

# Education’s Deep Roots: Historical Evidence for the Right to a Basic Minimum Education

Caroline A. Veniero†

For decades, the U.S. Supreme Court has left open the question whether the U.S. Constitution protects a right to some amount of education. While such a right is not specifically enumerated in the Constitution, advocates have long argued for the existence of an implicit, fundamental right to a basic minimum education under the Due Process Clause of the Fourteenth Amendment. Recognition of such a right requires grappling with the Supreme Court’s substantive due process jurisprudence. To be a fundamental right, one requirement is that a proposed right have deep roots in U.S. history and tradition. This Comment examines whether the right to a basic minimum education—defined as basic literacy—is deeply rooted.

While courts differ in how they analyze whether a right is deeply rooted, they all generally view the time around the Fourteenth Amendment’s enactment as a relevant historical consideration. With a focus on that time period, this Comment analyzes two case studies: the Bureau of Refugees, Freedmen, and Abandoned Lands—or “Freedmen’s Bureau”—and the Bureau of Indian Affairs. In both cases, the federal government perceived a gap in local provision of education and responded through these agencies with support for literacy education. In serving as a backstop to local educational failures, the federal government’s actions ensured access to a basic literacy education. This pattern of behavior provides support for the notion that the right to a basic minimum education is deeply rooted.

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† A.B. 2017, The University of Chicago; J.D. Candidate 2022, The University of Chicago Law School.

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*“There have been periods when the country heard with dismay that ‘the soldier was abroad.’ That is not the case now. There is another person abroad, a less important person, in the eyes of some. The schoolmaster is abroad! And I trust more to him, armed with his primer, than I do to the soldier in full military array, for upholding and extending the liberties of the country.”*

—Lord Brougham, *The Schoolmaster Is Abroad*, in *THE FREEDMEN’S THIRD READER* 201, 201 (Boston, The American Tract Society 1866).<sup>1</sup>

## INTRODUCTION

For twenty-six days in 2020, all students in Ohio, Kentucky, Tennessee, and Michigan could claim a fundamental right to a “basic minimum education” under the Fourteenth Amendment.<sup>2</sup> This exciting proclamation out of the U.S. Court of Appeals for the Sixth Circuit—while only briefly binding law—marks the first time a federal appeals court has recognized such a right. The

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<sup>1</sup> This reader proved to be a popular reader series used in classrooms in Reconstruction Era southern schools. JESSICA ENOCH, *REFIGURING RHETORICAL EDUCATION: WOMEN TEACHING AFRICAN AMERICAN, NATIVE AMERICAN, AND CHICANO/A STUDENTS, 1865–1911*, at 35 (2008).

<sup>2</sup> *Gary B. v. Whitmer (Gary B. I)*, 957 F.3d 616, 648 (6th Cir.), *reh’g granted and vacated*, 958 F.3d 1216 (6th Cir. 2020) (en banc).

decision has reignited fervor for the recognition of some right to education under the U.S. Constitution.

The case, *Gary B. v. Whitmer*,<sup>3</sup> was a class action suit brought by seven plaintiffs—all students in Detroit, Michigan—on behalf of current and future schoolchildren in Detroit's five worst-performing schools. In a 136-page complaint, the plaintiffs pleaded facts regarding the abysmal condition of school buildings, lack of qualified teachers, and failing test scores.<sup>4</sup> Among other arguments, the students alleged that the state officials had deprived them of their right to education, specifically “their constitutionally-guaranteed fundamental right of access to literacy.”<sup>5</sup> State officials moved to dismiss the complaint, and the district court granted the motion because it found there was no fundamental right to any education, including literacy education.<sup>6</sup> On appeal, the Sixth Circuit disagreed.

Reversing the district court, the Sixth Circuit held that there was a fundamental, implicit right to what the court termed a “basic minimum education” under the Fourteenth Amendment.<sup>7</sup> The court arrived at this novel conclusion by unpacking the Supreme Court's substantive due process jurisprudence. Mirroring the Supreme Court's methodology, the Sixth Circuit considered education's place in U.S. history and tradition. The court concluded that “the right to a basic minimum education . . . is so deeply rooted in this Nation's history and tradition as to meet the historical prong of the Supreme Court's substantive due process test.”<sup>8</sup>

While the Sixth Circuit held that the U.S. Constitution protects a right to a basic minimum education, the court declined to sketch out exactly what amount or kind of education this right guarantees.<sup>9</sup> Instead, the court decided that this inquiry would be better suited to the district court on remand.<sup>10</sup> However, the court

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<sup>3</sup> 957 F.3d 616 (6th Cir.), *reh'g granted and vacated*, 958 F.3d 1216 (6th Cir. 2020) (en banc).

<sup>4</sup> Class Action Complaint at 5–14, *Gary B. v. Snyder*, 329 F. Supp. 3d 344 (E.D. Mich. 2018) (No. 2:16-cv-13292-SJM-APP).

<sup>5</sup> *Id.* at 2.

<sup>6</sup> *Gary B. I*, 957 F.3d at 621.

<sup>7</sup> *Id.* at 648. Judge Eric Murphy dissented from the panel decision, arguing that the Fourteenth Amendment does not grant affirmative rights. *Id.* at 663 (Murphy, J., dissenting). *But see id.* at 656–57 (majority opinion) (explaining that the Supreme Court “has recognized affirmative fundamental rights” under the Fourteenth Amendment).

<sup>8</sup> *Id.* at 652 (quotation marks omitted) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)).

<sup>9</sup> *Id.* at 659.

<sup>10</sup> *Id.*

did offer that this right would at least include—as the plaintiffs had asserted—“an education sufficient to provide access to a foundational level of literacy.”<sup>11</sup>

As the first federal appeals court decision establishing such a right, the Sixth Circuit’s holding was nothing short of groundbreaking.<sup>12</sup> It was also short-lived. Soon after the court issued its opinion, a Sixth Circuit judge—taking advantage of a local procedural rule—called for a poll of the other judges in the circuit to see if the case would be reheard en banc.<sup>13</sup> A majority of judges voted for a rehearing, so the original opinion was vacated.<sup>14</sup> Then, before the court could rehear, the case settled.<sup>15</sup> The Sixth Circuit dismissed the rehearing as moot.<sup>16</sup>

While *Gary B.* is no longer binding law, the case remains of immense interest and importance to supporters of a right to education under the U.S. Constitution, as it is an indication that arguments for this right are not meritless.<sup>17</sup> Indeed, *Gary B.* is one case in a long line of efforts to litigate a right to education.<sup>18</sup> It is almost certainly not the last case either, as U.S. schools still struggle to teach skills like basic literacy to all students. Estimates indicate that one in five U.S. adults has low English literacy skills, and nearly one in twelve is functionally illiterate in English.<sup>19</sup>

Attorneys litigating a federal right to education have their work cut out for them, though, as they continue to face considerable obstacles. For starters, Supreme Court precedent presently limits the extent to which any kind of federal right to education can exist. Additionally, arguments for the existence of an implicit, fundamental right require diving headfirst into the Supreme Court’s substantive due process jurisprudence. A murky and

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<sup>11</sup> *Gary B. I.*, 957 F.3d at 659.

<sup>12</sup> See *History Is Made: Groundbreaking Settlement in Detroit Literacy Lawsuit*, PUB. COUNS. (May 14, 2020), <https://perma.cc/Y23V-A9TH>.

<sup>13</sup> *Gary B. v. Whitmer (Gary B. II)*, 958 F.3d 1216, 1216 (6th Cir. 2020) (en banc).

<sup>14</sup> *Id.*

<sup>15</sup> See 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/7CLD-9WRM>.

<sup>16</sup> Colter Paulson, *Sixth Circuit Vacates Right-to-Literacy Ruling*, NAT’L L. REV. (June 11, 2020), <https://perma.cc/2NVB-CS7W>.

<sup>17</sup> See, e.g., Mark Walsh, *U.S. Appeals Court Recognizes a Federal Right of Access to Literacy*, EDUC. WK. (Apr. 23, 2020), <https://perma.cc/BXY7-Y7FM>.

<sup>18</sup> For more information about this history, see generally Steve Smith, *Education Adequacy Litigation: History, Trends, and Research*, 27 U. ARK. LITTLE ROCK L. REV. 107 (2004).

<sup>19</sup> *Adult Literacy in the United States*, NAT’L CTR. FOR EDUC. STAT. (July 2019), <https://perma.cc/257J-XEY6>.

“embattled area of constitutional law,” substantive due process analysis remains in “a state of profound doctrinal confusion.”<sup>20</sup>

One common thread in the “conceptual chaos” of substantive due process analysis is an eye toward history and tradition.<sup>21</sup> Generally, courts ask whether a proposed right is “deeply rooted in this Nation’s history and tradition,”<sup>22</sup> as the Sixth Circuit did. In *Gary B.*, the court held that education was deeply rooted in history based on education’s persistent and ever-expanding importance in American life.<sup>23</sup>

Critically though, how courts determine whether a right is deeply rooted is not a settled matter. A court’s determination depends on what analytical framework and choices the judge makes. One broad school of thought is that this analysis should be expansive, tracing a right through history to see where it originates, as well as if and how it changes over time.<sup>24</sup> Another broad approach is to focus on the roots of a right at the time of the Fourteenth Amendment’s ratification and enactment.<sup>25</sup> With this approach to substantive due process analysis, the central question is essentially: What did the amendment’s drafters and ratifiers believe the amendment to protect?<sup>26</sup>

These two analytical methods are often in conflict with one another. While the differences between these approaches are numerous, they have an obvious point of overlap: regardless of which methodology a judge subscribes to, the Fourteenth Amendment’s enactment is relevant in determining whether a right is deeply rooted. For some, of course, it is the only time period worth considering. For others, though—particularly followers of the expansive approach—the Amendment’s enactment is still an important data point in U.S. history.

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<sup>20</sup> Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 65 (2006).

<sup>21</sup> *Id.* at 66.

<sup>22</sup> *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quotation marks omitted) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

<sup>23</sup> *Gary B. I*, 957 F.3d at 652.

<sup>24</sup> *See, e.g., id.* at 650 (“[T]his history should not be viewed as only a static point.”).

<sup>25</sup> *See, e.g., Obergefell v. Hodges*, 576 U.S. 644, 715–16 (2015) (Scalia, J., dissenting).

<sup>26</sup> *See* Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 979 (2012). While in the past decade the originalist view of this analysis has largely resided in the Court’s dissents, there is reason to believe that may change. With the recent confirmation of Justice Amy Coney Barrett, the Court’s originalist contingent is solidified for years to come. Moreover, the federal appellate and district court judges appointed by President Donald Trump have included a significant number of originalists. It would appear originalism is now in vogue. *See How Amy Coney Barrett Would Reshape the Court—and the Country*, POLITICO (Sept. 26, 2020), <https://perma.cc/3A3F-8WUC>.

While existing scholarship provides solid, enactment-focused evidence supporting the deep roots of a right to education, it largely focuses on the attitudes and actions of state actors and state governments.<sup>27</sup> Indeed, despite extensive scholarship that makes the case for a federal right to education, few have explored evidence that links the long-recognized importance of education<sup>28</sup> with the *federal* government. This Comment seeks to address that gap in scholarship. Specifically, this Comment explores whether a right to education—one that at a minimum includes a right to foundational literacy—is deeply rooted in U.S. history and tradition under an enactment-focused analysis of the federal government’s actions during that time.

