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Education: Constitutional Democracy's Predicate and Product

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EDUCATION: CONSTITUTIONAL DEMOCRACY'S PREDICATE AND PRODUCT

Martha Minow*

The combination of a global pandemic and global jeopardy to democracies exacerbates deficiencies in American education for children and youth and underscores the critical importance of renewed and amplified investments of resources and ideas. Underinvestment and stark disparities in educational opportunities persist across the nation. Inequities follow zip code and students' family income, and correlate with race and neighborhood, underscoring the differing effects of crime, family fragility, and access to educational opportunities outside of schooling. These matters take on constitutional significance at this time of frailty for many constitutional democracies, including in the United States. Actually, America's constitutional democracy both presumes and supports commitments to educating each generation in the knowledge and dispositions to enable self-governance, in theory, as well as equipping successive generations to take on adult employment and family roles. Yet by presuming what is also a goal, the Constitution has not given rise to sturdy recognition of a federal right to education.

Recent litigation advocating for constitutional recognition and enforcement of federal educational rights seeks judicial engagement, political action, and public attention. Arguments include historic roots in the views of the framers and national leaders, doctrinal developments in substantive due process and equal protection, and repeated Supreme Court articulations of the unique significance of education to the nation and its form of government. Objections to judicial recognition of a federal right to education can be countered and such a federal right could also be developed through legislation and practice. Work in this vein may stumble when it comes to spelling out the elements and priorities for practice; guided by education's relationship to constitutional democracy, its commitments should include cultivating understanding of facts, reasoned arguments, tolerance for social differences amid membership in communities, and the avenues for political participation and guards against tyranny. Whether enacted through judicial orders or political

* 300th Anniversary University Professor, Harvard University. Disclosure: I have participated by filing amicus briefs in *Gary B. v. Snyder* (later named *Gary B. v. Whitmer*) and *A.C. v. Raimondo* (later named *Cook v. McKee*), two cases described here. Many thanks to Neil Davey and Emily Gruber for their invaluable assistance.

processes, legal commitments should address the promise and dangers from expanding home schooling and remote-access digital learning while deepening education critical to constitutional democracy.

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I. INTRODUCTION

Constitutional democracy, some say, has the virtue of aiming to produce what it also presumes: equal respect for self-governing members of society.¹ But what if the virtuous circle linking predicates to outcomes does not work?

1. See U.S. CONST. pmbl. (stating the goals of the United States Constitution).

If the presuppositions are missing, is the constitutional democracy obliged or even capable of supplying them? Once a question for nations transitioning to democracy or for political philosophers, the missing predicates for constitutional democracy have become only too pressing by 2022 with serious jeopardy to the entire system of governance in the United States and in other established democratic republics.² Whether due to digital information technologies, authoritarian leaders, fears of dislocation due to global economic and migration trends, and a pandemic exposing and exacerbating massive social inequalities, the operations, effectiveness, and trust necessary for constitutional democracies are beleaguered.³

American educational programs specifically face profound challenges: teachers, students, and programs strained and disrupted by the pandemic as well as massive inequalities of resources.⁴ Schools, including afterschool programs, serve as one of the few safe places in many communities struggling with economic divestment, violence, and family instability.⁵ Chronic underfunding of educational programs characterizes most communities as do inequitable distribution of resources and racially separated schooling.⁶ The

2. See Lawrence Lessig, *Why the US Is a Failed Democratic State*, N.Y. REV. BOOKS (Dec. 10, 2021), <https://www.nybooks.com/daily/2021/12/10/why-the-us-is-a-failed-democratic-state/> [<https://perma.cc/Z787-4LT8>] (“At every level, the institutions that the US has evolved for implementing our democracy betray the basic commitment of a representative democracy: that it be, at its core, fair and majoritarian. Instead, that commitment is now corrupted in America. And every aspiring democracy around the world should understand the specifics of that corruption—if only to avoid the same in its own land.”). See generally Sarah Repucci & Amy Slipowitz, *Freedom in the World 2021: Democracy Under Siege*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/2021/democracy-under-siege> [<https://perma.cc/YZD7-WGD2>] (“As a lethal pandemic, economic and physical insecurity, and violent conflict ravaged the world, democracy’s defenders sustained heavy new losses in their struggle against authoritarian foes, shifting the international balance in favor of tyranny.”).

3. See Lessig, *supra* note 2.

4. See generally U.S. DEP’T OF EDUC., *EDUCATION IN A PANDEMIC: THE DISPARATE IMPACTS OF COVID-19 ON AMERICA’S STUDENTS* (2021) (discussing “COVID-19’s Widespread Effects on K-12 Students and Schools”). For purposes of this article, “education” refers to formal and informal instruction to children and youth, prior to post-secondary education.

5. Clea Simon, *How COVID Taught America About Inequity in Education*, HARV. GAZETTE (July 9, 2021), <https://news.harvard.edu/gazette/story/2021/07/how-covid-taught-america-about-inequity-in-education/> [<https://perma.cc/E8KA-Z4D4>].

6. *Id.* On racial separation, see Kimberly Ayudant, Comment, *Systemic Inequality | A Call for Desegregation in Education: Examining the Strength in Diversity Act*, 89 FORDHAM L. REV. ONLINE 60, 61 (2021). “Today, ‘nearly one-fifth of public schools have almost no [students] of color, while another one-fifth have almost no white [students].’ Another report found that more than half of American students live in school districts that are considered ‘racially concentrated’—that is, school districts composed of more than 75 percent of one race. Racial isolation has become the new status quo, even in some of the most diverse U.S. cities.

defects and failures are especially troubling at this time of fragility for American constitutional democracy.

This is the context for renewed arguments for recognition of a federal right to education. Those arguments address not only courts but also legislatures and the broader public and can animate political and programmatic changes addressed to the pressing issues of quality, equity, and preparation of self-government that the Constitution both presumes and inspires.⁷

II. THE STATE OF SCHOOLING IN AMERICA

Underinvestment and stark disparities in educational opportunities persist across the nation.⁸ When compared with results from other industrialized nations, the United States falls behind on student test results.⁹ Indeed, “Among the 35 members of the Organization for Economic Cooperation and Development, which sponsors the [testing] initiative, the U.S. ranked 30th in math and 19th in science.”¹⁰

Within the United States, inequities in educational resources follow zip code and students’ family income, correlate with race, and include strikingly different contexts in terms of effects of crime, family fragility, internet culture, and access to educational opportunities outside of schooling.¹¹

New York City, recognized globally for its diversity, is home to one of the most segregated school systems in the country for Black students. The average Black student in New York City attends a school where only 15 percent of the students are white. Moreover, 64 percent of Black students in New York City attend intensely racially isolated schools where 90–100 percent of students are nonwhite.” at 67 (internal citations omitted).

7. See Daarel Burnette II, *Should There Be a Federal Right to Education?*, EDUCATIONWEEK (Jan. 7, 2020), <https://www.edweek.org/education/should-there-be-a-federal-right-to-education/2020/01> [<https://perma.cc/DQ43-84JA>] (“[I]nadequate schools cost us billions in health-care costs, social welfare programs, and in the criminal justice system.”).

8. The Hechinger Report, *U.S. Spends Less as Other Nations Invest More in Education*, U.S. NEWS (Sept. 18, 2017), <https://www.usnews.com/news/national-news/articles/2017-09-18/while-rest-of-the-world-invests-more-in-education-the-us-spends-less> [<https://perma.cc/DQ9R-UWBV>]. Before recent federal action, U.S. education investment declined while other developed nations boosted their allocations to education. *Id.*

9. Moriah Balingit & Andrew Van Dam, *U.S. Students Continue to Lag Behind Peers in East Asia and Europe in Reading, Math and Science, Exams Show*, WASH. POST (Dec. 3, 2019), https://www.washingtonpost.com/local/education/us-students-continue-to-lag-behind-peers-in-east-asia-and-europe-in-reading-math-and-science-exams-show/2019/12/02/e9e3b37c-153d-11ea-9110-3b34ce1d92b1_story.html [<https://perma.cc/9UDF-FQFT>].

10. Drew DeSilver, *U.S. Students’ Academic Achievement Still Lags That of Their Peers in Many Other Countries*, PEW RSCH. CTR., (Feb. 15, 2017), <https://www.pewresearch.org/fact-tank/2017/02/15/u-s-students-internationally-math-science/> [<https://perma.cc/9HQ3-LJQT>].

11. CARMEL MARTIN ET AL., CTR. FOR AM. PROGRESS, A QUALITY APPROACH TO SCHOOL FUNDING 14 (2018), <https://cf.americanprogress.org/wp-content/uploads/2018/11/>

Investment of money and support for quality instruction are critical to student achievement—and additional investments are needed to address the social background differences that so deeply influence student progress.¹² One study showed how students in Mississippi and Alabama receive 40–50% of the per-pupil expenditures in New Jersey and Connecticut—and New Jersey and Connecticut stand ahead of most states while Mississippi and Alabama rest near the bottom of state rankings by student academic performance.¹³ Reliance on local property taxes and other defects in school finance systems are entrenched and perpetuate stark differences between well-resourced suburban—largely White—school districts compared with urban and rural communities even within the same state.¹⁴

New York spends more than \$12,400 more per student than does Idaho, and predominantly White school districts spend \$23 billion more than predominantly non-White districts.¹⁵ It is hard to imagine how unequal opportunities can be redressed until the federal government becomes involved, when greater spending is correlated with higher rates of high school graduation as well as higher adult earnings.¹⁶ And different opportunities within states leave students in high-poverty areas worse off in terms not only of per pupil expenditure but also of access to rigorous courses, quality

LessonsLearned_SchoolFunding-report-4.pdf [https://perma.cc/MF5J-NQVJ]; see Sterling C. Lloyd & Alex Harwin, *Nation Earns a 'C' on School Finance, Reflecting Inconsistency in K-12 Funding and Equity*, EDUC. WEEK (June 1, 2021), <https://www.edweek.org/policy-politics/nation-earns-a-c-on-school-finance-reflecting-inconsistency-in-k-12-funding-and-equity/2021/06> [https://perma.cc/SH2L-FENK] (showing discrepancies in federal funding on education in different states); see also SCOTT SARGRAD ET AL., CTR. FOR AM. PROGRESS, A QUALITY EDUCATION FOR EVERY CHILD 1 (July 2, 2019), <https://cf.americanprogress.org/wp-content/uploads/2019/07/Next-Presidents-Agenda.pdf> [https://perma.cc/GRU8-53FU] (documenting stagnation in math and science achievement for American children compared with others in similar nations and structural barriers to quality education correlated with race and income of American students).

12. See generally DAVID T. BURKAM & VALERIE E. LEE, ECON. POL'Y INST., *INEQUALITY AT THE STARTING GATE: SOCIAL BACKGROUND DIFFERENCES IN ACHIEVEMENT AS CHILDREN BEGIN SCHOOL* (2002) (exploring factors that prevent equal education opportunities).

13. MARTIN ET AL., *supra* note 11, at 8; see Kimberly Jenkins Robinson, *Introduction: The Essential Questions Regarding a Federal Right to Education*, in *A FEDERAL RIGHT TO EDUCATION* 1, 12–14 (Kimberly Jenkins Robinson ed., 2019) (discussing enduring opportunity disparities amongst students in different states).

14. U.S. COMM'N ON C.R., *PUBLIC EDUCATION FUNDING INEQUITY IN AN ERA OF INCREASING CONCENTRATION OF POVERTY AND RESEGREGATION* 6–7 (2018) [hereinafter *PUBLIC EDUCATION FUNDING*], <https://www.usccr.gov/files/pubs/2018/2018-01-10-Education-Inequity.pdf> [https://perma.cc/DK7J-4U6U].

15. SARGRAD ET AL., *supra* note 11, at 2, 5.

16. *PUBLIC EDUCATION FUNDING*, *supra* note 14, at 5.

instruction, and continuity in staff.¹⁷ Some communities are marked by rich varieties of afterschool programs including enrichment opportunities in languages, technology, sports, and the arts, while others lack either these programs or the money needed for private tuition.¹⁸ With skyrocketing reliance on the internet and other technologies occasioned by the pandemic and by changes in the private sector, once again, disparities by family and community wealth—with associated racial and ethnic differences—deeply affect access and adult guidance for youth.¹⁹

The pandemic and economic dislocations motivated the American Rescue Plan—which commits resources to amplify student learning through an extended school year, summer enrichment, or high-quality, evidenced-based tutoring programs—to stabilize and diversify the workforce in schools, and to provide for healthy conditions and social supports.²⁰ Choices about how to use most of the actual expenditures will rest with local decisionmakers; experts urge choices based on research findings and equitable commitments.²¹ With some of the dollars dependent on competitive grants, local school leadership—and the variations in time and preparation of local leaders—matters.²² And despite court decisions forbidding state-mandated segregation

17. *Id.* at 7–8; see also ADRIENNE FISCHER ET AL., EDUC. COMM’N OF THE STATES, 50-STATE COMPARISON: K-12 AND SPECIAL EDUCATION FUNDING (2021), <https://www.ecs.org/50-state-comparison-k-12-and-special-education-funding/> [<https://perma.cc/28U3-P6MM>] (discussing primary funding models).

18. JENNIFER MCCOMBS ET AL., RAND CORP., THE VALUE OF OUT-OF-SCHOOL TIME PROGRAMS 4 (2017), https://www.rand.org/content/dam/rand/pubs/perspectives/PE200/PE267/RAND_PE267.pdf [<https://perma.cc/5CTT-PYW9>].

19. AFTERSCHOOL ALL., AMERICA AFTER 3 PM SPECIAL REPORT: AFTERSCHOOL IN COMMUNITIES OF CONCENTRATED POVERTY 3 (2016), http://www.afterschoolalliance.org/aa3pm/concentrated_poverty.pdf [<https://perma.cc/6JGU-WTQT>]; M. Margaret Dolcini et al., *National-Level Disparities in Internet Access Among Low-Income and Black and Hispanic Youth: Current Population Survey*, 12 J. MED. INTERNET RSCH., 10 (Oct. 12, 2021); Dian Schaffhauser, *Poverty, Race Linked to Lack of Internet for Students*, JOURNAL (May 14, 2020), <https://thejournal.com/articles/2020/05/14/poverty-race-linked-to-lack-of-internet-for-students.aspx> [<https://perma.cc/V9TP-WBD6>].

20. *E.g.*, Press Release, U.S. Dep’t of Educ., U.S. Department of Education Announces Distribution of All American Rescue Plan ESSER Funds and Approval of All 52 State Education Agency Plans (Jan. 18, 2022), <https://www.ed.gov/news/press-releases/us-department-education-announces-distribution-all-american-rescue-plan-esser-funds-and-approval-all-52-state-education-agency-plans> [<https://perma.cc/YR8C-5EWG>].

21. Michael Griffith, *An Unparalleled Investment in U.S. Public Education: Analysis of the American Rescue Plan Act of 2021*, LEARNING POL’Y INST. (Mar. 11, 2021), <http://learningpolicyinstitute.org/blog/covid-analysis-american-rescue-plan-act-2021> [<https://perma.cc/E4CW-9SL3>].

