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SEARCHING FOR A CONSTITUTIONAL RIGHT TO LITERACY EDUCATION IS SUFFICIENTLY FUNDAMENTAL

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ABSTRACT

The Due Process Clause of the Fourteenth Amendment safeguards rights that, despite not being guaranteed by the Constitution, are thought to be so basic that they cannot be violated. Although the Supreme Court explicitly rejected the existence of a fundamental right to education, it left open the possibility that some minimal level of education might qualify as a fundamental right in order to protect the freedom of speech and political participation guaranteed by the Constitution. A fundamental right to access literacy is protected by the Due Process Clause, according to a ruling made in *Gary B. v. Whitmer*¹ by the Sixth Circuit Court of Appeals in 2020. This Note contends that despite the Sixth Circuit's decision's short lifespan and lack of precedent, it presents a formulation of the right to education that upholds Supreme Court precedent, recognises the value of literacy and public education in American life, and offers a strong tool for potential plaintiffs looking to address educational inequity.

INTRODUCTION

With kids falling behind pre-pandemic standards at the conclusion of the 2020–2021 school year by an average of five months, the COVID–19 pandemic has raised attention to the US educational system. Black children lost six months of schooling, and low-income pupils lost seven, which was particularly felt by historically disadvantaged populations. Of course, the

¹ Gary B. v. Whitmer – 957 F.3d 616 (6th Cir. 2020)

inequity highlighted by the pandemic learning loss reflects broader disparities that have existed in the American educational system for a considerable amount of time.

In response to similar educational injustices in 2018, a class of plaintiffs made up of students from Rhode Island's public schools filed a federal court lawsuit against the State in an effort to have public education recognised as a fundamental right guaranteed by the US Constitution. The student plaintiffs claimed that many of Rhode Island's public schools had failed to give their students a rigorous education that would have allowed them to effectively exercise their right to free expression and to vote. According to the plaintiffs, this deficiency violated their fundamental right to an education that would prepare them to be informed citizens capable of participating in the democratic process.

The United States District Court for the District of Rhode Island rejected the student plaintiffs' action in *A.C. v. Raimondo*² in October 2020. Although dismissing their case, the District Court commended the plaintiffs for starting one that exposed the flaws in Rhode Island's educational system and recognised the value of educated citizens in maintaining and preserving democracy.

The First Circuit Court of Appeals upheld the dismissal of the lawsuit in *A.C. ex rel. Waithe v. McKee*³ in January 2022, handing the Rhode Island plaintiffs another defeat at the appellate level. The plaintiffs intend to request certiorari from the US Supreme Court in the near future.

A restricted right to education under the Due Process Clause has some legal basis, despite the absurdity of a constitutional right to education. After all, the most culturally significant area of constitutional interpretation is the Supreme Court's rulings concerning public education. Although the Supreme Court has ruled that there is no general right to education, the ruling in *San Antonio Independent School District v. Rodriguez*⁴ from 1972 and its subsequent decisions leave open the possibility that the Due Process Clause may protect a fundamental right that includes some basic education required to exercise the right to vote and the right to free expression. Since *Rodriguez*, plaintiffs have made attempts to make the case for a fundamental right to education in a number of forums, but none have been successful to date.

² *A.C. v. Raimondo* 494 F. Supp. 3d 170 (D.R.I. 2020)

³ *A.C. v. McKee* 23 F.4th 37 (1st Cir. 2022)

⁴ *San Antonio Independent School District v. Rodriguez* 411 US 1 (1972)

By analysing pertinent Supreme Court precedents and the historical progression of the American educational system, this Paper investigates the question of a fundamental right to a basic education. The Sixth Circuit Court of Appeals' majority and dissenting decisions in *Gary B. v. Whitmer* from 2020 are used in this Article to illustrate the conflicting potential outcomes to the debate over whether there is a constitutional right to education.

