

COMMENT

FREEDOM OF MOVEMENT, COMPULSORY ATTENDANCE, AND THE SEARCH FOR A FEDERAL RIGHT TO EDUCATION*

I. INTRODUCTION

“Shouldn’t there be something at the end of the bus ride?”

– Chief Justice Burley Mitchell, Supreme Court of North Carolina (1997)¹

The Supreme Court has expressly held that there is no fundamental right to education.² Indeed, in contrast with almost every other nation on Earth, the United States Constitution does not mention the word “education” at all.³ While the constitutions of all fifty states guarantee access to some level of public education,⁴ the federal judiciary has avoided taking responsibility for schools.⁵ The recent emphasis on localism in schooling has created intense funding disparities, which work to systemically disadvantage minorities.⁶ What is more, local change is often “short-lived and superficial,” failing to get at the root of the issue.⁷ “[S]tate-level legislative inaction, executive acquiescence,

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1. William Kent Packard, Note, *A Sound, Basic Education: North Carolina Adopts an Adequacy Standard* in *Leandro v. State*, 76 N.C. L. REV. 1481, 1502–03 (1998) (citing Steve Ford, *A Sound, Basic Step Toward Better Schools*, NEWS & OBSERVER (Raleigh, N.C.), July 27, 1997, at A28).

2. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18 (1973).

3. See *Education*, CONSTITUTE,

http://www.constituteproject.org/search?lang=en&q=education&status=in_force

[<http://perma.cc/WZ8T-SJDB>] (last visited Feb. 1, 2022) (click “view results”; then select the letter “U”; then scroll through the list to see that it does not include the U.S. Constitution).

4. See EMILY PARKER, EDUC. COMM’N OF THE STATES, 50-STATE REVIEW: CONSTITUTIONAL OBLIGATIONS FOR PUBLIC EDUCATION 1 (2016),

<http://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf>

[<http://perma.cc/25Y9-57CD>] (noting each state constitution “mandates the creation of a public education system”). Some state constitutions require a “thorough and efficient” school system, see, e.g., N.J. CONST. art. VIII, § 4, while others guarantee an “adequate” education for all students, see, e.g., GA. CONST. art. VIII, § 1.

5. See Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 133 (2013) (“The third rail of education reform has long been the conviction . . . that the responsibility for educating children should take place at the local level.”).

6. See Derek W. Black, *The Constitutional Compromise To Guarantee Education*, 70 STAN. L. REV. 735, 750 (2018).

7. Kimberly Jenkins Robinson, *The Essential Questions Regarding a Federal Right to Education*, in A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY 1, 2 (Kimberly Jenkins Robinson ed., 2019) [hereinafter Robinson, *Essential Questions*]; see also *id.* at 13 (remarking that state education reforms “tinker at the margins”).

and judicial abdication” have combined as a deadly recipe for poor-quality public schools.⁸

There have been a number of attempts in recent years to end this “judicial abdication” and recognize a federal right to education.⁹ Most recently, students in Detroit sued the State of Michigan, arguing that their schools—“schools in name only”—failed to plausibly provide access to even a basic level of literacy.¹⁰ Before the panel ruling was regrettably vacated,¹¹ the Court of Appeals for the Sixth Circuit found that the U.S. Constitution does protect a fundamental right to a basic minimum education.¹² While this achievement is likely the most important outcome of the case, the plaintiffs in *Gary B. v. Whitmer*¹³ also evinced a compelling argument involving compulsory attendance that has received minimal academic treatment.¹⁴

“Compulsory . . . attendance laws are a restraint on [students’] freedom of movement,” which is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment.¹⁵ Thus, such statutes must satisfy a heightened level of judicial scrutiny.¹⁶ The Sixth Circuit panel reasoned that, in most cases, the state’s compelling interest in mandating attendance—an educated citizenry—will justify this infringement on students’ liberty.¹⁷ However, the limitations on freedom imposed by mandatory attendance laws must be at least rationally related to their stated purpose.¹⁸ The plaintiffs in *Gary B.* argued that their schools provided no access to education, and thus the compulsory attendance laws that bound them were unrelated to the state’s alleged aims and therefore unconstitutional.¹⁹ The Sixth Circuit dismissed this claim for failing to allege sufficient facts about the nature and extent of the restraint on students’ freedom

8. Kristine L. Bowman, *The Inadequate Right to Education: A Case Study of Obstacles to State Protection*, in *A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY* 65, 65 (Kimberly Jenkins Robinson ed., 2019).

9. See Robinson, *Essential Questions*, *supra* note 7, at 16 (explaining litigants in three different cases recently sued in federal court over “inadequate learning conditions”).

10. *Gary B. v. Whitmer*, 957 F.3d 616, 620–21 (6th Cir.), *vacated en banc*, 958 F.3d 1216 (6th Cir. 2020).

11. *Gary B. v. Whitmer*, 958 F.3d 1216 (6th Cir. 2020).

12. See *Gary B.*, 957 F.3d at 621. About three weeks after the Sixth Circuit issued its panel decision, the plaintiffs reached a settlement agreement with Governor Gretchen Whitmer, which included \$280,000 for educational programming for the plaintiffs and the promise to pursue legislation for additional state-level education funding. Just a few days later, a majority of Sixth Circuit judges voted to rehear the case *en banc*, meaning that the decision no longer constitutes binding precedent. In June 2020, the Sixth Circuit ruled that the settlement agreement rendered the issues in the case moot, and thus the case will not be reheard. See Christine M. Naassana, Comment, *Access to Literacy Under the United States Constitution*, 68 *BUFF. L. REV.* 1215, 1232–34 (2020).

13. 957 F.3d 616 (6th Cir.), *vacated en banc*, 958 F.3d 1216 (6th Cir. 2020).

14. See *Gary B.*, 957 F.3d at 638.

15. *Id.* at 640.

16. See *Reno v. Flores*, 507 U.S. 292, 301–02 (1993).

17. *Gary B.*, 957 F.3d at 640.

18. See *id.* at 640–41 (“[F]orcing students to attend a ‘school’ in which they are simply warehoused and provided no education at all . . . bear[s] no reasonable relationship to the state’s asserted purpose . . .”).

19. *Id.* at 638.

imposed by compulsory attendance laws.²⁰ However, the court left the possibility of this argument's efficacy open for future litigation.²¹

Although this substantive due process argument is attractive, especially because it avoids the difficulty of overturning strong precedent against finding a fundamental right to education, it is ultimately untenable. There are a number of hurdles that litigants would have to overcome in order to successfully use this argument to improve schools.²² Advocates could likely show that minors' right to freedom of movement is deserving of heightened protection, as the ensuing example of juvenile curfews shows, and that the general constitutional theory underlying this compulsory attendance argument is sound. However, only in very rare cases would they be able to allege sufficient facts to satisfy the constitutional standard. At trial, plaintiffs would be hard-pressed to prove that the nature of the restraint imposed by compulsory attendance statutes was not justified by the amount of education that they received, however negligible. Advocates for federal involvement in education would be better served by focusing on a fundamental right to a minimum level of education.²³

Section II of this Comment provides an overview of fundamental rights, in general and as applied to minors, with a special focus on the right to freedom of movement in the context of juvenile curfews. It also describes the history and legality of compulsory attendance regimes, and the role that courts—most recently the Sixth Circuit with *Gary B.*—have taken to support students' access to a quality education. Section III argues that while the constitutional theory that underlies the compulsory attendance argument in *Gary B.* is sound, a plaintiff would be highly unlikely to be able to allege sufficient facts to withstand judicial scrutiny. Instead, educational advocates should turn to other constitutional avenues to locate a federal right to education.

II. OVERVIEW

To understand the compulsory attendance argument made by the plaintiffs in *Gary B. v. Whitmer* and its potential for success, there are several areas of law and legislation that must be examined. First, Part II.A discusses substantive due process and fundamental rights. It explores how courts have addressed the fundamental rights of juveniles and then contrasts how the right to freedom of movement has been applied to adults and to minors. Next, Part II.B reviews the history and constitutionality of compulsory attendance statutes in the United States. Finally, Part II.C details the various ways that courts have been involved in the right to education and then breaks down the *Gary B.* mandatory attendance claim and its theoretical underpinnings.

A. Fundamental Rights

The Due Process Clause has been increasingly interpreted substantively to provide a source for unenumerated “fundamental” rights upon which the government may not

20. *Id.* at 642.

21. *See id.* (noting plaintiffs could seek leave to amend their complaint).

22. *See infra* Parts III.A and III.B for a discussion of this argument's disadvantages, in both theory and practical application.

23. *See infra* Part III.C.

infringe, “no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.”²⁴ Once a right is designated as “fundamental,” it requires strict scrutiny analysis: the government may not infringe on the right unless it has a compelling interest and uses narrowly tailored means.²⁵ This Part outlines minors’ fundamental rights generally and then considers the fundamental right of freedom of movement, contrasting the right as applied to adults and to juveniles.

1. Fundamental Rights and Juveniles Generally

The Supreme Court has expressly held that children are “‘persons’ under our Constitution” who possess “fundamental rights which the State must respect.”²⁶ Therefore, “logic would seem to demand strict scrutiny” be applied to any curtailment of children’s fundamental rights, just as it is to those of adults.²⁷ However, courts have been very split on the appropriate level of scrutiny to afford minors’ rights.²⁸

Courts generally reference the “unique characteristics of childhood” when finding that a fundamental right enjoyed by an adult does not merit the same level of scrutiny when applied to a child.²⁹ For example, in *Planned Parenthood of Central Missouri v. Danforth*,³⁰ the Supreme Court explained that “[c]ertain decisions are . . . outside the scope of a minor’s ability to act in his own best interest or in the interest of the public.”³¹ Undergirding this holding was the belief that children are developmentally immature and incapable of exercising their rights in a safe and appropriate manner.³² Another argument for minors’ rights being treated differently is that the state has distinctive and more extensive interests in directing the welfare of young people than it does in the lives of adults.³³

24. *Reno v. Flores*, 507 U.S. 292, 302 (1993).

25. *E.g., id.*

26. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

27. *See Note, Assessing the Scope of Minors’ Fundamental Rights: Juvenile Curfews and the Constitution*, 97 HARV. L. REV. 1163, 1168–71 (1984) (“Children as a class are necessarily different from adults, but the differences need not always be constitutionally significant, and the mere fact of childhood should not be a sufficient justification for differential treatment in a given case.”).

28. *See id.* at 1169 (“[C]ourts . . . have afforded minors’ rights a level of protection lower than that secured by traditional strict scrutiny.”).

29. *See id.* at 1168.

30. 428 U.S. 52 (1976).

31. *Danforth*, 428 U.S. at 72.

32. *See, e.g., Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990) (plurality opinion) (“The State has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely.”); *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (plurality opinion) (“These rulings have been grounded in the recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.”); *Ginsberg v. New York*, 390 U.S. 629, 649–50 (1968) (Stewart, J., concurring) (arguing that a minor may, in some “precisely delineated areas,” lack the capacity to exercise certain rights).

33. *See, e.g., Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) (“[T]he power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . .”).

However, the Supreme Court has explained that in some cases, “the child’s right is virtually coextensive with that of an adult.”³⁴ In *Bellotti v. Baird*,³⁵ addressing a statute requiring parental consent for minors to get an abortion, the Supreme Court outlined a framework for determining whether minors’ constitutional rights should be treated differently than those of adults.³⁶ In deciding whether young people’s rights should be afforded less protection, the Court weighed three factors: “the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.”³⁷

Applying these factors, the Court recognized a valid parental interest in consent and involvement in minors’ important decisions such as terminating a pregnancy,³⁸ but held the statute unconstitutional because it did not allow for the possibility that some minors may be “mature and fully competent to make this decision independently.”³⁹ The overly broad statute did not satisfy the second prong of the test.⁴⁰ Courts have applied *Bellotti*’s three-part test to determine whether juveniles’ fundamental rights—including, for example, the right against self-incrimination⁴¹ and the right to be released from immigration detention⁴²—should be “discounted” from those of adults.

2. Freedom of Movement for Adults

Freedom of movement has long been deemed a fundamental right under the Due Process Clause.⁴³ The Supreme Court has described that the right to come and go as one pleases is “historically part of the amenities of life as we have known them . . . responsible for giving our people the feeling of independence.”⁴⁴ Thus, for adults, statutes that infringe on freedom of movement usually receive strict scrutiny treatment.⁴⁵

Generally, the Constitution does not require affirmative action on the part of the government but rather describes restrictions on government power. For example, due process may be seen as a limitation on any laws that curtail a fundamental right, like freedom of movement.⁴⁶ In this vein, the Due Process Clause is traditionally read to

34. *Bellotti*, 443 U.S. at 634 (plurality opinion).

