

A “CHARTER OF NEGATIVE LIBERTIES” NO LONGER: EQUAL DIGNITY AND THE POSITIVE RIGHT TO EDUCATION

ARIJEET SENSHARMA*

In the Spring of 2020, a panel of the Sixth Circuit Court of Appeals in Gary B. v. Whitmer penned an opinion recognizing a fundamental right to a basic minimum education. While this decision was subsequently vacated pending en banc review and then dismissed as moot following a settlement, it stands as a bellwether of the long-overdue march toward recognition of positive rights under the Constitution. A series of Burger Court opinions attempted to calcify the notion that the Constitution is a “charter of negative liberties,” most famously DeShaney v. Winnebago County Department of Social Services and its progeny. These opinions erected three key doctrinal barriers to recognition of positive rights: 1) that a cognizable due process claim must arise from direct, de jure state deprivation; 2) that separation of powers points towards legislatures, not courts, as the appropriate bodies for curing social and economic ills; and 3) that furnishing equality is not a proper aim of due process.

But substantive due process doctrine has transformed over the past few decades. Most notably in a series of cases protecting the rights of LGBTQ+ individuals—Lawrence v. Texas in 2003, United States v. Windsor in 2013, and Obergefell v. Hodges in 2015—the doctrines of due process and equal protection have fused so intimately as to have revealed a new doctrinal structure, which Laurence Tribe has termed “equal dignity.” The doctrine of equal dignity has profound implications for the recognition of positive rights. Its theoretical tenets undermine the doctrinal elements which have traditionally steered federal courts away from recognizing positive rights. This Note argues that the case of education—considered in light of the post-Obergefell substantive due process doctrine—dismantles each of the traditional pillars of negative-rights constitutionalism, paving the way for recognition of a positive right to a basic minimum education. More broadly, Gary B. demonstrates that courts are now doctrinally equipped to recognize positive rights within the framework of modern substantive due process, a development that has radical implications for Fourteenth Amendment jurisprudence and the project of constitutional equality.

INTRODUCTION	836
I. PILLARS OF NEGATIVE-RIGHTS CONSTITUTIONALISM ...	841
A. <i>Direct State Deprivation</i>	844

* Copyright © 2022 by Arijeet Sensharma. J.D. Candidate, 2022, New York University School of Law. B.A., 2019, Frank Batten School of Leadership & Public Policy, University of Virginia. I am deeply grateful to Professor Kenji Yoshino for his mentorship and guidance throughout the development of this Note, and to Professors Helen Hershkoff and Chris Jaeger for invaluable conversations as I developed the idea for this Note. Incalculable thanks to my family and friends for their unwavering support. Finally, thank you to the terrific editors of the *New York University Law Review* for their thoughtful and diligent work on this Note.

B. <i>Separation of Powers: To the Legislatures</i>	848
C. <i>Equality Distinguished</i>	850
II. <i>OBERGEFELL, EQUAL DIGNITY, AND SUBSTANTIVE DUE PROCESS REIMAGINED</i>	851
III. <i>GARY B. v. WHITMER AND THE POSITIVE RIGHT TO EDUCATION</i>	858
A. <i>Deprivation of Liberty Reimagined</i>	861
B. <i>Separation of Powers: To the Courts</i>	866
C. <i>Equality Indispensable</i>	870
CONCLUSION	871

INTRODUCTION

The fundamental right to a basic minimum education enjoyed a fleeting breath in the spring of 2020. Less than a month elapsed between the landmark Sixth Circuit decision in *Gary B. v. Whitmer* and its demise, when the decision was vacated pending en banc review¹ and subsequently dismissed as moot after the parties settled.² Courts have long resisted the notion that the Due Process Clause of the Fourteenth Amendment guarantees positive substantive rights³—affirmative governmental duties to provide for certain basic needs.⁴ Nevertheless, the *Gary B.* decision may have been a bellwether of a march toward the long-overdue recognition of such positive rights.

The normative case for finding positive rights within the Constitution has been persuasively but unavailingly argued by scholars for decades⁵ and by civil rights attorneys in the pre-*Brown* era.⁶ These arguments, however, have risen and fallen against a

¹ 957 F.3d 616 (6th Cir. 2020), *vacated pending reh'g en banc*, 958 F.3d 1216 (6th Cir. 2020) (mem.).

² Press Release, Off. of Governor Gretchen Whitmer, Governor Whitmer and Plaintiffs Announce Settlement in Landmark Gary B. Literacy Case (May 14, 2020), <https://www.michigan.gov/whitmer/news/press-releases/2020/05/14/governor-whitmer-and-plaintiffs-announce-settlement-in-landmark-gary-b-literacy-case> [<https://perma.cc/XK9M-G4DH>]; Colter Paulson, *Sixth Circuit Vacates Right-to-Literacy Ruling*, NAT'L L. REV. (June 11, 2020), <https://www.natlawreview.com/article/sixth-circuit-vacates-right-to-literacy-ruling> [<https://perma.cc/LRG5-JSSX>].

³ See *infra* Part I.

⁴ Using this as the operational definition of positive rights, this Note defines negative rights as rights framed as limitations on governmental action; that is, liberties upon which governments cannot infringe.

⁵ See, e.g., Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) (advocating for a theory of “minimum protection” adjacent to but distinct from conventional equal protection doctrine).

⁶ See RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 150 (2007) (describing the “transformation in conceptualizing and enforcing civil rights” that emerged out of New Deal notions of economic security whereby “the *Lochner*-era conception of civil rights as a

remarkably consistent background of federal court jurisprudence adhering to the general notion that “the Constitution is a charter of negative rather than positive liberties.”⁷ For proponents of positive rights, Supreme Court caselaw paints a grim picture—a series of Burger Court decisions in the 1970s and 1980s implicitly or explicitly declined to recognize any such entitlements as fundamental due process rights in a variety of settings, including welfare,⁸ housing,⁹ reproductive healthcare,¹⁰ and education.¹¹ A bifurcated Due Process Clause has emerged—treating life, liberty, and property interests as fundamental for those already in possession of such interests and dispensable for those striving to acquire them.¹²

Education is perhaps the field that best exemplifies the failure of our negative-rights model to afford equality. When the Supreme Court forbade de jure segregation of public schools in *Brown v. Board of Education*, it gave much lip service to the fundamentality of education. Chief Justice Warren’s opinion explained:

Today, education is perhaps the most important function of state and local governments. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.¹³

By adding the nested clause, “where the state has undertaken to provide it,” Warren situated even such an essential “right” as education within a negative-rights framework in the same breath that he recognized that “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.” Nineteen years later, *San Antonio Independent School District v. Rodriguez* further entrenched the negative-rights vision of education by declining to recognize a due process right to education.¹⁴

The implications of these decisions have been, and continue to be, striking—to provide a small sampling of the vast data on education disparities, “[i]n 2015, the average reading score for white students on

constraint on government action no longer occupied the field,” and a “new positive liberty in which the federal government acted as wielder of the sword had grown up beside it”).

⁷ *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983); see also *infra* notes 8–11 and accompanying text.

⁸ *Dandridge v. Williams*, 397 U.S. 471, 484 (1970).

⁹ *Lindsey v. Normet*, 405 U.S. 56, 74 (1972).

¹⁰ *Harris v. McRae*, 448 U.S. 297, 317–18 (1980).

¹¹ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

¹² See *infra* Part I.

¹³ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

¹⁴ 411 U.S. at 35.

the National Assessment of Educational Progress (NAEP) 4th and 8th grade exam was 26 points higher than [B]lack students.”¹⁵ Segregation itself has continued relatively unscathed—“only about one in eight white students (12.9%) attends a school where a majority of students are black, Hispanic, Asian, or American Indian. . . . In contrast, nearly seven in 10 black children (69.2%) attend such schools.”¹⁶ Racial segregation intersects with economic segregation and concomitant resource disparities: “Less than one in three white students (31.3%) attend a high-poverty school, compared with more than seven in 10 black students (72.4%).”¹⁷ Erwin Chemerinsky has chastised the federal judiciary for not only failing to advance prompt desegregation, but also, even after advances had been made, contributing to the resegregation of schools in the 1970s and 1990s that continues to render schooling separate and unequal today.¹⁸ While *Brown* certainly marked a groundbreaking moment in rejecting de jure segregation, its practical impact on disparities in education has been far more meager—bluntly, “American public schools remain largely separate and unequal – with profound consequences for students, especially students of color.”¹⁹

Against this backdrop, and facing a record which laid bare the utter failure of Detroit public schools to afford its children even a basic education,²⁰ a Sixth Circuit panel became the first federal court

¹⁵ *K-12 Disparity Facts and Statistics*, UNCF, <https://uncf.org/pages/k-12-disparity-facts-and-stats> [<https://perma.cc/4XRL-4VFV>] (citing *No Significant Change in Racial/Ethnic Score Gaps for Fourth-Graders in Reading Compared to 2013*, THE NATION’S REPORT CARD, 2015 MATHEMATICS & READING ASSESSMENTS: NATIONAL SCORE GAPS, https://www.nationsreportcard.gov/reading_math_2015/#reading/gaps?grade=4 [<https://perma.cc/FSZ8-QN9N>]) (reporting that white fourth-grade students recorded an average score of 232 and Black students recorded an average of 206, on a scale in which the overall average score was 223).

¹⁶ Emma García, *Schools Are Still Segregated, and Black Children Are Paying a Price*, ECON. POL’Y INST. (Feb. 12, 2020), <https://www.epi.org/publication/schools-are-still-segregated-and-black-children-are-paying-a-price> [<https://perma.cc/26P4-XREE>].

¹⁷ *Id.*

¹⁸ See Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts’ Role*, 81 N.C. L. REV. 1597, 1600 (2003) (“[C]ourts could have done much more to bring about desegregation, and instead, the judiciary has created substantial obstacles to remedying the legacy of racial segregation in schools.”).

¹⁹ Keith Meatto, *Still Separate, Still Unequal: Teaching About School Segregation and Educational Inequality*, N.Y. TIMES (May 2, 2019), <https://www.nytimes.com/2019/05/02/learning/lesson-plans/still-separate-still-unequal-teaching-about-school-segregation-and-educational-inequality.html> [<https://perma.cc/3M3K-XP37>]; see also Linda Darling-Hammond, *Unequal Opportunity: Race and Education*, BROOKINGS (Mar. 1, 1998), <https://www.brookings.edu/articles/unequal-opportunity-race-and-education> [<https://perma.cc/YKG9-A4YN>] (“[E]ducational experiences for minority students have continued to be substantially separate and unequal.”).

²⁰ See *infra* notes 121–22 and accompanying text.

to recognize a positive fundamental right to a basic education under the Due Process Clause of the Fourteenth Amendment in *Gary B. v. Whitmer*. Judge Eric L. Clay, writing for a two-to-one majority, defined that right as “one that plausibly provides access to literacy.”²¹ While the case was awaiting en banc rehearing, Michigan Governor Gretchen Whitmer entered into a settlement with the *Gary B.* plaintiffs, agreeing, inter alia, to propose legislation devoting at least \$94.4 million to literacy-related programs in the Detroit public school system.²² Following settlement, the case was dismissed as moot,²³ leaving the now-vacated opinion by Judge Clay standing as a symbolic landmark.

Given the longstanding reticence of federal courts to recognize positive constitutional rights, together with the rightward lurch of the federal judiciary in recent years and indeed decades,²⁴ one might reasonably wonder whether the symbolism of *Gary B.* is just that—symbolism, and no more. But the substantive due process doctrine has transformed over the past few decades. Most notably in a series of cases protecting the rights of LGBTQ+ individuals—*Lawrence v. Texas* in 2003, *United States v. Windsor* in 2013, and *Obergefell v. Hodges* in 2015—the doctrines of due process and equal protection have fused so intimately as to have revealed a new doctrinal structure. In Laurence Tribe’s formulation, “*Obergefell*’s chief jurisprudential achievement is to have tightly wound the double helix of Due Process and Equal Protection into a doctrine of equal dignity.”²⁵ This doctrine lays out a new framework for recognizing fundamental liberty inter-

²¹ *Gary B. v. Whitmer*, 957 F.3d 616, 648 (6th Cir. 2020); see *infra* Part III.

²² Press Release, Off. of Governor Gretchen Whitmer, *supra* note 2.

²³ *Id.*; Paulson, *supra* note 2.

