

The Public Right to Education

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Public education is “the most important function of state and local government” and yet not a “fundamental right or liberty.” This Article engages one of constitutional law’s most intractable problems by introducing “the public right to education” as a doctrinal pathway to a constitutional right to education process in three steps. First, it identifies that the otherwise right-to-education foreclosing case, San Antonio Independent School District v. Rodriguez, only contemplated education as a fundamental right or liberty interest. Second, by identifying public education as a due process–protected property interest, this Article presents a viable pathway for circumventing Rodriguez. Third, mindful of myriad judicial competency concerns and consistent with the Court’s recent call to reimagine a “twenty-first-century” due process, it reintroduces the “public right” to understand how schoolchildren might appeal to substantive due process to protect their rights to state-created interests. This ambitious yet modest approach covers securing schoolchildren’s rights to both discrete education tangibles and the integral educational opportunity that the states have assumed the affirmative duty to provide. This approach also has promise for improving individual rights to quality public schooling.

INTRODUCTION..... 1180

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I. THE STATE OF DUE PROCESS IN EDUCATION	1193
A. The Evasive Fundamental Right to Education.....	1193
B. (De)constructing <i>San Antonio v. Rodriguez</i>	1195
1. Absence of a fundamental rights claim at the district court.	1195
2. Stealth emergence of an antifundamental rights logic by state appellants at the Supreme Court.	1198
3. Justice Powell’s elevation of the proto-fundamental rights argument.....	1200
C. The Never-Applicable “ <i>Rodriguez</i> Formulation”	1201
II. WHAT ABOUT PROPERTY INTERESTS?.....	1206
A. <i>Goss v. Lopez</i> and the Limits of Procedural Due Process..	1207
B. Substantive Due Process for Educational Property?.....	1209
C. Educational Property	1214
1. Public education as “New Property.”	1215
2. <i>Plyler v. Doe</i> : The prototypical case for a public right to education.....	1220
III. PRACTICAL CONSIDERATIONS.....	1226
A. The Public Right to Education, Delimited	1227
B. A More Complete Due Process in Education	1228
C. <i>Rodriguez</i> Revisited.....	1232
D. Notes on Separation of Powers	1236
E. Whither Education Federalism?.....	1239
F. Jurisprudential Concerns Against Normative Ideas of Education Justice	1240
CONCLUSION.....	1243

INTRODUCTION

The decades-long fight to recognize a fundamental right to education within the U.S. Constitution appears lost. In *A.C. v. Raimondo*,¹ a plaintiff class of young students sought only a “meaningful educational opportunity” that would adequately prepare them for civic life in the United States.² Judge William Smith lamented that “[t]his case does not represent a wild-eyed effort to expand the reach of substantive due process, but rather a cry for help from a generation of young people who are destined

¹ 494 F. Supp. 3d. 170 (D.R.I. 2020), *aff’d*, A.C. *ex rel.* Waithe v. McKee, 23 F.4th 37 (1st Cir. 2022).

² *Id.* at 174–75 (quotation marks omitted) (quoting Complaint at 45–46, *id.* (No. 1:18-cv-645)).

to inherit a country which we—the generation currently in charge—are not stewarding well.”³

However, he dismissed the case because “the arc of the law in this area is clear.”⁴ The U.S. Court of Appeals for the First Circuit affirmed, in part because, absent a “radical or absolute denial of *any* educational opportunity,” current interpretations of the Fourteenth Amendment do not support an education right.⁵ As Judge Smith concluded more bluntly, *San Antonio Independent School District v. Rodriguez*⁶ “leaves Plaintiffs here without a viable claim.”⁷ For almost fifty years, *Rodriguez* has been an impregnable firewall against any meaningful federal constitutional intervention in students’ rights to public education. This is because *Rodriguez* appears on its face to settle fully the long-standing question of whether the federal Due Process Clauses guarantee education as a fundamental right. For the five-Justice majority, Justice Lewis Powell wrote that “[e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.”⁸ While dicta later in the opinion suggest that some “identifiable quantum of education” could conceivably be constitutionally protected,⁹ the Supreme Court has yet to identify a single educational benefit that qualifies. The Court has not even considered the question since 1988.¹⁰

Despite having long recognized public education as “perhaps the most important function of state and local governments,”¹¹ as the “very foundation of good citizenship,”¹² and as the most important governmental service for developing individual human

³ *Id.* at 175.

⁴ *Id.*

⁵ *Waithe*, 23 F.4th at 43 (quotation marks omitted) (quoting *Papasan v. Allain*, 478 U.S. 265, 284, 284 n.15 (1986)).

⁶ 411 U.S. 1 (1973).

⁷ *Raimondo*, 494 F. Supp. 3d at 186 (“In any event, *Rodriguez* leaves Plaintiffs here without a viable claim [for civics education], but the call is closer than Defendants suggest, and closer than one might conclude on first pass.”).

⁸ *Rodriguez*, 411 U.S. at 35.

⁹ *See id.* at 35–37 (discussing whether constitutional protections might extend to the “identifiable quantum of education” necessary to enjoy fundamental rights to speech and vote).

¹⁰ *See Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 458 (1988) (finding that education is not a fundamental right to which strict equal protection scrutiny would apply).

¹¹ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

¹² *Id.*

capital and preparing a labor market,¹³ the Supreme Court remains wholly “unpersua[ded]” that “education is a fundamental right or liberty” protected from arbitrary governmental infringement or diminishment by the states.¹⁴ According to the *Rodriguez* Court, so long as a state does not “occasion[] an absolute denial of educational opportunities to any of its children”—in particular, “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”—then substantive due process offers no relief.¹⁵ The lower federal courts have followed suit and almost always have declined to extend meaningful substantive due process protection to any aspect of education.¹⁶ The doctrinal impasse that forces these outcomes is unlikely to change despite the well-known catastrophic consequences¹⁷ of constitutional agnosticism toward a right to education.¹⁸ *Rodriguez* is “settled law”¹⁹ and is unlikely to be overturned in the near future. A robust literature has developed over the past twenty years that debates the best approach to confront the stranglehold that *Rodriguez* has on advancing the right to education. Sara Solow and Professor Barry Friedman have proposed attacking the decision head-on through forensic legal histories that challenge the due process conclusions

¹³ See *id.* (“Today it is a principal instrument . . . in preparing [the child] for later professional training.”).

¹⁴ *Rodriguez*, 411 U.S. at 37.

¹⁵ *Id.*

¹⁶ See *infra* note 149; see, e.g., *Waithe*, 23 F.4th at 42. But see generally Gary B. v. Whitmer, 957 F.3d 616 (6th Cir. 2020), *vacated*, 958 F.3d 1216 (6th Cir. 2020) (en banc).

¹⁷ See Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 551–52 (1992) (describing the crisis as being “of such menacing proportions that not only is the national self-concept of a free and independent people imperiled, but the very economic and political pre-eminence of the nation has been jeopardized.”); Kimberly Jenkins Robinson, *The High Cost of Education Federalism*, 48 WAKE FOREST L. REV. 287, 314–22 (2013) (indicting local control and its reliance on unequal tax bases as a primary driver of educational inequities within and between states); JAMES E. RYAN, *FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA* 271–304 (2010) (localizing the U.S. education crisis to students served by high-poverty schools and districts with limited political agency or influence).

¹⁸ See generally Ian Millhiser, Note, *What Happens to a Dream Deferred?: Cleansing the Taint of San Antonio Independent School District v. Rodriguez*, 55 DUKE L.J. 405 (2005) (arguing against judicial deference to state legislatures when legislatures are indifferent to or incapable of curing continuing constitutional violations).

¹⁹ See generally G. Alexander Nunn & Alan M. Trammell, *Settled Law*, 107 VA. L. REV. 57 (2021) (discussing what it means for a case to constitute settled law).

underpinning Justice Powell’s opinion,²⁰ while Professor Derek Black makes an originalist appeal grounded in the principles evident both at the ratification of the Constitution and at the adoption of the Fourteenth Amendment.²¹ Others have grounded constitutional protections for education in alternative constitutional provisions,²² in a nontextual fundamental right,²³ or even in common law constitutionalism.²⁴ Professor Joshua Weishart has proposed a more integrated approach: a hybrid fundamental due process—meets—equal protection right to education.²⁵ While each of these approaches is promising, none has yet garnered practical traction.

This Article presents, in three steps, a novel pathway that could.²⁶ First, it observes that *Rodriguez* contemplated education as a “fundamental right or *liberty*” interest protected by due process.²⁷ *Rodriguez* did not engage education as a property interest at all. Discursively—and doctrinally—this makes *Rodriguez*’s due process analysis incomplete. As it turns out, states are “constrained to recognize a student’s legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause,”²⁸ a finding on which all nine Justices agreed only two years after *Rodriguez* in *Goss v. Lopez*.²⁹

²⁰ Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 110–45 (2013).

²¹ Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1076–1112 (2019).

²² See generally Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330 (2006) (arguing that the Fourteenth Amendment’s guarantee of national citizenship supports a right to adequate education).

²³ See generally, e.g., Areto A. Imoukhuede, *The Fifth Freedom: The Constitutional Duty to Provide Public Education*, 22 U. FLA. J.L. & PUB. POL’Y 45 (2011) (arguing that education should be viewed as a nontextual fundamental right).

²⁴ See, e.g., Scott R. Bauries, *A Common Law Constitutionalism for the Right to Education*, 48 GA. L. REV. 949, 989–1017 (2014).

²⁵ See generally Joshua E. Weishart, *Equal Liberty in Proportion*, 59 WM. & MARY L. REV. 215 (2017); Joshua E. Weishart, *Reconstituting the Right to Education*, 67 ALA. L. REV. 915 (2016) [hereinafter *Reconstituting the Right*].

²⁶ There are tomes to be written about the plausibility of this or a future Court adopting any of these constitutional right-to-education approaches. Neither is the focus of this Article. My goal here is to advance a *possible* alternate approach: one that complements the work that has preceded it, but one that may appeal differently to current and future jurists because of the uniqueness of its doctrinal approach.

²⁷ *Rodriguez*, 411 U.S. at 37.

²⁸ *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

²⁹ 419 U.S. 565 (1975). See *id.* at 574; *id.* at 586 (Powell, J., dissenting) (“State law [] extends the right of free public school education to Ohio students in accordance with the education laws of that State. The right or entitlement to education so created is protected in a proper case by the Due Process Clause.”).

Second, it recovers substantive due process as a sword and shield for protecting eligible schoolchildren's public education as a due process-protected property interest. *Goss* mistakenly has been interpreted as constraining constitutional due process coverage over educational property to only procedural matters.³⁰ But the substance of educational property was not at issue in *Goss*.³¹ As a result, the Court did not deign to define it or distinguish educational property from aspects of education that plausibly fall outside the due process-protected property interest or other forms of new or regulatory property, nor did the Court need to.

Had the Justices done so, this Article proposes that they would have adhered closely to the instructions of *Board of Regents of State Colleges v. Roth*³² and looked first to the state laws, rules, and understandings that create and define the dimensions of property interests protected by due process.³³ Conditional on identifying the state's proffered educational benefits, the Court would have investigated whether the state could terminate educational benefits "at will" or "for cause" as the later *Roth*-clarifying instructions of *Memphis Light, Gas & Water Division v. Craft*³⁴ suggest.³⁵ If the state could terminate benefits only "for cause," then the beneficiary would have a sufficiently "legitimate claim of entitlement" to a due process-protected educational property interest.³⁶

³⁰ See generally, e.g., Kenneth Culp Davis, *The Goss Principle*, 16 SAN DIEGO L. REV. 289 (1979) (discussing the promise of *Goss* for correcting procedural injustice in informal decisions); Michael A. Ellis, Note, *Procedural Due Process after Goss v. Lopez*, 1976 DUKE L.J. 409 (1976); Lawrence B. Ransom, Comment, *Procedural Due Process in Public Schools: The Thicket of Goss v. Lopez*, 1976 WIS. L. REV. 934 (1976); William R. Fletcher, Comment, *Due Process in School Discipline: The Effect of Goss v. Lopez*, 12 SAN DIEGO L. REV. 912 (1975) (proposing procedural requirements for school discipline in the aftermath of *Goss*).

³¹ The *Goss* Court disagreed on whether the disciplinary procedures at issue fell within the substantive dimensions of the educational property interest and were therefore beyond the Court's competency to adjust, see *Goss*, 419 U.S. at 586-88 (Powell, J., dissenting), or whether they fell outside and were therefore within the Court's competency to evaluate for adequacy, see *id.* at 573-74. See also *infra* Part II.A.

³² 408 U.S. 564 (1972).

³³ See *id.* at 577:

Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

³⁴ 436 U.S. 1 (1978).

³⁵ *Id.* at 11-12.

³⁶ *Id.*

State constitutions, statutes, regulations, and guidance documents define the dimensions of the state-created educational property. Through these documents, the state conveys the expectations that eligible schoolchildren have to a state-provided public education³⁷ and “plainly” confers in them a “legitimate claim[] of entitlement”³⁸ to public education, their reliance on which “must not be arbitrarily undermined.”³⁹ This language—the preclusion of arbitrary deprivation—appropriately invokes substantive due process.⁴⁰ Third, to theorize the appropriate scope of substantive due process over educational property, this Article invokes the Court’s decades-long recognition of education as “perhaps the most important function of state and local governments,”⁴¹ the

³⁷ Whether or not eligible schoolchildren decide to enroll in public schools, they retain a property interest in public education. The Court is currently considering a variant of this take-up problem in *Carson ex rel. O.C. v. Makin*, 979 F.3d 21 (1st Cir. 2020), *cert. granted*, 141 S. Ct. 2883 (2021). In order to meet its obligation to provide all eligible schoolchildren with a free public education opportunity, Maine allows school districts that do not operate secondary schools to arrange for their districted students to attend private schools. Some districts select the private high schools; others allow students to receive direct tuition assistance to enable their enrollment in a private school of their choice. *Id.* at 25. The state’s ability to provide educational opportunity through a public-private partnership and its obligation to provide the same for all eligible students in need is not at issue. The Court granted certiorari to consider students’ rights to use state-funded tuition assistance to enroll in a religious school. See *Petition for Writ of Certiorari at i, Carson ex rel. O.C. v. Makin*, 141 S. Ct. 2883 (2021) (No. 20-1088).

A student who relies on the state’s tuition assistance program to access the educational opportunity the state has guaranteed has the right to choose any school that meets the state’s standards and obligations. The state should be agnostic to the student’s choice whether to attend a religious school. See *generally* *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246 (2020) (holding that Montana’s “no-aid” provision barring religious schools from accessing scholarships funded by tax credits violated the Free Exercise Clause). The state cannot disestablish, diminish, or divest the rights of some students to the state-provided educational opportunity in order to fund others’ educational choices. See *generally* *Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty.*, 377 U.S. 218 (1964) (invalidating a racially segregative voucher program predicated on the dissolution of public schools, the establishment of whites-only segregation academies, and the unavailability of private schools for Black students); see also Blake E. McCartney, Note, *A Case against School Choice: Carson ex rel. O.C. v. Makin and the Future of Maine’s Nonsectarian Requirement*, 73 ME. L. REV. 313, 330–32 (2021) (cautioning about the school-funding and enrollment effects of eliminating Maine’s nonsectarian constraint on tuition assistance for private high schools).

³⁸ *Goss*, 419 U.S. at 573.

³⁹ *Roth*, 408 U.S. at 577.

⁴⁰ Cf. *Univ. of Mich. v. Ewing*, 474 U.S. 214, 223 (1985) (assuming the existence of a medical student’s substantive due process property interest in continued enrollment before deciding that his dismissal by the state medical school was not an arbitrary deprivation). See *generally* Erica Chee, Comment, *Property Rights: Substantive Due Process and the Shocks the Conscience Standard*, 31 U. HAW. L. REV. 577 (2009) (discussing substantive due process for real property).

⁴¹ *Brown*, 347 U.S. at 493.

“very foundation of good citizenship,”⁴² and the most important governmental service for developing individual human capital and preparing a labor market.⁴³ Together with the states’ extraordinary public policy decisions to both provide public schools⁴⁴ and require school attendance,⁴⁵ this framing of education’s unique constitutional position⁴⁶ merits a more stringent standard of review for educational property deprivations than the deferential standard typically applied in due process analyses of other state-created regulatory property interests.

Thus, I propose “the public right to education” as a doctrinal approach to constitutional engagement with rights to education. Through conversation with theories of “New Property,”⁴⁷ I revive the “due process revolution”⁴⁸ concept of a “public right” in order to theorize an individual’s constitutional right to enforce a governmental duty owed to him as a member of the public.⁴⁹ The public right differs from the fundamental right in both source and operation. The fundamental right is based in the Federal Constitution, while the public right is based in state laws. The public right is a positive right, but, importantly, it is not a *judicially created* positive right,⁵⁰ nor is it a *federally imposed* positive

⁴² *Id.*

⁴³ *See id.* (“Today it is a principal instrument . . . in preparing [the child] for later professional training.”).

⁴⁴ *See infra* note 257.

⁴⁵ *See infra* note 258.

⁴⁶ *See Plyler v. Doe*, 457 U.S. 202, 221 (1982) (citation omitted) (“Public education is not a ‘right’ granted to individuals by the Constitution. But neither is it merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation. . . . [E]ducation has a fundamental role in maintaining the fabric of our society.”).

⁴⁷ *See generally* Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) [hereinafter *New Property*] (defining the “New Property” interests created by expanding governmental services and employment); *see also* Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1253–56 (1965) [hereinafter *Individual Rights*] (proposing constitutional questions raised by government entitlements); *cf., e.g.*, Harry N. Scheiber, *Public Rights and the Rule of Law in American Legal History*, 72 CALIF. L. REV. 217, 221–27 (1984) (arguing that nineteenth-century American law was replete with “public rights,” characterized as property rights).

⁴⁸ *See generally* Erwin N. Griswold, *Due Process Revolution and Confrontation*, 119 U. PA. L. REV. 711 (1971); Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973 (1996).

⁴⁹ *See infra* Part II.C.2.

⁵⁰ *Cf. DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 204 (Brennan, J., dissenting) (dismissing the Court’s approach to a case involving governmental non-enforcement, by remarking that “[n]o one . . . has asked the Court to proclaim that, as a general matter, the Constitution safeguards positive as well as negative liberties.”). *Compare supra* notes 20–25 and accompanying text (articulating various approaches to recognizing positive rights to education and theorized positive benefits and externalities), *with*

right.⁵¹ The public right is a *state-created* positive right.⁵² And so, its judicial enforcement, in either federal or state court, does not require the courts to define, derive, or imply it. The public right merely invokes constitutional due process for its proper function in protecting the individual's established property interest.

It is also an *individual* right. An individual public-rights claimant should have the right to sue the state for enforcement of the state's duty to maintain its secured property interest against acts or omissions that diminish, deprive, divest, or otherwise meaningfully interfere with his enjoyment of that property. Thus, the Due Process Clauses of the Fifth and Fourteenth Amendments are the appropriate sources from which to seek constitutional relief.⁵³

Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857 (2001) (arguing that recognition of positive rights would be ineffective, and in some cases counterproductive). *But see* STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* 43–44 (2000) (“[A]ll legally enforced rights are necessarily positive rights” because “[a]ll rights are claims to an affirmative government response.”); *id.* at 211–12 (analogizing investments in public education to investments in property rights and protection from property crimes).

⁵¹ *Cf.* *United States v. Harris*, 106 U.S. 629, 639–40 (1883) (holding that the Thirteenth Amendment neither imposes the duty nor confers the power on Congress to criminalize private individuals' actions that deprive others of civil rights). *But see* *Griffin v. Breckinridge*, 403 U.S. 88, 104–06 (1971) (holding that Congress was within its Thirteenth Amendment powers to create statutory causes of civil action against private individuals who conspire to engage in racial discrimination). *But see generally* Liu, *supra* note 22 (proposing that the Citizenship and the Privileges and Immunities Clauses of the Fourteenth Amendment *do* obligate Congress to affirmatively act to preserve rights to education).