22. *E.g.*, Press Release, U.S. Dep’t of Educ., U.S. Department of Education Releases “Frequently Asked Questions: Using American Rescue Plan Funding to Support Full-Service Community Schools & Related Strategies” (July 14, 2021), <https://www.ed.gov/news/press-releases/us-department-education-releases-%E2%80%9Cfrequently-asked-questions-using->

of students by race, the percentage of Black students attending predominantly non-White schools has reached over 80%.²³

Mirroring disparities in educational opportunities and quality are differences in civic participation.²⁴ Some schools offer effective instruction in history and civics and help students experience political efficacy and actual community participation.²⁵ Other schools do not offer these opportunities.²⁶ Some schools provide chances for students to debate with others, prompt desires and chances to participate in their communities, and cultivate concern for the rights and welfare of others, which are the elements of civics education as described by a 2003 national project.²⁷

In contrast, many students lack civics courses, related work in history and social studies, and hands-on opportunities for observing and participating in political activities.²⁸ These gaps affect students in low-income communities and students of color even more than others, although neglect of civic education is a problem across much of the country.²⁹ Leaders across various

american-rescue-plan-funding-support-full-service-community-schools-related-strategies%E2%80%9D [https://perma.cc/24BL-B3FG].

23. GARY ORFIELD & DANIELLE JARVIE, UCLA C.R. PROJECT, BLACK SEGREGATION MATTERS: SCHOOL RESEGREGATION AND BLACK EDUCATIONAL OPPORTUNITY 28 (2020), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/black-segregation-matters-school-resegregation-and-black-educational-opportunity/BLACK-SEGREGATION-MATTERS-final-121820.pdf> [https://perma.cc/3XN4-RRUK]; Kimberly Ayudant, Comment, *Systemic Inequality | A Call for Desegregation in Education: Examining the Strength in Diversity Act*, 89 FORDHAM L. REV. ONLINE 60, 61 (2021).

24. Meira Levinson, *The Civic Empowerment Gap: Defining the Problem and Locating Solutions*, in HANDBOOK OF RESEARCH ON CIVIC ENGAGEMENT IN YOUTH 331 (Lonnie Sherrod et al. eds., 2010); JAMES WEINBERG, CIVIC EDUCATION AS AN ANTIDOTE TO INEQUALITIES IN POLITICAL PARTICIPATION? NEW EVIDENCE FROM ENGLISH SECONDARY EDUCATION (2021).

25. See Levinson, *supra* note 24, at 320–22, 325, 330–31.

26. *Id.* at 331.

27. RICHARD BATTISTONI ET AL., CARNEGIE CORP. OF N.Y. & CIRCLE: CTR. FOR INFO. & RSCH. ON CIVIC LEARNING & ENGAGEMENT, THE CIVIC MISSION OF SCHOOLS 10 (2003), https://media.carnegie.org/filer_public/9d/0a/9d0af9f4-06af-4cc6-ae7d-71a2ae2b93d7/ccny_report_2003_civicismission.pdf [https://perma.cc/C3VW-EVE9] [hereinafter CARNEGIE & CIRCLE, CIVIC MISSION OF SCHOOLS].

28. Levinson, *supra* note 24, at 330.

29. Despite investments in improved education in other fields, civics education has lagged. REBECCA WINTHROP, BROOKINGS INST., THE NEED FOR CIVIC EDUCATION IN 21ST-CENTURY SCHOOLS 2 (2020), https://www.brookings.edu/wp-content/uploads/2020/04/BrookingsPolicy2020_BigIdeas_Winthrop_CivicEducation.pdf [https://perma.cc/4PCY-TR6P]; MICHAEL HANSEN ET AL., BROWN CTR. ON EDUC. POL'Y AT BROOKINGS, THE 2018 BROWN CENTER REPORT ON AMERICAN EDUCATION: HOW WELL ARE AMERICAN STUDENTS LEARNING? 11–12 (2018), https://www.brookings.edu/wp-content/uploads/2018/06/2018-Brown-Center-Report-on-American-Education_FINAL1.pdf [https://perma.cc/966F-EH3Z]. For discussion of civic education needs in the context of larger problems for

sectors have summoned attention to needed investments in the “civic mission” of schools for over a decade.³⁰

The effects of these disparities hurt democracy. Recent studies reported that only 26% of Americans could name the three branches of government and only one in three Americans could pass the nation’s Citizenship Test.³¹ Civics used to be a focus of American public schooling.³² Priorities given to math and reading displace civics in many schools.³³ Disagreement among experts about standards to set in social studies also contributes to declining attention to civics in schools as does suspicion in some communities that civics education advances left-wing political projects.³⁴ Similar forces surround legislation against the teaching of “critical race theory” or curricula that contribute to discomfort among students over the nation’s racial history.³⁵ Calls for and opposition to reinvigorated civics education have intensified recently, reflecting partisan divisions that have exploded after the 2020 election and the Jan. 6, 2021, assault on the U.S. Capitol.³⁶

American democracy, see AM. ACAD. OF ARTS & SCIS., OUR COMMON PURPOSE: REINVENTING AMERICAN DEMOCRACY FOR THE 21ST CENTURY 62–63 (2020), <https://www.amacad.org/ourcommonpurpose/report> [<https://perma.cc/YWX6-FGC3>].

30. CAMPAIGN FOR THE CIVIC MISSION OF SCHS., GUARDIAN OF DEMOCRACY: THE CIVIC MISSION OF SCHOOLS 13–14 (Jonathan Gould et al. eds., 2011), https://media.carnegie.org/filer_public/ab/dd/abdda62e-6e84-47a4-a043-348d2f2085ae/ccny_grantee_2011_guardian.pdf [<https://perma.cc/U6NX-E9KK>]; NAT’L CONF. OF STATE LEGISLATORS, THE CIVIC MISSION OF SCHOOLS (2022), <https://www.ncsl.org/legislators-staff/legislators/trust-for-representative-democracy/the-civic-mission-of-schools-executive-summary.aspx> [<https://perma.cc/AZ6C-N2SF>]; NAT’L ACAD. OF EDUC., EDUCATING FOR CIVIC REASONING & DISCOURSE 5–6 (Carol D. Lee et al. eds., 2021), <https://3e0hjncy0c1gzjht1dopq44b-wpengine.netdna-ssl.com/wp-content/uploads/2021/04/NAEd-Educating-for-Civic-Reasoning-and-Discourse.pdf> [<https://perma.cc/XEM9-E8AE>].

31. Annenberg Pub. Pol’y Ctr. of the Univ. of Pa., *Americans’ Knowledge of the Branches of Government Is Declining* (Sept. 13, 2016), <https://www.annenbergpublicpolicycenter.org/americans-knowledge-of-the-branches-of-government-is-declining/> [<https://perma.cc/LFW7-9ALC>]; Woodrow Wilson Nat’l Fellowship Found., *National Survey Finds Just 1 in 3 Americans Would Pass Citizenship Test* (Oct. 3, 2018), <https://woodrow.org/news/national-survey-finds-just-1-in-3-americans-would-pass-citizenship-test/> [<https://perma.cc/RQ9W-9XWR>].

32. CAMPAIGN FOR THE CIVIC MISSION OF SCHS., *supra* note 30, at 13.

33. *Id.* at 14.

34. *See id.*

35. *See* Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, BROOKINGS (Nov. 2021), <https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/> [<https://perma.cc/RSV4-3QAW>] (assessing “anti-CRT state legislation”).

36. Kelly Field, *Leftist Propaganda or Engaging Class? The Debate over ‘Action Civics’ School Projects*, USA TODAY (Aug. 1, 2021, 5:00AM), <https://www.usatoday.com/story/news/education/2021/08/01/action-civics-school-project-debate/5445068001/?gnt-cfr=1> [<https://perma.cc/F3PZ-R2MG>]; James R. Stoner Jr. & Paul O. Carrese, *What’s So Un-American*

In the meantime, schooling in the United States thus falls far short of excellence and of constitutional democracy's demands. "Each generation has to maintain its institutions and repair any damage that its predecessors inflicted or allowed. This task begins with civic education, so that Americans know how their government works, and thus what to expect from their constitutional institutions," explains law professor Adam White.³⁷ To fulfill the opportunities and obligations of citizenship in a constitutional democracy, individuals need to know how to participate in the governing processes, how to assess priorities and policies both for oneself and for the larger community, how to assess information and arguments, and how to develop virtues of public spiritedness and sufficient restraint to use votes and arguments rather than violence of suppression in the face of disagreement.³⁸ The inequities, gaps, and results of American schooling do not meet these requirements.

III. EDUCATION WHEN DEMOCRACY IS IMPERILED

Even in good times, self-governance in a constitutional democracy is hard work that takes time.³⁹ It produces conflicts.⁴⁰ It leaves us with few to blame but ourselves.⁴¹ Playwright George Bernard Shaw was not stretching the truth when he gave one of his characters these words: "Democracy substitutes election by the incompetent many for appointment by the corrupt few."⁴²

About a Shared American Civics?, NAT'L REV. (June 9, 2021, 6:30 AM), <https://www.nationalreview.com/2021/06/whats-so-un-american-about-a-shared-american-civics/> [https://perma.cc/6LRN-CRPB].

37. Adam J. White, *A Republic, If We Can Keep It*, ATLANTIC (Feb. 4, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/a-republic-if-we-can-keep-it/605887/> [https://perma.cc/T3LM-6SBV].

38. See WINTHROP, *supra* note 29, at 2; HANSEN ET AL., *supra* note 29, at 11–12; Irving Kristol, Republican Virtue vs. Servile Institutions, Address Before the Poynter Center at Indiana University (May 1974), in *THE ALTERNATIVE: AN AMERICAN SPECTATOR*, Feb. 1975, at 5, 8 ("[W]ithout self-government, the people perish—from boredom, from a lack of self-respect, and from a loss of confidence in their institutions which, they realize, only mirror their alienation from the better selves that lie dormant within their actual selves."); Education also helps guard against tyranny. Edward L. Glaeser et al., *Why Does Democracy Need Education?*, 12 J. ECON. GROWTH 77, 77–78 (2007) ("As education raises the benefits of civic engagement, it raises participation in support of a broad-based regime (democracy) relative to that in support of a narrow-based regime (dictatorship).").

39. See WINTHROP, *supra* note 29, at 2.

40. See AM. ACAD. OF ARTS & SCI., *supra* note 29, at 1–2.

41. "[D]emocracy is the worst form of Government except all those other forms that have been tried from time to time," Winston Churchill famously observed. HC Deb (11 Nov. 1947) (444) cols. 203–321.

42. GEORGE BERNARD SHAW, *MAN AND SUPERMAN. A COMEDY AND A PHILOSOPHY* 228 (1903).

We are not living in good times. Existing democracies are fragile.⁴³ Democracy as an ideal and as a practice is in retreat.⁴⁴ Many of the fledgling democracies established after the break-up of the Soviet Union have turned to autocratic leaders and undermined governmental checks and balances and democratic values; the military coup suspending democracy in Myanmar imprisoned democratically-elected leadership.⁴⁵

The United States, despite record-breaking voter turnout in 2020, witnessed the precariousness in the actual system for reporting and certifying the vote; subsequently, many states enacted laws weakening the guard-rails against partisan hijacking of elections, erecting obstacles to voting, and amplifying doubts about elections and democracy.⁴⁶ For the first time in six decades, Congressional district lines are being redrawn without federal limits set by the Voting Rights Act because of a closely divided Supreme Court decision.⁴⁷ Two-thirds of Americans, a year after the violent assault at the U.S. Capitol interrupted the certification of the presidential election, view the nation's democracy as threatened; some call the use of violence justified.⁴⁸

43. See James McHenry, Papers of Dr. James McHenry on the Federal Convention of 1787 (on file with the Harvard Law School Library) (after working to help found the democratic republic of the United States, Benjamin Franklin was asked: "Well, Doctor, what have we got [-] a [R]epublic or a [M]onarchy[?]" He replied: "A [R]epublic . . . if you can keep it."). The date this anecdote was written is uncertain. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 app. A, at 85 n.1 (Max Farrand ed., 1911).

44. See Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 163 (2018) ("[T]he long era of American growth has run its course, it is possible that we have reached not just the limit of available marginal improvements in democratic quality, but an inflection point at which movement shifts in the other direction.").

45. See ZSELYKE CSAKY, NATIONS IN TRANSIT: DROPPING THE DEMOCRATIC FAÇADE 3 (2020), https://freedomhouse.org/sites/default/files/2020-04/05062020_FH_NIT20_20_vfinal.pdf [<https://perma.cc/JWK4-BEGG>] ("The media and civil society continued to bear the brunt of government attacks in more autocratic settings during the year, but they faced mounting difficulties in democracies as well. In a new development, smears and attacks on the judicial branch and particular judges have become a widespread phenomenon, no longer limited to high-profile cases like Poland."); Alice Cuddy, *Myanmar Coup: What is Happening and Why?*, BBC NEWS (Apr. 1, 2021), <https://www.bbc.com/news/world-asia-55902070> [<https://perma.cc/ACQ4-LZW4>] (discussing the military coup in Myanmar).

46. See Sam Levine, *Democracy Under Attack: How Republicans Led the Effort to Make it Harder to Vote*, GUARDIAN (Dec. 27, 2021, 3:00 PM), <https://www.theguardian.com/us-news/2021/dec/27/democracy-under-attack-trump-republicans> [<https://perma.cc/PD9A-EB4P>] (discussing distrust in voting systems and new laws restricting the ability to vote).

47. See Michael Wines, *As Gerrymanders Get Worse, Legal Options to Overturn Them Dwindle*, N.Y. TIMES (Nov. 21, 2021), <https://www.nytimes.com/2021/11/21/us/redistricting-gerrymandering-republicans.html> [<https://perma.cc/K7DC-2225>] ("The Supreme Court in 2019 ended a decades-long debate over the constitutionality of partisan gerrymandering, saying it was up to Congress, not the courts, to fix politically skewed maps.").

48. Anthony Salvanto et al., *CBS News Poll: A Year After Jan. 6., Violence Still Seen Threatening U.S. Democracy, and Some Say Force Can Be Justified*, CBS NEWS

The United States may join Hungary, Myanmar, Poland, Turkey, Tunisia, and Venezuela as nations where democracy is teetering and may not prevail.⁴⁹

Some leaders appeal to the fears and hatreds of masses of people—at the expense of minorities, truth, and reason—and gain supporters while undermining belief in equality, tolerance, and the rule of law.⁵⁰ Perhaps people can always be tempted to surrender their power to others by appeals to fears and hatreds. The global pandemic, attending economic insecurities, digital disinformation, and dire circumstances of poverty, hunger, and violence⁵¹ are conditions particularly made for fears, rumors, blame, and division. Populist appeals, assaults on human rights and the press, manipulated communications, election confusion, self-dealing by those in power: these are the exact elements Yale professor Timothy Snyder identified as predicates for tyranny and reasons to learn lessons from the lead-up to World War II.⁵²

Internet communications exacerbate these problems.⁵³ The Internet enables social media and search, which bring much of the world's knowledge

(Jan. 2, 2022, 1:01 PM), <https://www.cbsnews.com/news/january-6-opinion-poll-2022/> [<https://perma.cc/QN3D-RPAP>].