Beginning in 1865—three years ahead of the Fourteenth Amendment’s ratification—and well into the 1870s, the federal government perceived gaps in local provision of education and positioned itself as a backstop to local and state failures in educating citizens. This positioning is apparent in two key case studies, both of which are largely unexplored by legal scholarship in the context of a right to education. The first is the Bureau of Refugees, Freedmen, and Abandoned Lands—or “Freedmen’s Bureau” for short. As a post–Civil War transition agency, the Freedmen’s Bureau responded to southern states’ deliberate failures to educate their Black citizens by supporting the creation of schools that encouraged literacy.<sup>29</sup> The second is the Bureau of Indian Affairs. This agency founded compulsory boarding schools in response to what it identified as a failure on behalf of tribes and private “benevolent organizations” to properly educate indigenous children.<sup>30</sup> This Comment will explore how these case studies provide support for a deeply rooted right to some amount of education under the Fourteenth Amendment of the U.S. Constitution.

To that end, this Comment will proceed in four parts. Part I explores past efforts at litigating a fundamental right to education under the U.S. Constitution and parses out the obstacles to establishing such a right. Part II lays out the role of the historical prong in the Supreme Court’s substantive due process test and highlights the value of enactment-focused evidence. Part III

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<sup>27</sup> See *infra* Part II.C.

<sup>28</sup> For more on the Founders’ recognition of education’s importance, see Malhar Shah, Comment, *The Fundamental Right to Literacy: Relitigating the Fundamental Right to Education After Rodriguez and Plyler*, 73 NAT’L LAW. GUILD REV. 129, 130–37 (2016).

<sup>29</sup> See *infra* Part III.A.

<sup>30</sup> See *infra* Part III.B.

explores and examines each case study individually. Part IV brings these case studies into conversation with one another. Part IV also addresses the proverbial elephant in the room—the highly colonialist motivations behind these federal actions. This Comment concludes by arguing that, because of the actions the federal government took, there is support for the right to education's deep roots, even with an enactment-era focus.

## I. THE RIGHT TO EDUCATION

To understand present efforts to litigate a federal right to a basic minimum education, it is helpful to understand what the Supreme Court has already said about any potential right to education under the U.S. Constitution. However, before delving into the Court's precedent, one distinction is useful. Many famous examples of right-to-education cases come out of state courts; *DeRolph v. State*<sup>31</sup> and *Gannon v. State*<sup>32</sup> are two such cases. These famed cases are significant in their own rights, but they are distinct from the conversation about a right to education under the U.S. Constitution.<sup>33</sup> Instead, *DeRolph* and *Gannon* proceeded based on the educational provisions of their respective state constitutions.<sup>34</sup> Using such provisions, litigants have brought challenges to state decisions like school funding, alleging that these actions violate students' educational rights under the relevant provision of the state's constitution.<sup>35</sup> In contrast, efforts to litigate a right to education under the U.S. Constitution are based on the Fourteenth Amendment. While the specifics of how such a right could even derive from the Fourteenth Amendment are discussed in Part II, it is sufficient for now to note that cases

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<sup>31</sup> 677 N.E.2d 733 (Ohio 1997). For more information on the aftermath of the *DeRolph* decision, see generally Larry J. Obhof, *DeRolph v. State and Ohio's Long Road to an Adequate Education*, 2005 BYU EDUC. & L.J. 83.

<sup>32</sup> 319 P.3d 1196 (Kan. 2014). For more information on the various stages of the decades-long educational adequacy litigation in Kansas, see generally Caroline DiBarotolomeo, Comment, *State Constitutional Law—Education Finance—The Ongoing Battle for Adequate School Funding in the State of Kansas*. *Gannon v. State*, 390 P.3d 461 (Kan. 2017), 71 RUTGERS U. L. REV. 1257 (2019).

<sup>33</sup> For a discussion of the developments of this movement in state courts, see Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 121–32 (2013).

<sup>34</sup> An educational provision can be found in every single state constitution, but the guarantees of those provisions vary by state. EMILY PARKER, EDUC. COMM'N OF THE STATES, 50-STATE REVIEW: CONSTITUTIONAL OBLIGATIONS FOR PUBLIC EDUCATION 1 (2016), <https://perma.cc/XZA4-K5D3>.

<sup>35</sup> See Friedman & Solow, *supra* note 33, at 121–32.

like *DeRolph* and *Gannon* do not bear on the question whether a federal right to education exists because they do not implicate the U.S. Constitution.<sup>36</sup>

Focusing then on a right to education under the U.S. Constitution, this Part will unpack what the Supreme Court has said—and has not said—about this proposed right. Part I.A explores the Court's repeated emphasis on education's importance leading up to 1973. Part I.B describes what changed in 1973—namely, how *San Antonio Independent School District v. Rodriguez*<sup>37</sup> foreclosed a broad, generalized right to education. Finally, Part I.C unpacks *Rodriguez*'s aftershocks. It shows that, although the Court rejected a broad educational right in *Rodriguez*, the Court has since acknowledged that whether a right to some minimum amount of education exists is still an open question.

#### A. Early Cases: The Supreme Court Emphasizes Education's Importance

The Supreme Court has long acknowledged the importance of education to American life. In 1923, less than a decade after the advent of compulsory schooling, the Supreme Court noted in *Meyer v. Nebraska*<sup>38</sup> that “[t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted.”<sup>39</sup> Such a longstanding attitude, the Court went on, could be traced back to the Northwest Ordinance of 1787.<sup>40</sup> This foundational document provided that “[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”<sup>41</sup> Because education occupied such an important position in American life, the Court determined that teachers’ “right [ ] to teach and the right of parents to engage [them] so to instruct their children . . .

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<sup>36</sup> One may wonder why it is useful to pursue a right to education under the Fourteenth Amendment if state constitutions already confer such a right. Two considerations are worth noting. First, in a nation with such uneven educational provision, additional protections—particularly protections that implicate the federal government as a distinct, additional system of enforcement—are valuable. Second, not all state educational provisions are created equal. Some state constitutions do not explicitly protect a certain quality of education or anything beyond the mere provision of public schools. See PARKER, *supra* note 34, at 5–22.

<sup>37</sup> 411 U.S. 1 (1973).

<sup>38</sup> 262 U.S. 390 (1923).

<sup>39</sup> *Id.* at 400.

<sup>40</sup> *Id.*

<sup>41</sup> Act of Aug. 7, 1789, ch. 8, art. 3, 1 Stat. 50, 52.



are within the liberty of the [Fourteenth] Amendment.”<sup>42</sup> With this conclusion, the Court ultimately held in *Meyer* that Nebraska’s law prohibiting foreign language instruction—a vestige of post–World War I xenophobia<sup>43</sup>—was an unconstitutional exercise of state power.<sup>44</sup>

This acknowledgement of education’s importance was not a one-off incident. In 1954, in the landmark case *Brown v. Board of Education*,<sup>45</sup> the Supreme Court once again opined on the ingrained importance of education in American life. Striking down school segregation laws as unconstitutional, the Court wrote:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.<sup>46</sup>

Here, the Court not only reiterated education’s importance; it connected that importance to the “very foundation” of citizenship and democratic society more broadly. The Court also acknowledged some additional functions of education, including “awakening the child to cultural values, [ ] preparing him for later professional training, and [ ] helping him to adjust normally to his environment.”<sup>47</sup> Given the multitude of functions education serves, the Court expressed doubt that “any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”<sup>48</sup> In connecting education with both societal and democratic function, the Court positioned education as a near essential in American life.

Again, in 1972, the Court reaffirmed the importance of basic education to performing the functions of citizenry. In *Wisconsin v.*

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<sup>42</sup> *Meyer*, 262 U.S. at 400.

<sup>43</sup> See Allen Pusey, *Justices Hear a Challenge to ‘English-Only’ Laws*, 103 A.B.A. J. 72, 72 (2017).

<sup>44</sup> *Meyer*, 262 U.S. at 403.

<sup>45</sup> 347 U.S. 483 (1954).

<sup>46</sup> *Id.* at 493.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* While the Court lauded education, it notably did not base *Brown* on the conclusion that school segregation laws violated students’ fundamental right to education.

*Yoder*,<sup>49</sup> the Court had to decide whether the state could compel Amish parents to send their children to secondary school.<sup>50</sup> Although the Court ultimately held that the state could not, the Court emphasized that Amish parents had no objections to their children attending elementary school to learn critical skills like reading.<sup>51</sup> Moreover, the Court agreed with state officials “that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.”<sup>52</sup>

While none of these cases speak squarely to a right to education under the Fourteenth Amendment, the Court in each case emphasized a longstanding national value on education in order to explain its decision. In *Meyer* and *Brown*, the importance of education underscored the Court’s decision to strike down restrictions on education. In *Yoder*, the agreement between the parties that education is important insofar as it teaches critical skills like reading served to cabin the reach of the Court’s decision. In all of these cases, the Court treated the historical and traditional importance of education as a near given. Yet despite the Court’s continued recognition of education’s importance, the question whether the Constitution protects a student’s right to education did not reach the Court until 1973.

B. A Blow to a Broad Right: *San Antonio Independent School District v. Rodriguez*

While the Supreme Court heard oral arguments in *Yoder*, a monumental legal challenge was brewing in the south of Texas. After *San Antonio Independent School District v. Rodriguez*, right-to-education advocates could no longer plausibly argue that the Fourteenth Amendment protected a broad, generalized right to education.

Demetrio Rodriguez, a sheet-metal welder residing in San Antonio, sent his children to the local Edgewood public schools.<sup>53</sup> He and other parents in the district noticed a disturbing trend in their children’s education. Edgewood—a district that served

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<sup>49</sup> 406 U.S. 205 (1972).

<sup>50</sup> *Id.* at 221.

<sup>51</sup> *Id.* at 211–12.

<sup>52</sup> *Id.* at 221.

<sup>53</sup> Michael Heise, *The Story of San Antonio Independent School Dist. v. Rodriguez: School Finance, Local Control, and Constitutional Limits*, in *EDUCATION LAW STORIES* 51, 52–53 (Michael A. Olivas & Ronna Greff Schneider eds., 2008).

predominantly children of color and low-income families—could afford to spend about \$356 per pupil each year.<sup>54</sup> In contrast, the Alamo Heights district—a nearby district that served predominantly white, affluent students—spent about two-thirds more per pupil.<sup>55</sup> This difference existed despite the fact that Edgewood taxed its property at a higher percentage than Alamo Heights did.<sup>56</sup> Attempts to raise tax rates in the district even further to make up for the difference in per pupil spending in Edgewood could not succeed, as state law imposed a ceiling on property taxes.<sup>57</sup>

Rodriguez and other families brought a challenge to the state's funding system on behalf of Texas schoolchildren residing in districts with low property values. Rather than challenging the system under state law, the plaintiffs asserted that Texas's funding system violated the Equal Protection Clause of the Fourteenth Amendment, which prohibits a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws."<sup>58</sup> Accordingly, when a law classifies or distinguishes between people who have been "historically subject to discrimination or political powerlessness," that classification is "suspect," and courts will review that law with strict scrutiny, making it incredibly difficult for the law to survive.<sup>59</sup>

Here, the plaintiffs argued that Texas's school funding system classified based on wealth and that wealth was a suspect classification meriting strict scrutiny review. Additionally, the plaintiffs argued that strict scrutiny was warranted because the classification implicated a fundamental interest—namely, education.<sup>60</sup> A three-judge panel in the Western District of Texas found both arguments to be persuasive and, using an injunction, "restrained and enjoined . . . the operation of" the school finance laws "insofar as they discriminate[d] against plaintiffs and others on the basis of wealth."<sup>61</sup> The panel also ordered "that defendants . . .

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<sup>54</sup> *Id.* at 53.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> U.S. CONST. amend. XIV, § 1.

<sup>59</sup> See Selene C. Vázquez, Note, *The Equal Protection Clause & Suspect Classifications: Children of Undocumented Entrants*, 51 U. MIA. INTER-AM. L. REV. 63, 64–65 (2020).

<sup>60</sup> Heise, *supra* note 53, at 54, 56; see also *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 282 (W.D. Tex. 1971), rev'd, 411 U.S. 1 (1973).

