

WHEN DEPRIVATION OF ACCESS TO LITERACY
INFRINGES ON INDIGENT PARENTS’ RIGHT TO DIRECT
THE EDUCATION OF THEIR CHILDREN

Dana Leone Kennedy†

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† Editor-in-Chief, *Cardozo Law Review* Volume 41. J.D. Candidate (June 2020), Benjamin N. Cardozo School of Law; B.A., Pace University, 2016. I would like to thank Professor David Rudenstine for his expert guidance and advice, without which this Note would not be possible. Thank you to the entire *Cardozo Law Review* staff for their feedback and diligence in preparing this Note for publication. To my parents, thank you for supporting me throughout my entire law school endeavor. I am so grateful for your endless encouragement.

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INTRODUCTION

Education quality is a major issue in America, with many children unable to gain access to literacy in state public school systems.¹ Unfortunately, there are public school districts in America where learning to read is not guaranteed and, in fact, not probable.² Children attend public schools where teachers do not show up for class or are unqualified, textbooks are either non-existent or outdated, roofs leak, and there are rodent and insect infestations.³ The quality of the school is

¹ Gary B. v. Snyder, 329 F. Supp. 3d 344, 366 (E.D. Mich. 2018) (“The conditions and outcomes of Plaintiffs’ schools, as alleged, are nothing short of devastating. When a child who could be taught to read goes untaught, the child suffers a lasting injury—and so does society.”); Valerie Strauss, *Too Many of America’s Public Schools Are Crumbling—Literally. Here’s One Plan to Fix Them.*, WASH. POST (Mar. 5, 2019), <https://www.washingtonpost.com/education/2019/03/05/too-many-americas-public-schools-are-crumbling-literally-heres-one-plan-fix-them/> [<https://perma.cc/KK8R-RWHD>]. For purposes of this Note, literacy is the ability to read and write, and specifically, the “ability to encode and decode language so as to use language to engage with the world—to understand, synthesize, analyze, reflect, and critique.” *Frequently Asked Questions*, RIGHT TO LITERACY, <https://www.detroit-accessstoliteracy.org/faq> [<https://perma.cc/Q5SA-MG68>].

² Gary B., 329 F. Supp. 3d 344; Lorelei Laird, *Judge Dismisses Lawsuit Alleging Constitutional Right to Literacy; Plaintiffs Vow Appeal*, A.B.A. J. (July 3, 2018, 10:21 AM), http://www.abajournal.com/news/article/judge_dismisses_lawsuit_alleging_constitutional_right_to_literacy_plaintiff [<https://perma.cc/ST64-9HDX>]; Strauss, *supra* note 1.

³ See, e.g., Complaint, Gary B. v. Snyder, 329 F. Supp. 3d 344 (E.D. Mich. 2018) (No. 2:16-cv-13292) (alleging that, unlike the majority of schools, schools in Detroit are without teachers and are rodent infested); see also Mary Rose Madden, *Baltimore Schools Closed After Outrage over Frigid Classrooms*, NPR (Jan. 3, 2018, 2:27 PM), <https://www.npr.org/2018/01/03/575337312/outrage-as-some-baltimore-students-attend-school-in-frigid-classrooms> [<https://perma.cc/NWY4-VMYE>] (“Baltimore’s public schools closed Thursday after parents and educators there complained students were enduring frigid classrooms with plumbing issues—conditions the local teachers union called ‘inhumane.’”); *Williams v. State of California*, ACLU S. CAL. [hereinafter ACLU], <https://www.aclusocal.org/en/cases/williams-v-state-california> [<https://perma.cc/L6SB-ZVDP>] (“Parents, students, and teachers argued that the

so inadequate that the school is not providing its students with access to literacy or a minimally adequate education.⁴ The public school is essentially providing no education at all.⁵

The Supreme Court held that children do not have a fundamental right to education,⁶ and in *Gary B. v. Snyder*, the United States District Court for the Eastern District of Michigan held that children do not have a fundamental right to access literacy or a minimally adequate education.⁷ However, the Supreme Court held that parents have a right to direct the upbringing and education of their children to prepare them for future obligations without state interference.⁸ When states have compulsory education laws,⁹ parents have the right to send their children to private school, public school, or even homeschool their children.¹⁰ In other words, states can mandate education,¹¹ but parents have significant discretion to choose where their children attend school, which a state cannot hinder as it is parents' natural duty to prepare their children for future obligations in society.¹²

State failed to provide thousands of public school students, particularly those in low-income communities and communities of color, with the basic necessities required for an education.”); Laird, *supra* note 2; Strauss, *supra* note 1 (“Too many [students] enter buildings that are crumbling—literally—and that suffer from problems, including poor air and water quality, mold, broken toilets and rodents.”).

⁴ See, e.g., *Gary B.*, 329 F. Supp. 3d 344; see also Laird, *supra* note 2; Strauss, *supra* note 1.

⁵ See *infra* Section I.D.

⁶ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973). A fundamental right is “[a] basic or foundational right, derived from natural law; a right deemed by the Supreme Court to receive the highest level of Constitutional protection against government interference.” *Fundamental Right*, YOURDICTIONARY.COM, <https://www.yourdictionary.com/fundamental-right> [<https://perma.cc/C2ED-BHKK>].

⁷ *Gary B.*, 329 F. Supp. 3d at 366.

⁸ *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399–401 (1923).

⁹ All states now have some form of compulsory education laws. Kevin S. Huffman, *Charter Schools, Equal Protection Litigation, and the New School Reform Movement*, 73 N.Y.U. L. REV. 1290, 1312 (1998); *Compulsory Attendance*, HOME SCH. LEAGUE DEF. ASS’N, https://hslsda.org/content/docs/nche/Issues/S/State_Compulsory_Attendance.asp [<https://perma.cc/Y2Y5-SJ4M>]; see *infra* Section II.A.

¹⁰ *Compulsory Attendance*, *supra* note 9; see *infra* Section I.B.

¹¹ *Compulsory Attendance*, *supra* note 9; see *infra* Section I.B.

¹² *Pierce*, 268 U.S. at 534–35 (“The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”); *Meyer*, 262 U.S. at 399–401.

Since states cannot prevent parents from sending their children to private school, a state cannot, through its actions or lack thereof, deprive parents of the ability to send their children to public school.¹³ In a state where parents are mandated to send their children to school, if state public schools fail to provide access to literacy, the state is essentially depriving parents of the ability to send their children to public school.¹⁴ In districts with inadequate public schools, parents with lower income do not have the same opportunity to send their children to private school or homeschool in order to provide access to literacy or a minimally adequate education.¹⁵ Instead, indigent parents have no alternative but to send their children to public school where the children are provided the equivalent of no education at all.¹⁶ When a state provides such poor quality education in its public schools that children are not afforded access to literacy, the state violates indigent parents' equal protection rights under the Fourteenth Amendment of the Constitution because they cannot exercise their right to choose their children's education and prepare their children for future obligations and responsibilities in the same way as parents with higher income.¹⁷

¹³ *Pierce*, 268 U.S. at 534–35; *Meyer*, 262 U.S. at 399–401.

¹⁴ See *infra* Sections I.D, II.B.

¹⁵ Richard J. Murnane et al., *Who Goes to Private School?*, EDUC. NEXT, <https://www.educationnext.org/who-goes-private-school-long-term-enrollment-trends-family-income> [<https://perma.cc/YE2J-89HT>]; *Homeschooling in the United States: 2003*, NAT'L CTR. FOR EDUC. STAT., <https://nces.ed.gov/pubs2006/homeschool/characteristics.asp> [<https://perma.cc/BBB7-P3AH>]. For purposes of this Note, indigent, poverty, poor, and low-income are classifications based on the federal government's poverty threshold. This is a dollar amount determined by the federal government based on the household's size and composition. *U.S. Federal Poverty Guidelines Used to Determine Financial Eligibility for Certain Federal Programs*, OFF. ASSISTANT SECRETARY FOR PLANNING & EVALUATION, <https://aspe.hhs.gov/poverty-guidelines> [<https://perma.cc/CV7Q-M9JG>].

¹⁶ See, e.g., *Complaint, Gary B. v. Snyder*, 329 F. Supp. 3d 344 (E.D. Mich. 2018) (No. 2:16-cv-13292); see *infra* Section I.D; see also Laird, *supra* note 2; Strauss, *supra* note 1; ACLU, *supra* note 3.

¹⁷ See *infra* Part III. The Fourteenth Amendment of the U.S. Constitution states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

This Note considers the constitutionality of states mandating school attendance yet failing to provide education that results in students being literate. This Note focuses on the Equal Protection Clause and low-income parents' right to direct the education of their children.¹⁸ This Note argues that states that compel education, yet have inadequate schools that deprive children of access to literacy, violate indigent parents' equal protection rights because the state is substantially burdening the low-income parents' ability to direct the education of their children and prepare their children for future obligations.¹⁹ Because of this focus, this Note does not propose that the Supreme Court revisit the issue of education as a fundamental right for children, nor does it intend to compel states to provide education.²⁰

This Note proceeds in three Parts. Part I describes the history of education in the United States and the background on parents' right to direct the education and upbringing of their children. It also examines the present state of education in America with an emphasis on poverty and school conditions. Part II analyzes an Equal Protection Clause claim regarding low-income parents' right to direct the education of their children when public schools are not providing their children access to literacy. Part III proposes that states can remedy this equal protection violation by increasing funding to provide better school conditions, which would afford children access to literacy in the public schools.

I. BACKGROUND

A. *Compulsory Education Laws*

There is no dispute that education is fundamentally important in American society.²¹ In *Brown v. Board of Education*, the Supreme Court recognized the importance of education in a democratic society, acknowledging that children cannot reasonably be expected to succeed

¹⁸ *Pierce*, 268 U.S. 510; *Meyer*, 262 U.S. 390.

¹⁹ *Pierce*, 268 U.S. 510; *Meyer*, 262 U.S. 390.

²⁰ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that children do not have the fundamental right to an education).

²¹ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954), *supplemented*, 349 U.S. 294 (1955).

if they are not provided an opportunity to acquire an education.²² According to the Court, education is necessary for citizens to perform essential public functions, like serve in the armed forces or obtain a job.²³ Education also facilitates adjusting to new environments and introduces cultural values.²⁴ Thus, education is intended to provide children with the indispensable tools to become valuable, productive members of their community.²⁵

While education is now vital to a democratic society,²⁶ formal education was not originally mandated in America.²⁷ During colonial times, roughly ten percent of children went to school, and these children were typically from the wealthiest families.²⁸ Massachusetts Bay Colony was the first to enact some form of a mandatory education in 1642, requiring parents to teach their children to read and provide religious instruction for their children.²⁹ Larger towns were also required to

²² *Id.* The Court explained:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Id. at 493.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*; *A Brief History of Education in the United States*, in SOCIOLOGY: UNDERSTANDING AND CHANGING THE SOCIAL WORLD 16.1 (2010), <http://open.lib.umn.edu/sociology/chapter/16-1-a-brief-history-of-education-in-the-united-states> [<https://perma.cc/MAW3-VQEU>] ("Education is the social institution through which a society teaches its members the skills, knowledge, norms, and values they need to learn to become good, productive members of their society.").

²⁶ See *supra* text accompanying notes 21–25.

²⁷ *A Brief History of Education in the United States*, *supra* note 25; *Compulsory Attendance*, *supra* note 9.

²⁸ *A Brief History of Education in the United States*, *supra* note 25.

