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Educational Environments and the Federal Right to Education in the Wake of Parkland

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Educational Environments and the Federal Right to Education in the Wake of Parkland

MAYBELL ROMERO*

A vociferous debate rages over the measures that should be taken to prevent high-profile incidents of mass school shootings like that at Marjory Stoneman Douglas High School in Florida on February 14, 2018, or, more recently, that at Santa Fe High School in Texas on May 18, 2018. Heightened security and surveillance measures, such as metal detectors and closed-circuit television (“CCTV”) monitoring, have been proposed in a variety of school districts. These measures, however, have been shown to have only a deleterious effect on learning outcomes and the relationships between students and school faculty, and they may even be hazardous to the physical health of students. Rather than relying on ineffective security measures that arguably violate student Fourth Amendment rights, this Article argues that the long-dormant federal right to education should once again be enforced to stand in conflict with the increasingly expansive individually focused Second Amendment right to bear arms. A number of scholars have done important work addressing the failures of tighter security and visual surveillance methods in primary and secondary schools, particularly Professor Jason Nance, who has written a series of papers on the use of surveillance in public schools and the observable effects on students. While these scholars have made

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excellent recommendations for reform of school security apparatuses, they do not make the arguments that are necessary to connect these reforms to the enforcement of a federal right, making the institution of such reforms much less likely.

This Article argues for the recognition of a historical right to education that originally arose with the readmission of formerly Confederate states into the Union in conjunction with the ratification of the Fourteenth Amendment. This Article frames this argument in the context of the Parkland shooting that occurred in February of 2018. This Article takes the novel view that this right to education has been underenforced and can be revived to take its place among other fundamental rights incorporated against the states in much the same fashion as the right to bear arms. A recognized right to education would make many of the reforms called for by other education law scholars much easier to implement.

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INTRODUCTION

*“[The Second Amendment] has been the subject of one of the greatest pieces of fraud, I repeat the word fraud, on the American public by special interest groups that I have ever seen in my lifetime.”*¹

*“If I wanted to be on Big Brother I would have auditioned for it”*²

After a tragic mass shooting at Marjory Stoneman Douglas High School in Parkland, Florida, on February 14, 2018,³ students were out of school for almost ten days.⁴ Upon returning to class after spring break on April 2, 2018, the students were greeted by a number of changes, including fewer entrances, police posted at each entrance, mandatory identification badges for students and teachers to be worn at all times, and the mandatory, exclusive use of clear plastic backpacks.⁵

¹ Nina Totenberg, *From ‘Fraud’ to Individual Right, Where Does the Supreme Court Stand on Guns?*, NPR (Mar. 5, 2018, 2:55 PM) (quoting former Chief Justice Warren Burger on PBS NewsHour in 1991).

² Emmeline Taylor, *I Spy with My Little Eye: The Use of CCTV in Schools and the Impact on Privacy*, 58 SOC. REV. 381, 398 (2010) (quoting Sarah, a student in a school in the North of England).

³ Oliver Laughland et al., *Florida School Shooting: At Least 17 People Dead on ‘Horrific, Horrific Day,’* GUARDIAN, (Feb. 15, 2018 3:53 AM), <https://www.theguardian.com/us-news/2018/feb/14/florida-shooting-school-latest-news-stoneman-douglas>.

⁴ Students returned to school for the first time after the shooting on February 28, 2018. Emanuella Grinberg et al., *His Daughter Died in the Parkland Shooting. Today, His Son Went Back to School*, CNN (Feb. 28, 2018, 5:48 PM), <https://www.cnn.com/2018/02/28/us/florida-school-shooting/index.html>.

⁵ Shortly after the students returned to school on February 28, 2018, Zachary Cruz (the brother of the shooter) was arrested for trespassing on campus and two students were arrested for bringing knives to school. Carli TeProff, *Douglas Students to Carry Only Clear Backpacks, and Metal Detectors May Soon Arrive, District Says*, MIAMI HERALD (Mar. 21, 2018, 6:41 PM), <https://www.miamiherald.com/news/local/community/broward/article206288209.html>. After these

Student reactions to these changes ranged from skepticism to anger.⁶ District officials explained that Marjory Stoneman Douglas would serve as the “pilot for possible district-wide security changes.”⁷ A number of (what have been popularly characterized as) right-wing media outlets have lambasted students for claiming violations of their Fourth Amendment rights while simultaneously advocating for limitations on or abolishment of the Second Amendment.⁸ Student concerns regarding their own rights have also been downplayed and often ignored by parents, school officials, and other adults who, understandably, presume to know what is best.⁹

In *New Jersey v. T.L.O.*, the Supreme Court acknowledged that children enjoy a right to privacy and protection from unreasonable searches and seizures under the Fourth Amendment.¹⁰ One may read

security issues, District officials announced that, upon returning from spring break, new security measures would be implemented throughout the school. *Id.*; Alexis Diao, *Parkland Students Return to School Skeptical of Clear Backpacks*, NPR, (Apr. 3, 2018, 3:26 PM), <https://www.npr.org/sections/thetwo-way/2018/04/03/599112587/parkland-students-return-to-school-skeptical-of-clear-backpacks>.

⁶ See Diao, *supra* note 5.

⁷ Scott Travis, *Stoneman Douglas Students Question New Security Measures Regulating Backpacks*, SUN SENTINEL, (Apr. 2, 2018, 5:50 PM), <http://www.sun-sentinel.com/local/broward/parkland/florida-school-shooting/fl-florida-school-shooting-clear-backpacks-20180330-story.html>.

⁸ See, e.g., Chris Enloe, *Anti-gun David Hogg Complains Clear Backpacks at School Infringe on Students' Constitutional Rights*, BLAZE (Mar. 24, 2018 12:21 PM), <https://www.theblaze.com/news/2018/03/24/anti-gun-david-hogg-complains-clear-backpacks-at-school-infringes-on-students-constitutional-rights>. Additionally, some media personalities have resorted to personal attacks and threats of violence against children who have expressed their opinions regarding gun control. See, e.g., Christina Zhao, *Who Is Jamie Allman? Conservative TV Host Resigns After Threatening Parkland Survivor David Hogg*, NEWSWEEK (Apr. 10, 2018, 5:28 AM), <http://www.newsweek.com/who-jamie-allman-conservative-radio-host-resigns-after-threatening-parkland-878472>.

⁹ See, e.g., Kennedy Mattes, Letter to the Editor, *A Student's Voice for Gun Control*, N.Y. TIMES (Feb. 22, 2018), <https://www.nytimes.com/2018/02/22/opinion/student-gun-control.html>; Opinion, *Student Voices Are to Be Heard, Not Ignored*, STARTRIBUNE (May 26, 2016, 6:17 PM), <http://www.startribune.com/student-voices-are-to-be-heard-not-ignored/381043161/>.

¹⁰ 469 U.S. 325, 333 (1985). The Court previously held that the Fourteenth Amendment, through its incorporation of Fourth Amendment rights to the states, protects students against “encroachment by public school officials” and all organs of state power, not just police. *Id.* at 334 (citing *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 637 (1943)).

T.L.O. as a logical extension of Fourth Amendment rights to students after *Tinker v. Des Moines Independent Community School District*, which recognized students' First Amendment rights to freedom of speech in schools.¹¹ While both cases recognized the rights of schoolchildren, these rights were not found to be coextensive with those of adults.¹² The *T.L.O.* Court established a new balancing test for determining the validity of searches in public schools: A search performed at a public school must be "reasonably related to the objectives of the search and not excessively intrusive" given the circumstances of the suspected violation necessitating the search and the student's individual characteristics.¹³ The Court also explained that a student's Fourth Amendment rights are to be balanced against "the interest of the States in providing a safe environment conducive to education in the public schools."¹⁴

Security measures that have commonly been adopted in schools—such as video cameras, metal detectors, clear backpacks, and the presence of police (euphemistically called "resource officers")—have altered learning environments in public schools with the constant specter of surveillance.¹⁵ This Article argues that the greater emphasis on safety, as seen after rashes of school shootings around the country, deprioritizes and, in some cases, completely ignores the requirement set forth in *T.L.O.* that an "environment conducive to education" and learning in our nation's public schools must be maintained.¹⁶ Some scholars have focused on maintaining a balance between two competing interests: (1) security and safety; and (2) preservation of an environment that encourages students to learn.¹⁷ However, their research has focused mainly on the effects

¹¹ Students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

¹² *T.L.O.*, 499 U.S. at 342; *Tinker*, 393 U.S. at 513 ("But conduct by the student, in class or out of it, which . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.").

¹³ *T.L.O.*, 499 U.S. at 342.

¹⁴ *Id.* at 332 n.2, 338–40.

¹⁵ Jason P. Nance, *Student Surveillance, Racial Inequalities, and Implicit Racial Bias*, 66 EMORY L.J. 765, 779–80, 785 (2017) [hereinafter Nance, *Student Surveillance*].

¹⁶ *T.L.O.*, 499 U.S. at 332 n.2.

¹⁷ See Nance, *Student Surveillance*, *supra* note 15, at 784–92.

of increased law enforcement presence or surveillance at disadvantaged schools, including how this impacts students from underserved communities or who attend schools with a majority of students of color,¹⁸ rather than focusing on all schools as a whole. This research is absolutely vital to advancing arguments in favor of reducing the impact of surveillance, police, and firearms in schools. This Article, however, takes a broader approach: It considers the effects of burgeoning social science and medical studies that strongly suggest tightened security measures will interfere with both the learning and long-term safety of students.

After examining research that suggests turning schools into something more akin to juvenile detention facilities impedes learning and may make children more prone to illness over time, this Article attempts to examine what, if anything, may be done to limit or entirely jettison the need for harsh security measures in schools. In *McDonald v. City of Chicago*, the Supreme Court held that the Second Amendment right of the people to “keep and bear arms” was incorporated to the states by the Due Process Clause of the Fourteenth Amendment.¹⁹ The Court’s decision to incorporate rested on its conclusion that “the right to keep and bear arms is fundamental to [the Nation’s] scheme of ordered liberty”²⁰ and “deeply rooted in this Nation’s history and tradition.”²¹ This conclusion followed a decades-long effort to re-characterize the Second Amendment as an individual right.²²

No rights—no matter how fundamental—are absolute.²³

¹⁸ *Id.* at 797.

¹⁹ *See* 561 U.S. 742, 750 (2010).

²⁰ *Id.* at 767 (citing *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)).

²¹ *Id.* at 768 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). The right to bear arms, however, was not always interpreted as an individual right. “[F]rom the time law review articles first began to be indexed in 1887 until 1960, all law review articles dealing with the Second Amendment endorsed the collective right model,” which views the Second Amendment as granting a collective right to armed militias to the American people. Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 4–5 (2000) (citing Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 CHI.-KENT L. REV. 349, 364, 384 tbl.1 (2000)).