<sup>61</sup> *Rodriguez*, 337 F. Supp. at 285.

restructure the financial system in such a manner as not to violate the equal protection provision[ ].”<sup>62</sup>

Texas appealed the panel’s judgment directly to the U.S. Supreme Court.<sup>63</sup> In a 5–4 decision, the Supreme Court reversed the district court panel and admonished the panel’s failure to appreciate “the novelty and complexity of the constitutional questions posed by appellees’ challenge to Texas’ system of school financing.”<sup>64</sup> First, the Court held that wealth was not a suspect classification that implicated the Equal Protection Clause.<sup>65</sup> Second, critically, the Court found there was no fundamental right to education because it “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.”<sup>66</sup>

With these words, the Supreme Court closed the door on a general “right to education” under the Fourteenth Amendment. But upon closing that door, the Court opened a window. Even though the Court held that there is no broad-reaching, general right to education under the U.S. Constitution, the *Rodriguez* Court did hypothesize that some minimum amount of education could be fundamental and thus protected. The Court wrote, “Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of [other constitutional rights,] we have no indication that the present levels of educational expenditures in Texas provide an education that falls short.”<sup>67</sup> Because no such showing was made, the Court did not address whether such a right actually exists. In the years since *Rodriguez*, the Court has given small hints of what that “identifiable quantum of education” might entail. The Court has done so primarily by confirming what pleadings are *insufficient* to implicate that minimum quantum of education.

### C. A Constitutional Right to Education After *Rodriguez*

Since *Rodriguez*, the Supreme Court has occasionally revisited what that “identifiable quantum of education” looks like, but the issue has largely been treated incidentally and indirectly.

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<sup>62</sup> *Id.* at 285–86.

<sup>63</sup> Heise, *supra* note 53, at 59.

<sup>64</sup> *Rodriguez*, 411 U.S. at 17.

<sup>65</sup> *Id.* at 28.

<sup>66</sup> *Id.* at 35.

<sup>67</sup> *Id.* at 36–37.

Take, for instance, *Papasan v. Allain*.<sup>68</sup> In that case, Mississippi students and school officials in 23 counties brought suit against various state officials, alleging unlawful denial of “economic benefits of public school lands granted by the United States to the State of Mississippi well over 100 years ago.”<sup>69</sup>

To understand the plaintiffs’ claim, one must understand the history and purpose of these land grants. In 1785, Congress—in positioning the nation for westward expansion—established requirements for surveying and selling the Northwest Territory.<sup>70</sup> One of those requirements was that each township reserve the sixteenth section of its territory to be held in trust by the state for the benefit of public schools.<sup>71</sup> The state then had a fiduciary duty to maximize the benefits of the trust by leasing and selling the land at fair market value.<sup>72</sup> In Mississippi though, the Chickasaw Nation held the state’s northern lands.<sup>73</sup> As a result, no public school land could be set aside in that portion of the state.<sup>74</sup> However, in 1832, the Chickasaw Nation ceded its lands to the state.<sup>75</sup> All of these lands were sold to private parties, and no Sixteenth Section lands were retained by the state.<sup>76</sup> Instead, the state set aside “lieu lands” for the benefit of students in the so-called Chickasaw Counties.<sup>77</sup> Those lands were eventually sold to invest in state railroads, but those railroads were destroyed in the Civil War.<sup>78</sup> To compensate the Chickasaw Counties for the missing land grants, the state paid them from a fund, but that payment did not nearly equal the funding that land grants generated for students in the rest of Mississippi.<sup>79</sup> Accordingly, as part of their claim, the plaintiffs alleged that the unequal funding between different areas of the state deprived the students in the Chickasaw Counties of their right to a minimally adequate education.<sup>80</sup>

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<sup>68</sup> 478 U.S. 265 (1986).

<sup>69</sup> *Id.* at 267–68.

<sup>70</sup> C. Maison Heidelberg, Note, *Closing the Book on the School Trust Lands*, 45 VAND. L. REV. 1581, 1584 (1992).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 1586.

<sup>73</sup> *Papasan*, 478 U.S. at 271.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 272.

<sup>77</sup> Heidelberg, *supra* note 70, at 1586 n.21.

<sup>78</sup> *Papasan*, 478 U.S. at 272.

<sup>79</sup> *Id.* at 273.

<sup>80</sup> *Id.* at 274.

The Supreme Court rejected this contention. Writing for the Court, Justice Byron White dismissed the plaintiffs' allegations in the complaint as mere legal conclusions lacking sufficient factual support. He noted that the complaint did not allege that students in these counties were "not taught to read or write; they d[id] not allege that they receive[d] no instruction on even the educational basics."<sup>81</sup> Because the plaintiffs "allege[d] no actual facts in support of their assertion that they have been deprived of a minimally adequate education," the Court found that it could disregard their claim.<sup>82</sup>

While *Papasan* did not resolve the question whether there is a fundamental right to some amount of education, the Court's opinion is important in two ways. First, it gave an indication of what facts could support a claim that one's right to some amount of education had been violated. Clearly, grave educational malpractice must occur. Second, the case confirmed that whether the Fourteenth Amendment guarantees a right to some minimal amount of education is still an open question after *Rodriguez*.<sup>83</sup> Indeed, rather than dismissing the plaintiffs' claim because there is no such right, the Court merely noted that the pleadings were insufficient to implicate any potential right. With the possibility of this right still on the table, test cases attempting to establish that right—like *Gary B.*—still appear on federal dockets today.

## II. SUBSTANTIVE DUE PROCESS AND HISTORICAL TRADITION

In bringing those cases, advocates for a right to education not only run up against the limits of Supreme Court precedent; they also encounter obstacles in the Court's jurisprudence surrounding substantive due process analysis. This Part lays out those obstacles and focus on one in particular—the Court's historical inquiry. Part II.A provides a brief overview of substantive due process analysis generally, including the requirement that courts consider U.S. history and tradition. Part II.B explores the varying approaches to this historical inquiry and identifies a point of commonality between these approaches. Finally, Part II.C lays out

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<sup>81</sup> *Id.* at 286.

<sup>82</sup> *Id.*

<sup>83</sup> See *Gary B. I*, 957 F.3d at 642 ("While the Supreme Court has repeatedly discussed this issue, it has never decided it, and the question of whether such a right exists remains open today."); see also Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1061–62 (2019).

how an enactment-focused study of federal involvement in literacy education would aid followers of both approaches.

#### A. Substantive Due Process: An Overview

Substantive due process derives from the Due Process Clause of the Fourteenth Amendment.<sup>84</sup> The Due Process Clause provides that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law.”<sup>85</sup> The clause thus offers procedural protection. However, courts also interpret this clause to mean that some rights are so substantial that the government cannot restrict them without a compelling state interest, no matter how much procedure is in place.<sup>86</sup> These substantive rights include those listed in the Bill of Rights as well as implicit, “fundamental” rights.<sup>87</sup> Over time, the Supreme Court has recognized that fundamental rights under the Due Process Clause include the right to marry, the right to procreate, the right to bodily integrity, and more.<sup>88</sup>

Determining what constitutes a fundamental right is challenging. As an initial matter, courts proceed with extreme reluctance when litigants request recognition of a new fundamental right.<sup>89</sup> Recognizing new fundamental rights can lead to criticism that the court is improperly legislating.<sup>90</sup> Beyond these critiques, the proper analysis to undertake when determining whether a right is fundamental is unclear. The Supreme Court has asserted there is no set formula for determining what is a fundamental right.<sup>91</sup>

*Washington v. Glucksberg*<sup>92</sup> is the closest the Court has ever come to establishing a definitive test for new fundamental rights.

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<sup>84</sup> Conkle, *supra* note 20, at 65–66.

<sup>85</sup> U.S. CONST. amend. XIV, § 1.

<sup>86</sup> *Gary B. I.*, 957 F.3d at 643.

<sup>87</sup> *Id.*

<sup>88</sup> See *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (collecting cases).

<sup>89</sup> See, e.g., *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (“As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.” (citing *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225–26 (1985))).

<sup>90</sup> See *Glucksberg*, 521 U.S. at 720.

<sup>91</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015) (“The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, ‘has not been reduced to any formula.’” (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting))).

<sup>92</sup> 521 U.S. 702 (1997).

In this case, the Court considered whether a law prohibiting physician-assisted suicide implicated a fundamental right. To determine whether the “right to assistance in committing suicide” is fundamental, the Court considered the “two primary features” of its “established method of substantive-due-process analysis.”<sup>93</sup> The first feature is twofold: “[T]he Due Process Clause specially protects those fundamental rights and liberties which are, [(a)] objectively, deeply rooted in this Nation’s history and tradition, and [(b)] implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.”<sup>94</sup> The second feature is ensuring “a careful description of the asserted fundamental liberty interest.”<sup>95</sup> Conceptualizing a right to education thus requires engaging with each feature of this test.

This Comment focuses solely on the first prong of that first feature—an analysis of whether the proposed right is “objectively, deeply rooted in this Nation’s history and tradition.” This inquiry has been dubbed “the historical prong of the Supreme Court’s substantive due process test.”<sup>96</sup> True, support for the historical prong is not dispositive, and deep roots in history and tradition do not supplant the utility of additional scholarship establishing the other requirements.<sup>97</sup> However, whether a right to education fulfills the historical prong is hotly contested and thus goes a long way in establishing this right. The next Section will delve into what it means for a right to be “deeply rooted in this Nation’s history and tradition” and how different judges grapple with that question.

## B. How to Determine Whether a Right Is Deeply Rooted

When confronted with a standard like the “deeply rooted” consideration, a natural follow-up question is: How does a court know if a right is deeply rooted? Like many legal standards, the answer is not totally clear.

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<sup>93</sup> *Id.* at 720, 726.

<sup>94</sup> *Id.* at 720–21 (quotation marks and citations omitted) (first quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion); and then quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)).

<sup>95</sup> *Id.* at 721 (quotation marks omitted) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

<sup>96</sup> *Gary B. I.*, 957 F.3d at 652 (“[W]e find that the right to a basic minimum education . . . meet[s] the historical prong of the Supreme Court’s substantive due process test.”).

<sup>97</sup> Interestingly, while scholarship addresses both additional requirements, whether the right to education is implicit in the concept of ordered liberty receives far more scholarly attention than whether this right is carefully described. *See, e.g.*, Shah, *supra* note 28, at 137 (arguing that a right to literacy is implicit in the concept of ordered liberty).



To understand how courts analyze an asserted right's historical roots, it can be helpful to think about why history merits consideration in substantive due process analysis at all. The primary rationale for doing so is largely rooted in judicial restraint.<sup>98</sup> By limiting fundamental rights to those that are longstanding and recognizable in American life, “judges of diametrically opposed opinions on the wisdom or justice of [a] challenged law should reach the same legal conclusion, since the decision will hinge on objective historical fact rather than on normative judgment.”<sup>99</sup> Unsurprisingly though, judges do find themselves able to disagree about a whole host of historical claims. This disagreement likely stems from the reality that the idea of “objective historical facts” is dually misleading here. First, “objective historical facts” are not always easy to come by. More importantly, historical facts are only pieces of the historical analysis, not the analysis itself. Judges can agree that a particular action occurred but disagree on what the implications of that action are.<sup>100</sup> In this sense, the historical analysis provides minimal judicial restraint.<sup>101</sup>

Judges do agree that the “deeply rooted” question is a historical inquiry. Yet in endeavoring to answer whether a proposed right is deeply rooted, a principal source of disagreement among judges is how to conduct that historical analysis. There is unfortunately no guidebook. Different judges espouse different methodologies, and this results in a number of unclear points.

One major uncertainty in this realm is what kind of evidence to consult. At various points, the Supreme Court has considered many different types of evidence. Supreme Court precedent on this historical analysis includes the use of quotes from past cases, brief tours through ancient Roman law, and considerations of briefs from historians.<sup>102</sup> However, the Supreme Court does not

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<sup>98</sup> See, e.g., *Glucksberg*, 521 U.S. at 721 (“Our Nation’s history, legal traditions, and practices thus provide the crucial guideposts for responsible decision-making that direct and restrain our exposition of the Due Process Clause.” (quotation marks and citation omitted) (quoting *Collins*, 503 U.S. at 125)).