35. 443 U.S. 622 (1979).

36. *See Bellotti*, 443 U.S. at 634 (plurality opinion).

37. *Id.* at 633–34.

38. *See id.* at 640.

39. *Id.* at 651.

40. *Id.*

41. *See J.D.B. v. North Carolina*, 564 U.S. 261, 272 (2011) (“[A] reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go.”).

42. *See, e.g., Flores ex rel. Galvez-Maldonado v. Meese*, 942 F.2d 1352, 1360 (9th Cir. 1991) (discussing the “fundamental right to be free from governmental detention unless there is a determination that such detention furthers a significant governmental interest”), *rev’d sub nom. Reno v. Flores*, 507 U.S. 292 (1993).

43. *Kent v. Dulles*, 357 U.S. 116, 125 (1958) (“The right to travel is a part of the ‘liberty’ of which the citizen cannot be deprived without the due process of law under the Fifth Amendment.”).

44. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972).

45. *See, e.g., id.* at 161, 164–66.

46. Rebecca Aviel, *Compulsory Education and Substantive Due Process: Asserting Student Rights to a Safe and Healthy School Facility*, 10 LEWIS & CLARK L. REV. 201, 204–05 (2006).

“protect the people from the State,” rather than to confer a right to government aid.⁴⁷ However, there are certain contexts in which the Constitution imposes onto governments affirmative duties; namely, when the state has constrained an individual’s liberty.⁴⁸ One such situation is when an individual is incarcerated.⁴⁹ In *Estelle v. Gamble*,⁵⁰ the Court held that acting with deliberate indifference in denying medical treatment to prisoners is cruel and unusual punishment, reasoning that “[a]n inmate must rely on prison authorities to treat his medical needs.”⁵¹ The state has undertaken an affirmative action to constrain prisoners’ liberty through incarceration, so it must provide for their basic needs because “if the authorities fail to do so, those needs will not be met.”⁵²

Even beyond the context of incarceration, where the government has constrained an individual’s liberty, the state assumes an affirmative duty to protect that individual from harm.⁵³ In *Youngberg v. Romeo*,⁵⁴ the state involuntarily committed a thirty-three-year-old man, Romeo, who was diagnosed with severe mental disabilities.⁵⁵ At the state institutionalization facility, Romeo was injured numerous times by his own violence and that of other residents.⁵⁶ Later, ostensibly in order to protect him, the facility physically restrained Romeo for “prolonged periods on a routine basis.”⁵⁷

The plaintiff’s mother brought suit against the institution, alleging that the state had failed to adequately address Romeo’s violent behavior, which was the very reason for his commitment.⁵⁸ *Youngberg* recognized a constitutionally protected liberty interest in freedom of movement, explaining that “[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action.”⁵⁹ The Court found that the state had violated Romeo’s substantive due process rights by physically restraining him.⁶⁰

Romeo also argued that he had the right to “minimally adequate habilitation.”⁶¹ The Court acknowledged that, “[a]s a general matter, a State is under no constitutional duty to provide substantive services,” but “[w]hen a person is institutionalized . . . and wholly dependent on the State,” a duty to provide certain services does exist.⁶² The Court announced a balancing test to determine whether Romeo’s rights were violated, weighing the plaintiff’s liberty interests against the relevant state interest of ensuring Romeo was

47. *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 196–97 (1989).

48. *Aviel*, *supra* note 46, at 205.

49. *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

50. 429 U.S. 97 (1976).

51. *Estelle*, 429 U.S. at 103.

52. *Id.*

53. *See, e.g., Youngberg v. Romeo*, 457 U.S. 307, 324 (1982).

54. 457 U.S. 307 (1982).

55. *Youngberg*, 457 U.S. at 310.

56. *Id.*

57. *Id.* at 311.

58. *Id.* at 310–11.

59. *Id.* at 316 (alteration in original) (quoting *Greenholtz v. Neb. Penal Inmates*, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part)).

60. *Id.* at 324–25.

61. *Id.* at 316 (quoting Brief for Respondent at 8, 23, 45).

62. *Id.* at 317.

safe and nonviolent.⁶³ Although the Court cautioned deference to professionals' judgment, it held that Romeo had a right to the training and habilitation that would enable him to be safe and free from undue restraint.⁶⁴ On remand, the state was instructed to deliver at least the minimum amount of training that would ensure that its aim of commitment—safety—was achieved.⁶⁵

Similarly, in *Jackson v. Indiana*,⁶⁶ the plaintiff, who was deaf and mute, was subjected to involuntary commitment after being charged with a series of criminal offenses.⁶⁷ The state determined that his mental capacities rendered him unfit to stand trial and ordered him committed, without offering any rehabilitation.⁶⁸ The Court found that this amounted to an unconstitutional permanent institutionalization, as the plaintiff was not “aid[ed] . . . in attaining competency” through training or treatment, given that “attaining competency” was the “ostensible purpose of the commitment.”⁶⁹ Justice Blackmun explained that “due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.”⁷⁰ Likewise, in *Foucha v. Louisiana*,⁷¹ the Supreme Court found that it was inappropriate to hold a pretrial detainee in a psychiatric facility when he was not mentally ill; the nature of his commitment was not rationally related to the purpose of the commitment.⁷²

The substantive due process right to affirmative protection from third-party harms in custodial settings is frequently confused with the issue of affirmative provision of services.⁷³ In *DeShaney v. Winnebago County Department of Social Services*,⁷⁴ the Court held that failure to protect an individual from private violence does not violate the Constitution.⁷⁵ A number of exceptions to the *DeShaney* rule have been recognized, including when the state has a special relationship with the plaintiff—such as in the incarceration and institutionalization examples above—or when the state itself creates the danger.⁷⁶ Courts have frequently applied these exceptions to school settings, generally holding that traditional public schools do not satisfy the special relationship

63. *Id.* at 321.

64. *Id.* at 324.

65. *See id.*

66. 406 U.S. 715 (1972).

67. *See Jackson*, 406 U.S. at 719.

68. *Id.*

69. *See id.* at 738.

70. *Id.*

71. 504 U.S. 71 (1992).

72. *Foucha*, 504 U.S. at 79.

73. *See Gary B. v. Whitmer*, 957 F.3d 616, 640 n.12 (6th Cir.), *vacated en banc*, 958 F.3d 1216 (6th Cir. 2020).

74. 489 U.S. 189 (1989).

75. *See DeShaney*, 489 U.S. at 202.

76. *DeShaney* itself suggested these exceptions. It implied a “special relationship” exception when it stated that the state may have a duty arising from the “limitations which it has imposed on [an individual’s] freedom to act on his own behalf, through imprisonment, institutionalization, or other similar restraint of personal liberty.” *Id.* at 190. The Court indicated a “state-created danger” exception by holding that a duty of affirmative protection from private harms may arise when the state “play[s a] part in their creation” or “render[s an individual] more vulnerable to them.” *See id.*

exception to *DeShaney*, as parents are still students' primary caretakers and can choose to change their child's school placement if they wish.⁷⁷ *DeShaney* and its progeny, however, do not apply to the issue here, as *DeShaney* focuses on third-party action; in education cases, the state itself is causing harm by withholding a quality education from its students.⁷⁸

3. Freedom of Movement for Minors

Children's rights, including the right of free movement, are not automatically considered coextensive with those of adults.⁷⁹ As the Supreme Court has explained, minors often lack the right to "come and go at will."⁸⁰ Especially at a young age, children are subject to the control of their parents or guardians.⁸¹ While it is true that "juveniles, unlike adults, are always in some form of custody,"⁸² it is generally the parent who decides whether a child may move about rather than the state.⁸³

While courts have been split on whether *Bellotti* points to diminishing the standard of review for juveniles' right to free movement, overall, the cases "exhibit a clear judicial preference for some form of heightened review" over rational basis.⁸⁴ However, applying *Bellotti* to the question of freedom of movement, children are more vulnerable than adults in terms of where they choose to go and when, and their "lesser ability to make important decisions wisely could cause them harm."⁸⁵

The fundamental right to freedom of movement, as applied to minors, is most often challenged in the context of juvenile curfews, as exemplified in the New York decision *Anonymous v. City of Rochester*.⁸⁶ There, the City of Rochester imposed a nighttime curfew of 11:00 p.m. to 5:00 a.m. for minors under the age of seventeen.⁸⁷ The curfew was challenged as a violation of a minor's constitutional right to freedom of movement.⁸⁸

77. See, e.g., *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 973 (9th Cir. 2011); *Walton v. Alexander*, 44 F.3d 1297, 1305 (5th Cir. 1995).

78. See *Gary B.*, 957 F.3d at 640 n.12 (citing *DeShaney*, 489 U.S. at 198–200) ("There is a difference between the custody exception to *DeShaney* . . . which concerns whether the state has a duty to protect an individual in its custody against private violence, and the question of whether the state's restriction of a person's liberty . . . is itself allowed under the Due Process Clause.")

79. See *supra* Part II.A.1.

80. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995).

81. *Id.*

82. *Schall v. Martin*, 467 U.S. 253, 265 (1984).

83. See *Ramos v. Town of Vernon*, 353 F.3d 171, 183 (2d Cir. 2003) ("If a parent decides not to limit a child's mobility, and if this decision is not 'unfit' parenting warranting state intervention, then the child has a right to free movement.")

84. Patryk J. Chudy, Note, *Doctrinal Reconstruction: Reconciling Conflicting Standards in Adjudicating Juvenile Curfew Challenges*, 85 CORNELL L. REV. 518, 555 (2000). Many of the decisions that use rational basis review were decided before *Bellotti* and might have a different outcome today. *Id.* (citing *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1245 (M.D. Pa. 1975), *aff'd*, 535 F.2d 1245 (3d Cir. 1976)).

85. *Hutchins ex rel. Owens v. District of Columbia*, 144 F.3d 798, 809 (D.C. Cir.) (applying intermediate scrutiny to a juvenile curfew challenge), *reh'g en banc granted, opinion vacated*, 156 F.3d 1267 (D.C. Cir. 1998), *and on reh'g en banc sub nom. Hutchins v. District of Columbia*, 188 F.3d 531 (D.C. Cir. 1999).

86. 915 N.E.2d 593 (N.Y. 2009).

87. *City of Rochester*, 915 N.E.2d at 594. The curfew allowed minors to stay out until 12:00 a.m. on Fridays and Saturdays. *Id.*

88. *Id.* at 595–96.

The court acknowledged that, for an adult, “there is no doubt that [the right of freedom of movement] is fundamental and an ordinance interfering with the exercise of such a right would be subject to strict scrutiny.”⁸⁹ Recall, however, that the rights of children do not always align precisely with the rights of adults.⁹⁰ The court applied the factors from *Bellotti* and determined that a minor’s right to freedom of movement is somewhat limited as compared with that of an adult.⁹¹ Because children have some level of protectable rights, but can still be subject to greater regulation by the state than can adults, the court found intermediate scrutiny to be the appropriate standard by which to assess the curfew ordinance.⁹²

In applying intermediate scrutiny, the court analyzed whether the curfew was “substantially related” to an “important” government interest.⁹³ The court examined the legislative findings from the Rochester City Council in determining that the purpose of the statute was to protect children, who are often victims or suspects of nighttime crimes, and to “promot[e] parental supervision through the establishment of reasonable standards.”⁹⁴ While the state therefore had an important purpose, there was not a “substantial nexus” between the “burdens imposed” by the regulation and the government interest in protecting children.⁹⁵

The curfew was not substantially related to its intent because it was ineffective and did not further its goals.⁹⁶ The court found that the curfew was motivated by a few specific instances of crime—which would not have been prevented under the ordinance—and that the crime statistics did not support the necessity of a curfew.⁹⁷ An examination of data revealed that the statute, while motivated by an interest in “prevent[ing] minors from perpetrating and becoming victims of crime during nighttime hours,” would not actually impact the safety of juveniles.⁹⁸ For example, city statistics showed that minors were 375% more likely to be suspects of violent crime perpetrated on a weekend night, yet the curfew was less prohibitive on these nights.⁹⁹ Therefore, there was not a significant relationship between the curfew, its related curtailment on freedom of movement, and its stated goals; the statute failed intermediate scrutiny and was overturned.¹⁰⁰

B. Compulsory Attendance

All fifty states have passed compulsory school attendance laws that generally require young people between the ages of five or six and anywhere from sixteen to

89. *Id.* at 597.