²⁴ See John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RESEARCH. CTR. (Jan. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges> [https://perma.cc/VBS7-QGUY] (“Trump appointed 54 federal appellate judges in four years, one short of the 55 Obama appointed in twice as much time. In the process, Trump ‘flipped’ the balance of several appeals courts from a majority of Democratic appointees to a majority of Republican appointees.”); see also Julian E. Zelizer, *How Conservatives Won the Battle over the Courts*, ATLANTIC (July 7, 2018), <https://www.theatlantic.com/ideas/archive/2018/07/how-conservatives-won-the-battle-over-the-courts/564533> [https://perma.cc/U5N3-NRZT] (describing the sustained efforts of political actors beginning in the 1980s to build up a conservative judiciary); Rebecca R. Ruiz, Robert Gebeloff, Steve Eder & Ben Protess, *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES (Mar. 14, 2020), <https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html> [https://perma.cc/36NA-WPJJ] (detailing the conservative bona fides of Trump-appointed judges).

²⁵ Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 17 (2015) (emphasis omitted). While he notably applied this phrase to characterize the doctrine emergent in *Obergefell* and its predecessors, Tribe did not invent the concept of equal dignity—as Tribe himself notes, the concept has a “robust doctrinal pedigree.” *Id.*

ests that is grounded in notions of dignity as both individual autonomy and collective equality, foregrounding an antisubordination ethos that has too often remained muted in Fourteenth Amendment jurisprudence.²⁶

Negative-rights constitutionalism is not the only stricture that has limited fundamental rights jurisprudence under substantive due process—the rigid doctrinal test of *Washington v. Glucksberg*, decided in 1997, limits recognition to those rights that are “‘deeply rooted in this Nation’s history and tradition,’ . . . ‘implicit in the concept of ordered liberty,’” and given a “careful description.”²⁷ Kenji Yoshino has discussed the ways in which *Obergefell* loosened—and perhaps abrogated—the prongs of this test, and this alone has significant implications for substantive due process doctrine.²⁸ Yet even with a more capacious test in place, negative-rights constitutionalism threatens to limit the reach of fundamental rights; that is the limitation against which this Note seeks to intervene.

The doctrine of equal dignity has profound implications for the recognition of positive rights. Its theoretical tenets undermine the doctrinal elements which have traditionally steered federal courts away from recognizing positive rights,²⁹ and the *Gary B. v. Whitmer* opinion demonstrates a concrete application of this doctrinal transformation, applying the new substantive due process framework to recognize a positive fundamental right to a basic minimum education.³⁰ While this Note channels its analysis through the lens of the right to education, the list of positive rights that may flow from the emergent doctrine does not end with education; that elaboration will be left to future scholarship.

Part I of this Note will lay out the traditional justifications for negative-rights constitutionalism. Part II will briefly describe the evolution of substantive due process leading up to the modern era. Part III will describe the circumstances of and the landmark decision in *Gary B. v. Whitmer*, and argue that the case of education, under

²⁶ See *id.*; Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 1009 (2002) (“Current Supreme Court doctrine understands equal protection as an antidiscrimination principle rather than an antisubordination principle . . .”).

²⁷ 521 U.S. 702, 721 (1997) (citations omitted).

²⁸ See Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 162 (2015) (“After *Obergefell*, it will be much harder to invoke *Glucksberg* as binding precedent. As Chief Justice Roberts’s dissent observed, ‘the majority’s position requires it to effectively overrule *Glucksberg* . . .’ *Obergefell* pressed against or past the three *Glucksberg* constraints more definitively than *Lawrence* did.” (quoting *Obergefell v. Hodges*, 576 U.S. 644, 702 (2015) (Roberts, C.J., dissenting))).

²⁹ See *infra* Part II.

³⁰ See *infra* Part III.

modern substantive due process doctrine, refutes each of the key pillars of negative-rights constitutionalism outlined in Part I. Finally, this Note will tentatively assess the implications of this argument for positive rights beyond education, offer a very brief normative case for positive rights, and conclude.

I

PILLARS OF NEGATIVE-RIGHTS CONSTITUTIONALISM

A positive right to education would seem beyond reach under the negative-rights constitutionalism of the late twentieth century. The Supreme Court in 1989 delivered its clearest statement that the Due Process Clause does not house positive rights in *DeShaney v. Winnebago County Department of Social Services*.³¹ The facts were nightmarish—the Winnebago County Department of Social Services first learned that a young boy by the name of Joshua DeShaney was potentially the victim of child abuse in 1982.³² When he was admitted to a hospital with bruising and abrasions, a Wisconsin juvenile court temporarily placed him in the custody of the hospital.³³ A “Child Protection Team” recommended protective measures, but allowed Joshua to be returned to the custody of his father.³⁴ In the ensuing two years, officials on multiple occasions observed severe injuries indicative of further abuse and noticed that the recommended protective measures were not being complied with.³⁵ They took no action.³⁶

³¹ 489 U.S. 189 (1989). One might wonder why the Due Process Clause of the Fourteenth Amendment is the proper home in which to search for positive rights. The answer is likely much the same as the answer to the question of how “substantive due process” itself came to exist—the strangling of the Privileges or Immunities Clause of the Fourteenth Amendment in the *Slaughter-House Cases*, 83 U.S. 36, 76–80 (1873) (confining “the privileges and immunities of citizens of the several States” to a narrow set of already-recognized federal interests). Scholars have suggested that a different outcome could have set constitutional interpretation more broadly on a course towards recognizing positive rights. See, e.g., Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 412–13 (1990). The Equal Protection Clause may also seem a more natural home for positive rights, but the Supreme Court has effectively foreclosed this possibility through its imposition of the “state action” requirement, see *The Civil Rights Cases*, 109 U.S. 3, 17–18 (1883), and further doctrinal restrictions limiting the relief available through equal protection, see Michelman, *supra* note 5, at 17 (“[T]o the extent that the Court were disposed to exploit the equal protection clause to enforce some affirmative duties of protection, it could hardly help noticing that it would be ‘equal,’ not minimum protection which had to be extended.”). See generally Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).

³² *DeShaney*, 489 U.S. at 192.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 192–93.

³⁶ *Id.* at 193.

Joshua's father subsequently beat him, then four years old, to the point of falling into a "life-threatening coma," leaving him with "brain damage so severe that he [was] expected to spend the rest of his life confined to an institution" for the intellectually disabled.³⁷ Joshua passed away in 2015 at the age of 36.³⁸

Joshua and his mother brought an action under 42 U.S.C. § 1983 alleging that the county and its officials "deprived Joshua of his liberty without due process of law, in violation of his rights under the Fourteenth Amendment, by failing to intervene to protect him against a risk of violence at his father's hands of which they knew or should have known."³⁹ Writing for the six-member majority affirming a grant of summary judgment for the county, Chief Justice Rehnquist found that "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."⁴⁰ Rehnquist could have limited the implications of *DeShaney* by confining the holding to the distinction between public and private harms—that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors."⁴¹ But Rehnquist's language is far more sweeping. He immediately followed with language assuring that the anti-positive rights principle extends beyond the boundary of private harm: "The [Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security."⁴²

The *DeShaney* opinion placed the Supreme Court's imprimatur on the notion that the Fourteenth Amendment is content with a bifurcated Due Process Clause—one which treats life, liberty, and property interests as fundamental for those already in possession of such protectable interests, but treats the same interests as wholly dispensable for those unable to fully realize them in the first place. This evinces manifest inequality even in the abstract, and the devastating *human*

³⁷ *Id.*

³⁸ Linda Greenhouse, *The Supreme Court and a Life Barely Lived*, N.Y. TIMES (Jan. 7, 2016), <https://www.nytimes.com/2016/01/07/opinion/the-supreme-court-and-a-life-barely-lived.html> [<https://perma.cc/7BDT-KMPR>].

³⁹ *DeShaney*, 489 U.S. at 193.

⁴⁰ *Id.* at 196.

⁴¹ *Id.* at 195. Indeed, Judge Clay of the Sixth Circuit, writing the majority opinion in *Gary B.*, attempted to characterize *DeShaney* as such, suggesting that it could be distinguished, although he proceeded to recognize the right to a basic minimum education even assuming that *DeShaney* did control. *Gary B. v. Whitmer*, 957 F.3d 616, 658–59 (6th Cir. 2020).

⁴² *DeShaney*, 489 U.S. at 195.

implications of this inequality can be concretized by reference to Maslow's hierarchy of needs.⁴³

Abraham Maslow posited a theory that “the basic human needs are organized into a hierarchy of relative prepotency.”⁴⁴ His “hierarchy” places the five categories of needs he identifies into an order; lower, more foundational needs dominate the consciousness until they are satisfied, and only then do “higher” needs emerge more potently into the psyche. The most foundational needs are the “physiological needs”—such as food, water, and sleep—followed by safety needs—physical safety and stability.⁴⁵ Needs for love and esteem follow.⁴⁶ These categories of basic needs are “deficiency needs”—needs arising from deprivation that grow stronger the longer they go unmet and must generally be at least somewhat satisfied before higher order, “growth needs” can take over the consciousness.⁴⁷ “Growth needs” encompass the highest category of needs in Maslow's hierarchy: self-actualization needs. The need for self-actualization, in simple terms, is the need to pursue happiness and satisfaction in life—inherent in even the notion of fundamental rights embodied in the Declaration of Independence.⁴⁸ “A musician must make music, an artist must paint, a poet must write, if [they are] to be ultimately happy. What a [person] can be, [they] must be.”⁴⁹

Once people enter the “mainstream” economic and social fold such that they possess protectable interests, *negative* due process rights generally prevent the State from impeding their paths to self-actualization. When one has secure possession of basic life, liberty, and property interests, they are free to seek happiness and satisfaction without undue governmental interference. On the other hand, the

⁴³ See Robert S. Lawrence, Iris Chan & Emily Goodman, *Poverty, Food Security, and the Right to Health*, 15 *GEO. J. POVERTY L. & POL'Y* 583, 600 (2008) (referring to Maslow's hierarchy of needs in “emphasiz[ing] the importance of securing . . . ‘positive’ rights through action by governments to respect, protect, and fulfill the right to food and the right to health”); Frank B. Cross, *The Error of Positive Rights*, 48 *UCLA L. REV.* 857, 858–59 (2001) (referencing Maslow's hierarchy in describing “basic sustenance” or “minimum welfare” as potentially constituting “a prerequisite to the realistic meaningfulness of the rights guaranteed by the Constitution”).

⁴⁴ See Abraham H. Maslow, *A Theory of Human Motivation*, 50 *PSYCH. REV.* 370, 375 (1943).

⁴⁵ See *id.* at 372–80.

⁴⁶ See *id.* at 380–82.

⁴⁷ See generally Saul McLeod, *Maslow's Hierarchy of Needs*, *SIMPLY PSYCH.* (Mar. 20, 2020), <https://www.simplypsychology.org/maslow.html> [<https://perma.cc/Y6Q8-RPFW>].

⁴⁸ See *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men . . .”).

⁴⁹ Maslow, *supra* note 44, at 382.

absence of *positive* due process rights means that those unable to meet deficiency needs—due to, for example, lack of food, water, health, or housing—effectively possess no protectable interests, as the path to self-actualization itself has high barriers to entry. This deep-seated inequality defines the bifurcated Due Process Clause.

From the *DeShaney* line of cases and the accompanying literature emerge three key justificatory principles underlying the longstanding judicial aversion to recognizing positive constitutional rights: 1) the purpose of the Due Process Clause was to prevent governments from using their power as a means of oppression, and thus a cognizable due process claim can only arise from direct state deprivation; 2) structural and pragmatic considerations regarding separation of powers point towards legislatures, not courts, as the appropriate bodies for curing social and economic ills; and 3) furnishing equality is not a proper aim of due process.

A. *Direct State Deprivation*

The first key principle underlying the negative-liberties constitutional formulation is that the Due Process Clause was intended to guard against oppressive governmental action, and cognizable due process violations must therefore be directly attributable to active state deprivation. This state action requirement is familiar to constitutional theory, and its equal protection counterpart has similarly functioned to limit the remedial potential of the Fourteenth Amendment.⁵⁰ It is nonetheless worth examining in this context to help guide understanding of how doctrinal changes affect its role in modern substantive due process.

Justice Thomas, dissenting in *Obergefell*, argued that this limitation on the reach of due process derives from notions of natural rights intertwined with founding-era philosophy,⁵¹ with the result being that “our Constitution is a ‘collection of “Thou shalt nots,”’ . . . not ‘Thou

⁵⁰ See Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 291–95 (1991) (describing how the Burger and Rehnquist Courts curtailed equal protection jurisprudence by bolstering the state action requirement). See generally Siegel, *supra* note 31 (arguing that a formal and historically static conception of equal protection limits the scope of equal protection law).