Part I of the Note gives an overview of the history of public education in the United States as well as the injustices that characterise the current status of American education, as well as a summary of Supreme Court precedent concerning fundamental rights and education. Section II analyses the arguments made in the majority and dissenting opinions of the Whitmer decision by the Sixth Circuit Court of Appeals. Part III concludes by arguing that even though the Sixth Circuit's conception of the right to access literacy is limited, it could be a useful tool for plaintiffs seeking to affect change. This is because plaintiffs seeking to establish a meaningful right to education should adopt the Sixth Circuit majority's framing of a right to access basic literacy.

I. THE HISTORICAL AND LEGAL CONTEXT OF FUNDAMENTAL RIGHTS US PUBLIC EDUCATION AND JURISPRUDENCE

The legal framework for classifying constitutional rights, as well as education's place in the country's "history and tradition," are key factors in determining whether access to education is basic enough to require substantive due process protection. The history of public education in the United States is briefly summarised in Section A of this Part, outlining its development and the growth of state participation in education over time. Also, it offers some details about the current state of educational inequity in the US. Part B examines the development of constitutional law as well as pertinent Supreme Court rulings relating to educational access.

A. A Succinct History of American Education

Throughout the political and social history of the United States, public education has a long history. The first public schools in America were formed before the country even existed. On April 23, 1635, Boston Latin School, the country's first school founded by a European, opened its doors. The Massachusetts Bay Colony passed a statute in 1642 mandating that officials

evaluate the educational status of every kid living in the Colony. The Colony established educational requirements for its children in 1648.

The Commonwealth of Massachusetts placed a strong emphasis on the value of public education and public schools when it drafted its state constitution in 1780. Thirty-seven of the thirty-seven states in the union had education in their state constitutions by the time the Fourteenth Amendment to the United States Constitution was ratified in 1868. All fifty state constitutions in the United States today mandate that the state educate its citizens, with 18 state constitutions noting explicitly that education is essential to democracy. Other states' state courts have gone a step further and ruled that education is a fundamental right protected by their state constitutions, including North Carolina and Connecticut.

Prior to the 1830s, there was little to no state or federal regulation of local school administration. But in the years that followed, proponents of educational reform like Horace Mann argued that democratic necessity required the establishment of mandatory state-run public education. All kids between the ages of eight and fourteen had to attend school starting on May 18, 1852, making Massachusetts the first state to impose this requirement. The majority of states had adopted similar laws requiring children to attend school by 1891. By 1918, legislation requiring school attendance had been passed by each of the forty-eight states that were then in existence.

As early as 1787, before the Constitution was even ratified, the federal government was concerned about education. The Northwest Ordinance recognised the need of knowledge for effective governance and supported the establishment of schools and education in the Northwest Territories. During the Civil War, in 1867, Congress formed the United States Department of Education to gather information on state-by-state educational trends and assist state and local leaders in setting up educational institutions.

The Department of Education's function expanded in scope and importance over the course of its first century of operation. The Department of Education Organization Act, passed by Congress in 1979, elevated the Department of Education to a cabinet-level department. As a full-time, cabinet-level federal official with responsibility for education, the Act also established the office of Secretary of Education. According to its declared mission, the Department of Education seeks to increase educational access and quality in order to support students in achieving academic

achievement. Around \$580 billion, or more than \$14,000, was spent on primary and secondary education in the United States in 2018. The majority of this investment comes from the states and localities, with only around 7% of K–12 education funding coming from the federal government. Almost fifty million pupils are educated in public schools nationwide, or more than 85% of all students in the country.

Education disparities still exist across the American educational system, despite this significant investment and the lofty terminology utilised by the Department of Education. Compared to students in primarily "non-white" districts, "predominantly white" pupils as a whole got more than \$23 billion in investment, or around \$2,000 more per student. Furthermore, low income, predominately non-white school districts receive around \$1,600 less on average than the typical U.S. school district, despite poor, primarily white school districts receiving \$150 less on average. Further to losing additional knowledge due to the COVID-19 epidemic, minority and low-income students already faced challenges due to their frequent attendance at failing institutions of higher learning. Also, pupils who are low-income, disabled, Black, American Indian, and Hispanic are much more likely to drop out of high school. The differences in educational access and quality along racial and class lines suggest that the Department of Education's mission has not yet been accomplished if its goal is to support the achievement of all children.