⁵² *See* EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS* 67–105 (2013) (arguing in the chapter appropriately titled “Education: A Long Tradition of Positive Rights in America” that education is a state-provided positive right). Statutorily created positive rights also fit within the definition of “public right,” irrespective of which level of government creates them or its degree of sovereignty. For example, the federal obligation that states receiving federal funds provide eligible students with disabilities with a “free appropriate public education” in the “least restrictive environment” through an “individualized education program,” Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773, *amended by* Individuals with Disabilities Education Act, Pub. L. No. 101-476, 104 Stat. 1103, is a positive right that individual students can enforce. *See, e.g.,* *Endrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988, 993–94 (2017) (citing 20 U.S.C. §§ 1401(9)(D), 1412(a)(1)).

⁵³ *Cf. Graham v. Connor*, 490 U.S. 386, 395 (1989) (declining to apply substantive due process to evaluate the constitutionality of excessive force used in an investigatory stop because the Fourth Amendment provides an “explicit textual source of constitutional protection” against the same).

Public education is the archetypical regulatory property to which there is a public right. Each eligible schoolchild has a legitimate claim to the educational entitlement simply because they reside within the state.⁵⁴ Public schools are free, and neither an individual's expectation of service nor their enjoyment of the same is a function of their ability to pay.

The public right to education is more than just access or usage rights in schools.⁵⁵ It also encompasses the right to praxis: quality instruction, engagement, and development that is simultaneously exclusive to the individual student and acquired through communal interactions with curriculum, instructors, and peers. While the state does not confer a property interest in specific instructors, peers, schools, or even districts, it does confer a property interest to every eligible schoolchild in a meaningful opportunity to such praxis according to the state's approved curriculum and standards. Most importantly, the state confers this property interest in each individual schoolchild and not in schoolchildren as a collective.

Public education is not a commons. It is not subject to depletion by others' access or use. Rather, when distributed properly and fairly, one's education improves in breadth, depth, and value as a function of others' genuine participation and earnest engagement. Improving individual access and achievement is linked directly to positive peer effects and externalities of various types at all ecological levels of the educational enterprise.⁵⁶ At the same

⁵⁴ See *Plyler*, 457 U.S. at 224–25 (finding “that the undocumented status of [] children *vel non* [does not] establish [] a sufficient rational basis for denying them benefits that a State might choose to afford other residents.”).

⁵⁵ The concept of “education as property” is broader than “schools as property,” and perhaps even “schooling as property.” Professor LaToya Baldwin Clark examines the second of these, “schools as property,” in her recent articles, *Education as Property*, 105 VA. L. REV. 397 (2019), and *Stealing Education*, 68 UCLA L. REV. 566 (2021) [hereinafter *Stealing Education*]. See also *infra* Part II.C.

⁵⁶ See, e.g., Eleonora Patacchini, Edoardo Rainone, & Yves Zenou, *Heterogeneous Peer Effects in Education*, 134 J. ECON. BEHAV. & ORG. 190, 196 (2017) (finding strong, persistent peer effects on educational attainment); Matthew Neidel & Jane Waldfogel, *Cognitive and Noncognitive Peer Effects in Early Education*, 92 REV. ECON. & STAT. 562, 569–71 (2010) (finding statistically significant peer effects from preschool on early math and reading outcomes). *But see* John A.C. Hattie, *Classroom Composition and Peer Effects*, 37 INT'L J. EDUC. RSCH. 449, 472–74 (2002) (identifying exposure to high-quality teachers and the attendant effects of high expectations, rather than the presence of heterogeneous peers, as the primary driver of positive learning outcomes).

time, its reliance on the public purse makes its maintenance vulnerable to commons problems like congestion.⁵⁷

Because of the nature of the property interest in public education⁵⁸ and residents' expectations and reliance on the states' respective promises to provide educational opportunity through public schools, each state should be constrained from substantively reducing, limiting, or otherwise arbitrarily infringing on the right without satisfying some form of heightened scrutiny. At a minimum, a state should not be able to change the terms of its educational expectations unilaterally or selectively fail to meet them in a meaningful way without demonstrating a rational relationship between its actions or inactions and a substantial governmental interest. The federal courts have already found such an interest insufficient when the states have tried to withhold educational opportunities from discretely identifiable groups of students in pursuit of "fiscal integrity"⁵⁹ or in usurpation of federal policy objectives.⁶⁰ They should also find the interest insufficient when the states provide different levels of educational quality and

⁵⁷ Stating that public education qua education is not a commons does not elide the redistributive features of public education *finance*, suggest that there are no costs, or imply that *funding* an expansive public education right would not deplete already strained governmental resources. As Professor Carol Rose suggests, satisfying public school students' claims to a baseline education would burden the state to generate sufficient supportive revenues through taxation or other confiscations even if the court did not specifically require such levies. Carol M. Rose, *Property as the Keystone Right*, 71 NOTRE DAME L. REV. 329, 347–48 (1996). But the federal courts have already eschewed the states' abandonment of educational responsibilities because of their costs. See *Plyler*, 457 U.S. at 227 (finding that a state's interest in preserving its funds does not allow it to abdicate its educational responsibilities to undocumented children). A more pressing concern presented by a greater resource need would be regressive, often illegal tax levies—similar in character to the one at issue in *Rodriguez*—imposed against the beneficiary population with limited returns to their schools. See generally Bernadette Atuahene & Timothy R. Hodge, *Stategraft*, 91 S. CAL. L. REV. 263 (2018) (describing how governmental agents transfer property from vulnerable residents to the state in violation of its own laws in a process the authors call "stategraft"); Bernadette Atuahene, *Predatory Cities*, 108 CALIF. L. REV. 107 (2020) (introducing the term "predatory cities" to describe urban areas that systematically engage in stategraft).

⁵⁸ See *infra* Part II.C.

⁵⁹ *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969) ("[A] State may not . . . reduce expenditures for education by barring indigent children from its schools."); see also, e.g., *Mills v. Bd. of Educ. of D.C.*, 348 F. Supp. 866, 876 (D.D.C. 1972) ("[T]he District of Columbia's interest in educating the excluded [disabled] children clearly must outweigh its interest in preserving its financial resources.")

⁶⁰ Cf. *Plyler*, 457 U.S. at 223–26 (finding that Texas's intended exclusion of undocumented migrant children from its public schools was inconsistent and inharmonious with then federal immigration directives).

opportunity⁶¹ to residents based on state-created school districts⁶² or to different schools within the same district.⁶³ Because the expectation is uniform at the policymaking level,⁶⁴ the states should have to demonstrate the substantial governmental importance of withholding discretely identifiable curricular opportunities from individual students,⁶⁵ whether through tracking,⁶⁶

⁶¹ *E.g.*, *Rodriguez*, 411 U.S. at 44–47 (finding that Texas’s public school funding scheme that tied individual district funding to property taxes bore a “rational relationship to a legitimate state purpose”).

⁶² *See generally* *Martinez ex rel. Morales v. Bynum*, 461 U.S. 321 (1983) (upholding a state’s authority to create school districts and assign students to schools based on within-district residency).

⁶³ *Cf. Hobson v. Hansen*, 269 F. Supp. 401, 406, 419 (D.D.C. 1967).

⁶⁴ *See, e.g.*, *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 370 (4th Cir. 1998) (“[T]he school, not the teacher, has the right to fix the curriculum.”). *See also generally* *Debra P. v. Turlington*, 644 F.2d 397 (5th Cir. Unit B May 1981).

⁶⁵ *See infra* Part III.A.

⁶⁶ *Cf. Hobson*, 269 F. Supp. at 443 (holding that the effects of within-school tracking violate Fifth Amendment due process irrespective of racial intent). *But see* *Morales v. Shannon*, 516 F.2d 411, 414 (5th Cir. 1975) (finding that “ability groupings are not unconstitutional per se”); *People Who Care v. Rockford Bd. of Educ.*, Sch. Dist. No. 205, 111 F.3d 528, 536 (7th Cir. 1997) (reversing a remedial decree that would have forbidden a school district from ability-grouped tracking despite the decree’s acknowledgment that the district’s practice of manipulating the tracking system to accomplish within-school racial segregation).

gifted-and-talented identification,⁶⁷ provision of segregated disability services,⁶⁸ in-school suspension,⁶⁹ alternative school reassignment,⁷⁰ or school closures.⁷¹

This Article advocates applying substantive due process to accommodate schoolchildren's claims against the state for deprivation of educational property interests,⁷² but only those that the *state itself* has conveyed. It does not ask the courts to define any duty; it merely asks them to enforce the duties the states have already affirmatively assumed. Within these guideposts, the states and their educational agencies could foresee and avoid reasonable claims through preemptive action, and the courts could

⁶⁷ Cf. *Roe v. Pennsylvania*, 638 F. Supp. 929, 931 (E.D. Pa. 1986), *aff'd*, 813 F.2d 398 (3d Cir. 1987) (assuming without deciding that a gifted education program could create a property interest in the program before dismissing a due process challenge to exclusion from gifted-education opportunities).

⁶⁸ Cf. *Roncker ex rel. Roncker v. Walter*, 700 F.2d 1058, 1062 (6th Cir. 1983) (holding that district courts should review de novo an administrative choice not to "mainstream[]" a child with disabilities into a public school under the Individuals with Disabilities Education Act).

⁶⁹ *But see Laney v. Farley*, 501 F.3d 577, 581 (6th Cir. 2007) (finding that in-school suspension does not implicate due process because it does not effect a "total exclusion from the educational process" (quoting *Goss*, 419 U.S. at 576)).

⁷⁰ Cf. *Buchanan v. County of Bolivar*, 99 F.3d 1352, 1359 (6th Cir. 1996):

"[A plaintiff] may not have procedural due process rights to notice and an opportunity to be heard when the sanction imposed is attendance at an alternative school *absent some showing that the education received at the alternative school is significantly different from or inferior to that received at his regular public school.*"

(emphasis added). *But see Swindle v. Livingston Par. Sch. Bd.*, 655 F.3d 386, 389, 394 (5th Cir. 2011) (finding that a student disciplinarily assigned to an alternative school has not been deprived of her educational property interest because she has the right to continue public education in that school); *C.B. v. Driscoll*, 82 F.3d 383, 389 (11th Cir. 1996) (declining to find due process violation for alternative-school assignment); *Zamora v. Pomeroy*, 639 F.2d 662, 669 (10th Cir. 1981) (making a similar finding).

⁷¹ Cf. *Smith v. Henderson*, 54 F. Supp. 3d 58, 65–73 (D.D.C. 2014) (finding that Title VI does not support a discriminatory impact action based on school closures); see also Matthew Patrick Shaw, *Creating the Urban Educational Desert Through School Closures and Dignity Taking*, 92 CHI.-KENT L. REV. 1087, 1107–10 (2017) (discussing the "dignity taking" that school communities experience when school districts exercise their unquestioned statutory authority to close neighborhood schools without concern for families' property interests in safe, meaningful, accessible, and *local* educational opportunities). For the concept of dignity takings, see generally Bernadette Atuahene, *Dignity Takings and Dignity Restoration: Creating a New Theoretical Framework for Understanding Involuntary Property Loss and the Remedies Required*, 41 L. & SOC. INQUIRY 796 (2016).

⁷² Cf. *Liu*, *supra* note 22, at 334–35 (preferring to assign a congressional duty to establish a meaningful right to education through the Fourteenth Amendment Citizenship Clause over an adjudicative duty to recognize a substantive right through other Fourteenth Amendment provisions).

engage in responsible decision-making on those claims within the judicial competency.

The public right to education is neither simply aspirational⁷³ nor just symbolic.⁷⁴ Rather, it is mechanically modest and conservative, respectful of federalism and separation-of-powers concerns, and emancipatory for students and families who have long been disserved by the educational status quo.

This Article begins presenting the case for the intervention in Part I by discussing the state of due process in education and explaining why any path to securing constitutional protections for education must work within the constraints of *Rodriguez*. Part II takes seriously the opportunity to advance the right-to-education project through exploring the property interest as an anchor for substantive due process. In particular, it discusses *Plyler v. Doe*⁷⁵ as a model for how courts might review substantive claims of deprivation of the property interest in education. Part III elaborates the public right to education as the most plausible pathway to a more robust substantive due process in education. Here, the Article repurposes the public right for securing education rights and discusses how the right would operate in practice. This Part further investigates the practical viability of this approach and articulates normative considerations for engaging the project before briefly concluding. Much in the same way that the federal courts are beginning to rethink their reliance on Fourteenth Amendment due process jurisdiction doctrines that are increasingly out of sync with modern realities and practically unworkable,⁷⁶ they should revisit *Rodriguez*'s scope. Constitutional coherence, if not the contemporary realities facing public education, requires nothing less.

⁷³ See Cass R. Sunstein, *On Property and Constitutionalism*, 14 CARDOZO L. REV. 907, 917–21 (1993) (cautioning postcommunist emergent Eastern European democracies against articulating positive rights in their new constitutions, finding the same to establish broad “aspirations” that evade judicial enforcement).

⁷⁴ Professor Mark Tushnet critiques rights as rhetorical diversions to pacify those whom legal systems have marginalized and made vulnerable. Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1379–80 (1984) (discussing education rights and *Rodriguez* in particular). According to this view, symbolic rights, or, to use Tushnet's term, “rights-talk,” are harmful because they offer false promises of meaningful relief. See *id.* at 1376–80; see also Rose, *supra* note 57, at 350–51.

⁷⁵ 457 U.S. 202 (1982).

⁷⁶ See *infra* note 415 and accompanying text.

I. THE STATE OF DUE PROCESS IN EDUCATION

The decades-long fight to recognize a fundamental right to education within the U.S. Constitution appears lost. This Part diagnoses why by examining the current state of due process in education⁷⁷ and how *San Antonio Independent School District v. Rodriguez* came to impose such an impressive barrier to constitutional rights to education.⁷⁸ This Part concludes with a survey of proposed work-arounds with an eye toward identifying feasible opportunities for doctrinal intervention without disturbing the settled law of *Rodriguez*.⁷⁹

A. The Evasive Fundamental Right to Education

After decades of avoiding federal claims to education rights, plaintiff classes in two cases have recently sought a declaration that public school students have rights to basic literacy⁸⁰ and civics education,⁸¹ if not a more comprehensive right to adequate education.

Not too long ago, *Gary B. v. Whitmer*⁸² seemed promising. A Sixth Circuit panel reversed a district court's dismissal of Detroit Public Schools students' claims that Michigan's failure to offer an opportunity to learn how to read violated a fundamental right.⁸³ The Sixth Circuit majority found "[a]ccess to a foundational level of literacy" to be "implicit in the concept of ordered liberty"⁸⁴ and construed the plaintiffs' claims to implicate a broader right to a "basic minimum education" without which "it is impossible to participate in our democracy."⁸⁵ Relying largely on the Supreme

⁷⁷ *Infra* Part I.A.

⁷⁸ *Infra* Part I.B.

⁷⁹ *Infra* Part I.C.

⁸⁰ See generally *Gary B. v. Snyder*, 329 F. Supp. 3d. 344 (E.D. Mich. 2018). More accurately, the *Gary B.* class pled a fundamental right to "access to literacy," *id.* at 348, and that the State of Michigan, which had maintained significant supervision and control over Detroit Public Schools, *id.* at 351, 353–54, had not adequately provided "minimum level of instruction on learning to read," *id.* at 364–65.

⁸¹ *Raimondo*, 494 F. Supp. 3d. at 174.

⁸² 957 F.3d 616 (6th Cir. 2020).

⁸³ *Id.* at 661–62.

⁸⁴ *Id.* at 642 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)); see also Caroline A. Veniero, Comment, *Education's Deep Roots: Historical Evidence for the Right to a Basic Minimum Education*, 88 U. CHI. L. REV. 981, 1001–18 (2021) (extending the historical proof of education's deep constitutional roots to include federal actions). See generally Black, *supra* note 20 (elaborating an originalist argument for education as a fundamental right).

⁸⁵ *Gary B.*, 957 F.3d at 642.

Court's exposition of substantive due process in *Obergefell v. Hodges*⁸⁶ to recognize same-sex couples' right to marriage,⁸⁷ the *Gary B.* majority hedged that although a fundamental right to basic education might "lack[] substantial historical roots," the role of public education has evolved such that "neither liberty nor justice would exist if [it] were sacrificed."⁸⁸ Given that the Supreme Court had left open the fundamental rights question in *Papasan v. Allain*,⁸⁹ this approach seemed sufficiently viable such that the balance of the panel would have allowed the *Gary B.* plaintiffs to state their claim.⁹⁰

But one month after the divided panel issued their opinions in *Gary B.*,⁹¹ the full complement of Sixth Circuit active judges vacated that opinion in preparation for a hearing en banc.⁹² The parties settled the case soon after.⁹³ The sum of these procedures leaves *Gary B.* a nonprecedent, a judicial event with reduced persuasive value, if any.⁹⁴ Thus, any plaintiffs aspiring to secure a fundamental right to education might find it difficult to rely successfully on *Gary B.*⁹⁵

⁸⁶ 576 U.S. 644 (2015).

⁸⁷ *Gary B.*, 957 F.3d at 643–44 (citing, *inter alia*, *Obergefell*, 576 U.S. at 651–62, 664–65).

⁸⁸ *Id.* at 644 (quoting *Glucksberg*, 521 U.S. at 721).

⁸⁹ 478 U.S. 265 (1986); *Gary B.*, 957 F.3d at 657, 657 n.17 (citing *Papasan*, 478 U.S. at 285). The notable quote, however, appears one page earlier in *Papasan*: "The Court [in *Rodriguez*] did not, however, foreclose the possibility 'that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either the right to speak or the right to vote.'" 478 U.S. at 284 (alterations omitted) (quoting *Rodriguez*, 411 U.S. at 36).

⁹⁰ See *Gary B.*, 957 F.3d at 661–62.

⁹¹ *Gary B.*, 957 F.3d 616 (majority opinion); *id.* at 662 (Murphy, J., dissenting).

⁹² See generally *Gary B.*, 958 F.3d. 1216.

⁹³ Valerie Strauss, *Michigan Settles Historic Lawsuit After Court Rules Students Have a Constitutional Right to a "Basic" Education, Including Literacy*, WASH. POST (May 14, 2020), <https://perma.cc/Q345-V8T8>.

⁹⁴ *Raimondo*, 494 F. Supp. 3d at 175 n.2 (describing the *Gary B.* opinion as "effectively a legal nullity"); *cf.* *Alvarado v. Bd. of Tr. of Montgomery Cmty. Coll.*, 848 F.2d 457, 459 (4th Cir. 1988) (stating that vacated opinions have precedential value only when they are validated by a court through adoption by reference in a subsequent case); *Durning v. Citibank*, 950 F.2d 1419, 1424 n.2 (9th Cir. 1991) ("[A] decision that has been vacated has no precedential authority whatsoever."); *Akrawi v. Booker*, No. 05-CV-74518-DT, 2007 WL 2259112, at *1 (E.D. Mich. Aug. 3, 2007) (rejecting the precedential value of a decision that the Sixth Circuit vacated pending hearing en banc).

⁹⁵ *Cf.* *Eden LLC v. Justice*, No. 5:20-CV-201, 2021 WL 4241020, at *9–10 (N.D.W. Va. Jan. 7, 2021) (citing *Gary B.*, 957 F.3d at 662) (discounting the weight of *Gary B.* as a persuasive source for the proposition that there is a fundamental right to education because it was vacated).

B. (De)constructing *San Antonio v. Rodriguez*

And so, , one seeking constitutional relief for educational deprivation will have to contend with *Rodriguez*, which held: “Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.”⁹⁶

1. Absence of a fundamental rights claim at the district court.

An important note for framing: *Rodriguez* is a curious case (even before one contends with the Justices’ choice of dispositive due process interest) because due process was not the primary—or even motivating—doctrine in *Rodriguez*. Equal protection was.