90. *Id.*

91. *Id.* at 597–98 (citing *Bellotti v. Baird*, 443 U.S. 622, 634–35 (1979) (plurality opinion)). See *supra* notes 35–40 and accompanying text for a summary of the holding of *Bellotti*.

92. *City of Rochester*, 915 N.E.2d at 598.

93. *Id.* at 599 (citing *Craig v. Boren*, 429 U.S. 190, 197 (1976)).

94. *Id.* at 595.

95. *Id.* at 599.

96. See *id.* at 599–600.

97. *Id.*

98. *Id.* at 599.

99. *Id.* at 600.

100. See *id.* at 600–01.

eighteen to attend school.¹⁰¹ The history of mandatory schooling in the United States goes back to the nation's founding. As the Supreme Court has recognized: “[A]s Thomas Jefferson 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.”¹⁰²

Generally, compulsory attendance laws have been justified from a public policy perspective.¹⁰³ From their inception, these statutes have been defended as necessary to ensure that the state realizes its goals of inculcating social values and protecting children.¹⁰⁴ For example, advocating for a new mandatory attendance statute in 1872, the state superintendent of Connecticut argued that the “great influx of this foreign element” (as he described immigrants) required new compulsory legislation, “for we have imported parents so imbruted as to compel their young children to work for their grog and even to beg and steal in the streets when they should be in schools.”¹⁰⁵ There, the state justified its mandatory attendance policies as necessary to protect children from child labor and abuse.¹⁰⁶

Other states were motivated by economic considerations, such as the productivity of a future labor force, as well as the instillation of American values into immigrant families.¹⁰⁷ Ultimately, most modern-day compulsory attendance laws are undergirded by a “general interest in youth’s well being” and “the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies.”¹⁰⁸ In sum, the state’s interest in education is founded on the value to our country of learned citizens.¹⁰⁹

For example, in 1993, the Supreme Court of Michigan held that the state has an important interest in “seeing that all children within its borders are properly educated.”¹¹⁰ The state’s compulsory attendance statutes are undergirded by interests in both “academic[s] and socialization.”¹¹¹ Michigan’s compulsory attendance statute is intended to support the state’s interest in “prepar[ing] citizens to participate effectively

101. *Compulsory School Attendance Laws, Minimum and Maximum Age Limits for Required Free Education, by State: 2017*, NAT’L CTR. FOR EDUC. STAT., http://nces.ed.gov/programs/staterreform/tab5_1.asp [<http://perma.cc/3FYP-XQ79>] (last visited Feb. 1, 2022).

102. *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

103. See TRACY L. STEFFES, *SCHOOL, SOCIETY, AND STATE: A NEW EDUCATION TO GOVERN MODERN AMERICA, 1890–1940*, at 122–24 (2012).

104. *See id.* at 124.

105. *Id.* at 123–24.

106. *See id.* at 127 (“They saw schooling as a necessary component to solving the child labor problem.”).

107. *See id.* at 127–28.

108. *Prince v. Massachusetts*, 321 U.S. 158, 166–68 (1944).

109. *See, e.g., Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (recognizing “the importance of education to our democratic society”); *Plyler v. Doe*, 457 U.S. 202, 211, 221 (1982) (“[E]ducation has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.”); Edward Knox Proctor V, A. Delconte v. State: *Some Thoughts on Home Education*, 64 N.C. L. REV. 1302, 1308 (1986).

110. *People v. Bennett*, 501 N.W.2d 106, 116 (Mich. 1993). Michigan is highlighted here as it is the setting of *Gary B. v. Whitmer*. *See* 957 F.3d 616 (6th Cir.), *vacated en banc*, 958 F.3d 1216 (6th Cir. 2020).

111. *People v. DeJonge*, 501 N.W.2d 127, 140 (Mich. 1993).

and intelligently” in our society, “awakening [children] to cultural values,” and “preparing [children] for later professional training.”¹¹²

However, recent national studies have shown that compulsory school attendance laws do not lead to increased high school graduation rates or reduced numbers of students who drop out.¹¹³ Nor does mandatory education legislation actually increase levels of attendance.¹¹⁴ Although analyses have purported to show that compulsory schooling leads to higher earnings down the line, critics have argued that this is more accurately associated with higher socioeconomic status and preexisting academic ability rather than school attendance.¹¹⁵ Mandatory schooling has been shown neither to increase the integration of immigrants nor to change cultural attitudes.¹¹⁶

Mandatory attendance laws such as Michigan’s Revised School Code are enforced by school districts.¹¹⁷ If a student is deemed chronically truant, the parent or legal guardian might be required to attend truancy court and ultimately could lose custody of their child.¹¹⁸ Over one thousand truant children each year are removed from their homes “for nothing more than absences from school.”¹¹⁹ Additionally, in Michigan, as in many states, parents who fail to comply with mandatory attendance laws are guilty of a misdemeanor.¹²⁰ Legal consequences can include jail time for “contributing to the delinquency of a minor.”¹²¹ Finally, truancy sometimes has severe financial consequences for parents. For example, in Pennsylvania, guardians may be fined \$300

112. *Hanson v. Cushman*, 490 F. Supp. 109, 115 (W.D. Mich. 1980) (first quoting *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972); and then quoting *Brown*, 347 U.S. at 493).

113. GROVER J. “RUSS” WHITEHURST & SARAH WHITFIELD, BROWN CTR. ON EDUC. POL’Y AT BROOKINGS, COMPULSORY SCHOOL ATTENDANCE: WHAT RESEARCH SAYS AND WHAT IT MEANS FOR STATE POLICY 3, 6 (2012), http://www.brookings.edu/wp-content/uploads/2016/06/0801_education_graduation_age_whitehurst_whitfield.pdf [<http://perma.cc/GYN9-V34C>].

114. William M. Landes & Lewis C. Solmon, *Compulsory Schooling Legislation: An Economic Analysis of Law and Social Change in the Nineteenth Century*, 32 J. ECON. HIST. 54, 86 (1972).

115. See Tyler Boston, Mayuri Chaturvedi & Karina Hermawan, *Does Compulsory School Attendance Affect Schooling and Earnings?*, http://www.damonclark.net/wp-content/uploads/2014/04/angrist_krueger.pdf [<http://perma.cc/8MPR-59MY>] (last visited Feb. 1, 2022) (citing Joshua D. Angrist & Alan B. Krueger, *Does Compulsory School Attendance Affect Schooling and Earnings?*, 106 Q. J. ECON. 979 (1991)).

116. See Adriana Lleras-Muney & Allison Shertzer, *Did the Americanization Movement Succeed? An Evaluation of the Effect of English-Only and Compulsory Schooling Law on Immigrants*, 7 AM. ECON. J.: ECON. POL’Y 258, 286 (2015).

117. *Compulsory School Attendance: Attendance Policies and Grades*, MICH. DEP’T EDUC. (Nov. 2011), http://www.michigan.gov/documents/mde/compulsory_attendance_257944_7.pdf [<http://perma.cc/V4Y5-DTU5>].

118. See Dana Goldstein, *Inexcusable Absences*, MARSHALL PROJECT (Mar. 6, 2015) <http://www.themarshallproject.org/2015/03/06/inexcusable-absences> [<http://perma.cc/68HX-VRSS>].

119. *Id.*

120. MICH. DEP’T EDUC., *supra* note 117.

121. Goldstein, *supra* note 118; see also MICH. COMP. LAWS § 380.1599 (West 2021) (“A parent . . . who fails to comply with this part is guilty of a misdemeanor punishable by . . . imprisonment for not more than 90 days . . .”).

for each additional unexcused absence after referral to truancy court.¹²² In 2014, a mother died in jail while serving a sentence for being unable to pay such fees.¹²³

Compulsory attendance statutes are not enforced uniformly.¹²⁴ As many as fifteen percent of American students are “chronically absent,” yet not all eight million of these students are referred to truancy court.¹²⁵ Intensive enforcement occurs most often in low-income schools and communities of color.¹²⁶

Courts have found that mandatory attendance laws are unconstitutional when they “impinge[] on fundamental rights and interests.”¹²⁷ For example, the Supreme Court has overturned such statutes when they violate freedom of religion¹²⁸ or the liberty interest in making choices about parenting and upbringing.¹²⁹ Indeed, as early as 1893, the Massachusetts Supreme Judicial Court found a law that mandated attendance at a Commonwealth-approved school unconstitutional, holding that parents should retain authority in directing the education of their child.¹³⁰ The court explained that “[t]he great object of these [compulsory attendance] statutes has been that all the children shall be educated, not that they shall be educated in any particular way.”¹³¹ Therefore, for over a century, mandatory attendance laws have been subject to various limitations based on recognized liberty interests.¹³²

In a more recent example of weighing individuals’ liberty interests over the state’s interest in education, *Wisconsin v. Yoder*,¹³³ the Supreme Court exempted Amish children from compulsory attendance beyond the eighth grade.¹³⁴ The Court, while recognizing the “legitimacy of the State’s concern”¹³⁵ in education, found that the parents’ interests in governing religious education and maintaining Amish society were more compelling.¹³⁶ While many cases overturning compulsory attendance statutes were defending liberty interests in parenting, that is not the only liberty interest implicated by

122. Goldstein, *supra* note 118.

123. Nadja Popovich, *Do US Laws that Punish Parents for Truancy Keep Their Kids in School?*, *GUARDIAN* (June 23, 2014, 11:59 AM), <http://www.theguardian.com/education/2014/jun/23/-sp-school-truancy-fines-jail-parents-punishment-children> [<http://perma.cc/L3JL-KN6B>].

124. *See* Goldstein, *supra* note 118 (describing the “nearly untrammelled discretion” that schools enjoy in their enforcement of truancy laws).

125. *See id.*

126. *See* Annette Fuentes, *The Truancy Trap*, *ATLANTIC* (Sept. 5, 2012), <http://www.theatlantic.com/national/archive/2012/09/the-truancy-trap/261937/> [<http://perma.cc/WQ7H-NAX4>] (“Chronic absenteeism . . . is how poverty manifests itself on school achievement.” (omission in original)).

127. *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972).

128. *See, e.g., Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925) (overturning an Oregon compulsory education statute that required students to attend public school, in part because it limited their ability to choose to attend parochial schools and practice their religion).

129. *See, e.g., Yoder*, 406 U.S. at 232 (“The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children.”).

130. *See* *Commonwealth v. Roberts*, 34 N.E. 402, 403 (Mass. 1893).

131. *Id.*

132. *See id.*

133. 406 U.S. 205, 234 (1972).

134. *Yoder*, 406 U.S. at 234.

135. *Id.* at 239 (White, J. concurring).

136. *Id.* at 234.

mandatory schooling. The Supreme Court has also recognized that freedom from bodily restraint and freedom of movement are important liberty interests enjoyed by students.¹³⁷

C. A Federal Right to Education

The Supreme Court has expressly held that the right to education is not fundamental.¹³⁸ While state courts have varyingly enforced a right to education, many advocates argue that a federal right to education is necessary to make systemic change at the root of the issue.¹³⁹ This Part explores how courts have attempted to support or create a right to education. Part II.C.1 gives a brief overview of the role that the judiciary has taken in developing a right to education, at both the federal and state levels. Part II.C.2 explores in detail the arguments made in *Gary B.*

1. Courts' Role in the Right to Education

Advocates have made several attempts to create and protect a right to education, ranging from equal protection and school funding to fundamental rights and due process.¹⁴⁰ In the seminal decision *San Antonio Independent School District v. Rodriguez*,¹⁴¹ the Supreme Court upheld a Texas school funding scheme that allocated monies to districts based on property tax, which led to differential funding between high- and low-income neighborhoods.¹⁴² The Court held that education was not a fundamental right, as it appeared neither explicitly nor implicitly in the text of the Constitution, and thus upheld the statute using a rational basis review under the Equal Protection Clause of the Fourteenth Amendment.¹⁴³

Because the funding scheme in Texas still allowed access to some level of education, regardless of equity, the Court did not address the situation of a complete deprivation of access to education.¹⁴⁴ Nine years later, such a situation arose: in *Plyler v. Doe*,¹⁴⁵ the Court struck down a statute that allowed the state to completely deprive undocumented students of access to public education.¹⁴⁶ The total denial of access to any sort of education for these students was found to violate equal protection under a heightened rational basis standard.¹⁴⁷

In response to these holdings—specifically the application of rational basis to the issue of equal protection and education when some level of education is being

137. See *Ingraham v. Wright*, 430 U.S. 651, 673–74 (1977) (applying the fundamental right of freedom of movement and bodily liberty to students' rights and corporal punishment in schools).

138. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18, 37 (1973).