⁵¹ Justice Thomas recited a history of the Due Process Clauses drawn, for instance, from the Magna Carta and William Blackstone’s writing to argue that the original vision of these Clauses was to restrict the content of the concept of “liberty” to “freedom from physical restraint.” *Obergefell v. Hodges*, 576 U.S. 644, 723–25 (2015) (Thomas, J., dissenting). This analysis only attempts to explain the Fifth Amendment’s Due Process Clause; Justice Thomas pens a rather conclusory paragraph asserting that the Fourteenth Amendment’s Due Process Clause likely uses the same concept of “liberty” as that of the Fifth Amendment. *Id.* at 725–26.

shalt provides.’”⁵² He invoked a Lockean social contract theory to contend that from a state of natural liberty, people surrender some small portion of that natural liberty in exchange for increased security. The result is a system of “civil liberty,” or liberty “to be under no other legislative power but that established by consent in the commonwealth; nor under the dominion of any will or restraint of any law, but what that legislative shall enact according to the trust put in it.”⁵³

The *DeShaney*-era caselaw bears out Justice Thomas’s view. The *DeShaney* Court itself recited the historical view that the Due Process Clauses were “intended to prevent government ‘from abusing [its] power, or employing it as an instrument of oppression.’”⁵⁴ In *Maher v. Roe*, the Court held that a Connecticut regulation limiting Medicaid benefits for first trimester abortions to those that are medically necessary “places no obstacles absolute or otherwise in the pregnant woman’s path to an abortion. . . . The indigency that may make it difficult and, in some cases perhaps, impossible for women to have abortions is neither created nor in any way affected by the Connecticut regulation.”⁵⁵ Here there was plainly state action, but no constitutionally cognizable state *deprivation* because Connecticut did not actively impose direct restrictions on the right to choose an abortion.

Contrasting *Maher* with the Court’s decision in *Youngberg v. Romeo* is instructive. In *Youngberg*, Justice Powell, while affirming the principle that states generally have no duty to provide services to their citizens, found that such a duty may arise “[w]hen a person is institutionalized—and wholly dependent on the State”⁵⁶ The State in fact conceded that Romeo was entitled to adequate food, shelter, clothing, and medical care while institutionalized.⁵⁷ Only by

⁵² *Id.* at 732 (quoting *Reid v. Covert*, 77 S. Ct. 1222, 1226 (1957)). Justice Thomas’s dissent was joined by Justice Scalia.

⁵³ *Id.* at 726 (quoting JOHN LOCKE, *SECOND TREATISE OF CIVIL GOVERNMENT*, § 22, at 13 (J.W. Gough ed., 1947)). Consider, however, that such a social contract theory could easily point in the other direction—that people cede some degree of natural liberty in exchange for security could in fact suggest that a core *duty* of any government is to provide for the basic security of all those who enter into this contract. *See, e.g.*, Liliya Abramchayev, *A Social Contract Argument for the State’s Duty to Protect from Private Violence*, 18 ST. JOHN’S J. LEGAL COMMENT. 849 (2004).

⁵⁴ *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 196 (1989) (quoting *Davidson v. Cannon*, 474 U.S. 344, 348 (1986)).

⁵⁵ *Maher v. Roe*, 432 U.S. 464, 474 (1977).

⁵⁶ 457 U.S. 307, 317 (1982). *Youngberg v. Romeo* involved a young man named Nicolas Romeo with developmental disabilities resulting in his institutionalization—Romeo’s mother brought a section 1983 suit on his behalf asserting due process rights to “(i) safe conditions of confinement; (ii) freedom from bodily restraints; and (iii) training or ‘habilitation.’” *Id.* at 309.

⁵⁷ *Id.* at 315.

virtue of the State first *depriving* Romeo of his liberty could it be compelled to take affirmative steps to protect him. Indeed, Frank Cross argues that these rights can functionally be defined as negative rights since they would not manifest absent the state's initial act of confinement.⁵⁸ He posits that the appropriate test for distinguishing between positive and negative rights is to ask: "[I]f there was no government in existence, would the right be automatically fulfilled?"⁵⁹ This test seems descriptively true in assessing the *DeShaney*-era substantive due process doctrine—the relevant comparator in judging whether a state deprivation occurred is what the state of things would be in the absence of any state action at all. Thus in *Rust v. Sullivan*, the Court upheld federal regulations limiting the ability of family-planning services funding recipients to engage in abortion-related activities because "Congress' refusal to fund abortion counseling and advocacy leaves a pregnant woman with the same choices as if the Government had chosen not to fund family-planning services at all."⁶⁰

A corollary to this is that financial barriers that cause *de facto* deprivations of due process interests are not cognizable harms because indigency is a condition not created by the state.⁶¹ State action must erect direct, *de jure* inhibitions on a protected right to raise constitutional concern. Indigency, in this view, is simply irrelevant to a due process inquiry—one has not been deprived of their rights so long as they could theoretically exercise them if they had the economic means to do so. This principle is perhaps best illustrated by the progression of abortion rights jurisprudence. Even as the Supreme Court repeatedly affirmed the right to choose an abortion, albeit with limitations to that right, it also affirmed, most notably in *Harris v. McRae* and *Maher v. Roe*, that there is no governmental duty to fund abortion care. Consequently, a person unable to access abortion due to indigency may, consistent with the Constitution, be effectively denied the right to choose abortion.⁶² Susan Frelich Appleton has

⁵⁸ Cross, *supra* note 43, at 870. This conception allows courts and commentators to recast those affirmative duties that have been recognized in our constitutional regime as something short of a true positive rights canon. For an overview of these extant affirmative duties, see *infra* notes 151–60 and accompanying text.

⁵⁹ Cross, *supra* note 43, at 866.

⁶⁰ 500 U.S. 173, 202 (1991).

⁶¹ See *Harris v. McRae*, 448 U.S. 297, 316 (1980) ("The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency.").

⁶² *Maher v. Roe*, 432 U.S. 464, 473–74 (1977) (holding that a Connecticut regulation was not unconstitutional despite acknowledging that under such regulation, a person's indigency "may make it difficult and in some cases, perhaps, impossible . . . to have abortions").

characterized decisions such as *Maher* as “implying that poor women are free to *decide* to obtain abortions even if they cannot *effectuate* their decisions.”⁶³ The emptiness of such a freedom should seem evident, and indeed the Court has directly recognized that its failure to consider indigency can mean that some people will simply not be able to exercise the full panoply of even judicially recognized due process rights: “Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice . . . , it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.”⁶⁴ This illustration of the bifurcated Due Process Clauses has left a gap which commentators have repeatedly tried to fill.⁶⁵

The abortion context also demonstrates the far-reaching effects of limiting substantive due process rights to their negative form—not only are states not obliged to affirmatively ensure access, but they are also constitutionally permitted to institute choice architecture that dissuades exercise of the right to choose an abortion. In *Webster v. Reproductive Health Services*, the Court upheld a Missouri restriction prohibiting public employees from performing abortions in public hospitals, on the grounds that this restriction leaves pregnant individuals in no worse a position than they would be in absent *any* state involvement in providing healthcare.⁶⁶ The Court went further, acknowledging—and accepting as constitutional—that the State was attempting, through policy, to discourage abortion.⁶⁷ Thus, within the paradigm of requiring direct state deprivation, due process is powerless to address state action that affirmatively erects indirect financial barriers rather than direct legal ones. In our market-driven society, financial barriers often play the largest role in impeding economic access and mobility.⁶⁸ Negative-rights constitutionalism gives states

⁶³ Susan Frelich Appleton, *Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and to the Welfare-Rights Thesis*, 81 COLUM. L. REV. 721, 730 (1981).

⁶⁴ *Harris*, 448 U.S. at 317–18.

⁶⁵ See, e.g., Mary Ziegler, *The New Negative Rights: Abortion Funding and Constitutional Law After Whole Women’s Health*, 96 NEB. L. REV. 577 (2018) (tracing distinctions between positive and negative rights in the Hyde Amendment debate); Appleton, *supra* note 63 (analyzing the impacts of abortion right decisions on fundamental rights analysis more broadly).

⁶⁶ 492 U.S. 490, 509 (1989).

⁶⁷ *Id.* at 510; see also *Maher*, 432 U.S. at 474 (“The State may have made childbirth a more attractive alternative, thereby influencing the woman’s decision, but it has imposed no restriction on access to abortions that was not already there.”).

⁶⁸ See Jared Bernstein & Ben Spielberg, *Outcomes and Opportunity: How Inequality and Income Stagnation Are Limiting Opportunity in America* (“[T]he direct effects of inequality—lower incomes and wealth levels themselves—may be the most significant obstacle to equality of opportunity.”), in PETER G. PETERSON FOUND., POLICY OPTIONS

the go-ahead to actively manipulate these barriers and functionally interfere with people's liberties without raising any constitutional flags.

B. *Separation of Powers: To the Legislatures*

Amidst concerns regarding manageable standards and justiciability,⁶⁹ the principle of separation of powers has been often invoked to discourage judicial recognition of positive rights. This concern has two strands: structural separation of powers concerns and pragmatic, institutional capacity concerns.

The Supreme Court has leaned into the structural strand of this concern, repeatedly affirming the view that it is simply not the role of courts to remedy social and economic maladies, placing the responsibility for this task squarely on the shoulders of legislatures.⁷⁰ In *Lindsey v. Normet*, rejecting the contention that the “need for decent shelter” and the “right to retain peaceful possession of one’s home” are fundamental rights, the Court threw its hands in the air: “We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. . . . Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.”⁷¹ This language demonstrates the potency of the structural separation of powers argument to assuage the judicial conscience, allowing judges to resist action without discrediting the immense practical harms underlying

FOR IMPROVING ECONOMIC OPPORTUNITY AND MOBILITY 4, 5 (2015), https://www.pgpf.org/sites/default/files/grant_cbpp_manhattaninst_economic_mobility.pdf [<https://perma.cc/4XA8-S8HV>]; cf. Caitlin Connolly, *Creating Barriers to Public Assistance Is Not the Pathway to Work*, NAT'L EMP. L. PROJECT (July 17, 2018), <https://www.nelp.org/blog/creating-barriers-public-assistance-not-pathway-work> [<https://perma.cc/V925-RM5X>] (arguing that imposing work requirements on public assistance programs is counterproductive to the end of helping people gain employment, and strips away benefits that are often the only avenue for indigent individuals and families to access basic needs such as housing and healthcare).

⁶⁹ See Christine M. O'Neill, *Closing the Door on Positive Rights: State Court Use of the Political Question Doctrine to Deny Access to Educational Adequacy Claims*, 42 COLUM. J.L. & SOC. PROBS. 545 (2009) (evaluating how states, importing the justiciability factors from the Supreme Court's decision in *Baker v. Carr*, 369 U.S. 186 (1962), have used a purported lack of manageable standards to dispel claims seeking positive rights to adequate education); Nat Stern, *Don't Answer That: Revisiting the Political Question Doctrine in State Courts*, 21 U. PA. J. CONST. L. 153, 204 (2018) (noting that given the federal courts' general disavowal of positive rights, “the susceptibility of positive rights claims to political question challenges arises only in the state context”).

⁷⁰ See, e.g., *Harris v. McRae*, 448 U.S. 297, 318 (1980) (“Whether freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer, not a matter of constitutional entitlement.”).

⁷¹ 405 U.S. 56, 73–74 (1972).

the challenges before them. This principle has the effect of absolving the judiciary from responsibility even when legislatures do not, in fact, take the actions that courts suggest they may. Returning to Justice Thomas's dissent in *Obergefell*, the structural separation of powers argument finds its purest form: "As a general matter, when the States act through their representative governments or by popular vote, the liberty of their residents is fully vindicated. . . . What matters is that the process established by those who created the society has been honored."⁷²

Turning to the institutional capacity strand of the separation of powers principle, commentators have suggested that courts are largely ineffectual when it comes to guaranteeing social welfare. Frank Cross has written what he classifies as a pragmatic critique of positive rights, arguing that the legislative and executive branches have historically been more able protectors of the poor than courts have.⁷³ He concludes that "the case for positive rights implicitly presumes that judges are benevolent magicians, willing and able to wave a wand and thereby dispel the sad conditions of poverty."⁷⁴ Steven Calabresi argues that the judiciary is too enmeshed in the political system to be able to independently promote social welfare absent the corresponding majoritarian support of the political branches.⁷⁵ Courts enforcing rights writ large is itself a puzzle—witness the aftermath of *Brown v. Board of Education*, in which the Court largely neglected to actually enforce its own desegregation mandate⁷⁶—and adding positive rights into the mix, critics argue, merely complicates this puzzle.⁷⁷

⁷² *Obergefell v. Hodges*, 576 U.S. 644, 732 (2015) (Thomas, J., dissenting).