The heart of the *Rodriguez* claimants’ complaint against Texas was the state’s then-operative school-finance system, which relied on districts to supplement uniform state per-pupil appropriations through ad valorem real-property taxes.⁹⁷ Poor families living in property-poor districts argued that the Texas system violated their school-age children’s Fourteenth Amendment right to *equal protection*.⁹⁸ Supported by data that showed that property-poor districts could not possibly raise the same supplemental revenues as property-wealthy districts, the *Rodriguez* claimants maintained that property-poor districts could not provide their students the same quality of education that property-wealthy districts could provide their students.⁹⁹ Worse, expert testimony submitted that property-poor districts were effectively subsidizing education in property-wealthy districts.¹⁰⁰

Educational inequality was the gravamen of the district court’s opinion in *Rodriguez v. San Antonio Independent School District*¹⁰¹ (“*San Antonio*”). And the parties’ pleadings reflect this. At the district court, the parties clearly focused on establishing wealth as a suspect classification and Texas’s school-finance system as impermissible discrimination on those grounds. The fundamental-rights nature of education featured nowhere in the

⁹⁶ *Rodriguez*, 411 U.S. at 35.

⁹⁷ *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 281–82 (W.D. Tex. 1971) [*San Antonio*], *rev’d*, 411 U.S. 1 (1973).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 282.

¹⁰¹ 337 F. Supp. 280 (W.D. Tex. 1971).

pleadings and only passingly in the district court's disposition of the case.¹⁰² Nor did the debate over the adequacy of educational opportunities enabled by the Texas system, which animated the intertextual dialogue between Justice Powell's opinion on behalf of the *Rodriguez* majority and Justice Thurgood Marshall's lengthy dissent.¹⁰³

This posture made *Rodriguez* different from the Court's previous cases involving rights to public education. In cases like *Cumming v. Richmond County Board of Education*,¹⁰⁴ *Brown v. Board of Education*,¹⁰⁵ and *Bolling v. Sharpe*,¹⁰⁶ the plaintiffs had incorporated blended due process–equal protection claims as evocative of general Fourteenth Amendment violations.¹⁰⁷ Despite there being no explicit discussion at the district court on fundamental rights, due process, adequacy, liberty, or property interests,¹⁰⁸ the district court made a critical, clunky finding that a

¹⁰² *Id.* (“More than mere rationality is required, however, to maintain a state classification which affects a ‘fundamental interest.’”).

¹⁰³ Compare *San Antonio*, 337 F. Supp. at 282 (analyzing the plaintiffs' claims without reference to adequacy or any reasonable synonym), with *Rodriguez*, 411 U.S. at 24 (“Texas asserts that the Minimum Foundation Program provides an ‘adequate’ education for all children in the State. . . . No proof was offered at trial persuasively discrediting or refuting the State’s assertion.”), and *Rodriguez*, 411 U.S. at 89 (Marshall, J., dissenting) (“I fail to see where [the Court] finds the expertise to divine that the particular levels of funding provided by the Program assure an adequate educational opportunity—much less an education substantially equivalent in quality to that which a higher level of funding might provide.”).

¹⁰⁴ 175 U.S. 528 (1899).

¹⁰⁵ 347 U.S. 483 (1954).

¹⁰⁶ 347 U.S. 497 (1954).

¹⁰⁷ Petitioners in *Cumming* argued that the school board's closing of the only Black high school deprived Black students of an educational opportunity they were otherwise entitled to. See 175 U.S. at 530–31. We would now recognize that as an educational due process property argument. But at the time it was overshadowed by the then-dominant, but since abrogated, state privileges doctrine. The parties' failure to identify the specific constitutional clauses that the county's actions offended undoubtedly enabled the Court to frame the disposition of the case as it saw fit. In the more famous case, *Brown*, petitioners pled that racial segregation of public schools violated due process and equal protection guarantees of the Fourteenth Amendment. See Statement as to Jurisdiction at 12, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (No. 1) (“Chapter 72-1724 of General Statutes of Kansas, 1949, is clearly an arbitrary and unreasonable exercise of state power in violation of the guarantees of the Fourteenth Amendment.”). In the *Brown* companion case, *Bolling*, the Court famously established that equal protection violations may *themselves* offend substantive due process liberty. 347 U.S. at 499–500. But it ignored the stand-alone substantive due process claims the *Bolling* parties themselves raised. See Brief for Petitioners on Reargument at 55, *Bolling v. Sharpe*, 347 U.S. 497 (1954) (No. 8) (“[I]t is submitted that the educational rights asserted by Petitioners have been judicially determined to be fundamental rights.”).

¹⁰⁸ See generally *San Antonio*, 337 F. Supp. 280.

very astute Justice Powell exploited to ripen an issue the parties themselves considered irrelevant to the appeal.

Interpreting dicta in *Brown* as recognizing the “grave significance of education both to the individual and to our society,” the district court found that Texas needed to “demonstrate a compelling state interest that is promoted by the current [wealth] classifications created under the financing scheme.”¹⁰⁹ However provocative, this rationale¹¹⁰ was completely irrelevant to the district court’s decision. The district court found that Texas “fail[ed] even to establish a reasonable basis” for the wealth-based classifications utilized by its school-finance system.¹¹¹ On that basis alone, the state’s school-finance system was found to violate the equal protection rights of school children living in property-poor districts.¹¹² Though unnecessary to the outcome, the district court’s stated rationale was importantly not dicta—at least not in the same way the *Brown* “most important function” passage was.¹¹³ The *San Antonio* judges’ articulation of the standard that they believed Texas needed to meet was relevant to their path of reasoning. They simply found the state failed to meet an even lower standard.¹¹⁴

¹⁰⁹ *Id.* at 283 (citing *Brown*, 347 U.S. at 493).

¹¹⁰ It would be somewhat anachronistic to call the inquiry the *San Antonio* district court engaged in “strict scrutiny,” at least not as we currently understand the analysis. The district court did not apply any prototypical version of the modern tripartite strict-scrutiny analysis, which was first introduced by Justice Powell in his controlling concurrence in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). Justice Powell’s formulation required a state to show that any infringement on a fundamental right or use of a putatively suspect classification is “necessary” to accomplish a “*compelling* state interest,” *Bakke*, 438 U.S. at 306–20 (Powell, J., concurring) (emphasis added), and not merely a “permissible” or a “substantial” one. *Id.* at 305 (Powell, J., concurring) (quoting *In re Griffiths*, 413 U.S. 717, 721–22 (1973)). Justice Powell’s *Bakke* opinion also introduced the requirement that otherwise suspect actions be “precisely tailored” toward accomplishing those goals, *id.* at 299 (Powell, J., concurring), a concept a Supreme Court majority first embraced as “narrow[] tailor[ing]” in *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94, 508–09 (1989) (O’Connor, J., plurality opinion).

¹¹¹ *San Antonio*, 337 F. Supp. at 284.

¹¹² *Id.* at 285–86.

¹¹³ See Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1065 (2005) (defining holdings as propositions along a court’s decisional path that “(1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment” and dicta as any other propositions stated in a case).

¹¹⁴ See *San Antonio*, 337 F. Supp. at 284 (“Not only are defendants unable to demonstrate compelling state interests for their classifications based upon wealth, they fail even to establish a reasonable basis for these classifications.”).

2. Stealth emergence of an antifundamental rights logic by state appellants at the Supreme Court.

Unlike the *Bolling* respondents,¹¹⁵ the *Rodriguez* appellees did not develop strong due process arguments at the Supreme Court. The entirety of the appellees' fundamental-rights argument was that the "Court ha[d] recently reaffirmed that public school education is a fundamental personal right."¹¹⁶ While, of course, the Court had recently discussed education as a fundamental right in *Weber v. Aetna Casualty & Surety Company*,¹¹⁷ neither there nor elsewhere had it established a firm doctrinal foundation for understanding why or on what basis education was constitutionally fundamental. The *Rodriguez* appellees' motion did not even cite, let alone discuss, the Due Process Clause, defaulting the remainder of its fourteen pages to a robust equal protection conversation.¹¹⁸

The state appellants hammered the *Rodriguez* appellees' due process argument as "simplistic" and the district court's adoption of the same as without basis in any direct authority.¹¹⁹ Using language that Justice Powell would later echo, the appellants said: "We fully agree with the statement by the District Court about 'the very great significance of education to the individual.' But that does not mean that it is 'fundamental' in the sense that makes applicable the 'compelling state interest' or 'rigid scrutiny test.'"¹²⁰

Comprehensively proceeding to analogize education to social welfare programs that the Court had not found fundamental and distinguishing education from rights it had found fundamental, the state appellants punctuated their appeal with the accurate observation that "[t]he strict scrutiny test was applied in *Brown* not because education is a fundamental interest but because classification by race is clearly suspect."¹²¹

For all of their advocacy in distilling equal protection logics from the due process question, the appellants did not themselves

¹¹⁵ See *supra* note 107.

¹¹⁶ Motion to Affirm at 6, *Rodriguez*, 411 U.S. 1 (1973) (No. 17-1331) (first citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); then citing *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966); and then citing *Weber v. Aetna Cas. & Sur. Co.* 406 U.S. 164, 172 (1972)).

¹¹⁷ 406 U.S. 164 (1972).

¹¹⁸ See generally Brief for Appellees, *Rodriguez*, 411 U.S. 1 (1973) (No. 71-1332).

¹¹⁹ Brief for Appellants at 6, *Rodriguez*, 411 U.S. 1 (1973) (No. 71-1332).

¹²⁰ *Id.* at 28 (citation omitted) (quoting *San Antonio*, 337 F. Supp. at 283).

¹²¹ *Id.* at 29.

engage in a searching due process argument. The appellees did not take advantage of this misstep. They did not hold the appellants to a rigorous exposition of due process and its potential as a source for educational adequacy under liberty or property interests. Unlike in the *Bolling* petitioners' briefs,¹²² there was no mention of students' educational liberty rights to "acquire useful knowledge,"¹²³ parents' rights to direct their children's education,¹²⁴ or how implicitly affirming geography as a determinative school-sorting mechanism¹²⁵ would limit both parents' choices and the knowledge students could acquire.¹²⁶

Instead, the *Rodriguez* appellees buried their strongest arguments. Rather than assert that the state owes all of its students an adequate educational opportunity because of its fundamental significance under state law, the appellees couched it in an anti-wealth-discrimination argument.¹²⁷ In the alternative, they argued that education is embedded in the First Amendment free speech guarantee—namely, that without education one would be unable "to speak intelligently and knowledgeably."¹²⁸ "Education," in that sense, "is not exclusively an economic and social welfare issue," which could be evaluated simply for rational basis.¹²⁹

But the appellees never elevated education rights above the derivative. They did not tie education's speech-facilitative properties to any specific interests the states were obligated to secure. They made a compelling argument that education is a "fundamental interest," which is underscored by the state constitution requiring support for public education and eligible residents being compelled to attend school,¹³⁰ but they did not spell out that the *state's actions* had made education fundamental. Worse, the appellees had already stipulated that their entire due process

¹²² Brief for Petitioners on Reargument at 55, *Bolling*, 347 U.S. 497 (1954) (No. 8).

¹²³ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

¹²⁴ See *id.* at 400; *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925).

¹²⁵ Ten years after *Rodriguez*, Justice Powell wrote the opinion in *Martinez v. Bynum*, 461 U.S. 321 (1983), which upheld school districting and local residence requirements as constitutional over the lone dissent of Justice Marshall, *id.* at 334 (Marshall, J., dissenting). In *Milliken v. Bradley*, 418 U.S. 717 (1974), the Court implicitly upheld school districts as constitutional in invalidating multidistrict desegregation plans.

¹²⁶ *But see Zelman v. Simmons-Harris*, 536 U.S. 639, 662–63 (2002) (rejecting a First Amendment Establishment Clause challenge to an Ohio school voucher program that provides tuition support for students to attend out-of-district public or independent schools, both sectarian and nonsectarian).

¹²⁷ See Brief for Appellees at 38–39, *Rodriguez*, 411 U.S. 1 (1973) (No. 71-1332).

¹²⁸ *Id.* at 31.

¹²⁹ *Id.*

¹³⁰ *Id.* at 28, 38, 41–42.

argument was based on dicta.¹³¹ They did not need to. Only the liberty interest arguments were. The rest were on firm, if under-explored, doctrinal footing.

3. Justice Powell's elevation of the proto-fundamental rights argument.

Justice Powell deftly exploited the vulnerabilities of the appellees' proto-fundamental rights argument.¹³² Having independently found no basis for fundamental rights treatment, the Justice defaulted to his a priori position that matters of school finance were too complex and localized for any decision possibly to implicate federal due process.¹³³ Moreover, Justice Powell was "deeply reluctant for the judiciary to plunge 49 states" into a court-ordered restructuring of state school-finance schemes.¹³⁴ The balance of Justices acknowledged Justice Powell as the subject-matter expert on education administration¹³⁵—notwithstanding Justice Marshall's apparent primacy in federal litigation in matters of educational discrimination.¹³⁶

Justice Powell's *Rodriguez* opinion sandwiched the fundamental rights analysis between the equal protection discussions of the constitutional appropriateness of a school-finance policy that discriminated on the basis of poverty.¹³⁷ This served two purposes. The Court could nod to its prior jurisprudence that had not neatly engaged issues of educational equal protection distinctly

¹³¹ See *id.* at 26 ("Although this Court has never expressly held that education is a fundamental interest, there is strong dicta to this effect.")

¹³² *Rodriguez*, 411 U.S. at 17–18, 29–39, 40–59.

¹³³ Memorandum from Lewis F. Powell, Jr., to Larry Hammond on San Antonio Indep. Sch. Dist. v. *Rodriguez* 15 (Oct. 12, 1972) (on file with author):

I would like to find a reasoned and principled position that avoided destroying the usefulness of local control of the schools, and which also minimizes the wide gaps which now exist as a result of primary reliance on local funding. But I have not yet identified an intermediate position that is based on objective standards, as distinguished from subjective judgment as to what is "adequate."

¹³⁴ *Id.* Hawaii operates a single statewide school district.

¹³⁵ Justice Powell is the jurist most commonly identified as "the education justice," with the most substantive doctrinal impact in this domain in the Court's history. See generally Victoria J. Dodd, *The Education Justice: The Honorable Lewis Franklin Powell, Jr.*, 29 FORDHAM URB. L.J. 683 (2001).

¹³⁶ Cf. MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961 116–49 (1994) (discussing Justice Marshall's efforts to overturn *Plessy v. Ferguson*, 163 U.S. 537 (1896)); JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 209–27 (2011) (discussing the same).

¹³⁷ See generally *Rodriguez*, 411 U.S. 1.

from due process in education. Without needing to consider race, heightened scrutiny was no longer a given. If such scrutiny were appropriate, it would have to apply as a function of either a suspect classification of wealth in equal protection or the fundamental nature of education in substantive due process. Thus charged, the Court could finally engage in a distilled due process analysis and announce the appropriate standard of judicial review of state decision-making in education. So that is what the Court proceeded to do.

Only after deciding that wealth is not a suspect classification¹³⁸ did the *Rodriguez* court take on the isolated due process question, culminating in its seismic finding that public education was not a fundamental right.¹³⁹

According to Justice Powell, a state school-finance system that relied on local property-tax revenues to supplement state per-pupil expenditures could not possibly offend a fundamental right to education because no such stand-alone right exists under the Federal Constitution.¹⁴⁰ Beyond the absence of an integral right to education, the five-justice majority did not believe the cascading consequence of unequal revenues—unequal expenditures and unequal opportunities—implicated a derivative right to education based in students' well-recognized fundamental rights to speak and possibly to vote.¹⁴¹ State-education decisions, Justice Powell resolved, "should be scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution."¹⁴² The *Rodriguez* appellees lost on all counts.

C. The Never-Applicable "*Rodriguez* Formulation"

While dicta later in the majority opinion suggest that some modicum of education could conceivably be constitutionally protected,¹⁴³ the Supreme Court has yet to identify a single educational benefit that satisfies what Justice Harry Blackmun later

¹³⁸ *See id.* at 28–29.

¹³⁹ *See id.* at 37.

¹⁴⁰ *See id.* at 35.

¹⁴¹ *See id.* at 35–37.

¹⁴² *Rodriguez*, 411 U.S. at 39.

¹⁴³ *Id.* at 35–37 (discussing whether constitutional protections might extend to the "identifiable quantum of education" necessary to enjoy fundamental rights to speech and vote).

called the “*Rodriguez* formulation.”¹⁴⁴ Worse, the Court has upheld *Rodriguez* as a bar to any meaningful inquiry that could justify such recognition.¹⁴⁵ These positions have persisted even in the face of the near-absolute deprivation of educational opportunity,¹⁴⁶ educational divestment,¹⁴⁷ and the imposition of access-prohibitive transportation fees.¹⁴⁸ Following the Justices’ lead, the federal courts of appeals have not since extended constitutional protection to any degree of educational opportunity—no matter how basic, minimal, or foundational, no matter how severe the depriving state action.¹⁴⁹

¹⁴⁴ *Plyler*, 457 U.S. at 231–33 (Blackmun, J., concurring). Justices Powell and Blackmun are the only Justices to join the majorities in both *Rodriguez* and *Plyler*. Unlike Justice Powell, who does not address the fundamental-rights analysis from his *Rodriguez* opinion at all in his *Plyler* concurrence, compare *Rodriguez*, 411 U.S. at 28–39 (outlining Powell’s fundamental-rights analysis in *Rodriguez*), with *Plyler*, 457 U.S. at 236–41 (Powell, J., concurring), Justice Blackmun takes considerable efforts to address how the Constitution prohibits the states from excluding undocumented-migrant children from public-education benefits within what he calls the “*Rodriguez* formulation,” which he believes “implicitly acknowledged that certain interests, though not constitutionally guaranteed, must be accorded a special place in equal protection analysis.” *Plyler*, 457 U.S. at 232–33 (Blackmun, J., concurring).

¹⁴⁵ See *Plyler*, 457 U.S. at 223 (citing *Rodriguez*, 411 U.S. at 28–39) (“Nor is education a fundamental right.”); *Papasan*, 478 U.S. at 285–86 (“Nor does this case require resolution of these [fundamental rights and equal protection] issues.”); *Kadmas v. Dickinson*, 487 U.S. 450, 458 (1988) (“Nor have we accepted the proposition that education is a ‘fundamental right.’”).

¹⁴⁶ *Plyler*, 457 U.S. at 224–25, 230 (holding that imposing tuition burdens uniquely on undocumented students threatened their absolute deprivation of education without accomplishing some “substantial goal of the state.”).

¹⁴⁷ The issue in *Papasan* concerned only one part of the state’s school-funding system: the state’s property management and distribution of benefits from lieu lands set aside by Native American cessation. 478 U.S. at 270–74. The Court remanded for more development on whether the Fourteenth Amendment Equal Protection Clause allows the state to distribute proceeds (or, in this case, losses) from the lieu lands unequally among its school districts. *Id.* at 292.

¹⁴⁸ In *Kadmas*, a majority of the Justices found that a North Dakota school district’s assessment of busing fees did not threaten an impoverished student’s right to access public school opportunities. 487 U.S. at 455, 458.