²⁹ *Id.*; *Compulsory Attendance*, *supra* note 9.

provide an elementary school so children could learn religion and learn to read and write.³⁰

The next bout of education reform came after the Revolutionary War.³¹ In order to create a unified nation,³² textbooks were written that enforced patriotism and religious beliefs, as well as standardized spelling and pronunciation.³³ However, in this era, it was still only children from wealthy families that were attending schools.³⁴ For the next 200 years, education laws remained minimal and did not change significantly.³⁵ Education laws continued to be geared towards ensuring that children knew what it meant to be an honorable member of society, were able to read the Bible, or could learn a trade through an apprenticeship.³⁶ Education also remained the responsibility of the family.³⁷

In the mid-1800s, compulsory education laws re-emerged with a vengeance due to child labor disputes, immigration, and industrialization.³⁸ The laws were intended to protect the welfare of children and to teach children how to read, write, and do arithmetic so that they could thrive in an industrial economy.³⁹ Education reform was also intended to unite the nation and educate immigrants on "American values."⁴⁰ By 1918, every state had compulsory attendance laws.⁴¹ This was a crucial development because it became possible for all children from all social classes to attend school for free.⁴² Governments in all fifty

³⁰ *A Brief History of Education in the United States*, *supra* note 25.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Compulsory Attendance*, *supra* note 9.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *A Brief History of Education in the United States*, *supra* note 25; *Compulsory Attendance*, *supra* note 9.

³⁹ *A Brief History of Education in the United States*, *supra* note 25; *Compulsory Attendance*, *supra* note 9.

⁴⁰ *A Brief History of Education in the United States*, *supra* note 25; *Compulsory Attendance*, *supra* note 9.

⁴¹ *Compulsory Attendance*, *supra* note 9.

⁴² *A Brief History of Education in the United States*, *supra* note 25.

states ensured that every student was able to go to school without having to pay.⁴³

All states now have an education clause in their constitution designating a duty on the state to educate its citizens, and all states now have some form of compulsory education laws.⁴⁴ These laws differ from state to state, but they all generally mandate that children attend school, either private or public, with some exceptions for homeschooling, during a specified period of years.⁴⁵ Additionally, the education laws typically require students to attend a certain amount of school days per year, which is enforced by state courts and local law enforcement agencies.⁴⁶ When children do not attend school or do not meet the mandated minimum attendance requirement, parents are held legally responsible because parents are legally required to send their children to school.⁴⁷ If the child fails to attend school, the parent faces the consequences, such as being fined or even imprisoned.⁴⁸

⁴³ Aaron Jay Saiger, *School Choice and States' Duty to Support "Public" Schools*, 48 B.C. L. REV. 909, 915 (2007).

⁴⁴ Huffman, *supra* note 9; *Compulsory Attendance*, *supra* note 9. Saiger states:

Every State constitution has a clause that discusses primary and secondary education. In Florida, to take a state discussed at greater length below, the constitution requires that "[a]dequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education." The Ohio constitution, also discussed below, requires its General Assembly to "make such provisions, by taxation, or otherwise, as . . . will secure a thorough and efficient system of common schools throughout the State." The New Jersey constitution, in a famous provision that has generated decades of litigation and mountains of scholarly analysis, mandates a "thorough and efficient system of free public" primary and secondary schools. Other states' clauses, although they vary in scope and in specific language, generally deploy subsets of a constellation of key terms: education should be "thorough," "public," "common," "free," "general," "uniform," "efficient."

Saiger, *supra* note 43, at 925–26 (internal citations omitted).

⁴⁵ *Compulsory Attendance*, *supra* note 9.

⁴⁶ *Id.* ("These laws are enforced by local attendance officers, law enforcement officers, and courts.").

⁴⁷ *Id.*

⁴⁸ Dana Goldstein, *Inexcusable Absences*, NEW REPUBLIC (Mar. 6, 2015), <https://newrepublic.com/article/121186/truancy-laws-unfairly-attack-poor-children-and-parents> [<https://perma.cc/5Q25-G657>] ("[T]he criminalization of truancy often pushes students further away from school, and their families deeper into poverty."); Nadja Popovich, *Do US Laws that Punish Parents for Truancy Keep Their Kids in School?*, GUARDIAN (June 23, 2014, 11:59 PM), <https://www.theguardian.com/education/2014/jun/23/sp-school-truancy-fines-jail->

B. Parents' Right to Direct the Upbringing and Education of Their Children

The Due Process Clause of the Fourteenth Amendment protects the constitutional right of parents and their children to live together without governmental interference.⁴⁹ This includes the parents' interest in the care and custody of their children.⁵⁰ More specifically, parents have the right to direct the upbringing and education of their children to prepare them for future obligations without undue interference from the state.⁵¹ In other words, parents have broad discretion in choosing where to send their children to school.⁵² States still have the right to compel parents to send their children to school, but the state's right is limited by the parents' constitutional right to choose the education that

parents-punishment-children [<https://perma.cc/W6EJ-C5XW>]; Molly Redden, *The Human Costs Of Kamala Harris' War On Truancy*, HUFFPOST (March 27, 2019, 4:50 PM), https://www.huffpost.com/entry/kamala-harris-truancy-arrests-2020-progressive-prosecutor_n_5c995789e4b0f7bfa1b57d2e [<https://perma.cc/5GP9-XFRW>] ("We are putting parents on notice," Harris said at her 2011 inauguration. "If you fail in your responsibility to your kids, we are going to work to make sure you face the full force and consequences of the law.""). For example:

[u]nder New York's compulsory education laws, it's the responsibility of parents to make sure their children go to school. If they don't do that, they could be charged with violating the law, unless they can show that they aren't able to control their kids. A first offense comes with a maximum fine of \$10 or 10 days in jail, but each violation after that could result in a fine of \$50 and/or 30 days in jail.

E.A. Gjelten, *What Happens to Truants and Their Parents in New York*, LAWYERS.COM (citing N.Y. EDUC. LAW §§ 3212, 3233 (McKinney 2005)), <https://www.lawyers.com/legal-info/research/education-law/what-happens-to-truants-and-their-parents-in-new-york.html>.

⁴⁹ U.S. CONST. amend. XIV, § 1; MARY A. LENTZ, LENTZ SCHOOL SECURITY § 1:1 (12th ed. 2018). It is important to note that the government can interfere with the parent's decision about their child when it is believed that the parents are not acting in the best interest of the child. See Alexa Renee, *When Can the Government Override a Parent's Medical Decision in the U.S.?*, ABC10 (July 25, 2017, 1:04 PM), <https://www.abc10.com/article/news/local/when-can-the-government-override-a-parents-medical-decision-in-the-us/459250777> [<https://perma.cc/T2HL-E33A>] ("The *parens patriae* doctrine gives the state the right to intervene with a parent's decision when it's believed they are not acting in the best interest for the child's well-being.").

⁵⁰ LENTZ, *supra* note 49.

⁵¹ 59 AM. JUR. 2D *Control of Education* § 23 (2018); *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399–401 (1923); William G. Ross, *The Contemporary Significance of Meyer and Pierce for Parental Rights Issues Involving Education*, 34 AKRON L. REV. 177, 182–83 (2000).

⁵² LENTZ, *supra* note 49.

their children receive.⁵³ Thus, states cannot prevent parents from choosing a specific educational program for their children or foreclose the possibility of parents choosing a certain path of education for their children.⁵⁴ Essentially, the parent speaks for the child when it comes to matters of education.⁵⁵ The theory is that children are not capable of educating themselves, and therefore parents are responsible and have the right to prepare their children for their future.⁵⁶

1. Establishing the Right

As compulsory education laws became stricter, more debate ensued about their constitutionality, especially in regard to parental rights.⁵⁷ Eventually, compulsory education and parental right disputes made their way up to the Supreme Court.⁵⁸ In a series of cases, the Supreme Court acknowledged the right of parents to direct the upbringing and education of their children without undue interference by the state.⁵⁹

⁵³ *Control of Education*, *supra* note 51 ("For example, the 14th Amendment prevents states from denying parents the right to choose private schools for their children's education.").

⁵⁴ *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 533 (1st Cir. 1995) (citing *Meyer*, 262 U.S. at 402). States cannot, in effect, standardize the education of its children by mandating that parents send their child to one specific type of school. Typically, this discussion comes up when parents want to remove their children from public school and send their children to private school. The Court has held that the school cannot force parents to send their children to public school only. But, it could arguably be applied in the reverse where the State cannot deny parents the ability to send their children to public school. See *Pierce*, 268 U.S. 510; *Control of Education*, *supra* note 51; Saiger, *supra* note 43, at 914-15.

⁵⁵ Barbara Bennett Woodhouse, *Speaking Truth to Power: Challenging "The Power of Parents to Control the Education of Their Own,"* 11 CORNELL J.L. & PUB. POL'Y 481, 487-88 (2002).

⁵⁶ *Pierce*, 268 U.S. at 535; Woodhouse, *supra* note 55.

⁵⁷ *Compulsory Attendance*, *supra* note 9.

⁵⁸ *Pierce*, 268 U.S. at 534-35; *Meyer*, 262 U.S. at 399-401; Ross, *supra* note 51; *Compulsory Attendance*, *supra* note 9.

⁵⁹ *Pierce*, 268 U.S. at 534-35; *Meyer*, 262 U.S. at 399-401; Ross, *supra* note 51. Post *Pierce* and *Meyer*, the Supreme Court, as well as lower courts, have continued to enforce parents' right to direct the upbringing and education of their children. See, e.g., *Troxel v. Granville*, 530 U.S. 57 (2000) (recognizing the interest of parents in directing the upbringing and education of their children as one of the oldest fundamental rights recognized); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (affirming the liberty interest of parents to direct the upbringing of their children); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); *Hot, Sexy & Safer*

The parental right was first established in 1923, in *Meyer v. Nebraska*.⁶⁰ The Supreme Court held unconstitutional a state statute that forbade teaching any child any language other than English in private or public school if the child had not completed the eighth grade.⁶¹ The Supreme Court focused on the right of parents to control and direct the education of their children.⁶² The Court determined that establishing a home and raising children is a liberty interest protected by the Fourteenth Amendment.⁶³ The Court also found that parents have a “natural duty” to provide their children an education that they find suitable.⁶⁴ This right is enforced by all states through their compulsory education laws.⁶⁵ According to the Court, states may not arbitrarily interfere with this liberty interest under the pretext of protecting the public unless the legislative action is reasonably related to a legitimate state interest.⁶⁶ In *Meyer*, knowledge of the German language could not reasonably be considered harmful to justify infringing on the parents’ constitutional right to direct the education of their children.⁶⁷ To the

Prods., Inc., 68 F.3d at 533–34 (holding the State cannot prohibit parents from educating their children, and the State cannot prevent parents from choosing a different path of education for their children); see also Linda L. Schlueter, *Parental Rights in the Twenty-First Century: Parents as Full Partners in Education*, 32 ST. MARY’S L.J. 611, 617; Richard W. Garnett, *Taking Pierce Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109, 124–27 (2000). The parental right is not explicit in the Constitution. According to the Court, this is an implicit liberty right “guaranteed by the Fourteenth Amendment’s protection of ‘life, liberty, and property.’” Eric W. Schulze, *The Constitutional Right of Parents to Direct the Education of Their Children*, 138 EDUC. L. REP. 583, 584 (1999).

⁶⁰ *Meyer*, 262 U.S. at 399–401; Schulze, *supra* note 59.

⁶¹ *Meyer*, 262 U.S. at 400; Schulze, *supra* note 59.

⁶² *Meyer*, 262 U.S. at 399–401; Schulze, *supra* note 59.

⁶³ *Meyer*, 262 U.S. at 399; Schulze, *supra* note 59. The Court, while not exactly defining what the liberty right guarantees, has stated certain rights which are encompassed by it. These include:

the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer, 262 U.S. at 399.

⁶⁴ *Meyer*, 262 U.S. at 400; Schulze, *supra* note 59.

⁶⁵ *Meyer*, 262 U.S. at 400; *Compulsory Attendance*, *supra* note 9.