²² Bogus, *supra* note 21, at 8–10, 14.

²³ Perhaps the most widely known case examining practical limits on a fundamental right, specifically freedom of speech, is *Schenck v. United States*, in which Justice Holmes explained that “[t]he most stringent protection of free

Fundamental rights frequently come into conflict with each other.²⁴ The right to bear arms, however, continues to expand in public schools, with more states allowing concealed weapons on college and university grounds²⁵ and more elected officials proposing to allow teachers to carry guns at school.²⁶ In contrast, in 1973's *San Antonio Independent School District v. Rodriguez*, the Supreme Court held that education is "not among the rights afforded explicit protection" in the Constitution.²⁷ The Court has, however, issued a number of decisions that have appeared to stress the importance of education on several grounds, stating that education is necessary to enable effective participation in society,²⁸ to keep the citizens of the nation free and independent,²⁹ and to foster good citizenship in the first place.³⁰ This Article argues that with the adoption of the Fourteenth Amendment and the readmission of states that seceded from the Union during the Civil War, a fundamental federal right to education was created.³¹ This right should be interpreted as a right that comes with citizenship, as guaranteed by the Fourteenth Amendment and incorporated to the states.

When Southern states were readmitted to the Union, "Congress placed two major conditions on readmission: Southern states had to adopt the 14th Amendment and rewrite their state constitutions to

speech would not protect a man in falsely shouting fire in a theatre and causing a panic." 249 U.S. 47, 52 (1919).

²⁴ See, e.g., David Davenport, *The 1st Versus the 14th Amendments*, FORBES (Oct. 18, 2017, 5:33 PM), <https://www.forbes.com/sites/daviddavenport/2017/10/18/the-culture-wars-latest-battlefront-the-1st-versus-the-14th-amendments/#7f4fcc5c683f>.

²⁵ See *Guns on Campus' Laws for Public Colleges and Universities—By the Campaign to Keep Guns Off Campus*, ARMED CAMPUSES, www.armedcampuses.org (last visited Dec. 13, 2018).

²⁶ See, e.g., Kamila Kudelska, *Wyoming District to Decide on Teachers Carrying Guns*, NPR (Apr. 17, 2018 5:16 AM), <https://www.npr.org/2018/04/17/603093464/wyoming-district-to-decide-on-teachers-carrying-guns>.

²⁷ 411 U.S. 1, 35 (1973). After this decision, most education litigation began to be handled in state courts. Jeffrey S. Sutton, *San Antonio Independent School District v. Rodriguez and Its Aftermath*, 94 VA. L. REV. 1963, 1973 (2008). The United States is unusual in denying a right to education. See *infra* notes 245–47.

²⁸ *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

²⁹ *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

³⁰ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

³¹ See *infra* Part III.

conform to a republican form of government.”³² By 1868, nine out of the ten Southern states seeking readmission had rewritten their state constitutions and enshrined a right to education in each of them.³³ The last three holdout states—Virginia, Mississippi, and Texas—were explicitly required to provide a right to education in their constitutions prior to readmission.³⁴

This Article will argue that these readmission conditions, as well as the ratification of the Fourteenth Amendment that conferred the rights of citizenship upon those to whom such rights had been unjustly withheld, created a fundamental, if implicit, right to education that should stand on the same footing as the right to bear arms. This Article also argues that finally recognizing education as a fundamental right would facilitate a shift in understanding of students’ search and seizure rights when they are considered in light of how heightened security procedures harm students. This recognition would also provide additional future avenues for greater gun control and better educational environments to the benefit of public school students nationwide. These arguments help serve the Article’s overall purpose: To provide the beginnings of an analytical framework for considering and enforcing the federal right to education.

Part I of this Article examines the history of public schools in the United States, tracing the emergence of recognized rights of school children in Supreme Court jurisprudence. Part II discusses what might be done to help ensure the establishment of educational environments that are conducive to learning, where students have no fear engaging in complex concepts and participating in the “marketplace of ideas.” It also examines the question of whether strict security measures are effective by reviewing empirical studies and psycho-sociological theories, offering an interdisciplinary approach to answering this important question. Part III explores the existence of

³² Derek W. Black, *The Constitutional Right to Education Is Long Overdue*, SALON (Dec. 16, 2017 11:59 AM), https://www.salon.com/2017/12/16/the-constitutional-right-to-education-is-long-overdue_partner/.

³³ *Id.*

³⁴ *Id.* MISS. CONST. OF 1868 art. VIII § 1; Mississippi Readmission Act, 19 Stat. 68 (1870); TEX. CONST. OF 1869 art. IX § 1; VA. CONST. OF 1868 art. VIII § 3; Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 744 (2018) [hereinafter *Constitutional Compromise*]; Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education*, 2014 MICH. ST. L. REV. 429, 461.

a long-dormant federal right to education that arose during Reconstruction and should be enforced to protect students from intense surveillance tools and gun violence.

I. THE GENESIS AND EVOLUTION OF AMERICAN PUBLIC SCHOOLS

A. *The Industrial Revolution Through Reconstruction*

American public schools only began to emerge with the arrival of the Industrial Revolution in New England; this region began to experiment with public schools in an effort to impart values such as “[p]unctuality, accuracy, diligence[,] and perseverance” upon children in an attempt to make them better future factory employees.³⁵ The educational picture in what then comprised the Southern United States was vastly different than that found in New England. The South was generally indifferent to public education, even through the days of Reconstruction following the Civil War.³⁶ This was in large part due to the South’s belief that slaves did not need or deserve education. After the Civil War, the South continued to hold this belief about “agricultural day laborers” (i.e. freed slaves).³⁷ Nevertheless, public education in the South, and especially for African Americans, was poised for a drastic change after the Civil War. The Freedman’s Bureau, established by Congress, promoted African-American education and laid the groundwork for a system of federally supported public education.³⁸ Efforts by the Bureau, along with efforts of teachers from the North, to teach members of the African American community were met with distrust and anger by white Southerners.³⁹

Following the conclusion of the Civil War, Congress supervised

³⁵ WARD M. MCAFEE, RELIGION, RACE, AND RECONSTRUCTION: THE PUBLIC SCHOOL IN THE POLITICS OF THE 1870S, at 9 (1998). While these schools were meant to homogenize society, both African American and girl students were still taught in separate schools. *Id.* at 10.

³⁶ *Id.* at 12.

³⁷ *Id.*

³⁸ *Id.* at 12–13; see also Ronald E. Butchart, SCHOOLING THE FREED PEOPLE: TEACHING, LEARNING, AND THE STRUGGLE FOR BLACK FREEDOM, 1861–1878, at 6 (2010).

³⁹ WALTER L. FLEMING, *Introduction to Educational Problems of Reconstruction*, in 2 DOCUMENTARY HISTORY OF RECONSTRUCTION, POLITICAL, MILITARY, SOCIAL, RELIGIOUS, EDUCATIONAL AND INDUSTRIAL, 165, 166–67 (Walter L. Fleming, ed., 1950) (1906).

Reconstruction and the readmission process of the former Confederate states. These states were expected to provide free public education for all upon readmission.⁴⁰ The new post-bellum constitutions of former Confederate states all provided for the establishment of public school systems.⁴¹ The goals of the establishment of such systems were, in some ways, much the same as those of public schools established throughout the Northeastern states pre-Civil War: to impose a greater sense of unity among the citizens⁴² of the United States through acculturation,⁴³ as well as to provide the means of a more informed electorate.⁴⁴

⁴⁰ MCAFEE, *supra* note 35, at 15.

⁴¹ *Id.* at 15–16.

⁴² Former slaves who were born in the United States were finally given the status of citizens with the adoption of the Fourteenth Amendment on July 9, 1868. U.S. CONST. amend. XIV, § 1.

⁴³ See MCAFEE, *supra* note 35, at 15 (“It was common knowledge that the victorious North expected the former slave states to become more ‘northern,’ and the development of public-school systems was primary evidence that this expectation was being met.”). Such schools that emphasized turning youth into disciplined, hardworking, and respectful citizens are now often referred to as “factory model schools.” This term itself has a short history, however, as it first appeared in 1972. Gretchen Robinson, *Greenville School System Lauded for Work in Human Relations Area*, GREENVILLE NEWS, Sept. 16, 1972, at 9.

⁴⁴ See MCAFEE, *supra* note 35, at 15 (stating that the establishment of a public-school system was necessary for newly enfranchised African Americans to become literate to “grasp the political issues of the day”). The Fifteenth Amendment, ratified on February 3, 1870, provides that both federal and state governments are prohibited from denying a citizen the right to vote based on “race, color, or previous condition of servitude.” U.S. CONST. amend. XV, § 1. The democratic ideals underlying the Fifteenth Amendment, however, are difficult to maintain without an educated electorate. John Dewey, the philosopher and educational reformer, explained that many Americans think of their governments, both federal and state, as being far removed from their everyday lives rather than citizens working together for the common good. JOHN DEWEY, *Creative Democracy—The Task Before Us*, in 14 JOHN DEWEY: THE LATER WORKS, 1925–1953, 224, 227–30 (Jo Ann Boydston ed., 1976). Dewey opined that the more educated the electorate the greater participation in self-governance. *Id.* Other educational experts have argued that “[p]ublic schools should teach knowledge about and practice in the processes of democracy: skills in deliberation, in working across difference, and in decision making as well as in promoting the values of democracy that extend across many publics, such as liberty and equality.” SARAH M. STITZLEIN, *AMERICAN PUBLIC EDUCATION AND THE RESPONSIBILITY OF ITS CITIZENS: SUPPORTING DEMOCRACY IN THE AGE OF ACCOUNTABILITY* 47 (2017) (citing Gert Biesta, *Education and the Democratic Person: Towards a Political Conception*

B. *Education in the Progressive Era*

In 1892, the physician Joseph Mayer Rice began his studies of public schooling in various American cities, including New York, Chicago, Minneapolis, and St. Paul.⁴⁵ Throughout a subsequent tour of schools in 1895, he administered a spelling test to 33,000 fourth-through eighth-grade students and found that those students who were forced to spend more time in class participating in repetitive spelling drills performed worse than those who spent less time doing the same.⁴⁶ This was likely the first scientific study ever done of education, which helped to usher in the Progressive Era of American education.⁴⁷

While the term “Progressive” may conjure ideas of a more open-minded and student-centered pedagogy, one of the impetuses for the Progressive education movement was the acculturation of immigrant and first-generation children whose parents arrived in the United States during waves of mass immigration from the 1880s through the 1920s.⁴⁸ Many states adopted compulsory education laws during this era, requiring students to attend school or otherwise risk having their parents fined or even declared unfit to raise their own children.⁴⁹

Apart from requiring compulsory attendance from students,

of Democratic Education, 109 TEACHERS C. REC. 740, 746 (2007)).