139. See *infra* notes 158–162 and accompanying text.

140. See Robinson, *Essential Questions*, *supra* note 7, at 16–18.

141. 411 U.S. 1 (1973).

142. See *Rodriguez*, 411 U.S. at 8, 54–55.

143. See *id.* at 33–35, 40–41, 55.

144. Note, *A Right To Learn?: Improving Educational Outcomes Through Substantive Due Process*, 120 HARV. L. REV. 1323, 1325–26 (2007).

145. 457 U.S. 202 (1982).

146. *Plyler*, 457 U.S. at 229–30.

147. *Id.* at 223–24 (“By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions . . .”).

provided—school funding litigation has mostly proceeded in state court.¹⁴⁸ State constitutions generally include some guarantee of an “adequate” education.¹⁴⁹ Some courts have read these clauses as providing for what scholars call a “high-minimum quality education for all,” but judges have struggled in defining what exactly that means.¹⁵⁰

State courts generally focus both on “inputs” and “outputs” in measuring adequacy.¹⁵¹ “Inputs,” ranging from student-teacher ratio to quality of facilities, refer to the type of education provided to students and are often measured in dollars.¹⁵² In contrast, “outputs” constitute the impact of education on students.¹⁵³ For example, the West Virginia Supreme Court of Appeals defined the eight outputs necessary for creating an adequate minimum level of education:

(1) literacy; (2) ability to add, subtract, multiply and divide numbers; (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his own governance; (4) self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work—to know his or her options; (5) work-training and advanced academic training as the child may intelligently choose; (6) recreational pursuits; (7) interests in all creative arts, such as music, theatre, literature, and the visual arts; [and] (8) social ethics, both behavioral and abstract, to facilitate compatibility with others in this society.¹⁵⁴

More recently, states have used national standards, promulgated by the Every Student Succeeds Act,¹⁵⁵ to define a minimally adequate education.¹⁵⁶ One common issue in these adequacy cases is the concern over judicial activism, specifically focused on whether the judiciary has sufficient expertise to define a minimum level of education.¹⁵⁷

148. Robinson, *Essential Questions*, *supra* note 7, at 12–13; *see also* Naassana, *supra* note 12, at 1221, 1223 (“As a result of *Rodriguez*, the Supreme Court essentially punted authority for educational funding back to the states.”).

149. *See supra* note 4 for information about state constitutions and their education clauses.

150. Paul A. Minorini & Stephen D. Sugarman, *Educational Adequacy and the Courts: The Promise and Problems of Moving to a New Paradigm*, in *EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES* 175, 188 (Helen F. Ladd et al. eds., 1999).

151. *Id.* at 189.

152. *Id.*

153. *Id.*

154. *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W. Va. 1979); *see also* *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 212 (Ky. 1989) (defining seven capacities students must be equipped with after receiving an adequate education).

155. Pub. L. No. 114-95, 129 Stat. 1802 (2015) (codified as amended in scattered sections of 20 U.S.C.).

156. Derek W. Black, *Implying a Federal Constitutional Right to Education*, in *A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY* 135, 144 (Kimberly Jenkins Robinson ed., 2019).

157. *See* Eloise Pasachoff, *Doctrine, Politics, and the Limits of a Federal Right to Education*, in *A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY* 84, 84, 95 (Kimberly Jenkins Robinson ed., 2019) (describing this as the “definitional rationale”).

Some advocates believe that the right to education should return to federal court, after its post-*Rodriguez* retreat to state judiciaries.¹⁵⁸ Activists believe that constitutional enshrinement would help to insulate the right to education from the buffeting of political and economic winds, which most often harm disadvantaged communities.¹⁵⁹ It also may create what scholar Cass Sunstein has called a constitutive commitment.¹⁶⁰ That is, finding a federal right to education could serve as “a catalyst, a goad, a call to action”—encouraging continued growth and positive change within the sphere of education reform.¹⁶¹ To these advocates, state reform will always lack “the power and the sustained impact of a federal constitutional right,” which more directly conveys a national priority.¹⁶²

2. *Gary B. v. Whitmer*

In a recent federal challenge involving both adequacy and equal protection, *Gary B. v. Whitmer*, several students in Detroit public schools sued the State of Michigan for failing to provide any meaningful level of education.¹⁶³ The plaintiffs, who attended schools that serve almost exclusively low-income students of color, alleged that the schools that they were forced to attend were “schools in name only.”¹⁶⁴ They claimed that a combination of uncertified and ineffective teachers, decrepit and unsafe physical conditions, and a lack of appropriate learning materials created an all-out failure to provide an education.¹⁶⁵ Plaintiffs “sit in classrooms where not even the pretense of education takes place,” they argued, “in schools that are functionally incapable of delivering access to literacy.”¹⁶⁶

This characterization of the failure of Detroit schools is supported by data.¹⁶⁷ First, according to the National Education Association, fifty-three percent of schools nationwide need physical improvements to achieve safety.¹⁶⁸ Unhealthy schools abound, ranging from those with lead in their drinking water to buildings with asbestos and

158. See Robinson, *Essential Questions*, *supra* note 7, at 16.

159. See Friedman & Solow, *supra* note 5, at 154; see also Goodwin Liu, *Education, Equality, and National Citizenship*, 116 *YALE L. J.* 330, 333 (2006) (“These facts speak clearly to the need for a national approach to the distribution of educational opportunity.”).

160. CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 62 (2004) (defining “constitutive commitments” as expectations of government that are so universally valued that they are essentially free from political attack).

161. Friedman & Solow, *supra* note 5, at 151–52.

162. Robinson, *Essential Questions*, *supra* note 7, at 14 (quoting Michael A. Rebell, *Rodriguez Past, Present, and Future*, in *THE ENDURING LEGACY OF RODRIGUEZ: CREATING NEW PATHWAYS TO EQUAL EDUCATIONAL OPPORTUNITY* 65, 72–73 (Charles J. Ogletree, Jr. & Kimberly Jenkins Robinson eds., 2015)).

163. *Gary B. v. Whitmer*, 957 F.3d 616, 620–21 (6th Cir.), *vacated en banc*, 958 F.3d 1216 (6th Cir. 2020).

164. *Id.* at 621.

165. *Id.* at 624.

166. *Id.* at 661 (quoting the plaintiffs’ complaint).

167. See *id.* at 624.

168. Amanda Litvinov, *Our Crumbling Public School Infrastructure*, NAT’L EDUC. ASS’N (Oct. 30, 2018), <http://www.nea.org/advocating-for-change/new-from-nea/our-crumbling-public-school-infrastructure> [<http://perma.cc/D7VK-MW8Z>].

asthma triggers.¹⁶⁹ Second, chronically ineffective and inexperienced teachers can have a large impact on student achievement: teacher value-added measures directly correlate with a student's likelihood of attending college and earning more.¹⁷⁰ Researchers estimate that dismissing the bottom quartile of novice teachers would result in significant net increase in student test scores.¹⁷¹ Finally, many classrooms have no textbooks, and teachers must shell out personally to pay for basic school supplies like dry-erase markers.¹⁷² Access to effective textbooks has been shown to swell student achievement by 3.6 percentile points, a large boost when considered in context.¹⁷³

The conditions alleged by the plaintiffs in *Gary B.* are therefore directly correlated to lower achievement; these issues disparately impact students of color.¹⁷⁴ For example, while white public high school students on average attend schools in the sixtieth percentile for literacy, Black students on average attend schools in the thirty-fifth.¹⁷⁵ These trends persist even when controlling for socioeconomic status and metropolitan location.¹⁷⁶

The combination of the factors described by the plaintiffs in *Gary B.* led to “abysmal” educational outcomes: for example, only 4.2% of third graders at a Detroit school scored “proficient or above” on the state’s English assessment, compared with 46.0% of third-graders statewide.¹⁷⁷ Some grade levels enjoy zero percent proficiency.¹⁷⁸ Plaintiffs thus alleged that these are institutions that are “not truly schools by any traditional definition or understanding of the role public schools play in affording access to [an education].”¹⁷⁹

169. See COALITION FOR HEALTHIER SCHS., TOWARDS HEALTHY SCHOOLS: REDUCING RISKS TO CHILDREN 3–4 (2016), <http://www.healthyschools.org/data/files/TowardsHealthySchools-Risks.pdf> [<http://perma.cc/XJH5-ANLN>].

170. See Raj Chetty, John N. Friedman & Jonah E. Rockoff, *Great Teaching: Measuring Its Effects on Students' Future Earnings*, 12 EDUC. NEXT 59, 60 (2012).

171. ROBERT GORDON, THOMAS J. KANE, DOUGLAS O. STAIGER & BROOKINGS INST., IDENTIFYING EFFECTIVE TEACHERS USING PERFORMANCE ON THE JOB 8 (2006), http://www.brookings.edu/wp-content/uploads/2016/06/200604hamilton_1.pdf [<http://perma.cc/6RXX-F3PY>]; see also Linda Darling-Hammond, *Assuring Essential Educational Resources Through a Federal Right to Education*, in A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY 235, 243 (Kimberly Jenkins Robinson ed., 2019) (detailing the ways that teachers' qualifications significantly affect student achievement).

172. See, e.g., Nicole Amato, *A Lack of Resources for Many Classrooms*, N.Y. TIMES: ROOM FOR DEBATE (Mar. 26, 2015, 6:51 AM), <http://www.nytimes.com/roomfordebate/2015/03/26/is-improving-schools-all-about-money/a-lack-of-resources-for-many-classrooms> [<http://perma.cc/PDL4-CYCC>].

173. Thomas J. Kane, *Never Judge a Book By Its Cover—Use Student Achievement Instead*, BROOKINGS (Mar. 3, 2016), <http://www.brookings.edu/research/never-judge-a-book-by-its-cover-use-student-achievement-instead/> [<http://perma.cc/3U6Y-MTF2>].

174. See *Gary B. v. Whitmer*, 957 F.3d 616, 637 (6th Cir.), *vacated en banc*, 958 F.3d 1216 (6th Cir. 2020).

175. JOHN R. LOGAN, US2010 PROJECT, WHOSE SCHOOLS ARE FAILING? 2 (2010).

176. *Id.* at 3–4.

177. *Gary B.*, 957 F.3d at 627.

178. *Id.*

179. *Id.* at 624 (quoting the plaintiffs' complaint).

The Sixth Circuit considered three main arguments as to why the level of education provided by the state was unconstitutional.¹⁸⁰ First, the plaintiffs alleged that their schools violated the Equal Protection Clause because they did not provide students the same access to literacy as other Michigan schools.¹⁸¹ The court dismissed this argument for failing to state a claim, as the complaint did not allege sufficient facts about other schools in the state as compared to their own.¹⁸²

Second, the plaintiffs argued that Michigan had violated students' substantive due process rights in failing to provide an education that could plausibly impart a basic level of literacy.¹⁸³ A panel of the Sixth Circuit agreed with this claim, finding, for the first time ever, that the Due Process Clause protects a fundamental right to a basic level of literacy.¹⁸⁴ The majority reasoned that literacy is essential to nearly every interaction between a government and its citizens, including paying taxes, voting, and serving on a jury.¹⁸⁵ The panel also considered the equalizing effect of education, explaining that denying access to literacy arbitrarily denies young people all opportunity for success in life.¹⁸⁶ Although the Sixth Circuit sitting en banc vacated the panel's ruling soon after, the panel's groundbreaking decision has encouraging implications for the future of federal courts' intervention into failing schools.¹⁸⁷

While recognizing a new fundamental right to literacy is likely the greatest achievement of *Gary B.*, this Comment focuses instead on the third argument made by the plaintiffs, also involving substantive due process.¹⁸⁸ The Sixth Circuit recognized that "[c]ompulsory school attendance laws are a restraint on Plaintiffs' freedom of movement, and thus implicate the core protections of the Due Process Clause."¹⁸⁹ Accepting the analogy between mandatory attendance and cases like *Estelle* and *Youngberg*,¹⁹⁰ the court explained that "[w]hile the degree of deprivation is obviously greatest in a case like involuntary commitment, there is no reason why this balancing principle should not apply to less-extensive restraints as well."¹⁹¹ Indeed, mandatory attendance laws are often referred to as "in your seat" policies, suggesting their significant restraint on students' freedom of movement.¹⁹²

In most cases, the *Gary B.* court reasoned, the state's interest in educating its citizens will justify the deprivation of freedom of movement that mandatory attendance

180. *Id.* at 620–21.

181. *Id.* at 633.

182. *Id.*

183. *See id.* at 642.

184. *See id.* at 655.

185. *See id.* at 652–53.

186. *See id.* at 654–55.