⁶⁶ *Meyer*, 262 U.S. at 399–400 (citing *Lawton v. Steele*, 152 U.S. 133 (1894)).

⁶⁷ *Id.* at 400–03.

contrary, learning German is typically deemed to be a valuable skill one would want to obtain.⁶⁸

In *Pierce v. Society of Sisters*, the Supreme Court reaffirmed the right of parents to choose their children's education that was announced in *Meyer*.⁶⁹ The Court held it unconstitutional for states to compel children to attend public schools.⁷⁰ The Court prohibited states from forcing parents to educate their children by one specific type of school with the intention of preserving the diversity process of education.⁷¹ However, the Court did support regulation of education by states to further their interest in education.⁷² Per the Court, states may regulate, supervise, examine, and inspect schools, teachers, and students.⁷³ States may also mandate that children of a certain age attend school, and states may require certain studies to be taught to ensure a functioning, moral society.⁷⁴ But forcing parents to send their children to public school unreasonably conflicts with the parents' liberty interest in directing and choosing the education of their own children.⁷⁵ According to the Court, forcing parents to send their children to public school denies parents the ability to choose the school that they believe will provide suitable learning opportunities for their own children⁷⁶ and hinders the parents ability to prepare their children for future obligations.⁷⁷

⁶⁸ *Id.*

⁶⁹ *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925); *Meyer*, 262 U.S. at 399–401; Christopher J. Klicka, *Decisions of the United States Supreme Court Upholding Parental Rights as "Fundamental,"* HOME SCH. LEAGUE DEF. ASS'N (Oct. 27, 2003), <https://hslida.org/content/docs/nche/000000/00000075.asp> [<https://perma.cc/LLR8-KA3E>].

⁷⁰ *Pierce*, 268 U.S. at 534–35; *Compulsory Attendance*, *supra* note 9.

⁷¹ Klicka, *supra* note 69 (“The holding in *Pierce*, therefore, preserves diversity of process of education by forbidding the State to standardize the education of children through forcing them to only accept instruction from public schools.”).

⁷² *Pierce*, 268 U.S. at 534–35; Saiger, *supra* note 43, at 916.

⁷³ *Pierce*, 268 U.S. at 534.

⁷⁴ *Id.*

⁷⁵ *Id.* at 534–35 (“Under the doctrine of *Meyer v. Nebraska*, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.”).

⁷⁶ *Id.* at 532.

⁷⁷ *Id.* at 535 (“The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”).

2. Application of the Parental Right

While the Supreme Court established that parents have a constitutional right to direct the upbringing and education of their children,⁷⁸ the Court has not determined or applied a consistent level of scrutiny⁷⁹ when analyzing violations of the parental right.⁸⁰ Both *Pierce* and *Meyers* seem to apply rational basis review⁸¹ to strike down the state laws.⁸² Then, in *Troxel v. Granville*, the Court held unconstitutional a state statute that allowed third parties to petition for visitation at any time.⁸³ The Court held the state statute violated the parents' liberty interest in the "care, custody, and control of their children."⁸⁴ The plurality, concurring, and dissenting opinions all articulated a different level of scrutiny that should be applied when a court analyzes the parental right.⁸⁵ The plurality noted the importance of the parental right but did not articulate a level of scrutiny.⁸⁶ Justice Thomas's concurrence,

⁷⁸ Klicka, *supra* note 69; *see infra* Section II.B.

⁷⁹ "The Supreme Court has different levels on determining if a law has infringed upon the rights of an individual (or group) under the 14th Amendment." Bhanodai Pippala, *Levels of Scrutiny in the Equal Protection Clause*, ODYSSEY (Nov. 21, 2016), <https://www.theodysseyonline.com/equal-protection-levels-scrutiny> [<https://perma.cc/PE8U-2RQ7>]. The levels are strict scrutiny, intermediate scrutiny, and rational basis scrutiny. *Id.*

⁸⁰ For more information, see Margaret Ryznar, *A Curious Parental Right*, 71 SMU L. REV. 127, 157 (2018). Ryznar theorized that there is inconsistency because the parental right is too complex and spans many different issues so one level of scrutiny is not appropriate or easy to define. She suggests determining the level of scrutiny based on the specific parental issue at stake. *Id.* at 130–32.

⁸¹ Rational basis scrutiny is the lowest level of scrutiny. Courts will uphold a law under rational basis if the law is rationally related to a legitimate state interest. Pippala, *supra* note 79.

⁸² Both *Meyer* and *Pierce* use language such as "reasonable relation," which infers a standard of rational review to analyze the legislation. *Pierce*, 268 U.S. at 534–35 ("As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state."); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) ("The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect.").

⁸³ *Troxel v. Granville*, 530 U.S. 57, 67–68 (2000); Ryznar, *supra* note 80.

⁸⁴ *Troxel*, 530 U.S. at 66–67.

⁸⁵ Ryznar, *supra* note 80, at 134.

⁸⁶ *Troxel*, 530 U.S. at 66–67, 80 (Thomas, J., concurring) ("The opinions of the plurality, Justice Kennedy, and Justice Souter recognize such a right, but curiously none of them articulates the appropriate standard of review."); Ryznar, *supra* note 80, at 134.

on the other hand, emphasized that the proper level of scrutiny is strict scrutiny.⁸⁷ In dissent, Justice Scalia wrote that the parental right should only be afforded rational basis review.⁸⁸ Because the Court did not articulate a clear level of scrutiny, lower courts have been inconsistent with the level of scrutiny applied in parental right cases.⁸⁹

In cases where there has been a total deprivation of the parental right due to the parent's socioeconomic status, the Court has used intermediate scrutiny.⁹⁰ In *M.L.B. v. S.L.J.*, the Court used a heightened standard of review when analyzing an equal protection violation of an indigent woman whose parental rights were terminated.⁹¹ Her appeal was dismissed because M.L.B. lacked the funds required by the State to pay the advance record preparation fees.⁹² The Court held that the State violated the Equal Protection Clause in denying M.L.B. appellate review on the sufficiency of the evidence used to terminate M.L.B.'s parental rights based on her inability to afford to pay the funds for the appeal.⁹³ The Court relied on the importance of the fundamental right to make choices about the upbringing of her children, and the importance of

⁸⁷ *Troxel*, 530 U.S. at 80 (Thomas, J., concurring) ("[P]arents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them. . . . I would apply strict scrutiny to infringements of fundamental rights."); Ryznar, *supra* note 80, at 134. If a fundamental right or suspect class is involved, courts will apply strict scrutiny when analyzing the claim. Pippala, *supra* note 79. Strict scrutiny is the highest standard. *Id.* Strict scrutiny requires that the State actor has a compelling interest and the State's action be narrowly tailored to further that interest using the least drastic means necessary. *Id.*

⁸⁸ *Troxel*, 530 U.S. at 92 (Scalia, J., dissenting) ("[T]he theory of unenumerated parental rights . . . has small claim to *stare decisis* protection."); Ryznar, *supra* note 80, at 134.

⁸⁹ Ryznar, *supra* note 80, at 127–29.

⁹⁰ See *Equal Protection, Poverty, and Inequality of Wealth*, EXPLORING CONST. CONFLICTS, <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/wealthandepc.html> [<https://perma.cc/28NM-BUYJ>]. For intermediate scrutiny, there is a heightened standard of review, but it is not as rigorous as strict scrutiny. The court must analyze whether there is an important state interest and whether the state conduct is substantially related to the State's purported interest. Pippala, *supra* note 79. To prompt an intermediate level of review, the alleged class needs to have similar characteristics to a suspect class, the right violated needs to be important, and the disability of the class needs to be extremely substantial. Russell W. Galloway, Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121, 157–58 (1989).

⁹¹ *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996); see *Equal Protection, Poverty, and Inequality of Wealth*, *supra* note 90.

⁹² *M.L.B.*, 519 U.S. at 106.

⁹³ *Id.* at 106–07.

protecting this right from undue interference by the state.⁹⁴ According to the Court, parents have a vital interest in the care, custody, and management of their children that necessitates deference and protection unless a state can assert a powerful countervailing interest.⁹⁵ While noting that poverty is not a suspect class,⁹⁶ the Court emphasized that where a state adversely interferes in the family context, the Court will step in to protect the interest of the indigent person.⁹⁷

C. *Education Is Not a Fundamental Right in America*

While parents have the right to direct their children's education, children do not have a fundamental right to education protected by the Due Process Clause.⁹⁸ In 1973, the Supreme Court foreclosed the idea that education is a fundamental right protected by the Constitution in *San Antonio Independent School District. v. Rodriguez*.⁹⁹ Per the Court, fundamental rights need to be explicit or implicit in the Constitution, and education is not.¹⁰⁰ Something cannot be considered a fundamental right just because it is a central function of the state or undisputedly

⁹⁴ *Id.* at 116–17 (“Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as ‘of basic importance in our society,’ . . . rights sheltered by the Fourteenth Amendment against the State’s unwarranted usurpation, disregard, or disrespect.”).

⁹⁵ *Id.* at 117–18. “[A] parent’s desire for and right to ‘the companionship, care, custody, and management of his or her children’ is an important interest,” one that “undeniably warrants deference and, absent a powerful countervailing interest, protection.” *Id.* (quoting *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27 (1981)).

⁹⁶ *Id.* at 126. The four suspect classes are race, religion, national origin, and alienage. These groups are subject to strict scrutiny. See *Suspect Classification*, CORNELL L. SCH., https://www.law.cornell.edu/wex/suspect_classification [<https://perma.cc/VG3F-EHRU>]. Plaintiffs have been unsuccessful in convincing the Court that wealth is a suspect class. Typically, state conduct that places unequal burdens on low income individuals is only subject to rational review. See *Equal Protection, Poverty, and Inequality of Wealth*, *supra* note 90.

⁹⁷ *M.L.B.*, 519 U.S. at 117–18. The Court noted that the disparate impact was based solely on one’s ability to pay and the right was completely terminated. This is similar in the education context where the disparate impact affects those who cannot remedy the effects of inadequate school districts, essentially destroying the parent’s ability to direct the education of their children. See *id.* at 126–27.

⁹⁸ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973); see *infra* Section I.C.

⁹⁹ *San Antonio Indep. Sch. Dist.*, 411 U.S. at 35.

¹⁰⁰ *Id.* at 33.

important.¹⁰¹ However, in dicta, the Court left open the possibility that there could be a constitutional violation if an education system does not provide children with a minimally adequate education or the opportunity to attain basic minimal skills required to take advantage of their fundamental rights actually guaranteed by the Constitution, like freedom of speech or to engage in the political process.¹⁰²

Because the Court held in *San Antonio Independent School District* that education is not a fundamental right and thus not subject to strict scrutiny,¹⁰³ cases regarding access to education have typically been reviewed under a rational basis standard.¹⁰⁴ For example, *Kadrmas v. Dickinson Public Schools District* applied rational review scrutiny when analyzing whether or not states could charge a fee to transport students to and from school.¹⁰⁵ The claimants alleged that the fee deprived children who could not afford to pay the fee access to education.¹⁰⁶ The Court held that the State's action was rationally related to the State's purpose of encouraging local districts to provide bus service and, therefore, survived equal protection scrutiny.¹⁰⁷ In affording rational basis review, the Court relied on the fact that wealth is not a suspect class and education is not a fundamental right.¹⁰⁸ The Court further articulated that its rationale in using rational basis review instead of intermediate scrutiny was because the children were only denied access to education because their parents chose not to pay the transportation

¹⁰¹ *Id.* at 30. For example, there is no fundamental right to shelter or housing even though it is indisputably important. *Id.* at 32.