⁴⁵ J. M. RICE, THE PUBLIC-SCHOOL SYSTEM OF THE UNITED STATES 2–4 (1893). Dr. Rice published a magazine article in 1891 exhorting school systems to provide teachers with training that emphasizes relationships and developmental psychology. See Virginia Wise Berninger et al., *Mapping Research Questions About Translation to Methods, Measures, and Models*, in TRANSLATION OF THOUGHT TO WRITTEN TEXT WHILE COMPOSING: ADVANCING THEORY, KNOWLEDGE, RESEARCH METHODS, TOOLS, AND APPLICATIONS 28 (Michel Fayol et al. eds., 2012).

⁴⁶ Berninger et al., *supra* note 45, at 28.

⁴⁷ See *id.*; Wayne Urban, *Organized Teachers and Education Reform During the Progressive Era: 1890-1920*, 16 HIST. EDUC. Q. 1, 36 (1976).

⁴⁸ David F. Labaree, *Progressivism, Schools and Schools of Education: An American Romance*, 41 PAEDAGOGICA HISTORICA 275, 284–84 (2005) (arguing that progressivism was attractive because, among other things, it promised “to Americanize the children of immigrants”). Much of this immigration came from southern Europe and Russia and consisted largely of Roman Catholic and Jewish immigrants. See THOMAS ARCHDEACON, *BECOMING AMERICAN: AN ETHNIC HISTORY* 121–28 (1983).

⁴⁹ See Samuel M. Davis et al., *CHILDREN IN THE LEGAL SYSTEM: CASES AND MATERIALS* (3rd ed. 2014).

states began to regulate curriculum more closely, justifying such action through the doctrine of *in loco parentis*.⁵⁰ This often placed schools in direct conflict with parents—who had long been considered both legally and culturally to be the final arbiters of what was best for their own children—and their rights.⁵¹

These tensions provided the genesis to two of the first Supreme Court cases examining the allocation of power between states and parents over the control of children. In *Meyer v. Nebraska*, the Supreme Court examined a 1919 Nebraska law that criminalized the teaching of “foreign languages” to students up to and through the eighth grade.⁵² By teaching a foreign language in contravention of the statute, one could have been convicted of a misdemeanor, fined, and imprisoned for up to thirty days.⁵³

⁵⁰ See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) (“The power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the State’s power to prescribe a curriculum for institutions which it supports.”); see also Mary-Michelle Upson Hirschhoff, *Parents and the Public School Curriculum: Is There a Right to Have One’s Child Excused from Objectionable Instruction*, 50 S. CAL. L. REV. 871, 924–925, 924 n.185 (1977).

⁵¹ See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

⁵² *Meyer*, 262 U.S. at 396–97. Due to Nebraska’s definition of “foreign languages” at the time, this policy amounted to English-only education: “No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any language to any person in any language other than the English language.” *Id.* at 397. The Nebraska Supreme Court was very clear in its explicit support of these measures, explaining that

[t]he salutary purpose of the statute is clear. The legislature has seen the baneful effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety. To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country. . . . The obvious purpose of this statute was that the English language should be and become the mother tongue of all children reared in this state.

Id. at 397–98.

⁵³ *Id.* at 397.

The *Meyer* court held that the Nebraska law exceeded the permissible power of the State by invading the liberty guaranteed by the Due Process Clause of the Fourteenth Amendment.⁵⁴ The Court, however, did not focus on the right of a child to learn a foreign language or the right of a parent to have their child instructed in such, but rather the right of Meyer to teach German in a hostile environment immediately after World War I.⁵⁵ The Court also, in a perfunctory fashion, acknowledged a parent's right to direct the education of a child, but downplayed the rights of a child wishing to learn a foreign language.⁵⁶ Thus, the child in Meyer is an afterthought.

In *Pierce v. Society of Sisters*, the Court addressed an Oregon law that mandated public school attendance of all children ages eight to sixteen.⁵⁷ Much like in *Meyer*, this law was meant to limit the influence of foreign values on children.⁵⁸ Again, as in *Meyer*, neither students nor parents were the challengers of the law.⁵⁹ Rather, two private schools, one Catholic and one military, challenged the Oregon law, arguing for an injunction to prevent irreparable injury to their businesses.⁶⁰ The Court in *Pierce* stated that the Oregon law would not only violate the rights of parents to choose a school for their children, but would also violate "the right of the child to influence the parents' choice of a school."⁶¹ The Court, however, did not acknowledge that children themselves had any right to direct their educational experience, explaining that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."⁶²

⁵⁴ *Id.* at 402.

⁵⁵ *Id.* at 400–01.

⁵⁶ *Id.*

⁵⁷ 268 U.S. 510, 530 (1925).

⁵⁸ *Id.* at 516. (argument for Society of Sisters).

⁵⁹ *Meyer*, 262 U.S. at 396 (describing the plaintiff as a teacher at "Zion Parochial School, [who] unlawfully taught . . . German").

⁶⁰ The military school emphasized that students were being withdrawn from their school and that parents who were considering signing contracts with the school refused to do so as a result of the state law. *Pierce*, 268 U.S. at 533.

⁶¹ *Id.* at 532.

⁶² *Id.* at 535. The Court also made it clear that given both schools were corporations, they could not claim any liberty interest under the Fourteenth Amendment. *Id.* In affirming the District Court's decision to grant the requested preliminary injunctions, the Court found that Oregon would be depriving private schools

Meyer and *Pierce* became landmark Supreme Court decisions by being two of the first cases to examine substantive due process in the context of civil liberties. Additionally, they are also two of the first cases to address children in the context of the tension between states and parents making decisions regarding schooling. While the “Court employed a crude form of comparative constitutional analysis” in these cases, they would come to be regarded as “the two sturdiest pillars of the substantive due process temple Their language bespoke the authority of parents to make basic choices directing the upbringing of their children” and determining which educational environment would be best.⁶³ Cases in the decades to come would acknowledge public school children as more autonomous with rights similar to, but not necessarily coextensive with, those of their parents or other adults.

C. *The Recognition of Children’s Rights*

1. *WEST VIRGINIA STATE BOARD OF EDUCATION V. BARNETTE AND PRINCE V. MASSACHUSETTS*

Two cases in the 1940s involving Jehovah’s Witnesses chipped away at the notion that children had no rights of their own apart from those of their parents. In *West Virginia State Board of Education v. Barnette*, the Court considered the question of whether public schools could force their students to participate in either the flag salute or the Pledge of Allegiance.⁶⁴ Jehovah’s Witnesses believe that “bowing down to a flag or saluting it . . . is a religious act that ascribes salvation, not to God, but to the State or its leaders” and that Witnesses should refuse to participate in such.⁶⁵ The West Virginia Board of Education adopted a policy that required all teachers and students to participate in the flag salute and Pledge of Allegiance on

of their property without due process if enforcement of the law in question were allowed. *Id.* at 535–36.

⁶³ Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1934 (2004).

⁶⁴ 319 U.S. 624, 628–29 (1943).

⁶⁵ *Id.* at 629. The Watchtower Online Jehovah’s Witnesses encyclopedia explains that this belief arises from interpretations of scripture, specifically Isaiah 43:11, 1 Corinthians 10:14, and 1 John 5:21. See *Flag Salute, Voting, and Civilian Service*, WATCHTOWER ONLINE, <https://wol.jw.org/en/wol/d/r1/lp-e/1102008085> (last visited Dec. 15, 2018).

a daily basis.⁶⁶ The penalty for children who refused to do so was expulsion.⁶⁷ Marie and Gathie Barnett were Jehovah's Witnesses attending school in Charleston; they refused to salute the flag or say the pledge.⁶⁸ Both children were expelled, and though they attempted to return to class after their expulsion, they were repeatedly sent home.⁶⁹

Only three years earlier in *Minersville School District v. Gobitis* did the Supreme Court rule that students could be compelled to salute the flag and say the Pledge of Allegiance.⁷⁰ Lillian and William Gobitas were expelled from their public school for refusing to take part in these daily ceremonies.⁷¹ In *Gobitis*, the Court prized national security and unity above all, explaining that they were "inferior to none in the hierarchy of legal values."⁷² In adopting its own policies, the West Virginia Board of Education relied on the *Gobitis* decision not only as explicit approval of the legality of such a policy, but also used language from the *Gobitis* decision in the policy's drafting.⁷³

The *Barnette* Court made a dramatic course correction: It overturned *Gobitis*, finding no compelling reason to force students to take part in patriotic ceremonies that require "affirmation of a belief and an attitude of mind."⁷⁴ The Court finally recognized students' rights under the First Amendment to be free of compulsion or force in stating particular beliefs completely apart from any rights of their parents or guardians.⁷⁵

⁶⁶ *Barnette*, 319 U.S. at 626, 628–29.

⁶⁷ *Id.* at 629.

⁶⁸ Gregory L. Peterson et al., *Recollections of West Virginia State Board of Education v. Barnette*, 81 ST. JOHN'S L. REV. 755, 769–70 (2007). The courts misspelled Marie and Gathie's last name as "Barnette." *Id.* at 755 n.1.

⁶⁹ *Id.* at 769–71.

⁷⁰ 310 U.S. 586, 599–600 (1940).

⁷¹ *Id.* at 591. The courts also misspelled Lillian and William's last name as "Gobitis." Jeffrey S. Sutton, *Barnette, Frankfurter, and Judicial Review*, 96 MARQ. L. REV. 133, 134–35 (2012).

⁷² Justice Frankfurter wrote in his majority opinion that "[n]ational unity is the basis of national security. To deny the legislature the right to select appropriate means for its attainment presents a totally different order of problem from that of the propriety of subordinating the possible ugliness of littered streets to the free expression of opinion through distribution of handbills." *Gobitis*, 310 U.S. at 595.

⁷³ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 626 (1943).

⁷⁴ *Id.* at 633.

⁷⁵ *Id.* at 631, 641–42.

Prince v. Massachusetts arose from a separate conflict between Jehovah's Witnesses and the State.⁷⁶ Sarah Prince, a Jehovah's Witness who was the aunt and guardian of nine-year-old Betty Simmons, was convicted of violating Massachusetts child labor laws.⁷⁷ On a December evening in 1941, Prince, Betty, and Prince's two sons were attempting to sell Jehovah's Witnesses' publications, "Watch Tower" and "Consolation," to passersby on the sidewalks.⁷⁸ Prince tried to leave the children at home but relented when the children began to cry in an attempt to get what they wanted—to go out with Prince.⁷⁹ Prince then took the children downtown, where Prince allowed Betty "to engage in the preaching work with her."⁸⁰ Prince was subsequently arrested and convicted of giving Betty the magazines to sell on the streets illegally and allowing her to work unlawfully.⁸¹ Prince attempted to argue that such a conviction violated her right to freedom of religion and denied her the equal protection of the law.⁸² While this argument was not successful—the Court found the prohibition on children selling newspapers and pamphlets constitutional, as it barred all other children from such behavior⁸³—the Court firmly acknowledged that "children have rights, in common with older people," but that, in this specific case, those rights were not as broad as those enjoyed by adults.⁸⁴ However, the Court explained that this holding, which balanced the rights of a child to religious freedom with the state's role as *parens patriae*,⁸⁵ was not to be applied to any other factual scenario.⁸⁶ The narrow use of such a balancing test, however, would not come to pass, and *Prince* would be the case in which (1) children were recognized as autonomous,

⁷⁶ 321 U.S. 158, 159 (1944).