49. Ari Shapiro, *Decline in Democracy Spreads Across the Globe as Authoritarian Leaders Rise*, NPR (Aug. 3, 2017, 4:35 PM), <http://www.npr.org/2017/08/03/541432445/decline-in-democracy-spreads-across-the-globe-as-authoritarian-leaders-rise> [<https://perma.cc/S7D8-QUMX>]; see Tarek Amara & Angus McDowall, *Tunisian Leader Names New PM with Little Experience at Crisis Moment*, REUTERS (Sept. 29, 2021, 1:43 PM), <https://www.reuters.com/world/africa/tunisian-president-names-romdhane-prime-minister-2021-09-29/> [<https://perma.cc/H8DK-94HE>] (“Elected in 2019, Saied has been under domestic and international pressure to name a government after he dismissed the prime minister, suspended parliament and assumed executive authority in July in moves his foes call a coup.”); see also Tarek Amara, *Tunisians Protest Against President's Power Grab as Opposition Deepens*, REUTERS (Sept. 26, 2021, 10:49 AM), <https://www.reuters.com/world/africa/tunisians-protest-against-presidents-power-grab-opposition-deepens-2021-09-26/> [<https://perma.cc/GVZ2-MP9S>] (“Saied this week brushed aside much of the 2014 constitution, giving himself power to rule by decree two months after he sacked the prime minister, suspended parliament and assumed executive authority.”).

50. See Molly Ball, *Donald Trump and the Politics of Fear*, ATLANTIC (Sep. 2, 2016), <https://www.theatlantic.com/politics/archive/2016/09/donald-trump-and-the-politics-of-fear/498116/> [<https://perma.cc/SPA4-KJMV>] (using Donald Trump as an example of a leader that appeals to fears and hatreds of Americans).

51. See SARAH REPUCCI & AMY SLIPOWITZ, *DEMOCRACY UNDER LOCKDOWN: THE IMPACT OF COVID-19 ON THE GLOBAL STRUGGLE FOR FREEDOM 1* (2020), <https://freedomhouse.org/report/special-report/2020/democracy-under-lockdown> [<https://perma.cc/EZD5-89B6>] (“The COVID-19 pandemic has fueled a crisis for democracy around the world.”).

52. TIMOTHY SNYDER, *THE ROAD TO UNFREEDOM: RUSSIA, EUROPE, AMERICA* 266–79 (2018).

53. See JOSHUA A. TUCKER ET AL., *SOCIAL MEDIA, POLITICAL POLARIZATION, AND POLITICAL DISINFORMATION: A REVIEW OF THE SCIENTIFIC LITERATURE* 15–16 (2018) (“New

within the reach of more people than ever in human history.⁵⁴ Information—and disinformation—are plentiful and within the reach of a few keystrokes.⁵⁵ Peer-to-peer connections through social media, game-platform-chatting, and other channels enable individuals and algorithms to propel conspiracies and to prey upon anxieties.⁵⁶ Some who push these posts are spurred by the promise of money tied to the eyeballs of viewers who engage in electronic rubbernecking or dare-you-to-be-outrageous games.⁵⁷

Democracy gains some boosts: with digital communities, repressive regimes have to work harder to keep information out of people's reach.⁵⁸ Citizen journalism allows a cell-phone recording of police violence to spread quickly around the globe.⁵⁹ Internet tools enable Black Lives Matter marches but also mobilized the Jan. 6 assault on the U.S. capitol.⁶⁰ The internet can

technological tools that allow anyone to easily broadcast political information to large numbers of citizens can lead to a more pluralistic public debate, but they can also give a platform to extremist voices and actors seeking to manipulate the political agenda in their own financial or political interest.”).

54. Mary C. Joyce, *The Democratic Power Shift on the Internet*, BERKMAN CTR. FOR INTERNET & SOC'Y AT HARV. UNIV.: INTERNET & DEMOCRACY BLOG (May 14, 2008), <http://blogs.harvard.edu/idblog/2008/05/14/the-democratic-power-shift-on-the-internet/> [https://perma.cc/7QZX-2C4P]. People find others with similar interests and then share and spread words, images, and views. Recruitment to any cause is facilitated through the ease of one-to-many communication. *Id.*

55. Digital communications bypass gatekeepers who historically vetted information for reliability, suitability, authoritativeness, or marketability. Social media sites enable anonymous messages. Dominant business models demand not money but only personal data and attention from users. So global social media companies eliminate speedbumps in the circulation of lies and hatred, and allow once-isolated, unaccountable, and even venomous individuals to communicate and mobilize.

56. See Joyce, *supra* note 54.

57. See Jon Russell, *YouTube Bans 'Hateful' Videos from Making Money Via Its Advertising Network*, TECHCRUNCH (June 2, 2017, 1:13 AM), <https://techcrunch.com/2017/06/01/youtube-bans-hateful-videos-from-making-money-via-its-advertising-network/> [https://perma.cc/MX6N-37DQ] (“The Google-owned [platform] has updated the guidelines that govern which YouTube videos can run ads to prevent previous mismatches and assuage both its community of video makers and advertisers.”).

58. Elizabeth Stoycheff & Erik C. Nisbet, *Is Internet Freedom a Tool for Democracy or Authoritarianism?*, CONVERSATION (July 20, 2016, 6:08 AM), <http://theconversation.com/is-internet-freedom-a-tool-for-democracy-or-authoritarianism-61956> [https://perma.cc/F5AE-U8PE].

59. See HAL ABELSON ET AL., *BLOWN TO BITS: YOUR LIFE, LIBERTY, AND HAPPINESS AFTER THE DIGITAL EXPLOSION* 12–13 (Mark Taub et al. eds., 2008) (“In the fall of 2007, when the government of Myanmar suppressed protests by Buddhist monks, television stations around the world showed video clips taken by cell phone, probably changing the posture of the U.S. government.”).

60. Paul Barrett et al., *How Tech Platforms Fuel U.S. Political Polarization and What Government Can Do About It*, BROOKINGS (Sept. 27, 2021), <https://www.brookings.edu/blog/techtank/2021/09/27/how-tech-platforms-fuel-u-s-political-polarization-and-what-government-can-do-about-it/> [https://perma.cc/5UKD-PSM2].

promote resistance we desire and resistance we fear.⁶¹ The internet and digital platforms spur emotions and amplify fears and doubts, spreading knowledge but also misinformation with the press of a button—seemingly free, around the globe—and producing communities living in separate realities.⁶²

Responsibility also attaches to broadcast and cable communications companies that have eroded distinctions between reporting and opinion and that have cultivated emotion and even rage.⁶³ Altogether, contemporary communications technologies can undermine the crucial desire—the hunger for participation, knowledge, reason, freedom—required by constitutional democracy.⁶⁴ Especially on social media platforms, accurate information is often overwhelmed by misinformation and conspiracy theories.⁶⁵ Distrust of communications, of experts, and of “others” seems to grow.⁶⁶

The RAND Corporation has named the result: “Truth decay.”⁶⁷ Big digital platforms employ psychologists to exploit vulnerabilities in human cognition that bypass rational thinking in order to keep people “engaged” and have more eyeballs to see to ads.⁶⁸ Clickbait makes people vulnerable to

61. See Stoycheff & Nisbet, *supra* note 58; ANNE APPLEBAUM, *TWILIGHT OF DEMOCRACY: THE SEDUCTIVE LURE OF AUTHORITARIANISM* 115 (2020). Applebaum also notes that among populist demagogues, an early defense against critics is to claim: it’s just humor, just a joke. Meanwhile, authoritarian governments also use the digital world for surveillance and intimidation.

62. Barrett et al., *supra* note 60.

63. *Id.*

64. *Id.*

65. See *id.*; J.M. Berger, *How Terrorists Recruit Online (and How to Stop It)*, BROOKINGS (Nov. 9, 2015), <https://www.brookings.edu/blog/markaz/2015/11/09/how-terrorists-recruit-online-and-how-to-stop-it/> [<https://perma.cc/BG9S-G89H>] (“The mainstream media . . . has a role to play, by making sure its coverage is measured and responsible, and that it does not robotically amplify the ISIS message.”); see also HAL ABELSON ET AL., *supra* note 58, at 145–56.

66. See, e.g., Barrett et al., *supra* note 60.

67. JENNIFER KAVANAGH & MICHAEL D. RICH, RAND CORP., *TRUTH DECAY: AN INITIAL EXPLORATION OF THE DIMINISHING ROLE OF FACTS AND ANALYSIS IN AMERICAN PUBLIC LIFE* 2 (2018). For a discussion on QAnon, see Paul P. Murphy, *Born on the Dark Fringes of the Internet, QAnon is now Infiltrating Mainstream American Life and Politics*, CNN (July 3, 2020, 9:50 AM), <https://www.cnn.com/2020/07/03/us/what-is-qanon-trnd/index.html> [<https://perma.cc/YK9L-5Z3Y>].

68. Tero Karppi & David B. Nieborg, *Facebook Confessions: Corporate Abdication and Silicon Valley Dystopianism*, 23 *NEW MEDIA & SOC’Y* 2634, 2641 (2021); Sarah Friedmann, *This Is What Your Brain Does Every Time Your Insta Post Gets a “Like,”* BUSTLE (Sept. 21, 2019), <https://www.bustle.com/p/how-your-brain-responds-to-a-like-online-shows-the-power-of-social-media-18725823> [<https://perma.cc/SJB7-7YKY>]; Trevor Haynes, *Dopamine, Smartphones & You: A Battle for Your Time*, HARV. UNIV. GRADUATE SCH. ARTS & SCIS. (May 1, 2018), <https://sitn.hms.harvard.edu/flash/2018/dopamine-smartphones-battle-time/> [<https://perma.cc/K2WX-MX58>]; see Cynthia Dwork & Martha Minow, *Distrust of Artificial Intelligence: Sources & Responses from Computer Science and Law*, 151 *DÆDALUS* 309 (Spring

media manipulation, trolls, scare tactics, and appeals to rebelliousness that feed Islamophobia, misogyny, anti-Semitism, and racism in digital worlds.⁶⁹ Algorithms sort people into different demographic and interest groups in order to sell ads and to escalate messages tailored for the “user” with resulting “digital gerrymandering,” selecting different content to show different people and diminishing the chance of shared understandings.⁷⁰ Broadcast, cable, and digital media trade a search for all audiences for those who have a particular viewpoint—and accentuate partisanship, like political primaries pushing candidates to appeal to those on the extremes of each party.⁷¹

As political polarization and distrust eat away at our communities, Americans report low trust in government and in one another.⁷² This spells real trouble for democracy. A global study found that few millennials object to autocracy; only 19% of Americans surveyed report that a military takeover would be illegitimate if the government is incompetent.⁷³ It is in this context that education—involving each generation in learning civics, history, political process, and rational analysis—especially takes on constitutional valence and perhaps even an existential significance.

IV. CONSTITUTIONAL ARGUMENTS ABOUT A FEDERAL RIGHT TO EDUCATION

What are the prospects for recognition of a federal right to education? If addressed to the United States Supreme Court, the prospects are not good.

2022) (discussing platform companies profiting from “engagement”). Appeals to emotion bypass rationality. Psychologist Steven Pinker explains that rationality involves logic, distrusting first impressions, resisting arguments based solely on the authority of a person, distinguishing causation from correlation, and working to overcome biases in how we perceive, think, and plan. STEVEN PINKER, *RATIONALITY: WHAT IT IS, WHY IT SEEMS SCARCE, WHY IT MATTERS* (2021).

69. ALICE MARWICK & REBECCA LEWIS, *DATA & SOC’Y RSCH. INST., MEDIA MANIPULATION AND DISINFORMATION ONLINE 1* (2017), https://datasociety.net/wp-content/uploads/2017/05/DataAndSociety_MediaManipulationAndDisinformationOnline-1.pdf [https://perma.cc/G2A6-W4G4].

70. Benjamin Powers, *Digital Gerrymandering and the Dangerous Influence of the Internet on Politics*, PASTE MAG. (Apr. 28, 2016, 10:05 AM), <https://www.pastemagazine.com/politics/digital-gerrymandering-and-the-dangerous-influence/> [https://perma.cc/V7BZ-T2GU]; Jonathan Zittrain, *Engineering an Election*, 127 HARV. L. REV. F. 335, 336–37 (2014).

71. See Powers, *supra* note 70.

72. Lee Rainie & Andrew Perrin, *Key Findings About Americans’ Declining Trust in Government and Each Other*, PEW RSCH. CTR. (July 22, 2019), <https://www.pewresearch.org/fact-tank/2019/07/22/key-findings-about-americans-declining-trust-in-government-and-each-other/> [https://perma.cc/9A3C-3LA7].

73. *How to Teach Citizenship in Schools*, ECONOMIST (Feb. 2, 2017), <https://www.economist.com/news/international/21716250-governments-are-failing-prepare-young-use-their-votes-well-how-teach> [https://perma.cc/D5S8-CEZ8].

Among the many precedents that the current Court may overturn,⁷⁴ its rejection of a federal constitutional right to education is not a likely candidate.⁷⁵ In *San Antonio Independent School District v. Rodriguez*, five justices rebuffed challenges to the school finance system used in Texas that resulted in some school districts in the state spending twice as much per pupil as others.⁷⁶ In the course of its opinion, the majority concluded not only that there is no fundamental right to education under constitutional due process, but also that wealth is not a suspect class giving rise to strict scrutiny when used in legislative classifications.⁷⁷ And the five-justice majority concluded that the school funding mechanisms resulting in some state districts spending twice as much per student as others was not irrational.⁷⁸

That decision did not end the question about constitutional dimensions of education in America for multiple reasons. Prior and subsequent Supreme Court decisions emphasize constitutional dimensions of public education.⁷⁹ The case has launched decades of debate and criticisms, including some rating the decision among the Court's worst.⁸⁰ Subsequent litigation under state

74. David Schultz, *The Supreme Court has Overturned Precedent Dozens of Times in the Past 60 Years*, OHIO CAP. J. (Sept. 30, 2021, 12:20 AM), <https://ohiocapitaljournal.com/2021/09/30/the-supreme-court-has-overturned-precedent-dozens-of-times-in-the-past-60-years/> [https://perma.cc/5EHH-4JVQ]; Ruth Marcus, Opinion, *At the Supreme Court, Precedent Takes a Leave of Absence*, WASH. POST (May 21, 2021, 5:51 PM), <https://www.washingtonpost.com/opinions/2021/05/21/supreme-court-precedent-takes-leave-absence/> [https://perma.cc/J843-6VP2].