⁷³ Cross, *supra* note 43, at 921–22. There is a certain circularity to this argument. Given a jurisprudential model where positive rights are generally not permitted, it should not come as a surprise that courts have been less effective in protecting the poor than other branches. This does not support the conclusion that courts *should* not have a role in protecting the poor, only that they *have* not.

⁷⁴ *Id.* at 923.

⁷⁵ See Steven G. Calabresi, *The Crisis in Constitutional Theory*, 83 VA. L. REV. 247, 263 (1997).

⁷⁶ See *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955) (instructing only that lower courts take action "with all deliberate speed" to implement the desegregation mandate of the Court's landmark decision a year earlier); Doug Rendleman, *Brown II's "All Deliberate Speed" at Fifty: A Golden Anniversary or A Mid-Life Crisis for the Constitutional Injunction as a School Desegregation Remedy?*, 41 SAN DIEGO L. REV. 1575, 1588 (2004) (describing the aftermath of *Brown II*, in which the Court failed to "establish[] a positive desegregation remedies program" and individual litigants bore the burden of enforcing the desegregation mandate "on a piecemeal basis"); see also *supra* notes 13–19 and accompanying text.

⁷⁷ See Antonio Carlos Pereira-Menaut, *Against Positive Rights*, 22 VAL. UNIV. L. REV. 359, 379–81 (1988) (drawing on foreign constitutional experiences to argue for the impracticability of judicially enforcing positive rights); David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 889, 889 n.129 (1986) (arguing that

C. Equality Distinguished

The final key principle justifying negative-rights constitutionalism in the substantive due process context posits simply that promoting equality is not a legitimate end of the Due Process Clauses. The Supreme Court stated this principle most directly in *San Antonio Independent School District v. Rodriguez*, declining to recognize a due process right to education: “It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws.”⁷⁸ The Court relied on *Lindsey v. Normet* and *Dandridge v. Williams* in support of this conclusion; in this pair of cases, the Court acknowledged the crucial importance of housing and social welfare, respectively, but found this insufficient reason to diverge from standard modes of constitutional analysis.⁷⁹ Responding to arguments that education is a necessary precondition for enjoyment of other rights, such as First Amendment speech and voting, Justice Powell wrote that while promoting the ability of the citizenry to exercise “the most effective speech or the most informed electoral choice” may be desirable, “the[se] are not values to be implemented by judicial intrusion into otherwise legitimate state activities.”⁸⁰

Justice Thomas in his *Obergefell* dissent attempted to provide a normative explanation of why equality concerns lie outside the purview of the Due Process Clauses. He deployed natural rights philosophy to argue that “[h]uman dignity has long been understood in this country to be innate. . . . The government cannot bestow dignity, and it cannot take it away.”⁸¹ Under this view, dignity is inherently equal; when government deprives a person of their material life, liberty, or property interests, it does not deprive that person of their dignity because it *cannot*. And, it follows, one who lacks some protectable interests to begin with cannot have their dignity equalized by government intervention. Due process, in the view of Justice Thomas, is con-

state and international constitutional positive rights provisions have largely been rendered null by lack of enforcement).

⁷⁸ 411 U.S. 1, 33 (1973). The bluntness of this distinction is peculiar given that the inverse of this proposition has been recognized in the fundamental rights strand of equal protection jurisprudence. That is, infringement of a fundamental right can trigger strict scrutiny of a governmental classification under the Equal Protection Clause. See Russel W. Galloway, Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121, 148–63 (1989).

⁷⁹ See *Lindsey v. Normet*, 405 U.S. 56, 74 (1972); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (recognizing that the “administration of public welfare assistance . . . involves the most basic economic needs of impoverished human beings”).

⁸⁰ *Rodriguez*, 411 U.S. at 36.

⁸¹ *Obergefell v. Hodges*, 576 U.S. 644, 735 (2015) (Thomas, J., dissenting).

cerned with preventing government from interfering with the natural order, and whatever inequalities that order may entail;⁸² due process cannot be in the business of equalizing dignity because human dignity is unchangeably equal and therefore no government action, good or bad, can affect one's dignity. This is a reductive view of dignity, to be sure, or at least it is just one of many possible conceptualizations of dignity.⁸³ But it offers a theoretical justification for keeping equality interests out of due process doctrine.

These three principles—requiring direct state deprivation, separation of powers pointing away from judicially recognized positive rights, and keeping equality interests out of due process doctrine—underpin the bifurcated Due Process Clause and negative-rights constitutionalism as they *have been*, most strongly in the era of *DeShaney*. But substantive due process doctrine has evolved. Part II will describe this evolution and suggest that it undermines each of the principles just discussed, removing doctrinal barriers to recognition of positive due process rights.

II

OBERGEFELL, EQUAL DIGNITY, AND SUBSTANTIVE DUE PROCESS REIMAGINED

The doctrinal evolution of substantive due process has a lengthy history and profound implications. This Part will synthesize caselaw and scholarship to elucidate the Supreme Court's developing consciousness of the equality dimensions of substantive due process, revealing a doctrinal structure long waiting to emerge to the surface of the Court's jurisprudence. This development uproots the doctrinal barriers to recognition of positive rights discussed in Part I and clears the way for Part III, which will analyze the implications of emergent doctrine for negative-rights constitutionalism and the right to education.

At the time *DeShaney* was handed down in 1989, the Court's substantive due process jurisprudence had only begun to show signs of explicitly internalizing equality interests. To be sure, important sub-

⁸² *Cf. id.* at 727 (“The founding-era idea of civil liberty as natural liberty constrained by human law necessarily involved only those freedoms that existed *outside of* government.”).

⁸³ Neomi Rao, for example, has conceptualized three versions of the legal concept of dignity: inherent dignity (similar to Justice Thomas's view), substantive conceptions of dignity (standing for “what is valuable for individuals and society at large,” including social welfare), and dignity as recognition (requiring “esteem and respect for the particularity of each individual”). Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 196, 221, 243 (2011); see also Elizabeth B. Cooper, *The Power of Dignity*, 84 FORDHAM L. REV. 3, 16 (2015) (“Dignity . . . is neither a new nor uniform concept employed by the Court.”).

stantive due process cases dating back to the early twentieth century can be conceived of as equality-promoting decisions, as commentators have noted.⁸⁴ A prominent set of decisions in the 1960s and 1970s clearly served gender equality interests, most notably *Griswold v. Connecticut*⁸⁵ and *Eisenstadt v. Baird*,⁸⁶ affirming a right to use contraception as part of a “zone[] of privacy” divined from the “penumbras” and “emanations” of the specific rights guarantees in the Bill of Rights,⁸⁷ and *Roe v. Wade*,⁸⁸ affirming the right to choose abortion. Scholars in the decades surrounding *DeShaney* suggested various relationships between the Due Process Clause and the Equal Protection Clause,⁸⁹ but the relationship between due process and equal protection had largely remained unspoken, even if lurking close below the surface. Just over a decade before *DeShaney*, the Court gutted equal protection doctrine by requiring a showing of discriminatory intent to prove a violation in *Washington v. Davis*;⁹⁰ only four years before *DeShaney*, the Court effectively foreclosed granting heightened scrutiny to any further protected classes under equal protection in *City of Cleburne v. Cleburne Living Center, Inc.*⁹¹ The diminished potency of equal protection to actually serve equality interests had just begun to

⁸⁴ See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 788–90 (2011) (discussing *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925), *Bolling v. Sharpe*, 347 U.S. 497 (1954), and *Loving v. Virginia*, 388 U.S. 1 (1967)).

⁸⁵ 381 U.S. 479 (1965).

⁸⁶ 405 U.S. 438 (1972).

⁸⁷ *Griswold*, 381 U.S. at 484.

⁸⁸ 410 U.S. 113 (1973).

⁸⁹ See, e.g., Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 McGEORGE L. REV. 473, 474 (2002) (“Like the two hands that emerge from the sheet of paper to draw one another in M.C. Escher’s famous 1948 lithograph, *Drawing Hands*, the ideas of equality and liberty expressed in the equal protection and due process clauses each emerge from and reinforce the other.” (footnote omitted)); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163 (1988) (arguing that the two clauses “operate along different tracks” because the Due Process Clause is backwards looking while the Equal Protection Clause is forward looking).

⁹⁰ 426 U.S. 229, 240 (1976) (“The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.”).

⁹¹ 473 U.S. 432, 445–46 (1985) (“[I]f the large and amorphous class of the [intellectually disabled] were deemed quasi-suspect . . . , it would be difficult to find a principled way to distinguish a variety of other groups We are reluctant to set out on that course, and we decline to do so.”).

become apparent, and the Due Process Clause would begin to pick up the banner of equality.⁹²

Most notably since the Court's 2003 opinion in *Lawrence v. Texas* prohibiting the criminalization of sodomy,⁹³ scholars recognized that substantive due process doctrine was being infused with considerations more akin to those traditionally associated with equal protection doctrine,⁹⁴ with Laurence Tribe describing the two doctrines as "profoundly interlocked in a legal double helix."⁹⁵ Justice Kennedy, writing for the Court in *Lawrence*, explicitly recognized that their decision on liberty grounds served simultaneously to vindicate the equal protection interests at stake.⁹⁶ Emergent also from this opinion was an understanding that constitutional liberty, particularly when merged with equality, is imbued with values of autonomy and dignity which transcend concrete spatial notions of privacy.⁹⁷ This transcendental approach extended to Justice Kennedy's vision of defining rights, untethering due process from the history-bound test of *Washington v. Glucksberg* in writing that "[a]s the Constitution

⁹² See Yoshino, *supra* note 84, at 750 (setting forth a comprehensive "descriptive claim that the Court has shut doors in its equality jurisprudence in the name of pluralism anxiety and opened doors in its liberty jurisprudence to compensate").

⁹³ 539 U.S. 558, 578 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

⁹⁴ See, e.g., Matthew Coles, *Lawrence v. Texas & the Refinement of Substantive Due Process*, 16 *STAN. L. & POL'Y REV.* 23, 37 (2005) ("I suspect that the Court is in the process of collapsing the two lines of case law into one."); Pamela S. Karlan, *Foreword: Loving Lawrence*, 102 *MICH. L. REV.* 1447, 1454–55 (2004) (describing how the *Lawrence* opinion "shows the centrality of an equal protection sensibility to the Court's due process analysis"); Deborah Hellman, *The Epistemic Function of Fusing Equal Protection and Due Process*, 28 *WM. & MARY BILL RTS. J.* 383, 396 (2019) (asserting that the fusion of equal protection and due process "resurfaces with added oomph in *Lawrence v. Texas*").

⁹⁵ Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" that Dare Not Speak Its Name*, 117 *HARV. L. REV.* 1893, 1898 (2004).

⁹⁶ *Lawrence*, 539 U.S. at 575 ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."); see also Tribe, *supra* note 95, at 1934 ("The *Lawrence* Court's explicit recognition of the 'due process right to demand respect for conduct protected by the substantive guarantee of liberty' and of the way in which that right is linked to '[e]quality of treatment' was an obviously important doctrinal innovation." (alteration in original)).

⁹⁷ *Lawrence*, 539 U.S. at 562 ("Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."); see also Paul M. Secunda, *Lawrence's Quintessential Millian Moment and Its Impact on the Doctrine of Unconstitutional Conditions*, 50 *VILL. L. REV.* 117, 127–28 (2005) (characterizing the *Lawrence* Court as recognizing "that both the complementary concepts of equality and liberty embrace a robust notion of individual autonomy and human dignity").

endures, persons in every generation can invoke its principles in their own search for greater freedom.”⁹⁸

The drumbeat of liberty as equal dignity intensified in *United States v. Windsor*, holding that the Defense of Marriage Act’s provision defining marriage, for purposes of federal law, as between a man and a woman, was unconstitutional because it “violate[d] basic due process and equal protection principles applicable to the Federal Government.”⁹⁹ With Justice Kennedy once again at its helm, the Court found that refusing to recognize same-sex marriages valid under state law deprived those couples of liberty guaranteed by due process and equality guaranteed by equal protection, interfering with “the equal dignity of same-sex marriages.”¹⁰⁰ Justice Scalia in dissent chastised the majority for breaking with traditional equal protection and due process jurisprudence¹⁰¹ and predicted that an outright requirement that states recognize same-sex marriages was inevitable after *Windsor*.¹⁰² Fortunately, both of these observations were accurate.