⁷⁷ *Id.*

⁷⁸ *Id.* at 161–62.

⁷⁹ *Id.* at 162.

⁸⁰ *Id.*

⁸¹ *Id.* at 160.

⁸² *Id.* at 160, 164.

⁸³ *Id.* at 170.

⁸⁴ *Id.* at 169.

⁸⁵ *Id.* at 166. For a discussion on the history of the *parens patriae* doctrine, see Lawrence B. Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195, 195 (1978) ("[T]hat doctrine applies to the state's power to substitute its authority for that of natural parents over their children . . .").

⁸⁶ "Our ruling does not extend beyond the facts the case presents." *Prince*, 321 U.S. at 171.

singular people with their own rights, but (2) the understanding of those rights was drastically limited when the state was acting in what the Court considered an acceptable *parens patriae* fashion.

2. *TINKER V. DES MOINES* AND THE LIMITATIONS SET BY *T.L.O.*

In *Tinker v. Des Moines Independent Community School District*, the Court considered the First Amendment rights of John Tinker, Mary Beth Tinker, and Christopher Eckhardt.⁸⁷ The children, ranging in age from thirteen to sixteen, all attended Des Moines public schools.⁸⁸ After attending a meeting of adults and students, the children decided to wear black armbands to school in protest of the Vietnam War.⁸⁹ The principals throughout the district heard of this plan and preemptively adopted a policy to suspend students who refused to remove the armband after a request to do so.⁹⁰

The group of children wore the armbands to school and refused to remove them, and they were all sent home and subsequently suspended.⁹¹ The District Court held that that the school policy and the children's suspensions were constitutional, opining that the armband policy was reasonable "in order to prevent disturbance of school discipline."⁹² The Eighth Circuit affirmed without an opinion.⁹³

Tinker has become a landmark case in both First Amendment and juvenile law jurisprudence, as it contains some of the most full-throated support the Court has voiced for juvenile rights, famously declaring that neither "students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."⁹⁴ The Court cited both *Meyer* and *Pierce* in support of this declaration, recasting those cases as fundamentally supporting the First Amendment rights of students, rather than the Due Process rights of businesses and teachers attempting to make a living.⁹⁵

Tinker, however, did not grant unfettered, unlimited First

⁸⁷ 393 U.S. 503, 504 (1969).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 504–05.

⁹³ *Id.* at 505.

⁹⁴ *Id.* at 506.

⁹⁵ *See id.* at 506–07.

Amendment rights to public school students. The Court distinguished between “pure speech,”⁹⁶ which is completely devoid of any disruptive conduct apart from the act of speech itself, and disruptive speech, such as a school walkout, when formulating the balancing test⁹⁷ that would come to be used and adapted to other situations when the rights of public school students conflicted with those of school authorities.⁹⁸ The *Tinker* Court held that the expression of opinions and ideas in public school is permissible as long as doing so does not “materially and substantially interfer[e] with the requirements of appropriate discipline in the operation of the school.”⁹⁹ Actions by students that “materially disrupt[] classwork or involve[] substantial disorder or invasion of the rights of others [are], of course, not immunized by the constitutional guarantee of freedom of speech.”¹⁰⁰ While students made remarkable gains in *Tinker*, its introduction of a test balancing speech against school discipline still imposed a limit on those rights, rendering them lesser than and unequal to those of adults.

In *New Jersey v. T.L.O.*, the Court applied the limited principle seen in *Tinker* to Fourth Amendment rights in public schools.¹⁰¹ The fourteen-year-old T.L.O., a freshman in a New Jersey high school, was called into the vice principal’s office after getting caught smoking cigarettes in a school bathroom.¹⁰² T.L.O. was interrogated by the vice principal and T.L.O. denied smoking at all.¹⁰³ In response, the vice principal took T.L.O.’s purse, opened it, and saw a pack of

⁹⁶ *Id.* at 508.

⁹⁷ *Id.* at 513.

⁹⁸ See Jason P. Nance, *School Surveillance and the Fourth Amendment*, 2014 WISC. L. REV. 79, 124 [hereinafter Nance, *School Surveillance*] (“*Tinker* is important because the Court clearly articulated the general principles for evaluating students’ constitutional rights in schools . . .”).

⁹⁹ *Tinker*, 393 U.S. at 513.

¹⁰⁰ *Id.* *Tinker* appears to make certain distinct judgments regarding how to value student speech and how that value might affect its status under the First Amendment. While conduct disruptive of learning is not protected under *Tinker*, speech that contributes to a thriving “marketplace of ideas” seems to be more compelling and worth of protection to the *Tinker* Court. Nance, *School Surveillance*, *supra* note 98, at 124. As such, the pedagogical value of the speech in question matters. *Id.*

¹⁰¹ 469 U.S. 325, 327 (1985).

¹⁰² *Id.* at 328.

¹⁰³ *Id.*

cigarettes as well as rolling papers.¹⁰⁴ After seeing the rolling papers, which are commonly associated with marijuana, the vice principal searched the entirety of the purse and found “marijuana, a pipe, a number of empty plastic bags, a substantial quantity of money in one-dollar bills, an index card that appeared to be a list of students who owed T.L.O. money, and two letters that implicated T.L.O. in mari[j]uana dealing.”¹⁰⁵ While it appeared that T.L.O. was an experienced marijuana dealer, T.L.O. had yet to learn not to accumulate all the evidence of drug dealing in one centralized place.

The vice principal turned the items over to police, who later interviewed T.L.O. at the police station.¹⁰⁶ T.L.O. confessed that she had been dealing marijuana at school and was charged with delinquency in the juvenile court.¹⁰⁷ T.L.O. moved to suppress the evidence seized by the vice principal, arguing the seizure violated the Fourth Amendment.¹⁰⁸ The juvenile court denied the motion, holding that

a school official may . . . search . . . a student’s person if the official has a reasonable suspicion that a crime has been or is in the process of being committed, *or* reasonable cause to believe that the search is necessary to maintain school discipline or enforce school policies.¹⁰⁹

The standard set by the New Jersey juvenile court represented a vast departure from prior Supreme Court search and seizure jurisprudence. The Fourth Amendment requires a warrant based upon probable cause to be issued before a search or seizure can be conducted.¹¹⁰ The Supreme Court has variously defined probable cause

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 328–29.

¹⁰⁷ *Id.* at 329.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* (quoting *State ex rel. T.L.O.*, 428 A.2d 1327, 1333 (Juv. & Dom. Rel. Ct., Middlesex County, 1980)).

¹¹⁰ U.S. CONST. amend. IV. There are a number of exceptions to this warrant requirement, such as consent searches, *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973), the plain view doctrine, *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971), and searches conducted under exigent circumstances, *Schmerber v. California*, 384 U.S. 757, 770–71 (1966).

from the point “where ‘the facts and circumstances within . . . [the officers’] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that’ an offense has been or is being committed”¹¹¹ to a more relaxed standard that is satisfied when there is a “substantial basis” or “fair probability” of criminal activity.¹¹²

While the Supreme Court recognized in *T.L.O.* that students enjoy Fourth Amendment protections against unreasonable searches and seizures while on public school grounds, including against searches and seizures conducted by school officials, the Court also explained that “what is reasonable depends on the context within which a search takes place.”¹¹³ The *T.L.O.* Court explained that even though students find themselves in an institutional environment where maintaining order is important, if not vital, to a school’s mission, students should still enjoy an expectation of privacy.¹¹⁴

Like in *Tinker*, however, the *T.L.O.* Court had to confront the question of how “to balance . . . the schoolchild’s legitimate expectations of privacy [with] the school’s equally legitimate need to maintain an environment in which learning can take place[.]”¹¹⁵ *T.L.O.* resolved this question in much the same fashion as *Tinker*: The Court held that the warrant requirement was particularly ill-suited to an educational environment, and that school officials should not be required to secure a warrant before initiating a search or seizure.¹¹⁶ Rather than requiring school officials to obtain a warrant based on probable cause, the Court created an additional exception to the warrant requirement altogether by holding that searches by school officials be conducted pursuant to reasonable suspicion.¹¹⁷

¹¹¹ *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

¹¹² *Illinois v. Gates*, 462 U.S. 213, 230–32, 238–39 (1983) (emphasizing that probable cause is a “flexible concept” based on “the totality of the circumstances”).

¹¹³ *T.L.O.*, 469 U.S. at 337.

¹¹⁴ *Id.* at 338.

¹¹⁵ *Id.* at 340.

¹¹⁶ *Id.*; see *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

¹¹⁷ “Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard.” *T.L.O.*, 469 U.S. at 341.

Reasonable suspicion, of course, is a much easier standard to meet than probable cause and is one of the lowest standards of proof in American law.¹¹⁸ It is more than an “inchoate and unparticularized suspicion or ‘hunch’”¹¹⁹ and needs to be based on “specific and articulable facts . . . taken together with rational inferences from those facts.”¹²⁰ The *T.L.O.* Court, however, found that lowering the standard of proof required for searches and seizures initiated by school officials was the best way to resolve the question of how to “provid[e] a safe environment conducive to education in the public schools.”¹²¹ In adopting this standard, however, the court reemphasized that the rights of public school students were not coextensive with those of adults and established that one of the goals of public education should be the fostering of a safe environment conducive to learning. How such an environment should be created and maintained is the subject of the remainder of this Article.

II. ENSURING EDUCATIONAL ENVIRONMENTS CONDUCTIVE TO LEARNING

Professor Jason Nance has written that

among school officials’ most important responsibilities are keeping students safe and promoting an orderly climate conducive to learning. However, there comes a point where monitoring students no longer enhances the learning environment, but impedes it, especially when school officials rely on a combination of . . . strict security measures . . . , which can create an intense surveillance environment.¹²²

¹¹⁸ See Dale Edward F.T. Zane, Note, *School Searches Under the Fourth Amendment* *New Jersey v. T.L.O.*, 72 CORNELL L. REV. 368, 387 (1987); *Evidentiary Standards and Burdens of Proof*, JUSTIA, <https://www.justia.com/trials-litigation/evidentiary-standards-burdens-proof/> (last visited Dec. 20, 2018).