¹⁴⁹ See, e.g., *Bauza v. Morales Carrion*, 578 F.2d 447, 450–53 (1st Cir. 1978) (finding that there is no substantive Fourteenth Amendment right to fair application procedures to “select[]” public schools); *Handberry v. Thompson*, 436 F.3d 52, 70 (2d Cir. 2006) (concluding that incarcerated persons have no substantive Fourteenth Amendment right to general education services); *Brian B. ex rel. Lois B. v. Pa. Dep’t of Educ.*, 230 F.3d 582, 586 (3d Cir. 2000) (deciding that incarcerated persons have no substantive Fourteenth Amendment right to general education); *Sellers ex rel. Sellers v. Sch. Bd. of Manassas*, 141 F.3d 524, 530–31 (4th Cir. 1998) (declining to find a Fourteenth Amendment right to disability screening, diagnosis, or accommodation necessary to access educational opportunities); *O’Connor v. Bd. of Educ. of Sch. Dist. No. 23*, 645 F.2d 578, 580–81 (7th Cir. 1981) (rejecting a fundamental educational “right to personal development”); *Friends of Lake*

Students have not encountered better success before state courts or legislatures. After *Rodriguez*, litigants first turned to state courts to take on school-finance schemes.¹⁵⁰ Both as a matter of substantive law and of procedure, the appropriateness of school-finance systems thus depended entirely on how state supreme courts interpreted their own state constitutions.¹⁵¹ Initially, this approach found occasional success, particularly in Kentucky,¹⁵² New Jersey,¹⁵³ and West Virginia,¹⁵⁴ often as a function of the state high courts deeming the education right “fundamental.”¹⁵⁵ However, in more than half the states, the state supreme courts have either upheld the school-finance system as constitutional¹⁵⁶ or invoked separation of powers to abstain from directing state legislatures in their economic-policy prerogatives.¹⁵⁷

Irrespective of individual state-court outcomes, the emergence of state school-finance litigation spurred structural changes

View Sch. Dist. v. Beebe, 578 F.3d 753, 761 (8th Cir. 2009) (holding that there is no fundamental-rights barrier to state law facilitating the consolidation of school districts); *Petrella v. Brownback*, 787 F.3d 1242, 1265–66 (10th Cir. 2015) (avoiding the fundamental rights question); *cf. Knight v. Alabama*, 476 F.3d 1219, 1228 n.18 (11th Cir. 2007) (distinguishing between school-finance litigation and claims seeking fundamental rights protection). *But see generally Gary B.*, 957 F.3d 616 (extending fundamental rights recognition to basic literacy prior to being vacated). Neither the Fifth Circuit, the Ninth Circuit, nor the D.C. Circuit appears to have remarked substantively on the fundamental nature of education rights since *Kadrmas*.

¹⁵⁰ See John Dayton & Anne Dupre, *School Funding Litigation: Who’s Winning the War?*, 57 VAND. L. REV. 2351, 2412 (2004) (discussing state-court school-finance litigation strategies as necessary, but comprehensively ineffective for accomplishing educational adequacy, equity, and racial desegregation).

¹⁵¹ *Cf. Wainwright v. Goode*, 464 U.S. 78, 84 (1983).

¹⁵² *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 215 (Ky. 1989) (“Kentucky’s entire system of common schools is unconstitutional.” (emphasis in original)).

¹⁵³ *Abbott v. Burke*, 495 A.2d 376, 390–94 (N.J. 1985) (transferring the case to an administrative agency for a determination of whether educational inequities were so stark as to violate equal protection guarantees).

¹⁵⁴ *Pauley v. Bailey*, 324 S.E.2d 128, 129–30, 133–35 (W.Va. 1984) [*Pauley III*], (citing *Pauley v. Kelly*, 255 S.E.2d 859 (W.Va. 1979) [*Pauley I*]) (finding that West Virginia state officials had a duty under the state constitution to “ensure the complete executive delivery and maintenance of a ‘thorough and efficient system of free schools’” (quoting W. VA. CONST. art. XII, § 1)).

¹⁵⁵ See *Rose*, 790 S.W.2d at 201; *Pauley I*, 255 S.E.2d at 878; *Robinson v. Cahill*, 351 A.2d 713, 720 (N.J. 1975) [*Robinson IV*]. *But see McCleary v. State*, 269 P.3d 227, 261–62 (Wash. 2012).

¹⁵⁶ See, e.g., *McDaniel v. Thomas*, 285 S.E.2d 156, 167–68 (Ga. 1981); *Pendleton Sch. Dist. v. Oregon*, 185 P.3d 471, 482 (Or. Ct. App. 2008).

¹⁵⁷ See, e.g., *Ex parte James*, 836 So.2d 813, 819 (Ala. 2002); *Neb. Coal. for Educ. Equity & Adequacy v. Heineman*, 731 N.W.2d 164, 183 (Neb. 2007).

in how all states collect and distribute revenues to school districts—whether these changes were directed by the courts or generated *sua sponte* by state legislatures.¹⁵⁸ And while legislature-initiated reforms typically have been less effective than court-ordered ones in terms of both resource allocation and student achievement,¹⁵⁹ court-supervised reforms have not been uniformly successful.¹⁶⁰ Most economists who study education link school-finance-reform successes to a shift in focus from “equity” to “adequacy.”¹⁶¹ A recent paper demonstrates a robust link between (in)adequacy findings, absolute and relative spending in high-poverty districts and notable improvement in student-graduation rates,¹⁶² while earlier research suggests that these infusion-based achievement effects wane over time.¹⁶³ Another influential article suggests that school-finance equalization has perverse incentives that lead to *fewer* resources for impoverished schools in high-tax states.¹⁶⁴ Critical scholarship illuminates a more worrying concern: that majority–Mexican American school districts like the ones that initiated the *Rodriguez* cases continue

¹⁵⁸ William N. Evans, Sheila E. Murray & Robert M. Schwab, *Schoolhouses, Court-houses, and Statehouses after Serrano*, 16 J. POL. ANALYSIS & MGMT. 10, 28 (1997). *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971), was, in many respects, the precursor case to *Rodriguez*. The California Supreme Court’s finding that education is a fundamental right under the *Federal* Constitution, *Serrano*, 487 P.2d at 1258, became the *casus belli* for Justice Powell’s *Rodriguez* opinion and his concentration in that opinion on discrediting *Serrano*’s supporting theory and social science. See, e.g., *Rodriguez*, 411 U.S. at 23 (critiquing the “major factual assumption of *Serrano*” as false (quoting Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 YALE L.J. 1303, 1328–29 (1972))). The post-*Serrano* and *Rodriguez* amendments to the California Constitution illustrate the role that political resistance to court decisions have played in school financing outcomes. See, e.g., Scott R. Bauries, *State Constitutional Design and Education Reform: Process Specification in Louisiana*, 40 J.L. & EDUC. 1, 21–30 (2011).

¹⁵⁹ See Evans et al., *supra* note 158, at 29.

¹⁶⁰ Sean P. Corcoran & William N. Evans, *Equity, Adequacy, and the Evolving State Role in Education Finance*, in HANDBOOK OF RESEARCH IN EDUCATION FINANCE AND POLICY 353, 363–65 (Helen F. Ladd & Margaret E. Goertz, eds., 2d ed. 2015).

¹⁶¹ See, e.g., *id.* at 364–65 (describing research). But see generally Joshua E. Weishart, *Transcending Equality versus Adequacy*, 66 STAN. L. REV. 477 (2014) (delegitimizing the dichotomy by arguing that equality (or equity) and adequacy are not mutually exclusive in practice).

¹⁶² Christopher A. Candelaria & Kenneth A. Shores, *Court-Ordered Finance Reforms in the Adequacy Era*, 14 EDUC. FIN. & POL’Y 31, 57 (2019) (using the equity vs. adequacy distinction to inform identification strategy and econometric modeling).

¹⁶³ Julien Lafortune, Jesse Rothstein & Diane Whitmore Schanzenbach, *School Finance Reform and the Distribution of Student Achievement*, 10 AM. ECON. J.: APPLIED ECON. 1, 16–17 (2018).

¹⁶⁴ Caroline M. Hoxby, *All School Finance Equalizations Are Not Created Equal*, 116 Q.J. ECON. 1189, 1228–29 (2001).

to receive inequitable resources even under both equity and adequacy funding schemes.¹⁶⁵

However one understands the successes of school-finance litigation, it seems likely that this approach is reaching its breaking point, even where it has previously been successful. The New Jersey Supreme Court continues ploddingly to hold the state educational agencies to their promises to fully fund “*Abbott* schools,” districts that the New Jersey court determined were under-resourced and unable to adequately provide their students with promised educational benefits.¹⁶⁶ After decades of mediating equitable school finance, in *Neeley v. West Orange-Cove Consolidated Independent School District*,¹⁶⁷ the Texas Supreme Court acquiesced to the limits of school-finance reform alone to adequately avail to all school districts the resources necessary to fulfill the state’s educational obligations.¹⁶⁸ As the Texas court concluded: “[D]efects in the structure of the public school finance system expose the system to constitutional challenge. Pouring more money into the system may forestall those challenges, but only for a time. They will repeat until the system is overhauled.”¹⁶⁹

For half a century, scholars and advocates have marshaled careful, impassioned, and cogent arguments against *Rodriguez* and argued for creative ways around it, but nothing has changed.¹⁷⁰ States appear to have almost complete latitude to determine the contours of any right to education under their respective laws.¹⁷¹ Federal courts also appear to have no appetite for reviving the long-dormant federal privileges-and-immunities conversation¹⁷² or revisiting *Rodriguez*’s framing of education as a substantive liberty interest.¹⁷³

¹⁶⁵ E.g., Enrique Alemán, Jr., *Situating Texas School Finance Policy in a CRT Framework: How “Substantially Equal” Yields Racial Inequity*, 43 EDUC. ADMIN. Q. 525, 548 (2007).

¹⁶⁶ *Abbott ex rel. Abbott v. Burke*, 20 A.3d 1018, 1037–38 (N.J. 2011) (citing *Robinson IV*).

¹⁶⁷ 176 S.W.3d 746 (Tex. 2005).

¹⁶⁸ *Id.* at 754 (Tex. 2005). Perversely, the Texas court finally found that local ad valorem tax-based school financing was unconstitutional, but only because the state’s shifted reliance on property-wealthy districts’ taxes was an improperly levied state tax.

¹⁶⁹ *Id.* (citation omitted).

¹⁷⁰ See, e.g., *supra* notes 17–18, 20–25.

¹⁷¹ Cf. *Goode*, 464 U.S. at 84.

¹⁷² See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742, 758 (2010) (“For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause.”).

¹⁷³ Cf. Black, *supra* note 20.

So any viable approach toward a constitutionally recognized right to education must regard *Rodriguez* as more than just precedent. It must accept the intractability of that case as what Professors G. Alexander Nunn and Alan Trammell term “settled law.”¹⁷⁴ It must work *within* the constraints of that case to identify an opportunity to secure federal-constitutional protections for education.

II. WHAT ABOUT PROPERTY INTERESTS?

In his efforts to limit judicial scrutiny of states’ educational decisions, Justice Powell was less than perfectly tidy. He was correct that “[e]ducation . . . is not among the rights afforded explicit protection under our Federal Constitution,”¹⁷⁵ but the universality of his implicit-rights analysis is not supported by the text of his decision. The *Rodriguez* Court examined and debated liberty interests. The Court distinguished school-finance issues from the *educational* liberty canon¹⁷⁶ and separately articulated why public education is not otherwise a *fundamental* liberty.¹⁷⁷ But the Justices by no means examined the full set of due process interests, even as the Court understood them then.¹⁷⁸ In Justice Powell’s own words, “[w]e have carefully considered each of the arguments supportive of the District Court’s finding that education is a fundamental right or liberty and found *those arguments* unpersuasive.”¹⁷⁹ A close read of all four *Rodriguez* opinions reveals that none—including Justice Marshall’s heralded dissent—discusses education as a property interest. Justice Powell’s language identifies “fundamental rights” and “liberty.”¹⁸⁰ And, mindful of education’s nonappearance in the Federal Constitution, this identification strategy treats liberty interests as the only cognizable harbor for due process in education.

This is simply not true. Property interests have considerable untapped and underexplored potential for sourcing procedural—and substantive—due process rights in education. Wholly apart from that, the text of the *Rodriguez* decision does not support the

¹⁷⁴ Nunn & Trammell, *supra* note 19.

¹⁷⁵ *Rodriguez*, 411 U.S. at 35.

¹⁷⁶ *See id.* at 58 (“These practical considerations [regarding school finance], of course, play no role in the adjudication of the constitutional issues presented here.”).

¹⁷⁷ *See id.* at 37–39.

¹⁷⁸ For further discussion of the Court’s understanding of substantive due process, see *infra* Part II.B.

¹⁷⁹ *Rodriguez*, 411 U.S. at 37 (emphasis added).

¹⁸⁰ *Id.* at 37–38; *see also id.* at 61 (Stewart, J., concurring).

broad reading the federal courts have imposed upon it. At best, the majority opinion establishes doctrine on students' educational liberty interests. The opinion's complete silence on the concept of education as property means that questions on both remain open. The *Rodriguez* Court's failure to engage a property-interest analysis, in particular, should be treated as an Achilles' heel by which to narrow its otherwise overly broad settlement of the education-rights question.¹⁸¹

Considering the Justices' error by omission, if it were possible to identify doctrinal support for education as a property interest, one could secure the elusive due process protection without disturbing the settled law of *Rodriguez* on educational liberty.

A. *Goss v. Lopez* and the Limits of Procedural Due Process

A due process discussion of the educational property interest begins with *Goss v. Lopez*. In *Goss*, all nine Justices agreed that the State of Ohio created a property interest in public education—through the combination of laws that provide public education¹⁸² to all residents and laws that compel all eligible children to attend school¹⁸³—that is protected by due process. Because students have the necessary “legitimate claim[s] of entitlement” to public education, the state cannot interfere with students' enjoyment of these public education opportunities “without adherence to the minimum procedures required by [the Fourteenth Amendment Due Process] Clause.”¹⁸⁴ As a result, the states must give students

¹⁸¹ One's perspective on the universality of *Rodriguez* will color one's perspective on whether I propose here a “distinguishing” from *Rodriguez* on doctrinal completeness grounds or a “narrowing” of the *Rodriguez* holding that otherwise should apply. See Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1868–70 (2014) [hereinafter *Narrowing Precedent*]; Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 927–29 (2016) [hereinafter *Narrowing from Below*]. The architecture of Justice Powell's *Rodriguez* majority opinion purports to fully settle the question even if its engineering does not fully support that claim. If one goes with the architecture, as I suspect most who read *Rodriguez* will, this account of the case is a “narrowing.” But if one goes with the engineering, this is a “distinguishing.” That difference, while possibly important for doctrinal-accuracy purposes and perhaps for persuading the federal courts to adopt the proposed approach, is of lesser importance for identifying the opportunity or justifying its merits.

¹⁸² See *Goss*, 419 U.S. at 573 (“[O]n the basis of state law, [students] plainly had legitimate claims of entitlement to a public education.”); *id.* at 586 (Powell, J., dissenting) (“State law . . . extends the right of free public school education to Ohio students in accordance with the education laws of that State.”); see also Black, *supra* note 20, at 1071.

¹⁸³ *Goss*, 419 U.S. at 567; *id.* at 586 (Powell, J., dissenting).

¹⁸⁴ *Id.* at 573–74.

adequate notice and hearing before depriving them of educational opportunities.¹⁸⁵

But *Goss* does not address the nature of education—the specifics of *what* the *Goss* plaintiffs were entitled to.¹⁸⁶ Unlike in *Rodriguez*, this was not an error by the Court. The substance of the educational property was not at issue.¹⁸⁷ And so a searching analysis of the nature of education beyond whether the state’s prescribed disciplinary rules were part of the substantive entitlement or severable as procedure¹⁸⁸ would have been inappropriate.¹⁸⁹

However, the Justices did agree that the substantive public educational–property interest does not emanate from the Federal Constitution.¹⁹⁰ Instead, it “stem[s] from an independent source such as state law . . . that secure[s] certain benefits and that support[s] claims of entitlement to those benefits.”¹⁹¹ As *Board of Regents of State Colleges v. Roth* instructs, the states determine the predicate “dimensions”—whether and to what extent a right to public education exists at all.¹⁹² Where those “rules or understandings” create a mutual expectation in a substantive education tangible, then procedural due process attaches.¹⁹³ But when

¹⁸⁵ *Id.* at 581.

¹⁸⁶ Though the majority purports to consider “the *nature* of the interest at stake,” *id.* at 575–76 (emphasis in original) (quoting *Roth*, 408 U.S. at 570–71) the whole of its analysis on that front is to quote the *Brown* maxim that opens this Article: “[E]ducation is perhaps the most important function of state and local governments.” *Goss*, 419 U.S. at 576 (quoting *Brown*, 347 U.S. at 493).

¹⁸⁷ Compare *Goss*, 419 U.S. at 573, with *id.* at 586 (Powell, J., dissenting).

¹⁸⁸ Justice Powell’s dissent argues that discipline rules are part of the defining dimensions of the educational expectation, while Justice Byron White’s majority opinion argues that they are severable for purposes of procedural due process review. Compare *id.* at 586–87 (Powell, J., dissenting), with *id.* at 573–74.

¹⁸⁹ Cf. *Univ. of Mich. v. Ewing*, 474 U.S. 214, 220, 222–23 (1985) (noting “Justice Brandeis’[s] admonition not to ‘formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied’” and thus declining to evaluate whether substantive due process extends to educational property because, assuming that it does, the university’s decision to terminate a failing medical student’s enrollment was not arbitrary or capricious (quoting *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring))).

¹⁹⁰ See *Goss*, 419 U.S. at 572–73; *id.* at 586 (Powell, J., dissenting).

¹⁹¹ *Roth*, 408 U.S. at 577.

¹⁹² See *Goss*, 419 U.S. at 586 (Powell, J., dissenting) (“In identifying property interests subject to due process protections, the Court’s past opinions make clear that these interests ‘are created and their *dimensions are defined* by existing rules or understandings that stem from an independent source such as state law.’” (emphasis in original) (quoting *Roth*, 408 U.S. at 577)).

¹⁹³ See, e.g., *Debra P. v. Turlington*, 644 F.2d 397, 403 (5th Cir. Unit B May 1981).

those same “rules or understandings” are either hortatory or create no vested interest in an education tangible, then procedural due process does not attach.¹⁹⁴

Procedural due process, when it does attach, is insufficient as a safeguard against a state making material changes to the educational entitlement. Although education science has advanced considerably in documenting the importance of access to high-quality classroom instruction for teaching and learning,¹⁹⁵ incorporating this context might only weight consideration of the *Mathews v. Eldridge*¹⁹⁶ factors more favorably toward the conclusion that *total* exclusion¹⁹⁷ from high-quality teaching-and-learning environments is a material deprivation of educational property.¹⁹⁸ Neither improvements in education science nor the general public’s increasing awareness of educational deprivation nor application of the *Eldridge* factors could prevent a state from making harmful amendments to its public-education entitlement so long as they were plausibly rational in basis. Nor could they prevent a state from unreasonably withdrawing an education benefit from an individual student so long as it followed appropriate procedures in doing so.¹⁹⁹

B. Substantive Due Process for Educational Property?

Only a substantive due process right appears able to prevent a state from taking such an action. And *Goss* is silent on whether

¹⁹⁴ Cf. *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 370 (4th Cir. 1998) (“[T]he school, not the teacher, has the right to fix the curriculum.”).

¹⁹⁵ See Ryan, *supra* note 17, at 276 (“School quality is also important. . . . [S]tudents who move from high-poverty schools to middle-income schools generally improve their academic performance and increase their chances of graduating.”).

¹⁹⁶ 424 U.S. 319 (1976). One year after *Goss*, the Court developed a three-factor rubric to assist administrators and the courts in determining the constitutional sufficiency of divestment procedures: (1) the importance of the subject property interest and the nature of the injury to that interest; (2) the risk of erroneous deprivation because of the procedures used, including assessment of the probable value of alternative or additional procedural safeguards; and (3) the government’s interest, including cost and administrative burden. See *id.* at 335.

¹⁹⁷ To retroactively apply the *Eldridge* factors, *Goss* infamously undersells the importance of the educational interest by defining material deprivation as “total exclusion from the educational process for more than a trivial period,” 419 U.S. at 576.

¹⁹⁸ See *supra* notes 69–70 (collecting cases that discuss the limited scope of procedural due process in alternative-school assignments and in-school suspensions based on the theory that neither effects a *total* deprivation of the educational entitlement).