¹⁰² *Id.* at 36–37. However, the Southern Division of the United States District Court for the Eastern District of Michigan recently held that access to literacy or minimally basic, adequate education is also not a fundamental right. *Gary B. v. Snyder*, 329 F. Supp. 3d 344 (E.D. Mich. 2018).

¹⁰³ *San Antonio Indep. Sch. Dist.*, 411 U.S. at 35; *Equal Protection, Poverty, and Inequality of Wealth*, *supra* note 90.

¹⁰⁴ *San Antonio Indep. Sch. Dist.*, 411 U.S. at 40 (“A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the State’s system be shown to bear some rational relationship to legitimate state purposes.”); *Equal Protection, Poverty, and Inequality of Wealth*, *supra* note 90.

¹⁰⁵ *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 461–62 (1988); *Equal Protection, Poverty, and Inequality of Wealth*, *supra* note 90.

¹⁰⁶ *Kadrmas*, 487 U.S. at 462.

¹⁰⁷ *Id.* at 461–62.

¹⁰⁸ *Id.* at 458.

fee.¹⁰⁹ Furthermore, the Court did not believe that the transportation fee would create illiterate children and increase problems like unemployment, welfare, and crime.¹¹⁰

While education cases are typically afforded a standard of rational basis review, in education cases that allege a state has denied a specific group a specific right, the Court has afforded plaintiffs intermediate scrutiny.¹¹¹ For example, in *Plyler v. Doe*, the Court applied heightened scrutiny to hold that the exclusion of undocumented children from Texas public schools violated the Equal Protection Clause.¹¹² The Court reaffirmed that education is not a fundamental right but emphasized the importance of education to our society.¹¹³ In discussing education, the Court noted that the denial of education to a child has a lasting negative impact on the child and on society as a whole.¹¹⁴ Education is vital to

¹⁰⁹ *Id.* at 459–60 (“Sarita was denied access to the school bus only because her parents would not agree to pay the same user fee charged to all other families that took advantage of the service.”).

¹¹⁰ *Id.* at 459–60.

¹¹¹ *Plyler v. Doe*, 457 U.S. 202, 223–24 (1982); Huffman, *supra* note 9, at 1307.

¹¹² *Plyler*, 457 U.S. at 223–24. Texas attempted to exclude undocumented children from state public schools by mandating that the undocumented children pay a full tuition before attending the public school. The Court noted that:

[t]his situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.

Id. at 218–19.

¹¹³ *Id.* at 221.

¹¹⁴ *Id.* The Court recognized:

The American people have always regarded education and the acquisition of knowledge as matters of supreme importance. We have recognized the public schools as a most vital civic institution for the preservation of a democratic system of government, and as the primary vehicle for transmitting the values on which our society rests. As pointed out early in our history, some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. And these historic perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists. In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society.

Id. (internal citations and quotation marks omitted).

America's culture and political life.¹¹⁵ Furthermore, education is important to society's basic institutions and in ensuring that people are financially successful, which benefits all of society.¹¹⁶ The heightened scrutiny did not rest on education as a fundamental right or on the undocumented children being a suspect class.¹¹⁷ Rather, the heightened scrutiny was a result of the combination of the importance of education and the discrimination based on children's status as innocent undocumented children.¹¹⁸ A specific group was disadvantaged, and education was so important that to be denied it would impose a severe disadvantage on a discrete group of innocent children.¹¹⁹

D. *Education in Public Schools*

1. School Conditions

Many present-day controversies about education focus on the quality of education and resources being offered in state public schools.¹²⁰ In certain poverty stricken school districts throughout the country, the physical conditions of schools are so inadequate that they are essentially falling apart.¹²¹ As a result of inadequate funding,¹²² the physical school buildings are substandard, with issues such as plaster

¹¹⁵ *Id.* The Court emphasized that there are "significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests." *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* To justify the denial of free public education to a discrete group of innocent children the State needed to show that the denial furthered a substantial state interest. *Id.* at 224.

¹¹⁸ *Id.* at 221.

¹¹⁹ *Id.*

¹²⁰ Gary B. v. Snyder, 329 F. Supp. 3d 344 (E.D. Mich. 2018); ACLU, *supra* note 3. "There are currently lawsuits in Michigan, New Mexico, and California seeking to establish that school districts have violated a student's 'right to literacy' by providing inadequate learning conditions and insufficient school funding. The 'right to literacy,' they argue, requires better conditions and more funding." Lindsey M. Burke & Caroline Willcox, *Creating a "Right to Literacy" Won't Ensure Children Learn to Read*, HERITAGE FOUND. (Aug. 6, 2018), <https://www.heritage.org/education/commentary/creating-right-literacy-wont-ensure-children-learn-read> [<https://perma.cc/HKW2-KHRF>].

¹²¹ *A Brief History of Education in the United States*, *supra* note 25, at 16.2; see sources cited *supra* note 3.

¹²² See Strauss, *supra* note 1.

falling off the walls, leaking roofs, malfunctioning climate control, rat droppings, and insect infestations in classrooms.¹²³ For example, the complaint in *Gary B. v. Snyder*, one of the more recent cases regarding the constitutionality of access to literacy, alleges that the school buildings in Michigan were so cold during the winter that children could see their own breath and had to wear coats in classrooms.¹²⁴ Furthermore, the classrooms were so warm during the summer that some teachers and students fainted or vomited.¹²⁵

Besides the substandard facilities, due to inadequate funding,¹²⁶ poor school districts suffer from other serious issues.¹²⁷ In certain school districts, school supplies and instructional materials, such as textbooks, are either severely outdated or nonexistent, and schools lack methods to assist students who are struggling with the educational material.¹²⁸ Some classrooms are without teachers, with students sitting for periods of

¹²³ *Gary B.*, 329 F. Supp. 3d 344; Kristine L. Bowman, *Education Reform and Detroit's Right to Literacy Litigation*, 75 WASH. & LEE L. REV. ONLINE 61, 61–62 (2018). As one teacher observed, schools throughout the country are falling apart:

In East St. Louis, Illinois, where most of the residents are poor and almost all are African American, schools had to shut down once because of sewage backups. The high school's science labs were 30 to 50 years out of date when Kozol visited them; the biology lab had no dissecting kits. A history teacher had 110 students but only 26 textbooks, some of which were missing their first 100 pages. At one of the city's junior high schools, many window frames lacked any glass, and the hallways were dark because light bulbs were missing or not working. Visitors could smell urinals 100 feet from the bathroom. When he visited an urban high school in New Jersey, Kozol found it had no showers for gym students, who had to wait 20 minutes to shoot one basketball because seven classes would use the school's gym at the same time.

A Brief History of Education in the United States, *supra* note 25, at 16.4; Laird, *supra* note 2; William S. Koski, *Beyond Dollars? The Promises and Pitfalls of the Next Generation of Educational Rights Litigation*, 117 COLUM. L. REV. 1897, 1918–19 (2017); *see* sources cited *supra* note 3.

¹²⁴ Complaint, *Gary B.*, 329 F. Supp. 3d 344 (No. 2:16-cv-13292); Bowman, *supra* note 123.

¹²⁵ Complaint, *Gary B.*, 329 F. Supp. 3d 344 (No. 2:16-cv-13292); Bowman, *supra* note 123.

¹²⁶ Strauss, *supra* note 1.

¹²⁷ *See* Complaint, *Gary B.*, 329 F. Supp. 3d 344 (No. 2:16-cv-13292); Bowman, *supra* note 123; Strauss, *supra* note 1.

¹²⁸ Complaint, *Gary B.*, 329 F. Supp. 3d 344 (No. 2:16-cv-13292); Bowman, *supra* note 123; Koski, *supra* note 123, at 1919; Laird, *supra* note 2 (“[H]e found schools with outdated textbooks, malfunctioning climate control and rat droppings in classrooms.”).

time not learning anything.¹²⁹ Furthermore, when there are teachers, they are unqualified or lack proper support.¹³⁰ Some schools are so overcrowded that the classes have to be held in the auditorium, shared with the school choir.¹³¹

2. The Effect on Children and Their Families

Arguably, poverty stricken public schools that provide such inadequate educational environments, resources, and curriculums are denying their students proper access to literacy.¹³² The subpar school districts produce only a small percentage of literate students and even fewer students that can actually demonstrate mastery at reading.¹³³ For example, in *Gary B.*, the claimants specifically complained that the students are not provided the opportunity to learn or become literate

¹²⁹ Complaint, *Gary B.*, 329 F. Supp. 3d 344 (No. 2:16-cv-13292); Koski, *supra* note 123; Laird, *supra* note 2 (“Some classrooms were without teachers, he said, and those students ‘just sat for a period of time, learning nothing.’”).

¹³⁰ Complaint, *Gary B.*, 329 F. Supp. 3d 344 (No. 2:16-cv-13292); Koski, *supra* note 123; Laird, *supra* note 2.

¹³¹ *A Brief History of Education in the United States*, *supra* note 25, at 16.4.

¹³² Complaint, *Gary B.*, 329 F. Supp. 3d 344 (No. 2:16-cv-13292); Koski, *supra* note 123; Burke & Willcox, *supra* note 120; Laird, *supra* note 2.

There are currently lawsuits in Michigan, New Mexico, and California seeking to establish that school districts have violated a student’s “right to literacy” by providing inadequate learning conditions and insufficient school funding. . . . According to the 2017 National Assessment of Education Progress, only 29 percent of California eighth-graders are at or above proficient in math, and 32 percent achieved that level in reading. Thirty-one percent of Michigan eighth-graders are proficient in math and 34 percent in reading. New Mexico scores even lower, with only 21 percent proficiency in math and 24 percent in reading.

Burke & Willcox, *supra* note 120.

¹³³ See, e.g., Complaint, *Gary B.*, 329 F. Supp. 3d 344 (No. 2:16-cv-13292); Bowman, *supra* note 123, at 65–66. For example, “[o]nly 5 percent of the city’s 4th grade students can read at or above a proficient level. For Detroit’s eighth graders, that number rises to only 7 percent. ‘As a student in kindergarten, for example, wasn’t even exposed to kindergarten standards,’ Vitti said. ‘So, we’re setting children up for failure.’” “*We are 10 Steps Behind: Detroit Students Seek Fair Access to Literacy*, CBS NEWS (Sept. 18, 2018, 8:21 AM), <https://www.cbsnews.com/news/school-matters-detroit-students-lawsuit-claims-schools-denied-them-access-to-literacy> [<https://perma.cc/HLY6-YP3L>].

and many students are not graduating or attending college.¹³⁴ At least two-thirds of students in poor school districts do not reach a basic level of proficiency in subjects on national tests, which indicates that the students cannot comprehend grade-level material.¹³⁵ In urban school districts, where there are typically high poverty rates, the majority of fourth grade students cannot understand or read a simple children's book.¹³⁶

Children who are not literate are handicapped later in life.¹³⁷ This is because literacy is necessary for children to be able to succeed in society, for example, in going on to obtain gainful employment and having the ability to purchase a home.¹³⁸ Furthermore, while education was not explicitly made a fundamental right under the Constitution, an education is absolutely essential for the form of government anticipated by the Constitution.¹³⁹ An illiterate person cannot effectively engage in the democratic political system envisioned by the Constitution because they cannot truly be informed or educated about the political process and public policies.¹⁴⁰ Required by the Declaration of Independence for

¹³⁴ Complaint, *Gary B.*, 329 F. Supp. 3d 344 (No. 2:16-cv-13292); Koski, *supra* note 123, at 1919.

¹³⁵ James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 272–74 (1999).

¹³⁶ *Id.* According to Ryan:

Students in urban districts are disproportionately poor. Over half of the students in the largest urban districts were eligible for a free or reduced lunch in 1990-1991, which is the primary measure of student poverty and the one used to determine Title I eligibility. The schools that have the highest minority enrollment also have the highest incidence of student poverty: In 87% of schools that are over 90% minority (African-American and Hispanic), over half of the students come from families living in poverty.