¹¹⁹ *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

¹²⁰ *Id.* at 21.

¹²¹ *T.L.O.*, 469 U.S. at 332 n.2.

¹²² Nance, *Student Surveillance*, *supra* note 15, at 768–69. Professor Nance offers a number of examples of the “intense surveillance environment” that his scholarship rightfully opposes, including that of a student who had to swipe her student identification card for admittance to her own school, withstand scrutiny by law enforcement stationed at the entrance, and endure a screening process

When what seem like desperate times call for desperate measures, priorities—of children, parents, schools, and the general public—may change. Given the large number of prominently covered school shootings over the last decades, many school districts have taken extreme measures to try to ensure the safety of their students.¹²³ This would seem to align with the priorities expressed by the *T.L.O.* Court, specifically that schools should be safe environments for their students.

Since the Columbine High School massacre in 1999, there have been “more than 187,000 students attending at least 193 primary or secondary schools” who have “experienced a shooting on campus during school hours.”¹²⁴ The unique American character of these incidents has been discussed in many fora, from popular news outlets to the Senate floor.¹²⁵ According to child psychiatrist Bruce D. Perry, “[i]t’s no longer the default that going to school is going to make you feel safe. . . . Even kids who come from middle-class and upper-middle-class communities literally don’t feel safe in schools.”¹²⁶ There has been a multitude of theories advanced for the cause of mass shootings in schools, ranging from a generalized American culture of violence¹²⁷ to battered child syndrome resulting

similar to the Transportation Security Administration’s most invasive kinds of screening at airports. *Id.* at 769. She explained that “[t]hey treated us like criminals. It made me hate school. When you cage up students like that it doesn’t make us safe, it makes things worse.” *Id.* at 769.

¹²³ See *infra* Section II.A.

¹²⁴ John Woodrow Cox & Steven Rich, *Scarred by School Shootings*, WASH. POST (Mar. 25, 2018), https://www.washingtonpost.com/graphics/2018/local/us-school-shootings-history/?utm_term=.95a0522419e5.

¹²⁵ See, e.g., *id.*; Brandon Carter, *Murphy: Scourge of School Shooting After Shooting Only Happens in US*, HILL (Feb. 14, 2018), <http://thehill.com/home-news/senate/373890-murphy-scourge-of-school-shooting-after-shooting-only-happens-in-us>.

¹²⁶ Cox & Rich, *supra* note 124. The wording of this statement would seem to suggest that the problem of gun violence and mass shootings in schools is worse now that it also affects middle and upper-middle class students. This quotation, however, is included here to emphasize that gun violence negatively impacts public school students from all walks of life and diverse classes, even if Dr. Perry’s statement can be read as insensitive and tone-deaf.

¹²⁷ See, e.g., George Barnes, Editorial, *Barnestorming: Culture of Violence at the Heart of School Shootings*, TELEGRAM.COM (Feb. 17, 2018, 5:25 AM), <http://www.telegram.com/news/20180217/barnestorming-culture-of-violence-at-heart-of-school-shootings>.

from the bullying of classmates,¹²⁸ and from untreated mental illness¹²⁹ to socioeconomic inequalities and injustices.¹³⁰ Some have even advanced absurd explanations, such as blaming shootings on the viewing of pornography.¹³¹ Others, in search for some plausible explanation, have blamed the existence of “pure evil.”¹³²

¹²⁸ See, e.g., Mitali R. Vyas, Note, *School Shooters: Perpetrators or Victims? The Need for Expanding Battered Child Syndrome to Include Peer Harassment in School-Violence Prosecutions*, 41 STETSON L. REV. 215, 242–47 (2011).

¹²⁹ See, e.g., Jonathan M. Metzl & Kenneth T. MacLeish, *Mental Illness, Mass Shootings, and the Politics of American Firearms*, 105 AM. J. PUB. HEALTH 240, 240 (2015) (noting that, while many commentators have declared that mental illness kills people rather than guns, “notions that mental illness caused any particular shooting, or that advance psychiatric attention might prevent these crimes, are more complicated than they often seem”).

¹³⁰ See, e.g., James Gilligan & Bandy Lee, Opinion, *Look at the Root Causes of Gun Violence*, U.S. NEWS (Feb. 21, 2018, 8:00 AM), <https://www.us-news.com/opinion/policy-dose/articles/2018-02-21/after-florida-school-shooting-look-to-the-root-causes-of-gun-violence>.

¹³¹ Eli Rosenberg, *Pornography Is a ‘Root Cause’ of School Shootings, Republican Congresswoman Says*, WASH. POST (May 29, 2018), https://www.washingtonpost.com/news/powerpost/wp/2018/05/29/pornography-is-a-root-cause-of-school-shootings-republican-congresswoman-says/?noredirect=on&utm_term=.bdc9e4715b52 (noting that, while some studies link pornography to “a myriad of sexual, mental and emotional problems,” others show that it “helps people’s relationships”). Rep. Diane Black of Tennessee raised the issue of pornography during a meeting with pastors to discuss gun violence in school. *Id.* According to Rep. Black, she considers “root cause” when thinking about such issues, explaining to her audience that

I think it’s the deterioration of the family. . . . [Children without a support system are] looking for something, maybe on the internet. . . .

. . . .

Pornography. It’s available. It’s available on the shelf when you walk in the grocery store. Yeah, you have to reach up to get it, but there’s pornography there. All of this is available without parental guidance. And I think that is a big part of the root cause.

Jennifer Bendery, *Porn Leads to School Shootings, GOP Congresswoman Says*, HUFFPOST (May 29, 2018), https://www.huffingtonpost.com/entry/diane-black-porn-school-gun-violence_us_5b0d6634e4b0568a880ede65?19.

¹³² “You come to the conclusion this is just absolutely pure evil,” stated Florida Governor Rick Scott after the shooting at Marjory Stoneman Douglas High School. Elizabeth Chuck et al., *17 Killed in Mass Shooting at High School in Parkland, Florida*, NBC NEWS (Feb. 15, 2018, 3:18 PM), <https://www.nbcnews.com/news/us-news/police-respond-shooting-parkland-florida-high-school->

While it would seem reasonable to devote federal resources to researching the cause of what many view as a nationwide problem, “the Dickey Amendment to the 1996 Omnibus Consolidated Appropriations Bill provided that ‘none of the funds made available for injury prevention and control at the Centers for Disease Control and Prevention [“CDC”] may be used to advocate or promote gun control.’”¹³³ Given that the terms of the Dickey Amendment were exceptionally vague, scientists who would have investigated the causes of gun violence were understandably chilled from doing so, as “no federal employee was willing to risk his or her career or the [CDC’s] funding to” investigate and determine those causes.¹³⁴

While it may be difficult to determine or understand the definitive cause of mass shootings in schools, it is comparatively easy to see and assess what measures schools and school districts have taken in efforts (or perhaps political stunts made to appear like efforts) to keep students safe. Furthermore, while some would argue that imposing *more* safety policies and procedures in schools is the best way to keep students safe,¹³⁵ studies show that such policies and procedures negatively affect students’ physical and mental well-being and hinder the learning environment.¹³⁶ Therefore, this Article argues that the only effective way to reduce mass school shootings without such negative effects is by imposing limitations and regulations on the right to bear arms.¹³⁷

A. *School Responses to Mass Shootings*

News outlets have focused on some of the cultural ramifications of mass school shootings, including psychic numbing and

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¹³³ Andrew Jay McClurg, *In Search of the Golden Mean in the Gun Debate*, 58 HOW. L.J. 779, 786 (2015) (quoting Department of Health and Human Services Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009-244 (1996)).

¹³⁴ Christine Jamieson, *Gun Violence Research: History of the Federal Funding Freeze*, PSYCHOL. SCI. AGENDA (Am. Psychological Ass’n, Wash., D.C.), Feb. 2013, <https://www.apa.org/science/about/psa/2013/02/gun-violence> (quoting Arthur L. Kellermann & Frederick P. Rivara, *Silencing the Science on Gun Research*, 309 J. AM. MED. ASS’N 549, 549 (2013)); McClurg, *supra* note 133, at 786.

¹³⁵ See *infra* Section II.A.

¹³⁶ See *infra* Sections II. B–C.

¹³⁷ See *infra* Part III.

compassion fatigue.¹³⁸ Compassion fatigue has been defined by psychologist Charles Figley “as a disorder that affects those who do their work well,” and includes “the burnout and vicarious trauma associated with those” who “attempt[] to view the world from the perspective of one who is traumatized.”¹³⁹ Schools and their officials, however, have found themselves in a position where it is impossible to give in to such fatigue and have had to formulate their own reactions to gun violence.

After the Columbine massacre, Columbine High School adopted a number of changes to their security measures, including creating

unified command centers, which are modeled after law-enforcement dispatch centers, with trained security personnel monitoring video and other technology;

. . .

installing card readers; making changes in the way visitors [were] managed, such as using video/intercom “buzz-in” systems; coordinating active-shooter plans with students and teachers; updating exterior and interior locks for school doors; and adding security systems and cameras.¹⁴⁰

After the Sandy Hook shooting, displaced elementary students attended a nearby unused middle school, and the Newtown school board requested law enforcement presence in all elementary schools,

¹³⁸ See, e.g., Brian Resnick, *Mass Shootings and the Limits of Human Compassion*, VOX (Feb. 15, 2018, 3:08 PM), <https://www.vox.com/science-and-health/2018/2/15/17016098/parkland-florida-school-shooting-psychology-psychic-numbing>.

¹³⁹ Brittany Stringfellow Otey, *Buffering Burnout: Preparing the Online Generations for the Occupational Hazards of the Legal Profession*, 24 S. CAL. INTERDISC. L.J. 147, 167–68 (2014).

¹⁴⁰ Nathalie Sczublewski, *Columbine Leaders Share School Security Solutions*, OCALA STAR BANNER (Aug. 8, 2018, 1:54 PM), <https://www.ocala.com/news/20180808/columbine-leaders-share-school-security-solutions>; see also Gianna Caserta, *MSD Safety Commission Learns About Columbine School Safety Changes*, 25 WPBF NEWS (Aug. 8, 2018, 6:05 PM), <https://www.wpbf.com/article/msd-safety-commission-learns-about-columbine-school-safety-changes/22678818>.

including in the temporary Sandy Hook.¹⁴¹ After the May 18, 2018, Santa Fe High School shooting in Santa Fe, Texas, J.R. “Rusty” Norman, president of the Santa Fe School District’s board of trustees, seemed to tacitly admit a certain uselessness in predetermining policies and procedures in the events of a mass shooting: “My first indication is that our policies and procedures worked. . . . Having said that, the way things are, if someone wants to get into a school to create havoc, they can do it.”¹⁴² The Lieutenant Governor of Texas, Dan Patrick, offered unusual explanations for the shooting, including Texas schools having too many doors,¹⁴³ as well as the influence of violent video games,¹⁴⁴ rather than current gun control policies. Some school districts have considered arming teachers,¹⁴⁵ while others already do.¹⁴⁶

There is, however, data that suggests schools are currently safer than they have been since the 1990s. This follows a nationwide trend: The crime rate across the entire country has dropped since the 1990s.¹⁴⁷ Since 1996, there have been sixteen multiple-victim

¹⁴¹ See Mark Zaretsky, *Newtown Board Wants More Cops in Schools*, NEW HAVEN REGISTER (Jan. 31, 2013, 12:00 AM), <https://archive.is/20130216133129/http://www.nhregister.com/articles/2013/01/31/news/doc510b4f1251891266411083.txt>.