187. *See Naassana, supra* note 12, at 1273.

188. *See Gary B.*, 957 F.3d at 640.

189. *Id.*

190. *See supra* Part II.A.2.

191. *Gary B.*, 957 F.3d at 640.

192. *See, e.g., Joe Gerald & Benjamin Brady, Time To Make Your Mandatory-Attendance Policy Optional?*, CHRON. HIGHER EDUC. (Jan. 13, 2019), <http://www.chronicle.com/article/time-to-make-your-mandatory-attendance-policy-optional/> [<http://perma.cc/KSK7-V2E4>].

laws generate.¹⁹³ However, forcing students to attend a “school” that provides no education at all would violate substantive due process protections, because it would “bear no reasonable relationship to the state’s asserted purpose.”¹⁹⁴ Analyzing a claim such as this entails balancing the extent of the deprivation of students’ liberty interests against the education actually provided by the state.¹⁹⁵ The Sixth Circuit held that the plaintiffs’ complaint did not allege facts sufficient to withstand the defendants’ motion to dismiss on this argument—which this Comment will refer to as “the *Youngberg* argument”—as they did not provide adequate information about the nature of the restraint that they faced.¹⁹⁶ However, the court left the possibility of this argument’s efficacy open for future litigation.¹⁹⁷

The *Youngberg* argument has been accepted by a court once before, in a little-known case from the Supreme Court of Alabama.¹⁹⁸ In *Opinion of the Justices No. 338*,¹⁹⁹ the plaintiffs claimed that the inadequate education provided by Alabama’s public school system violated their right to adequate education under the Constitution.²⁰⁰ The court held that, because the state deprived students of their liberty by mandating attendance, students had the right to “services adequate to meet the purposes of their confinement”—that is, education.²⁰¹ The court cited mental institutionalization precedent as analogous to compulsory attendance, holding that, “as a matter of fairness, the state ought to have to provide an adequate education” if it was depriving children of their liberty in a similar way to institutionalization.²⁰² Alabama remains the only state to recognize this legal argument.²⁰³ States decline to follow Alabama’s lead, fearing the challenges that accompany the approach.²⁰⁴

The vacated *Gary B.* opinion was decided two to one by a three-judge panel; Judge Murphy issued a vociferous dissent.²⁰⁵ In opposing the *Youngberg* argument, he focused on two main issues: federalism and judicial activism.²⁰⁶

First, Judge Murphy argued that the Due Process Clause cannot be used to compel a state to affirmatively act.²⁰⁷ In general, he argued, the balance of federalism should prevent the federal government from using its “‘numerous and indefinite’ powers” to

193. *Gary B.*, 957 F.3d at 640.

194. *Id.* at 640–41.

195. *Id.* at 641–42 (“For such a claim to be viable . . . Plaintiffs would have to show that the degree of restraint imposed on them cannot be justified by whatever education, however negligible, they are receiving.”).

196. *Id.* at 642. The court suggested that facts about the hours per day and days per year of schooling required by compulsory attendance statutes would satisfy this burden. *Id.*

197. *See id.*

198. *See Op. of the Justs.*, 624 So. 2d 107 (Ala. 1993).

199. 624 So. 2d 107 (Ala. 1993).

200. *Op. of the Justs.*, 624 So. 2d at 161.

201. *Id.*

202. *Id.* at 161–62.

203. *See* William S. Koski, *Educational Opportunity and Accountability in an Era of Standards-Based School Reform*, 12 STAN. L. & POL’Y REV. 301, 310 n.94 (2001).

204. *See id.*

205. *See Gary B. v. Whitmer*, 957 F.3d 616, 662 (6th Cir.) (Murphy, J., dissenting), vacated en banc, 958 F.3d 1216 (6th Cir. 2020).

206. *See id.* at 668–71.

207. *See id.* at 667–69.

make decisions that undercut state authority.²⁰⁸ More specifically, Judge Murphy analogized abortion to education in arguing that the Due Process Clause cannot be used to require a state to pay for services, even those necessary to secure access to a fundamental right.²⁰⁹ In *Harris v. McRae*,²¹⁰ the Supreme Court held that while substantive due process—through the fundamental right of privacy—forbids states from banning access to abortion, it does not require states to pay for these services.²¹¹ Judge Murphy averred that “a state does not ‘deprive’ individuals of their ‘liberty’ interest in abortion merely by failing to provide access to the procedure.”²¹² Thus, according to Judge Murphy, the majority violated the vital tenets of federalism by ruling that Michigan was required to affirmatively provide (and to pay for) a certain level of education.²¹³

Second, Judge Murphy argued that courts stepping in to assist in raising the minimum level of schooling provided by the state is impermissible judicial activism, which “jumble[s] our separation of powers.”²¹⁴ Like many criticisms on the grounds of judicial overstepping, Judge Murphy contended that education policy should be decided by legislatures, not judges.²¹⁵ He noted that local decisionmaking, closer to public debate, should be used to shape education;²¹⁶ federal judges are not as well versed in education policy as their legislative counterparts;²¹⁷ and states should be able to serve as “laboratories” for experimenting and devising solutions to social problems.²¹⁸ According to Judge Murphy, the majority should have left the responsibility of failing Detroit schools to the Michigan State Legislature.²¹⁹

208. *Id.* at 668 (quoting THE FEDERALIST NO. 45, at 289 (James Madison) (Clinton Rossiter ed., 1961)).

209. *Id.* at 667–68 (“[D]ue process does not compel states to spend funds on these necessities of life.”).

210. 448 U.S. 297 (1980).

211. *See Harris*, 448 U.S. at 311; *see also Gary B.*, 957 F.3d at 667 (Murphy, J., dissenting) (citing *Rust v. Sullivan*, 500 U.S. 173, 201 (1991)).

212. *Gary B.*, 957 F.3d at 668 (quoting U.S. CONST. amend. XIV, § 1); *see also Harris*, 448 U.S. at 317–18 (“Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice . . . it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.”).

213. *See Gary B.*, 957 F.3d at 667 (Murphy, J., dissenting).

214. *Id.* at 662–63.

215. *Id.*; *see also* Keenan D. Kmiec, *The Origin and Current Meanings of “Judicial Activism”*, 92 CAL. L. REV. 1441, 1444 (2004) (listing five core meanings of the term “judicial activism”).

216. *See Gary B.*, 957 F.3d at 668–69 (Murphy, J., dissenting) (“Federal courts undercut the people’s interest in local decisionmaking whenever they nationalize new extratextual rights.”).

217. *Id.* at 670; *see also* *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 488 (1979) (Powell, J., dissenting) (“Courts are the branch least competent to provide long-range solutions acceptable to the public and most conducive to achieving . . . quality education.”).

218. *Gary B.*, 957 F.3d at 669 (Murphy, J., dissenting) (quoting *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (“In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.”)).

219. *See id.* at 670.

III. DISCUSSION

While the *Youngberg* argument is attractive as an avenue for change, it would be a mistake for educational legal advocates to continue focusing their energy on this flawed claim. In *Gary B.*, the Sixth Circuit simply accepted the premise of this argument without deeply diving into its implications.²²⁰ Although the claim's legal reasoning is sound, the difficulty that litigants would have alleging facts sufficient to withstand judicial scrutiny is ultimately insurmountable.²²¹ Advocates are better served by pursuing the recognition of a fundamental right to education.

Part III.A of this Section addresses theoretical legal issues that proponents of the *Youngberg* argument are likely to encounter (including whether freedom of movement is a fundamental right for young people), then determines that litigants can probably overcome these theoretical hurdles. Part III.B then examines the hazards inherent in alleging facts to apply to this theoretical schema, ultimately concluding that the set of facts that would satisfy the standard are incredibly rare. Finally, Part III.C probes the consequences of this analysis, concluding that the *Youngberg* argument's difficulties—as well as the underlying values that it implicates—indicate that educational advocates are better off pursuing recognition of a fundamental right to education, regardless of whether the state has deprived a student of their physical liberty.

A. The Theory Underlying the Youngberg Argument Is Sound

This Part argues that the theory supporting the *Youngberg* argument is constitutionally sound. Part III.A.1 contends that intermediate scrutiny is the best fit for assessing the right to freedom of movement for young people. Part III.A.2 describes how compulsory attendance laws fail the “substantial nexus” test required for intermediate scrutiny. Finally, Part III.A.3 evaluates and dismisses other constitutional critiques of the *Youngberg* argument.

1. Juveniles' Right to Freedom of Movement Is Deserving of Heightened Scrutiny

Minors' right to freedom of movement must be considered fundamental to implicate substantive due process.²²² The court in *Gary B.* did not reach a discussion of these constitutional standards, given that the plaintiffs did not allege sufficient facts relating to the *Youngberg* argument for the claim to survive the motion to dismiss.²²³ However, if this argument is to have any success moving forward, plaintiffs will have to overcome the hurdle that is assigning minors' rights the status of fundamental, such that compulsory attendance statutes are subject to more than rational basis review.²²⁴ While this Comment concludes that this freedom of movement analysis is not the most appropriate legal avenue for educational advocates to take, a discussion of the fundamental rights of young people is a prerequisite to using substantive due process and may aid litigants moving forward.

220. *See id.* at 642.

221. *See infra* Part III.B.

222. *See Reno v. Flores*, 507 U.S. 292, 301–02 (1993).

223. *See supra* Part II.C.2 for an overview of the holding of *Gary B.*

224. *See supra* Part II.A.3.

The right to freedom of movement is fundamental for adults, thus triggering strict scrutiny; however, courts often “discount” the standard used to assess the rights of juveniles.²²⁵ While some judges have advocated for applying strict scrutiny to juveniles’ right to free movement, just as they do to adults,²²⁶ the unique characteristics of children must be considered in some way in analyzing minors’ constitutional rights.²²⁷

Rational basis, on the other hand, would be too far a departure from the strict scrutiny that adults enjoy.²²⁸ Children are protected by the same constitutional guarantees as adults.²²⁹ Beyond its clearly disfavored position in precedent,²³⁰ rational basis scrutiny would evince a belief that minors’ rights do not deserve virtually any protection at all as compared to those of adults.²³¹

The most workable test for minors’ right to freedom of movement is intermediate scrutiny. This standard recognizes that children, like adults, have a liberty interest in freedom of movement, but then reduces the level of scrutiny to “compensate for children’s special vulnerabilities.”²³² Children “do possess at least qualified rights,” so any law that restricts their liberty should be subject to more than rational basis review; yet, since their rights are not the same as adults, such a restriction should be subject to less than strict scrutiny.²³³ Intermediate scrutiny is the suitable middle ground, and therefore circumvents the Court’s hesitancy to expand the list of fundamental rights and their concurrent protections.²³⁴

Intermediate scrutiny is often applied in the context of juvenile curfews, as exemplified by *Anonymous v. City of Rochester*.²³⁵ In much the same way as a juvenile curfew, mandatory attendance statutes are an infringement on young people’s right to

225. See *supra* Part II.A.1 for a discussion of how courts adjust judicial scrutiny for the rights of minors.

226. *E.g.*, *Hutchins ex rel. Owens v. District of Columbia*, 144 F.3d 798, 825–26 (D.C. Cir.) (Tatel, J., concurring) (“I fear that intermediate scrutiny risks reducing protection for juvenile rights more than necessary to accommodate society’s special interest in and authority over children.”), *reh’g en banc granted, opinion vacated*, 156 F.3d 1267 (D.C. Cir. 1998), and *on reh’g en banc sub nom. Hutchins v. District of Columbia*, 188 F.3d 531 (D.C. Cir. 1999).

227. See, *e.g.*, *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (plurality opinion) (holding that juveniles’ rights “may be treated differently from adults” given children’s immaturity and vulnerability); see also *Ramos v. Town of Vernon*, 353 F.3d 171, 179 (2d Cir. 2003) (“[T]he Supreme Court has indicated that youth-blindness is not a goal in the allocation of constitutional rights.”).

228. See *Schleifer v. City of Charlottesville*, 963 F. Supp. 534, 540–41 (W.D. Va. 1997), *aff’d*, 159 F.3d 843 (4th Cir. 1998).

229. *Bellotti*, 443 U.S. at 635; see also *Application of Gault*, 387 U.S. 1, 13 (1967) (“[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.”).

230. See Brant K. Brown, Note, *Scrutinizing Juvenile Curfews: Constitutional Standards & the Fundamental Rights of Juveniles & Parents*, 53 VAND. L. REV. 653, 662 (2000) (“Few courts have used the rational basis standard to review juvenile curfew ordinances.”).