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

76. See *id.* at 35, 46–47; Geoffrey R. Stone, *How a 1973 Decision has Contributed to Our Inequality*, DAILY BEAST (July 12, 2017, 3:35 PM), <https://www.thedailybeast.com/how-a-1973-supreme-court-decision-has-contributed-to-our-inequality> [https://perma.cc/RR5Y-G4AQ] (discussing *Rodriguez*).

77. *Rodriguez*, 411 U.S. at 28–29.

78. See *id.* at 54–55.

79. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); *Plyler v. Doe*, 457 U.S. 202, 230 (1982).

80. See Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1061–62 (2019) (“Most scholarly theories lack a strong doctrinal argument, operating instead on the questionable premise that evolving educational norms and policy-based arguments are enough to prompt the Court to overturn *Rodriguez*. The strongest theories suffer from the opposite problem. They require the Court to rewrite basic doctrine that would reach well beyond education.”); Frank J. Macchiarola & Joseph G. Diaz, *Disorder in the Courts: The Aftermath of San Antonio Independent School District v. Rodriguez in the State Courts*, 30 VAL. U. L. REV. 551, 552 (1996) (discussing whether the *Rodriguez* Court failed). Some have called *Rodriguez* one of the worst decisions by the Supreme Court. Andrea Sachs, *The Worst Supreme Court Decisions Since 1960*, TIME (Oct. 6, 2015, 11:36 AM), <https://time.com/4056051/worst-supreme-court-decisions/> [https://perma.cc/BQ4Z-5RCF]; David G. Savage, *How Did They Get It So Wrong?*, ABA J. (Jan. 1, 2009, 6:30 AM), https://www.abajournal.com/magazine/article/how_did_they_get_it_so_wrong [https://perma.cc/6JCH-2V94].

constitutions has developed analysis and remedies.⁸¹ A federal litigation effort (*Gary B. v. Snyder*)⁸² convinced a panel in the Federal Court of Appeals for the Sixth Circuit that the decrepit conditions and poor educational outcomes in five Detroit public schools violated the federal Constitution's guarantees, but then the Sixth Circuit court acting en banc vacated the opinion; the case ended with a settlement.⁸³ Another federal case argued for a federal right to civics education, generated a sympathetic but unsuccessful opinion in the district court, and was affirmed on appeal.⁸⁴ Pursuing the matter to the Supreme Court could actually make the prospects for a federal constitutional right to education worse.

Nonetheless, the significance of the federal Constitution extends far beyond decisions of the United States Supreme Court. As public officials swear an oath to uphold it, each legislator, governor, mayor, and others in office have the duty to interpret and implement the Constitution.⁸⁵ Beyond judicial orders are constitutional considerations that do and should guide the actions not only of officials but also of individuals participating in the polity.⁸⁶

81. See William S. Koski, *Beyond Dollars? The Promise and Pitfalls of the Next Generation of Educational Rights Litigation*, 117 COLUM. L. REV. 1897, 1915–23, 1928–31 (2017) (“Just as the move from second-wave ‘equity’ litigation to third-wave ‘adequacy’ litigation was prompted in part by strategic necessity due to the courts’ concerns about the second-wave approach, there appears to be an emerging educational rights litigation movement that strategically departs from the third-wave focus on educational funding and educational finance systems.”); James E. Ryan, Essay, Sheff, *Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529, 530–32 (1999) (“At the same time, *Sheff* shows how the underlying right recognized in school finance cases—the right to an adequate or equal education—need not be defined solely in monetary terms, and instead can support alternative theories of the elements necessary to ensure an adequate or equal education.”); EMILY PARKER, EDUC. COMM’N STATES, 50-STATE REVIEW: CONSTITUTIONAL OBLIGATIONS FOR PUBLIC EDUCATION 2 (2016), <https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf> [<https://perma.cc/B4AP-2JXK>] (“In recent years, the constitutional language mandating the creation of public schools has been the basis for school finance court cases in some states.”).

82. When Governor Gretchen Whitmer took office, the case name became *Gary B. v. Whitmer*.

83. Alyssa Evans, *The Other Branch: Outcomes of Gary B. v. Snyder*, EDUC. COMM’N STATES: EDNOTE (July 15, 2020), <https://ednote.ecs.org/the-other-branch-outcomes-of-gary-b-v-snyder/> [<https://perma.cc/3DP4-ZNW2>]. The circuit court voted to hear the case en banc, vacating the panel judgment pending the en banc hearing. Before the case could be heard en banc, the parties announced a settlement. Therefore, the panel judgment has no precedential value. *Gary B. v. Whitmer*, 957 F.3d 616 (6th Cir.), *reh’g en banc granted, opinion vacated*, 958 F.3d 1216 (6th Cir. 2020).

84. *A.C. v. Raimondo*, 494 F. Supp. 3d 170, 197 (D.R.I. 2020). On appeal, the case was renamed *Cook v. McKee*. *Cook v. McKee*, No. 20-2082, 2022 WL 100001, at *1 (1st Cir. Jan. 11, 2022).

85. 5 U.S.C. § 3331.

86. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1222 (1978); Alan Garfield, *In Divisive Times*,

Thus, policies and legislation can reinforce and help realize values and commitments of American constitutional democracy.⁸⁷ Further, the very language of constitutional rights supports a sense of empowerment for individuals and communities that in turn affects political and legal movements and actions.⁸⁸

Although the U.S. Constitution is often and fairly described as primarily a “negative-liberty” constitution, setting limits on government, there are some obligations it imposes that create affirmative government duties.⁸⁹ These include ensuring right to counsel in criminal matters that include risks of incarceration, opportunities for individual recipients of government benefits to be heard prior to termination of benefits, right to counsel where an individual risks loss of liberty, and access for the press to both prisons and criminal trials.⁹⁰ If recognizing a constitutional right to education starts with

the Constitution Binds Us Together as Americans, DEL. ONLINE (Sept. 13, 2018, 8:17 AM), <https://www.delawareonline.com/story/opinion/contributors/2018/09/13/divisive-times-constitution-binds-us-together-americans/1280204002/> [<https://perma.cc/RX9B-B7JA>]. For cautions, see Mark Tushnet, Book Review, 116 ETHICS 607, 607 (2006) (reviewing LAWRENCE GENE SAGER, *JUSTICE IN PLAIN CLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* (2004)).

87. See William N. Eskridge, Jr. & John A. Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1230–31 (2001) (“Our first criterion for super-statutes is that they alter substantially the then-existing regulatory baselines with a new principle or policy.”); *Presidential Commission on the Supreme Court of the United States* 11 (Aug. 17, 2021) (written testimony of Mark Tushnet, Harvard Law School) [hereinafter Tushnet Testimony], <https://www.whitehouse.gov/wp-content/uploads/2021/08/Professor-Mark-Tushnet.pdf> [<https://perma.cc/HU6G-3JSV>] (“[T]he courts often interpret statutes in light of constitutional concerns or, more important, what I call constitutionally-inflected concerns.”); MARTHA MINOW, *SAVING THE NEWS: WHY THE CONSTITUTION CALLS FOR GOVERNMENT ACTION TO PRESERVE FREEDOM OF SPEECH* 101–44 (Oxford Univ. Press ed., 2021) (“Justifications for . . . regulations that should survive a First Amendment challenge turn on the limits of human attention, on the vulnerability of each user to being overwhelmed by floods of digital materials, and on the crucial dependence of democratic self-governance on access to meaningful information.”).

88. Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1879–80 (1987); see Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto Era*, 94 CAL. L. REV. 1323, 1359 (2006) (“As the suffrage example illustrates, advocates can create powerful reasons for change they otherwise lack power to achieve if they succeed in destabilizing the reference of constitutional principles and memories.”).

89. See Steven J. Heyman, *Positive and Negative Liberty*, 68 CHI.-KENT L. REV. 81, 84–86 (1992) (“It is important to observe that these rights were not merely negative but also positive—they were not simply rights against interference by others, but rights to be secure in one’s life, liberty and property under the law.”).

90. On procedural due process, see *Mathews v. Eldridge*, 424 U.S. 319, 339–40 (1976); see also *Goldberg v. Kelly*, 397 U.S. 254, 270–71 (1970) (permitting counsel at pre-termination hearings). For right to counsel, see *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); see also *In re Gault*, 387 U.S. 1, 39–41 (1967) (stating that parties must be notified of their rights to counsel). On press access, see *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 582–83

the assumption that no affirmative rights fall within the U.S. Constitution, that is false. Moreover, the tight connections between education and voting and between education and freedom of speech make it different from other human needs propelling theoretical arguments for rights recognition.

Education holds a crucial role under a constitution establishing self-governance, individual rights, and structural checks against tyranny. This form of government both assumes and supports commitments to educating each generation to enable not only taking up successful employment and family roles but also the duties associated with self-governance.⁹¹ Yet by presuming what is also a goal, the Constitution has not given rise to sturdy recognition of its predicate, education.⁹² Through intense struggles, the initial group entrusted with self-governance expanded from free adult White men to all adult citizens who each need opportunities to develop the knowledge, skills, and dispositions involved in the work of elections, policymaking, and advancing the interests of individuals and communities.⁹³ Elements of schooling have historic roots that arguably warrant constitutional recognition marked by commitments to equality and quality. At a minimum, dedication of greater resources and smarter programs are necessary to cultivate the knowledge, skills, and dispositions required by a constitutional democracy. Any doubts should be quelled now, as the constitutional system itself faces jeopardy.

A. *Constitutional Arguments in Recent Litigation*⁹⁴

The arguments for a federal constitutional right to education are not difficult to sketch.⁹⁵ Advocates before federal courts have done just that in the

(1980) (Stevens, J., concurring); *see also* *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 602–03 (1982) (rejecting state law requiring exclusion of press and public during testimony of a minor allegedly victimized in a sex offense); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505–08 (1984) (extending access right to voir dire examinations of prospective jurors in criminal trial and to transcripts of preliminary hearing in criminal case).

91. *See* CAMPAIGN FOR THE CIVIC MISSION OF SCHS., *supra* note 30, at 11.

92. *See* Burnette II, *supra* note 7.

93. *See id.*

94. This section draws on briefs reflecting my work with a team of fine lawyers at Selendy & Gay. *See* Brief for Martha Minow as Amicus Curiae Supporting Plaintiffs-Appellants, *Cook v. Raimondo*, No. 20-2082 (Feb. 1, 2021) (on appeal from the U.S. District Court for the District of Rhode Island, No. 1:18-CV-00645); Brief for Martha Minow as Amicus Curiae Supporting Plaintiffs-Appellants, *Gary B. v. Richard D. Snyder*, No. 18-1855/18-1871 (Nov. 6, 2018) (on appeal from the U.S. District Court for the Eastern District of Michigan, No. 2:16-CV-13292) (Lena Konanova, David S. Flugman, Jessica Underwood, Bria Delaney & Nicholas J. Klenow, Selendy & Gay, counsel).

95. The arguments can deploy originalist techniques, and methods relying on historical practice, national ethos, judge-made doctrines. *See* Derek W. Black, *Implying a Federal*

past several years and used established methods of constitutional argument by pointing to the public meanings of the post-Civil War amendments,⁹⁶ the repeated statements of founders of the nation as well as later leaders about the crucial contributions of education to democratic citizenship, and the legal doctrines built up over time interpreting substantive due process fundamental rights and equal protection of the laws.⁹⁷ A recent edited volume of essays thoroughly reviews the arguments for and against a federal right to education.⁹⁸ Two of the three judges who heard the arguments in the federal court of appeals for the Sixth Circuit agreed; thus, before the court en banc vacated the judgment, the appellate court drew upon the substantive due process fundamental rights precedents, the Supreme Court's own treatment of education in constitutional cases, and the historic role and prevalence of education to announce a narrow fundamental right to a minimum education.⁹⁹

The court had before it factual findings of disturbing conditions and poor education outcomes in five Detroit public schools: decrepit facilities not only falling below city health and safety codes but also subjecting students to collapsing ceilings and infestations of rodents and insects; classrooms staffed by individuals with little or no training; insufficient; out-of-date teaching materials; and proficiency rates on state tests falling below 10% of the student population.¹⁰⁰ The *Gary B.* panel noted that even the *Rodriguez* opinion left open avenues for constitutional challenges to effective deprivation of a minimum quantum of education necessary to exercise constitutional rights of speaking and voting and identified the defective facilities, teaching, and educational materials as failing to meet the requisite minimum.¹⁰¹ After all, the Supreme Court in *Rodriguez* left open the possibility of constitutional

Constitutional Right to Education, in A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY 135 (Kimberly J. Robinson ed., 2019) [hereinafter FUNDAMENTAL QUESTIONS]. For a fresh and powerful demonstration of contributions to a federal right to education from multiple sources in the constitution, see Derek W. Black, *Freedom, Democracy, and the Right to Education*, 116 NW. L. REV. 1031, 1036–37 (2022).

96. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment was Ratified in 1868: What Rights are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 13–15 (2008); Michael W. McConnell, *The Originalist Case for Brown v. Board of Education*, 19 HARV. J.L. & PUB. POL'Y 457, 459–64 (1996).

97. McConnell, *supra* note 96, at 459.

98. See FUNDAMENTAL QUESTIONS, *supra* note 95; see also Martha Minow, *Foreword to FUNDAMENTAL QUESTIONS*, *supra* note 95, at vii, vii–xvi; see also Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 334–35 (2006) (arguing that the Fourteenth Amendment affords “a meaningful floor of educational opportunity” by enforcing citizenship rights).

99. *Gary B. v. Whitmer*, 957 F.3d 616, 642–62 (6th Cir.), *reh'g en banc granted, opinion vacated*, 958 F.3d 1216 (6th Cir. 2020).

100. *Id.* at 660–62.

101. *Id.* at 651–52, 661–62.

violation if a state “fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.”¹⁰²

As the Supreme Court itself noted in its later decision in *Plyler v. Doe*, the *Rodriguez* Court “reserved judgment on the constitutionality of a state system that ‘occasioned an absolute denial of educational opportunities to any of its children.’”¹⁰³ Determining specific remedies would await remand, but after the panel decision, Michigan’s Governor Gretchen Whitmer announced a settlement.¹⁰⁴ It included individual awards to the seven student plaintiffs, funding to support literacy programs, establishment of two task forces to monitor the quality of education in Detroit and advise the Michigan Governor on education reform in the city, and a promise to propose legislation authorizing more funding for literacy programs in the Detroit schools; it also ended a prohibition on Detroit’s use of bonds to raise capital for its schools.¹⁰⁵

Similar (though not identical) arguments challenged the lack of civics education in Rhode Island.¹⁰⁶ Again, the arguments use the Supreme Court’s treatment of fundamental rights under substantive due process, looking to national history, legal traditions, and practices.¹⁰⁷ Advocates point to the importance attached to education by founders of the United States, the creation of common (public) schools in the nineteenth century and universal adoption of compulsory school by the twentieth century, the Supreme Court’s treatment of education as the foundation to American life and democracy in *Brown v. Board of Education*,¹⁰⁸ and the Court’s further view of education in *Plyler*, as not “merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation,” but instead “education has a fundamental role in maintaining the fabric of our society.”¹⁰⁹

Tying education even more tightly to the democratic process, advocates challenged the failures of Rhode Island to ensure civics education in all of its

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

103. *Plyler v. Doe*, 457 U.S. 202, 235 (1982) (Blackmun, J., concurring) (quoting *Rodriguez*, 411 U.S. at 37).