Id. Non-urban school districts are typically wealthier than urban school districts. “In non-urban schools, by contrast, the figure is nearly the opposite: two-thirds of the students score at least at the basic level on national tests.” *Id.*

¹³⁷ Gary B. v. Snyder, 329 F. Supp. 3d 344, 367 (E.D. Mich. 2018) (“When a child who could be taught to read goes untaught, the child suffers a lasting injury—and so does society.”); Jessica Reynolds, *All Children Deserve Access to Literacy*, STAND FOR CHILDREN (July 9, 2018), <http://stand.org/national/blog/all-children-deserve-access-literacy> [<https://perma.cc/S3PH-WJUK>] (“A child who can’t read by fourth grade is four times more likely to drop out of high school and will likely trail behind their peers in later school years.”).

¹³⁸ Reynolds, *supra* note 137.

¹³⁹ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30–35 (1973).

¹⁴⁰ *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972). “[A]s Thomas Jefferson pointed out early in our history, that some degree of education is necessary to prepare citizens to participate

our political process is “the consent of the governed.”¹⁴¹ The consent the Declaration of Independence is referencing is informed consent, as sound public policies could only result from educated and informed consent at elections.¹⁴² Thus, literacy is essential in order for citizens to take part in the political process.¹⁴³

Schools with deteriorating physical conditions and failing curricula have a direct negative impact on children from families living in poverty.¹⁴⁴ Inadequate schools tend to be in the poorest districts with minimal funding.¹⁴⁵ The majority of children living in poverty continue to go to the inadequate public schools,¹⁴⁶ as parents living in poverty

effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society.” *Id.*

¹⁴¹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

Id.

¹⁴² *Yoder*, 406 U.S. at 221.

¹⁴³ *Id.* For further discussion on literacy and our political process see Malhar Shah, *The Fundamental Right to Literacy: Relitigating the Fundamental Right to Education After Rodriguez and Plyler*, 73 NAT’L L. GUILD REV. 129 (2016).

¹⁴⁴ See Gary B. v. Snyder, 329 F. Supp. 3d 344 (E.D. Mich. 2018); *A Brief History of Education in the United States*, *supra* note 25, at 16.4; Bowman, *supra* note 123, at 62–66; Ryan, *supra* note 135; Strauss, *supra* note 1; “We are 10 Steps Behind”: *Detroit Students Seek Fair Access to Literacy*, *supra* note 133. Denying children access to literacy has historically resulted in certain groups of people being kept at a disadvantage. For further discussion, see Reynolds, *supra* note 137.

¹⁴⁵ *A Brief History of Education in the United States*, *supra* note 25, at 16.4; Bowman, *supra* note 123, at 62–66; see Ryan, *supra* note 135; Reynolds, *supra* note 137; Strauss, *supra* note 1; “We are 10 Steps Behind”: *Detroit Students Seek Fair Access to Literacy*, *supra* note 135; e.g., Complaint, Gary B., 329 F. Supp. 3d 344 (No. 2:16-cv-13292).

¹⁴⁶ *Homeschool Demographics*, COALITION FOR RESPONSIBLE HOME EDUC., <https://www.responsiblehomeschooling.org/homeschooling-101/homeschool-demographics> [<https://perma.cc/5EGW-TNVB>]; *Homeschooling in the United States*, *supra* note 15. School choice programs and charter school programs are outside the scope of this Note. For further discussion on these topics, see Robin Cheryl Miller, *Validity, Construction, and Application of Statute or Regulation Governing Charter Schools*, 78 AM. L. REP. 533 (2000); *Are Charter Schools*

have less opportunity to remedy the negative effects of inadequate and failing school districts.¹⁴⁷ It is near impossible to transfer to a better public school district as most states mandate that children attend the school assigned to them unless parents can homeschool their children or afford private schools, in addition to paying taxes for the public school.¹⁴⁸ Poor children make up only about nine percent of the private school population.¹⁴⁹ In contrast, children not living in poverty are more likely to go to private school.¹⁵⁰ Children from wealthier socioeconomic backgrounds make up seventy-five percent of private schools.¹⁵¹ Additionally, impoverished children are less likely to be homeschooled.¹⁵² One reason for the discrepancy is that private schools are not affordable for low-income parents,¹⁵³ and low-income families would be substantially burdened if they had to resort to homeschooling and give up a salary.¹⁵⁴ Even if an indigent parent considered homeschooling, the success of the homeschooling depends on the level of education of the parent.¹⁵⁵ States should not be able to abandon their self-imposed duty to provide access to literacy by relying on parents to homeschool their children, especially when homeschooling is not an option for the children most affected, those living below the poverty line.¹⁵⁶

Better in Bringing Education Equity to Urban Areas?, U. SAN DIEGO, <https://onlinedegrees.sandiego.edu/are-charter-schools-better-in-creating-education-equity> [<https://perma.cc/AY9B-WHKG>].

¹⁴⁷ *Homeschool Demographics*, *supra* note 146.

¹⁴⁸ Burke & Willcox, *supra* note 120.

¹⁴⁹ *Homeschool Demographics*, *supra* note 146; *Homeschooling in the United States*, *supra* note 15.

¹⁵⁰ *Homeschool Demographics*, *supra* note 146.

¹⁵¹ *Id.*

¹⁵² *Homeschool Demographics*, *supra* note 146; *Homeschooling in the United States*, *supra* note 15.

¹⁵³ Saiger, *supra* note 43, at 917.

¹⁵⁴ Rachel Coleman, *Public Funding for Homeschooling is Not a Solution to Failing Public Schools*, COALITION FOR RESPONSIBLE HOME EDUC. (Sept. 12, 2016), <https://www.responsiblehomeschooling.org/public-funding-for-homeschooling-is-not-a-solution-to-failing-public-schools> [<https://perma.cc/ZU47-DKCT>].

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* Coleman argues:

Policy makers should not abdicate their responsibility to provide a robust public education system by relying on the ability of some parents to take up the slack through homeschooling. Homeschooling can and does provide a useful option for

II. FUTURE EDUCATION LITIGATION AND THE PARENTAL RIGHT

Federal courts have continually refused to consider education, and more specifically access to literacy, a constitutional right for children under the Due Process Clause.¹⁵⁷ There would be a more promising outlook for children and literacy if future education litigation focused on the Equal Protection Clause and parental rights. Under the Due Process Clause, parents have a long-established right to choose the education of their children in order to prepare their children for future obligations and responsibilities.¹⁵⁸ Arguably, indigent parents are not equally afforded that same fundamental right as compared to parents from a higher socioeconomic status.¹⁵⁹ As emphasized in *Brown*, where the state provides an opportunity, such as education, that opportunity must be provided to all citizens equally.¹⁶⁰ In current-day America, all states not only provide but also compel children to attend school,¹⁶¹ and for children who do not attend, their parents are held legally responsible.¹⁶² Children are mandated to attend school to be educated, and presumably, education includes, at a minimum, being taught to read and write.¹⁶³ However, some poverty stricken school districts are not providing children access to literacy.¹⁶⁴ Hence, when a state mandates education, but does not provide access to literacy within its public schools, the state denies low-income parents, who cannot afford private or homeschooling options, an equal opportunity to choose the

some students zoned to attend schools with chronic funding or administration problems, but it is generally not an option for those most affected by failures in public education—children in extreme poverty.

Id.

¹⁵⁷ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973); *Gary B. v. Snyder*, 329 F. Supp. 3d 344 (E.D. Mich. 2018); see *infra* Sections I.C, I.D.

¹⁵⁸ *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399–401 (1923); Ross, *supra* note 51.

¹⁵⁹ Saiger, *supra* note 43, at 921.

¹⁶⁰ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954), *supplemented*, 349 U.S. 294 (1955) (“Such an opportunity, where the state has undertaken to provide [education], is a right which must be made available to all on equal terms.”).

¹⁶¹ *Compulsory Attendance*, *supra* note 9.

¹⁶² *Id.*

¹⁶³ See generally Shah, *supra* note 143, at 137–53; *Compulsory Attendance*, *supra* note 9.

¹⁶⁴ See *Gary B. v. Snyder*, 329 F. Supp. 3d 344 (E.D. Mich. 2018); Laird, *supra* note 2; Madden, *supra* note 3; Strauss, *supra* note 1; ACLU, *supra* note 3.

education of their children. Parents are, in effect, denied an equal opportunity to prepare their children for future societal responsibilities.¹⁶⁵ This Part outlines the elements necessary to bring a successful claim on behalf of indigent parents when their children are denied access to literacy.¹⁶⁶

A. *There Is State Action*

When claimants allege that their Fourteenth Amendment equal protection rights have been violated, the court must first determine whether the state or state actor was “sufficiently entwined” in the discriminatory conduct, because the Fourteenth Amendment is only applicable to state-governed activity.¹⁶⁷ In this circumstance, the infringement on the parental right is a result of the state’s action because the public school is the state.¹⁶⁸ Public schools are set up by the state for the fulfillment of public education through their legislature and constitutions,¹⁶⁹ and public schools are funded by the government, regulated by the government, and subject to review by the government.¹⁷⁰ State governments further ensure that every student can

¹⁶⁵ *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535 (1925).

¹⁶⁶ This equal protection claim is theoretical and has never been tried before a court. Thus, a court could find that there is no equal protection violation. For the reasoning on how a court could find an equal protection violation, see *infra* notes 167–206 and accompanying text. This Note does not discuss the possibility of a substantive due process violation of the parental right in this context due to the Court’s reservations with education matters. See *infra* Section II.D.

¹⁶⁷ Huffman, *supra* note 9, at 1305.

¹⁶⁸ Saiger, *supra* note 43, at 918.

¹⁶⁹ Huffman, *supra* note 9, at 1312; Saiger, *supra* note 43, at 915–16; *Compulsory Attendance*, *supra* note 9. “The right to a free public school education is established in each state constitution for school-aged citizenry, usually ages six to eighteen, and ages 21 or 22 if disabled.” LENTZ, *supra* note 49. “In our country, state legislatures have primary responsibility for maintaining a system of laws that both support and constrain our school districts.” Bowman, *supra* note 123, at 72.

¹⁷⁰ Saiger, *supra* note 43, at 916. Attendance is compelled by the state. *Compulsory Attendance*, *supra* note 9. In *Pierce*, the Court supports regulation of education by the State to further the State’s interest in education. *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925); Saiger, *supra* note 43, at 916. States may regulate, inter alia, the age of children who are mandated to attend, the number of days children are required to attend, textbooks, qualifications for teachers, and school curriculums. Saiger, *supra* note 43, at 915–16; *Compulsory Attendance*, *supra* note 9. Furthermore, almost all types of school

attend school without cost.¹⁷¹ State legislatures provide funding to public schools through taxes in order to satisfy the right to education granted to citizens in the state constitution.¹⁷² The goal is to provide a free, basic education and a uniform system of public schools.¹⁷³ Even where the local government has more control over the public school districts, there is still Fourteenth Amendment protection under the Equal Protection Clause.¹⁷⁴ The only reason that local governments exist is because they are established by states through their constitution and laws.¹⁷⁵

B. *The State Action Is "As Applied"*

The discrimination must either be "facial" or "as applied."¹⁷⁶ Facial discrimination occurs when the discriminatory conduct is express in the words of a statute or court order.¹⁷⁷ As applied discrimination is when the government's conduct is facially neutral, but the conduct has a discriminatory effect, or is allocating burdens and benefits unequally.¹⁷⁸

policies are decided through a form of public procedure that is consistent with constitutional and democratic limitations. Saiger, *supra* note 43, at 918. Saiger explains:

For example, although government regulation of private schools must be neutral as to religion and generally tolerates a range of points of view, public schools must be areligious and embrace a point of view established through political/bureaucratic processes. Local school district democracy, local interest-group politics, hierarchical bureaucracy, collective bargaining by teachers and other professionals, and judicial oversight have combined to create public systems that are often incredibly specific and directive with respect to what schools may do.