<sup>99</sup> Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 672.

<sup>100</sup> Judges can also fall victim to “law office history”—a derogatory term employed by historians when lawyers or judges cherry-pick certain quotations or happenings to support a given legal argument. Law office history can prove “manipulable.” Thomas Hilbink, *Schooling: History as Handmaiden*, 5 LAW, CULTURE & HUMANS. 43, 44–47 (2009).

<sup>101</sup> See John C. Toro, *The Charade of Tradition-Based Substantive Due Process*, 4 N.Y.U. J.L. & LIBERTY 172, 181–94 (2009).

<sup>102</sup> See *id.* at 181–86.

prescribe what evidence one *must* consult when examining whether an asserted right is deeply rooted.

The temporal limits on what evidence one can use are also not uniform. Should evidence of a right's deep roots be limited to the time surrounding the enactment of the Fourteenth Amendment? Should there be any limits at all? These questions are unsettled, and judges frequently disagree.<sup>103</sup> To better understand these methodological disagreements, consider a more recent substantive due process case: *Obergefell v. Hodges*.<sup>104</sup>

1. Differing methodologies in *Obergefell*.

*Obergefell* exemplifies how, in recent years, the Court has taken an expansive approach to its historical analysis by tracing proposed rights through history.<sup>105</sup> This method definitionally requires drawing on sources that span decades or even centuries. Writing for the Court, Justice Anthony Kennedy explained, "History and tradition guide and discipline this inquiry but do not set its outer boundaries. . . . When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed."<sup>106</sup> With this approach in mind, the Court began its historical analysis with "the dawn of history," tracing the importance of marriage through "the annals of human history," starting "[f]rom their beginning to their most recent page."<sup>107</sup> With this sizeable scope, the Court consulted evidence from Confucius, Cicero, William Blackstone, and more.<sup>108</sup> Using this evidence, the Court particularly emphasized the connections these thinkers made between marriage and civilized society.<sup>109</sup> The Court ultimately held that the fundamental right to marry—a deeply rooted tradition—included the right to marry someone of the same sex.<sup>110</sup>

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<sup>103</sup> See Ronald Turner, *On Substantive Due Process and Discretionary Traditionalism*, 66 SMU L. REV. 841, 847 (2013).

<sup>104</sup> 576 U.S. 644 (2015).

<sup>105</sup> See *Gary B. I.*, 957 F.3d at 643–44.

<sup>106</sup> *Obergefell*, 135 S. Ct. at 2598. Some scholars argue that *Obergefell* effectively overrules *Glucksberg*, but this interpretation is controversial. See Ronald Turner, *W(h)ither Glucksberg?*, 15 DUKE J. CONST. L. & PUB. POL'Y 183, 209–16 (2020) (describing and rejecting such contentions). Of course, even assuming arguendo that *Obergefell*'s approach supplants that of *Glucksberg*, tradition and history remain relevant, even if they do not totally control the fundamental rights inquiry.

<sup>107</sup> *Obergefell*, 135 S. Ct. at 2593–94.

<sup>108</sup> *Id.* at 2594–96.

<sup>109</sup> *Id.* at 2594.

<sup>110</sup> *Id.* at 2607–08.

In dissent, Justice Antonin Scalia railed against the majority's use of such expansive evidence in its historical analysis. In doing so, he espoused a completely different evidentiary limit. Justice Scalia wrote that the Court had “no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment's text, and that bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment's ratification.”<sup>111</sup> For Justice Scalia, the focus ought to be on “[w]hen the Fourteenth Amendment was ratified in 1868.”<sup>112</sup> Thus, the fact that “it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification” was determinative.<sup>113</sup>

Of course, this time stamp of “ratification” is itself not so definite as it may appear. While the Fourteenth Amendment was officially enacted in 1868, ratification is a process rather than a single moment in time. Proposals for the Fourteenth Amendment can be traced to a proposal before the Joint Committee on Reconstruction in 1865, and the amendment in its final form did not receive the requisite approval from both houses of Congress until June 13, 1866.<sup>114</sup> After that, it took another two years for enough states to ratify the amendment, and it became the law of the land on July 9, 1868.<sup>115</sup> Unsurprisingly, though, the people who ratified that amendment—both in the U.S. Congress and in the states—continued to serve as legislators and continued to live their lives after the amendment process concluded. Their beliefs on the amendment did not begin and end in 1868. Thus, their actions—even those beyond 1868—continue to offer meaningful insight into the amendment. As a result, evaluating an asserted right's deep roots—even at the time of ratification, as Justice Scalia suggested—is not so clearly a focus on 1868 as it is a focus on the Reconstruction Era more generally.

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<sup>111</sup> *Id.* at 2628 (Scalia, J., dissenting).

<sup>112</sup> *Obergefell*, 135 S. Ct. at 2628 (Scalia, J., dissenting).

<sup>113</sup> *Id.*

<sup>114</sup> *On This Day, Congress Approved the 14th Amendment*, NAT'L CONST. CTR. (June 13, 2020), <https://perma.cc/V34A-U2KE>.

<sup>115</sup> *Landmark Legislation: The Fourteenth Amendment*, U.S. SENATE, <https://perma.cc/FRL3-7HQP>.

## 2. The methodological overlap.

Reading the majority opinion and Justice Scalia's dissent together, *Obergefell* exemplifies two opposing theories of the historical inquiry. Justice Kennedy presents a far-reaching, holistic analysis of history that consequently draws on historical sources from a wide array of time periods. In contrast, Justice Scalia offers an enactment-focused analysis with strict temporal limits. Proponents of each method can point to a number of shortcomings in the opposing approach. Followers of the expansive method critique the enactment-focused analysis as unnecessarily restrictive.<sup>116</sup> Conversely, those who focus on the ratification and enactment of the Fourteenth Amendment denounce the holistic approach as bad history with a present bias.<sup>117</sup> Neither approach commands the full support of each member of the Court.<sup>118</sup>

While these two theories are clearly different, they overlap in their view of the enactment's relevance in conducting this analysis. In Justice Scalia's dissent, this is easy to see. Indeed—to paraphrase William Shakespeare—for him, the enactment's the thing.<sup>119</sup> However, even within Justice Kennedy's more holistic approach, the enactment of the Fourteenth Amendment surely falls somewhere between the first and last pages of the “annals of human history.” Therefore, evidence from when the Fourteenth Amendment was enacted is useful in a holistic analysis as well. Thus, for right-to-education advocates, an enactment-focused analysis of education is useful no matter what methodology a judge they encounter subscribes to.

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<sup>116</sup> See, e.g., *Gary B. I.*, 957 F.3d at 650 (“[T]his history should not be viewed as only a static point.”).

<sup>117</sup> See Katharine T. Bartlett, *Tradition as Past and Present in Substantive Due Process Analysis*, 62 DUKE L.J. 535, 555 (2012).

<sup>118</sup> Cf. Richard S. Myers, *Obergefell and the Future of Substantive Due Process*, 14 AVE MARIA L. REV. 54, 68 (2016) (noting that substantive due process outcomes are not inevitable as “[m]uch depends on the Court's personnel at the time the issue comes before the Justices”).

<sup>119</sup> WILLIAM SHAKESPEARE, *HAMLET* act 2, sc. 2, l. 593 (Oxford 1987) (“The play's the thing.”).

### C. An Enactment Focus on the Right to a Basic Minimum Education

#### 1. Previous scholarship.

While the time around the amendment's enactment is relevant no matter the methodology, there is nonetheless little scholarship laying out the enactment-focused case for a deeply rooted right to education. That is why this Comment will place its focus there. True, scholars like Professors Steven Calabresi and Sarah Agudo have argued that the right is deeply rooted based on an examination of state constitutions around the time of the Fourteenth Amendment's enactment.<sup>120</sup> In their extensive survey on what rights are deeply rooted, education made the list, with thirty-six out of thirty-seven states including some right to education in their state constitutions.<sup>121</sup> As Calabresi and Agudo theorized, a right to public education "may be at least one very fundamental positive-law entitlement that all Americans have long possessed."<sup>122</sup> Professor Derek Black has similarly argued for the right to education's deep roots at the time of the Fourteenth Amendment's enactment. In his article, *The Fundamental Right to Education*, Black establishes himself as the "first to offer an originalist argument for a fundamental right to education."<sup>123</sup> He thus examines the asserted right to education during the Founding and around the time of the Fourteenth Amendment's enactment.<sup>124</sup> When analyzing the right during the 1860s, Black notes that immediately after the amendment's enactment, Congress explicitly premised rebellious states' readmission to the Union in part on whether they introduced educational clauses into their state constitutions.<sup>125</sup> In connecting education with readmission, Black argues that the framers of the Amendment positioned education as a critical facet of a republican government, thereby evidencing the right to education's deep roots at the time of the enactment.<sup>126</sup> Black also examines the constitutional conventions

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<sup>120</sup> Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 108 (2008).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> Black, *supra* note 83, at 1063.

<sup>124</sup> *Id.* at 1063–64.

<sup>125</sup> *Id.* at 1063.

<sup>126</sup> *Id.* at 1067.

held in the southern states to rewrite their state constitutions.<sup>127</sup> Based on the notes of those constitutional conventions, he concludes that delegates “consistently acknowledged that their task was to create a republican form of government and that education was a necessary component of that government.”<sup>128</sup>

While scholars like Calabresi, Agudo, and Black all provide valuable insights into education’s deep roots at the time of the Fourteenth Amendment’s enactment, their evidence largely focuses on the states. Enacting an amendment requires state *and* federal actors. Yet, while state constitutions and state constitutional conventions illuminate the attitudes of key state actors, they do not tell us much about the federal government’s actions. This Comment seeks to remedy that by analyzing two key federal, enactment-era programs: the Freedmen’s Bureau’s support for southern schools after the Civil War and the Bureau of Indian Affairs’ creation of compulsory boarding schools for indigenous children.

## 2. Terminology.

Before undertaking an enactment-focused analysis of this right’s historical roots, a clarification of scope and terms is helpful. Because a general right to education is foreclosed by *Rodriguez*, this Comment focuses on whether—as the Supreme Court hypothesized—“some identifiable quantum of education” is deeply rooted.<sup>129</sup> For ease of terminology, this Comment refers to this minimum amount of education that the Fourteenth Amendment could conceivably protect as “a basic minimum education.” Similarly, when discussing the right to that education, this Comment uses the term “a right to a basic minimum education.” Scholarly literature and courts occasionally depart from this language, opting for “minimally adequate education,” but this term can be somewhat confusing as it also appears frequently in state right-to-education cases where state constitutional provisions often guarantee an education that is “adequate.”<sup>130</sup> Instead, because

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<sup>127</sup> *Id.* at 1090.

<sup>128</sup> Black, *supra* note 83, at 1090 (citation omitted).

<sup>129</sup> *Rodriguez*, 411 U.S. at 36. Notably, in conducting this historical analysis, *Rodriguez* is of limited value. *Rodriguez* predates *Glucksberg*, and thus, while the Court acknowledged the importance of education, it did not explore the proposed right’s historical roots.

<sup>130</sup> For a comparison of educational provisions in state constitutions, see generally PARKER, *supra* note 34.

recent efforts at litigating this right at the federal level use the term “basic minimum education,” this Comment follows suit.