¹⁹⁹ Cf. *Ingraham v. Wright*, 430 U.S. 651, 701–02 (1977) (Stevens, J., dissenting) (arguing that deprivations of property might merit lesser procedural due process protections than deprivations of liberty).

substantive due process exists for state-created rights like public education. At the same time, the Supreme Court has never interpreted *Goss*—or any other case—as foreclosing the possibility.²⁰⁰

Ostensibly, the federal courts are reluctant to expand the scope of substantive due process because of the absence of guiding criteria for embracing some rights based elsewhere and excluding others.²⁰¹ Apart from the doctrinal concerns, there are also practical concerns about the courts' technical competence to evaluate granular questions of administrative sufficiency.²⁰² Such practical concerns are possibly heightened possibly by the prospect of a deluge of individual claims that could overwhelm scarce judicial resources.²⁰³ This judicial reluctance has sunk many an attempt at expanding the canon of interests that might qualify for substantive due process protections.²⁰⁴

But the Court occasionally has embraced newly articulated interests when it understands them as “implicitly guaranteed by the Constitution.”²⁰⁵ Many of these—including the canonical education rights to teach,²⁰⁶ learn,²⁰⁷ operate independent schools,²⁰⁸ and direct the upbringing of one's children²⁰⁹—emerged during

²⁰⁰ See, e.g., *Ewing*, 474 U.S. at 223 (declining to decide the question of substantive due process in education property); *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 91–92 (1978) (same).

²⁰¹ Cf. *Collins v. City of Harker Heights*, 503 U.S. 115, 125–26 (1992) (citing *Ewing*, 474 U.S. at 225–26).

²⁰² See, e.g., *Rodriguez*, 411 U.S. at 42–44 (“The very complexity of the problems of financing and managing a statewide public school system suggests that ‘there will be more than one constitutionally permissible method of solving them,’ and that, within the limits of rationality, ‘the legislature’s efforts to tackle the problems’ should be entitled to respect.” (quoting *Jefferson v. Hackney*, 406 U.S. 535, 546–47 (1972))).

²⁰³ Cf. *Freeman v. Pitts*, 503 U.S. 467, 471, 489–90 (1992) (directing the federal courts to return control over expenditures and student and teacher assignment to local school boards upon finding a school district has reached “unitary status”).

²⁰⁴ See, e.g., *Collins*, 503 U.S. at 125–26 (finding no substantive due process interest in adequate job training); *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (finding, similarly, no such interest in assisted suicide).

²⁰⁵ *Rodriguez*, 411 U.S. at 33–34.

²⁰⁶ See *Meyer v. Nebraska*, 262 U.S. 390, 400 (1925) (noting that a teacher’s right to teach was “within the liberty of the [Fourteenth] Amendment”); *Farrington v. Tokushige*, 273 U.S. 284, 298–99 (1927) (recognizing Fifth Amendment due process interest in teaching and learning).

²⁰⁷ See *Meyer*, 262 U.S. at 399–400 (recognizing substantive liberty interest in “acquir[ing] useful knowledge”); *Tokushige*, 273 U.S. at 298–99.

²⁰⁸ See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535–36 (1925) (recognizing a substantive property interest in operating an independent school); *Tokushige*, 273 U.S. at 298–99 (recognizing Fifth Amendment due process interest in operating independent-school business).

²⁰⁹ See *Meyer*, 262 U.S. at 400–01; *Pierce*, 268 U.S. at 534–35; cf. *Wisconsin v. Yoder*, 406 U.S. 205, 234–35 (1972) (recognizing parents’ rights to direct religious upbringing of

the *Lochner* era,²¹⁰ which since has been selectively praised and denigrated for imposing constitutional limits on legislative infringements of individual civil liberties.²¹¹ Since the *Lochner* era, most newly recognized interests, like the rights to bodily integrity,²¹² contraception,²¹³ marriage,²¹⁴ privacy,²¹⁵ and child custody,²¹⁶ have developed as derivative of the constitutional liberty interest.

children, as informed by both substantive liberty to direct children's upbringing and First Amendment religious liberty in the post-*Lochner* era).

²¹⁰ Named for *Lochner v. New York*, 198 U.S. 45 (1905), the era is characterized by an expansive use of substantive due process to strike down state laws believed to infringe on economic liberty and property interests. Most identify the era as beginning with *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), the first case in which the Court interpreted the word "liberty" in a due process context, and ending with *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), which upheld a state's minimum-wage law against a substantive due process liberty-of-contract claim.

²¹¹ See generally Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751 (2009).

²¹² *Skinner v. Oklahoma*, 316 U.S. 535, 544–46 (1942) (Stone, C.J., concurring) (finding that forced sterilization by the state violates an individual's "liberty of the person"). But see *Doe ex rel. Tarlow v. District of Columbia*, 489 F.3d 376, 383 (D.C. Cir. 2007) (finding no due process violation in the failure to consider the autonomy wishes of "a person who has never had the capacity 'to make an informed and voluntary choice'" (quoting *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 280 (1990)) (emphasis in original)).

²¹³ *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring) ("[T]he concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights."); *id.* at 500 (Harlan, J., concurring) (finding that a state law restricting married persons' access to contraception "violates basic values 'implicit in the concept of ordered liberty'" (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937))); *id.* at 507 (White, J., concurring) (finding that a state law restricting married persons' access to contraception has a "telling effect on the freedoms of married persons, and therefore . . . deprives such persons of liberty without due process of law").

²¹⁴ See generally *Loving v. Virginia*, 388 U.S. 1 (1967) (recognizing a substantive liberty interest in choice of spouse); *Obergefell*, 576 U.S. 644 (same); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (finding that a state cannot infringe upon right to marry based on non-payment of child support).

²¹⁵ *Griswold*, 381 U.S. at 484–86 (finding that the "right of privacy" emanates from "penumbras" of "specific guarantees" in the Bill of Rights); *id.* at 499 (Goldberg, J., concurring) ("[P]rivacy in the marital relation is fundamental and basic—a personal right 'retained by the people' within the meaning of the Ninth Amendment" (quoting U.S. CONST. amend. IX)); *id.* at 486 (Goldberg, J., concurring) ("[T]he concept of liberty . . . embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution.").

²¹⁶ *Stanley v. Illinois*, 405 U.S. 645, 650–52 (1972) (applying substantive due process to invalidate a state law that rendered children of unwed fathers wards of the state even if their fathers desired custody).

No newly recognized interests have similarly emanated from the property interest. Outside the contexts of real property,²¹⁷ other tangible property,²¹⁸ and the ability to contract,²¹⁹ one might be convinced that *constitutional* property interests do not exist at all.²²⁰

The oft-quoted standard²²¹ for extending substantive due process protections to a heretofore unrecognized interest is that said interest is “deeply rooted in this Nation’s history and tradition”²²² and “implicit in the concept of ordered liberty,”²²³ such that “neither liberty nor justice would exist if [the interest at issue] were sacrificed.”²²⁴ As Professor Derek Black demonstrates in *The Fundamental Right to Education*, public education more than meets this standard.²²⁵ Black tracks down the historical roots of public education in tradition and, more importantly, in law.²²⁶ Among other things, Black shows that establishing public schools was foundational for statecraft and, in the cases of newer and reconstructed states, a prerequisite for admission to the Union.²²⁷ After admission, the federal government required new territories to set aside land on which new schools could be built or existing schools

²¹⁷ See, e.g., *Buchanan v. Warley*, 245 U.S. 60, 82 (1917) (finding that a zoning ordinance prohibiting the sale of a home to a Black buyer because of neighborhood demographics violated seller’s property right of alienation); *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) (finding that a requirement that private-property owners grant public easements and make improvements for public use in exchange for zoning permits for private-property improvements is an unconstitutional condition in violation of the Takings Clause).

²¹⁸ See, e.g., *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 172 (1998) (finding that interest income generated by Interest on Lawyer Trust Accounts is the “private property” of the owner of the principal, which under Texas law is the client).

²¹⁹ See, e.g., *Pierce*, 268 U.S. at 536.

²²⁰ See, e.g., *Siegert v. Gilley*, 500 U.S. 226, 233–35 (1991) (declining to recognize a substantive due process property-based interest in reputation); see also Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555, 560–61 (1997).

²²¹ See, e.g., *Obergefell*, 576 U.S. at 697–98 (Roberts, C.J., dissenting); *McDonald v. Cty. of Chicago*, 561 U.S. 742, 767 (2010); *Lawrence v. Texas*, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 952–53 (1992) (Rehnquist, C.J., concurring in part and dissenting in part); *Paul v. Davis*, 424 U.S. 693, 713 (1976); *Roe v. Wade*, 410 U.S. 113, 152–53 (1973).

²²² *Glucksberg*, 521 U.S. at 720–21 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

²²³ *Palko*, 302 U.S. at 325.

²²⁴ *Id.* at 326.

²²⁵ See generally Black, *supra* note 20.

²²⁶ See *id.* at 1081–95.

²²⁷ *Id.* at 1090–93.

could be supported.²²⁸ These efforts make the enterprise both “deeply rooted in the Nation’s history and tradition” and *explicit* “in the concept of ordered liberty.”²²⁹

Eminent constitutional law scholars of education such as Professors Susan Bitensky,²³⁰ Derek Black,²³¹ and Joshua Weishart²³² have presented compelling arguments for how one could situate education within liberty concepts; Black’s proof for identifying education as “implicit in the concept of ordered liberty” is particularly impeccable. Nevertheless, understanding education as a due process liberty does not fully identify the interest. And it construes education in a sufficiently abstract way that the Supreme Court could guarantee a liberty-based educational interest only for it to be devoid, not ironically, of substance. This is because the hallmark of a liberty interest is *removing* governmental constraints. Freedom and choice are defined by the absence of governmental action, excepting only the most ministerial tasks like licensure, and even then only when the access to licensure is predicated on individual—and not the government’s—choice.

The Court’s unwillingness to take substantive property interests as seriously as it has taken substantive liberty interests led prominent legal historian of property rights Professor James W. Ely, Jr., to decry the “artificial and unhistorical [post–New Deal jurisprudence] division between the rights of property owners and other individual liberties.”²³³ Even the Court’s invalidation in *Moore v. City of East Cleveland*²³⁴ of a zoning ordinance that restricted occupants of a residence to members of a single family

²²⁸ See generally, e.g., *Papasan*, 478 U.S. 265 (discussing a school district’s right to federal land-grant proceeds).

²²⁹ Black, *supra* note 20, at 1063.

²³⁰ Bitensky, *supra* note 17 at 588–90 (suggesting that the importance of education has increased over time such that education rights are implicit in due process liberty).

²³¹ See generally Black, *supra* note 20 (suggesting that education is implicit in the concept of ordered liberty).

²³² *Reconstituting the Right*, *supra* note 25, at 976–78 (suggesting an “equal liberty” not inconsistent with the Court’s approach in *Bolling*).

²³³ James W. Ely, Jr., *Reflections on Buchanan v. Warley, Property Rights, and Race*, 51 VAND. L. REV. 953, 953–54 (1998); see also James W. Ely, Jr., *The Enigmatic Place of Property Rights in Modern Constitutional Thought*, in *THE BILL OF RIGHTS IN MODERN AMERICA AFTER 200 YEARS* 87, 89–90 (David J. Bodenhamer & James W. Ely, Jr. eds., 1993). See also generally JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* (3d ed. 2008) [hereinafter *THE GUARDIAN*].

²³⁴ 431 U.S. 494 (1977).

turned primarily on the ordinance's invasion of "freedom of personal choice in matters of marriage and family life"²³⁵—in other words, liberty.²³⁶ Though Justice John Paul Stevens justified his deciding vote based on the enjoyment-of-private-property restriction that compliance required,²³⁷ he was alone in his judgment that property was "the critical question presented by [that] case."²³⁸ And that was with respect to private real property. Under the most generous possible construction, the balance of constitutional property interests in public education are neither private nor real nor "fundamental" in the same way that recognized civil liberties are. Does this mean that substantive educational property is anathema to substantive federal due process?

C. Educational Property

No. Public education *is* a property interest, and as such it must be protected from arbitrary infringement by the states through both procedural *and substantive* due process.²³⁹ Anything less would relegate property to a second tier of due process interests,²⁴⁰ and the Constitution neither contemplates nor infers such

²³⁵ *Id.* at 499 (plurality opinion) (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974)).

²³⁶ See generally *Johnson v. City of Cincinnati*, 310 F.3d 484 (6th Cir. 2002) (finding that a city ordinance banning persons with drug-offense histories from "drug exclusion zones" violates substantive liberty-based rights to travel and association).

²³⁷ *Moore*, 431 U.S. at 513 (Stevens, J., concurring).

²³⁸ Compare *id.*, with *id.* at 498 (plurality opinion) (distinguishing the issue in *Moore* from the Court's previous decision in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), which upheld a similar ordinance affecting *unrelated* individuals, because the ordinance in *Moore* affected *related* individuals and therefore family-related liberty), and *Moore*, 431 U.S. at 531–32 (Stewart, J., dissenting) (applying *Belle Terre* without distinction).

²³⁹ Although I acknowledge that this Article employs property as a vehicle for recognizing constitutional rights to education, it does so not based on the premise that property is illusory or somehow a second-best alternative to other constitutional approaches, see Edward Rubin, *The Illusion of Property as a Right and its Reality as an Imperfect Alternative*, 2013 WIS. L. REV. 573, 577–78 (2013), but rather based on a compelling belief that education *is* property and that rights to education within our federal constitutional system are most legible as property.

²⁴⁰ Cf. THE GUARDIAN, *supra* note 233, at 8 (lamenting the post–New Deal status quo in which property rights are constructed as second-tier rights).

a hierarchy.²⁴¹ As Justice Potter Stewart wrote for the majority in *Lynch v. Household Finance Corp.*²⁴²:

[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a “personal” right, whether the “property” in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.²⁴³

This Section proposes that education is cognizable as an entitlement or “New Property” and utilizes *Plyler v. Doe* as a model for how courts ought to review substantive claims for deprivation of such a property interest in education.

1. Public education as “New Property.”

In his classic article *The New Property*, Professor Charles Reich noted that “[c]ivil liberties must have a basis in property, or bills of rights will not preserve them.”²⁴⁴ Moreover, as one district court summarized Reich’s viewpoint, “governmental entitlements in our modern society often take on the incidents of

²⁴¹ As a concurring aside, it seems somewhat as much of a stretch to infer the order of “life, liberty, and property” as suggesting ranking among due process interests as it would be to infer the order of citizenship, privileges and immunities, due process, and equal protection to infer importance among Fourteenth Amendment rights or the list of enumerated powers in Article I, Section 8 of the Constitution to infer differences in plenary magnitude.

²⁴² 405 U.S. 538 (1972).

²⁴³ *Id.* at 552. *But see* *Richardson v. Belcher*, 404 U.S. 78, 80–84 (1971) (rejecting the idea that welfare benefits were sufficiently analogous to property to limit Congress’s authority to make substantive changes in welfare benefits). There is a plausible distinction between *Belcher*’s construction of property interests as against the actions by the *states* and the same as against actions by the *federal government*. A similar bifurcation emerged between state and federal authorities to discriminate against certain noncitizens in providing welfare benefits. *Compare, e.g.,* *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (upholding an equal protection claim by newly arrived noncitizens against a state that imposed years-of-residence requirements for welfare eligibility), *with* *Mathews v. Diaz*, 426 U.S. 67, 84–87 (1976) (rejecting an extension of *Richardson* to limit Congress’s power similarly because of its different (and plenary) posture in immigration matters compared to the states).

²⁴⁴ Reich, *New Property*, *supra* note 47, at 771.

property.”²⁴⁵ Writing in the 1960s before *Lynch*, *Roth*, *Goss*, or *Memphis Light*, Reich was observing a growing welfare state in which governments were increasingly providing basic standard-of-living services, such as housing, financial assistance, and education, that citizens were not always able fully to secure for themselves in the free-market economy.²⁴⁶ Among these, he remarked, “[t]he most important public service of all, education, is one of the greatest sources of value to the individual.”²⁴⁷ And while he struggled with how to reconcile the state’s ability to withdraw these services without compensation with traditional notions of property that would not allow such a taking, he agreed with other leading scholars that the emerging “welfare state must be regarded as a source of new rights.”²⁴⁸ Mindful of these concerns, he recommended that administration of these services, which he collectively called “government largess,” “be subject to scrupulous observance of fair procedures.”²⁴⁹ His article concludes with his seismic thesis: “We must create a new property.”²⁵⁰ Though not by direct reference to education or “New Property,” in his follow-up essay, *Individual Rights and Social Welfare: The Emerging Legal Issues*, Reich elaborated on “[t]he idea of entitlement” as societal support to which individuals should be entitled by right.²⁵¹ Noting that “[s]ociety today is built around entitlement[s],” Reich understood them as “sources of security”—as “essentials” to those who partake.²⁵² Specifically centering the poor, he noted that it is only their entitlements—those to basic standard-of-living services—that the law did not enforce.²⁵³ Submitting that such entitlements represent a “minimal share in the commonwealth,” Reich argued that the poor have a right to these entitlements.²⁵⁴

Thus, public education is well-theorized as “new” or regulatory property.²⁵⁵ The Court has also established it doctrinally as

²⁴⁵ *Lopez v. Williams*, 372 F. Supp. 1279, 1299 n.16 (S.D. Ohio 1973), *aff’d sub nom. Goss v. Lopez*, 419 U.S. 565 (1975) (citing Reich, *New Property*, *supra* note 47).

²⁴⁶ Reich, *New Property*, *supra* note 47, at 738.

²⁴⁷ *Id.* at 737.

²⁴⁸ *Id.* at 786 n.233 (citing Harry W. Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143, 154–55 (1958)).

²⁴⁹ *Id.* at 783.

²⁵⁰ *Id.* at 787.

²⁵¹ *Individual Rights*, *supra* note 47, at 1256.

²⁵² *Id.* at 1255.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ See Rose, *supra* note 57, at 347 (describing the “right to such human capital as education” as among the cardinal “new property” rights).

property. Two years after *Rodriguez, Goss* recognized that the states have *already* created in their school-age populations a “legitimate entitlement to a public education as a property interest[,] which is protected by the Due Process Clause.”²⁵⁶ Either through constitutional provision or statute, each state has secured public education as a benefit it will provide to every school-age resident.²⁵⁷

Moreover, the states have required school-age youth to attend school.²⁵⁸ It follows, thus, that the states cannot withdraw

²⁵⁶ *Goss*, 419 U.S. at 574.

²⁵⁷ ALA. CONST. § 256; ALASKA CONST. art. 7, § 1; ARIZ. CONST. art. XI, § 1A; ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 5; COLO. CONST. art. IX, § 2; CONN. CONST. art. Eighth, § 1; DEL. CONST. art. x, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. 8, § 1; IOWA CONST. art. IX, § 12; KAN. CONST. art. 6, § 1; KY. CONST. §§ 183–89; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, Part First, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. part the Second, ch. V, § II; MICH. CONST. art. VIII, § 2; MINN. CONST. art. VIII., § 1; MISS. CONST. art. 8, § 201; MO. CONST. art. IX, § 1; MONT. CONST. art. X, § 1, cl. 3; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, § 2; N.H. CONST. art. 83; N.J. CONST. art. VIII, § IV, cl. 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VIII, § 2; OHIO CONST. art. VI, § 2; OKLA. CONST. art. XIII, § 1, OR. CONST. art. VIII, § 3, PA. CONST. art. III, § 14, R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. ch. II, § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 2; W. VA. CONST. art. XII, § 1; WISC. CONST. art. X, § 3; WYO. CONST. art. 7, § 1.