Windsor paved the way not only for the result in *Obergefell v. Hodges*, but also arguably the doctrine that would emerge fully in *Obergefell*—as one commentator noted, “[t]he *Windsor* decision creates a bridge between past cases that embraced equal liberty principles and future equal liberty cases for which it provides additional precedential support.”¹⁰³ The potential doctrinal implications of *Obergefell* are sweeping. In recognizing that same-sex couples have a right to get married, the Court—with Justice Kennedy yet again writing for the majority—cut the substantive due process inquiry loose from the strictures of *Glucksberg*, implicitly abrogating the dual requirements of tradition and specificity and adopting a more open-ended, forward-looking inquiry:

⁹⁸ *Lawrence*, 539 U.S. at 579; see also Yoshino, *supra* note 84, at 781 (arguing that after *Lawrence*, “[l]iberty and equality became—or were revealed to be—horses that ran in tandem rather than in opposite directions”).

⁹⁹ 570 U.S. 744, 769 (2013).

¹⁰⁰ *Id.* at 746.

¹⁰¹ See *id.* at 793–94 (Scalia, J., dissenting) (arguing the majority’s “nonspecific hand-waving” fails to justify its holding on either equal protection or due process grounds).

¹⁰² See *id.* at 798 (“It takes real cheek for today’s majority to assure us, as it is going out the door, that a constitutional requirement to give formal recognition to same-sex marriage is not at issue here . . .”).

¹⁰³ Nancy C. Marcus, *Deeply Rooted Principles of Equal Liberty, Not “Argle Bargle”*: *The Inevitability of Marriage Equality After Windsor*, 23 TUL. J.L. & SEXUALITY 17, 27 (2014); see also *id.* at 45 (“*Windsor* represents the continued evolution of the liberty interest in intimate life choices ‘from a negative right to be left alone [right to privacy] to a more comprehensive affirmative liberty interest in self-determination, autonomy, and respect.’” (quoting Nancy C. Marcus, *Beyond Romer and Lawrence: The Right to Privacy Comes Out of the Closet*, COLUM. J. GENDER & L. 355, 357 (2006))).

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.¹⁰⁴

Justice Kennedy was unabashed in surfacing both liberty and equality. The opinion cites a history of discrimination against same-sex couples in support of the proposition that denying them the right to marry “works a grave and continuing harm” and “serves to disrespect and subordinate them.”¹⁰⁵ As a result, “the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry.”¹⁰⁶ The infusion of Equal Protection concerns, made explicit in the above-cited passages from Justice Kennedy's opinion, also provides a framework for identifying those injustices and harms which should be within the purview of substantive due process.¹⁰⁷ Indeed, Justice Kennedy emphasized the degree to which the doctrines of due process and equal protection had palpably fused. Discussing *Zablocki v. Redhail*,¹⁰⁸ in which the Court's equal protection analysis centered around the fundamental nature of the right to marriage, Justice Kennedy remarked, “[i]t was the essential nature of the marriage right . . . that made apparent the law's incompatibility with requirements of equality. Each concept—liberty and equal protection—leads to a stronger understanding of the other.”¹⁰⁹

The magnitude of *Obergefell's* doctrinal implications led Laurence Tribe to declare:

¹⁰⁴ *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015). This mode of inquiry harkens back to the open-ended common law approach suggested by Justice Harlan in his dissent in *Poe v. Ullman* and given precedential value in *Planned Parenthood of Southeastern Pennsylvania v. Casey*—“Due process has not been reduced to any formula The balance . . . [is] having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.” *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 849–50 (1992) (“[A]djudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise . . . reasoned judgment. Its boundaries are not susceptible of expression as a simple rule.”).

¹⁰⁵ *Obergefell*, 576 U.S. at 675.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 673 (“Indeed, in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.”).

¹⁰⁸ 434 U.S. 374 (1978).

¹⁰⁹ *Obergefell*, 576 U.S. at 673.

Obergefell's chief jurisprudential achievement is to have tightly wound the double helix of Due Process and Equal Protection into a doctrine of *equal dignity*—and to have located that doctrine in a tradition of constitutional interpretation as an exercise in public education. Equal dignity, a concept with a robust doctrinal pedigree, does not simply look back to purposeful past subordination, but rather lays the groundwork for an ongoing constitutional dialogue about fundamental rights and the meaning of equality.¹¹⁰

While the precise contours of equal dignity as constitutional doctrine have not yet been developed and firmed up, an evolutive process for any nascent doctrine, some clear foundational principles are readily identifiable.¹¹¹ Antisubordination is the lodestar of equal dignity.¹¹² This antisubordination principle can serve as a limiting boundary for equal dignity, distinguishing the perils of *Lochnerian* substantive due process,¹¹³ but it serves an even more crucial *positive* role, guiding the future development of the doctrine. The notion of dignity itself has deep roots in antisubordination norms, with a robust pedigree in international human rights discourse centering fundamental rights as touchstones of free and equal societies.¹¹⁴ Where equal protection and due process doctrines have separately fallen short of living up to the antisubordination ethos of the Fourteenth Amendment, equal dignity

¹¹⁰ Tribe, *supra* note 25, at 17.

¹¹¹ See Note, *Equal Dignity—Heeding Its Call*, 132 HARV. L. REV. 1323, 1323–34 (2019) (articulating the core principles underlying equal dignity).

¹¹² See Yoshino, *supra* note 28, at 174 (“[O]ne of the major inputs into [the new substantive due process] analysis will be the impact of granting or denying such liberties to historically subordinated groups.”); Tribe, *supra* note 25, at 18 (“[T]he freedom to marry championed in *Obergefell* was understood by all to directly redress the subordination of LGBT individuals.”).

¹¹³ See Tribe, *supra* note 25, at 17–19 (discussing how the antisubordination principle inherent to equal dignity provides a principled way to distinguish *Lochner*); Yoshino, *supra* note 28, at 175 (responding to Chief Justice Roberts’s admonition, dissenting in *Obergefell*, that the majority’s analysis would risk “repeating the error of *Dred Scott* and *Lochner*,” by arguing that “[t]o apprehend a liberty principle inflected with a notion of antisubordination, however, is to meet his most immediate concerns” (citing *Obergefell*, 576 U.S. at 695–98)).

¹¹⁴ See Tribe, *supra* note 25, at 20–21 (describing how dignity was conceptualized in post-World War II constitutions and in South Africa’s post-apartheid constitution). Consider, for example, the Universal Declaration of Human Rights, which begins: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world” G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948). Importantly, for the purposes of this Note, these paradigmatic formulations of human rights fully embrace positive rights and indeed command governments to provide affirmative benefits to those under their protection such that their “rights and freedoms . . . can be fully realized.” *Id.* art. 28; see also William A. Fletcher, *International Human Rights and the Role of the United States*, 104 NW. U. L. REV. 293, 297 (2010) (noting that the “enormously influential” Declaration enumerates affirmative rights).

allows for a rejuvenation and liberation of this ethos.¹¹⁵ To that end, the doctrinal methodologies of equal protection and due process interact with one another, such that marked histories of subordination can inform the contours of fundamental liberty and understandings of fundamental freedoms can inform the meaning of constitutional equality.¹¹⁶ Finally, and importantly, equal dignity is not bound up in any rigid temporal dimension—considerations of past harm, present injustice, and constant social evolution are all legitimate and indeed necessary components of the equal dignity inquiry.¹¹⁷

So how does this doctrine of equal dignity, revealed by *Obergefell*, affect the viability of positive rights claims? Kenji Yoshino suggests that by choosing to credit both liberty and equality claims in *Obergefell*, Justice Kennedy “deliberately elid[ed] the negative/positive liberty distinction,” a decision that “may reflect his desire to revamp the substantive due process inquiry *tout court*.”¹¹⁸ As the next Part will demonstrate, the new substantive due process, inextricably bound up with equal protection interests, undermines or reimagines each of the principles supporting negative-rights constitutionalism identified in Part I.

Equal dignity undermines the requirement of direct state deprivation by reconceptualizing liberty itself from a formalistic zone of privacy free from state interference to a more autonomous form of freedom rooted in human flourishing. History of state-sanctioned discrimination, typically considered part of equal protection analysis, can substantially inform which liberty interests require protection in order to further equality interests. The strong antisubordination norm of equal dignity brings into focus the relevance of *Carolene Products*

¹¹⁵ See Tribe, *supra* note 25, at 19 (“[R]ecognizing that even *unintended* effects can render a traditional practice or definition inconsistent with the Fourteenth Amendment, *Obergefell* may well have laid the foundation for reexamining a longstanding but always controversial doctrinal obstacle, . . . requiring proof of *intentional* discrimination as an element of an asserted Fourteenth Amendment violation.”).

¹¹⁶ See *Obergefell*, 576 U.S. at 672 (“In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right.”).

¹¹⁷ See Tribe, *supra* note 25, at 24 (“Justice Kennedy describes the multitude of ways in which ‘new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.’” (quoting *Obergefell*, 576 U.S. at 660)); see also Steve Sanders, *Dignity and Social Meaning: Obergefell, Windsor, and Lawrence as Constitutional Dialogue*, 87 *FORDHAM L. REV.* 2069, 2104–05 (2019) (arguing that the Court’s focus on dignity primarily serves a dialogic function, allowing judicial review to stay in touch with social mores).

¹¹⁸ Yoshino, *supra* note 28, at 168.

Footnote Four¹¹⁹ in rebalancing the separation of powers calculus. Finally, most simply yet most emphatically, equal dignity upends *DeShaney*-era substantive due process by commanding, contrary to the *Rodriguez* notion that due process should not be used to further equality, that courts *must* consider equality in determining what liberty is guaranteed under the Constitution. The following Part will introduce *Gary B. v. Whitmer* more fully and unpack the aforementioned doctrinal implications of equal dignity in the context of analyzing the positive right to education.

III

GARY B. V. WHITMER AND THE POSITIVE RIGHT TO EDUCATION

The post-*Obergefell* substantive due process doctrine illuminates *Gary B. v. Whitmer*. Plaintiffs were several students from “five of the lowest performing schools in Detroit.”¹²⁰ They asked the court to recognize, among other forms of relief, “a fundamental right to a basic minimum education,” one that would afford meaningful access to literacy.¹²¹ As the *Gary B.* opinion describes, “[p]laintiffs attend ‘schools in name only, characterized by slum-like conditions and lacking the most basic educational opportunities that children elsewhere in Michigan and throughout the nation take for granted.’ ‘[T]hey wholly lack the capacity to deliver basic access to literacy, functionally delivering no education at all.’”¹²²

The state of education in Detroit is dire. Data from 2015 revealed that only 16% of Detroit third-graders achieved a baseline level of reading proficiency.¹²³ Between 2015 and 2019, racial disparities in this metric grew more pronounced: The percentage of white third-graders achieving reading proficiency grew from 20% to 31%, while the percentage of proficient Latinx third-graders shrunk from 21% to 19% and the percentage of proficient Black third-graders

¹¹⁹ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting that heightened judicial scrutiny might be warranted where the political processes ordinarily expected to protect “discrete and insular minorities” have malfunctioned); *see infra* notes 168–70 and accompanying text (discussing the political process theory that emerged from *Carolene Products* Footnote Four).

¹²⁰ *Gary B. v. Whitmer*, 957 F.3d 616, 624 (6th Cir. 2020) (quoting Complaint at 2, *Gary B. v. Whitmer*, No. 16-CV-13292 (E.D. Mich. Sept. 13, 2016), ECF No. 1).

¹²¹ *Id.* at 621.

¹²² *Id.* (alteration in original) (citations omitted).