Beyond the term itself, what this “basic minimum education” could entail is not settled, as discussed in Part I. However, for the sake of argumentative clarity, this Comment assumes that that right at the very least encompasses, as the Sixth Circuit suggested, “a foundational level of literacy.”<sup>131</sup>

Why the focus on literacy? First, this approach is in line with the obvious notion that literacy skills are required in nearly every aspect of modern life, from filling out a job application to paying taxes and voting. Indeed, “[t]he importance of literacy in modern society cannot be over-emphasized.”<sup>132</sup> The Supreme Court acknowledged as much in its previous education cases, as Part I.A explores in detail. Yet despite this wide recognition of literacy’s importance, current estimates indicate that one in five U.S. adults has a low level of English literacy, and nearly one in twelve is functionally illiterate in English.<sup>133</sup> Thus, an exploration of whether a right to an education that includes foundational literacy exists is a timely, pressing question.

More critically though, this approach is in line with the Court’s conceptualization of what amount of education could feasibly be protected by the U.S. Constitution. In *Rodriguez*, the Court rejected plaintiffs’ claims and noted that they had not claimed—nor could they—that Texas’s funding system “fail[ed] 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.”<sup>134</sup> The Court did not specify what those “basic minimal skills” entailed, but basic literacy is implicit in that description. The centrality of literacy to this potential right to a basic minimum education also receives discussion in *Papasan*; there, the Court found it relevant that “[t]he petitioners do not allege that schoolchildren in the Chickasaw Counties are not taught to read or write” in determining that the petitioners failed to allege facts to support their contention that the state violated their fundamental right to some minimum

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<sup>131</sup> *Gary B. I.*, 957 F.3d at 659.

<sup>132</sup> Literacy’s importance to everyday activities is not the only reason it is so critical. A lack of functional literacy can not only hinder a person’s ability to perform these critical activities, but it can also negatively affect other cognitive skills like memory, attention, and calculation. Roger T. Wilson, *Literacy and Its Significance in Modern Life*, 13 COLLEAGUES 9, 10 (2016).

<sup>133</sup> *Adult Literacy in the United States*, *supra* note 19.

<sup>134</sup> *Rodriguez*, 411 U.S. at 37.

amount of education.<sup>135</sup> Thus, if the Court were to find that the Fourteenth Amendment protected the right to a basic minimum education, basic literacy would certainly be included.

### III. INTRODUCING THE CASE STUDIES

This Comment explores two key federal actions around the time of the Fourteenth Amendment's enactment: the educational support provided by the Freedmen's Bureau and the Bureau of Indian Affairs' creation of compulsory boarding schools for indigenous children. This Part explores how these federal programs began, how they operated, and to what extent literacy education played a role.

Before undertaking those case studies, one may wonder why the case study method is a valuable means of performing this analysis at all. The reasoning lies partly in pragmatism and partly in historical methodology. To the former, case studies offer a reasonable scope to an otherwise unwieldy analysis. Even for judges who only consider the time around the Fourteenth Amendment's enactment, there is a lot of potential evidence to consider—state constitutions, state ratification conventions, and legislative history are just a few. Expand that to fit the needs of a judge who takes a holistic approach, and the scope quickly becomes overwhelming. Case studies offer clear parameters and save the discussion from spiraling into a multivolume encyclopedia. Beyond the practical considerations, the case study method also finds support in historical practice. Historians routinely adopt narrow foci to answer big questions.<sup>136</sup> That is because there is immense value in exploring a topic in greater depth and in relation to important context informing that moment. Indeed, without this context, one runs the risk of falling into the trap of “law office history.”<sup>137</sup> Thus, this Comment seeks not only to explore the actions of these federal agencies in depth, but to offer important historical context along the way.

In a similar vein, one may wonder why these federal actions are valuable case studies to analyze. In a historical analysis, the selection of evidence is crucial. These two examples are valuable

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<sup>135</sup> *Papasan*, 478 U.S. at 286.

<sup>136</sup> A well-known example is an article by Professor Wendy Anne Warren, which focuses on one paragraph in a seventeenth-century colonial travelogue to demonstrate the flaws in historical accounts of that period. See generally Wendy Anne Warren, “*The Cause of Her Grief: The Rape of a Slave in Early New England*,” 93 J. AM. HIST. 1031 (2007).

<sup>137</sup> See *supra* note 100.



because, unlike state constitutions<sup>138</sup> or state ratification convention notes<sup>139</sup> tackled by previous scholars, these case studies provide largely unexplored links between the federal government—the same government that enacted the Fourteenth Amendment—and literacy education. While evidence of state and local attitudes toward an asserted right allows us to understand the people and the states that ratified the amendment, they do not tell us much about the federal legislature that initially crafted it. Importantly, like any governmental body, the federal government is not a monolithic entity with uniform thoughts and opinions. Still, the actions undertaken by the federal government as a whole provide valuable information on whether an asserted right truly has deep roots that can be traced to the time of the enactment.<sup>140</sup>

#### A. The Freedmen's Bureau

Just two months before General Robert E. Lee's famous surrender at Appomattox Court House, the Bureau of Refugees, Freedmen, and Abandoned Lands—"Freedmen's Bureau"—was born through an act of Congress.<sup>141</sup> The more recognizable, shortened name reflects the Bureau's primary focus; "freedmen" referred to the millions of Black Americans who had been enslaved and were set to finally be recognized under the law as citizens. The Freedmen's Bureau Act of 1865<sup>142</sup> established the Bureau for one year and gave the Bureau authority over "supervision and management of all abandoned lands, and the control of all subjects relating to refugees and freedmen from rebel states . . . under such rules and regulations as may be prescribed by the head of the bureau and approved by the President."<sup>143</sup> What "control of all subjects" entailed was not specified. In practice, the Bureau served as transitional support after the end of the Civil War. The Bureau split the eleven rebel states into districts, creating and maintaining local offices in each district as well as a central office in Washington, D.C.<sup>144</sup> At its peak, the Bureau employed about nine hundred agents to carry out its work.<sup>145</sup> These Bureau agents

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<sup>138</sup> See Calabresi & Agudo, *supra* note 120, at 108.

<sup>139</sup> See Black, *supra* note 83, at 1090.

<sup>140</sup> Cf. Conkle, *supra* note 20, at 134 n.398 (noting that congressional action is relevant to determining evolving national values).

<sup>141</sup> *Freedmen's Bureau*, HISTORY (Oct. 3, 2018), <https://perma.cc/LC6G-WRTA>.

<sup>142</sup> Ch. 90, 13 Stat. 507.

<sup>143</sup> Freedmen's Bureau Act of 1865 § 1, 13 Stat. at 507–08.

<sup>144</sup> *Freedmen's Bureau*, *supra* note 141.

<sup>145</sup> *Id.*

performed a number of functions in the South. They maintained freedmen's courts, performed marriages, and attempted to procure basic necessities like food and housing.<sup>146</sup> Famously, the Bureau also supported the establishment of schools. This educational role would define much of the Bureau's work and legacy.<sup>147</sup> While much is notable about the Bureau's educational role, this Section focuses on two key takeaways. First, this Section explores how the organization of the Freedmen's Bureau's Education Division enabled literacy education and educational outreach more generally. Second, this Section highlights the longevity of the Bureau's educational function and Congress's positioning of educational provision as a requirement for the Bureau's dissolution.

### 1. The Education Division's organization.

The value the Bureau placed on education is evidenced by the organization of its Education Division. In this context, the meaning of "organization" is twofold. The Bureau was organized in the sense that its Education Division had a sophisticated, hierarchical structure that enabled wide outreach in the South. It was also organized in the sense that it created and maintained detailed records on this structure and its operations.

The structure of the Bureau's Education Division tracked closely with the structure of the Bureau at large. Each district had a superintendent of education who reported to the superintendent in the Bureau's Washington, D.C., office. Reports were due from each district's superintendent of education on the first of every month, even during the summer when most schools were out of session.<sup>148</sup>

The meticulousness of the Bureau's educational recordkeeping is notable. These records not only tracked the number of schools in a district, but they also collected detailed information about the pupils in attendance. The Bureau went so far as to

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<sup>146</sup> See *id.*; AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 42 (1998).

<sup>147</sup> See ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION, 1863–1877, at 65 (1990) ("Bureau schools nonetheless helped lay the foundation for Southern public education. Education probably represented the agency's greatest success in the postwar South.").

<sup>148</sup> During the summer months, the reports generally included a remark about how many schools were closed for the season. See, e.g., BUREAU OF REFUGEES, FREEDMEN, AND ABANDONED LANDS, REPORT OF SCHOOLS IN ALABAMA FOR MONTH OF AUGUST, 1866 (1866), *microformed on* Records of the Education Division of the Bureau of Refugees, Freedmen, and Abandoned Lands, 1865–1871, Roll 15 (Nat'l Archives) [hereinafter Records of the Education Division].

compile and maintain records of students enrolled in literacy classes specifically.<sup>149</sup> In fact, rather than just maintaining a tally of the number of students enrolled in general “literacy” classes, the districts would track the level of literacy education being received: from classes on the alphabet and syllables to advanced reader classes.<sup>150</sup> To be sure, schools supported by the Bureau taught a number of subjects, including geography, arithmetic, and needlework.<sup>151</sup> Common across all districts though was literacy education. Classes were available for early readers and advanced readers alike. That the Bureau tracked enrollment in literacy by level is further support that reading was especially important. This focus is unsurprising given the recognized role of literacy in religious and political life and the fact that teaching Black people to read had been criminalized in much of the antebellum South.<sup>152</sup>

In some districts, the data collection form changed to include an additional area for the state superintendent of education to note the number of “places now destitute where schools might be organized” as well as the number of “pupils (estimated) who would attend such schools.”<sup>153</sup> In these districts, the Bureau was not only monitoring the performance of schools already in operation, but it was actively seeking out additional information on where education was still lacking.

Indeed, the Bureau’s structure enabled this flexible, differentiated response to the needs of different districts. As a result, how the Bureau approached school establishment and support varied by district. The Bureau did purchase and maintain ownership over a number of school buildings throughout the South.<sup>154</sup> However, the Bureau also worked to support existing schools by, for

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<sup>149</sup> See, e.g., BUREAU OF REFUGEES, FREEDMEN, AND ABANDONED LANDS, ABSTRACT OF REPORTS OF STATE SUPERINTENDENTS FOR MONTH OF OCTOBER, 1866 (1866), *microformed on* Records of the Education Division, Roll 33.

<sup>150</sup> See *id.*

<sup>151</sup> See *id.*

<sup>152</sup> Black, *supra* note 83, at 1065–66.

<sup>153</sup> BUREAU OF REFUGEES, FREEDMEN, AND ABANDONED LANDS, REPORT OF THE SUPERINTENDENT OF EDUCATION, BUREAU R., F. & A.L., STATE OF ALABAMA, FOR THE MONTH OF JULY 1869 (1869), *microformed on* Records of the Education Division, Roll 15.

<sup>154</sup> They kept detailed records on this aspect of their work as well. See, e.g., BUREAU OF REFUGEES, FREEDMEN, AND ABANDONED LANDS, REPORT OF SCHOOL BUILDINGS OWNED BY BUREAU R., F. & A.L. AND BY OTHER PARTIES ENGAGED IN THE EDUCATION OF FREEDMEN, IN THE STATE OF ALABAMA MONTH OF JUNE 1870 (1870), *microformed on* Records of the Education Division, Roll 15.

example, assigning and transporting teachers.<sup>155</sup> Moreover, in areas where schools were few or insufficient to match the local need, Bureau agents reached out to what they termed “benevolent organizations”—essentially, private aid organizations—to use their resources to set up schools.<sup>156</sup> This was no one-size-fits-all approach to education. Instead, the Bureau was coordinating with and adapting to local educational conditions. With this adaptive framework, the Bureau’s educational reach expanded.

The Bureau’s structure and recordkeeping enabled it to track and expand literacy education to areas where state governments were unable or unwilling to do so. This is itself evidence of the federal government’s role in ensuring access to literacy education. As Part II.A.2 details, though, the Bureau’s increasing educational outreach during this time was made possible by Congress, who codified and supported that educational mission. This support allowed the Bureau to last for as long as it did and elevate its educational mission.