B. The Due Process Clause and the Law of Fundamental Rights

Some rights are guaranteed to the American people by the United States Constitution and cannot typically be violated by federal, state, or municipal authority. Many rights, including the freedom of speech and the right to bear arms, are expressly stated in the Constitution. The Due Process Clause of the Fourteenth Amendment, which stipulates that the government cannot "deprive any person of life, liberty, or property, without due process of law," also protects other rights, including the right to marry.

The Due Process Clause has been interpreted to protect fundamental rights, sometimes known as substantive due process rights, as well as procedural rights, the rights specified in the Bill of Rights, against infringement by the states. Education isn't mentioned in the Constitution, therefore any protections it might have under the Due Process Clause would have to be as a fundamental right. This Section's Subsection 1 will outline the many criteria the Supreme Court

has established for determining which rights are sufficiently fundamental to be protected by the Due Process Clause. In particular, Section 2 will look at Supreme Court cases that have dealt with basic rights in the context of education.

II. THE MAJORITY OPINION AND DISSENTING OPINION IN GARY B. v. WHITMER: A FUNDAMENTAL RIGHT TO ACCESS LITERACY?

The Sixth Circuit Court of Appeals, which rendered a split ruling in Gary B. v. Whitmer in 2020, was the first federal court in the country to acknowledge a federal constitutional right to basic education, which it defined as education sufficient to provide access to reading. The Whitmer judgements offer a good lens for examining the controversy around a right to education since the majority opinion in that case marked the first federal court to affirm a right to fundamental literacy and because the ruling drew a dissent that argued against that recognition. The factual and legal context leading up to the 2020 Sixth Circuit panel judgement in Whitmer is covered in Section A of this Part. The majority opinion's justification for recognising a fundamental right to attain basic literacy is examined in Section B. Part C examines the dissent's claim that the Constitution omits all mention of a basic right to education.

A. The factual and legal history of Gary B. v. Whitmer

The Detroit Public Schools, often known as the Detroit Public Schools Community District or simply "DPSCD," are a prime example of how the American educational system is flawed. For instance, the only district in Michigan where those without valid teaching credentials are permitted to teach is DPSCD. Teachers who are qualified and certified to teach their subject matter are lacking in many DPSCD schools. DPSCD has about 200 open teaching vacancies when the 2016–17 school year started in the fall. Due to a lack of instructors, either teaching assistants who are not certified to teach the subject matter, substitute teachers, or teachers of different subject matters teach the classes.

Detroit public schools struggle to find and keep qualified instructors. Before the 2016–17 school year began, the majority of the teachers employed by one Detroit school had never taught before. In another school, by the end of the academic year, half of the teachers who began their careers

there in 2012 had gone. The DPSCD's reliance on inexperienced instructors who frequently leave the district adds to the volatility of the system and deprives children of quality instruction.

Moreover, kids in Detroit Public Schools are not taught fundamental literacy skills or developed reading comprehension. The lack of consistent literacy training in elementary schools prevents pupils from learning to read at grade level. When pupils are in high school, their teachers are not equipped to support them since they are reading much below grade level, which causes students to fall further behind. One high school failed to offer pupils with books above the fifth-grade level despite trying to support its students through a tiered reading group structure.

Students at five of Detroit's least performing schools sued the governor of Michigan and the people in charge of the school district in 2016 in an effort to improve their educational options. The plaintiffs argued that the Due Process Clause guaranteed them a basic right to an education and that the DPSCD had violated that right by failing to give them a quality education. The pupils specifically claimed that their right to free speech and their right to vote were effectively denied to them since the Detroit schools they attended did not teach them the fundamentals of literacy.

The Eastern District of Michigan dismissed the kids' claims, and they appealed to the Sixth Circuit Court of Appeals. A divided Sixth Circuit panel of justices sided with the plaintiffs in Whitmer in 2020 and determined that the Constitution's Due Process Clause safeguards a fundamental right to "basic minimum education." So, the individuals under the authority of the United States Sixth Circuit Court of Appeals enjoyed a fundamental right to education for twenty-six days in the spring of 2020.