²⁵⁸ ALA. CODE § 16-28-3 (2019); ALASKA STAT. § 14.30.010; ARIZ. REV. STAT. §§ 15-802, 15-802 D-2 (2014); ARK. CODE ANN. § 6-18-201 (2021); CAL. EDUC. CODE § 48200; COLO. REV. STAT. § 22-33-104 (2020); CONN. GEN. STAT. § 10-184 (2021); DEL. CODE ANN. tit. 14, § 2702 (2022); FLA. STAT. § 1003.21 (2018); GA. CODE ANN. § 20-2-690.1 (2021); HAW. REV. STAT. § 302A-1132 (2020); IDAHO CODE § 33-202; 105 ILL. COMP. STAT. ANN. 5/26-1 (2022); IND. CODE §§ 20-33-2-6 (2005); 22-33-2-9(B) (2015); IOWA CODE § 299.1A (2013); KAN. STAT. ANN. § 72-3120 (2012); KY. REV. STAT. ANN. § 159.010 (2017); LA. STAT. ANN. § 17:221 (2021); ME. STAT. tit. 20A, § 3271 (2019); MD. CODE ANN., EDUC. § 7-301 (2018); MASS. GEN. LAWS ch. 76, § 1 (2014); MICH. COMP. LAWS § 380.1561 (2017); MINN. STAT. § 120A.22 (2017); MISS. CODE ANN. § 37-13-91 (2013); MO. REV. STAT. § 167.031 (2009); MONT. CODE ANN. § 20-5-102 (2009); NEB. REV. STAT. ANN. § 79-201 (2006); NEV. REV. STAT. § 392-040 (2022); N.H. REV. STAT. ANN. § 193.1 (2021); N.J. STAT. ANN. § 18A:38-25 (2013); N.M. CONST. art. XII, § 5; N.Y. EDUC. LAW § 3205 (2019); N.C. GEN. STAT. § 115C-378 (2009); N.D. CENT. CODE § 15-1-20-01 (2021); OHIO REV. CODE ANN. § 3321.01 (2013); OKLA. STAT. tit. 70, § 10-105 (2014); OR. REV. STAT. § 339.010 (2011); 24 PA. STAT. ANN. § 13-1327 (2019); R.I. GEN. LAWS § 16-19-1 (2012); S.C. CODE ANN. § 59-65-10 (2012); S.D. CODIFIED LAWS § 13-27-1 (2021); TENN. CODE ANN. § 49-6-3001(c)(1) (2021); TEX. EDUC. CODE ANN. § 25.085 (2020); UTAH CODE ANN. § 53G-6-202 (2021); VT. STAT. ANN. tit. 16, § 1121 (2012); VA. CODE ANN. § 22-1-254 (2021); WASH. REV. CODE § 28A.225.010 (2019); W. VA. CODE § 18-8-1 (2021); WIS. STAT. § 118.15 (2021); WYO. STAT. ANN. § 21-4-102 (2021).

the education benefit without cause.²⁵⁹ The second feature, compelled usage, sets public education apart among regulatory property. The possessor, in this case a schoolchild, is required to access it for his beneficial use²⁶⁰ or to access a substantially similar alternative approved of by the state.²⁶¹

The states extend these benefits through publicly accessible statutes, regulations, guidance documents, and operating documents that detail what specific educational benefits schoolchildren should expect, when, and largely in what form. Through curriculum, licensure,²⁶² accreditation, state-level assessments, funding schemes, or appropriation of state and federal funds, the states can establish discrete and identifiable expectations in the educational opportunities they will provide. These rules and understandings—the state’s educational policy—define the dimensions of the *state’s* educational guarantee and thus the constitutional due process interest.²⁶³

However, the states make no guarantee as to where, from whom, or with whom a schoolchild will access the secured educational benefit.²⁶⁴ Nor do they establish fixed expectations in the day-to-day provision of education.²⁶⁵ Instead, most states assign management of these indicia to districts that increasingly delegate more ministerial tasks, including student assignment and direct teaching and learning, to schools and teachers within

²⁵⁹ *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) (citing *Memphis Light*, 436 U.S. at 11–12); *Goss*, 419 U.S. at 573–74; *Roth*, 408 U.S. at 576–78.

²⁶⁰ Under the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), health insurance arguably shared this character with public education, although this is effectively no longer the case because the individual mandate is no longer enforced under the Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

²⁶¹ See *Pierce*, 268 U.S. at 535 (holding that although states can compel school attendance, they cannot compel attendance at public schools specifically).

²⁶² Cf. *Ambach v. Norwick*, 441 U.S. 68, 76, 80 (1979) (finding that a state has the authority to determine its own teacher eligibility standards because “[p]ublic education . . . fulfills a most fundamental obligation of government to its constituency” (quotation marks omitted) (quoting *Foley v. Connelie*, 435 U.S. 291, 297 (1978))).

²⁶³ See *Goss*, 419 U.S. at 586 (Powell, J., dissenting) (“State law, therefore, extends the right of free public school education to Ohio students *in accordance with the education laws of that State.*” (emphasis added)).

²⁶⁴ *But see generally Stealing Education*, *supra* note 55 (explaining how the states enforce district lines through criminal and civil penalties).

²⁶⁵ Cf. *Norwick*, 441 U.S. at 78:

Alone among employees of the system, teachers are in direct, day-to-day contact with students both in the classrooms and in the other varied activities of a modern school. . . . No amount of standardization of teaching materials or lesson plans can eliminate the personal qualities a teacher brings to bear in achieving these goals.

schools. But the states retain both the authority and the *obligation* to supervise all levels of the education ecosystem to ensure lawful and compliant, if not adequate, provision of the promised education. And so, while one might not have a reasonable expectation in assignment to a particular teacher, one would have a property interest in the state's continued evaluation of one's teacher's licensure, her fitness to teach its curriculum, and her effectiveness in having done so. This brings the fullness of public education within the due process-protected property interest.

Because the Constitution does not require the states to provide public education, the possibility always remains that the states could withdraw from the enterprise, especially in light of relatively recent, infamous attempts.²⁶⁶ In *Revoking Rights*, Professor Craig Konnoth observes that the eponymous action is much harder to accomplish once a fundamental right like marriage is extended or even an interest in public assistance (like participation in Affordable Care Act²⁶⁷ coverage) is established.²⁶⁸ But if the state could frame an action as restoring the status quo, Konnoth argues, a court might be more likely to uphold it even against strong claims of rights revocation.²⁶⁹

In the face of a judicially recognized duty, states would likely attempt to deregulate public education in precisely those areas where duties are found or stop evaluating the various outcomes discussed earlier. Because the states *do* retain the authority to prescribe and withdraw curricula and other specific educational incidents, a restoration frame is at least as plausible as a revocation frame with respect to particulars, especially the further one moves away from constitutional or statutory mandates and toward regulations, policies, and practices. But, to analogize to Konnoth's discussion of marriage, education is more than the "bundle of rights and obligations" that the state assigns or regulates.²⁷⁰

Education is praxis, a meaningful opportunity to access the prescribed curriculum and cocurricular opportunities, to teach and learn, to acquire knowledge. And the states have engaged in

²⁶⁶ *E.g.*, *Griffin v. Prince Edward County*, 377 U.S. 218, 232–34 (1964) (declaring Virginia's closing of integrated public schools and funding of private all-white schools unconstitutional); *Plyler*, 457 U.S. at 230 (declaring Texas's denial of public education to undocumented children unconstitutional).

²⁶⁷ Pub. L. No. 111-148, 124 Stat. 119 (2010).

²⁶⁸ *See generally* Craig J. Konnoth, *Revoking Rights*, 66 HASTINGS L.J. 1365 (2015).

²⁶⁹ *Id.* at 1435–37.

²⁷⁰ *Cf. id.* at 1438.

the enterprise partly in response to the importance of education for sociopolitical citizenship, labor-market participation, and individual and public health—and partly because of the limited availability and access to educational opportunity on the free market. And in so doing, they have created genuine expectations and reliance interests in *individuals'* opportunities to enjoy public education. Like fundamental rights, public education is a property *entitlement*.

A governmental attempt to remove existing educational opportunities because of their content—or to limit the exposure to viewpoints within previously established curricular content areas—would face First Amendment strict scrutiny.²⁷¹ It remains unclear what scrutiny administrative, legislative, or *instructional* changes to substantive educational expectations should face. The *Eldridge* factors would take the nature of education into account, but only with respect to the adequacy of a divestment *procedure*.²⁷² Because one must take the possibility of revocation seriously, one must also understand the appropriate standard for reviewing *substantive* divestment mindful of the state's general authority to prescribe curriculum.

2. *Plyler v. Doe*: The prototypical case for a public right to education.

The 1982 case *Plyler v. Doe* helps here. The *Plyler* Court forbade Texas from unilaterally withdrawing its education entitlement from undocumented migrants.²⁷³ Its rationale provides instructional guidance on how to review substantive claims of deprivation of the property interest in education through the public right.

Plyler concerned the constitutionality of two related statutory provisions. In the first, the State of Texas withheld from its public school districts the standard per-pupil expenditures for any student who was not authorized by federal immigration law to reside in the country.²⁷⁴ The second tacitly empowered districts to either

²⁷¹ See *Bd. of Educ. v. Pico ex rel. Pico*, 457 U.S. 853, 870–72 (1982) (plurality opinion) (finding that the First Amendment imposes limitation on school board's discretionary removal of library books based on their content).

²⁷² *Eldridge*, 424 U.S. at 332 (“Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendments.”).

²⁷³ *Plyler*, 457 U.S. at 230.

²⁷⁴ TEXAS EDUC. CODE ANN. § 21.031(a) (West, 1975):

charge undocumented-migrant students tuition to make up the appropriation shortfall or refuse their enrollment altogether.²⁷⁵ When the Tyler Independent School District adopted a tuition ordinance in response to the new school-finance law,²⁷⁶ undocumented migrants filed a class action to enjoin both the district's imposition of tuition and the state's divestment from their children's education as violations of the Equal Protection Clause.²⁷⁷ On appeal to the Supreme Court, this case was consolidated²⁷⁸ with a separate class action,²⁷⁹ which introduced First Amendment²⁸⁰ and preemption claims.²⁸¹

The state classifications that targeted a discrete group of undocumented-migrant children for exclusion from educational opportunity bear the hallmark of invidious discrimination.²⁸² But because of their noncitizenship and residency statuses, the federal government has plenary authority to regulate their lives²⁸³—and discriminate against them²⁸⁴—in ways it could never do to

All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.

²⁷⁵ TEXAS EDUC. CODE ANN. § 21.031(c) (West, 1975):

The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district.

²⁷⁶ *Plyler*, 457 U.S. at 207 n.2.

²⁷⁷ *See generally* Doe v. Plyler, 458 F. Supp. 569 (E.D. Tex. 1978).

²⁷⁸ *See Plyler*, 457 U.S. at 210.

²⁷⁹ *See generally* *In re Alien Child*, Educ. Litig., 501 F. Supp. 544 (S.D. Tex. 1980).

²⁸⁰ *Id.* at 560 (“If a substantial connection exists between [F]irst [A]mendment rights and the absolute deprivation of education, the infringement of [F]irst [A]mendment rights is not rendered inconsequential by the immigration status of the persons affected.”).

²⁸¹ *Id.* at 584–88.

²⁸² *Id.* at 210 n.9 (citing *Diaz*, 426 U.S. at 84–86) (“It would be incongruous to hold that the United States, to which the Constitution assigns a broad authority over both naturalization and foreign affairs, is barred from invidious discrimination with respect to unlawful aliens, while exempting the States from a similar limitation.”); *see also id.* at 231 (Marshall, J., concurring).

²⁸³ *Diaz*, 426 U.S. at 79–80.

²⁸⁴ *Id.* at 80 (“[N]or [can] the illegal entrant [] advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and *some* of its guests.” (emphasis in original)).

U.S. citizens.²⁸⁵ Not only might strict scrutiny be inappropriate,²⁸⁶ rational basis might be too stringent too.²⁸⁷ And, because of *Rodriguez*, the legislature's school-finance law could not have been subject to strict scrutiny.²⁸⁸ Thus *Plyler*'s most intriguing constitutional law feature is the Court's grappling with how to evaluate a state's deprivation of a nonfundamental right to an identifiable classification of individuals who are not only nonsuspect but also specifically set apart by the Constitution itself for certain adverse treatments because of their immigrant, noncitizen status.

Generally, the deference afforded to a state authority to regulate its own public-school eligibility and finance relies on the federal classification at issue (here, undocumented migrants). Preemption eliminates this deference. Because immigration is a federal prerogative,²⁸⁹ the states cannot adapt immigration classifications²⁹⁰ for their own policy purposes.²⁹¹ Taken one step further, even if discrimination against immigrant groups by the federal government were reviewed under a more deferential standard than rational basis, it would be inappropriate to review the same discrimination by a state government with that same deference.²⁹²

²⁸⁵ See generally *id.* But see, e.g., *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (establishing undocumented persons' rights to preremoval due process).

²⁸⁶ Cf. *Plyler*, 457 U.S. at 223 ("Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.'). But see *Richardson*, 403 U.S. at 372 (noting that state governments are rarely concerned with the legal status of residents); *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973) (finding that state authority to classify persons based on residency or citizenship status is confined within "narrow limits" (quoting *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 420 (1948))).

²⁸⁷ See *Plyler*, 457 U.S. at 250–51 (Burger, C.J., dissenting) (citing, *inter alia*, *DeCanas v. Bica*, 424 U.S. 351, 357 (1976); *Diaz*, 426 U.S. at 80).

²⁸⁸ Accord *Plyler*, 457 U.S. at 223 (citing *Rodriguez*, 411 U.S. at 28–29) ("[E]ducation [is not] a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population."); *id.* at 232 (Blackmun, J., concurring); *id.* at 247–48 (Burger, C.J., dissenting). But see *id.* at 230 (Marshall, J., concurring) ("While I join the Court opinion, I do so without in any way retreating from my [dissenting] opinion in [*Rodriguez*]. I continue to believe that an individual's interest in education is fundamental.")

²⁸⁹ See *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893).

²⁹⁰ See generally *Arizona v. United States*, 567 U.S. 387 (2012); *Dougall*, 413 U.S. 634; *Richardson*, 403 U.S. 365; *Takahashi*, 334 U.S. 410.

²⁹¹ States may only act with respect to undocumented migrants when their actions "mirror[] federal objectives and further[] a legitimate state goal." *Plyler*, 457 U.S. at 225 (citing *DeCanas*, 424 U.S. at 361).

²⁹² Cf. *id.*

Texas's status as a state provided just enough of a window for the Court to advance on equal protection. From there, the majority and concurring opinions deftly engaged in a scrutiny analysis to distinguish undocumented adults²⁹³—against whom governmental discrimination might be reviewed under variations of rational basis depending on the sovereign—and undocumented minors, to whom they append a makeshift intermediate scrutiny by analogy to natural children.²⁹⁴ The Court's approach worked in the end to invalidate the Texas laws.²⁹⁵ Not surprisingly, *Plyler* is viewed by many as a landmark case in the canons of equal protection and immigrant rights.

Plyler should also be foundational in the canons of substantive due process and education rights. *Rodriguez's* foreclosure of the fundamental right pathway forced the *Plyler* Court to articulate what the nature of education means to constitutional scrutiny in a way no case that presumed universal access to public schools possibly could have.²⁹⁶

For the *Plyler* majority, Justice William Brennan wrote, “Public education is not a ‘right’ granted to individuals by the Constitution. But neither is it merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation.”²⁹⁷ In this Article, I name the doctrinal space in which public education sits a “public right” and expose how such a right differs in nature, entitlement, and kind from various other public functions.

Justice Brennan chronicled the Court's recognition through the years of “the public schools as a most vital civic institution for the preservation of a democratic system of government,”²⁹⁸ as “the primary vehicle for transmitting ‘the values on which our society rests,’”²⁹⁹ as necessary for preparing “effective[] and intelligent[]” participation “in our open political system,”³⁰⁰ and as

²⁹³ *Id.* at 226–30.

²⁹⁴ *Id.* at 220; *id.* at 238–39 (Powell, J., concurring).

²⁹⁵ *Id.* at 230.

²⁹⁶ *Plyler*, 457 U.S. at 235 (Blackmun, J., concurring) (conceding the irony of “discuss[ing] the social necessity of an education in a case that concerned only undocumented [migrants] ‘whose very presence in the state and this country is [unlawful]’” (quoting Burger, C.J., dissenting)).

²⁹⁷ *Id.* at 221 (citation omitted) (citing *Rodriguez*, 411 U.S. at 35).

²⁹⁸ *Id.* (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring)).

²⁹⁹ *Id.* (quoting *Norwick*, 441 U.S. at 76).

³⁰⁰ *Id.* (quoting *Yoder*, 406 U.S. at 221).

“provid[ing] the basic tools by which individuals might lead economically productive lives.”³⁰¹ This history, which one³⁰² might go so far as to say is a matter “deeply rooted in our Nation’s history and tradition,”³⁰³ is underscored by social science that confirmed then³⁰⁴—and confirms even more so now—its “necessity.” “In sum,” Justice Brennan found that “education has a fundamental role in maintaining the fabric of our society.”³⁰⁵

This exposition, which in many other contexts would be dicta, is critical in *Plyler* and elsewhere to understanding both the value of the educational opportunity and the harm that would accrue to an individual by depriving them of it. “[E]ducation prepares individuals to be self-reliant and self-sufficient participants in society.”³⁰⁶ Inversely, “illiteracy,” and (as the science shows) miseducation and undereducation, are “enduring disabilit[ies] . . . [that] handicap the individual deprived . . . each and every day of [their] life.”³⁰⁷ The states have each made the unusual public-policy intervention of both providing public education and requiring all school-age youth to enroll (what I term “the public right”) in order to avoid both “the significant social costs borne by [the] Nation” and “[t]he inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement.”³⁰⁸

Concurring, Justice Harry Blackmun observed that “the Court’s experience has demonstrated that the *Rodriguez* formulation does not settle every issue of ‘fundamental rights.’”³⁰⁹ Justice Blackmun continued, “[o]nly a pedant would insist that there are *no* meaningful distinctions among the multitude of social and political interests regulated by the States, and *Rodriguez* does not stand for quite so absolute a proposition.”³¹⁰ He went on to suggest that “*Rodriguez* implicitly acknowledged that [such] interests . . . must be accorded a special place in equal protection

³⁰¹ *Plyler*, 457 U.S. at 221.

³⁰² Black, *supra* note 20, at 1081.

³⁰³ *Glucksberg*, 521 U.S. at 720–21.

³⁰⁴ *Plyler*, 457 U.S. at 221 (citing *Norwick*, 441 U.S. at 77).

³⁰⁵ *Id.* *Cf id.* at 230 (Marshall, J., concurring) (joining the *Plyler* majority “without in any way retreating from [his dissenting] opinion in *Rodriguez* . . . that an individual’s interest in education is fundamental”).

³⁰⁶ *Id.* at 222 (quoting *Yoder*, 406 U.S. at 205).

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 221–22.

³⁰⁹ *Plyler*, 457 U.S. at 232–33 (Blackmun, J., concurring).

³¹⁰ *Id.* at 233 (emphasis in original).

analysis.”³¹¹ But, as Chief Justice Warren Burger bitinglly observed for the dissent, ultimately that approach is doctrinally unsound and results in an amorphous “quasi-suspect-class and quasi-fundamental-rights analysis . . . custom-tailored to the facts of these cases.”³¹²

Justice Powell, the *Rodriguez* author who also concurred with the *Plyler* result, got us closer to a doctrinally integrated approach. While also appearing to blend due process and equal protection analyses, he abstracted to the general purpose of the Fourteenth Amendment.³¹³ By embracing the “public right,” one could reconcile Justice Powell’s *Plyler* rationale with his vote and rehabilitate the majority’s otherwise blended analysis without changing a word:

A legislative classification that threatens the creation of an underclass of future citizens and residents cannot be reconciled with one of the fundamental purposes of the Fourteenth Amendment. In these unique circumstances, the Court properly may require that the State’s interests be substantial and that the means bear a “fair and substantial relation” to these interests.³¹⁴

Offering this small correction has the added benefit of leaving undisturbed the decision in *Rodriguez*, which motivated Justice Powell’s separate concurrence in *Plyler*; in fact, Justice Powell refused to even mention *Rodriguez* in that concurrence.³¹⁵

As Justice Powell opined, categorical exclusion of undocumented minors “could not satisfy even the bare requirements of rationality.”³¹⁶ His concurrence concludes that “it hardly can be argued rationally that anyone benefits from the creation within our borders of a subclass of illiterate persons . . . adding to the problems and costs of both State and National Governments attendant upon unemployment, welfare, and crime.”³¹⁷ Justice Brennan employed similar language for the majority, going one step further to find that Texas’s proffered interest was “wholly insubstantial” in light of these costs.³¹⁸ Those observations hold

³¹¹ *Id.*

³¹² *Id.* at 244 (Burger, C.J., dissenting).

³¹³ *See id.* at 238–39 (Powell, J., concurring).