¹²³ JESSICA PIZAREK, VICTOR RUBIN, CHRIS SCHILDT, SHEILA XIAO, PAMELA STEPHENS & JUSTIN SCOGGINS, POLICYLINK & PROGRAM FOR ENV’T AND REG’L EQUITY, AN EQUITY PROFILE OF THE CITY OF DETROIT 69 (2017), <https://www.policylink.org/sites/default/files/detroit-city-final.pdf> [<https://perma.cc/HYF8-JZ7Y>].

remained largely constant, increasing only from 15% to 16%.¹²⁴ These conditions are the embers of de jure segregation, and the “white flight” over the latter half of the twentieth century which calcified the disparities in educational opportunity.¹²⁵ One Detroit parent described: “This is clearly discrimination against Black, brown and low-income children. Detroit schools . . . are the canary in the coal mine for kids across this state. As low-income Black and brown communities, we felt the divestment in public education in Michigan long before the predominantly White communities.”¹²⁶

Judge Clay’s opinion for a two-to-one panel majority in *Gary B.* reaches the groundbreaking conclusion that “the Constitution provides a fundamental right to a basic minimum education.”¹²⁷ After dispensing with two alternative theories of relief, he delves into a substantive due process analysis.¹²⁸ The influence of *Obergefell* and equal dignity in transforming the *Glucksberg* test is quite explicit. Clay cites *Obergefell* for the proposition that “[t]he Supreme Court has applied a holistic approach to [its] historical analysis, tracing the evolution of an asserted right through or even beyond the history of our country.”¹²⁹ He continues: “Even if a specific iteration of a right lacks substantial historical roots, this alone is not enough to foreclose recognition under the Due Process Clause. . . . *Obergefell* made clear that this historical inquiry may illuminate even newly recognized injustices that reveal a fundamental right.”¹³⁰

Laying this groundwork, the opinion marches through the substantive due process analysis to find the right to a basic minimum education a fundamental one under the Due Process Clause. Judge Clay concludes that the right to education is indeed “deeply rooted in our history and tradition, even under an originalist view” given the ubiq-

¹²⁴ EDWARD LYNCH, ASHLEY WILLIAMS CLARK, ANIKA GOSS, SHARI WILLIAMS & SEMA ABULHAB, CTR. FOR EQUITY, ENGAGEMENT, & RSCH., DETROIT FUTURE CITY, THE STATE OF ECONOMIC EQUITY IN DETROIT 76 (2021), https://detroitfuturecity.com/wp-content/uploads/2021/05/May_14_Annual-Report-Detroit_Future-City.pdf [<https://perma.cc/C5CR-5M4D>].

¹²⁵ See MICH. CIV. RTS. COMM’N, EDUCATION EQUITY IN MICHIGAN 11 (2020), https://www.michigan.gov/documents/mdcr/Education_Equity_in_Michigan_MCRC_11.23.2020_710084_7.pdf [<https://perma.cc/7N53-KFBK>] (“From the 1950s through the 1970s, Detroit lost over 30 percent of its White population to the suburbs By the 1970s, students of color comprised nearly 75 percent of a once majority-White system.”).

¹²⁶ *Id.* at 28.

¹²⁷ *Gary B.*, 957 F.3d at 642.

¹²⁸ See *id.* at 633–42 (considering and rejecting equal protection and compulsory attendance-based due process claims).

¹²⁹ *Id.* at 643–44.

¹³⁰ *Id.* at 644; see also *id.* at 653 (“Suffice it to say that the practices of the 1700s cannot be the benchmark for what a democratic society requires.”).

uity of state-provided public education dating back to the birth of the Fourteenth Amendment.¹³¹ The historical importance of education in allowing citizens to access economic and political power, together with the violent history of depriving education as a means of racial subordination, lends education a potent pedigree.¹³² The robust tradition of state-sponsored education, Clay reasons, has also long generated a variety of reliance interests whereby “the people have come to expect and rely on this education . . . to provide the basic skills needed for our children to participate as members of American society and democracy.”¹³³

Clay undertakes a functional analysis to establish that the asserted right is “implicit in the concept of ordered liberty,” pointing to the relationship between literacy and opportunities to meaningfully participate in our economy, polity, and society.¹³⁴ “[A]ccess to literacy ‘is required in the performance of our most basic public responsibilities’” when “[e]ven things like road signs and other posted rules, backed by the force of law, are inaccessible without a basic level of literacy.”¹³⁵ Denying some children the opportunity to even have a chance to participate in society on an equal basis with others works an arbitrary denial of liberty that is so fundamental as to render literacy “essential to our concept of ordered liberty.”¹³⁶ The notion that the right to literacy falls within the penumbra of the constitutional guarantee of liberty is bolstered by the fact that literacy is a necessary precept to enjoyment of other, enumerated constitutional rights—for example, the rights of speech and press.¹³⁷

Recognition of a new fundamental right under the Due Process Clause was significant in its own right, but even more significant was the nature of this right: a positive one. Even if one is able to satisfy the *Glucksberg* prongs, the implicit doctrinal barriers to recognition of a *positive* fundamental right, discussed in Part I, remain. The following Sections argue, building on Judge Clay’s opinion in *Gary B.*, that the

¹³¹ *Id.* at 649.

¹³² *See id.* at 650–52 (describing the historical relationship between racial discrimination and education).

¹³³ *Id.* at 650.

¹³⁴ *Id.* at 652–53 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)) (“Effectively every interaction between a citizen and her government depends on literacy.”).

¹³⁵ *Id.* at 653 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

¹³⁶ *Id.* at 655.

¹³⁷ *Id.* at 653 (citing *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (plurality opinion)) (describing how the ability to receive ideas and to communicate is necessary for meaningful freedom of speech and press).

case of education—considered in light of the post-*Obergefell* doctrine of equal dignity—emphatically tears down these barriers as well.

A. *Deprivation of Liberty Reimagined*

Equal dignity, and the vision of liberty it entails, undermines the orthodoxy of requiring direct state deprivation in order to find a Fourteenth Amendment violation. Justice Kennedy eloquently announced this view of liberty in *Obergefell*: “[W]hile *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. *Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.*”¹³⁸ Kenji Yoshino has recognized the transformative potential of this statement, and the assertions of liberty interests that could follow: “‘Being denied education by virtue of your indigency rather than by the state may be a step forward,’ a progressive might say, ‘but it does not achieve the full promise of liberty.’”¹³⁹

This Note enthusiastically accepts the role of such a hypothetical progressive. By recognizing that the constitutional promise of liberty transcends a mere promise of protection against the state, *Obergefell* suggests that the Fourteenth Amendment may provide redress for deprivations of liberty arising from any number of causes beyond discrete state action. Equal dignity posits that liberty *itself* is a promise; it is not a privilege for favored members of society, but rather a core tenet of free society that everyone must enjoy by right. Where affirmative governmental action is necessary to “achieve the full promise of liberty,”¹⁴⁰ positive rights emerge naturally from the doctrine of equal dignity.

The *Gary B.* opinion adopts the autonomous vision of liberty postulated by equal dignity, rejecting the notion of liberty solely as freedom from state interference—it frames education as a fundamental means of affirmatively empowering individuals to participate freely in democratic society. To support the finding that “basic literacy is foundational to our political process and society,”¹⁴¹ Judge Clay quotes the Supreme Court in *Wisconsin v. Yoder*—“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

¹³⁸ *Obergefell v. Hodges*, 576 U.S. 644, 667 (2015) (emphasis added).

¹³⁹ Yoshino, *supra* note 28, at 168 (quoting in part *Obergefell*, 576 U.S. at 667).

¹⁴⁰ *Obergefell*, 576 U.S. at 667.

¹⁴¹ *Gary B.*, 957 F.3d at 652.

and independence.”¹⁴² Negative-rights constitutionalism, as applied to education, would fall far short of the “full promise of liberty”¹⁴³ invoked in *Obergefell* and echoed in *Gary B.* Whether or not the state is the direct cause of a person’s lack of literacy, the state’s failure to afford meaningful access to literacy amounts to a deprivation of liberty because of the fundamentality of literacy to free participation in society. This recognizes the harms of the bifurcated Due Process Clause—with no affirmative guarantee of any liberty interests, those denied liberty by means other than direct state deprivation could be shut out of a plethora of institutions and rights we consider fundamental for those who are able to access them. As Judge Clay articulates,

[e]ffectively every interaction between a citizen and her government depends on literacy. Voting, taxes, the legal system, jury duty—all of these are predicated on the ability to read and comprehend written thoughts. Without literacy, how can someone understand and complete a voter registration form? Comply with a summons sent to them through the mail? Or afford a defendant due process when sitting as a juror in his case, especially if documents are used as evidence against him?¹⁴⁴

Liberty, to some extent, thus has to *itself* constitute a substantive right, one given meaning by considerations of antisubordination and equality. The opinion explicitly addresses the presumption against positive rights, arguing that indeed affirmative rights have been recognized, such as the right to counsel, and cites a string of marriage cases including *Obergefell* to argue that “while the burden involved in performing a marriage is substantially less than the burden in providing an education, the marriage cases at least show that the Constitution does not categorically rule out the existence of positive rights.”¹⁴⁵

Equal dignity does more to relocate state deprivation in Fourteenth Amendment analysis. The infusion of equality interests into conceptions of liberty calls for zooming out several frames and evaluating the historical role of governments in creating, nurturing, and perpetuating systems of subordination. There are circumstances under which—by virtue of prior acts or status relationships—governments obtain duties to act affirmatively, and derogation from such duties can be recast as state deprivation. The uniquely expansive role

¹⁴² *Id.* (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972)); see also *id.* at 652 (“[A] basic minimum education—meaning one that plausibly provides access to literacy—is fundamental because it is necessary for even the most limited participation in our country’s democracy.”).

¹⁴³ *Obergefell*, 576 U.S. at 667.

¹⁴⁴ *Gary B.*, 957 F.3d at 652–53.

¹⁴⁵ *Id.* at 657.

of government in furnishing public education makes the context of education particularly ripe for this analysis.

Consider an analogy to tort law: As a general matter, private individuals owe no duty of rescue to others.¹⁴⁶ This maps onto the traditional constitutional view of the role of government—it must not actively inflict harm in ways the Constitution deems impermissible, but has no duty to rescue its citizens. But the “no duty to rescue” rule is merely a default; it is subject to exceptions.¹⁴⁷ Broadly, these exceptions fall into three categories—an individual may bear a duty to rescue if 1) they have created the risk that another is exposed to;¹⁴⁸ 2) they have a special relationship with either a person facing harm or a person threatening to harm another such that they incur a duty of protection;¹⁴⁹ or 3) they undertake to rescue another and, in so doing, either further increase the other’s risk or leave the other reliant on them for care and rescue.¹⁵⁰

The first two of these categories of exceptions are already familiar to constitutional law, with analogs in the state-created danger doctrine reflected in, for example, *Wood v. Ostrander*,¹⁵¹ and the involuntary confinement or commitment doctrine reflected in, for example, *Youngberg v. Romeo*,¹⁵² respectively. Just as an individual may accrue a duty to rescue under tort law when they cause the risk that another is exposed to,¹⁵³ the state may accrue a duty to act affirmatively to protect those under its watch when the state itself has placed them in danger.¹⁵⁴ As Judge Posner has written, “[i]f the state puts a man in a position of danger from private persons and then fails to protect him, . . . it is as much an active tortfeasor as if it had thrown him into a snake pit.”¹⁵⁵ Just as an individual may accrue a duty to rescue by virtue of their special relationship establishing a necessary responsibility of care,¹⁵⁶ the state may accrue a duty to provide for

¹⁴⁶ See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 37 (AM. L. INST. 2012).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* §§ 37, 39.

¹⁴⁹ *Id.* §§ 40, 41.

¹⁵⁰ *Id.* § 42.

¹⁵¹ 879 F.2d 583 (9th Cir. 1989) (finding a state-created danger where police abandoned an arrestee’s companion in a high-crime area). See generally Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 *TOURO L. REV.* 1 (2007) (describing the evolution and contours of the state-created danger doctrine).

¹⁵² 457 U.S. 307 (1982) (holding that the state owes certain duties to a person involuntarily committed to a state institution).

¹⁵³ See, e.g., *Montgomery v. Nat’l Convoy & Trucking Co.*, 195 S.E. 247 (S.C. 1938) (finding that truck drivers stalled on a highway had a duty to warn approaching vehicles).

¹⁵⁴ See *supra* note 151 and accompanying text.

¹⁵⁵ *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

¹⁵⁶ See, e.g., *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976).

those with whom it bears a special relationship by virtue of having deprived them of their ability to provide for themselves—that is, through incarceration or involuntary commitment.¹⁵⁷

The third category of exceptions, however—where an individual obtains a duty to rescue by virtue of having undertaken to rescue another such that they either exacerbate harm or engender reliance¹⁵⁸—has yet to be meaningfully translated into the language of constitutional law and constitutional duties. The case of education begs this translation. The Restatement (Third) of Torts states:

An actor who undertakes to render services to another and who knows or should know that the services will reduce the risk of . . . harm to the other has a duty of reasonable care to the other in conducting the undertaking if: . . . the person to whom the services are rendered or another relies on the actor's exercising reasonable care in the undertaking.¹⁵⁹

Put simply, undertaking a rescue—even when there was no pre-existing duty to do so—leaves one with a duty to exercise reasonable care in continuing that rescue.