104. *Case: Gary B. v. Snyder*, C.R. LITIG. CLEARINGHOUSE, <https://www.clearinghouse.net/detail.php?id=15474> [<https://perma.cc/DZ9H-E3TS>].

105. *Id.* Press Release, The Office of Governor Gretchen Whitmer, Governor Whitmer and Plaintiffs Announce Settlement in Landmark Gary B. Literacy Case (May 14, 2020), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90640-529231--,00.html [<https://perma.cc/Q4WZ-9TGW>].

106. *Cook v. McKee*, No. 20-2082, 2022 WL 100001, at *1–2 (1st Cir. Jan. 11, 2022).

107. *Id.* at *2–4.

108. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

109. *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

schools.¹¹⁰ Beyond literacy, beyond basic facilities and materials, a national report urges schools to make sure that students understand the importance of their “contribut[ion] . . . to the progress of our Nation,” and understand how they can contribute.¹¹¹ The report continues, “Americans who are not properly educated about their roles as citizens are less likely to be civically engaged. . . . They are less likely to vote, less likely to engage in political discourse, and less likely to participate in community improvement projects than their counterparts who receive civic education.”¹¹² And because some students in the state do receive civics education in both direct instruction and school-supervised opportunities to engage in the governance activities in the community,¹¹³ claims of deprivations of equal protection of the law—with disproportionately negative effects on students who are members of minority racial and ethnic groups—could also be framed.

Despite these arguments, the Court of Appeals for the First Circuit recently affirmed the Rhode Island federal District Court’s decision, rejecting the students’ constitutional claims on January 11, 2022.¹¹⁴ While acknowledging the importance of education as “the most important function of state and local governments” and as the “very foundation of good citizenship,” the appellate

110. Allie Reed, *14 Students Sued Rhode Island over Civics Education. Now, They’re more Politically Engaged than Ever*, BOS. GLOBE (Nov. 11, 2020, 1:49 PM), <https://www.bostonglobe.com/2020/11/11/metro/14-students-sued-ri-over-civics-education-now-theyre-more-politically-engaged-than-ever/> [<https://perma.cc/32ZN-G6JJ>].

111. *Plyler*, 457 U.S. at 223; see CARNEGIE & CIRCLE, CIVIC MISSION OF SCHOOLS, *supra* note 27, at 7.

112. CAMPAIGN FOR THE CIVIC MISSION OF SCHS., *supra* note 30, at 12; see also U.S. DEP’T OF EDUC. NAT’L CTR. FOR EDUC. STAT., ADULT LITERACY IN THE UNITED STATES (2019), <https://nces.ed.gov/pubs2019/2019179.pdf> [<https://perma.cc/63YC-8JQT>] (examining literacy rates among adults in the United States); Annenberg Pub. Pol’y Ctr of the Univ. of Pa., *Americans’ Civics Knowledge Increases but Still Has a Long Way to Go*, (Sept. 12, 2019), <https://www.annenbergpublicpolicycenter.org/americans-civics-knowledge-increases-2019-survey/> [<https://perma.cc/EP6W-YS3K>] (“A regression analysis showed that people who said they took high school civics were more likely to know the answers to six survey “knowledge” questions, including naming the branches of government.”); JAN BRENNAN, EDUC. COMM’N STATES, ESSA: MAPPING OPPORTUNITIES FOR CIVIC EDUCATION 4 (2017), <https://www.ecs.org/wp-content/uploads/ESSA-Mapping-opportunities-for-civic-education.pdf> [<https://perma.cc/7WCY-R9A6>] (“Ample evidence suggests that increased levels of student engagement associated with high-quality civic learning and engagement activities can contribute to improvements in both academic and non-academic measures.”); Kathleen H. Jamieson, *The Challenges Facing Civic Education in the 21st Century*, 142 DÆDALUS 65, 72 (2013) (“Specifically, schooling in civics increases knowledge of our system of government and its history and laws; builds students’ confidence in their ability to exercise the prerogatives of citizenship; and increases participation in the community and in governments, including voting.”).

113. See Jamieson, *supra* note 112, at 73.

114. *Cook v. McKee*, No. 20-2082, 2022 WL 100001, at *6 (1st Cir. Jan. 11, 2022).

court ultimately found no basis for a constitutional right to an adequate civics education under the substantive due process or equal protection doctrines.¹¹⁵ Specifically, the panel held that failure to provide civics education did not amount to “total deprivation of a minimally adequate education” as is required to be actionable under *Rodriguez*,¹¹⁶ and found the state’s decisions about the school curriculum to be sufficiently rational.¹¹⁷ This decision leaves in place the lower court’s expressions of deep concern about the situation.¹¹⁸

B. Addressing Objections to a Federal Fundamental Right of Education

Objections to judicial recognition of a federal right to education can be countered. Arguments against a judicially-recognized constitutional right to education start with the majority in *Rodriguez* and have been amply repeated and extended more recently.¹¹⁹ First, judicial competence would be strained due to line-drawing problems in recognition of a constitutional right not expressly listed, e.g., how could education be distinguished from other needs such as housing and food?¹²⁰ Second, federal courts are the wrong institution to deal with the issues because legislatures, not courts, should pursue the matter due to differences in institutional competence and legitimacy of action.¹²¹ States are responsible for education and have prerogatives into which the federal government should not intrude.¹²² Thus, federal legislation and state action both reflect the authority and suppleness needed to devise policies adapted to actual needs and capable of regular revision.¹²³ And third,

115. *Id.* at *2 (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29–30 (1973)).

116. *Id.* at *3–4; *see also Rodriguez*, 411 U.S. at 37.

117. *Cook*, 2022 WL 100001, at *6.

118. *A.C. v. Raimondo*, 494 F. Supp. 3d 170, 197 (D.R.I. 2020), *aff’d sub nom. Cook v. McKee*, No. 20-2082, 2022 WL 100001, (1st Cir. Jan. 11, 2022) (“Plaintiffs should be commended for bringing this case. It highlights a deep flaw in our national education priorities and policies. The Court cannot provide the remedy Plaintiffs seek, but in denying that relief, the Court adds its voice to Plaintiffs’ in calling attention to their plea. Hopefully, others who have the power to address this need will respond appropriately.”).

119. *See generally* FUNDAMENTAL QUESTIONS, *supra* note 95. Particularly relevant sections include: Foreword, Introduction, and chapters 3, 7, and 11.

120. *See Black*, *supra* note 95, at 1060–61.

121. *See* Jeb Bush, *Let States Take the Lead in Education*, WASH. POST (Mar. 6, 2015) https://www.washingtonpost.com/opinions/let-states-take-the-lead-in-transforming-schools/2015/03/06/0c5ecbb8-c132-11e4-9ec2-b418f57a4a99_story.html [https://perma.cc/KR52-JTFU] (“Given all the challenges facing education reform, we need to remember who really should make the decisions about what happens in our schools: state and local authorities and, most important, parents.”).

122. *Id.*

123. *See* Rebecca Jacobsen & Andrew Saultz, *Poll Trends—Who Should Control Education?*, 76 PUB. OP. Q. 379, 388 (2012) (“The public often indicates a preference for local control. However, we do find support for state and federal control in specific circumstances.”).

judicial declaration of rights can produce backlash and consequential disillusionment, as experiences with school desegregation demonstrate.¹²⁴

Responses to the first two of these arguments begin with *Rodriguez*—a 5–4 decision that could well have come out the other way.¹²⁵ The majority itself noted, “Nothing this Court holds today in any way detracts from our historic dedication to public education. We are in complete agreement with the conclusion of the three-judge panel below that ‘the grave significance of education both to the individual and to our society’ cannot be doubted.”¹²⁶ While the majority asserts lack of judicial competence and concerns about intruding on state and local authorities, it also relies on judge-made doctrines about levels of scrutiny and what counts as irrational state policies for purposes of finding constitutional violations.¹²⁷ Those doctrines are both discretionary and malleable, not written in the Constitution’s text.¹²⁸ The dissenters rely on similar judicially made guidance about how and when courts can recognize fundamental rights.¹²⁹ Applying doctrines cited by the majority to the facts of the challenged Texas school finance system, Justice White (joined by two others) would have found violations even under the minimal constitutional scrutiny calling for a rational relationship between the state’s methods of school finance and its ends.¹³⁰

Justice Marshall, joined by Justice Douglas in dissent, conceived of the majority’s decision as departing from precedents regarding constitutional guarantees of equal protection and due process in the context of schooling.¹³¹ His analysis of the precedents under both lines of doctrine shows how the

124. See Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 81–82 (1994) (discussing backlash following the *Brown* decision).

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

126. *Id.* at 30 (quoting *Rodriguez*, 337 F. Supp. at 283).

127. *Id.* at 40–44.

128. Brett Snider, *Challenging Laws: 3 Levels of Scrutiny Explained*, FINDLAW (Jan. 27, 2014, 9:05 AM), <https://www.findlaw.com/> (search “Levels of Scrutiny” in search bar; follow first hyperlink) [<https://perma.cc/6XS7-CMCN>].

129. See, e.g., *Rodriguez*, 411 U.S. at 62–63 (Brennan, J., dissenting). Quoting Justice Marshall’s dissenting opinion in the same case, Justice Brennan stated that:

[O]ur prior cases stand for the proposition that “fundamentality” is, in large measure, a function of the right’s importance in terms of the effectuation of those rights which are in fact constitutionally guaranteed. Thus, “[A]s the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.”

Id. at 63 (Brennan, J., dissenting). Quoting Justice Marshall’s dissenting opinion in the same case, Justice Brennan concluded: “there can be no doubt that education is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment.” *Id.*

130. *Id.* at 63–70 (White, J., dissenting, joined by Douglas, J. and Brennan, J.).

131. *Id.* at 70–71 (Marshall, J., dissenting).

majority bypasses precedents where the Supreme Court recognized as fundamental rights (such as the right to travel, the right to vote, the right to appeal a trial court decision, and the right of reproductive choice involved in access to contraception) lacking specific textual references in the Constitution.¹³² Thus, although some see ours as primarily a “negative liberty” constitution, setting limits on government, varied affirmative duties of government have constitutional recognition. The close connections between education and voting, and between self-government and checks on tyranny, make educational needs different from other human needs.

Subsequent judicial decisions have only bolstered the dissenting view. The Court in *Plyler v. Doe* rejected as unconstitutional the Texas law excluding undocumented school-age children from the education provided to other children in the state.¹³³ It reasoned not only that the Fourteenth Amendment applies to persons, not only to citizens, but also that public education is not merely “some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction,” thus making education different than housing or food.¹³⁴ Without overturning *Rodriguez*’s rejection of a fundamental constitutionally recognized right to education, the Court nonetheless underscored the necessity of schooling to maintaining a democratic system as well as to equipping individuals to succeed economically.¹³⁵ The elevated treatment of education by the Court in *Brown v. Board of Education*, nearly two decades before *Rodriguez*, became a focal point for the *Plyler* court: it stressed that compulsory schooling is required for the most basic public duties and is the foundation of good citizenship.¹³⁶

132. *Id.* at 98–103 (Marshall, J., dissenting). Justice Marshall’s dissent also criticized the majority for accepting amelioration efforts by Texas rather than redressing a school finance system that the majority itself acknowledges produced substantial disparities due to the wealth of different communities. *Id.* at 126–30.

133. *Plyler v. Doe*, 457 U.S. 202, 220 (1982).

134. *Id.* at 221. The Court continued,

We have recognized “the public schools as a most vital civic institution for the preservation of a democratic system of government,” and as the primary vehicle for transmitting “the values on which our society rests.” “[A]s . . . 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.”

Plyler, 457 U.S. at 221 (first quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring); then quoting *Ambach v. Norwick*, 441 U.S. 68, 76 (1979); and then quoting *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)).

135. See *Plyler*, 457 U.S. at 221–22.

136. *Id.* at 222–23. The Court stated that “[w]hat we said 28 years ago in [*Brown v. Board of Education*] still holds true” and quoted the following influential passage:

Thus, rather than producing a slippery slope with line-drawing problems for other fundamental rights, education is distinctively critical. Similarly, in his concurring opinion, Justice Blackmun noted that “denial of an education is the analogue of denial of the right to vote: the former relegates the individual to second-class social status; the latter places him at a permanent political disadvantage.”¹³⁷ And rather than exceeding the capacity and authority of federal courts, in *Brown* and in *Plyler*, constitutional protection of educational access falls within their purview and capabilities.¹³⁸

Despite assertion of separation of powers limitations and questions about judicial competencies, courts in the United States have in fact overseen institutional reforms of the railroads, prisons, mental institutions, housing authorities—and schools.¹³⁹ The results are not always what advocates hope but the same can be said about legislated and administrative action.¹⁴⁰ The tools given to courts include hearing claims, gathering evidence, and forming judgements about both the substance and the remedies of constitutional obligations.¹⁴¹ In articulating the elements of constitutional rights and duties, courts can and do benefit from the input of experts, community members, masters appointed to conduct hearings and craft recommendations, and

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

Id. (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

137. *Id.* at 234 (Blackmun, J., concurring).

138. *See id.* at 209–16; *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

139. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1306–07 (1976); OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 17–18 (1978); William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 673–76 (1982). For a review of debates of judicial legitimacy and competency in structural reform litigation, see MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 356–72 (1990).

140. *See Klarman, supra* note 124, at 117–18.

141. *See generally How Courts Work*, ABA (Nov. 28, 2021), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/discovery/ [<https://perma.cc/EFW9-GB37>] (explaining some evidence-gathering tools courts and parties of which parties and courts can take positive advantage).

continuing input from the parties to litigation.¹⁴² All of these tools can be used in identifying the critical elements of a federal constitutional right to education and measures of its enforcement.¹⁴³

Concerns about judicial competency to rule on and design remedies enforcing a constitutional right to education can be countered by reference to decades of state judicial decisions interpreting and enforcing state rights to education.¹⁴⁴ Although some states have rejected remedies in deference to legislative solutions, many others have relied with some successes on their state constitutions, their equitable remedial powers, and consultative processes to devise and revise meaningful implementation of adequate education for their residents.¹⁴⁵ Judicial enforcement has prompted action by legislatures and involved varied groups in crafting efforts to improve schools and reduce inequities in education.¹⁴⁶ Even if the judicial action only corrects the worst barriers to education opportunity, it represents an important effort

142. See generally Dani Alexis Ryskamp, *Why are Expert Witnesses Important?*, EXPERT INST. (June 25, 2020), <https://www.expertinstitute.com/resources/insights/why-are-expert-witnesses-important/#:~:text=Expert%20witnesses%20are%20important%20to,strength%20of%20the%20entire%20case> [<https://perma.cc/DP6R-KDP4>] (discussing the value that expert and other witnesses contribute to litigation).