## 2. The longevity and positioning of the Bureau’s educational mission.

The Bureau’s tenure and role was in jeopardy at multiple points throughout the Reconstruction Era, but the educational mission nevertheless remained a consistently critical part of the Bureau’s operation. In 1866, with the Bureau’s initial yearlong tenure set to expire, Congress passed the Freedmen’s Bureau Act of 1866.<sup>157</sup> Unlike the Freedmen’s Bureau Act of 1865, the 1866 Act provided more detail on the exact operations of the Bureau, including an explicit codification of the Bureau’s educational mission.

A notable opponent of both the Freedmen’s Bureau and the codification of its educational role was President Andrew Johnson. On February 19, 1866, to the surprise of many in Congress,<sup>158</sup> President Johnson vetoed the bill. Among his many reservations was that Congress had “never founded schools for any class of our own people . . . but has left the care of education to the much more competent and efficient control of the States, of communities, of

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<sup>155</sup> See *African Americans and Education During Reconstruction: The Tolson’s Chapel Schools*, NAT’L PARK SERV., <https://perma.cc/6BQ2-QLZY> (last updated Oct. 6, 2020).

<sup>156</sup> See *id.*

<sup>157</sup> Ch. 200, 14 Stat. 173.

<sup>158</sup> Mark A. Graber, *The Second Freedmen’s Bureau Bill’s Constitution*, 94 TEX. L. REV. 1361, 1367 (2016).

private associations, and of individuals.”<sup>159</sup> Yet President Johnson’s contempt for federal involvement in state provision of education neither doomed the Bureau nor its educational mission. True, Congress did amend the bill in response to President Johnson’s veto, but the amended bill reached the President on July 3, 1866 with the following provision intact:

That the commissioner of this bureau shall at all times cooperate with private benevolent associations of citizens in aid of freedmen, and with agents and teachers, duly accredited and appointed by them, and shall hire or provide by lease buildings for purposes of education whenever such associations shall, without cost to the government, provide suitable teachers and means of instruction, and he shall furnish such protection as may be required for the safe conduct of such schools.<sup>160</sup>

President Johnson once again vetoed the bill, but this time, Congress had enough votes to override his veto.<sup>161</sup> By overriding the veto, Congress ensured the codification of the Bureau’s mission and symbolically expressed that mission’s importance. After all, removing any reference to the Bureau’s educational mission would have been responsive to the President’s concerns. Congress could have sacrificed the Bureau’s educational role in order to preserve other portions of the bill. However, Congress retained this textual commitment to education, solidifying the Bureau’s role in promoting and ensuring educational access during Reconstruction.

Of course, one may wonder whether President Johnson’s response undermines the notion that the right to a basic minimum education is deeply rooted. While the President—an admittedly key piece of the federal government—may have attempted to quash this bill and the Bureau’s educational mission, Congress’s response is crucial here. That is because it is Congress, not the President, that has a role in constitutional amendments.<sup>162</sup> Thus, it is their actions that speak most clearly to the question whether a right to some education under that amendment is deeply rooted.

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<sup>159</sup> Andrew Johnson, *Veto Message to the Senate (Feb. 19, 1866)*, in VETO MESSAGES OF THE PRESIDENTS OF THE UNITED STATES, WITH THE ACTION OF CONGRESS THEREON 289, 292 (Washington, Government Printing Office 1886).

<sup>160</sup> Freedmen’s Bureau Act of 1866 § 13, 14 Stat. at 176.

<sup>161</sup> *Freedmen’s Bureau Acts of 1865 and 1866*, U.S. SENATE, <https://perma.cc/C8Q9-YDBT>.

<sup>162</sup> See U.S. CONST. art. V.

In 1868, the tenure of the Freedmen's Bureau was once again up for debate. This time, Congress clarified an exit strategy for the Bureau. The Act of July 16, 1868, provided "[t]hat it shall be the duty of the Secretary of War to discontinue the operations of the bureau in any State whenever such State shall be fully restored in its constitutional relations with the government of the United States, and shall be duly represented in the Congress."<sup>163</sup> This language reflected a growing movement by southern states to return to their prerebellion status. The Act provided however "[t]hat the educational division of said bureau shall not be affected, or in any way interfered with, until such State shall have made suitable provision for the education of the children of freedmen within said State."<sup>164</sup> Indeed, even as the federal government set about establishing ways for the rebel states to regain independent control of their respective states, the federal government explicitly maintained their ability to ensure that some education was provided for. This treatment was distinct from other functions the Bureau carried out. For example, medical aid, provision of clothing, and efforts at obtaining housing for formerly enslaved people were scrapped far earlier on in the Bureau's lifespan.<sup>165</sup> Yet the educational mission received continued and, seemingly, greater support over the course of the Bureau's operations. This support is indicative that the same Congress that ratified the Fourteenth Amendment prioritized education as key to states' operation in the aftermath of the Civil War.

This requirement that southern states retain the Bureau until education was sufficiently provided for fits nicely within Black's account of that same Congress. He emphasized Congress's requirement that states introduce education provisions into their constitutions in order to be readmitted to the Union.<sup>166</sup> Providing for education suggests that it is important; premising independence from federal intervention on education suggests it is critical to the functioning of an independent state. Additionally, bear in mind that southern states faced a host of readmission criteria, including ratification of the Fourteenth Amendment.<sup>167</sup> Putting these pieces together, in order for the states in the former

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<sup>163</sup> Act of July 6, 1868, ch. 135, § 2, 15 Stat. 83, 83.

<sup>164</sup> Act of July 6, 1868 § 2, 15 Stat. at 83.

<sup>165</sup> Compare Act of July 6, 1868 § 2, 15 Stat. at 83, with Freedmen's Bureau Act of 1866 § 5, 14 Stat. at 174, and Freedmen's Bureau Act of 1865 §§ 2, 4, 13, 13 Stat. at 508.

<sup>166</sup> Black, *supra* note 83, at 1063.

<sup>167</sup> See *Landmark Legislation: The Fourteenth Amendment*, *supra* note 115.

Confederacy to rejoin the United States and regain Bureau-less control over their soil, they had to ratify and agree to provide education to all citizens. Because the Bureau's exit could only occur after the state had already ratified the amendment and placed an educational provision in its constitution, the notion that the amendment protects educational access has deep roots.

This first case study already provides key evidence that the right to a basic minimum education is deeply rooted. As a post-war transition agency, the Bureau was a federal entity designed to support primarily Black citizens. The Bureau viewed their mission as preparing these "new" citizens to participate fully in democratic society. A key part of executing that mission was supporting the establishment of schools, as educating Black people while they were enslaved was illegal in much of the antebellum South. Those schools in turn prioritized literacy, and in reporting on the progress of those schools, the Bureau prioritized literacy as well. This educational role of the Bureau was crucial. Its importance was reflected in the duration of the Bureau's educational capacity, even persisting through a presidential veto. Moreover, as the federal government looked to readmit rebel states into the United States, the Bureau's educational function remained statutorily authorized until the state could properly educate its entire citizenry. This requirement dovetailed other readmission criteria, including the ratification of the Fourteenth Amendment and the inclusion of an educational provision in each state's constitution. In this way, the federal government ensured access to a basic minimum education. As a result, this case study supports that the right to a basic minimum education has deep, enactment-focused roots.

#### B. The Bureau of Indian Affairs' Compulsory Boarding Schools

Turning to the second case study, a similar pattern of federal intervention emerges. Part III.B focuses on the federal actions behind the Bureau of Indian Affairs' compulsory boarding schools for indigenous youths. In sharp contrast to the Freedmen's Bureau's relatively short lifespan, the Bureau of Indian Affairs was created in 1824, decades before the Civil War and Reconstruction.<sup>168</sup> Like the Freedmen's Bureau, it too was an outgrowth of

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<sup>168</sup> *Bureau of Indian Affairs (BIA)*, U.S. DEPT OF THE INTERIOR, <https://perma.cc/8HB3-FN8U>.

the office of the Secretary of War.<sup>169</sup> Unlike the Freedmen's Bureau, education was not an initial primary concern of the Bureau of Indian Affairs. In fact, Congress did not begin appropriating money "expressly for the purpose of Indian education" until 1877.<sup>170</sup> The push for federal funding for indigenous children came in response to recognition that the education provided by the day schools on reservations—some run by tribes and some run by private organizations—were failing to address the so-called "Indian problem."<sup>171</sup> Essentially, federal officials feared that indigenous children were not learning "proper" values and skills. This Section explores how the architects of these schools used literacy education in order to remedy that perceived problem.

To properly investigate this case study, this Section proceeds as follows. Part III.B.1 describes early federal education commitments to indigenous people, explores the changing legal status of indigenous people during the nineteenth century, and explains how those changes impact the analysis of literacy education's historical roots. Part III.B.2 then dives into the structure of these schools and the degree to which literacy received emphasis.

1. Education and the changing legal status of indigenous people.

Like the Bureau of Indian Affairs itself, educational commitments to indigenous people did not begin in the 1860s or 1870s. Federal commitments to the education of indigenous children can be traced far before the Reconstruction Era. Indeed, "the United States pledged to provide a suitable education for the American Indian peoples" in the Northwest Ordinance of 1787.<sup>172</sup>

By 1871, just three years after the enactment of the Fourteenth Amendment, the United States had ratified more than 110 treaties that promised some amount of education to indigenous children.<sup>173</sup> Originally, many tribal leaders envisioned an education that merged the values of a given tribe with education in literacy, mathematics, and the arts.<sup>174</sup> However, federal officials

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<sup>169</sup> *Id.*

<sup>170</sup> DAVID WALLACE ADAMS, *EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875–1928*, at 26–27 (1995).

<sup>171</sup> Raymond Cross, *American Indian Education: The Terror of History and the Nation's Debt to the Indian Peoples*, 21 U. ARK. LITTLE ROCK L. REV. 941, 952 (1999).

<sup>172</sup> *Id.* at 950.

<sup>173</sup> See DAVID. H. DEJONG, *PROMISES OF THE PAST: A HISTORY OF INDIAN EDUCATION IN THE UNITED STATES* 34 (1993).

<sup>174</sup> Cross, *supra* note 171, at 950–52.



scrapped these plans and constructed an educational project that was far more “authoritarian.”<sup>175</sup>

To understand why this shift occurred, it is critical to understand that the legal status of indigenous people changed dramatically over the course of the eighteenth and nineteenth centuries. At the nation's Founding, their legal status was something close to that of independent nations whose lands largely lay beyond the borders of the original thirteen states.<sup>176</sup> However, in a series of Supreme Court decisions—the so-called “Marshall Trilogy”—the Court undermined that conceptualization, declaring that indigenous tribes held no title to their land and for the first time described them as akin to wards.<sup>177</sup> This ward conception gained traction over the course of the 1800s,<sup>178</sup> particularly among those involved in indigenous children's education.<sup>179</sup>

The changing legal status of indigenous people during this time makes analyzing the federal government's creation of compulsory boarding schools especially intriguing. With the conception of indigenous children and the tribes they were a part of as “wards,” there are two conflicting roads of analysis one could take. First, one could say that the wardship status shifts the role of the federal government such that it drove the federal government to do more than it would otherwise. In other words, because wardship is such a dependent state, federal officials' actions do not reflect what they believed to be necessary for a functioning society but instead was something they thought would just be beneficial to this special class of people. Essentially, this argument requires assuming that these educational programs are products of benevolence or pity rather than perceived necessity. Besides the host of problems that accompany assuming such motivations on behalf of the architects of these schools, this attitude, to put it lightly, does not track with the rest of the federal government's interactions with indigenous peoples in the nineteenth century.<sup>180</sup>

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<sup>175</sup> *Id.* at 954.

<sup>176</sup> Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107, 110–11 (1999).

<sup>177</sup> *Id.* at 129–30.