The analogy to the role of government in public education is potent. State governments have long undertaken to provide public education such that they arguably now bear the affirmative duty to continue providing public education, and to exercise reasonable care—here, providing at least some basic minimum education—in doing so. As Judge Clay notes in *Gary B.*, “state-provided education is ubiquitous throughout all but the earliest days of the United States, a historical fact that today leads its citizens to expect a basic public education as of right.”¹⁶⁰ He continues, “the people have come to expect and rely on this education—second perhaps only to the immediate family—in order to provide the basic skills needed for our children to participate as members of American society and democracy.”¹⁶¹ Given the comprehensive manner in which states have undertaken to provide public education, even *if* the Constitution did not otherwise house a positive right to education, they would have an ongoing duty to continue providing such education with reasonable care—reasonable care translated here to mean providing a basic minimum education.

¹⁵⁷ See, e.g., *Romeo*, 457 U.S. at 307 (1982); *Estelle v. Gamble*, 429 U.S. 97 (1976).

¹⁵⁸ See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 42 (AM. L. INST. 2012).

¹⁵⁹ *Id.*

¹⁶⁰ *Gary B. v. Whitmer*, 957 F.3d 616, 649 (6th Cir. 2020).

¹⁶¹ *Id.* at 650.

While the “undertaking” exception is the most relevant in establishing a broad-based affirmative duty of government to provide a basic education, it is worth noting as well that the other exceptions establishing duties of rescue under tort law can also be analogized to education, albeit creating perhaps more narrow, remedial duties of rescue and still resting on the notion that some state deprivation is needed to trigger affirmative duties (either historical deprivation creating a “danger” or deprivation of liberty through compulsion creating a special relationship). With respect to the “state-created danger” doctrine, the *Gary B.* opinion looks back at the dark history of state-led and state-sanctioned educational deprivation as a means of racial subordination:

Education, and particularly access to literacy, has long been viewed as a key to political power. Withholding that key, slaveholders and segregationists used the deprivation of education as a weapon, preventing African Americans from obtaining the political power needed to achieve liberty and equality. While most starkly displayed during the time of slavery, this history is one of evolution rather than paradigm shift, and so what began in the slave codes of the antebellum South transformed into separate-and-unequal education policies that persisted well after *Brown v. Board of Education*.¹⁶²

Even as the requirement of direct state deprivation has been eroded by equal dignity, in the realm of education there is indeed a robust history of state involvement in the creation and maintenance of educational disparities, further counseling in favor of recognizing an affirmative remedial state duty.¹⁶³ This move of looking to historical discrimination is traditionally associated with equal protection jurisprudence, but is plainly relevant to the substantive due process analysis here, and harkens back to Justice Kennedy’s consideration of historical discrimination against LGBTQ+ individuals in *Obergefell*.¹⁶⁴ Characterizing the *DeShaney* majority as “resting its holding on the fact that the state had played no role in creating or

¹⁶² *Id.*

¹⁶³ See Alana Semuels, *Good School, Rich School; Bad School, Poor School*, ATLANTIC (Aug. 25, 2016), <https://www.theatlantic.com/business/archive/2016/08/property-taxes-and-unequal-schools/497333> [<https://perma.cc/CBT5-SZH9>] (discussing various ways in which states generated and sustained unequal educational opportunity, from de jure segregation—the vestiges of which were never truly eradicated, even after *Brown*—to the centuries-old and ongoing property tax-based school financing schemes). Those same schemes have resulted in “high-poverty districts spend[ing] 15.6 percent less than low-poverty districts.” *Id.* This is a meaningful difference given that a “20 percent increase in per-pupil spending a year for poor children can lead to an additional year of completed education, 25 percent higher earnings, and a 20-percentage-point reduction in the incidence of poverty in adulthood.” *Id.*

¹⁶⁴ See *supra* text accompanying note 105.

worsening the threat of harm the victim faced,” *Gary B.* clearly distinguishes education as a realm which has consistently been under the dominion of state and local governments, who *have* often played a role in creating and worsening the harm facing marginalized students.¹⁶⁵ With respect to the “special relationship” exception, that states have made public education mandatory leaves them with a special duty to those under their supervision by compulsion—a duty that arguably extends beyond mere safety and requires actually furnishing an adequate education.¹⁶⁶

Under any of these theories, states are left with an affirmative “duty to rescue” in the form of providing a basic education to those within their borders—refuting the notion that a duty can only arise under the Due Process Clause when government actively deprives an individual of a protectable interest.¹⁶⁷

B. Separation of Powers: To the Courts

The vision of separation of powers that posits legislation, not constitutional rights, as the appropriate vehicle for curing social and economic ills is unsettled by equal dignity. While that vision may, in a vacuum, generally counsel in favor of judicial restraint, the antisubordination principle at the heart of equal dignity instructs that there are circumstances in which democratic failures lead to cycles of injustice that indeed *require* judicial intervention to protect the liberty and equality interests that separation of powers exists to protect. This invokes the political process theory reflected in the famous Footnote Four of *United States v. Carolene Products Co.*, rhetorically considering whether restrictions on “those political processes which can ordinarily be expected to bring about repeal of undesirable legislation,

¹⁶⁵ *Gary B.*, 957 F.3d at 658; *see also id.* (“Simply put, education is different. . . . [T]he state has come to effectively occupy the field in public education, and so is the only practical source of learning for the vast majority of students.”). Note that this characterization of the *DeShaney* majority highlights the argument that the holding was simply wrong on the facts, aside from its doctrinal assertions related to positive rights—Justice Brennan’s dissent argues that the State did in fact worsen Joshua’s situation and that the State’s role in creating his harm went unrecognized by the majority. *See DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 205–10 (1989) (Brennan, J., dissenting).

¹⁶⁶ *See* Helen Hershkoff & Nathan Yaffe, *Unequal Liberty and a Right to Education*, 43 N.C. CENT. L. REV. 1, 43 (2020) (“[T]he State’s right to restrain a person’s liberty is limited by the purpose of the restraint; some kinds of detention are constitutionally valid only if the state provides the goods or services that justify the restraint. Public schooling, supported by rules of compulsory attendance and state-enforced discipline, comfortably falls within this category.”).

¹⁶⁷ The full contours and implications of this tort analogy are beyond the scope of this Note but should be explored in future scholarship.

[are] to be subjected to more exacting judicial scrutiny.”¹⁶⁸ This footnote alone has generated its own rich body of literature,¹⁶⁹ and is subject to various interpretations, but carries the central proposition that although the political process is typically the vehicle for people to generate change and ensure that their interests are addressed by governing bodies, where law curtails participation in that very political process such that organic change is unlikely to occur, judicial intervention is warranted.¹⁷⁰ Understanding the inequalities inherent in political processes, equal dignity calls on us to remember the very purpose of separation of powers, which “exists not just to protect the component parts of our governmental architecture, but for the more basic reason of protecting the individuals that architecture serves.”¹⁷¹ Separation of powers, like federalism, “exists principally to protect personal liberty and equality.”¹⁷²

In the context of education, an argument against recognition of a positive right on the purported ground of separation of powers thus falls flat—negative-rights constitutionalism has entrenched the very inequality and deprivation of liberty that separation of powers ought to protect against. In *Gary B.*, responding to concerns raised by the dissent,¹⁷³ Judge Clay directly addresses the separation of powers argument, leaning into a compelling Footnote Four-adjacent rationale for why judicial recognition of a positive right is appropriate:

[I]t is unsurprising that our political process, one in which participation is effectively predicated on literacy, would fail to address a lack of access to education that is endemic to a discrete population. The affected group—students and families of students without access to literacy—is especially vulnerable and faces a built-in disadvantage at seeking political recourse. The lack of literacy of which they complain is exactly what prevents them from obtaining a basic minimal education through the normal political process. This double bind

¹⁶⁸ 304 U.S. 144, 152 n.4 (1938).

¹⁶⁹ See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); Lea Brilmayer, Carolene, *Conflicts, and the Fate of the “Inside-Outsider,”* 134 U. PA. L. REV. 1291 (1986); Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

¹⁷⁰ See Jamal Greene, *The Supreme Court, 2017 Term—Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 37–38 (2018) (characterizing John Hart Ely’s conception of Footnote Four as “reserv[ing] judicial review for instances in which the ordinary political process was unworthy of trust”).

¹⁷¹ Tribe, *supra* note 25, at 28.

¹⁷² *Id.*

¹⁷³ *Gary B. v. Whitmer*, 957 F.3d 616, 663 (6th Cir. 2020) (Murphy, J., dissenting) (“This positive right to a minimum education will jumble our separation of powers. It will immerse federal courts in a host of education disputes far outside our constitutionally assigned role to interpret legal texts.”).

provides increased justification for heightened judicial scrutiny and the recognition of the right as fundamental.¹⁷⁴

In short, the political process is unlikely to provide redress for a class of persons whose injury directly interferes with their ability to meaningfully participate in the political process. An affirmative guarantee of a basic minimum education is thus a crucial prerequisite for a truly free and egalitarian polity.¹⁷⁵

And there is more—Footnote Four also considers “whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”¹⁷⁶ Footnote Four expressly contemplates racial minorities here.¹⁷⁷ Deprivation of literacy has been used precisely for the purpose of excluding racial minorities from the political process, recognized in the *Gary B.* opinion by way of reference to “our history of segregated and unequal education based on race, a history that began for the express purpose of limiting African Americans’ political power.”¹⁷⁸ In the face of this subordination, excluding particularly Black Americans from the political process, judicial intervention has often been the only means of redress available.¹⁷⁹

The *Gary B.* opinion also responds to concerns about judicial overreach and inhibiting local legislative innovation. While leaving the contours of the newly declared right to the district court on remand, the majority suggests that the right would likely include “facilities, teaching, and educational materials (e.g., books). For each of these components, the quality and quantity provided must at least be sufficient for students to plausibly attain literacy within the educational system at issue.”¹⁸⁰ However, “this does not mean that any of these things individually has a ‘constitutionally required’ minimum level.

¹⁷⁴ *Id.* at 655–56.

¹⁷⁵ *See id.* at 653 (“[A]ccess to literacy is itself fundamental because it is essential to the enjoyment of . . . other fundamental rights, such as participation in the political process.”); *see also id.* at 651–52 (“[A]ccess to literacy was [historically] viewed as a prerequisite to the exercise of political power, with a strong correlation between those who were viewed as equal citizens entitled to self-governance and those who were provided access to education by the state.”).

¹⁷⁶ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

¹⁷⁷ *Id.*

¹⁷⁸ *Gary B.*, 957 F.3d at 654.

¹⁷⁹ *See id.* at 652 (“[W]hen faced with exclusion from public education, would-be students have repeatedly been forced to rely on the courts for relief. The denials of education . . . are now universally accepted as serious injustices, ones that conflict with our core values as a nation.”).

¹⁸⁰ *Id.* at 660.

Rather, the question is whether the education the state offers a student—when taken as a whole—can plausibly give her the ability to learn how to read.”¹⁸¹ As such, legislative innovation is not inhibited. There is no particular prescription that every state and local government must fill in order to satisfy their constitutional duty, and indeed each may go about satisfying this duty in any number of ways.¹⁸² The only mandatory criterion is the one imposed directly by the Constitution: that a school system “must give all students at least a fair shot at access to literacy—the minimum level of education required to participate in our nation’s democracy.”¹⁸³

As to the critique that positive rights are not conducive to enforcement, scholars have noted that courts do indeed enforce positive rights already—they are just statutorily granted rights, rather than judicially recognized ones.¹⁸⁴ Other scholars have looked to state and international constitutional traditions to demonstrate that positive rights regimes can indeed be effective, even if imperfect in achieving their stated aspirations.¹⁸⁵ The problem, therefore, may not be prima-

¹⁸¹ *Id.*

¹⁸² *See id.* (“[H]ow each state reaches the basic minimum level of education discussed above can vary dramatically, and nothing in our recognition of this right—or even any resulting remedy in this case—could alter the broad powers of the states under our federalist system.”). It is true that this flexibility in means may be a double-edged sword; legislative freedom may come at the expense of prompt and full implementation of a judicially recognized right. However, it also strikes an appropriate balance between setting a clear declaratory goal of what the Constitution requires—in this context, meaningful access to literacy—and avoiding complete usurpation of the legislative role by courts. Further, injunctions are necessarily fact-dependent, so to the extent that in a particular case there is only one viable path to achieving the constitutionally required goal, courts may of course enjoin states or localities to follow that path.