231. See *Schleifer*, 963 F. Supp. at 541; see also Brown, *supra* note 230, at 662, 682 (“[G]iven the amount of deference a statute receives under this standard, rational basis review virtually assures the statute’s constitutionality. . . . Rational basis . . . does not accord the rights at issue enough respect.”).

232. *Ramos*, 353 F.3d at 176.

233. *Schleifer ex rel. Schleifer v. City of Charlottesville*, 159 F.3d 843, 847 (4th Cir. 1998).

234. See *Bowers v. Hardwick*, 478 U.S. 186, 195 (1986).

235. See *supra* notes 86–100 and accompanying text for a review of the facts and holding of *Anonymous v. City of Rochester*.

freedom of movement.²³⁶ Instead of limiting their free movement during nighttime hours, compulsory attendance laws limit juveniles' right to move at will during the school day.²³⁷

The lessons from *Anonymous* and juvenile curfew jurisprudence, for the purposes of the *Youngberg* argument, are threefold. First, because minors' right to freedom of movement is somewhat limited (yet still constitutionally protected), intermediate scrutiny is the appropriate standard for assessing infringements.²³⁸ Second, under intermediate scrutiny, a statute will be found unconstitutional if it does not serve an important interest or does not have a "substantial nexus" between the burdens imposed and the interests promoted.²³⁹ Generally, it is the second prong of intermediate scrutiny that has proven more "problematic" for governments seeking to impose juvenile curfews.²⁴⁰ Finally, in assessing the relationship between an infringement and its stated purpose, courts may consider legislative findings, policy motivations, and statistical modeling and data on program success to determine whether such nexus exists.²⁴¹

2. Compulsory Attendance Laws Fail the Substantial Nexus Test

To overcome intermediate scrutiny, a state must show that its compulsory attendance statute furthers an important government interest and that the statute is substantially related—or has a "substantial nexus"—to that interest.²⁴² States have a valid interest in educating their citizens.²⁴³ However, this interest is not furthered by the requirement that students attend school when the schools, in practice, are not providing any semblance of an education.²⁴⁴

As the Supreme Court has explained, where a state impairs a liberty interest such as freedom of movement, the deprivation must be rationally related to a legitimate state purpose.²⁴⁵ While there is no "due process right to a specific kind of education," a right to a "sufficiently reasonable educational effort to justify the intrusion on the liberty interest" does exist.²⁴⁶ The quality of education provided by the schools that the *Gary B.* plaintiffs attended does not evince a substantial nexus between the deprivation of liberty imposed by compulsory attendance statutes and the asserted state intent of providing an education. As the majority in *Gary B.* explained, "a 'school' that provides no education at all" is an "arbitrary detention, prohibited by the common law's understanding of due

236. See *supra* note 86 and accompanying text.

237. See *supra* note 101 and accompanying text.

238. See *Anonymous v. City of Rochester*, 915 N.E.2d 593, 599 (N.Y. 2009).

239. *Id.*

240. Chudy, *supra* note 84, at 558.

241. See *Anonymous*, 915 N.E.2d at 600.

242. See *Craig v. Boren*, 429 U.S. 190, 197 (1976).

243. See *supra* notes 107–109 and accompanying text for information about states' interest underlying mandatory attendance statutes.

244. See *supra* notes 164–166 and accompanying text for a brief overview of the plaintiffs' arguments in *Gary B. v. Whitmer*.

245. See *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982).

246. *King v. State*, 818 N.W.2d 1, 88 (Iowa 2012) (Appel, J., dissenting).

process tracing back to the Magna Carta.”²⁴⁷ Thus, compulsory attendance fails the substantial nexus requirement of intermediate scrutiny when no semblance of an education is provided.

This line of reasoning is similar to that of juvenile curfew cases, such as *Anonymous*, which find that the infringement on minors’ right to free movement imposed by a juvenile curfew is not sufficiently related to the stated government purpose of ensuring the safety of young people.²⁴⁸ In *Anonymous*, the government may have been purporting to further a valuable social goal, but a closer examination of the relationship between that goal and the statute revealed that the ordinance did not further the goal in practice.²⁴⁹ The court concluded that, while the curfew was motivated by an important government interest, it did not further that interest and thus failed the “substantial nexus” test.²⁵⁰

Providing an education to all young people is a worthwhile interest, but when that interest is not being furthered—given the reality of failing schools—compulsory attendance statutes cannot rely on it as justification for their infringement on a fundamental right. Although the purpose of the mandatory attendance provision of Michigan’s Revised School Code is to “provide a system of public instruction,”²⁵¹ the plaintiffs in *Gary B.* alleged that Detroit public schools were not in fact providing any instruction.²⁵² Data has shown that mandatory schooling does not change cultural attitudes;²⁵³ thus, the intent of the statute to “awaken[] the child to cultural values” is similarly ineffective.²⁵⁴ The infringement on students’ liberty imposed by mandated attendance is not substantially related to the statute’s stated purposes.²⁵⁵

This argument also aligns with the jurisprudence surrounding institutionalization and commitment. Due process requires that “the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.”²⁵⁶ In *Foucha*, the Supreme Court applied this rule and found that it was inappropriate to incarcerate someone who was not mentally ill in a psychiatric facility, as the nature of his commitment was not rationally related to the purpose of the commitment.²⁵⁷ Similarly, students are being “committed” to school by mandatory attendance laws, yet the nature of their commitment—in schools that do not provide any level of

247. *Gary B. v. Whitmer*, 957 F.3d 616, 638 (6th Cir.), *vacated en banc*, 958 F.3d 1216 (6th Cir. 2020); *see also* *Jennings v. Rodriguez*, 138 S. Ct. 830, 861 (2018) (Breyer, J., dissenting) (“The Due Process Clause—itsself reflecting the language of the Magna Carta—prevents arbitrary detention.”).

248. *See supra* Part II.A.3.

249. *See* *Anonymous v. City of Rochester*, 915 N.E.2d 593, 599–600 (N.Y. 2009).

250. *Id.* at 599–601.

251. Revised School Code of 1976, 1976 Mich. Pub. Acts 451 (codified as amended at MICH. COMP. LAWS §§ 380.1–380.1853 (2019)).

252. *Gary B.*, 957 F.3d at 638.

253. *See* Lleras-Muney & Shertzer, *supra* note 116, at 286.

254. *Hanson v. Cushman*, 490 F. Supp. 109, 115 (W.D. Mich. 1980) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

255. *See Gary B.*, 957 F.3d at 638.

256. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

257. *Foucha v. Louisiana*, 504 U.S. 71, 79 (1992).

education—bears no reasonable relation to the purpose for which they are committed, which is to receive an education.²⁵⁸

In *Youngberg*, the Court balanced “the individual’s interest in liberty against the State’s asserted reasons for restraining individual liberty.”²⁵⁹ It is clear that the state’s interest in providing an education for its citizens, while noble, is not absolute.²⁶⁰ When the state does not provide any semblance of an education, then the infringement on students’ liberty by way of compulsory attendance laws weighs much more heavily than the state’s alleged interest. Thus, the statutes do not evince a substantial nexus to their alleged purpose; this means that under the *Youngberg* argument, the statutes clearly fail intermediate scrutiny.

3. General Constitutional Issues that the *Youngberg* Argument Must (and Can) Overcome

If states are restricting students’ liberty via compulsory attendance statutes, then they must be providing some basic level of education in exchange.²⁶¹ This theory will likely encounter criticism involving the purpose of substantive due process generally, including that it involves impermissible judicial activism and does not require states to undertake affirmative action.²⁶² Many of these arguments were made by Judge Murphy’s dissent in *Gary B.*²⁶³ Although these are significant hurdles, advocates can overcome these critiques and demonstrate that the legal theory underlying the *Youngberg* argument is sound.²⁶⁴

A faultfinder might read the *Youngberg* argument as advocating for the end of mandatory attendance laws.²⁶⁵ To the contrary, compulsory schooling is essential for students and for the future of the country.²⁶⁶ Advocates have good cause to worry that states considering this type of legal challenge would roll back mandatory attendance policies and even stop providing public education at all, for fear that the floodgates of litigation would deplete government treasuries.²⁶⁷ Of course, this development would further limit access to a quality education.²⁶⁸ Instead of getting rid of these services and requirements altogether, governments should be held responsible to their end of the bargain and provide a level of education that is substantially related to the stated purpose of this type of legislation: educating students.

258. See *supra* note 63 and accompanying text.

259. *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982).

260. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (holding that the state’s interest in providing an education is not more important than parental interest in religious upbringing).

261. See *supra* Part III.A.2.

262. See, e.g., *Gary B. v. Whitmer*, 957 F.3d 616, 665–66, 670–71 (6th Cir.) (Murphy, J., dissenting), *vacated en banc*, 958 F.3d 1216 (6th Cir. 2020).

263. See *supra* notes 205–219 and accompanying text.

264. See *infra* Part III.A.3.

265. See Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 825 n.195 (1985).

266. See *supra* notes 108–109 and accompanying text for a discussion of the purposes of mandatory attendance statutes.

267. See Ratner, *supra* note 265, at 825 n.195.

268. See *id.*

For the *Youngberg* argument to be successful, advocates must clear the hurdle that is courts' general disdain of substantive due process.²⁶⁹ The Supreme Court has taken a conservative approach to substantive due process jurisprudence, displaying a fear of extending the doctrine.²⁷⁰ However, the Court continues to recognize substantive due process as a test of the principles of fundamental fairness, and should continue to do so to protect the many unenumerated rights of Americans.²⁷¹ Moreover, the *Youngberg* argument does not necessitate the recognition of an entirely new fundamental right, instead relying on a right that already exists; a "narrower right means narrower judicial intervention," which may be more palatable to a conservative jurist.²⁷²

Even if substantive due process generally is recognized as legitimate, there may be pushback about the purpose of the doctrine.²⁷³ The Supreme Court has explained that "[t]he touchstone of due process is protection of the individual against arbitrary action of government."²⁷⁴ Many critics, including Judge Murphy, have extrapolated this holding to assert that the Due Process Clause does not mandate any affirmative duty for the government to provide services.²⁷⁵ This concern implicates the *Youngberg* argument because plaintiffs trying to sue for better schools, like those in *Gary B.*, are requesting government action as relief—that is, requiring the government to provide (and pay for) a service.²⁷⁶

Judge Posner famously said that "the Constitution is a charter of negative rather than positive liberties."²⁷⁷ However, the Supreme Court has recognized a number of affirmative fundamental rights, from the right to counsel²⁷⁸ to the right to marry.²⁷⁹ *Youngberg* found that the state owes involuntarily committed individuals affirmative rights.²⁸⁰ Moreover, the right to freedom of movement, on which the *Youngberg* argument focuses, does not require this type of affirmative action on the part of the government; the claim instead contends that the government should not infringe on a student's liberty without providing something in exchange.²⁸¹ This is hardly the type of affirmative governmental support that critics of substantive due process condemn. Thus, advocates of the *Youngberg* argument should not be slowed by critiques as to the purpose of due process.

269. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980).

270. See Black, *supra* note 156, at 152 (describing a general "judicial reluctance to recognize new fundamental rights").

271. See Jamal Greene, *The Meming of Substantive Due Process*, 31 CONST. COMMENT. 253, 267 (2016).

272. Black, *supra* note 156, at 153.

273. See *id.*

274. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (alteration in original) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)).

275. See, e.g., Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 534 (2008).

276. *Gary B. v. Whitmer*, 957 F.3d 616, 656 (6th Cir.), *vacated en banc*, 958 F.3d 1216 (6th Cir. 2020).

277. *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983).

278. *Gideon v. Wainwright*, 372 U.S. 335, 343–44 (1963).

279. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

280. See *supra* Part II.A.2 for an overview of the facts and holding of *Youngberg v. Romeo*.

281. See *Gary B.*, 957 F.3d at 641–42.

Beyond arguing against positive liberties, some critics will further protest that the Due Process Clause does not require governments to pay for services.²⁸² For example, in his dissent in *Gary B.*, Judge Murphy analogized abortion to education in arguing that the Due Process Clause cannot be used to require a state to pay for services.²⁸³

This analogy is extended beyond its usefulness. Abortions are not education—“[s]imply put, education is different.”²⁸⁴ Judge Murphy cited *Harris* for the proposition that the state need not pay for access to a fundamental right. In *Harris*, the majority analogized to education, explaining that just because a state may not prevent parents from sending their children to private schools, the state does not have an obligation to “ensure that all persons have the financial resources” to do so.²⁸⁵ Accessing abortions and private schools, while protectable liberty interests, are freedoms that only a subset of Americans choose to exercise.²⁸⁶ In contrast, since the adoption of the Fourteenth Amendment, states have controlled the provision of public education.²⁸⁷ Government has thus undertaken the responsibility to provide this right, and affirmatively requiring states to do so adds no additional burden beyond that which they have already accepted.²⁸⁸

Moreover, the reasoning behind refusing to provide funds for access to the fundamental right of privacy, as it is manifested in the freedom to choose abortion, does not align with the issue of public schooling. In *Harris*, the majority explained that “although government may not place obstacles in the path of a [person’s] exercise of [their] freedom of choice, it need not remove those not of its own creation.”²⁸⁹ There, the obstacle to accessing the fundamental right of freedom of choice was indigency, which the Court held “falls in the latter category”—an obstacle not of its own creation.²⁹⁰ Here, however, the obstacle to accessing the fundamental right of freedom of movement is directly placed in the path of individuals by the government through the use of mandatory attendance policies.²⁹¹ Therefore, the argument that the government need not pay for education to justify the curtailment of freedom of movement implicated by compulsory attendance is not supported by the analogy to abortion.

282. See Lee Goldman, *The Constitutional Right to Privacy*, 84 DENV. U. L. REV. 601, 620 (2006) (“[T]here is no obligation on behalf of the government to publicly fund fundamental rights.”).

283. *Gary B.*, 957 F.3d at 667 (Murphy, J., dissenting) (“[D]ue process does not compel states to spend funds on these necessities of life.”); see *supra* notes 209–219 and accompanying text.

284. *Gary B.*, 957 F.3d at 658 (majority opinion); see also *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (“[N]either is [public education] merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation.”).

285. *Harris v. McRae*, 448 U.S. 297, 318 (1980).

286. Between 2011 and 2014, it was estimated that fourteen percent of women aged fifteen to forty-four years would have an abortion by forty-five. Rachel K. Jones & Jenna Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008–2014*, 107 AM. J. PUB. HEALTH 1904, 1904 (2017).

287. *Gary B.*, 957 F.3d at 658 (“[T]he state has come to effectively occupy the field in public education, and so it is the only practical source of learning for the vast majority of students.”).

288. See *id.*

289. *Harris*, 448 U.S. at 316 (citing *Maier v. Roe*, 432 U.S. 464 (1977)).

290. *Id.* The author would like to note that she believes that indigency is in large part an obstacle that is government created, but that is neither here nor there.

291. See *supra* Part II.B for a discussion of mandatory attendance laws.

Critics argue that courts stepping in to assist in raising the minimum level of schooling provided by the state is impermissible judicial activism, which “jumble[s] our separation of powers.”²⁹² Like many criticisms on the grounds of judicial overstepping, Judge Murphy’s dissent in *Gary B. v. Whitmer* argued that education policy should be decided by legislatures, not judges.²⁹³ While Murphy’s point represents a potentially valid criticism of judicial overstep, this is not dispositive of the *Youngberg* argument.

In general, “judicial activism” is often an empty term, invoked in countless dissents across the years as a label for “Judges Behaving Badly.”²⁹⁴ The most difficult constitutional cases “don’t have clear right answers.”²⁹⁵ Accusations of “judicial activism” will always echo throughout the chambers of substantive due process jurisprudence and are in no way unique to the *Youngberg* argument.²⁹⁶ Moreover, as the majority in *Gary B.* explained, while it is true that courts should not “sit as a super-legislature,” it is “unsurprising that our political process, one in which participation is effectively predicated on literacy, would fail to address a lack of education that is endemic to a discrete population.”²⁹⁷ Thus, the issue about which the plaintiffs were complaining—a lack of literacy—is “exactly what prevents them from obtaining a basic minimal education through the normal political process.”²⁹⁸ This “double bind” requires active judicial intervention, as the inertia of school reform efforts has shown.²⁹⁹

In addition, the common refrain of conservatives that judges are not the experts and should defer to the legislature is in many ways a red herring. Of course, most judges are not experts in education policy, but neither are most elected representatives; that is why expert witnesses exist.³⁰⁰ Just as state governments have been able to use specialists via expert input and national standards (like the Every Student Succeeds Act) to define a minimally adequate education,³⁰¹ so too can federal judges rely on educational policymakers to inform their decisions.³⁰² Every day, the judiciary protects against invasions of rights; it was this power that allowed the *Anonymous* court to strike the city’s

292. *E.g.*, *Gary B. v. Whitmer*, 957 F.3d 616, 663 (6th Cir.) (Murphy, J., dissenting), *vacated en banc*, 958 F.3d 1216 (6th Cir. 2020).

293. *Id.*; *see also* Kmiec, *supra* note 215, at 1444 (listing five core meanings of the term “judicial activism”).

294. Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1401 (2002).

295. *See* Kermit Roosevelt III & Richard W. Garnett, *Judicial Activism and Its Critics*, 155 U. PA. L. REV. PENNUMBRA 112, 113 (2007).

296. *See* Kmiec, *supra* note 215, at 1442–43 n.7 (describing the growth in judges accusing their colleagues of judicial activism).

297. *Gary B.*, 957 F.3d at 655 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965)).

298. *Id.* at 655–56.

299. *See id.* at 656; *see also* ANNE NEWMAN, *REALIZING EDUCATIONAL RIGHTS: ADVANCING SCHOOL REFORM THROUGH COURTS AND COMMUNITIES* 85 (2013) (describing how proponents of judicial restraint that argue for legislative control of education can be “readily overcome” by pointing out legislative inaction).

300. *See* Pasachoff, *supra* note 157, at 91 (describing a legislature’s limitations in defining a quality education).

301. *See supra* note 4 and accompanying text.

302. *See* Black, *supra* note 156, at 140 (“Federal courts would merely be asked to follow the lead of states . . .”).

curfew statute.³⁰³ This action did not overtake the legislature's role in proscribing public safety; neither would a court striking a truancy statute interfere with the legislature's prerogative to set educational standards.

Ultimately, while there are significant hurdles to clear in applying this doctrinal theory, advocates can create a sound constitutional argument if they can overcome these criticisms. There is sufficient precedent to support substantive due process and affirmative governmental duties, making Judge Murphy's dissent conquerable. Unfortunately, the theory's application, in practice, serves to be more problematic.

B. The Extreme Facts that Litigants Would Have To Allege in Use of the Youngberg Argument Limit Its Potential Efficacy

Beyond disagreeing with the constitutional reasoning, defense counsel would likely claim that—even if the *Youngberg* argument's doctrinal underpinnings are sound—the claim does not apply to them: the degree of restraint on students' liberty is not so great, and the level of education not so negligible, as to be violative of substantive due process.³⁰⁴ Unfortunately, the set of facts that would allow a plaintiff to prove that the amount of education they received was not sufficient to justify the incursion onto their free movement imposed by compulsory attendance statutes is incredibly narrow.

Part III.B.1 argues that it is essentially unfeasible for plaintiffs to plead facts to prove that the level of education students receive is not sufficient to justify the incursion on students' freedom of movement. Part III.B.2 demonstrates the impossibility of alleging facts to show that the nature of the restraint on students' liberty violates due process.

1. A Balancing Act: The Impossibility of Defining "Enough" Education

In demonstrating a substantial nexus between the intent of a compulsory attendance statute and the burden imposed, a state must show that the nature of the infringement is substantially related to this goal.³⁰⁵ Most often, a state can satisfy this requirement: the nature of the infringement is such that students are required to go to a state-funded school, which is substantially related to the goal of education.³⁰⁶ However, this presupposes that the state is actually providing an education.

The plaintiffs in *Gary B.* alleged that their schools were so deplorable that they did not provide access to any meaningful level of education.³⁰⁷ The Sixth Circuit accepted the facts underlying the plaintiffs' argument, as the court was obligated to do at the motion to dismiss stage.³⁰⁸ The court thus gave credence to the plaintiffs' allegations that they attended "schools in name only," finding that the plaintiffs had "alleged sufficient facts to infer the extent of the education they are being provided (or at least the extent it

303. See *supra* note 100 and accompanying text.

304. See, e.g., Corrected Brief of Defendants-Appellees at 60, *Gary B. v. Whitmer*, 957 F.3d 616, 663 (6th Cir.), *vacated en banc*, 958 F.3d 1216 (6th Cir. 2020) (No. 18-1855/18-1871).

305. *Craig v. Boren*, 429 U.S. 190, 204 (1976).

306. See *supra* Part III.A.2.

307. See *supra* Part II.C.2.

308. See *Gary B.*, 957 F.3d at 630.

does not exceed).”³⁰⁹ These facts were the “inputs” described above (a lack of qualified teachers, decrepit and unsafe school buildings, and insufficient books and curriculum materials) and the “outputs” of the educational system (standardized testing data and literacy rates).³¹⁰

If the suit had proceeded to trial, the plaintiffs would have had to prove their case by a preponderance of the evidence.³¹¹ Thus, they would have had to allege facts that make it “more likely than not” that the student-plaintiffs were receiving a negligible education.³¹²

When the court is no longer required to construe facts so favorably to the plaintiffs, it would be incredibly difficult to prove that the level of education that the state is providing is not sufficient to justify the level of restraint on the freedom of movement imposed by compulsory attendance statutes. A party may attempt to compare the amount of education received, perhaps measured by test scores or other “outputs,” to the amount of time that students are required to spend in school.³¹³

One can imagine a very narrow set of facts that would satisfy this standard. For example, if a Limited English Proficient student was required to attend school via compulsory attendance statutes but was not given any English language instruction (such that they could not understand anything occurring in the school building), that would be a case where the state was providing zero education.³¹⁴ The *Youngberg* argument could be effective in an extreme scenario such as this, but the majority of cases will not be so clear-cut. Indeed, while litigants may not need to prove that the state was providing *zero* education, the threshold amount would likely be fiercely litigated. As the court in *Gary B.* explained, “a ‘school’ that provides no education at all” is an “arbitrary detention, prohibited by the common law’s understanding of due process tracing back to the Magna Carta.”³¹⁵ If a school was providing literally no education, while simultaneously requiring students to sit at their desks for eight hours a day, three hundred days per year, that would violate substantive due process.³¹⁶ When one factor goes up (i.e., the amount of education provided increases from zero), the other factor simultaneously goes up (i.e., the level of restraint on students’ liberty may increase). What amount of education is “enough” to justify what level of restraint is therefore a

309. *Id.* at 638–42.

310. *See id.* at 627.

311. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 253 (1989) (“[P]arties to civil litigation need only prove their case by a preponderance of the evidence.”).

312. *See* John Leubsdorf, *The Surprising History of the Preponderance Standard of Civil Proof*, 67 FLA. L. REV. 1569, 1573 (2015).

313. *See supra* note 154 and accompanying text for an example of measuring educational “outputs.”

314. *See, e.g.*, Amended Complaint, *Y.S. v. Sch. Dist. of Phila.*, No. 85-cv-6924 (E.D. Pa. 1985) (alleging that the state was failing to provide any English language instruction to the 14,000 Limited English Proficient students in the district); *see also Y.S. v. School District of Philadelphia*, PUB. INT. L. CTR., <http://www.pubintl.org/cases-and-projects/language-services-in-school-district-of-philadelphia/> [<http://perma.cc/XM3T-2JS2>] (last visited Feb. 1, 2022).

315. *Gary B.*, 957 F.3d at 638; *see also Jennings v. Rodriguez*, 138 S. Ct. 830, 861 (2018) (Breyer, J., dissenting) (“The Due Process Clause—itsself reflecting the language of the Magna Carta—prevents arbitrary detention.”).

316. *See Ratner, supra* note 265, at 828 (arguing that this hypothetical “is not rational”).

complicated algorithm of educational policy and constitutional doctrine, one which courts are not well primed to solve.³¹⁷

To be fair, every theory of this ilk involves some level of line drawing, and while the judiciary is not best suited to define a minimum level of education, judges are still able to recognize an excessive gap when they see one.³¹⁸ State courts have used different standards in defining a minimally adequate education.³¹⁹ There is no reason why federal courts would not be able to do similar adequacy analyses.³²⁰ However, state adequacy cases focus only on the quantum of education provided, rather than balancing that data with the extent of the restraint on students' freedom of movement, as contemplated by the plaintiffs in *Gary B.* Unless the facts are incredibly extreme—like in the Limited English Proficient hypothetical—courts would be unable to weigh these two factors concurrently, suggesting that advocates are better served focusing only on one issue: the minimum level of education provided.