<sup>178</sup> For a discussion of this evolving “wardship” status, see generally Nancy Carol Carter, *Race and Power Politics as Aspects of Federal Guardianship over American Indians: Land-Related Cases, 1887–1924*, 4 AM. INDIAN L. REV. 197 (1976).

<sup>179</sup> See, e.g., Porter, *supra* note 176, at 115–16.

<sup>180</sup> For a sample of this treatment, see generally DAVID E. WILKINS, *AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM* (2007).

If the federal government was not going above and beyond, that leaves an alternative. The federal government undertook a federalized education program because federal officials believed that program to be necessary for these children to function in “civilized” society. This notion tracks both with the government’s general policy toward indigenous peoples and with the expressed motivations of the program’s architects. For example, Merrill Gates, a critical member of the indigenous children’s education movement, reflected: “Is not a guardian’s first duty so to educate and care for his wards as to make them able to care for themselves?”<sup>181</sup> He concluded, “We must not only offer them education, we must force education upon them.”<sup>182</sup> Through this forced education, Gates and other proponents intended to “civilize” indigenous people, ultimately in order to prepare them for citizenship.<sup>183</sup> These officials’ insistence that cultural erasure was “necessary” is of course false and deplorable. However, the insistence that education is necessary tracks with the federal government’s actions in supporting the Freedmen’s Bureau in the American South.

One could argue that the unique legal status of indigenous people during this period renders this case study particularly ill-suited to a conversation about what the Fourteenth Amendment protects because the Amendment was not interpreted to change the legal status of Native Americans into citizens.<sup>184</sup> Thus, because indigenous people did not receive universal citizenship until the Indian Citizenship Act of 1924,<sup>185</sup> the argument would be that these federal educational initiatives cannot speak to what the Fourteenth Amendment protects. This argument misses two key points. First, while the Indian Citizenship Act of 1924 granted citizenship to all Native Americans, the vast majority were already U.S. citizens through other avenues.<sup>186</sup> Thus, to say the Fourteenth Amendment only came into play for indigenous people in 1924 is inaccurate. Second and more importantly, education was seen as a key step in preparing indigenous people to become citizens and thus clearly protected by the Fourteenth

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<sup>181</sup> Merrill E. Gates, *Land and Law as Agents in Educating Indians*, in H.R. Doc. No. 109, SEVENTEENTH ANNUAL REPORT OF THE BOARD OF INDIAN COMMISSIONERS, THE YEAR 1885 (1886), reprinted in *AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE “FRIENDS OF THE INDIAN,” 1880–1900*, at 46 (Francis Paul Prucha ed., 1973).

<sup>182</sup> *Id.* at 46, 52.

<sup>183</sup> See Porter, *supra* note 176, at 115–23.

<sup>184</sup> See *id.* at 133–34, 136.

<sup>185</sup> Pub. L. No. 68-175, 43 Stat. 253.

<sup>186</sup> *Id.* at 124.

Amendment. As Thomas Morgan, the Commissioner of Indian Affairs from 1889 to 1893, summarized the role of this federal program years after its inception, “[t]he great purpose which the Government has in view in providing an ample system of common school education for all Indian youth . . . is the preparation of them for American citizenship.”<sup>187</sup> Because education was seen as necessary to make indigenous people citizens—and thereby clearly protected by the Fourteenth Amendment—the Bureau of Indian Affairs’ educational efforts remain a critical case study of federal education action around the time of the Fourteenth Amendment’s enactment.

The changing legal status of indigenous people during the nineteenth century is important context to this case study. It explains why federal attitudes toward indigenous children’s education shifted from the Founding to the 1870s. This context is important, and if anything, it makes this case study even more worthy of attention. The federal government saw its mission as preparing its wards for U.S. citizenship. As Part III.B.2 now explores, that preparation always involved basic literacy education.

## 2. Literacy’s role in compulsory boarding schools.

Literacy featured prominently in the federal government’s compulsory schools because of the perceived link between literacy and civilized society. As the U.S. commissioner of education would describe the educational mission of these schools years after their founding, the schools would “give [indigenous children] letters, and make them acquainted with the printed page. . . . With these comes the great emancipation, and the school shall give [ ] that.”<sup>188</sup> The resulting compulsory boarding schools had a varied curriculum, but literacy featured prominently throughout the day. Indeed, the school day was half directed at traditional elementary education—the so-called three “Rs” of reading, ’riting, and ’rithmetic—and half directed at values and vocational education.<sup>189</sup> The time devoted to traditional school subjects focused

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<sup>187</sup> Thomas J. Morgan, *Instructions to Indian Agents in Regard to Inculcation of Patriotism in Indian Schools*, in H.R. Exec. Doc. No. 51-1, pt. 5, at clxvii (1890), reprinted in *AMERICANIZING THE AMERICAN INDIANS*, *supra* note 181, at 257.

<sup>188</sup> W.T. HARRIS, *THE RELATION OF SCHOOL EDUCATION TO THE WORK OF CIVILIZING OTHER RACES* (1895), reprinted in *PROCEEDINGS OF THE THIRTEENTH ANNUAL MEETING OF THE LAKE MOHONK CONFERENCE OF FRIENDS OF THE INDIAN* 33, 37 (Isabel C. Barrows ed., Boston, The Lake Mohonk Conference 1896).

<sup>189</sup> See Jon Reyhner, *American Indian Boarding Schools: What Went Wrong? What Is Going Right?*, 57 *J. AM. INDIAN EDUC.* 58, 60 (2018).

heavily on literacy.<sup>190</sup> Students were continually asked to read aloud from textbooks or readers, sometimes in unison and sometimes alone before the entire class.<sup>191</sup>

Outside of class, the importance of literacy was reinforced through the production of school newspapers, which featured student compositions and highlighted student achievements.<sup>192</sup> The schools in turn distributed these newspapers to the student body as well as to subscribers around the country.<sup>193</sup> These newspapers functioned as not only a means of highlighting educational achievement, but as a forum for school staff to reinforce the importance of literacy. Indeed, one boarding school administrator went so far as to write an entire novella, *Stiya: Or, A Carlisle Indian Girl at Home*,<sup>194</sup> that was originally published in one of these newspapers.<sup>195</sup> That novella told the story of Stiya, the ideal indigenous student, who returns home to her family after attending one of these boarding schools and transforms her family home into a middle-class domestic paradise.<sup>196</sup> She achieves this—in a rather meta twist—by reading and referring to her copies of her school’s newspaper, which she “kept so carefully” in her trunk “between two pasteboard box covers.”<sup>197</sup> Upon unpacking these papers back at home, Stiya experiences immediate relief, kissing and “talking to [the newspapers] as though they were a person.”<sup>198</sup> She then recounts: “I sat down by the fire, and for an hour lost myself reading over what we had done at Carlisle [Indian Industrial School] in years gone by.”<sup>199</sup>

In this way, Stiya embodied both the importance of literary education to school officials and the reason why reading received so much emphasis. To them, reading enabled students to both fully engage in society and assimilate their family and homes into that society.

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<sup>190</sup> See Sarah Klotz, *Impossible Rhetorics of Survivance at the Carlisle School, 1879–1883*, 69 *COLL. COMPOSITION & COMM’N*, 208, 212 (2017) (placing “the boarding school project within a long history of literacy training as settler colonialism in North America” (emphasis in original)); see also ADAMS, *supra* note 170, at 137.

<sup>191</sup> See ADAMS, *supra* note 170, at 137–38.

<sup>192</sup> See Klotz, *supra* note 190, at 212–13.

<sup>193</sup> *Id.* at 213.

<sup>194</sup> EMBE, *STIYA, A CARLISLE INDIAN GIRL AT HOME* (Cambridge, Riverside Press 1891).

<sup>195</sup> Amanda J. Zink, *Carlisle’s Writing Circle: Boarding School Texts and the Decolonization of Domesticity*, 27 *STUD. IN AM. INDIAN LITERATURES* 37, 37 (2015).

<sup>196</sup> *Id.* at 37–38.

<sup>197</sup> EMBE, *supra* note 194, at 108.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

Because school officials deemed reading to be so critical in this process, they attached severe consequences to seemingly minor reading stumbles. For example, when students failed to read a passage aloud correctly, students could expect harsh critiques and even discipline from their instructors.<sup>200</sup> In addition, those same student newspapers that highlighted student work and faculty fiction also published articles shaming students who failed to keep pace in the classroom.<sup>201</sup> To proponents of these schools, this harsh approach to learning literacy was deemed necessary to “civilizing” and “assimilating” indigenous children.<sup>202</sup> While these harsh consequences evidence the priority these federal schools placed on literacy, the abhorrent and problematic thinking underpinning those consequences—and school officials’ actions more generally—merits considerable discussion. Part IV engages deeply in that discussion.

Before that discussion begins, it is worthwhile to take stock of the federal government’s behavior in this context. The federal government saw education as a key step in making indigenous people U.S. citizens. When the federal government perceived a failure in educational provision of local schools on reservations, they responded with a federal program of schools. Much like the Southern schools supported by the Freedmen’s Bureau, these schools prioritized literacy. Through literacy, the architects of these schools hoped to prepare students and their families for U.S. citizenship. This pattern of thinking and action maps closely onto the cycle of behavior the federal government displayed through the Freedmen’s Bureau’s educational projects.

#### IV. CASE STUDIES IN CONVERSATION

With an understanding of how each case study speaks to the deep roots of a right to a basic minimum education, it is now time to bring those case studies into conversation with each other. While the actions undertaken by the Freedmen’s Bureau and the Bureau of Indian Affairs bear many similarities to one another, one similarity requires discussion first and foremost: both of these programs are inextricable from the colonialist motivations that underpin them. Part IV.A wrestles with this similarity. After unpacking these programs’ motivations, Part IV.A goes on to

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<sup>200</sup> See ADAMS, *supra* note 170, at 138–41.

<sup>201</sup> See Klotz, *supra* note 190, at 212–13.

<sup>202</sup> See ADAMS, *supra* note 170, at 25–27, 140–41, 291.

explain how these motivations impact a proposed right to a basic minimum education. Finally, Part IV.B concludes by showing that these programs—though problematically motivated—ultimately support the notion that the right to a basic minimum education has deep roots.

#### A. The Colonialist Motivations Behind Federal Action

The colonialism behind the actions of the Bureau of Indian Affairs and the Freedmen's Bureau is unmistakable. Consider first the compulsory boarding schools for indigenous children. The principal motivations behind these schools are hardly difficult to discern. With a stated goal of “[k]ill[ing] the Indian in him, and sav[ing] the man,”<sup>203</sup> the racism underpinning the creation of these schools was obvious and central. Children were not only discouraged from speaking in their native language or acknowledging their culture, but teachers also actively disciplined students for doing so. Descriptions of these disciplinary measures are deeply disturbing. One teacher wrote in her memoir about a time she forced her thirty-five kindergarten students to lay on tables “like little sardines” and spanked them in this fashion for speaking their native Mohave language.<sup>204</sup> Yet actions just like these received praise from school officials for teaching indigenous children how to “speak properly” and assimilate into white culture. The resulting trauma to students is well documented.<sup>205</sup>

With a much more complicated legacy, the Freedmen's Bureau has received both praise and critique for its operations. Praise derives from the Bureau's position of often working against the racism and revanchism in the postwar South. Popular websites laud the Bureau as a triumph through characterizations like the following: “During its years of operation, the Freedmen's Bureau fed millions of people, built hospitals and provided medical aid, negotiated labor contracts for ex-slaves and settled labor disputes. It also helped former slaves legalize marriages and locate lost relatives, and assisted black veterans.”<sup>206</sup> Unsurprisingly though, historical scholarship complicates any narrative that the

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<sup>203</sup> RICHARD H. PRATT, *THE ADVANTAGES OF MINGLING INDIANS WITH WHITES* (1892), reprinted in *AMERICANIZING THE AMERICAN INDIANS*, *supra* note 181, at 260–61; see also ADAMS, *supra* note 170, at 52.