¹⁴² Todd C. Frankel et al., *Texas School Had a Shooting Plan, Armed Officers and Practice. And Still 10 People Died*, WASH. POST (May 19, 2018), https://www.washingtonpost.com/national/santa-fe-school-had-a-shooting-plan-armed-officers-and-practice-and-still-10-people-died/2018/05/19/58b1b55e-5b8d-11e8-8b92-45fdd7aaef3c_story.html?utm_term=.2f809396b6ca.

¹⁴³ Sanford Nowlin, *Ban Doors, Not Guns, to Stop School Shootings, Dan Patrick Says*, SAN ANTONIO CURRENT (May 18, 2018, 3:38 PM), <https://www.sacurrent.com/the-daily/archives/2018/05/18/ban-doors-not-guns-to-stop-school-shootings-dan-patrick-says>.

¹⁴⁴ Harriet Sinclair, *Texas Lt. Gov. Thinks Abortion, Video Games Show ‘Culture of Violence’ That Leads to School Shootings*, NEWSWEEK (May 20, 2018, 3:21 PM), <https://www.newsweek.com/texas-lt-gov-dan-patrick-abortion-video-games-show-culture-violence-leads-935705>.

¹⁴⁵ Debbie Truong, *If It Helps, It Helps: A Rural Virginia School System Looks to Arm Teachers*, WASH. POST (Sept. 1, 2018), https://www.washingtonpost.com/local/education/if-it-helps-it-helps-a-rural-virginia-school-system-looks-to-arm-teachers/2018/09/01/0a1cdddc-a558-11e8-a656-943ee-fab5daf_story.html?utm_term=.11e877e5bf83.

¹⁴⁶ Erica L. Green & Manny Fernandez, *Trump Wants to Arm Teachers. These Schools Already Do.*, N.Y. TIMES (Mar. 1, 2018), <https://www.nytimes.com/2018/03/01/us/armed-teachers-guns-schools.html>.

¹⁴⁷ See Allie Nicodemo & Lia Petronio, *Schools Are Safer than They Were in*

shootings in schools, with eight of these being mass shootings.¹⁴⁸ Mass shootings at school are exceptionally rare, and while “mass murders occur between [twenty] and [thirty] times per year, . . . about one of those incidents on average takes place at a school.”¹⁴⁹ Dr. James Alan Fox, professor of criminology at Northeastern University, has concluded that mass school shootings are not an epidemic.¹⁵⁰ Rather, school shooting incidents have become rarer since the 1990s.¹⁵¹

Proponents of stricter school surveillance may attempt to take credit for these gains in safety. However, the questionable effectiveness of the Safe and Drug-Free Schools and Communities Act, which was enacted in 1994 and designed to fund school programs and measures focused on violence prevention and mental health services,¹⁵² tends to show otherwise.¹⁵³ Given the relative scarcity of mass school shootings, one would imagine that resources would best be focused on other causes of harm to children, such as gun access in the home. What schools must manage, however, is a perception of danger rather than a reality.¹⁵⁴

the 90s, and School Shootings Are Not More Common than They Used to Be, Researchers Say, NEWS @ NE. (Feb. 26, 2018), <https://news.northeastern.edu/2018/02/26/schools-are-still-one-of-the-safest-places-for-children-researcher-says/>; Daniel B. Wood, *US Crime Rate at Lowest Point in Decades. Why America is Safer Now.*, CHRISTIAN SCI. MONITOR (Jan. 9, 2012), <https://www.csmonitor.com/USA/Justice/2012/0109/US-crime-rate-at-lowest-point-in-decades.-Why-America-is-safer-now>.

¹⁴⁸ Nicodemo & Petronio, *supra* note 147.

¹⁴⁹ *Id.* (emphasis omitted).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² See Safe and Drug-Free Schools and Communities Act, Pub. L. No. 103-382, tit. I, § 101, 108 Stat. 3672 (codified as amended at 20 U.S.C. §§ 7101–7165 (2012)); CONG. RESEARCH SERV., SAFE AND DRUG-FREE SCHOOLS AND COMMUNITIES ACT: PROGRAM OVERVIEW AND REAUTHORIZATION ISSUES 3–11 (2008).

¹⁵³ RAND CORP., OPTIONS FOR RESTRUCTURING THE SAFE AND DRUG-FREE SCHOOLS AND COMMUNITIES ACT 5–9 (2001), https://www.rand.org/pubs/monograph_reports/MR1328.html.

¹⁵⁴ See Nance, *School Surveillance*, *supra* note 98, at 92–93.

Even though schools remain among the safest places for children, one cannot discount the role that fear plays in a school official’s decision to adopt strict security practices. In the wake of several highly publicized incidents of school violence, it is no surprise that school officials and policymakers have resorted to strict security measures to demonstrate to the

An important aspect appears to get lost in school officials' consideration of safety policies and procedures in the event of and in response to a mass shooting—while measures taken to prevent such incidents may plausibly lead to having safer schools, does militarizing schools necessarily engender an environment conducive to learning as encouraged in *T.L.O.*? Both empirical studies and sociological theories would suggest not. A number of educational studies recognize that collaborative relationships between students, schools, and families positively influence student academic achievement,¹⁵⁵ while imposing *more* safety policies and procedures in schools negatively affects students' physical and mental wellbeings and hinders the learning environment in the schools.¹⁵⁶

B. *Empirical Studies Related to the Effectiveness of School Safety Measures*

While it might be natural to assume that tighter security regulations, such as the use of metal detectors or greater criminalization of disruptive behavior, would make schools safer, “no clear evidence that the criminalization of school discipline is effective at preventing school violence” exists.¹⁵⁷ If anything, studies have found that metal

public that they are implementing measures to reduce school crime, maintain order, and protect children.

Id.

¹⁵⁵ Roger D. Goddard et al., *A Multilevel Examination of the Distribution and Effects of Teacher Trust in Students and Parents in Urban Elementary Schools*, 102 *ELEMENTARY SCH. J.* 3, 13–14 (2001) (citing BYRD, L. JONES & ROBERT, W. MALOY, *PARTNERSHIPS FOR IMPROVING SCHOOLS* (1988); Barbara J. Bank et al., *Effects of Peer, Faculty, and Parental Influence on Students' Persistence*, 63 *SOC. ED.* 208, 208–25 (1990); Catherine L. Garnier & Stephen W. Raudenbush, *Neighborhood Effects on Educational Attainment: A Multilevel Analysis*, 64 *SOC. ED.* 251, 251–62 (1991); Annette Lareau, *Social Class Differences in Family-School Relationships: The Importance of Cultural Capital*, 60 *SOC. ED.* 73, 73–85 (1987); Valerie E. Lee & Robert G. Croninger, *The Relative Importance of Home and School in the Development of Literacy Skills for Middle-Grade Students*, 102 *AM. J. ED.* 286, 286–329 (1994); Esther Ho Sui-Chu & J. Douglas Willms, *Effects of Parental Involvement on Eighth-Grade Achievement*, 69 *SOC. ED.* 126, 126–41 (1996)).

¹⁵⁶ *E.g.*, Kevin P. Brady et al., *School-Police Partnership Effectiveness in Urban Schools: An Analysis of New York City's Impact Schools Initiative*, 39 *ED. & URB. SOC'Y* 455, 455 (2007).

¹⁵⁷ Thomas Mowen et al., *School Crime and Safety*, in *THE HANDBOOK OF MEASUREMENT ISSUES IN CRIMINOLOGY AND CRIMINAL JUSTICE* 465, 474 (Beth

detector use in schools may make conditions worse, with correlations suggesting “higher levels of school disorder and lower levels of students’ perceptions of school safety.”¹⁵⁸ While the connection between feeling safe and learning in an effective fashion may not be readily apparent, recent studies have shown, for example, that high schoolers who do not feel safe at school not only suffer from greater emotional difficulties, but they also suffer from decreased academic performance.¹⁵⁹

Apart from more “traditional” forms of screening and violence prevention increasing in schools, such as greater police presence and metal detectors, electronic surveillance has been making inroads into the classroom. These might include closed-circuit television (“CCTV”) surveillance—either monitored or not—or the use of webcams that upload images from classrooms at regular intervals to a school website.¹⁶⁰ It has been well-documented that visible school security measures have a negative effect on non-academic outcomes, such as arrest and drug use.¹⁶¹ Increases in school surveillance also “cause[] students to distrust and avoid school officials” while feeling “a heightened sense of danger and disillusion,” which unequivocally undermines the goal of creating an environment conducive to learning.¹⁶² Perhaps one of the best-known studies

M. Huebner & Timothy S. Bynum eds., 2016).

¹⁵⁸ Nance, *Student Surveillance*, *supra* note 15, at 793.

¹⁵⁹ See Ruth Berkowitz et al., *A Research Synthesis of the Associations Between Socioeconomic Background, Inequality, School Climate, and Academic Achievement*, 87 REV. ED. RES. 425, 457–59 (2016); Carolyn Côté-Lussier & Caroline Fitzpatrick, *Feelings of Safety at School, Socioemotional Functioning, and Classroom Engagement*, 58 J. ADOLESCENT HEALTH 543, 547–48 (2016).

¹⁶⁰ Dominique Braggs, Note, *Webcams in Classrooms: How Far Is Too Far?*, 33 J.L. & EDUC. 275, 276–77 (2004) (“By the 1999–2000 school year, [fifteen percent (15%)] of public schools nationwide reported using some form of video surveillance.”).

¹⁶¹ See Arrick Jackson, *Police-School Resource Officers’ and Students’ Perception of the Police and Offending*, 25 POLICING: INT’L J. POLICE STRATEGIES & MGMT 631, 647 (2002); Chongmin Na & Denise C. Gottfredson, *Police Officers in Schools: Effects on School Crime and the Processing of Offending Behaviors*, 30 JUST. Q. 619, 642 (2013). *But see* Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 J. CRIM. JUST. 280, 286 (2009) (finding that “[school resource officers] were not associated with an increase in total arrests”).