The Whitmer judgement by the Sixth Circuit court received both praise and condemnation, but it was swiftly overturned. The lawsuit was settled after the Sixth Circuit panel decision, and the Sixth Circuit agreed to an en banc rehearing of the matter, nullifying the panel conclusion. So, even if the decision of the Sixth Circuit panel no longer serves as precedent, it raises the issue of whether or not education should be regarded as a basic right covered by the Due Process Article of the Fourteenth Amendment.

The Whitmer majority judgement established a fundamental right to "basic minimum education" for inhabitants of the Sixth Circuit Court of Appeals' jurisdiction, despite the fact that its success

was ultimately fleeting. The term "basic minimal education" was defined by the court as an instruction that offers a reasonable chance to become literate. The Supreme Court's 1997 *Washington v. Glucksberg*⁵ case provided the court with a framework for conducting a substantive due process examination. The court acknowledged that federal courts have historically been reluctant to extend fundamental rights protected by the Due Process Clause.

The Supreme court further stated that although *Glucksberg* had stated a historical prerequisite for basic rights, it was important to understand those requirements in the context of the present. The Supreme Court's cases that addressed education and its role in society were then discussed by the court. It showed the divergent interpretations that the parties had of the Supreme Court's ruling in *Brown v. Board of Education*⁶ in 1954. Plaintiffs argued that *Brown* upholds the essential function of education in society, while defendants maintained that the ruling confirmed that the state is not required to support any form of education. The Supreme Court's ruling in *San Antonio Independent School District v. Rodriguez* from 1972, which concluded that there is no basic right to education generally, was also cited by the court. Yet, the overwhelming opinion understood *Rodriguez* to be leaving the door open for a future recognition of a fundamental right to "basic minimum education." The court came to the conclusion that there was still no resolution to the question of a fundamental right to "basic minimum education" after discussing other Supreme Court rulings involving education.

B. No Fundamental Right to Education, according to The Whitmer Dissent

Judge Eric Murphy stated in dissent that no right to education, no matter how restricted, is protected by the Constitution. Judge Murphy, in contrast to the majority, believed that there is no basic right to education based on Supreme Court precedents regarding education. He argued that the Constitution should be interpreted in a way that limits the scope of government authority rather than mandating the support of individual rights.

As a result, the Constitution only grants negative rights to its citizens, safeguarding them against the abuse of power by the government. Because the Due Process Clause is written in the negative, according to Judge Murphy, it shouldn't be interpreted as granting positive rights.

⁵ *Washington v. Glucksberg* 521 U.S. 702 (1997)

⁶ *Brown v. Board of Education* 347 U.S. 483 (1954)

According to Supreme Court precedent, he pointed out that in cases where plaintiffs claimed the state had failed to supply these commodities and services, the Supreme Court declined to identify a fundamental right to food, shelter, or medical care. This, according to Judge Murphy, illustrates the constitutional distinction between a state outright outlawing a behaviour and a state refusing to fund it.

The importance of education to the country is apparent, and this was not contested by the dissent. However, maintained that Rodriguez violates a fundamental constitutional right to education. It further argued that establishing a right to a minimal level of education would transform judges into legislators and compel courts to render policy decisions on a range of matters, including taxation, teacher preparation, and school facility construction.

Judge Murphy said that the majority's ruling went beyond the bounds of the judiciary's authority to interpret the law. Additionally, he said that courts should follow Gluck's advice to exercise caution when it comes to substantive due process. The dissent expressed concern that the majority's conclusion may allow federal courts to dictate state legislatures in how to spend their money.

Judge Murphy concluded by saying that the majority had misinterpreted or misread the Supreme Court precedent pertaining to a right to a minimally sufficient education. The dissent argues that Rodriguez and its offspring are all Equal Protection Clause cases, so their remarks regarding the fundamental right to a minimally adequate education should only be understood in the context of whether or not equal protection cases involving education should make government action subject to greater scrutiny.

III. WHILE HAVING LITTLE IMPACT IN REAL LIFE, A FUNDAMENTAL RIGHT TO BASIC EDUCATION REFLECTS THE VALUE OF EDUCATION IN AMERICAN SOCIETY.