Id.

¹⁷¹ Huffman, *supra* note 9, at 1307; *Compulsory Attendance*, *supra* note 9. "Every state constitution has a clause that discusses primary and secondary education." Saiger, *supra* note 43, at 925–26; see also LENTZ, *supra* note 49.

¹⁷² LENTZ, *supra* note 49.

¹⁷³ *Id.*

¹⁷⁴ *The US Constitution and Local Government*, DAVID J. SHESTOKAS (Jan. 7, 2014), <http://www.shestokas.com/constitution-educational-series/the-us-constitution-and-local-government> [<https://perma.cc/Z7JT-4F9R>].

¹⁷⁵ *Id.*

¹⁷⁶ Galloway, Jr., *supra* note 90, at 128–29. For purposes of this Note, "as applied" and "in effect" are synonymous.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

Under these circumstances, the government conduct would be as applied because state constitutions and statutes are generally not explicitly discriminatory in the education context, but states are allocating benefits and burdens unequally.¹⁷⁹

Mandatory attendance laws coupled with poor allocation of funds and facilities in poor neighborhoods deprive indigent parents of the same educational choices as parents with higher incomes, which substantially burdens indigent parents' ability to prepare their children for future obligations and responsibilities.¹⁸⁰ Children who are not afforded the opportunity to become literate because of substandard school conditions will not be able to effectively participate in society, engage in the political process, or take advantage of their protected constitutional rights, such as effectively exercise their right to free speech.¹⁸¹ Furthermore, parents living in poverty cannot remedy the effects of an inadequate public school by paying to send their children to private school or resorting to homeschool.¹⁸² Those options are presumably only available to those parents in a higher income

¹⁷⁹ *Id.*; Saiger, *supra* note 43, at 925–26. For example, Michigan's State Constitution does not explicitly discriminate against one group of people:

The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin.

No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the State directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students. The legislature may provide for the transportation of students to and from any school.

MICH. CONST. art. VIII, § 2; *see infra* notes 180–186 and accompanying text.

¹⁸⁰ Saiger, *supra* note 43, at 921; Strauss, *supra* note 1.

¹⁸¹ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36–37 (1973); *Gary B. v. Snyder*, 329 F. Supp. 3d 344 (E.D. Mich. 2018); Laird, *supra* note 2; *see infra* Section I.D.

¹⁸² *Homeschool Demographics*, *supra* note 146; *see infra* Section I.D.

bracket.¹⁸³ Since low-income parents cannot afford private school or homeschool as an option when they are assigned to a subpar school district,¹⁸⁴ they have no choice but to keep their children in a potentially harmful learning environment where their children will not have access to literacy, which is the equivalent of no education at all.¹⁸⁵ As a result, indigent parents' ability to educate their children in order to prepare them for future societal responsibilities and obligations is substantially hindered by the state.¹⁸⁶

C. *The Court Should Apply Intermediate Scrutiny*

All discriminatory conduct by the government is subject to "means-end scrutiny."¹⁸⁷ The level of scrutiny depends on the type of right violated or the type of group discriminated against.¹⁸⁸ The levels of scrutiny are strict scrutiny, intermediate scrutiny, and rational basis review.¹⁸⁹ This Note argues for intermediate scrutiny similar to the approach taken in *Plyler* and *M.L.B.*¹⁹⁰ In each of those cases, the Court used a searching standard of review to analyze the claim, and in each case the Court found the State's action unconstitutional.¹⁹¹ This was based on the fact that, in both cases, the classes had qualities similar to a suspect class, and the rights affected were very important and imposed

¹⁸³ *Homeschool Demographics*, *supra* note 146; Saiger, *supra* note 43, at 918–19. One reason private school is only afforded to those in higher income brackets is because "private schools charge tuition, public schools do not." Saiger, *supra* note 43, at 917; *see also infra* Section I.D.

¹⁸⁴ Saiger, *supra* note 43, at 917.

¹⁸⁵ *See infra* Section I.D.

¹⁸⁶ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (citing *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534 (1925)).

¹⁸⁷ Galloway, Jr., *supra* note 90, at 129.

¹⁸⁸ *Id.* at 129–30; Huffman, *supra* note 9, at 1305.

¹⁸⁹ Galloway, Jr., *supra* note 90, at 129–30; Huffman, *supra* note 9, at 1305.

¹⁹⁰ *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996); *Plyler v. Doe*, 457 U.S. 202 (1982); Galloway, Jr., *supra* note 90, at 157–58; *see supra* Section I.B. Given that there is no suspect class or concrete level of scrutiny for the parental right, it is unlikely that the claim will be reviewed under strict scrutiny. *See supra* note 87.

¹⁹¹ In *M.L.B.*, the total deprivation of the parental right due to the claimant's low income heightened the level of scrutiny. *M.L.B.*, 519 U.S. at 117–18; *see also Equal Protection, Poverty, and Inequality of Wealth*, *supra* note 90. In *Plyler*, the deprivation of education coupled with the claimants' status as innocent undocumented children heightened the level of scrutiny. *Plyler*, 457 U.S. at 223–24; *see supra* Section I.B.

severe disabilities.¹⁹² Given that wealth is not a suspect class and there is no concrete standard of review for the parental right, it is unlikely that a claim will be given strict scrutiny deference.¹⁹³ However, low-income is similar to a suspect class in that depriving low-income parents the ability to provide their children with access to literacy creates an underclass of illiterate and politically disadvantaged people in society that flies in the face of the Equal Protection Clause.¹⁹⁴ Furthermore, the right of parents to direct the education of their children and prepare them for future obligations is extremely important. When parents are prevented from doing so, it creates a significant lasting disability on children and society because children cannot effectively engage in the political process and society, which increases problems like welfare, crime, and unemployment.¹⁹⁵ This claim is distinguishable from *Kadrmas*, which only afforded rational review to an education and

¹⁹² Galloway, Jr., *supra* note 90, at 158. Galloway explains:

To trigger this rule, the claimant must show that the class affected has some similarities to suspect or semi-suspect classes, that the right affected is very important, and the disability imposed is very severe. Thus, in *Plyler*, the Court was impressed by the fact that exclusion from public schools creates drastic disabilities affecting all aspects of the child's future.

Id.

¹⁹³ Ryznar, *supra* note 80, at 157; *see supra* note 96; *supra* Section I.B.

¹⁹⁴ *Plyler*, 457 U.S. at 221–23; *see supra* Part I. The Court explained:

In addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit. Paradoxically, by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority. But more directly, “education prepares individuals to be self-reliant and self-sufficient participants in society.” 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.

Plyler, 457 U.S. at 221–23 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)).

¹⁹⁵ *Plyler*, 457 U.S. at 230 (“It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime.”); *see infra* notes 244–251 and accompanying text.

wealth case¹⁹⁶ because a state depriving access to literacy is, in effect, completely depriving low-income parents the ability to educate their innocent child.¹⁹⁷ Thus, in a situation where indigent parents are, in effect, being denied the right to choose the education of their children, the court should use a heightened standard of review.

1. The State's Potential Justification

A state could try to make a financial argument to justify its actions.¹⁹⁸ For instance, a state may attempt to circumvent the fact that detrimental school conditions will impede access to literacy by arguing that such school conditions are simply the byproduct of a state rightfully allocating its funds as it sees fit.¹⁹⁹ However, in *M.L.B.*, the State's financial interest was not substantial enough to justify the interference in the parent's right to direct the upbringing of her children.²⁰⁰ Parents' not having the option to provide literacy to their children by virtue of subpar school districts would certainly interfere with the parents' right, and similarly to *M.L.B.*, a "pocketbook" interest by a state is not enough to justify the undue burden on the parents.²⁰¹

However, even if the court analyzes the claim under rational review like in *Pierce* or *Meyer*,²⁰² a state's interest in its finances will arguably not be enough to justify an inadequate school district because it is by a state's own mandate that parents must send their children to school.²⁰³ It would logically follow that a state should bear the responsibility of providing children in all districts equal access to literacy.²⁰⁴ Anything

¹⁹⁶ *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 461–62 (1988); *Equal Protection, Poverty, and Inequality of Wealth*, *supra* note 90.

¹⁹⁷ *Cf. Kadrmas*, 487 U.S. at 459–61 (“[T]he Kadrmas family could and did find a private alternative to the public school bus service for which Dickinson charged a fee.”); *see supra* Section I.D.ii.

¹⁹⁸ *See, e.g., M.L.B. v. S.L.J.*, 519 U.S. 102 (1996). There are potentially other justifications a state could advance, but state financing is the one contemplated for purposes of this Note.

¹⁹⁹ *See, e.g., M.L.B.*, 519 U.S. at 102.

²⁰⁰ *Id.* at 121 (“The State’s pocketbook interest in advance payment for a transcript, we concluded, was unimpressive when measured against the stakes for the defendant.”).

²⁰¹ *Id.*

²⁰² *Ryznar*, *supra* note 80, at 135–36.

²⁰³ *Compulsory Attendance*, *supra* note 9; *see supra* Section II.A.

²⁰⁴ *See supra* Part I.

short of that would not only deprive parents of their rights with respect to the upbringing of their children, but it would also fly in the face of the natural benefits of a state's educational mandate to begin with: educated and literate children.²⁰⁵ Furthermore, ensuring that children are actually attaining access to literacy at those schools would only benefit a state, not harm a state.²⁰⁶

III. CURING THE EQUAL PROTECTION VIOLATION

If a state has violated the Equal Protection Clause, the court must impose remedies to prevent future recurrences of the conduct, compensate victims for their damages, and eliminate continuing effects of past discriminatory acts.²⁰⁷ A determination that all state funded school districts must provide access to literacy to comply with the Equal Protection Clause would afford courts the broad discretion to remedy the discriminatory effect and unequal treatment of indigent parents who do not have the same means to educate their children as those parents with a higher income.²⁰⁸ Additionally, the remedy must be related to the discriminatory conduct.²⁰⁹ Conceivably, a state could remedy any perceived discrimination by simply closing the public schools and thereby depriving all children access to literacy.²¹⁰ However, that result would be unlikely given the importance of education to the individual,

²⁰⁵ See *supra* Sections I.B, I.C.

²⁰⁶ See *Meyer v. Nebraska*, 262 U.S. 390, 400–03 (1923).

²⁰⁷ Galloway, Jr., *supra* note 90, at 163–64.

²⁰⁸ *Id.* There are many ways to cure an Equal Protection Clause violation. This Note focuses on one potential cure. Other remedies, while potentially effective, are outside the scope of this Note. For further debate on how to cure literacy problems in state public schools, see Michel Rebell et al., *Many Schools Are Still Inadequate, Now What?*, EDUC.NEXT (2009), <https://www.educationnext.org/many-schools-are-still-inadequate-now-what> [<https://perma.cc/EQB5-4AFD>].