<sup>204</sup> ADAMS, *supra* note 170, at 141 (quotation marks omitted).

<sup>205</sup> See generally Lori V. Quigley, *Thomas Indian School Social Experiment Resulting in Traumatic Effects*, 14 JUD. NOTICE 48 (2019).

<sup>206</sup> *Freedmen's Bureau*, *supra* note 141.

Bureau operated as an instrument of pure altruism. Agents and architects of the Bureau's programs often admitted motivations and biases comparable in their racial paternalism to the education of indigenous children.<sup>207</sup> They expressed concern, for example, that Black citizens inherently lacked important moral values like integrity and hard work.<sup>208</sup>

No part of examining these actions should be equated with absolving these federal officials from their condemnable motivations and actions. A narrative suggesting that these actions were purely the products of altruism or even attempts at reparation would be deeply flawed. The point of examining these actions is not to praise the federal government. The point of examining these actions is to show that the federal government deemed education to be essential, so much so that it expended time on the Congress floor, dedicated resources from the national budget, and premised independent statehood on literacy education. It did so because it perceived that the states and private organizations had failed. These actions placed the federal government in such a position that it essentially served as a backstop, ensuring that where local educational provision failed, literacy education could still occur.

Of course, the colonialism underpinning these programs may lead one to think that these programs were not truly educational initiatives and rather that they were assimilationist and racist programs. The complicated, messy reality is that they were a bit of both. True, the reason that Congress and federal agents undertook these missions was based on problematic assumptions. In both case studies, they assumed in one form or another that people of color innately lacked the ability to engage in democratic society. These assumptions are obviously wrong. Yet, the programs federal officials created—while undeniably operating with these biases—were programs that prioritized educational provision, specifically where local actors had failed to do so. The reasoning behind these programs is unquestionably important and should under no circumstances be erased from accounts of these actions. But it is the actions the federal government took that define whether they protected a right to a basic minimum education. In the case of both the Freedmen's Bureau and the Bureau of Indian

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<sup>207</sup> See STANLEY, *supra* note 146, at 36.

<sup>208</sup> *Id.* at 36–37.

Affairs, they did in fact protect and support educational access to literacy.

Bad motivations can and do beget law that ultimately receives modern approval under a different rationale. Take, for example, worker protection laws like those establishing a minimum wage. The history of minimum wage laws can be traced to beliefs in the inherent inferiority of women.<sup>209</sup> Yet, today, these laws are a given in modern American life with a federal minimum wage as well as state minimum wage laws in all but five states.<sup>210</sup> Similarly, a right to a basic minimum education can have roots in federal actions that are imbued with problematic assumptions and motivations but ultimately function in a new way. Those roots cannot and should not be ignored or swept away. Yet while a right to education will share a history with those motivations, it need not be defined by them. In fact, that right could actively subvert the systemic educational inequality that resulted from very similar thinking.

With this notion in mind, the remainder of this Part discusses the role that the federal government ultimately assumed at the time of the Fourteenth Amendment's enactment and how that bears on the question of whether foundational literacy education is deeply rooted in U.S. history and tradition.

#### B. The Deep Roots of the Right to a Basic Minimum Education

With the understanding of a right to a basic minimum education as at least a right to some foundational level of literacy, this right has deep roots within the federal government around the time of the enactment. Indeed, the federal government at the time of the Fourteenth Amendment's enactment effectively positioned itself as an insurer of access to literacy instruction in areas where that access was believed to be extremely lacking or nonexistent.

First, consider the Freedmen's Bureau. The Congress that ratified the Fourteenth Amendment is the same Congress that passed the Freedmen's Bureau Act of 1866, codifying the Bureau's educational mission over the concerns of the president. In fact, after President Johnson's first veto, Congress put the bill on hold in order to ratify the Fourteenth Amendment. This is the same

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<sup>209</sup> See Raymund Munts & David C. Rice, *Women Workers: Protection or Equality?*, 24 *INDUS. & LABOR RELS. REV.* 3, 3–5 (1970).

<sup>210</sup> *State Minimum Wages*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 5, 2021), <https://perma.cc/54VK-YYYN>.



Congress that—despite President Johnson's disapproval of the Bureau's educational goals—codified that educational role regardless. When it came time to disband the Bureau, exiting a given state was made dependent on the status of its educational system. Both in supporting the establishment of schools and in making their operation a prerequisite of unencumbered statehood, the federal government expanded opportunities to access literacy education.

One may argue that these programs are not truly evidence of a right to a basic minimum education, but rather they are a policy response to the extraordinary circumstances of the Civil War and Reconstruction. This argument might have more credence if the federal government ceased its educational involvement after Reconstruction ended. But it didn't. Federal boarding schools still exist today,<sup>211</sup> and federal involvement in education has only increased since the Reconstruction Era.<sup>212</sup> It is also worth noting that this argument renders an enactment-era focus of this historical analysis effectively self-destructive. Surely, one cannot demonstrate that something is not a momentary policy response without looking to what happened after the relevant moment ends. Thus, to the extent this critique is lodged at right-to-education advocates, it is truly a critique of enactment-focused methodology rather than a critique of the Freedmen's Bureau or the Bureau of Indian Affairs specifically.

One may also argue that the federal government's focus on the South undercuts any argument that it assumed a role in ensuring educational access. However, this ignores the fact that the concentration of efforts in the South responded to an obvious need. Prior to the Civil War, many southern states made it a crime to teach enslaved people to read.<sup>213</sup> With the Union victory, the South presented a place where minimum amounts of education were patently unavailable.

Moreover, the Freedmen's Bureau was not the only example of the federal government engaging in this type of behavior. In devising compulsory schools for indigenous children, the federal government engaged in a similar cycle of behavior. It assessed the current state of education and determined it was lacking. In response, it used federal funds to create schools to address the

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<sup>211</sup> Reyhner, *supra* note 189, at 74.

<sup>212</sup> See generally CTR. ON EDUC. POL'Y, A BRIEF HISTORY OF THE FEDERAL ROLE IN EDUCATION: WHY IT BEGAN & WHY IT'S STILL NEEDED (1990).

<sup>213</sup> Black, *supra* note 83, at 1065–66.

perceived gap.<sup>214</sup> These schools prioritized literacy as a fundamental necessity of American society.

These case studies and the cycle of federal behavior that they both share mean that the federal government has a history of ensuring access to a minimum amount of education—specifically, basic literacy education—when it determines that local entities have failed. This history is directly from the period of the Fourteenth Amendment’s enactment and thus supports the notion that the right to a basic minimum education has deep roots in our nation’s history.

Bringing this support in conversation with other scholarship, the historical roots of a right to a basic minimum education abound. As this Comment addresses, the very notion of the federal government as a backstop to local educational failure has deep roots at the time of the Fourteenth Amendment’s enactment. This conclusion buttresses other findings about education’s history, from the right’s inclusion in nearly every state constitution to the relationship between those education provisions and readmission to the Union. Moreover, this mountain of evidence is just a small drop in the bucket if one embraces an expansive view of the historical prong, bringing in evidence like the advent of compulsory schooling and the early twentieth-century Supreme Court precedent discussed in Part I.A—as the Sixth Circuit did in *Gary B.*<sup>215</sup> Thus, under either methodology, there is considerable evidence that the right to a basic minimum education is deeply rooted in U.S. history and tradition.

With considerable support for the right’s deep roots under both of the prong’s analytical frameworks, advocates for such a right have multiple avenues of making their case. While advocates still must convince judges that the right is implicit in the concept of ordered liberty and carefully described, a recognized right may be closer than it appears.

#### CONCLUSION

Scholarship about a right to education has long been sidelined as fantastical theory rather than adopted by courts. After all, the Supreme Court explicitly foreclosed a broad, general right to education under the Fourteenth Amendment. Yet scholars and courts have acknowledged that the Court left open the question

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<sup>214</sup> See ADAMS, *supra* note 170, at 26–27.

<sup>215</sup> See *Gary B. I.*, 957 F.3d 650–52.

whether a right to some minimum amount of education exists. And indeed, the Sixth Circuit's opinion in *Gary B.*—albeit short-lived—has demonstrated that arguments for this right's recognition are not meritless. If a federal court of appeals can reach this conclusion, it is no longer fantasy to think that other courts might follow suit.

The path to a recognized right certainly contains obstacles. One key issue that advocates will have to wrestle with is the historical prong of substantive due process analysis. While judges today differ in how they analyze whether a proposed right is deeply rooted in U.S. history and tradition—from an expansive analytical approach to an enactment-focused one—the importance of identifying and analyzing those roots around the time of the Fourteenth Amendment's enactment is the same. Previous scholarship highlights important evidence from state constitutions and constitutional conventions, arguing that the pervasive discussions and guarantees of education in these sources indicate that the right is deeply rooted. Critically however, these state-focused pieces of evidence are not the only support available for this notion. Indeed, the federal government's actions in supporting the Freedmen's Bureau's educational operations and the Bureau of Indian Affairs' compulsory boarding schools for indigenous children both stand as distinct, interrelated examples of the government prioritizing, providing, and protecting literacy education as a necessity.

In both cases, the federal government assessed the state of education in a region, decided it was deeply lacking, and took it upon itself to establish or support the establishment of schools to address that issue. True, the government did not establish a federal system of public schools for all children. Instead, the government responded to areas it identified as high need by acting to ensure that at least some access to education existed. This education always included a literacy component. This positioning of education as a protected necessity is evidence that even when limiting one's evidence to around the time of the Fourteenth Amendment's ratification and enactment, the right to a basic minimum education is deeply rooted in U.S. history and tradition.

Importantly, even if courts hold that the right to a basic minimum education is deeply rooted, additional requirements must be shown before that right could be recognized. Per the Supreme Court's articulation of substantive due process analysis in *Glucksberg*, the asserted right to education must still be carefully

described.<sup>216</sup> The right must also be “implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.”<sup>217</sup> Whether the right to a basic minimum education satisfies these additional requirements is beyond the scope of this Comment.<sup>218</sup> However, it is worth noting that scholarship already links literacy’s importance to exercising key liberties like voting.<sup>219</sup> Moreover, defining a basic minimum education as a right to a foundational level of literacy is considerably narrower than the broad “right to education” presented in *Rodriguez*. In this way, advocates have plenty of room to argue that this right meets the additional criteria.

In the midst of all this theoretical uncertainty regarding whether the Fourteenth Amendment protects a right to a basic minimum education, one fact is certain. The U.S. education system is failing to provide fundamental skills like reading, especially to the most marginalized Americans.<sup>220</sup> Recognizing a right to a basic minimum education is no silver bullet; even if such a right is recognized and protected, systemic problems remain embedded within the education system’s core.<sup>221</sup> That being said, with the recognition of a right to a basic minimum education, the nation could move one step closer to protecting its citizens from a lack of access to a foundational level of literacy. To act as an enforcer of educational access is something of no small significance and may cause some federal officials to worry that the federal government is ill-equipped for such a role. But these officials can rest assured that this is something the federal government has—in one form or another—done before.

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<sup>216</sup> See *Glucksberg*, 521 U.S. at 721.

<sup>217</sup> *Id.* (quotation marks omitted) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)).

<sup>218</sup> There is considerable scholarship arguing that both requirements are indeed met. See generally Black, *supra* note 83; Friedman & Solow, *supra* note 33.

<sup>219</sup> See Black, *supra* note 83, 1089–90.

<sup>220</sup> See *Adult Literacy in the United States*, *supra* note 19.

<sup>221</sup> Aaron Tang, Ethan Hutt & Daniel Klasik, Opinion, *A Constitutional Right to Literacy for Detroit’s Kids?*, N.Y. TIMES (Apr. 26, 2020), <https://perma.cc/E24E-5STP> (arguing that systemic inequality in U.S. education cannot be properly addressed solely in federal courts).