of these cases was Abbott v. Burke, 495 A.2d 376 (N.J. 1985), a case that arose out of *Robinson v. Cahill*, in which school facilities were a central issue in attacking the adequacy of the state's funding scheme. David G. Sciarra, Koren L. Bell, and Susan Kenyon, *Safe and Adequate: Using Litigation to Address Inadequate K-12 School Facilities*, EDUC. L. CTR. (July 2006).

[189] This was a tactic that was used in *Brown* because it was generally less subjective than learning outcomes.

[190] 655 N.E.2d 661 (N.Y. 1995).

[191] *Id*. at 665.

[192] *Id*. at 666.

satisfy its constitutional obligation.[193] The court described what minimally adequate facilities should include: "enough light, space, heat, and air to permit children to learn . . . adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks."[194] Because of the procedural posture in this case, the court did not make a determination as to whether the State met this standard, but upheld that the plaintiffs' claim was sufficient.[195]

The courts in Ohio have also been asked to rule on the adequacy of classroom facilities in *DeRolph v. State*.[196] Here, the Ohio Supreme Court struck down large parts of the Classroom Facilities Act, an Ohio statute addressing the physical school buildings, on the grounds schools were so underfunded, that the law was unconstitutional.[197] Part of the court's reasoning for their holding were the results of a 1990 Ohio Public School Facility Survey which found that over $10 billion was needed for facility repair and construction.[198] The survey's findings were quoted by the court and they included: half of the buildings were 50 years or older, around half of the buildings lacked satisfactory electrical systems; only 17 percent of the heating systems and 31 percent of the roofs were satisfactory, 19 percent of the windows and 25 percent of the plumbing was adequate, only 20 percent of the buildings were handicap accessible, and only 30 percent of the schools had adequate fire alarms.[199] The court also included details about other health concerns such as: a school where 300 students were made sick by carbon monoxide poisoning, almost 70 percent of schools having asbestos that still needed to be removed, students breathing coal dust from the heating system, raw sewage flowing on athletics fields, arsenic in drinking water, and plaster falling from the ceiling so frequently that the principal worried it would hit a student.[200] The court found these conditions across the state to be neither safe

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[193] *Id*.

[194] *Id*.

[195] *Id*. at 666–67.

[196] 677 N.E.2d 733 (Ohio 1997). The Ohio Supreme Court had previously recognized the importance of buildings in an "efficient system of schools." Sciarra, *supra* note 188, at 12 (quoting Miller v. Korns, 140 N.E. 773, 776 (1923)).

[197] *DeRolph*, 677 N.E.2d at 747.

[198] *Id*. at 742.

[199] *Id.*

[200] *See id*. at 743–44.

nor conducive to learning and as such held that the state was failing in its constitutional obligation to provide students with a basic education.[201]

3. Learning Outcomes

The final strategy that plaintiffs in state courts have adopted is to attack the actual learning outcomes of school districts. This line of cases is very similar to the claims being made in *Leandro* and *Gary B.* These cases focus on markers such as curricular standards, test scores, graduation rates, and general self-sufficiency of the students as they move into adulthood. Generally, these claims argue that the schools are so inadequate that students are unable to be productive members of society.

The first of these cases is *Rose v. Council for Better Education*,[202] in which the Kentucky Supreme Court found that education was a fundamental right and that the General Assembly had failed to meet this obligation.[203] The court further stated: "Lest there be any doubt, the result of our decision is that Kentucky's *entire system* of common schools is unconstitutional."[204] Although this claim was made on the basis of education financing, the lower courts and the Kentucky Supreme Court spent a considerable amount of time looking at the outcomes of Kentucky public schools.[205] The court stated:

> The overall effect of appellants' evidence is a virtual concession that Kentucky's system of common schools is underfunded and inadequate; is fraught with inequalities and inequities throughout the 177 local school districts; is ranked nationally in the lower 20–25% in virtually every category that is used to evaluate educational performance; and is not uniform among the districts in educational opportunities.[206]

Additionally, the court noted that although poorer districts fared worse than wealthier districts, even the affluent schools in Kentucky fell below national standards and the levels of achievement of surrounding states.[207]

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[201] *Id.* at 746.