²⁰⁹ Galloway, Jr., *supra* note 90, at 163–64. For example, with education desegregation cases, courts could “alter attendance zones, order busing of students, throw out freedom of choice plans, and impose such other orders as are necessary to achieve desegregation ‘now.’” *Id.* at 164. However, courts could not “adjust their desegregation decrees to counteract the effects of white flight and other developments not ‘caused by segregative actions’ of school officials.” *Id.*

²¹⁰ See, e.g., *Palmer v. Thompson*, 403 U.S. 217, 219 (1971) (finding that the city had not acted unconstitutionally in closing its public swimming pools after they had been ordered desegregated).

the state, and society as a whole.²¹¹ Thus, one proposed way for a state to cure the constitutional violation and afford parents equal choice is for a state to ensure that public schools, from kindergarten to twelfth grade, are providing access to literacy that is grade and age appropriate.²¹² This can be accomplished by increasing funds to provide a sufficient number of qualified teachers, a safe and clean learning environment, and an adequate curriculum.²¹³

A. *Ensuring Access to Literacy in Public Schools*

In order for public schools to provide its students with access to literacy, the school must have a sufficient number of qualified teachers.²¹⁴ Qualified teachers provide students with the tools to take advantage of their constitutional rights and succeed in society.²¹⁵ Thus, without qualified teachers, indigent parents would not have the ability to send their children to a public school that would prepare them for their future societal obligations and responsibilities.²¹⁶ In *Ambach v. Norwick*, the Supreme Court noted that teachers are an essential component of the success of public schools and their students.²¹⁷

²¹¹ See *supra* Part II. This would also likely violate a state's constitution. See *supra* Section II.A.

²¹² For purposes of this Note, states would not be deemed in violation if they provided access to literacy, but a portion of the student body remained illiterate.

²¹³ Shah, *supra* note 143, at 153–61; see *supra* Section I.D.

²¹⁴ Shah, *supra* note 143, at 154–55.

²¹⁵ *Id.* at 156 (“Teachers instill in children the tools to develop not only basic literacy skills but also the critical thinking skills they will use, as the founders envisioned, to shape and maintain the nation’s democratic future. Teachers shape our future leaders and, ultimately, the fate of our nation.”).

²¹⁶ See *supra* Sections I.B, I.D.

²¹⁷ *Ambach v. Norwick*, 441 U.S. 68, 78–80 (1979); Shah, *supra* note 143, at 155. The importance of teachers to a minimally adequate education or access to literacy has also been reinforced by many states. For example:

In both Montana and Ohio, for example, the state supreme courts have held that an adequate state education requires teachers. Oklahoma and West Virginia have gone beyond those protections by requiring “competent teachers.” The Ohio state supreme court has further emphasized that “it is virtually impossible for students to receive an adequate education with a student-teacher ratio of [more than thirty students per classroom teacher].” As of 2011, over thirty states have supported this conclusion by enacting legislation for class size reduction.

According to the Court, teachers have broad discretion in teaching the course material in a coherent and motivating way.²¹⁸ Even with a standardized lesson plan, children cannot truly have access to literacy without the personal qualities that a teacher brings to the classroom to help students achieve that goal.²¹⁹ Furthermore, the Court emphasized that teachers are in constant contact with their students and, therefore, are critical in ensuring children understand their role as citizens in society and in teaching children about the government.²²⁰ Teachers are role models and have a significant, but subtle, influence over students' morals and insights which benefits society and democracy.²²¹

Aside from the Court, research has shown that the quality of the teacher correlates to students' academic success.²²² Smaller classroom sizes with less students per classroom have a positive effect on students and literacy in both primary and secondary schools in part because teachers are better able to interact with each student regarding the substantive materials.²²³ Students also score significantly higher in school when they are placed with qualified teachers, and qualified teachers are linked with better vocabulary and reading.²²⁴ Furthermore, quality teachers are linked with decreased absences, increased numbers of students graduating high school, increased numbers of students

Shah, *supra* note 143, at 155 (internal citations omitted).

²¹⁸ *Ambach*, 441 U.S. at 78–80.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* (“This influence is crucial to the continued good health of a democracy.”).

²²² Shah, *supra* note 143, at 155–56 (“These studies demonstrate that, within grade levels, ‘the single most dominant factor affecting student academic gain is teacher effect.’”).

²²³ *Id.* at 156. Shah points out:

With more students per classroom, the potential for distraction is greater, while in small classes teachers have more opportunities to “engage children and keep them on task. . . . From a logical perspective, these results may be attributed to the fact that class size significantly affects the amount of teacher interactions with individual students directly concerning the substantive content of subject knowledge, the number of students requiring the teacher’s attention, and active interaction with the teacher at the primary and secondary levels.” Furthermore, studies have shown that in smaller primary schools, teachers have more freedom to deal with and correct any negative behavior for low and medium attaining pupils.

Id. (internal citations omitted).

²²⁴ *Id.* at 155–56 (“[O]ne study revealing that students score up to 50 percentile points higher in their classes when placed with better qualified teachers.”).

attending college, and increased student earnings.²²⁵ Thus, teachers are critical in providing children access to literacy and their parents with the opportunity to prepare their children for future responsibilities in society.²²⁶

In order for public schools to provide children with access to literacy and their parents equal choice, schools will also need to have adequate facilities and resources.²²⁷ The necessity for minimally adequate facilities was articulated in *Swann v. Charlotte-Mecklenburg Board of Education*.²²⁸ According to the Court, inadequate facilities is the most important sign of a segregated school system.²²⁹ To ensure equality, corrective action has to be taken regarding the maintenance of school buildings and the distribution of school equipment.²³⁰ Furthermore, studies have shown that the educational environment has a direct impact on educational achievement.²³¹ Inadequate school facilities such as broken bathrooms, peeling paint, crumbling plaster, insufficient lighting, inadequate ventilation, and defective heating and

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* at 157.

²²⁸ See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18–19 (1971). The Court stated:

In *Green*, we pointed out that existing policy and practice with regard to faculty, staff, transportation, extracurricular activities, and facilities were among the most important indicia of a segregated system. Independent of student assignment, where it is possible to identify a ‘white school’ or a ‘Negro school’ simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a prima facie case of violation of substantive constitutional rights under the Equal Protection Clause is shown. When a system has been dual in these respects, the first remedial responsibility of school authorities is to eliminate invidious racial distinctions. With respect to such matters as transportation, supporting personnel, and extracurricular activities, no more than this may be necessary. Similar corrective action must be taken with regard to the maintenance of buildings and the distribution of equipment. In these areas, normal administrative practice should produce schools of like quality, facilities, and staffs. Something more must be said, however, as to faculty assignment and new school construction.

Id.; see also Shah, *supra* note 143, at 155–56.

²²⁹ See *Swann*, 402 U.S. at 18–19; Shah, *supra* note 143, at 155–56.

²³⁰ See *Swann*, 402 U.S. at 18–19; Shah, *supra* note 143, at 155–56.

²³¹ SSC Staff, *How Dirty Classrooms Could Be Negatively Affecting Your Students and Teachers*, SSC (Aug. 27, 2018), <http://sscserv.com/poor-school-facilities> [https://perma.cc/MX2H-F5BR].

cooling systems are linked to increased illnesses and absences, increased teacher turnover, and thus, increased expenditures, decreased morale, and decreased test scores.²³²

Finally, to ensure that low-income parents have equal choice to send their children to a school that is providing access to literacy, public schools must implement a curriculum that teaches students basic literacy skills.²³³ A significant obstacle with education litigation is the uncertainty surrounding education, for example, in determining what to teach, the best way to teach the material, and how to evaluate students' performance.²³⁴ Uncertainty about education has exacerbated the issues in many failing public school districts which are not even providing children with access to literacy.²³⁵ Clauses in state constitutions typically discuss a "free," "uniform," "public," and "common" education for all, but beyond requiring states to provide a free education to all, these terms do little to explain what an adequate education actually is.²³⁶ To

²³² *Id.*; *Impact of Inadequate School Facilities on Student Learning*, U.S. DEP'T EDUC., <https://cosfp.org/wp-content/uploads/HomeFiles/BEST/Impact%20of%20Inadequate%20School%20Facilities%20on%20Student%20Learning%20USDoE.pdf> [https://perma.cc/C8VD-2YDQ]. According to the U.S. Department of Education:

A study of the District of Columbia school system found, after controlling for other variables such as a student's socioeconomic status, that students' standardized achievement scores were lower in schools with poor building conditions. Students in school buildings in poor condition had achievement that was 6% below schools in fair condition and 11% below schools in excellent condition.

Impact of Inadequate School Facilities on Student Learning, supra.

²³³ Shah, *supra* note 143, at 160–61. For examples of literacy curriculums, see GINA BIANCAROSA & CATHERINE E. SNOW, *READING NEXT: A VISION FOR ACTION AND RESEARCH IN MIDDLE AND HIGH SCHOOL LITERACY* (2d ed. 2004), https://www.carnegie.org/media/filer_public/b7/5f/b75fba81-16cb-422d-ab59-373a6a07eb74/ccny_report_2004_reading.pdf [https://perma.cc/G93A-FLF2]; Int'l Reading Ass'n, *Literacy Implementation Guidance for the ELA*, *READING ROCKETS*, <http://www.readingrockets.org/article/literacy-implementation-guidance-ela> [https://perma.cc/NNT9-JVG8].

²³⁴ Saiger, *supra* note 43, at 925–26.

²³⁵ *Id.*

²³⁶ *Id.* at 936–37. Saiger explains:

Is it obvious, for example, whether a "free" school may demand, as many contemporary public schools do, that students provide at their own expense textbooks, necessary school supplies, or ancillary items like required uniforms? What about payments required only of members of cocurricular and extracurricular groups like choirs, math leagues, and football teams, which are often expected, through fees, donations, or solicitations, somehow to pay for necessary instruments, equipment, and transportation? Can schools similarly require students to cover their own lab

provide indigent parents equal choice, the public school curriculum needs to provide students with access to literacy, at the very least, to provide an adequate education; if a school is not providing, at a bare minimum, access to literacy, it is providing the equivalent of no education at all.²³⁷ Being literate is the most important aspect of an education because without the ability to read and write, one does not have the ability to take advantage of their other protected rights or succeed in society.²³⁸ Due to the Court's previous holding that education is not a fundamental right, requiring a curriculum that also specifies requirements for subjects such as math, science, or social studies will likely be unsuccessful.²³⁹ A narrower focus on access to literacy, such as reading comprehension, vocabulary, and writing should be sufficient to distinguish this matter from cases holding that education, generally, is not a fundamental right.²⁴⁰

B. *Implementation of Literacy Programs*

The state will need increased funds and resources to ensure that the public schools have a sufficient number of qualified teachers, adequate facilities and resources, and an adequate curriculum.²⁴¹ This can be accomplished by raising state taxes to increase funds so that inadequate school districts will be able to provide students with the proper premises, tools, and personnel to teach their students to read and write.²⁴² Although additional funding is not guaranteed to lead to better

expenses in order to enroll in advanced placement or other courses not required for graduation? Or consider the practices of many private and public schools of aggressively encouraging donations from parents and student-run sales campaigns hawking magazines and similar goods.

Id.

²³⁷ Gary B. v. Snyder, 329 F. Supp. 3d 344 (E.D. Mich. 2018); Laird, *supra* note 3; *see supra* Sections I.D, II.B.

²³⁸ Shah, *supra* note 143, at 137–53; *see supra* Section I.D.

²³⁹ *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

²⁴⁰ *See id.*; Gary B., 329 F. Supp. 3d 344.

²⁴¹ Strauss, *supra* note 1; *Frequently Asked Questions*, *supra* note 1.

²⁴² *See* Griffin v. Cty. Sch. Bd. of Prince Edward Cty., 377 U.S. 218, 233 (1964). For example, in *Griffin*, the Court held that the lower court “may if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school

educational programs, additional funding is required for schools to implement such programs.