³¹⁴ *Plyler*, 457 U.S. at 239 (Powell, J., concurring).

³¹⁵ *See id.* at 236–41 (Powell, J., concurring).

³¹⁶ *Id.* at 240.

³¹⁷ *Id.* at 241.

³¹⁸ *Id.* at 230.

true irrespective of whether the legislative classification discriminates between or among discretely identifiable groups of people, as was the case in *Plyler*, or exposes the tens of thousands of U.S. schoolchildren who depend on public schools as their only accessible means of education to the political and policy whims of elected officials who will never bear the direct, lifelong consequences of their potentially injurious actions.

And so, consistent with both the state-law origins and entitlement nature of a “public right,” particularly in education, a claim for substantive infringement or violation should be reviewed under some form of heightened scrutiny that acknowledges the state’s policy authority in education, its substantial interest in public education, and the public’s reliance on the same.

III. PRACTICAL CONSIDERATIONS

This Article asks the courts to ground a public right to education in the beleaguered doctrine of substantive due process. Whether such an approach is extraordinary or anathema to the current Court’s perspective on substantive due process, the claim is that it is plausible, and sufficiently so that a future Court might seriously take it up even if this one might not. Central to the plausibility of a public right to education is its modesty. First, the scope of the public right to education is limited. It holds the state accountable only to those education tangibles that it guarantees to individual school-aged members through its laws and public acts. Second, and somewhat orthogonally, it completes the analyses left underdeveloped by *Rodriguez* and *Goss*. And in so doing, it aids in completing our doctrinal understanding of both substantive due process in property and the broader Fourteenth Amendment. Third, by acknowledging the source of the educational property interest as laws created by state legislatures and acts taken by state administrative agencies, it staves off separation-of-powers and federalism complications that have too frequently been confounded wrongly with questions of the federal judiciary’s competency in adjudicating rights. Fourth, and somewhat cumulatively, the public-right-to-education approach takes these issues seriously without losing either the normative or doctrinal integrity of the right-to-education project.

A. The Public Right to Education, Delimited

The most important remaining definitional consideration is identifying judicial guideposts akin to legislative limiting principles. Such guideposts or principles, where appropriate, might assuage fears that unbounded litigation would identify every educational event as involving the due process property interest in each educational disappointment as a constitutional harm.

As Professors Mark Rosen and Christopher Schmidt observed, when examining novel constitutional issues such as those I present in this Article, the Court rarely offers a limiting principle, preferring instead for such principles to develop organically as the federal courts apply the proffered doctrine in subsequent cases.³¹⁹ Rather than “define the metes and bounds” of the right at issue in the case of first impression, the Court tends to address the constitutional question then before it.³²⁰ Sometimes the doctrine distills incrementally in the ordinary course toward limiting principles.³²¹ Other times the Court continues applying what Rosen and Schmidt term “localist reasoning,” never identifying a limiting principle even as the doctrine becomes progressively less novel.³²² The suggestion that one must identify a limiting principle when engaging a novel constitutional question is ahistorical and inconsistently invoked.³²³ The modal confrontation with new questions of constitutional rights is localist reasoning.³²⁴

Like *District of Columbia v. Heller*³²⁵ with respect to private possession of firearms, the concept of a public right presents a novel approach for evaluating substantive due process in educational property. Indeed, the public right is at least as novel with respect to the constitutional interest it engages as *Heller* was to its interest.³²⁶ And more so than the *Heller* majority—which declared that the subject ban failed “[u]nder any of the standards of

³¹⁹ Mark D. Rosen & Christopher W. Schmidt, *Why Broccoli?: Limiting Principles and Popular Constitutionalism in the Health Care Case*, 61 UCLA L. REV 66, 77–98 (2013).

³²⁰ *Id.* at 70.

³²¹ *Id.* at 78.

³²² *Id.*

³²³ *See id.* at 77–98.

³²⁴ Rosen & Schmidt, *supra* note 319, at 90.

³²⁵ 554 U.S. 570 (2008).

³²⁶ Rosen and Schmidt identify two cases prior to *Heller* in which the Court interpreted the Second Amendment: *United States v. Miller*, 307 U.S. 174 (1939), and *Lewis v. United States*, 445 U.S. 55 (1980). *See* Rosen and Schmidt, *supra* note 319, at 84 n.73. *Miller* rejected a Second Amendment challenge to the National Firearms Act, Pub. L. No. 73-474, 48 Stat. 1236 (1934), that required the registration of certain firearms with the precursor agency to the Bureau of Alcohol, Tobacco, and Explosives based on a reading

scrutiny that we have applied to enumerated constitutional rights”³²⁷—I offer upper and lower bounds to the public right frame and propose a cogent level of analysis for claims of governmental infringement.

My sense is that the public right is defined sufficiently narrowly as to render those concerns less necessary than in other instances where they have been raised. At the same time, the attempt to extend substantive due process rights in an area of public function like education could inspire preemptive attacks based on the absence of a clearly articulated principle. And so, I offer the following.

Changes to constitutions, statutes, regulations, curricula, and even “rules or understandings”³²⁸ that establish the “legitimate claim of entitlement”³²⁹ to public education should be reviewable under heightened scrutiny. More granular incidents within the education ecosystem, like classroom assignments and teaching-and-learning practices, should not be. The limiting principle for a public right that is defined based on a uniform public expectation set by the state should be those dimensions the state either sets itself or authorizes school boards and districts to establish as policies directing the provision of the promised educational interest.

A “public rights” approach as limited as this is helpful but incomplete, meaningful but unsatisfactory, necessary but insufficient. By holding the state accountable for its affirmative actions within the educational domain—in constitutional establishment, statutory provision, and administrative management—this approach recognizes an individual’s constitutional right to enforce an educational duty owed to him as a member of the public.

B. A More Complete Due Process in Education

Through its intervention, the public right to education innovates, complements, and, most importantly, builds upon a body of impressive, creative constitutional-law scholarship on education rights.

of the prefatory clause linking gun possession with the militia. *See Miller*, 307 U.S. at 178. *Lewis* applied *Miller* in support of provisions in the Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351, 82 Stat. 197 (1968), that limited gun ownership by a person who had previously been convicted of a felony. *See Lewis*, 445 U.S. at 65 n.8.

³²⁷ *Heller*, 554 U.S. at 628–29.

³²⁸ *Roth*, 408 U.S. at 577.

³²⁹ *Memphis Light*, 436 U.S. at 11–12.

One line of scholarship commits to a collateral attack on *Rodriguez's* holding on liberty through various legal-history appeals. Across two separate, influential articles, Professor Derek Black argued that the Framers and the Fourteenth Amendment drafters separately understood education to be fundamental despite the persistent textual silence on the matter. In *The Constitutional Compromise to Guarantee Education*, Black asserted that the Congress that drafted the Fourteenth Amendment intended public education to be a benefit of state citizenship.³³⁰ Showing that assent to the Amendment and inclusion of affirmative education provisions were conditions precedent to readmission, Black demonstrated that Congress intended the availability of public education to be ubiquitous across all states and beyond the realm of political infringement.³³¹ He extended this argument in *The Fundamental Right to Education*. There, he argued throughout that education is a fundamental virtue “implicit in the concept of ordered liberty.”³³² Pointing to congressional statehood acts before and after Reconstruction, Black linked the requirement that newly admitted states provide public education to an inherent understanding that such education is necessary to “guarantee . . . a Republican Form of Government.”³³³

Using the “living originalism”³³⁴ of the Second Amendment case *McDonald v. City of Chicago*³³⁵ as a guide, Black argues that education, too, must be fundamental, with the right enforceable against the states through *substantive* due process.³³⁶ Black’s work built on Sara Solow and Professor Barry Friedman’s creative use of “traditional [methods] of constitutional interpretation” to uncover the substantive right within governmental convergence over time around the importance of public education.³³⁷

This Article extends this literature even further, but in ways that could be more appealing to a Supreme Court reluctant—now or in the future—to recognize the expansion of substantive liberty. The public right unquestionably relies on the convergence around public education that Friedman and Solow point out. This

³³⁰ Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 765–800 (2018).

³³¹ *Id.* at 775–97.

³³² Black, *supra* note 20, at 1063, 1079–81 (quoting *Glucksberg*, 521 U.S. at 720–21).

³³³ *Id.* at 1072–73 (quoting the Guarantee Clause, U.S. CONST., art. IV, § 4).

³³⁴ See generally JACK M. BALKIN, LIVING ORIGINALISM (2011).

³³⁵ 561 U.S. 742 (2010).

³³⁶ Black, *supra* note 20, at 1076–96.

³³⁷ Friedman & Solow, *supra* note 20, at 96, 110–11, 121–49.

Article takes full advantage of the narrowing variation over time in educational guarantees and practices to canvas and prescribe the public right as a federal approach reliant on state educational guarantees to yield national rights in education. Where Black's *Constitutional Compromise* and *The Fundamental Right to Education* link the origins of these state guarantees to a putative liberty frame, I thread the same guarantees to extant obligations in property. While a fundamental right approach requires far less definitional establishment in terms of identification and unitary enforcement, it would require a reconceptualization of liberty away from freedom and choice and toward entitlement and expectation. The latter is properly the domain of property. Still, Black's work is very instructive, and *Constitutional Compromise*, in particular, shields vulnerabilities in the public-rights approach, and vice versa. In concert, the three approaches elevate public education beyond merely being "the most important function of state and local governments" toward being rights- and obligations-creating responsibilities of state and local governments.³³⁸

The public right to education also addresses many of the ample concerns that then-Professor (now California Supreme Court Justice) Goodwin Liu made in his article, *Education, Equality, and National Citizenship*,³³⁹ which arguably started this new wave of creative post-*Rodriguez* scholarship. Justice Liu made a variation of the argument that the Fourteenth Amendment should be read as a single commandment rather than as separate, distinguishable clauses. The Citizenship Clause did more than define who could rightly call themselves American.³⁴⁰ It defined state and federal citizenship for purposes of identifying for both sovereigns those to whom they owed various privileges and immunities, including education.³⁴¹ By Justice Liu's estimation, Section Five, the so-called Enforcement Clause,³⁴² requires Congress to promote the Amendment's aims by "appropriate legislation."³⁴³ Like Justice Liu, I promote federal Fourteenth Amendment jurisprudence as a national protection for education rights. But unlike Justice Liu, I do not call for Congress to take specific

³³⁸ *Id.* at 120 (quoting *Brown*, 347 U.S. at 493).

³³⁹ See generally Liu, *supra* note 22.

³⁴⁰ *Id.* at 352–53.

³⁴¹ *Id.* at 355–56 (discussing Justice Harlan's dissent in *The Civil Rights Cases*, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting)).

³⁴² U.S. CONST., amend XIV, § 5.

³⁴³ Liu, *supra* note 22, at 400.

action toward establishing a statutory right to education. Though leading scholars have promoted such actions since *National Citizenship*'s publication,³⁴⁴ I hesitate to join such a call because of current congressional gridlock and recently successful court challenges to Necessary and Proper Clause exercises,³⁴⁵ which operate similarly to Section Five.³⁴⁶

Professor Joshua Weishart introduced a second line of scholarship that harkens back to a pre-*Rodriguez* Fourteenth Amendment jurisprudence. *Transcending Equality Versus Adequacy* wisely cautions against a due process adequacy that is uninformed by extant inequalities and an equal protection focused on pursuing equal achievement to the frustration of the guaranteed equality of opportunity.³⁴⁷ Justice Powell took great pains to distill equality from adequacy in the very structure of his *Rodriguez* opinion. And only through such distillation was he, arguably, able to isolate the discriminatory effects of Texas's plan from a heightened scrutiny logic. I agree with Professor Weishart that equality and adequacy concerns converge. I might go further by converging educational equity with equality and adequacy in pursuit of a uniform educational justice.

The retreat to a unitary Fourteenth Amendment jurisprudence could also support federal rights to education, healthcare, and other social services consigned historically through the Tenth Amendment to the states. Were the courts to favor none of the clauses in their analysis but instead obey the grammar that understands them as working together to provide a single constitutional guarantee against arbitrary and discriminatory practices of the states, many of the oppositional Hohfeldian³⁴⁸ relationships that Professors Scott Bauries and Weishart separately identify as

³⁴⁴ See generally, e.g., Derek W. Black, *The Congressional Failure to Enforce Equal Protection through the Elementary and Secondary Education Act*, 90 B.U. L. REV. 313 (2010); Kimberly Jenkins Robinson, *The Case for a Collaborative Enforcement Model for a Federal Right to Education*, 40 U.C. DAVIS L. REV. 1653 (2007).

³⁴⁵ E.g., Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 558–60 (2012) (holding that the Necessary and Proper Clause did not empower Congress to enact the Affordable Care Act's individual insurance mandate).

³⁴⁶ See *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997) (holding that the Religious Freedom Restoration Act of 1993 exceeded the scope of Congress's Fourteenth Amendment Section Five enforcement power).

³⁴⁷ Weishart, *supra* note 161, at 525–32.

³⁴⁸ See generally Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) (outlining a basic framework of "judicial relations"); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917) (elaborating on that framework).

endemic in federalized education rights might be nullified. After Black's, Friedman and Solow's, and Liu's approaches discussed earlier, a unitary approach would be consistent with the Amendment drafters' original intent and the Amendment's textual structure and early doctrine. *Rodriguez* was the anomalous discontinuity that isolated the clauses for doctrinal analyses in perversion of the Amendment's constitutional goal. Almost fifty years after *Rodriguez*, a unitary Fourteenth Amendment approach would be a meaningful doctrinal intervention. But it would face unique difficulties in gaining traction because of the decades of substantive Fourteenth Amendment jurisprudence based on the idea that the clauses are severable and discretely evaluable. Mindful of these concerns, I submit that the public right secures the necessary flank: a pathway for reintroducing education rights to the federal constitutional conversation. Once introduced, the complementary, supplementary, and unitary Fourteenth Amendment arguments all have stronger doctrinal footing as plausible interventions.

Against these considerations, Judge Smith's lament in *A.C. v. Raimondo* need not be the last word in the saga of federal education rights in the United States. The longstanding question of whether education is a constitutionally fundamental right might not be answered in the affirmative, but because the states have conferred legitimate claims of entitlement to education in all of their age-eligible residents, education is nevertheless a due process-protected property interest. The public right to education thus recognizes education as a claim-right held by residents that the states have a duty to honor attendant to immunities from educational divestment. Even though state supreme courts might recast this duty as imposing a legislative inability to avoid judicial abstention, the federal courts are sufficiently competent to enforce the duty through the Fourteenth Amendment. Enforcement could result in substantial improvements in educational equity well beyond the basic literacy and civics-education rights to which the *Rodriguez* approach has consigned the education-rights project.

C. *Rodriguez* Revisited

One of the benefits of a public-rights approach to substantive educational due process in education is its firm foundation in existing constitutional doctrine. The intervention is elegant. It

follows the recipe for “determin[ing] whether due process requirements apply in the first place” set forth in *Roth*³⁴⁹ as elaborated in *Perry v. Sindermann*³⁵⁰ and applied in *Rodriguez, Goss, and Plyler*,³⁵¹ with clarifying assistance from *Memphis Light* on the necessary conditions for constitutional due process protections to attach³⁵² and *Washington v. Glucksberg*³⁵³ on substantive due process.³⁵⁴ It first looks “to the nature of the interest at stake,”³⁵⁵ and, guided by the rejection of the rights-privileges distinction the Court previously used to deny *procedural* due process protections to state-created interests,³⁵⁶ strives to understand “liberty” and “property” as distinct, integral, yet not all-encompassing, constitutional interests³⁵⁷—“broad and majestic” though they may be.³⁵⁸

This Article has colored well within the lines on liberty not being property; it has offered a plausible pathway for construing educational opportunity as property. Freedoms and choices are materially different from the entitlements and expectations that define regulatory property. And yet constitutional protections for both may be “deeply rooted in this Nation’s history and tradition”³⁵⁹ and “implicit in the concept of ordered liberty.”³⁶⁰

Importantly, *Roth* instructs that “[t]he Fourteenth Amendment’s procedural protection of property is a safeguard of the security of interests that a person *has already acquired in specific benefits*.”³⁶¹ “These interests—property interests—may take many forms,”³⁶² but they “of course, are not created by the Constitution.”³⁶³ The *substance* of a property interest comes from elsewhere, from “rules or understandings that stem from an independent source such as state law . . . that secure certain benefits

³⁴⁹ *Roth*, 408 U.S. at 570–71.

³⁵⁰ 408 U.S. 593 (1972); *see id.* at 602–03.

³⁵¹ *See supra* Part I.B; *supra* Part II.A.

³⁵² *Memphis Light*, 436 U.S. at 11–12.

³⁵³ 521 U.S. 702 (1997).

³⁵⁴ *Id.* at 720–21.

³⁵⁵ *Roth*, 408 U.S. at 571.

³⁵⁶ *Id.* at 571–72.

³⁵⁷ *Id.* at 572 (“[W]hile the Court has eschewed rigid or formalistic limitations on the protection of procedural due process, it has at the same time observed certain boundaries. For the words ‘liberty’ and ‘property’ in the Due Process Clause of the Fourteenth Amendment must be given some meaning.” (emphasis added)).

³⁵⁸ *Id.* at 571.

³⁵⁹ *Moore*, 431 U.S. at 503 (plurality opinion).

³⁶⁰ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

³⁶¹ *Roth*, 408 U.S. at 576 (emphasis added).

³⁶² *Id.*

³⁶³ *Id.* at 577.

and that support claims of entitlement to those benefits.”³⁶⁴ *Memphis Light* offers a limited extension of due process protection to vested state-created interests that are revocable only “for cause.”³⁶⁵

Sindermann clarified that “‘property’ denotes a broad range of interests that are secured by ‘existing rules or understandings’”³⁶⁶ and that in an individual employment context, appropriate procedural due process could provide the initial opportunity to challenge “sufficient cause,”³⁶⁷ that is, that the substantive property right was violated.

Rodriguez involved students’ claim that unequal funding deprived them of a substantive educational opportunity.³⁶⁸ Justice Powell and the majority clearly knew this,³⁶⁹ but none of the opinions mentioned *Roth*, *Sindermann*, “property interest,” or “expectation” even once.³⁷⁰ On “entitlement,” the majority discussed the “district’s entitlement” to state appropriations—albeit in a footnote;³⁷¹ Justice White’s dissent discussed the respondents’ argument “that [they are] entitled to the benefits of the Equal Protection Clause”;³⁷² and Justice Marshall’s dissent mentioned “equal entitlement” in discussing men and women’s equal capacity to serve as estate administrators.³⁷³ Because *Rodriguez* did not deign to address the issue, analyzing whether education is guaranteed as a due process–protected property interest in no way disturbs that precedent.

Goss did not establish that the Constitution implicitly guarantees educational property; in a reprisal of *Roth*, it settled that it does not.³⁷⁴ It did, however, establish that the Constitution *protects* education as property.³⁷⁵ On a much stronger basis than the entitlement recognized in *Sindermann*, *Goss* established that,

³⁶⁴ *Id.*

³⁶⁵ *Memphis Light*, 436 U.S. at 11–12 (citing *Arnett v. Kennedy*, 416 U.S. 134 (1974)).

³⁶⁶ *Sindermann*, 408 U.S. at 601 (quoting *Roth*, 408 U.S. at 577).

³⁶⁷ *Id.* at 601–03 (quotation marks omitted).

³⁶⁸ *See supra* Part I.B.

³⁶⁹ *Cf. Rodriguez*, 411 U.S. at 37 (“[N]o charge fairly could be made that the system 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.”).

³⁷⁰ *See generally id.*

³⁷¹ *Id.* at 12 n.31.

³⁷² *Id.* at 69–70 (White, J., dissenting).

³⁷³ *Id.* at 106–07 (Marshall, J., dissenting).

³⁷⁴ *Goss*, 419 U.S. at 572–73 (citing *Roth*, 408 U.S. at 577).