143. For further elaboration of potential elements of the right and enforcement, see *infra* Part V.

144. See NAT'L RSCH. COUNCIL, EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 16–17 (Helen F. Ladd et al. eds., 1999), <https://www.nap.edu/read/6166/chapter/1> [<https://perma.cc/6Y7Q-QU94>] (discussing that quality of education can vary based on wealth inequality); see, e.g., *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 215–16 (Ky. 1989) (“[E]ducation is a basic, fundamental constitutional right that is available to all children within this Commonwealth. The General Assembly should begin with the same premise as it goes about its duty. The system, as we have said, must be efficient, and the criteria we have set out are binding on the General Assembly as it develops Kentucky’s new system of common schools.”). For a study of the implementation of the landmark Kentucky case, *Rose v. Council for Better Education*, see Caroline Ford Wilson, *Adequacy Post-Rose v. Council for Better Education in Kentucky Public School Facilities: A Case Study* (2013) (Ph.D. dissertation, The University of North Carolina at Charlotte), http://libres.uncg.edu/ir/uncc/f/Wilson_uncc_0694D_10494.pdf [<https://perma.cc/CG6P-TQJA>].

145. See, e.g., ROBERT M. CONSTRELL, MASSACHUSETTS’ HANCOCK CASE AND THE ADEQUACY DOCTRINE 16–17 (2006), https://www.hks.harvard.edu/sites/default/files/centers/rappaport/files/final_hancock.pdf [<https://perma.cc/2SLQ-PNXV>] (describing Massachusetts case rejecting request for remedies); *Horton v. Meskill*, 376 A.2d 359, 373–74 (Conn. 1977) (discussing Connecticut’s measures to promote proper education). Studies suggest that state courts ordering remedies to ensure adequate schools have contributed to improvements in student learning. William J. Glenn, *School Finance Adequacy Litigation and Student Achievement: A Longitudinal Analysis*, 34 J. EDUC. FIN. 247, 250 (2009).

146. Rebecca I. Yergin, Note, *Rethinking Public Education Litigation Strategy: A Duty-Based Approach to Reform*, 115 COLUM. L. REV. 1563, 1567–68 (2015).

that in turn helps to prompt further reforms and initiatives.¹⁴⁷ Short of enforceable decisions, the fact of litigation over whether there is a constitutional right to education can stimulate public education and consciousness, debate, and investment.¹⁴⁸

As to the third objection—the risk of public backlash against federal judicial declaration of rights—a rich empirical literature on the subject has emerged since *Rodriguez*. Michael Klarman has explored how the Supreme Court's school desegregation decisions may have temporarily slowed local progress and triggered backlash, but ultimately set in motion events culminating in the end of legally mandated segregation in and beyond public education.¹⁴⁹ Scholarly debates over direct versus indirect effects of judicial decisions do not alter the general conclusion that *Brown v. Board of Education* contributed substantially to the end of racial apartheid in America.¹⁵⁰ The Supreme Court's decision requiring access to marriage for same-sex couples seems to have accelerated public opinion's movement in that direction.¹⁵¹

147. See *id.* at 1565–66. The dialogue between legislature and judiciary is part of the constitutional system in the United States, though it may be an even greater element in other constitutional democracies, see Kent Roach, *Constitutional and Common Law Dialogues between the Supreme Court and Canadian Legislatures*, 80 CAN. BAR REV. 481, 484, 496–501 (2001).

148. See JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 139–40 (2011) (examining whether the Constitution demands that citizens that are equal people deserve equal education); JULES LOBEL, *SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA* 7–9 (2003) (“If success can be measured only by direct result, immediate change, or easily perceived impact, then these earlier cases were unmitigated failures. But, if success can be viewed like the penitenti of a painting, as an unseen underside necessary to the final perceptible painting, then these cases take on a different hue. Success inheres in the creation of a tradition, of a commitment to struggle, of a narrative of resistance that can inspire others similarly to resist.”); Hendrik Hartog, *The Constitution of Aspiration and “The Rights That Belong to Us All,”* 74 J. AM. HIST. 1013, 1018, 1028 (1987) (“American constitutional rights consciousness began with the dream of an autonomous identity, but critiques of law and other forms of official power and violence productive of hierarchy and social division have defined its political vision.”); Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 953–56 (2011) (discussing the positive impacts of litigation). Similarly, the technical failure of a constitutional amendment process can alter public and judicial understandings. See Siegel, *supra* note 88, at 1330–31. In contrast, decisions to settle or not bring litigation can foreshorten the factual bases and debates that contribute to legal and social change. Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 L. & SOC’Y REV. 869, 871–72 (1999).

149. Klarman, *supra* note 124, at 82.

150. See Matthew D. Lassiter, *Does the Supreme Court Matter? Civil Rights and the Inherent Politicization of Constitutional Law*, 103 MICH. L. REV. 1401, 1402–04 (2005) (discussing scholars’ analyses of *Brown*’s impact).

151. Emily Kazyak & Mathew Stange, *Backlash or a Positive Response?: Public Opinion of LGB Issues After Obergefell v. Hodges*, 65 J. HOMOSEXUALITY 2028, 2031–32 (2018). State

Negative political responses to judicial action can be serious, but also difficult to predict; such concerns may be out of place given the charge to judges to render decision based solely on the specific facts of a case and the relevant law.¹⁵²

In short, although there are familiar objections to judicial involvement in announcing or enforcing a federal right to education, there are equally longstanding responses.¹⁵³ Those include nearly seventy years of federal judicial articulation of the fundamental role of education to American society and democracy and extensive involvement by state courts in adjudicating and enforcing a right to education in their state constitutions.¹⁵⁴ By making school attendance compulsory and providing for sanctions against noncomplying parents and children,¹⁵⁵ every state underscores the importance of education. The risks to liberty posed by such laws further suggests moral, if not legal, grounds for federal recognition of enforceable rights to at least minimal quality education.¹⁵⁶

C. *A Federal Constitutional Right Outside of the Federal Judiciary*

Quite apart from judicial action, a federal right to education could be developed through legislation and practice, and constitutional arguments

and lower court judicial decisions involving same-sex marriage prior to the Supreme Court's decision produced some backlash but also some acceleration of the changes in public opinion to favor gay rights. See MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 165–82 (2012).

152. The topic has generated a subfield of scholarship in political science and law. See Joseph Daniel Ura, *Backlash and Legitimation: Macro Political Responses to Supreme Court Decisions*, 58 AM. J. POL. SCI. 110, 112–13 (2014) (discussing the “negative relationship between the direction of decision making of federal courts and public opinion”); Øyvind Stiansen & Erik Voeten, *Backlash and Judicial Restraint: Evidence from the European Court of Human Rights*, 64 INT’L STUD. Q. 770, 782 (2020) (“[T]he Court has become more reluctant to rule against democratic critics.”). On what judges think, see Katie Zezima, *A Conversation with the Judge who Wrote the Decision that Allowed America’s First Gay Marriages*, WASH. POST (June 7, 2014), <https://www.washingtonpost.com/news/post-politics/wp/2014/06/07/a-conversation-with-the-judge-who-wrote-the-decision-that-allowed-americas-first-gay-marriages/> [https://perma.cc/3RYT-ZSTY].

153. See Burnette II, *supra* note 7.

154. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

155. See *id.* at 493 (“[E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society.”).

156. Judge John Wisdom advanced the view of a “right to treatment” in exchange for civil commitment of nondangerous individuals, but the Supreme Court instead concluded that the states cannot constitutionally deprive liberty for someone who is not dangerous. *O’Connor v. Donaldson*, 442 U.S. 563, 573, 576 (1975). Similarly, the Court rejected a “quid pro quo” theory that would call for treatment of juveniles facing deprivations of liberty through the juvenile courts. See *In re Gault*, 387 U.S. 1, 22 n.30 (1967).

supply support. Congress has overcome claims of exclusive state control over schooling through more than sixty years of statutory programs providing funding and standards for education.¹⁵⁷ Professor Kimberly Robinson advocates for Congressional action to work with interested states to experiment, then implement new strategies.¹⁵⁸ She argues that this incremental approach would allow the federal government to fix legislative shortcomings before expanding the efforts; she also suggests that this cooperative approach joining federal, state, and local governments could reduce fears of federal intrusion on state autonomy.¹⁵⁹ The Southern Education Foundation urges the introduction and pursuit of an amendment to the United States Constitution to ensure equitable education for all Americans.¹⁶⁰

Social and political movements have played critical roles in building educational institutions and related resources and government involvement over the course of the nation's history.¹⁶¹ Even as colonies, Massachusetts and Connecticut mandated public education as an essential preparation for self-government.¹⁶² Local efforts rather than national ones emerged, despite schemes for national systems of education proposed by statesmen involved in the American Revolution.¹⁶³ Political efforts to ensure "common schools" for all proceeded, especially in New England, during the early republic and expanded across the nation with the leadership of Horace Mann in the 1830s

157. See Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (reauthorized by the Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015)) and the No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425); Stewart B. McKinney Homeless Assistance Act, Pub. L. No. 100-77, §§ 721-25, 101 Stat. 482, 525-28 (1987) (codified as amended at 42 U.S.C. §§ 11431-11435) (providing education and youth programs for homeless children); Individuals with Disabilities Education Act, Pub. L. No. 101-476, 104 Stat. 1103 (1990) (codified as amended at 20 U.S.C. §§ 1400-1471).

158. Kimberly J. Robinson, *A Congressional Right to Education: Promises, Pitfalls, and Politics*, in FUNDAMENTAL QUESTIONS, *supra* note 95, at 186, 186-88.

159. *Id.* at 188-96.

160. S. Educ. Found., *No Time to Lose: Why the United States Needs an Education Amendment to the US Constitution*, in FUNDAMENTAL QUESTIONS, *supra* note 95, at 208, 208-10. The Foundation argues that process for securing such an amendment would strengthen national commitment and investments in education. *Cf.* Siegel, *supra* note 88, at 1367-68 (discussing effects of advocacy for the Equal Rights Amendment).

161. See Mark Warren, *The Power of Educational Justice Movements*, LEARNING POL'Y INST. (Nov. 1, 2018), <https://learningpolicyinstitute.org/blog/power-educational-justice-movements> [<https://perma.cc/4UGZ-CJ7T>] ("The civil rights movement of the 1950s and '60s spawned a war on poverty and a broad set of social reforms that led to significant progress in educational attainment and well-being of African Americans and Latinos through the 1970s and '80s.").

162. Marcus W. Jernegan, *Compulsory Education in the American Colonies: I. New England*, 26 SCH. REV. 731, 733, 744 (1918).

163. BERNARD BAILYN, *EDUCATION IN THE FORMING OF AMERICAN SOCIETY: NEEDS AND OPPORTUNITIES FOR STUDY* 45-46 (1960).

and 1840s.¹⁶⁴ Leaders in American education proposed and implemented common schools; they emphasized commitment to public schooling to support “the level of education that made democracy effective” and schooling helped to forge the nation’s character.¹⁶⁵

Many African-Americans pushed for educational opportunities to support their emancipation from slavery and full citizenship and self-government, even when that meant fighting against the educational plans or denials of education by the established authorities and other Whites.¹⁶⁶ The creation of a federal department of education after the Civil War and the devotion of the federal Freedman’s Bureau, collaborating with private groups, reflect the work of advocates, politicians, and philanthropists to pursue education for formerly enslaved individuals and indeed for all Americans.¹⁶⁷

Presidents of both the Republican and Democratic parties—notably Dwight D. Eisenhower, Lyndon B. Johnson, George W. Bush, and Barack Obama—have made education a federal priority.¹⁶⁸ So have philanthropic initiatives, including national commissions exposing shortfalls in American schools and urging reforms.¹⁶⁹ Whether focusing on narrowing the racial gap in achievement on standardized tests, the needs of special populations, such as immigrants, students with disabilities, and English-language learners, civic organizations and political movements that have built American educational

164. See generally CARL KAESTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780-1860* (1983); JONATHAN MESSERLI, *HORACE MANN: A BIOGRAPHY* (1972). For a critique of schools developed on the Horace Mann model, see generally BOB PEPPERMAN TAYLOR, *HORACE MANN’S TROUBLING LEGACY: THE EDUCATION OF DEMOCRATIC CITIZENS* (2010) (arguing that the focus on civics detracted from intellectual pursuits). For a detailed history of efforts to build schools and other educational opportunities in America, see generally WAYNE J. URBAN, JENNINGS L. WAGONER, JR. & MILTON GAITHER, *AMERICAN EDUCATION: A HISTORY* (6th ed. 2019).

165. Bailyn, *supra* note 163, at 10–11. These public schools overtook the seeds of education planted during the colonial period when the Puritans and others transferred family-based instruction to formal instructional institutions having cultural as well as vocational goals. *Id.* at 27. Reflecting religious missions and dependent more on private donations than public taxation, colonial education did not have the same elements of public commitment as what emerged in the nineteenth century. *Id.* at 43–46.

166. See generally JAMES D. ANDERSON, *EDUCATION OF BLACKS IN THE SOUTH, 1860-1935* (1988); HEATHER ANDREA WILLIAMS, *SELF-TAUGHT: AFRICAN AMERICAN EDUCATION IN SLAVERY AND FREEDOM* (2007).

167. S. Educ. Found., *supra* note 160, at 212–16.

168. Valerie Strauss, *Who Was the ‘Best’ Education President?*, WASH. POST (Nov. 21, 2011), https://www.washingtonpost.com/blogs/answer-sheet/post/who-was-the-best-education-president/2011/11/20/gIQA3kkgN_blog.html [<https://perma.cc/SVF8-MBK2>].

169. NAT’L COMM’N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* 18–34 (1983); RICHARD D. KAHLBERG & CLIFFORD JANEY, *THE CENTURY FOUND., PUTTING DEMOCRACY BACK INTO PUBLIC EDUCATION* (2016), <https://production-tcf.imgix.net/app/uploads/2016/11/10195924/Putting-Democracy-Back-into-Public-Education1.pdf> [<https://perma.cc/V9VM-NUTK>].

systems could be galvanized to contribute even more through debates over a federal right to education.¹⁷⁰

Hence, sustained historical practices, emphatic support from political leaders across time and political parties, and the advocacy of parents, teachers, and others both underscore the deep significance of education as a universal opportunity for American children and youth and produce federal initiatives that are inflected by constitutional considerations.¹⁷¹ Thus, the development and enactment of policies and legislation can articulate commitments of American constitutional democracy.¹⁷² Pursuing such civic work outside the courts with the language of constitutional rights imbues the efforts with empowerment for individuals and communities. The symbolic dimensions of the Constitution emerged after its enactment and reach into the consciousness of communities well beyond its instrumental uses.¹⁷³ Indeed, beliefs held by individuals and groups and struggles over fundamental rights, power, and policies are what make constitutional rights endure and remain relevant as successive generations seek to make their own the visions of “we the people.”¹⁷⁴

V. PRIORITIES FOR THE CONTENT AND SHAPE OF FEDERALLY GUARANTEED EDUCATION

Whether part of advocacy before courts, legislatures, school boards, or communities, advocates need to sharpen the priorities for education while articulating the meaning of a right to education. Guided by education's relationship to constitutional democracy, advocates should stress cultivating

170. See KAHLENBERG & JANEY, *supra* note 169.

171. On the idea of “constitutionally inflected” action outside of the courts, see generally MARTHA MINOW, *SAVING THE NEWS: WHY THE CONSTITUTION CALLS FOR GOVERNMENT ACTION TO PRESERVE FREEDOM OF SPEECH* 101–44 (2021); see Tushnet Testimony, *supra* note 87, at 11.