Increasing taxes for education is typically met with opposition from residents.²⁴³ However, the denial of access to literacy to children and their parents is more costly in the long run to individuals, the states, and to the country as a whole than the increase in tax dollars.²⁴⁴ Studies have shown that citizens who are illiterate have higher risks of dropping out of school,²⁴⁵ teen pregnancy,²⁴⁶ incarceration and committing crime,²⁴⁷ and being on welfare and food stamps.²⁴⁸ Furthermore, other

system in Prince Edward County like that operated in other counties in Virginia.” *Id.*; see also Strauss, *supra* note 1; *Frequently Asked Questions*, *supra* note 1. Reallocation of resources is another alternative for funding, but it is outside the scope of this Note. For further information about reallocation of resources, see KAREN HAWLEY MILES & LINDA DARLING-HAMMOND, *RETHINKING THE ALLOCATION OF TEACHING RESOURCES: SOME LESSONS FROM HIGH PERFORMING SCHOOLS* (1997), https://www.cpre.org/sites/default/files/researchreport/779_rr38.pdf [<https://perma.cc/Z6B3-37UR>].

²⁴³ Robert Gehrke, *Opposition to Tax Hike for Schools Shows Utahns Don't Value Education the Way They Claim to*, SALT LAKE TRIB. (July 5, 2018), <https://www.sltrib.com/news/politics/2018/07/05/gehrke-opposition-tax> [<https://perma.cc/Z7FK-PYUQ>] (“Every time they are asked about their top priorities, education comes in at or near the top of the list. Yet, when they’re given an opportunity to put their money behind it, they refuse.”); Alan Greenblatt, *What Not to Do When Asking Voters to Increase Their Taxes*, GOVERNING (Apr. 15, 2015, 6:00 PM), <http://www.governing.com/topics/finance/gov-failed-tax-increases-schools-webster-groves.html> [<https://perma.cc/LQQ7-JRMX>] (“[T]he failure to convince residents in an affluent area that they needed to spend more money to keep up the quality of the schools offers several lessons as to why local tax increases are often a tough sell.”).

²⁴⁴ Rebecca Lake, *23 Statistics on Illiteracy in America*, CREDITDONKEY, <https://www.creditdonkey.com/illiteracy-in-america.html> [<https://perma.cc/572E-CK8M>] (last updated May 12, 2016) (“While the difficulties that go along with being unable to read typically manifest themselves in adulthood, their roots can be traced back to the elementary and secondary school years.”); *Id.* (“[W]e looked at statistics linking illiteracy to lower levels of financial achievement. While the impact is most immediately felt at the individual level, there is a trickle-down affect [sic] that touches the economy as a whole.”); *Frequently Asked Questions*, *supra* note 1.

²⁴⁵ *11 Facts About Illiteracy in America*, DOSOMETHING.ORG, <https://www.dosomething.org/us/facts/11-facts-about-literacy-america#fn9> [<https://perma.cc/UW6N-34E4>] (“Students who don’t read proficiently by the 3rd grade are 4 times likelier to drop out of school.”).

²⁴⁶ *Id.* (“Teenage girls between the ages of 16 to 19 who live at or below the poverty line and have below average literacy skills are 6 times more likely to have children out of wedlock than girls their age who can read proficiently.”).

²⁴⁷ *Id.* (“Nearly 85% of the juveniles who face trial in the juvenile court system are functionally illiterate, proving that there is a close relationship between illiteracy and crime. More than 60% of all inmates are functionally illiterate.”).

studies have shown that illiteracy costs the healthcare industry over seventy million dollars annually.²⁴⁹ When people are illiterate, they cannot advance out of poverty because they lack the education and skills to improve their status, which costs the nation as a result.²⁵⁰ Furthermore, reports have shown that growing levels of illiteracy negatively affect the United States' ability to compete economically with other nations and result in trillions of GDP losses.²⁵¹

Increasing funds for education has also been criticized by education reformers.²⁵² Court involvement and increasing funds have been criticized by Eric Hanushek and Al Lindseth who do not believe increasing funds for education has been or will be effective, and would rather implement a "performance-based funding" program.²⁵³ However,

²⁴⁸ *Id.* ("75% of Americans who receive food stamps perform at the lowest 2 levels of literacy, and 90% of high school dropouts are on welfare.").

²⁴⁹ Lake, *supra* note 244 ("Being able to read is important to maintaining good health, particularly if you have a serious illness or condition that requires medication or ongoing treatment. When patients lack basic reading skills, it can impact the health care system to the tune of \$100 billion annually."); *11 Facts About Illiteracy in America*, *supra* note 245. Some reports claim that low literacy costs the healthcare industry "over \$230 billion a year in health care costs because almost half of Americans cannot read well enough to comprehend health information, incurring higher costs." The Room 241 Team, *Crisis Point: The State of Literacy in America*, CONCORDIA U.: ROOM 241 (Mar. 5, 2018), <https://education.cu-portland.edu/blog/education-news-roundup/illiteracy-in-america> [<https://perma.cc/3XBB-CBW7>].

²⁵⁰ Lake, *supra* note 244 ("In terms of lost productivity, it's estimated that the portion of the population that can't read costs the nation a staggering \$225 billion each year."); The Room 241 Team, *supra* note 249.

²⁵¹ The Room 241 Team, *supra* note 249. As noted by a Concordia University blog:

The NCAL report notes that the U.S. is less educated than it was a generation ago, and our growing levels of illiteracy will foster a downward slide in our ability to compete economically with other nations. McKinsey Research finds that education gaps have contributed more than recessions to trillions in GDP losses. Not to mention, a national abjection from the unending toxicity of racial divides built upon 300 years of oppression and antipathy.

Id.

²⁵² Burke & Willcox, *supra* note 120 ("Although the petitioners' grievances are understandable, research shows that increased funding does not necessarily lead to improved educational outcomes, and the funding is sometimes even used fraudulently by school districts."); Rebell, *supra* note 208.

²⁵³ The feasibility and implementation of performance-based funding is outside the scope of this Note. For more information of the performance based funding program, see Rebell, *supra* note 208 ("[P]erformance-based funding: a system of integrated education policies and funding mechanisms designed to drive and reward better performance by teachers, administrators, students, and others involved in the education process.").

“performance-based funding” programs have not proven to be consistently effective, whereas court involvement and increasing education funds have been successful in education reform in the past and, if allocated properly, can be effective moving forward.²⁵⁴ For example, states such as New Jersey and Kentucky, where judicially imposed funding remedies were placed on state school districts, saw increases in students’ academic performance.²⁵⁵ Achievement gaps decreased by more than one-third in New Jersey, and, in Kentucky, schools that ranked at the bottom of the national average now rank above the national average.²⁵⁶

C. *The Federal Government and Education*

Finally, while the federal government typically leaves education matters to the state legislature, the state does not always give way for state deference.²⁵⁷ In a situation where one group of citizens is being deprived of their already-established right to choose the education of their children, it is the perfect opportunity for the federal government to step in.²⁵⁸ State’s compulsory education laws and assigned public schools

²⁵⁴ *Id.* According to Rebell:

The evidence strongly indicates that money well spent does make a significant difference in student achievement, and as Education Sector’s Kevin Carey has noted in reviewing one of Mr. Hanushek’s books: “There is little evidence that starving schools of needed funds is a catalyst for innovation, or that well-funded schools are more likely than others to be inefficient.”

Id. (internal citations omitted).

²⁵⁵ *Id.* Rebell explains:

Recent, more finely tuned data for New Jersey, provided by Peg Goertz, a University of Pennsylvania researcher who has closely followed developments in the Garden State, indicate that from 1999 to 2007 substantial gains were made in the *Abbott* districts, which were the focus of the judicial remedies. For example, in 4th-grade mathematics, the achievement gaps between the *Abbott* districts and the rest of the state were cut by more than one-third. Similarly, Kentucky, which was near the bottom of the national rankings in virtually all performance indexes before its 1989 court decision, now ranks above the national averages in reading and science and almost at the national average in math.

Id.

²⁵⁶ *Id.*

²⁵⁷ Bowman, *supra* note 123, at 72.

²⁵⁸ *Id.*

mitigate any incentive on behalf of the state to improve the public school system.²⁵⁹ Furthermore, given the discrepancies between low-income school districts and wealthier school districts, and the negative impact on students, families, and society,²⁶⁰ the judiciary has a crucial role in holding states accountable for the denial of literacy in the public schools.²⁶¹

To resolve federalism concerns,²⁶² education should remain the primary responsibility of states and local government, but the federal court should be involved to ensure that the already established right of the parent is not reserved to one class.²⁶³ The judicial branch, executive branch, and legislative branch can work in concert to ensure that the aforementioned programs are being implemented and are effective.²⁶⁴ The federal courts' role would be to outline what is needed to cure the constitutional defect in such a way to allow flexible application depending on the facts and circumstances of each case, but the state legislature and executive branches should have the responsibility to actually formulate the specifics of these policies.²⁶⁵ State education departments and local school districts should also be heavily involved to determine the best way to implement the educational reforms in their districts.²⁶⁶ Federal judicial oversight should remain to ensure that these policies are properly funded, adequately implemented, and result in improved student literacy.²⁶⁷

²⁵⁹ Burke & Willcox, *supra* note 120 ("Because school attendance is mandated, and because most children attend assigned public schools, any incentive for improvement on the part of the public system is mitigated.").

²⁶⁰ See *supra* Section I.D.

²⁶¹ See Rebell, *supra* note 208.

²⁶² San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 44 (1973) ("It must be remembered, also, that every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system.").

²⁶³ See *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925); Bowman, *supra* note 123, at 72.

²⁶⁴ Rebell, *supra* note 208.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.* ("Since significant compliance cannot be achieved overnight, in most cases courts will need to maintain nominal jurisdiction for a multiyear period, probably 10 to 15 years."). As Rebell argues:

[Courts] can ensure continued adherence to implementation of stated policy goals, and actual interventions should be rare, especially if it is clearly understood that all

CONCLUSION

Education is so fundamental to this country that all fifty states compel parents to send their children to school.²⁶⁸ Yet, in certain poverty-stricken districts, children are deprived of access to literacy or a basic, minimally adequate education.²⁶⁹ In essence, children who are forced by virtue of their low-income status to attend inadequate public schools that lack the resources to teach their students how to read and write are essentially receiving no education at all.²⁷⁰ Denying children access to literacy interferes with their parents' right to be able to direct the education of their children and prepare their children for future obligations in society.²⁷¹ Specifically burdened are indigent parents who cannot afford private school or homeschooling options.²⁷² Parents from a higher socioeconomic status have the option to remedy inadequate schools by sending their child to a private school or homeschool while indigent parents do not.²⁷³ Education lawsuits in federal courts have traditionally been brought under the Due Process Clause, focusing on the rights of the child.²⁷⁴ However, these cases have consistently failed.²⁷⁵ Thus, if there is going to be any success in this area, a more viable avenue would be to pursue a claim under the Equal Protection Clause focusing on the rights of the parent.²⁷⁶ This avenue would allow courts and legislatures to increase funding and provide public schools with

the courts would be enforcing are the state's own policy goals. A judicial presence is especially important to ensure that the reform process—and reasonable funding levels—are maintained in times of economic stress or recession like the present, where children's needs and constitutional values are often given short shrift.

Id.

²⁶⁸ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954), *supplemented*, 349 U.S. 294 (1955); *Compulsory Attendance*, *supra* note 9.

²⁶⁹ *See supra* Section I.D.

²⁷⁰ *See supra* Section I.D.

²⁷¹ *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535 (1925).

²⁷² *See supra* Section I.D.

²⁷³ *See supra* Section I.D.

²⁷⁴ *E.g.*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973); *Gary B. v. Snyder*, 329 F. Supp. 3d 344 (E.D. Mich. 2018); *see supra* Section I.C.

²⁷⁵ *E.g.*, *San Antonio Indep. Sch. Dist.*, 411 U.S. 1; *Gary B.*, 329 F. Supp. 3d 344; *see supra* Section I.C.

²⁷⁶ *Bowman*, *supra* note 123, at 72.

better teachers, facilities, and curricula, affording children access to literacy and indigent parents equal choice to choose their children's education.²⁷⁷

²⁷⁷ See *supra* Part III.

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