³⁷⁵ *Id.* at 574.

by creating public schools and requiring all school-age youth to attend school, Ohio state law created a “legitimate entitlement to a public education,”³⁷⁶ and that procedural due process is required before taking that entitlement away.³⁷⁷

While *Goss* looked to the nature of the educational property interest, it had no need to understand it to determine the scope of appropriate due process. Because of the unique intersection of the presumption of state authority to regulate education finance and the classification of undocumented migrants, *Plyler* had to elaborate the nature of education to “determine the proper level of deference to” afford the Texas law.³⁷⁸

Though emergent in an equal protection conversation, the *Plyler* majority’s observations on education track well the criteria later suggested in *Glucksberg* for extension of *substantive* due process protections.³⁷⁹ As Black has shown,³⁸⁰ education is “objectively, ‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if [it was] sacrificed.’”³⁸¹ And the Justices’ colloquy “careful[ly] descri[bed]” the asserted interest.³⁸²

The only material deviation from the *Glucksberg* scheme is the nature of the interest in property, rather than liberty. The court protects property interests differently than liberty interests, which, arguably, it both creates and protects.³⁸³ But it *does* protect these interests, which means—to the extent that an educational property interest exists—the Constitution demands it receive appropriate protection. The state-law basis for the educational property interest merits acknowledgment and some deference, but the interest is an entitlement nonetheless.

Mindful of these considerations, the public right centers the constitutional conversation on “new” or regulatory property created and guaranteed by the state. Though different in nature from liberty interests or fundamental rights—with the collateral

³⁷⁶ *Id.* at 573–74.

³⁷⁷ *Id.*

³⁷⁸ *Plyler*, 457 U.S. at 221–24.

³⁷⁹ *Glucksberg*, 521 U.S. at 720–21.

³⁸⁰ See generally Black, *supra* note 20.

³⁸¹ *Glucksberg*, 521 U.S. at 720–21 (citations omitted) (first quoting *Moore*, 431 U.S. at 504; and then quoting *Palko*, 302 U.S. at 325, 326).

³⁸² Compare *supra* Part II.C.2 (discussing the *Plyler* opinions), with *Glucksberg*, 521 U.S. at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

³⁸³ *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998).

benefits of leaving *Rodriguez* undisturbed as settled law and narrowing its scope,³⁸⁴ it falls within the orbit of interests the Constitution pledges to secure from arbitrary governmental infringement through heightened scrutiny.³⁸⁵

D. Notes on Separation of Powers

Following such a forceful advancement of a novel public right to education based on extending substantive due process, one might expect questions challenging judicial interpolation into administrative or legislative prerogatives in education,³⁸⁶ judicial competence to apply heightened scrutiny,³⁸⁷ or the capacity of the courts to meet anticipated increases and variety of claims,³⁸⁸ let alone expend scarce judicial resources.³⁸⁹

While “[n]o single tradition in public education is more deeply rooted than local control over the operation of schools”³⁹⁰ except perhaps the state’s power to establish them, compel enrollment, or make reasonable regulations,³⁹¹ no greater obligation is more fundamental than the federal courts’ to resolve whether rights to federal constitutional protections have vested³⁹² or have been violated.³⁹³

³⁸⁴ Cf. *Narrowing Precedent*, *supra* note 181, at 1868–70; *Narrowing from Below*, *supra* note 181, at 927–29.

³⁸⁵ This Article reserves for future elaboration a discussion of the appropriate form of heightened scrutiny to apply in evaluating a public right claim. Here, I acknowledge that such an analysis must recognize and consider both the state’s primary authority in education matters and the individual’s public right to it.

³⁸⁶ See *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (“Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint.”).

³⁸⁷ Cf. *Rodriguez*, 411 U.S. at 31 (repeating fears that based on differential application of strict scrutiny, the Court would “assum[e] a legislative role . . . for which the Court lacks both authority and competence”).

³⁸⁸ See *Breen v. Kahl*, 419 F.2d 1034, 1038 (7th Cir. 1969) (“[W]e find unpersuasive the argument that to hold such school regulations unconstitutional would open the floodgates to litigation by students challenging all sorts of school regulations and practices.”).

³⁸⁹ Cf. *Pearson v. Callahan*, 555 U.S. 223, 236–37 (2009) (voicing concerns regarding the potential for “substantial expenditure of scarce judicial resources”).

³⁹⁰ *Freeman v. Pitts*, 503 U.S. 467, 505 (1992) (quoting *Milliken v. Bradley*, 418 U.S. 717, 741 (1974)).

³⁹¹ See *Meyer v. Nebraska*, 262 U.S. 390, 401–02 (1923).

³⁹² See *Marbury v. Madison*, 5 U.S. 137, 166 (1803) (evaluating judicial competency to determine whether a substantive right to an appointment vests).

³⁹³ *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 275–76 (1856) (extending judicial competency to evaluate due process claims).

*Epperson v. Arkansas*³⁹⁴ invalidated a state statute forbidding the teaching of evolution because it violated the First Amendment establishment clause and therefore students' Fourteenth Amendment due process liberty.³⁹⁵ Announcing the standard for intervention, Justice Abe Fortas wrote:

Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values. *On the other hand, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."*³⁹⁶

Judicial interpolation frequently has been necessary to protect constitutional freedoms in American schools, as in *Brown* and *Goss* (among other cases). It is no less necessary to protect students' entitlement to that same education, as the Court did in *Plyler*. And when those protections have required heightened scrutiny of state actions, the Courts have applied it. The idea that judicial review of public education need be obsequious lest the courts transmogrify into a "super-legislature" is, to quote Justice Stewart's dissent from *Griswold v. Connecticut*³⁹⁷ ironically, "uncommonly silly."³⁹⁸ The courts are fully competent to regard the states' guarantee of public education for the property entitlement that it is and to evaluate it accordingly. Neither action reduces the inquiry to "a majority's view of the importance of the interest affected."³⁹⁹ Rather, by adopting the public right approach, the courts would do exactly what Justice Powell did not do in *Rodriguez*: evaluate whether and how public education should be regarded as a property interest protected from arbitrary infringement by the Due Process Clause.⁴⁰⁰

This Article has already discussed how limiting principles can mitigate the fear that courts would be overwhelmed with

³⁹⁴ 393 U.S. 97 (1968).

³⁹⁵ *Id.* at 109.

³⁹⁶ *Id.* at 104 (alteration in original) (emphasis added) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

³⁹⁷ 381 U.S. 479 (1965).

³⁹⁸ *Id.* at 527–28 (Stewart, J., dissenting) (finding the state birth-control law that forbade contraception to anyone "uncommonly silly" but nevertheless voting to uphold it without meaningful consideration of the due process challenge because "courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws" (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963))).

³⁹⁹ *Rodriguez*, 411 U.S. at 31.

⁴⁰⁰ *Cf. id.* at 30–31.

cases following a potential determination that a state had violated its students' substantive public right to education.⁴⁰¹ Furthermore, a public right, in education or otherwise, is not a prescription of the type given in *Brown v. Board of Education (Brown II)*.⁴⁰² It gives a name to the already-existing liminal space in constitutional law that public education currently occupies. And it provides a framework for scrutinizing state actions that would diminish the entitlement. There is no charge to the federal courts to oversee the processes of educational provision.⁴⁰³ Nor are there any post-judgment factors⁴⁰⁴ that would aid courts in determining whether a state or local school district has achieved "[f]ull implementation of these constitutional principles."⁴⁰⁵ Undoubtedly, were the courts to recognize a public right to education, individuals would bring claims that the states are not honoring their educational commitments in infringement of that right. That is neither odd nor problematic; it is desirable. And, as experience has shown, states and school districts would adjust over time to meet the *law's* expectations, with viable claims requiring adjudication possibly experiencing a temporary spike in frequency.⁴⁰⁶

Recognizing a substantive due process right to education—through public right or otherwise—might introduce a perverse incentive for the states to avoid elaborating their educational expectations in constitutions, statutes, rules, understandings, or other statements. Recognizing a public right might chill the promulgation of new expectations, but it would not change the status quo where they already do not exist.

Finally, the encouragement that the federal courts "think carefully before expending 'scarce judicial resources' to resolve difficult and novel questions of constitutional or statutory interpretation that will 'have no effect on the outcome of the case'"⁴⁰⁷ is already accommodated by the public right approach. Offered in response to intense fact inquiries that dominated the first of the

⁴⁰¹ *Supra* Part III.A.

⁴⁰² 349 U.S. 294 (1955).

⁴⁰³ *Cf. id.* at 299 (remanding the *Brown* cases to their local district courts for implementation oversight).

⁴⁰⁴ *Cf. id.* at 300–01.

⁴⁰⁵ *Cf. id.* at 299.

⁴⁰⁶ See Evans et al., *supra* note 158, at 26 ("In many states, reform was initiated by the courts that found the existing system of school finance unconstitutional.")

⁴⁰⁷ Ashcroft v. Al-Kidd, 563 U.S. 731, 735 (2011) (quoting *Pearson*, 555 U.S. at 236–37).

two-stage qualified-immunity standard,⁴⁰⁸ *Pearson v. Callahan*⁴⁰⁹ directs the district courts to first evaluate whether a constitutional right was “clearly established” at the time of an event before examining the facts that might demonstrate that an official violated that right.⁴¹⁰ As with all due process property-interest cases, the substance is predicate. The entitlement comes before the claim. This approach does not change the order of operations. It just allows a substantive remedy commensurate with the substantive harm.

E. Whither Education Federalism?

On subject matter, the public right employs federal constitutional law to realize the promise of the public-education property interest. Crucially but subversively, because the public right is to the state-conferred entitlement, it offers a path to reclaiming federalism and local control—both tropes that have long been used against an expansive educational right⁴¹¹—for the benefit of student learners. Because each state has conferred on their residents a legitimate claim of entitlement to a meaningful educational opportunity, none can arbitrarily deny them that education without running afoul of substantive due process. Thus, in addressing one of the last remaining underexplored Fourteenth Amendment pathways, the public right to education complements decades of scholarship—in education, law, and elsewhere—toward a holistic federal civil rights jurisprudence.

A public-right-to-education approach also circumvents the need to engage with internecine state procedure and separation-of-powers fights. Additionally, it relieves the state courts of endless expenditures of judicial resources in periodically evaluating the economic sufficiency of the school-finance system de jour for meeting the state educational guarantee.

Its most important strategic intervention is divorcing educational equity or adequacy from funding and instead marrying it

⁴⁰⁸ See *Harlow v. Fitzgerald*, 457 U.S. 800, 818–19 (1982).

⁴⁰⁹ 555 U.S. 223 (2009).

⁴¹⁰ *Id.* at 236–37.

⁴¹¹ See, e.g., *Rodriguez*, 411 U.S. at 50; *Bradley*, 418 U.S. at 742–43; *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977); *Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 248 (1991); *Freeman*, 503 U.S. at 489–90; *Missouri v. Jenkins*, 515 U.S. 70, 99 (1995); see also Michael Heise, *The Political Economy of Education Federalism*, 56 EMORY L.J. 125, 130–35 (2006). See also generally Robinson, *supra* note 17.

to the legitimate entitlement the state has already promised eligible students. This approach fulfills much of what Professor James Ryan prescribed in his article *Schools, Race, and Money* as a remedy for overreliance on inefficacious expenditure fights for equalizing schooling: assigning an affirmative duty to the state.⁴¹²

It also avoids the need to turn to Congress to negotiate a cooperative federalism intervention, which, as Professors Michael Heise and Kimberly Jenkins Robinson separately observed from the No Child Left Behind experience, come at high political and economic costs.⁴¹³ Because individuals have a legitimate claim of entitlement to the public right—and that right is not fungible and exhaustive—this approach can advance student equity. Unlinked to finance concerns, each state's educational guarantee promises to provide both the individual and the class of individuals their entitled education.

And because the federal courts have the competency—indeed the obligation—to enforce due process obligations against the state, an approach based on entitlement over finance is both feasible and promising.

F. Jurisprudential Concerns Against Normative Ideas of Education Justice

Jurisprudential concerns over courts' willingness to employ this Article's doctrinal strategies are more slippery and harder to assuage. The courts are quite disinclined toward broad enforcement of equal protection obligations,⁴¹⁴ let alone of substantive due process duties to act.⁴¹⁵ And they are more likely to abstain from doing so when the obligations and duties at issue are based in state law.⁴¹⁶ If nothing else, the federal courts' unsuccessful experiences with managing state- and district-level school desegregation might make them less likely to recognize a right to

⁴¹² James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 307–10 (1999).

⁴¹³ See generally Heise, *supra* note 411; Robinson, *supra* note 17.

⁴¹⁴ Cf. *Washington v. Davis*, 426 U.S. 229, 239–40 (1976).

⁴¹⁵ See generally, e.g., *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989) (finding that a child has no substantive due process right to state protection from parental abuse and that the state has no constitutional duty to act); *Town of Castle Rock v. Gonzales ex rel. Gonzales*, 545 U.S. 748 (2005) (finding that a mother has no substantive due process right to police enforcement of a restraining order and that the state has no constitutional duty to act).

⁴¹⁶ Cf. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341–42 (1936) (Brandeis, J., concurring) (arguing that the Court should not have reached the Constitutional question in part because the challenged action was legal under state law).

education, even when, as I argue here, the constitutional text requires such an acknowledgment. If *Parents Involved in Community Schools v. Seattle School District No. 1*⁴¹⁷ is any indication,⁴¹⁸ the current Court might prove impervious to this call. It does not help that the ask evokes positive rights.

These concerns only reinforce the indictment against consigning the enjoyment of public-education rights to the political whims of legislatures and school boards. Fifty years of the post-*Rodriguez* era have shown that political branches of state and local governments have failed to provide meaningful educational opportunities. And they have done so by exploiting the concurrent disadvantage of demographic minority and comparative economic and political powerlessness to impose this failure upon the modal population of students for whom state-provided public education is the only available option. The massive miseducation under the current regime of constitutional ignorance to substantive due process in education inflicts upon hundreds of thousands of U.S. public school students should outweigh the balance of jurisprudential concerns.⁴¹⁹ Much as the development of governmental welfare necessitated an evolution away from the rights-privileges distinction that foreclosed procedural due process before the mid-twentieth century, recognition of a public right is necessary now to facilitate an appropriate substantive due process suited for the way education and the rights the states have guaranteed their residents to the same have evolved into the 21st century.

Confronting the then-settled, but no less unsound Fourteenth Amendment jurisprudence that allowed for racially segregated public schools,⁴²⁰ the *Brown* Court exhorted: “In approaching this

⁴¹⁷ 551 U.S. 701 (2007).

⁴¹⁸ See *id.* at 730–32 (plurality opinion); *id.* at 760–61, 766–68 (Thomas, J., concurring). The Court forbade school districts from utilizing plausibly ameliorative classifications of race even in the narrowest of defensible contexts with several justices expressing fears that such approaches have “no logical stopping point” and might open the floodgates to a new, interminable era of court supervision over public education. *Id.* at 731 (plurality opinion) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989)); *id.* at 760 (Thomas, J., concurring).

⁴¹⁹ See generally Robinson, *supra* note 17 (detailing how education federalism has hampered desegregation efforts, school-finance litigation, and the promise of No Child Left Behind, resulting in substandard educational opportunities for many children).

⁴²⁰ See *Gong Lum v. Rice*, 275 U.S. 78, 85 (1927) (citing *Cumming*, 175 U.S. at 545) (identifying the material Fourteenth Amendment equal protection challenge to a Chinese American girl’s assignment to a “colored” school as one involving the reasonableness of the state’s classifications and accepting as settled law the state’s authority to classify and assign students by race).

problem, we cannot turn the clock back to 1868. . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation.”⁴²¹

When the Court decided *Brown* in 1954, it understood anew the centrality of public education to citizenship, cultural values, labor-market participation, and individual self-determination, and it realized how state-sponsored racial segregation wrongly assigned unequal access to those educational opportunities⁴²² in violation of educational liberty.⁴²³ The *Rodriguez* Court failed to fully understand the role the Fourteenth Amendment performs in guaranteeing a meaningful public-education opportunity. More is at stake constitutionally than parents’ and students’ freedoms to choose which schools to attend. The right to a public education, though state-conferred and not fully tangible, is a property interest within the meaning of the Due Process Clauses. In the absence of robust constitutional protections, the states have divested, diminished, and delegitimized the public-educational property interest such that many students are deprived of any access to a quality education.

Recently, in his concurrence to *Ford Motor Company v. Montana Eighth Judicial District Court*,⁴²⁴ Justice Neil Gorsuch urged the Court to rethink the continued reliance on an *International Shoe v. Washington*⁴²⁵ specific personal jurisdiction doctrine that is increasingly out-of-sync with the modern realities of multistate and multinational corporations and becoming progressively unworkable.⁴²⁶ While it would be a far stretch to project the Court’s, or any one Justice’s, frustration-based entertainment of novel procedural doctrines onto its willingness to revisit its far less frequently amended substantive due process doctrine, it might be wise to begin developing arguments to refine the Court’s doctrine, especially in ways that do not require disturbing principles settled elsewhere.

⁴²¹ *Brown*, 347 U.S. at 492–93.

⁴²² *Id.*

⁴²³ *Bolling*, 347 U.S. at 499–500.

⁴²⁴ 141 S. Ct. 1017 (2021).

⁴²⁵ 326 U.S. 310, 316 (1945).

⁴²⁶ *Ford Motor*, 141 S. Ct. at 1036–39 (Gorsuch, J., concurring); see also *id.* at 1032 (Alito, J., concurring) (acknowledging that “there are grounds for questioning the standard that the Court adopted” in *International Shoe* and for “wonder[ing] whether the case law [that the Court has] developed since that time is well suited for the way in which business is now conducted,” though declining to address those issues in the case at hand).

As in the personal jurisdiction context, whether now or in the future, the federal courts will need to resolve the inchoate substantive due process challenges raised by public education “in light of the Constitution’s text and the lessons of history.”⁴²⁷ The Court has proved willing to extend educational liberty by upholding⁴²⁸ and extending school-voucher programs.⁴²⁹ And because of its concern for educational justice, families who otherwise would have been unable to explore available independent-school options can enjoy educational choices. It did so, as Justice Clarence Thomas observed in concurrence to *Zelman v. Simmons-Harris*,⁴³⁰ to “emancipat[e]” children from “system[s] that continually fail[] them.”⁴³¹ To borrow loosely from strict scrutiny, and not ironically so, it is no less necessary to revisit educational property as a constitutional sword and shield for emancipation. Without being dismissive, impertinent, or contemptuous of the currently empaneled Court, the profound disservice of justice to the nation’s public schools in the absence of constitutional rights protection demands our rethinking of *Rodriguez* and reinforcement of *Plyler*.

CONCLUSION

While novel in its cohesive articulation, the public right to education is rooted firmly in existing constitutional cases involving public education. To borrow from statistics, the public right approach provides the best-fit line across the pantheon of foundational education cases toward coalescing a single, usable right-to-education doctrine. Through this framework, one can better understand the successes and failures of *Brown v. Board of Education* in securing educational opportunity, as well as how *San Antonio Independent School District v. Rodriguez* was never structured for success in that endeavor. The otherwise doctrinal orphan, *Plyler v. Doe*, can be read not only as consistent with the balance of education-rights case law but also as the greatest exemplar for a public right to education discourse.

This Article provides necessary guidance to governments on the scope of their substantive powers to infringe upon public

⁴²⁷ *Id.* at 1039 (Gorsuch, J., concurring).

⁴²⁸ *E.g.*, *Simmons-Harris*, 536 U.S. at 653.

⁴²⁹ *E.g.*, *Espinoza v. Mont. Dep’t. of Rev.*, 140 S. Ct. 2246, 2260–62 (2020).

⁴³⁰ 536 U.S. 639 (2002).

⁴³¹ *Id.* at 676 (Thomas, J., concurring).

education, the appropriate procedures by which such a government might go about imposing such infringements, how an affected member of the public might raise a claim, and what specific entitlements one has a right to. It also affirms the public's expectation to a meaningful public education and equips them with heightened scrutiny, a tool by which to hold the state accountable for its guarantee. This Article thus begins to fill the constitutional void between the protection of fundamental rights and the protection of ordinary state-created benefits.