172. This understanding of value tinged with constitutional concerns, imbuing statutes in turn, can guide judicial interpretation of statutes. See William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1018 (1989) (“Many rules and presumptions of statutory interpretation find their policy origin (at least partially) in our society's commitment to particular public values, and public values are often equally important as background context for statutory.”).

173. See generally MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* 68–94 (1986) (discussing the Constitution as an influential national symbol).

174. Vincent Gordon Harding, *Wrestling Toward the Dawn: The Afro-American Freedom Movement and the Changing Constitution*, 74 J. AM. HIST. 718, 719 (1987); Hendrick Hartog, *The Constitution of Aspiration and ‘The Rights That Belong to Us All,’* in *THE CONSTITUTION AND AMERICAN LIFE* 353 (David Thelen ed., 1987); Judge Learned Hand, *The Spirit of Liberty Speech during I AM an American Day* (1944), in *OUR NATION'S ARCHIVES: THE HISTORY OF THE UNITED STATES IN DOCUMENTS* (Erik Bruun & Jay Crosby eds., 1999).

understandings of facts, reasoned arguments, tolerance for social differences amid membership in communities, and the avenues for political participation and guards against tyranny. Legal commitments should ensure schools are places of safety from violence and from bullying or abuse; schools should also be equipped with the resources needed for quality and for redressing existing inequities. Education should support not only cognitive capacities but also students' social and emotional growth.

The vulnerability of democratic governance and civility across America underscores the need to cultivate students' abilities to detect and understand facts, to make and respond to reasoned arguments, to tolerate social differences while valuing membership in communities, and to comprehend and engage with the avenues for political participation and protections against tyranny. During this time of national and global crisis around health, practices around remote-learning, home schooling, and learning outside of school hours are mutable and deserve serious attention. That means a rigorous focus on the promises and dangers to equity and to democracy from expanding home schooling, remote-access digital learning, and learning beyond formal schooling.

A. Quality and Equity in Instruction and Learning Conditions

Children, born with capacities and eagerness to explore and learn, thrive when given challenging and supportive learning environments, with teachers who are also learning and who collaborate and communicate, and with involvement of parents and other caring adults.¹⁷⁵ Leaders who are innovative, engaging, and collaborative matter; so do both continual assessment and efforts to improve. Many high-quality schools across the country, including many with predominantly low-income students, are effective.¹⁷⁶ Building systems to create and sustain high-quality schools is much more difficult than establishing one very good school, and it can be exceptionally challenging to create and maintain effective schools where families and communities are strained by poverty, crime, or drugs.¹⁷⁷ The sheer physical condition of many

175. See G. SUE SHANNON & PETE BYLSMA, OFF. OF SUPERINTENDENT OF PUB. INSTRUCTION, NINE CHARACTERISTICS OF HIGH-PERFORMING SCHOOLS: A RESEARCH-BASED RESOURCE FOR SCHOOLS AND DISTRICTS TO ASSIST WITH IMPROVING STUDENT LEARNING 24 (2d ed. 2007) (discussing conditions under which schoolchildren thrive).

176. See generally KARIN CHENOWETH, SCHOOLS THAT SUCCEED: HOW EDUCATORS MARSHAL THE POWER OF SYSTEMS FOR IMPROVEMENT (2017) (profiling the difficulties schools with low-income students face and highlighting what those schools do to help students succeed).

177. Abel McDaniels, *Building Community Schools Systems: Removing Barriers to Success in U.S. Public Schools*, CTR. AM. PROGRESS (Aug. 22, 2018), <https://www.americanprogress.org/article/building-community-schools-systems/> [<https://perma.cc/SVB8-MRWU>].

schools across the nation can be so poor as to jeopardize not only learning but also the health of students and staff.¹⁷⁸

Quality education inevitably requires good teachers and adequate resources.¹⁷⁹ Fine leadership and resources to plan and to be nimble in cases of crises are critical as the COVID-19 period has underscored.¹⁸⁰ Those schools that already had digital learning plans could pivot when remote learning became essential.¹⁸¹ Yet many schools and school districts lack such elements—and lacking access to reliable internet services, computers, and quiet places to learn—exacerbates educational disparities in the United States.¹⁸² For those learning English, for those who have disabilities, and for those with other distinct challenges, the issues are even more pronounced.¹⁸³

178. See Claudia Persico, *Now is the Time to Invest in School Infrastructure*, BROOKINGS (May 19, 2021), <https://www.brookings.edu/blog/brown-center-chalkboard/2021/05/19/now-is-the-time-to-invest-in-school-infrastructure/> [<https://perma.cc/94DL-Q2G4>] (explaining that some schools present unhealthy physical conditions). Schools operated by the Federal Bureau of Indian Education show “major facility deficiencies and health and safety concerns,” which shows that federal involvement alone, absent something like a constitutional mandate, is insufficient. OFF. OF INSPECTOR GEN., U.S. DEP’T OF INTERIOR, REP. NO. C-EV-BIE-0023-2014, CONDITIONS OF INDIAN SCHOOL FACILITIES 1 (2016), <https://www.doioig.gov/reports/evaluation/condition-indian-school-facilities> [<https://perma.cc/A6YH-FJTC>]. The 2021 federal infrastructure law has funding for broadband, water decontamination, and energy efficiency but does not provide resources to remedy pest-infested, decrepit school buildings. *Compare* Press Release, White House, Fact Sheet: The Bipartisan Infrastructure Deal (Nov. 6, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/06/fact-sheet-the-bipartisan-infrastructure-deal/> [<https://perma.cc/5GF3-Q6F4>], with Gary B. v. Whitmer, 957 F.3d 616, 660–62 (6th Cir.), *reh’g en banc granted, opinion vacated*, 958 F.3d 1216 (6th Cir. 2020).

179. *Defining Quality in Education* 3 (UNICEF Working Paper, Paper No. PD/ED/00/02, 2000), https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/UNICEF_Defining_Quality_Education_2000.PDF [<https://perma.cc/24GJ-U6YH>].

180. See *id.*; Persico, *supra* note 178.

181. See Renee Morad, *States with the Best Public Schools*, FORBES (Aug. 4, 2020, 3:30 PM), <https://www.forbes.com/sites/reneemorad/2020/08/04/states-with-the-best-public-schools/?sh=1968b96d1f4c> [<https://perma.cc/YK5A-43QL>] (“The coronavirus pandemic has drastically changed the educational experience for children, putting a bigger than ever emphasis on schools’ virtual teaching capabilities and e-learning resources. Many believe the impacts will be long-lasting, prompting families to move to certain towns based on how an area’s public schools handled the pandemic, rolled out a digital platform and communicated its plans and strategies to students and parents.”).

182. Annie Kapnick, *The Education Divide Caused by COVID-19*, HARV. L. SCH.: COVID-19 AND THE LAW BLOG (Dec. 26, 2020), <https://covidseries.law.harvard.edu/the-education-divide-caused-by-covid-19/> [<https://perma.cc/G5Z5-HGC2>].

183. See Tom Ridge, *Bridging the Digital Divide for Students with Disabilities*, HILL (Nov. 10, 2020, 11:30 AM), <https://thehill.com/opinion/education/525251-bridging-the-digital-divide-for-students-with-disabilities> [<https://perma.cc/XLG3-L2US>] (discussing increased challenges that the “digital divide” caused to students with disabilities).

Spending money matters in schooling, because it is correlated with student achievement records and with teachers with more training.¹⁸⁴ Despite stark inequalities of educational opportunity, nearly half the states did not restore budget cuts made during the Great Recession and federal dollars (providing about 8% of public school revenues) have not kept pace with inflation.¹⁸⁵ Funding affects the availability of smaller class sizes and support staff, including mental health professionals.¹⁸⁶ And reducing inequities in funding demonstrably reduces gaps in student test performance that previously existed between low-income and higher-income districts.¹⁸⁷ Funding can support higher quality public schools, charter schools, and vouchers for use in private schools; a mix of providers can offer valuable choice and competition, but inequities only increase without provision of resources to children whose families cannot move to suburban districts, pay private tuition, or navigate complex school choice regimes.¹⁸⁸ Ensuring a minimum quality of education means attending to the very different experiences with the effects of crime, the prevalence of family fragility, and the ability of parents or other caring adults to be engaged and supportive in the child's learning. Guaranteeing that the schools are themselves free of violence—including exposure to weapons and exposure to bullying—is a predicate for effective learning as well as for the physical safety of students and staff.¹⁸⁹

B. Skills Needed for Future Employment and for Self-governance Converge

Education should prepare children to earn a living and to become engaged and effective participants in constitutional democracy—and it turns out that both increasingly need explicit attention to social and emotional development and the “soft” skills of communicating effectively, getting along with diverse others, and collaborating to solve problems and adapt to changing circumstances.¹⁹⁰ Education for children and youth should support not only

184. Bruce D. Baker, *How Money Matters for Schools*, LEARNING POL'Y INST. (July 17, 2018), <https://learningpolicyinstitute.org/product/how-money-matters-brief> [https://perma.cc/6VEF-EXNK].

185. SARGRAD ET AL., *supra* note 11.

186. *See id.*

187. *See id.*

188. *Id.*

189. Stephen Sawchuk, *Violence in Schools Seems to Be Increasing. Why?*, EDUCATIONWEEK (Nov. 1, 2021), <https://www.edweek.org/leadership/violence-seems-to-be-increasing-in-schools-why/2021/11> [https://perma.cc/76TM-G6GN].

190. Bill Honig, *The Big Picture: The Three Goals of Public Education*, BLDG. BETTER SCHS., <http://www.buildingbetterschools.com/the-three-goals-of-public-education/> [https://

their developing cognitive capacities but also their social and emotional growth. Sometimes described as twenty-first century schools, teaching to collaborate, to communicate effectively with a variety of people, to create and solve unanticipated problems, to think critically, to be flexible, to navigate both in-person and virtual worlds, technologies, and media are increasingly vital to success in the work world and to participation in voting and other civic engagement.¹⁹¹

Developing self-awareness, self-management, and control of one's emotions even in the face of disagreements—what are increasingly called “social and emotional learning”—have become similarly vital tasks for education.¹⁹² Whether these are needs highlighted by changing environments or whether children need help from schools developing these capacities due to parents distracted by other duties, too much time spent in digital activities, or too many traumatic incidents, these are educational needs identified by employers and by experts in civic participation.¹⁹³ Experiences learning and working alongside students with different racial, ethnic, and socioeconomic backgrounds can be important elements of both cognitive and social learning.¹⁹⁴ Thurgood Marshall noted in one case: “[U]nless our children begin to learn together, then there is little hope that our people will ever learn to live together.”¹⁹⁵

The vulnerability of democratic governance and civility across America underscores the need for particular faculties in children and youth. These include: students' abilities to detect and understand facts, to make and respond to reasoned arguments, to tolerate social differences while valuing

perma.cc/HH2P-PTXG]; CAMPAIGN FOR THE CIVIC MISSION OF SCHS., *supra* note 30, at 20–22.

191. Bri Stauffer, *What are 21st Century Skills?*, APPLIED EDUC. SYS. (Jan. 13, 2021), <https://www.aeseducation.com/blog/what-are-21st-century-skills> [https://perma.cc/N7F7-JX45]; WINTHROP, *supra* note 29, at 3–4.

192. David Ross, *Mapping 21st-Century Skills to SEL Competencies*, GETTING SMART (Feb. 15, 2019), <https://www.gettingsmart.com/2019/02/15/mapping-21st-century-skills-to-sel-competencies/> [https://perma.cc/NH4Y-HS75]; ORANGE CNTY. DEP'T OF EDUC. & BUTTE CNTY. OFF. OF EDUC., SOCIAL AND EMOTIONAL LEARNING EMBEDDED IN CORE EDUCATION DOCUMENTS 3 (2018), https://www.csuchico.edu/norcalelc/_assets/documents/sel-embedded-core-docs.pdf [https://perma.cc/B97B-PDZ3]. For history on social-and-emotional learning, see Maureen Downey, Opinion, *Are Parents Missing Lesson in Social and Emotional Learning?*, ATLANTA J.-CONST. GET SCHOOLED BLOG (May 27, 2021), <https://www.ajc.com/education/get-schooled-blog/opinion-are-parents-missing-lesson-in-social-and-emotional-learning/GV6NUUM7Z5GJTJFXZSRKIYLP7E/> [https://perma.cc/R5B3-PQRP].

193. See WINTHROP, *supra* note 29, at 3.

194. AMY STUART WELLS, LAUREN FOX & DIANA CORDOVA-COBO, THE CENTURY FOUND., HOW RACIALLY DIVERSE SCHOOLS AND CLASSROOMS CAN BENEFIT ALL STUDENTS (2016), https://production-tcf.imgix.net/app/uploads/2016/02/09142501/HowRaciallyDiverse_AmyStuartWells-11.pdf [https://perma.cc/LW68-3B5N].

195. *Milliken v. Bradley*, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting).

membership in communities, and to comprehend and engage with the avenues for political participation and protections against tyranny.¹⁹⁶ The bet made by constitutional democracies is that self-government is possible and is indeed the best guard against demagoguery, but self-government is hard and the gullibility of humans is a persistent trait.¹⁹⁷

Education experts Richard Kahlenberg and Clifford Janney explain how the constitution's framers understood that more would be required to guard against tyranny and concentrated power than the checks and balances of separation of powers, federalism, and a free press.¹⁹⁸ They note how the founders understood that "a demagogue, appealing to passions rather than reason, can use democratic means to win office, and, once in power, chip away at rival sources of authority—such as an independent press, and an independent judiciary—that stand in his way."¹⁹⁹ Hence, beyond structures of government as a bulwark against demagogues, the nation needs "an educated populace. Thomas Jefferson argued that general education was necessary to 'enable every man to judge for himself what will secure or endanger his freedom.'"²⁰⁰ Education should equip voters with the analytical and perceptive abilities to discern which leaders have the nation's interests at heart; schools should also

instill a love of liberal democracy: a respect for the separation of powers, for a free press and free religious exercise, and for the rights of political minorities. In this way, demagogues who sought to undermine those institutions would themselves be suspect among voters. Educating common people was the answer to the oligarchs who said the average citizen could not be trusted to choose leaders wisely. The founder of American public schooling, nineteenth century Massachusetts educator Horace Mann, saw public education as fundamental to democracy[:] "A republican form of government, without intelligence in the people, must be, on a vast scale, what a

196. See WINTHROP, *supra* note 29, at 3; Edward L. Glaeser, Giacomo Ponzetto & Andrei Shleifer, *Why Does Democracy Need Education?*, 12 J. ECON. GROWTH 77, 77 (2007) ("As education raises the benefits of civic engagement, it raises participation in support of a broad-based regime (democracy) relative to that in support of a narrow-based regime (dictatorship).").