[202] 790 S.W.2d 186 (Ky. 1989).

[203] *Id*. at 206, 209.

[204] *Id*. at 215.

[205] *Id*. at 196–97.

[206] *Id*. at 197.

[207] *Id*. at 213.

Although the court stated that it was up to the general assembly to resolve this issue, the court supplied a seven-part definition of an efficient school system.[208] These seven parts focused on the outcomes of an education such as "sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization," "sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation," and "sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently."[209] Because the court recognized that education was within the authority of the state legislature it did not give any further direction as to how the legislature should work to meet this definition of efficient schools.[210]

A more recent case dealing with a state not meeting its constitutional obligations to provide an adequate education was *Cruz-Guzman v. State*,[211] in which families of Minnesota public schools, particularly those in Minneapolis and Saint Paul, claimed that there was a "high degree of segregation based on race and socioeconomic status" which resulted in "significantly worse academic outcomes" for schools that were predominantly comprised of students of color and students living in poverty.[212] The plaintiffs measured these outcomes with "graduation rates; pass rates for state-mandated Basic Standards Tests; and proficiency rates in math, science, and reading."[213] Here, the Minnesota Supreme Court reasoned that the language of the Education Clause of the Minnesota Constitution could not possibly have been intended to create an inadequate system which would not allow people to fulfill their duties as citizens.[214] Ultimately the court made clear that a determination of adequacy will require looking at outcomes and how well prepared students are.

Although all the above cases are at the state level and interpret state constitutional provisions, not federal law, they highlight some of the

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[208] *Id.* at 211–12. These seven factors are what would later inspire the Kansas Legislature in drafting K.S.A. 2013 Supp. 72-1127, *supra* note 185.

[209] *Id*. at 212. These seven factors are also very similar to the four that were developed in *Leandro*.

[210] *Id*. at 216.

[211] 916 N.W.2d 1, 10–11 (Minn. 2018).

[212] *Id*. at 5.

[213] *Id*.

[214] *Id*. at 12.

strategies that have worked in various states for plaintiffs making right-to-education claims. At other points in history federal courts have looked to how state courts handled questions of school integration, substantive due process, and education funding. Today federal plaintiffs, like those in *Gary B.*, might find it useful to present these trends in state law as guidance and support for the development of federal education law.

CONCLUSION: WHAT IS A LEGALLY ADEQUATE EDUCATION?

As federal courts begin to explore the possibility of recognizing a fundamental right to an education, they will also need to define this right. After *Brown*, it seemed as though education would be broadly protected, but *Rodriguez* made clear that was not the case. *Papasan* later distinguished that despite the bar on a broad federal right to an education, there might still be federal protection for a right to educational that is more narrowly defined.

It is this narrower definition of a right to education that plaintiffs have made successful claims for at the state and federal levels. Based on the lessons from North Carolina jurisprudence, as well as successful claims in other states, one can begin to see trends that might inform how a federally protected right to an education might be defined. By looking at existing case law across the nation, funding is brought up in a vast majority of cases. To be successful, plaintiffs need to argue that the current funding levels are either wholly inadequate or lead to great levels of disparity. The next claim that is frequently brought up is with regards to physical conditions and physical access to schools. Here, a successful argument might be that the physical conditions or access to the school is so bad that it is impossible for the child to receive an education.

The last area of successful claims are those that focus on educational outcomes. These tend to be hard to define, but they are critical to seeing real improvement. The argument here is that the outcomes of a given school, district or even state are simply inadequate. This could be that too few students are graduating, or that when they are graduating, students lack the skills necessary to contribute to society economically or as a citizen. Some of these standards from states even include looking at the student's future psychological well-being or intellectual fulfillment. Courts should look to states like Kentucky and Kansas who have several elements they want their students to be able to achieve. In *Leandro*, the court began do to this, but severely limited itself by only focusing on the child's economic future. Not only should courts broaden their horizons to ensure the education of the

whole child, but they should also allow these standards to be dynamic and adaptable as the world develops. Finally, while federal courts do not need to tell legislatures or school boards exactly how to achieve these ends, the standards should be as specific as possible and give as much guidance as possible.