¹⁸³ *Id.*

¹⁸⁴ *See* Jenna MacNaughton, Comment, *Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune*, 3 U. PA. J. CONST. L. 750, 779 (2001) (“American courts can already mandate the public expenditure of funds or the supervision of agency policies and have done so with considerable success . . .”); Jorge M. Farinacci-Fernós, *Looking Beyond the Negative-Positive Rights Distinction: Analyzing Constitutional Rights According to Their Nature, Effect, and Reach*, 41 HASTINGS INT’L & COMPAR. L. REV. 31, 40 (2018) (remarking that socioeconomic rights have indeed been recognized and enforced in the statutory context and that “[i]f statutory socioeconomic rights are normally enforced, so should those same rights that are promoted to constitutional status”).

¹⁸⁵ *See, e.g.*, Hiroaki Matsuura, *State Constitutional Commitment to Health and Health Care and Population Health Outcomes: Evidence from Historical US Data*, 105 AM. J. PUB. HEALTH 48, 51 (2015) (finding that state constitutional commitment to a right to health was associated with a 7.8% reduction in infant mortality rates); Helen Hershkoff, “*Just Words*”: *Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521 (2010) (analyzing the positive rights in some U.S. state constitutions and whether they might influence state common law decisionmaking); Alana Klein, *Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights*, 39 COLUM. HUM. RTS. L. REV. 351 (2008).

rily one of enforcement, but rather judicial willingness to grant recognition and shape consistent remedies.¹⁸⁶

Legitimate critiques can be levied against arguments for an expanded judicial role—our Constitution does not empower federal courts to serve as super-legislatures, and courts have often been forces for entrenchment rather than progress.¹⁸⁷ But as this Part argues, when that same constitutional structure fails to deliver on its core promises of liberty and equality, courts cannot pretend that nothing is broken. The *Gary B.* opinion urges that the very purpose of separation of powers is to *serve* liberty and equality, and where judicial intervention is required to answer the call of the Constitution, abstention is not an option:

The recognition of a fundamental right is no small matter. This is particularly true when the right in question is something that the state must affirmatively provide. But just as this Court should not supplant the state's policy judgments with its own, neither can we shrink from our obligation to recognize a right when it is foundational to our system of self-governance.¹⁸⁸

C. *Equality Indispensable*

Equal dignity plainly, yet emphatically, shatters any strictures about keeping equality interests out of substantive due process analysis—the very core of equal dignity as constitutional doctrine is the fusion of equal protection and due process. It is clear in *Lawrence*, and glaring in *Obergefell*, that the Clauses not only interact with one another, but indeed have fused so tightly so as to create a new doctrinal regime.¹⁸⁹ The Court's statement nearly half a century ago in *Rodriguez*, that “[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws,”¹⁹⁰ has been rendered antiquated by equal dignity. A contemporary Court faithfully following in the tradition of *Obergefell* might revise this phrase to read: “It is the *duty* of this Court to recognize substantive constitutional rights *particularly* in the name of guaranteeing equal protection of the laws.”

The operative influence of equality interests in recognizing a positive right to a basic minimum education is evident and explicit across the pages of the *Gary B.* opinion. In addition to the importance of

¹⁸⁶ See Farinacci-Fernós, *supra* note 184, at 40–41 (“[I]t would seem that the objections [to recognition of socioeconomic rights] are more ideological than conceptual.”).

¹⁸⁷ See *supra* Section I.B.

¹⁸⁸ *Gary B.*, 957 F.3d at 662.

¹⁸⁹ See *supra* Part II.

¹⁹⁰ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973).

literacy to participation in the political process, Judge Clay identifies “another reason why access to literacy is implicit in the ordered liberty of our nation. ‘[T]hat education is a means of achieving equality in our society’ is a belief ‘that has persisted in this country since the days of Thomas Jefferson.’”¹⁹¹ This clear infusion of equality considerations into the substantive due process inquiry exemplifies the doctrine of equal dignity. While “[i]t may never be that each child born in this country has the same opportunity for success in life, without regard to the circumstances of her birth,” neither can “the Constitution . . . permit those circumstances to foreclose *all* opportunity and deny a child literacy without regard to her potential.”¹⁹²

The *Gary B.* opinion leans on the Supreme Court’s 1982 decision in *Plyler v. Doe*,¹⁹³ which held that state policy excluding undocumented children from public schooling violated the Equal Protection Clause,¹⁹⁴ to discern and demonstrate the equality-promoting nature of education.¹⁹⁵ It borrows this language directly from *Plyler*: “[The] denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit.”¹⁹⁶ The important role of education in promoting equality counsels strongly in favor of recognizing a fundamental right. This phenomenon harkens back to the inklings of equal dignity expressed in *Lawrence*, where both equality and liberty interests are implicated in a particular constitutional claim “and a decision on the latter point advances both interests.”¹⁹⁷ As Judge Clay put it, “[e]ducation has long been viewed as a great equalizer, giving all children a chance to meet or outperform society’s expectations, even when faced with substantial disparities in wealth and with past and ongoing racial inequality.”¹⁹⁸

CONCLUSION

Education provides a potent test case for the advancement of positive rights, in no small part because of the depth of scholarship across several decades arguing for a right to education under myriad

¹⁹¹ *Gary B.*, 957 F.3d at 654 (alteration in original).

¹⁹² *Id.* at 654–55.

¹⁹³ 457 U.S. 202 (1982).

¹⁹⁴ *See id.* at 230.

¹⁹⁵ *See Gary B.*, 957 F.3d at 647 (“Invoking *Brown*, the *Plyler* Court also noted the distinct role of education as a social equalizer.”).

¹⁹⁶ *Id.* at 654 (alteration in original) (quoting *Plyler*, 457 U.S. at 221–22).

¹⁹⁷ *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

¹⁹⁸ *Gary B.*, 957 F.3d at 662.

legal theories.¹⁹⁹ The character of education, given the extent of state involvement it already entails, also locates it closer to more conventional Fourteenth Amendment jurisprudence.²⁰⁰ But rather than suggesting some sort of education exceptionalism, the strong principles underlying arguments for a positive right to education under a doctrine of equal dignity may well stand equally firm beneath arguments for other positive social welfare rights. Notwithstanding the exalted nature of marriage ascribed to it by the Court, Cary Franklin reminds us that “[t]o focus primarily on the marriage part of marriage equality is to miss the broader equality project of which the marriage cases are only one manifestation.”²⁰¹

That equal dignity provides a doctrinal framework for recognition of positive rights only begins the conversation. A full normative case for positive rights is beyond the scope of this Note—this case has already been made by scholars and advocates²⁰² and should continue to be expounded. The very definition of such rights also requires further explication—the question of whether a positive right to education ought to be defined as a “basic minimum” education or a more expansive notion of a quality education geared toward achieving something closer to *equal* educational opportunity is also beyond the scope of this Note. But a few brief observations are in order.

First, just as “pluralism anxiety” has perhaps cemented a judicial and political reticence for recognizing new group-based protections,²⁰³ the intersectionality of American subordination makes it difficult to comprehensively define such groups even for actors who *are* inclined to do so.²⁰⁴ Of course positive rights are no panacea, but they can perhaps begin to redress the most urgent harms—including those with

¹⁹⁹ See, e.g., Christine M. Naassana, *Access to Literacy Under the United States Constitution*, 68 *BUFF. L. REV.* 1215 (2020); Areto A. Imoukhuede, *Enforcing the Right to Public Education*, 72 *ARK. L. REV.* 443 (2019); Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 *STAN. L. REV.* 735 (2018); Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 *GEO. WASH. L. REV.* 92 (2013); Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 *NW. U. L. REV.* 550 (1992).

²⁰⁰ See Michelman, *supra* note 5, at 58 (“It happens that educational inequality and educational deprivation are so closely intertwined that minimum protection thinking about the educational-finance problem may lead to a statement of grievance in a justiciable form resembling that of more conventional equal protection disputation.”).

²⁰¹ Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 *V.A. L. REV.* 817, 827 (2014).

²⁰² See Michelman, *supra* note 5 and accompanying text.

²⁰³ See Yoshino, *supra* note 84, at 748.

²⁰⁴ See generally Katy Steinmetz, *She Coined the Term ‘Intersectionality’ Over 30 Years Ago. Here’s What It Means to Her Today*, *TIME* (Feb. 20, 2020, 7:27 AM), <https://time.com/5786710/kimberle-crenshaw-intersectionality> [<https://perma.cc/H4BT-73UH>] (interviewing

quite literally life-threatening consequences—for *all* those experiencing material deprivation and subordination. Second, although enforcement of positive rights will often be less straightforward than enforcement of negative rights, there is a substantial body of literature suggesting that positive rights can in fact have a meaningful, material impact in redressing inequality.²⁰⁵ Finally, recognition of positive rights can situate our Constitution more comfortably within international human rights frameworks, widely recognized as establishing the basic conditions of liberal society.²⁰⁶

This Note's focus on doctrinal theory may seem naïve to the current political valence of the Supreme Court and federal judiciary more broadly.²⁰⁷ In an important sense, this observation is entirely valid—the judiciary is unlikely to radically shift ideological course anytime soon, with the current Court composition likely to remain steady for decades.²⁰⁸ But there are reasons to believe that, should other lower courts follow the lead of the panel that decided *Gary B. v. Whitmer* and recognize a fundamental substantive due process right to education or another positive right, such decisions could have some staying power and gradually lift the presumption that the Constitution is a “charter of negative liberties.” For one, political considerations and principles of stare decisis alike suggest that even the current Court could well be hesitant to overturn *Obergefell*.²⁰⁹ Leaving the equal dignity doctrine of *Obergefell* in place—as demonstrated by this Note—clears the path for a more expansive substantive due process

Kimberlé Crenshaw and discussing the definition and implications of the concept of intersectionality in the context of understanding inequality).

²⁰⁵ See *supra* notes 184–85 and accompanying text.

²⁰⁶ See *supra* note 114.

²⁰⁷ See Ruiz et al., *supra* note 24 (noting the rightward lurch of the federal judiciary under the Trump administration).

²⁰⁸ See Joan Biskupic, *The Supreme Court Hasn't Been This Conservative Since the 1930s*, CNN (Sept. 26, 2020, 6:33 PM), <https://www.cnn.com/2020/09/26/politics/supreme-court-conservative/index.html> [<https://perma.cc/BB3R-3UCC>] (framing the new six-three conservative majority on the Supreme Court as a “new judicial era”).

²⁰⁹ See Evan Gerstmann, *Don't Panic: The Supreme Court Is Not Going to Overrule Its Same-Sex Marriage Decision*, FORBES (Oct. 10, 2020, 5:39 PM), <https://www.forbes.com/sites/evangerstmann/2020/10/10/dont-panic-the-supreme-court-is-not-going-to-overrule-its-same-sex-marriage-decision> [<https://perma.cc/AYQ6-59MF>]. Commentators from across the political and ideological spectrum have suggested that *Obergefell* is likely to stand—for example, Walter Olson of the conservative think tank Cato Institute penned a Wall Street Journal opinion piece to that effect. See Walter Olson, *Gay Marriage Is Here to Stay, Even with a Conservative Court*, WALL ST. J. (July 8, 2018, 2:22 PM), <https://www.wsj.com/articles/gay-marriage-is-here-to-stay-even-with-a-conservative-court-1531074136> [<https://perma.cc/TBQ5-ZDEG>]; see also Jonathan H. Adler, *8 Reasons Why Obergefell Won't Be Overturned*, VOLOKH CONSPIRACY (July 8, 2018, 2:50 PM), <https://reason.com/volokh/2018/07/08/8-reasons-why-obergefell-wont-be-overtur> [<https://perma.cc/5R94-M3AS>] (agreeing with Olson's opinion).

doctrine inclusive of positive rights. Additionally, as social and political pressures to address issues of inequality continue to mount, individual liberty approaches are likely to be more palatable to the current judiciary than traditional group-based equality approaches, leaving substantive due process as a key tool for litigating equality interests.²¹⁰

Whether other federal courts follow the example of the *Gary B. v. Whitmer* panel remains to be seen. What is clear for the moment is that an opportunity presents itself for courts to reimagine Fourteenth Amendment jurisprudence. The doctrine of equal dignity, unveiled in *Obergefell*, perhaps allows for a fuller realization of the Fourteenth Amendment's remedial purpose than either the Equal Protection Clause or the Due Process Clause have thus far been able to offer independently. Among the transformative implications of equal dignity is the potential ascendance of positive rights, long seen as outside the purview of the Constitution, and a new paradigm inclusive of positive rights could have radical implications for the project of American equality.

²¹⁰ See Yoshino, *supra* note 84, at 794 (“[I]t may be that individuals who are experiencing the most ‘equality fatigue’ are those who embrace the liberty argument most eagerly.”).