197. Adam Przeworski, *Self-Government in Our Times*, 12 ANN. REV. POL. SCI. 71, 73 (2009); see Rebecca Solnit, Opinion, *Why Republicans Keep Falling for Trump's Lies*, N.Y. TIMES (Jan. 5, 2022), <https://www.nytimes.com/2022/01/05/opinion/republicans-trump-lies.html> [<https://perma.cc/WBW4-P2CS>] ("That is, among those gulling the public, cynicism is a stronger force; among those being gulled, gullibility is, but the two are not so separate as they might seem."); White, *supra* note 37.

198. KAHLENBERG & JANNEY, *supra* note 169.

199. *Id.*

200. *Id.*

mad-house, without superintendent or keepers, would be on a small one.”²⁰¹

School-based education, grounded in history of the movements to abolish slavery and gain women's suffrage, about civics can enhance not only knowledge but also political participation and, perhaps, the nation's capacity to hold officials accountable and to self-correct.²⁰² Actual experiences engaging in civic processes such as engaging in debates, student governments, school newspapers, community volunteer work, and lobbying local elected officials are especially proved to be effective.²⁰³ A national study by the American Academy of Arts and Sciences found that despite contemporary political polarization, Americans across the country agree that the United States needs to invest in its civic education for young people; a new report from Educating for American Democracy “brought together leaders from around the country and across the political spectrum to develop a roadmap toward a new, national commitment to civic education.”²⁰⁴

C. Education Outside of Schools? Home Schooling, Remote Learning, and Other Challenges and Opportunities in Serving Constitutional Democracy

Education, of course, need not take place in schools. For much of human history, educating children and youth occupied adult family and community members and religious institutions.²⁰⁵ Even amid state compulsory schooling

201. *Id.* See generally JENNIFER L. HOCHSCHILD & NATHAN SCOVRONICK, THE AMERICAN DREAM AND THE PUBLIC SCHOOLS 12–21 (2004) (arguing that the American dream depends on teaching students how to be good citizens).

202. See generally HOCHSCHILD & SCOVRONICK, *supra* note 201, at 168–90 (discussing progressive social movements in America over time and their effect on schooling in the modern classroom).

203. LISA GUILFOILE, BRADY DELANDER & CAROL KRECK, EDUC. COMM'N OF THE STATES, GUIDEBOOK: SIX PROVEN PRACTICES FOR EFFECTIVE CIVIC LEARNING (Updated 2016), https://www.ecs.org/wp-content/uploads/Six-proven-practices-update_r2.pdf [<https://perma.cc/UVM2-RGJ7>].

204. *Investing in Civic Education and Our Democracy*, AM. ACAD. ARTS & SCIS. (Apr. 21, 2021), <https://www.amacad.org/events/civic-education-ead> [<https://perma.cc/FH7K-LBLD>]; see ICIVICS, EDUCATING FOR AMERICAN DEMOCRACY: EXCELLENCE IN HISTORY AND CIVICS FOR ALL LEARNERS 8 (2021), <https://www.educatingforamericandemocracy.org/wp-content/uploads/2021/02/Educating-for-American-Democracy-Report-Excellence-in-History-and-Civics-for-All-Learners.pdf> [<https://perma.cc/NP3X-4GV6>] (“[N]eglecting civics means that new generations of Americans are not learning how to adequately address contentious and challenging issues . . .”).

205. See LAWRENCE ARTHUR CREMIN, AMERICAN EDUCATION: THE COLONIAL EXPERIENCE, 1607–1783 (1970); see also JAMES MULHERN, A HISTORY OF EDUCATION: A SOCIAL INTERPRETATION (2d ed. 1959).

laws, the Supreme Court spurred growth of home schooling in the name of parental rights and religious freedom.²⁰⁶ During the pandemic, fledgling practices of remote-learning and on-line instruction proliferated as many schools had to shut down in-person learning for extended periods.²⁰⁷ The national and global crisis around health makes salient the significance of remote learning, home schooling, and learning outside of school hours to any serious consideration of educational rights and practices. This should include a rigorous focus on the promises and dangers to equity and to democracy from expanding home schooling, digital learning, and learning beyond formal schooling.

1. *Home Schooling*

Before the pandemic, 3%-4% of American school-age children were schooled at home by their parents and represented two distinct groups: a small group of left-leaning progressives who viewed traditional schooling as too constraining of children's creativity and eagerness to learn, and many more conservative Christians who treated public schools' messages as inconsistent with their religious beliefs.²⁰⁸ Over time, though, some highly educated, young urban professional parents have turned to home schooling for some portion of their children's education because of disappointment with the rates of progress in schools or desires to spend more time with their children.²⁰⁹ As many as 10% of all students spend some time being homeschooled.²¹⁰ With a range of state regulations governing the practice, and many states providing very little by way of requirements or oversight, four serious risks arise from home schooling: 1) risks of physical or emotional abuse occurring and going undetected; 2) lack of preparation for participation in a diverse society; 3) inadequate preparation for and constrained choice-making about adult work and roles; and 4) failure to learn the knowledge and values related to history, science, rational argument, and civic participation.²¹¹

206. *Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972).

207. Cathy Li & Farah Lalani, *The COVID-19 Pandemic Has Changed Education Forever: This Is How*, WORLD ECON. F. (Apr. 29, 2020), <https://www.weforum.org/agenda/2020/04/coronavirus-education-global-covid19-online-digital-learning/> [<https://perma.cc/KZW5-ZL7Y>].

208. Elizabeth Bartholet, *Homeschooling: Parent Rights Absolutism vs. Child Rights to Education & Protection*, 62 ARIZ. L. REV. 1, 9 (2020).

209. *Homework in a Literal Sense*, TAMPA BAY TIMES (Nov. 23, 1990), <https://www.tampabay.com/archive/1990/11/23/homework-in-a-literal-sense/> [<https://perma.cc/6QJH-SCNS>].

210. Bartholet, *supra* note 208, at 9.

211. *Id.* at 15.

The numbers of families turning to full-time homeschooling doubled during the pandemic.²¹² And the increase grew five-fold among respondents identifying as African American or Black.²¹³ Here, school closures and parents working from home coincided with racially related violence and low expectations or other racially linked failures by teachers—before and after the killing of George Floyd.²¹⁴ In addition, support from ideologically conservative investors in home schooling programs and advocacy may have contributed.²¹⁵ And even for students who remain enrolled in public or private schools, increasing use of remote instruction turned many of them into at least part-time home-school students.²¹⁶

If the increases in home schooling persist, the shortcomings and risks to children and to society will also grow—and call for concerted attention in the articulation and enforcement of a right to education. Particular concerns arise if a larger proportion of the population fails as children and youth to develop experiences with a diversity of others or to grow capacities to collaborate with and conceive of people unlike their own families as part of their community.

2. Digital Schooling

The pandemic also accelerated uses of digital learning in conjunction either with schools or with privately provided programs of study.²¹⁷ The gaps in access to the internet and to computers became obvious as more schools turned to on-line learning during the pandemic.²¹⁸ Access to the right technology is only part of the story. Learning online can be even more effective to learning in person for some students if there is appropriate

212. Casey Eggleston & Jason Fields, *Census Bureau's Household Pulse Survey Shows Significant Increase in Homeschooling Rates in Fall 2020*, U.S. CENSUS BUREAU (Mar. 22, 2021), <https://www.census.gov/library/stories/2021/03/homeschooling-on-the-rise-during-covid-19-pandemic.html> [<https://perma.cc/NG52-NSCR>].

213. *Id.*

214. Casey Parks, *The Rise of Black Homeschooling*, NEW YORKER (June 14, 2021), <https://www.newyorker.com/magazine/2021/06/21/the-rise-of-black-homeschooling> [<https://perma.cc/GU5L-LZD6>].

215. *Id.*

216. *The Stress of Homeschooling in a Pandemic*, WM. & MARY ARTS & SCIS.: PUB. POL'Y (July 23, 2020), https://www.wm.edu/as/publicpolicy/schroedercenter/_widgets/covid_qa/homeschool.php [<https://perma.cc/9K8M-7MLP>].

217. Dana Goldstein, *The Class Divide: Remote Learning at 2 Schools, Private and Public*, N.Y. TIMES (June 5, 2020), <https://www.nytimes.com/2020/05/09/us/coronavirus-public-private-school.html> [<https://perma.cc/5QFS-EZRV>].

218. Li & Lalani, *supra* note 207 (noting 95% of students in Switzerland, Norway, and Austria have a computer to use for their schoolwork, but only 34% in Indonesia do; 25% of students in the United States from disadvantaged backgrounds lack access to computers).

structure, personalization, and interaction.²¹⁹ Digital learning can incorporate engaging and fun activities and platforms that permit connections with students from other communities and countries.²²⁰ Digital capacities can also connect students with personal mentors, animated avatars, and adjustments to address personal learning styles, abilities, and disabilities.²²¹

But research shows that teacher involvement and ongoing learning and support for teachers remain crucial to student learning.²²² Education for most people requires human interactions with feedback, encouragement, and engagement with peers.²²³ At least in the near term, effective digital education may not produce cost savings although the subject is prompting research and debate.²²⁴ Digital instruction in public school settings also introduces new issues about privacy and security.²²⁵

With imagination and investment, on-line learning could bring within the reach of any student world-class instruction, dynamic interactive materials, personalized support and feedback, and opportunities for engagement with peers. Done poorly, however, on-line learning will magnify the disparities between households based on resources, including parents with varying degrees of educational background and time to oversee on-line activities. Greater use of on-line learning could also impair the development of social and emotional learning, including dealing with differences among people and developing patience and emotional management. Devising educational programs—and attendant rights—in the future will involve both the promise and challenges of digital resources.

219. *Id.* Digital Promise, a nonpartisan, nonprofit organization intended to accelerate educational innovation and opportunities, has received a transformation \$20 million gift from MacKenzie Scott that will specifically address work to reach those who have been excluded historically and systematically from quality education. Erica Lawton Weinschenk, *MacKenzie Scott Makes Transformational \$20 Million Gift to Digital Promise*, DIGIT. PROMISE (Mar. 7, 2022), <https://digitalpromise.org/2022/03/07/mackenzie-scott-makes-transformational-20-million-gift-to-digital-promise/> [https://perma.cc/9XLV-G6NU].

220. Li & Lalani, *supra* note 207.

221. *About Universal Design for Learning*, CTR. APPLIED SPECIAL TECH., <https://www.cast.org/impact/universal-design-for-learning-udl> [https://perma.cc/N762-5U8M]; see Ben Rearick et al., *Implementing Universal Design for Learning Elements in the Online Learning Materials of a First-Year Required Course*, 4 J. LIBR. USER EXPERIENCE (2021).

222. ALBERTO MUÑOZ-NAJAR ET AL., WORLD BANK GRP., REMOTE LEARNING DURING COVID-19: LESSONS FROM TODAY, PRINCIPLES FOR TOMORROW 4 (2021), <https://documents1.worldbank.org/curated/en/160271637074230077/pdf/Remote-Learning-During-COVID-19-Lessons-from-Today-Principles-for-Tomorrow.pdf> [https://perma.cc/P4KA-B3RH].

223. *Id.* at 16.

224. *Id.*

225. Mark Lieberman, *Massive Shift to Remote Learning Prompts Big Data Privacy Concerns*, EDUCATIONWEEK (Mar. 26, 2020), <https://www.edweek.org/technology/massive-shift-to-remote-learning-prompts-big-data-privacy-concerns/2020/03> [https://perma.cc/9S6H-3PZP].

3. *Learning Outside of Schools*

Families with resources can and do choose not only private schools but also an array of out-of-school learning opportunities to cultivate knowledge and talents.²²⁶ Learning outside of schools can also rely on libraries, community apprenticeship programs, and direct access to digital resources.²²⁷ What role do and should any of these opportunities play in constructing a federal right to education—this will remain a question for another day. But if the lens of constitutional democracy should inform a rights-based treatment of education, inequities in access and the effects of such experiences on the polity deserve attention. Whether enacted through judicial orders or political processes, legal commitments should address the promise and dangers from expanding home schooling and remote-access digital learning while deepening education critical to democracy.

VI. CONCLUDING REFLECTIONS

John Dewey, the theorist and practitioner of democratic educational reforms, once wrote: “The struggle for democracy has to be maintained on as many fronts as culture has aspects: political, economic, international, educational, scientific and artistic.”²²⁸ In the wake of a global pandemic, challenges to democracies around the world, and renewed attention to structures of racial and economic disadvantage in the United States, development of a federal right to education gains urgency and force. Digital learning and home schooling are changing the landscape of possibilities. Digital instruction accentuates need to devise experiences connecting individuals from different backgrounds, developing social and emotional skills, and literacies in digital materials as well as in math and reading. Whether achievable through judicial action or through legislative and policy work propelled by rights-conscious advocacy, a federal right to education should provide quality and equitable opportunities for all children and youth.

The United States Constitution established a governmental structure that calls for educating each generation in the knowledge and dispositions to enable self-governance in theory as well as equipping successive generations to take on adult employment and family roles. Marion Wright Edelman, founder of the Children’s Defense Fund and constant advocate for children, once said, “You need to be a flea against injustice. Enough committed fleas biting strategically can make even the biggest dog uncomfortable and

226. MUÑOZ-NAJAR ET AL., *supra* note 222, at 5.

227. Lieberman, *supra* note 225.

228. John Dewey, *Freedom and Culture*, in 13 THE LATER WORKS 1925–1953, at 187 (Jo Ann Boydston ed., 1988).

transform the biggest nation.”²²⁹ Let us be fleas for justice; let us make the predicates and the outcomes of our constitutional democracy a truly virtuous circle.

229. Oberlin College & Conservatory, *Marian Wright Edelman Commencement Speech*, YOUTUBE, at 27:54 (May 27, 2015), <https://www.youtube.com/watch?v=B2TJoaCM-HM> [<https://perma.cc/M3Q3-C74E>]; see also *Marion Wright Edelman Addresses Class of 2015*, OBERLIN COLL. & CONSERVATORY (May 28, 2015), <https://www.oberlin.edu/news/marian-wright-edelman-addresses-class-2015#:~:text=So%20be%20a%20flea%20for,Let's%20move%20forward!> [<https://perma.cc/K9P3-SLYV>].