When combined, the majority and dissent in *Gary B. v. Whitmer* by the Sixth Circuit Court of Appeals show how inadequate a right to a fundamental education is as well as how constrained it is by prior Supreme Court decisions. Although the right to access literacy as stated by the

SCOTUS majority is deficient, it is nevertheless superior to having no basic right to education and could still be a potent instrument for plaintiffs looking to use the legal system to combat educational inequalities.

As a first step, it would appear that access to literacy through education upholds both Supreme Court precedent and the foundation for fundamental rights established in *Washington v. Glucksberg*. The Supreme Court ruled in *Glucksberg* in 1997 that a right is only fundamental under the Due Process Clause if it is "implicit in the concept of ordered liberty" and is "deeply entrenched" in American "history and tradition." Furthermore, the Court required a thorough description of essential rights.

The founding fathers talked about the importance of an educated populace to the health of a democratic republic, and federal law promoting the extension of public education predates our Constitution. Additionally, the *Whitmer* majority points out that there has long been a link between literacy, active citizenship, and democratic engagement, suggesting that literacy is "embedded in the concept of ordered liberty." The Supreme Court has specifically referred to illiteracy as "a persistent impairment" and highlighted the struggles people who are refused education experience. Relegating pupils to an underclass by denying them access to literacy significantly restricts their future chances.

Each new fundamental right must also be specifically defined in accordance with *Glucksberg*; the *Whitmer* right to access literacy satisfies this test as well. The *Whitmer* standard is constrained to follow the Supreme Court's guidelines because the Court held in its 1973 decision in *San Antonio Independent School District v. Rodriguez* that only a minimally basic level of education could have fundamental right status in order to implement the right to vote or the right to free expression. A system where court involvement is only necessary where schools fail most severely would be created by recognising a limited right to literacy that would only demand that pupils reasonably could access basic literacy within a school system. The *Renner* majority's own admission that the right it outlined did not guarantee an ideal or even ordinary education leads one to believe that recognising the right to access literacy would not transform courts into decision-makers in the field of education policy.

This renders the Whitmer dissent ineffective on two fronts. First off, it fails to reflect the Supreme Court's frequent emphasis on the value of education. The Supreme Court has stated that supporting education is "probably the most essential responsibility of state and local governments" and that denying children access to literacy training destroys their chances of achieving future economic and social success. A concept that is more "embedded in the concept of ordered liberty, such that neither liberty nor justice would exist if they were abandoned" than the ideal of social mobility and democratic involvement through literacy and education is hard to imagine. The Whitmer dissent also falls short when it implies that a state legislature could abdicate its responsibilities for education and completely abolish its public schools if it so desired. Its beggars' belief that a constitutional provision could in one sentence acknowledge education as one of the fundamental responsibilities of the government yet in the next denounce any need to actually provide education.

The room left for a basic right to education after Rodriguez is similarly constrained, despite the fact that the Current threshold for a right to obtain literacy is clearly narrow. Whitmer's right to access literacy meets both Glucksberg and Rodriguez, thus it may offer a way for future litigants to try to fight for students' rights.



CONCLUSION

Future plaintiffs are probably going to urge the federal courts to support a fundamental right to education in the same way that *Gary B. v. Whitmer* and *A.C. v. McKee* did. Although there is support for a Due Process Clause entitlement to some basic education, these plaintiffs will encounter significant challenges due to the judiciary's aversion to be perceived as meddling in judicial activism or policymaking. Future plaintiffs are consequently given a decision to make. Those who want to incorporate a right to education into the law would be well to structure their arguments to be consistent with the Whitmer majority's access to basic reading. The Whitmer right to access literacy is currently the only idea of a limited right to education that has been approved by a federal court, and as long as *San Antonio Independent School District v. Rodriguez* remains binding Supreme Court precedent, there isn't much room left for a fundamental right to basic education. Although alleging a violation of a right to access basic

literacy may not always result in litigation success, its narrow focus increases the likelihood of withstanding a motion to dismiss, and could therefore serve as a useful tool to encourage school districts to reach settlement agreements that can result in increased equity and accountability.