2. The Nature of the Restraint Is Too Difficult To Prove

A person's "core liberty interest" in freedom of movement is implicated not only by total imprisonment but also by confinement in "some other form of custodial institution, even if the conditions of confinement are liberal."³²¹ Thus, being confined to a schoolhouse via mandatory attendance legislation involves substantive due process, which is violated when the level of education provided is so minimal that it does not justify such confinement.³²²

While the majority in *Gary B.* found that the plaintiffs alleged sufficient facts about the level of education that they were—or were not—receiving, their claim did not include any information about the mandatory attendance statutes that bound them.³²³ The Sixth Circuit indicated that facts about the hours per day and number of days per year of attendance required, as well as the "restrictions on Plaintiffs' liberty throughout the typical school day," would satisfy pleading requirements.³²⁴

However, the quantum of facts necessary to prove a restriction on freedom of movement is not at all as clear as the circuit court assumed. Just as a court would need to define a threshold minimum level of education that does not justify compulsory attendance, so too would a court have to decide just how much restraint on freedom of

317. While courts may be able to rely on experts to define a minimum level of education, *see* Black, *supra* note 156, at 140, they will be unable to do the same with these two factors concurrently.

318. *See id.* at 155 (arguing that judges can use a minimally adequate education as a "shorthand qualitative identifier of . . . an unconscionable gap in educational opportunity"); *see also* John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 755 (2017) (describing opponents of judicial activism who critique "doctrines that pose[] questions of degree without providing any principled metric for deciding whether a given case properly [falls] on one side or the other of the relevant line").

319. *See supra* notes 151–154 and accompanying text for a discussion of state courts' adequacy standards.

320. *See* Black, *supra* note 156, at 140.

321. *Reno v. Flores*, 507 U.S. 292, 315 (1993) (O'Connor, J., concurring).

322. *See supra* Part II.A.2 for an explanation of the legal theory underlying this argument.

323. *Gary B. v. Whitmer*, 957 F.3d 616, 642 (6th Cir.), *vacated en banc*, 958 F.3d 1216 (6th Cir. 2020).

324. *Id.*

movement is too much for the concurrent level of education.³²⁵ Even examining the content of mandatory attendance statutes, such as the number of hours per day and days per year as the *Gary B.* court suggested, would not end the analysis.³²⁶

Compulsory attendance statutes may not actually limit students' freedom of movement in the constitutional sense. As described above, mandatory attendance laws are enforced most often by punishing parents.³²⁷ Thus, while compulsory attendance statutes purport to limit students' freedom of movement, there are few direct consequences for students if they are broken.³²⁸ If a student is able to walk out of class and no one stops them, then mandatory attendance statutes cannot really be said to inhibit their bodily liberty.³²⁹

Compulsory attendance statutes are not enforced uniformly, or sometimes even at all.³³⁰ If a school district does not enforce its mandatory attendance requirements, then students' freedom of movement is not being restricted, and schools are under no constitutional obligation to provide a certain level of education in exchange.³³¹

Another issue may arise where parents authorize a school to restrain their children's freedom of movement via compulsory attendance laws. Minors enjoy some fundamental rights, but these are "discounted" to take into account the unique characteristics of juveniles.³³² One such characteristic is the "importance of the parental role in child rearing."³³³ Parents are authorized to limit their children's freedom in all sorts of ways, even without especially good reasons.³³⁴ Therefore, if a parent agrees to send their child to public school, the state may respond that it is not them that is restraining the child's freedom of movement, but the parent, so they are under no obligation to provide anything in exchange for the restraint.

Parents' freedom to choose alternative options for their respective children's education, such as private or charter schools, highlights the level of parental choice in sending a student to school; the state's role in limiting students' freedom of movement seems even more attenuated.³³⁵ To be sure, a plaintiff could respond that compulsory attendance laws obligate parents to send their children to school *somewhere*, and therefore to restrict their child's freedom.³³⁶ Moreover, parents frequently do not have

325. *See id.* at 640 (describing the necessary balancing between these two factors).

326. *See id.* at 642.

327. Goldstein, *supra* note 118.

328. *See* Popovich, *supra* note 123 (describing parental punishments for truancy, rather than interventions that target students themselves).

329. *See id.* ("I drop my child off at school and watch him walk through the front door and then . . . he walks right out the back door, and then the school calls me and yells at me.")

330. *See* Goldstein, *supra* note 118 (describing the "nearly untrammelled discretion" that schools enjoy in their enforcement of truancy laws).

331. *See supra* note 247 and accompanying text.

332. *See supra* Part II.A.1 for a discussion of the fundamental rights of minors.

333. *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (plurality opinion).

334. *See, e.g., Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995) ("[Children] are subject, even as to their physical freedom, to the control of their parents or guardians.")

335. *See Gary B. v. Whitmer*, 957 F.3d 616, 666 (6th Cir.) (Murphy, J., dissenting) (articulating how compulsory attendance laws still allow parents to choose their child's school), *vacated en banc*, 958 F.3d 1216 (6th Cir. 2020).

336. *See supra* notes 117–123 and accompanying text.

real school choice as to location.³³⁷ This back-and-forth constitutes a wrinkle that is a further drawback to focusing on freedom of movement in the context of educational adequacy.

Finally, in the era of COVID-19 and virtual schooling, the argument that compulsory attendance laws create a concomitant responsibility to provide an education may be moot. While students are still “in school,” some are attending from their own homes—this does not implicate the fundamental right of freedom of movement in the same way as traditional schooling.³³⁸ Some may argue that mandatory attendance does still implicate freedom of bodily movement in virtual school, given that students are required to be at a computer and logged in at certain times.³³⁹ It is undeniable, however, that this level of restraint on students’ liberty is less than in traditional, in-person school environments.³⁴⁰ Moreover, truancy court is closed in many jurisdictions, suggesting that compulsory attendance statutes are not being enforced in the same way as usual.³⁴¹ Online learning may therefore fatally undermine this substantive due process argument, as it does not affect freedom of movement to the same degree.

Ultimately, just as courts will need to draw lines around what level of education constitutes “enough” to justify an incursion on freedom of movement, so too will they need to define what level of “incursion” is implicated by compulsory attendance statutes.³⁴² The balancing between these two factors is likely too difficult, and the facts that potential plaintiffs would have to allege too specific, to make this line of argument a successful mechanism for educational change moving forward. Instead of requiring courts to analyze two factors—the level of education being provided and the extent of the restraint on students’ freedom of movement—litigants should instead focus on just one: finding a fundamental right to a basic level of education.

C. Advocates Should Focus Instead on a Fundamental Right to a Minimum Education

If the *Youngberg* argument had gone to trial, the plaintiffs would have hit a number of snags in successfully pleading their freedom of movement claim, which relies on difficult and complicated measurements and line drawing.³⁴³ The answers to the

337. See, e.g., Roy Lee Johnson, *School Choice: Limited Choices for Minority and the Poor*, INTERCULTURAL DEV. RSCH. ASS’N (Aug. 1994), <http://www.idra.org/resource-center/school-choice-limited-choices-for-minority-and-the-poor/> [<http://perma.cc/P37K-K3F9>].

338. Anya Kamenetz, *School Attendance in the COVID Era: What Counts as ‘Present’?*, NPR (Sept. 24, 2020, 6:00 AM), <http://www.npr.org/2020/09/24/909638343/school-attendance-in-the-covid-era-what-counts-as-present> [<http://perma.cc/3UUS-8VKD>].

339. See *id.*

340. Compare *id.* (discussing virtual-only attendance policies during the COVID-19 pandemic), with *supra* note 192 and accompanying text (labeling traditional compulsory attendance laws as “in your seat” policies).

341. See, e.g., Nora Perez, *Truancy Rates in the Coastal Bend Impacted by COVID-19 Pandemic*, KGW (Dec. 4, 2020, 5:39 PM), <http://www.kiiitv.com/article/news/education/truancy-rates-in-the-coastal-bend-impacted-by-covid-19-pandemic/503-cd074207-d88c-4d22-89a0-a5e0b13cfce7> [<http://perma.cc/HVP6-82MB>].

342. See *supra* note 323 and accompanying text.

343. See *supra* note 323 and accompanying text.

questions “how much is students’ liberty restrained?” and “how little education is provided?” are too difficult for courts to answer, especially when asked in concert.

In contrast, once a court finds a fundamental right to a basic level of education, they no longer must consider the level of restraint implicated by compulsory attendance schemes.³⁴⁴ This approach lessens the burden on litigants and likens the analysis more closely to the state adequacy claims described above.³⁴⁵ Given that state courts have been successful in defining what constitutes a basic minimum level of education,³⁴⁶ federal courts would likely be able to formulate their own definition of educational adequacy. The difficulty of the *Youngberg* argument lies in weighing the level of education against the nature of restraint—a fundamental right to a basic education avoids this problem entirely.

The language of a “right” to education is important. Calling it a “right” “give[s] us a moral vocabulary . . . to express our aspirations for education.”³⁴⁷ It also empowers students to “lay claim to the education they deserve here and now.”³⁴⁸ This language holds more power than a clause in a state law or a policy proposed by Congress could ever create.³⁴⁹

This “right” to a basic minimum education may have many contours, but should generally align with the right to literacy argument in *Gary B.*,³⁵⁰ which has been shown to be effective and has been echoed by numerous education law scholars.³⁵¹ The Supreme Court has articulated time and time again the importance of the state’s interest in creating an educated citizenry that can participate in democracy.³⁵² Thus, to further this interest, the state must provide access to a basic level of education that plausibly provides opportunities to access literacy.³⁵³

This argument avoids the double-factor balancing of the *Youngberg* argument, focusing only on the “output” of access to literacy.³⁵⁴ While some may argue that this approach is less likely to succeed given the strong counter precedent of *Rodriguez*,³⁵⁵ that case focused on denying a fundamental right to education generally, rather than defining a minimum level of quality.³⁵⁶ Indeed, *Rodriguez* left open the possibility of

344. See, for example, *supra* notes 188–192 and accompanying text for a description of the minimum level of education argument in *Gary B.*, which does not require a consideration of mandatory attendance.

345. See *supra* Part II.C.1 for an explanation of how state courts address educational adequacy claims.

346. See *supra* Part II.C.1.

347. NEWMAN, *supra* note 299, at 116.

348. *Id.*

349. See Kimberly Jenkins Robinson, *Designing the Legal Architecture To Protect Education as a Civil Right*, 96 IND. L. J. 51, 89–90 (2020) [hereinafter Robinson, *Legal Architecture*].

350. See *supra* notes 188–192 and accompanying text.

351. See, e.g., Robinson, *Legal Architecture*, *supra* note 349, at 98 (explaining that a federal right to education must create “engaged and effective citizens”); NEWMAN, *supra* note 299, at 3 (arguing that “deliberative democracy cannot be sustained without a robust right to education”).

352. See, e.g., *supra* note 102 and accompanying text.

353. See Naassana, *supra* note 12, at 1255.

354. See *supra* note 153 and accompanying text for a definition of “outputs.”

355. See, e.g., Bruce Meredith & Mark Paige, *Reversing Rodriguez: A Siren Call to a Dangerous Shoal*, 58 HOUS. L. REV. 355, 360 (2020).

356. See Naassana, *supra* note 12, at 1223–24 (calling the issue of adequacy a “crucial gap” left in Supreme Court doctrine).

recognizing some sort of constitutional floor of education, holding that Texas had been providing at least the minimum.³⁵⁷ This recognition has been affirmed in subsequent cases like *Plyler*, indicating that the “basic minimum” right may have success when revisited by the Supreme Court.³⁵⁸

IV. CONCLUSION

While a creative use of substantive due process, the argument here—that a state that restrains a student’s right to freedom of movement through the use of mandatory attendance statutes undertakes an attendant responsibility to provide that student with an education—is simply too difficult to prove in the vast majority of situations. Educational advocates would be better served by focusing on a fundamental right to a basic level of education, a right that most other countries on Earth recognize.³⁵⁹ This legal avenue avoids the impossible task of pleading facts sufficient to claim that the level of education being provided does not justify the level of restraint on students’ liberty.³⁶⁰ A fundamental right to literacy would ensure that students whose schools are “schools in name only,” who currently are not provided with the tools that they need to learn and grow, receive access to something closer to a quality education.³⁶¹

357. NEWMAN, *supra* note 299, at 54 (“[Rodriguez] recognized that some amount of education is necessary to make other rights meaningful—a point that opens the door to recognition of a minimal right to education.”).

358. *See* Note, *supra* note 144, at 1325–26.

359. *See supra* note 3 and accompanying text.

360. *See supra* Part III.C.

361. *Gary B. v. Whitmer*, 957 F.3d 616, 624 (6th Cir.), *vacated en banc*, 958 F.3d 1216 (6th Cir. 2020).