¹⁶² See Nance, *Student Surveillance*, *supra* note 15, at 787 (citing Jen Weiss, *Scan This: Examining Student Resistance to School Surveillance*, in SCHOOLS

demonstrating a correlation of increased visual security measures with negative outcomes arose out of New York City's Impact Schools Program, a "punitive-based school-police partnership."¹⁶³ This study showed that students at schools with increased police presence had worse outcomes in reading, math, SAT scores, and attrition rates.¹⁶⁴

Though his study does not focus specifically on students or schools, Jonathan W. Penney's recent Article in the Berkeley Technology Law Journal, *Chilling Effects: Online Surveillance and Wikipedia Use*, should not be discounted when considering whether increased security and surveillance measures are incompatible with the creation of a safe learning environment.¹⁶⁵ Some privacy theorists and other researchers have predicted that constant surveillance, not only in American society, but worldwide, will lead to a desensitization to privacy concerns and would not influence behavior.¹⁶⁶ This is in contravention of the "chilling effects doctrine," which "encouraged courts to treat rules or government actions that 'might deter' the free exercise of First Amendment rights 'with suspicion.'"¹⁶⁷ This type of chilling effect can create an "atmosphere of conformity and self-censorship"¹⁶⁸—in essence, an environment antithetical to the "marketplace of ideas" envisioned in *Tinker*.¹⁶⁹

UNDER SURVEILLANCE: CULTURES OF CONTROL IN PUBLIC EDUCATION 213, 227 (Torin Monahan & Rodolfo D. Torres eds., 2010)).

¹⁶³ Brady et al., *supra* note 156, at 468.

¹⁶⁴ *See id.*

¹⁶⁵ *See* Jonathan W. Penney, *Chilling Effects: Online Surveillance and Wikipedia Use*, 31 BERKELEY TECH. L.J. 117 (2016).

¹⁶⁶ *Id.* at 122 (citing Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 155 (2007); Sandro Nickel, *The Double-Edged Effects of Social Media Terror Communication: Interconnection and Independence vs. Surveillance and Human Rights Calamities*, in NEW OPPORTUNITIES AND IMPASSES: THEORIZING AND EXPERIENCING POLITICS 255, 263 (E. Zeynep Güler ed., 2014)).

¹⁶⁷ Penney, *supra* note 165, at 125 (quoting Neil Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1949–50 (2013)). The Supreme Court has recognized the "chilling effects doctrine." *See, e.g.,* *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965).

¹⁶⁸ Penney, *supra* note 165, at 126 (reviewing the history of chilling effects theory) (citing Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PENN. L. REV. 477, 488 (2006)).

¹⁶⁹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969) (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

Penney examines the assumptions underlying the chilling effects doctrine by undertaking the “first original empirical study of the impact [government surveillance] has had on Wikipedia use,” specifically using “an interrupted time series (ITS) design to determine whether traffic for articles that may raise privacy concerns for Wikipedia users decreased after the widespread publicity about [National Security Agency (“NSA”)] online surveillance activities.”¹⁷⁰ Penney chose Wikipedia as his focus because of its popularity, broad scope, and the cultural position it has taken as an “essential source of information” and learning.¹⁷¹ He hypothesized that after NSA’s monitoring of internet use was publicized in 2013, Wikipedia users would be “less likely to view or access” articles that might seem privacy-sensitive.¹⁷²

The results of Penney’s study affirmed his hypothesis, showing the behavioral changes envisioned by the chilling effects doctrine taking place after Wikipedia users acquired knowledge of government surveillance activity.¹⁷³ Penney’s data revealed an “immediate and statistically significant decrease” in Wikipedia view counts after reports of the NSA’s activities became widespread in June 2013.¹⁷⁴ His first set of results demonstrated that this decrease was rather long-lasting, with fewer Wikipedia page views recorded in August 2014 than in April or May of 2013.¹⁷⁵ According to Penney’s second set of results, the trend after June 2013 revealed a dramatic decrease every month for fourteen months after reports on the NSA’s surveillance activities, which strongly suggests that a chilling effect exists.¹⁷⁶ While some have theorized that people grow increasingly unconcerned with privacy issues due to the greater quotidian proliferation of surveillance tools, these results strongly suggest that “contrary to the ‘privacy paradox,’ privacy concerns are being reflected in online behavior.”¹⁷⁷

While the Penney study focuses on Wikipedia traffic, the study’s results support the argument that a more robust surveillance

¹⁷⁰ Penney, *supra* note 165, at 124.

¹⁷¹ *Id.* at 124–25.

¹⁷² *Id.* at 124.

¹⁷³ *Id.* at 161.

¹⁷⁴ *Id.* at 151.

¹⁷⁵ *Id.* at 148.

¹⁷⁶ *Id.* at 152.

¹⁷⁷ *Id.* at 162.

apparatus in schools does not foster an environment conducive to learning inasmuch that it encourages conformity, self-censorship, and a reticence to engage in the inquiries that would be made without constant monitoring.¹⁷⁸ While the State has an interest in creating safe learning environments conducive to learning, it seems that the use of school surveillance impedes rather than furthers that goal.

There is also a likelihood that increased surveillance in school leads to negative health outcomes. Events that cause fear and anxiety, as well as wider responses to such events that make communities feel vulnerable and unvalued, have been found to negatively affect the health of the members of those communities.¹⁷⁹ Such effects can be seen among members of racial minority groups targeted by racial hostility. Teenagers that have experienced racial hostility have shown altered cortisol slopes, “lower cortisol awakening response in young adulthood, elevated levels of endocrine, cardiovascular, and metabolic parameters at age 20, [and] epigenetic patterns of aging at age 22.”¹⁸⁰ A study of 1,836 American counties showed an elevated risk of death from heart disease in counties where racial prejudice and tensions were high.¹⁸¹ While this elevated risk affected blacks more strongly than whites, an increase in risk was observed in both groups.¹⁸²

Immigration raids have been shown to have health impacts on Latino communities. After a large 2008 immigration raid at a Postville, Iowa, meat-packing plant, a study observed “an increase in the risk of low birth weight among infants born to Hispanic mothers in

¹⁷⁸ See *id.* at 161–64.

¹⁷⁹ David R. Williams & Morgan M. Medlock, *Health Effects of Dramatic Societal Events—Ramifications of the Recent Presidential Election*, 376 *NEW ENG. J. MED.* 2295, 2295 (2017).

¹⁸⁰ *Id.* at 2296 (citing Emma K. Adam et al., *Developmental Histories of Perceived Racial Discrimination and Diurnal Cortisol Profiles in Adulthood: A 20-Year Prospective Study*, 62 *PSYCHONEUROENDOCRINOLOGY* 279, 285, 288 (2015); Gene H. Brody et al., *Perceived Discrimination Among African American Adolescents and Allostatic Load: A Longitudinal Analysis with Buffering Effects*, 85 *CHILD DEV.* 989, 998 (2014)). Epigenetic refers to genetic expression that is controlled by things other than the underlying genetic code. Danielle Simmons, *Epigenetic Influences and Disease*, 1 *NATURE EDUC.* 6, 6 (2008).

¹⁸¹ Williams & Medlock, *supra* note 179 (citing Yeonjin Lee et al., *Effects of Racial Prejudice on the Health of Communities: A Multilevel Survival Analysis*, 105 *AM. J. PUB. HEALTH* 2349, 2353 (2015)).

¹⁸² *Id.*

the year after the raid as compared with the previous year. No similar increase was evident among non-Hispanic white mothers.”¹⁸³ Latinos living in states with stricter immigration enforcement also suffer from elevated rates of mental illness.¹⁸⁴ Cuts to the federal Special Supplemental Nutrition Program for Women, Infants, and Children, as well as cuts to Medicare, have been shown to negatively affect the health of “pregnant [adults], children, and adults with chronic disease.”¹⁸⁵

While the medical studies may at first blush seem unrelated to the question of gun violence and school surveillance, these studies help to illuminate an important point: Conditions that make communities feel helpless, stressed, vulnerable, and targeted cause long-lasting negative health effects in those communities. The feeling of marginalization that can come from having to go through metal detectors, being monitored through CCTV, and having to carry clear backpacks does not create a safe environment for students inasmuch that it exposes them to the risk of long-lasting and potentially devastating health problems and negative outcomes. The feelings of insignificance and stigmatization that students experience navigating changes in security policies after mass shooting events may, quite literally, be bad for their health.¹⁸⁶

¹⁸³ *Id.* at 2297 (citing Nicole L. Novak et al., *Change in Birth Outcomes Among Infants Born to Latina Mothers After a Major Immigration Raid*, 46 INT’L J. EPIDEMIOLOGY 839, 845–46 (2017)).

¹⁸⁴ *Id.* (citing Mark L. Hatzenbuehler et al., *Immigration Policies and Mental Health Morbidity Among Latinos: A State-Level Analysis*, 174 SOC. SCI. & MED. 169, 174 (2017)).

¹⁸⁵ *Id.* (citing Mary O’Neil Munding, *Health Service Funding Cuts and the Declining Health of the Poor*, 313 NEW ENG. J. MED. 44, 45 (1985)).

¹⁸⁶ Professor Nance has related several examples of traumatic treatment. A high school student on the West Side of Chicago explained that

[f]rom the moment we stepped through the doors in the morning, we were faced with metal detectors, x-ray machines and uniformed security. Upon entering the school, it was like we stepped into a prison. . . . [T]he halls were full with school security officers whose only purpose seemed to be to serve students with detentions or suspensions.

Nance, *Student Surveillance*, *supra* note 15, at 770.

1. SOCIOLOGICAL FRAMEWORKS FOR CONSIDERING INCREASED SCHOOL SURVEILLANCE

Apart from empirical studies demonstrating that the establishment of a vast security apparatus in schools is likely harmful not just to a student's learning environment, but also to a student's physical health, it is also useful to consider sociological frameworks used to explain human motivation. Abraham Maslow approached the issue of human motivation in a landmark paper introducing his now well-known hierarchy of needs.¹⁸⁷ Maslow advanced a hierarchy of human needs first by categorizing them into two groups: deficiency needs and growth needs.¹⁸⁸ Lower-level needs in the deficiency needs group "must be satisfied to a reasonable degree before the more advanced need levels emerge as behavioral motivators."¹⁸⁹ The most basic of the deficiency needs—the physiological needs—amount to the lowest limits of what is required to survive.¹⁹⁰ Physiological needs such as food, water, clothing, and shelter must be met before a person can move to fulfilling the next level of needs.¹⁹¹

The second most basic of needs that humans must secure to fulfill themselves, according to Maslow's theory, is the need for safety.¹⁹² Again, these can only come into play after the most basic physiological needs are met.¹⁹³ This need for safety is even more acute in children than it is in adults.¹⁹⁴ "[T]he average child in our society generally prefers a safe, orderly, predictable, organized world, which he can count on, and in which unexpected, unmanageable or other dangerous things do not happen . . ."¹⁹⁵ Without the safety need satisfied, children are unable to move forward in satisfying their needs for love and belonging, let alone more complex growth

¹⁸⁷ A. H. Maslow, *A Theory of Human Motivation*, 50 PSYCHOL. REV. 370, 370 (1943).

¹⁸⁸ See *id.* at 373–82; see also BOB F. STEERE, BECOMING AN EFFECTIVE CLASSROOM MANAGER 21–22 (1988) ("Once the four lower needs are fulfilled, children become less concerned about maintenance needs and become more interested in growth needs—in becoming more *self-actualized* persons.").

¹⁸⁹ STEERE, *supra* note 188, at 21.

¹⁹⁰ Maslow, *supra* note 187, at 373.

¹⁹¹ *Id.*

¹⁹² *Id.* at 376.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 376–78.

¹⁹⁵ *Id.* at 378.

needs such as knowledge, understanding, aesthetic, or the need for self-actualization.¹⁹⁶

Like Maslow, a number of other psychological and sociological theories regard the need for safety as a fundamental and basic necessity. In 1969, Clayton P. Alderfer first revealed his own Existence, Relatedness, Growth (“ERG”) theory.¹⁹⁷ An extrapolation of sorts from Maslow’s theory, Alderfer grouped human needs into three difference spheres that influence behavior—existence, relatedness, and growth.¹⁹⁸ Safety under ERG theory refers primarily to “prevention from fear, anxiety, danger, tension, and so on.”¹⁹⁹

Under both Maslow’s and the ERG models, increased surveillance and erosion of student Fourth Amendment rights is harmful to child development and may prevent students from attempting to fulfill anything but their physiological and safety needs. In such environments, “children perceive that they are being treated as criminals; where they are diminished by such perceptions; and where they, consequentially, cultivate negative attitudes toward their schools.”²⁰⁰

2. THE IMPACT OF CCTV IN BRITISH SCHOOLS

While the United States has been grappling with the rise of surveillance, not just in schools but also in the generalized public sphere, “CCTV is widely acknowledged to be ubiquitous in British urban areas.”²⁰¹ British citizens in urban areas are subjected to heavy monitoring.²⁰² There is “one camera to every fourteen people” in the

¹⁹⁶ *Id.* at 380–82; see STEERE, *supra* note 188, at 21–22.

¹⁹⁷ Clayton P. Alderfer, *An Empirical Test of a New Theory of Human Needs*, 4 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 142 (1969).

¹⁹⁸ *Id.* at 145.

¹⁹⁹ Cheng-Liang Yang et al., *An Empirical Study of the Existence, Relatedness, and Growth (ERG) Theory in Consumer’s Selection of Mobile Value-Added Services*, 5 AFR. J. BUS. MGMT. 7885, 7886 (2011).

²⁰⁰ Nance, *School Surveillance*, *supra* note 98, at 105 (quoting Donna Lieberman, *Over-Policing in Schools on Students’ Education and Privacy Rights*, NYCLU (June 14, 2006), <https://www.nyclu.org/en/publications/over-policing-schools-students-education-and-privacy-rights> (testimony on behalf of the New York Civil Liberties Union before the New York City Council Committees on Education and Public Safety)).

²⁰¹ Taylor, *supra* note 2, at 381.

²⁰² “It is now widely accepted that British citizens are the most surveilled population in the world.” *Id.* at 382 (citing CLIVE NORRIS & GARY ARMSTRONG, THE

United Kingdom, and it is estimated that the average person in a British urban area is filmed by more than 300 separate cameras during the course of a day.²⁰³ It has proven even more difficult to assess how many CCTV cameras roll in British primary and secondary schools.²⁰⁴ In a survey by the Association of Teacher and Lecturers (“ATL”), eighty-five percent (85%) of teachers reported that there were CCTV cameras in their schools.²⁰⁵

In her study of the impact of CCTV upon British students, sociologist Emmeline Taylor conducted multiple focus groups with students and provided a low level of moderation.²⁰⁶ Based on these focus groups, it became “clear that the pupils involved in the research were incensed about the lack of trust that they were afforded by the schools that they attended as well as by wider society,” while teachers (perhaps predictably) thought that CCTV-based school surveillance did not present any real concern to their own privacy.²⁰⁷ Dr. Taylor posited that this difference arose from the common perception that CCTV cameras were meant to keep watch over students rather than teachers.²⁰⁸

Some student participants in the focus groups addressed the idea that “suspicion and mistrust . . . breed misbehaviour,” revealing what appears to be an intuitive sense of the sociological “labelling theory,” which holds that people act the way that they have been prejudged.²⁰⁹ In other words, a person lives up (or down) to expectations. A student explained her feelings about CCTV in schools as follows:

MAXIMUM SURVEILLANCE SOCIETY: THE RISE OF CCTV 39 (1999); JOHN PARKER, TOTAL SURVEILLANCE: INVESTIGATING THE BIG BROTHER WORLD OF E-SPIES, EAVESDROPPERS, AND CCTV 65 (2001)).

²⁰³ *Id.* at 382 (citing PARKER, *supra* note 202, at 66; Michael McCahill & Clive Norris, *CCTV in London* 20 (Urbaneye Working Paper No. 6, 2002), http://www.urbaneye.net/results/ue_wp6.pdf). Emmeline Taylor acknowledges that this number is extrapolated from a small sample size and should be “interpreted with caution.” *Id.* at 402 n.4.

²⁰⁴ *Id.* at 383.

²⁰⁵ *Id.* Emmeline Taylor acknowledged that the ATL’s survey neglected to record where the respondents taught, potentially skewing findings. *Id.* at 402 n.5.

²⁰⁶ *Id.* at 389–91.

²⁰⁷ *Id.* at 391.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 392 (citing HOWARD S. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* 8–9 (Free Press 1973) (1963)).

I think it is an invasion of privacy. I think if you want pupils to act responsibly then you need to show them that they are trusted. You need to treat them like adults, and with a little bit of respect. For some individuals it becomes a self fulfilling prophecy. If you are always expecting them to be up to no good then they might decide that they might as well misbehave because they are being treated like they are doing anyway.²¹⁰

While some may argue that surveillance—be it through CCTV cameras, police “resource officers,” or metal detectors—is beneficial because it makes students feel safe, Dr. Taylor’s study found that students felt the cameras were not deployed for the purpose of protecting them from outside criminal actors.²¹¹ Instead, the cameras served as another tool for managing the students’ own behavior.²¹²

Again, respecting student social needs—including those of respect, fairness, and trust—strongly impacts the maintenance of a healthy and productive learning environment in which students feel greater “ownership of their learning.”²¹³ While Dr. Taylor’s study focused on British students, it perhaps foretells the relationship students may have with their schools, teachers, and learning environments as surveillance methods intensify and increase in American public schools.

III. A RECOGNIZED RIGHT TO EDUCATION AS A BUFFER AGAINST GUN VIOLENCE AND HARMFUL SECURITY MEASURES

This Article has thus far examined the evolution of public schools and students’ rights in the context of their educational environments. It has also explored both empirical and psycho-sociological reasons why increased surveillance and security measures, such as those instituted shortly after the Parkland shooting, are ineffective

²¹⁰ *Id.* at 391.

²¹¹ *Id.*

²¹² *Id.* at 392.

²¹³ James H. Stronge et al., *What Makes Good Teachers Good? A Cross-Case Analysis of the Connection Between Teacher Effectiveness and Student Achievement*, 62 J. TCHR. EDUC. 339, 341 (2011) (citing Eric A. Covino & Edward F. Iwanicki, *Experienced Teachers: Their Constructs of Effective Teaching*, 10 J. PERSONNEL EVALUATION EDUC. 325, 334 (1996)).

in providing the safe environment conducive to learning that students need.

Scholars have made important calls to reform the use of intense surveillance measures, especially given that such measures have been shown to disproportionately harm students of color.²¹⁴ For example, Professor Nance has argued that “the federal government should require, in exchange for federal education funds, that states enact laws mandating all school personnel receive implicit bias training, and all teacher certification programs include such training.”²¹⁵ Such implicit bias training would be paid for, in part, with federal dollars.²¹⁶ He also argues that, among other things, federal and state governments should collect information and data regarding school security practices, including the number of searches of students conducted, the reason each search is conducted, and any alternative measures that schools might use to promote a safe learning environment.²¹⁷

These suggestions are admirable, but particularly difficult to institute, especially on the federal level.²¹⁸ Efforts at passing stricter gun control measures have been largely unsuccessful. Calls for greater gun control were especially strong after the Sandy Hook shooting in 2012,²¹⁹ in which twenty elementary school students and

²¹⁴ See, e.g., Nance, *Student Surveillance*, *supra* note 15, at 831 (citing Jason P. Nance, *Students, Security, and Race*, 63 EMORY L.J. 1, 48–55 (2013); Jason P. Nance, *Dismantling the School-to-Prison Pipeline: Tools for Change*, 48 ARIZ. ST. L.J. 313, 345–60 (2016)).

²¹⁵ *Id.* at 832. There has been some debate as to whether implicit bias training, though admirably well-intentioned, makes any positive difference at all. See, e.g., Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, HARV. BUS. REV., July–Aug. 2016, at 52, 54.

²¹⁶ Nance, *Student Surveillance*, *supra* note 15, at 834.

²¹⁷ *Id.* at 835. Nance also argues that all collected information should be publicly available and the federal and state governments should fund implicit bias research. *Id.* at 834–45.

²¹⁸ See Brendan Pelsue, *When It Comes to Education, the Federal Government Is in Charge of . . . Um, What?*, HARV. ED. MAG., Fall 2017, at 30, 34–35 (describing the difficulty in passing federal education policy).

²¹⁹ See, e.g., Nick Wing, *White House Gun Control Petition Becomes Site’s Most Popular Ever*, HUFFPOST (Dec. 17, 2012, 2:50 PM), https://www.huffingtonpost.com/2012/12/17/white-house-gun-control_n_2317189.html; Catherine New, *Anti-Gun Donations Surge After Connecticut Shooting*, HUFFPOST (Dec. 14, 2012, 7:40 PM), https://www.huffingtonpost.com/2012/12/14/anti-gun-donations-surge-connecticut-shooting_n_2303632.html; Lydia Saad, *Americans Want*

seven adults were killed.²²⁰ The Obama Administration formed an interagency gun task force,²²¹ which held a number of meetings and solicited ideas.²²² Unsurprisingly, congressional Republicans and the National Rifle Association (“NRA”) derided these efforts as ineffective, with the NRA issuing a statement expressing its “disappoint[ment] with how little this meeting had to do with keeping our children safe and how much it had to do with an agenda to attack the Second Amendment.”²²³ Congressional Democrats attempted to pass more stringent gun control, particularly the proposed Assault Weapons Ban of 2013²²⁴ and the Manchin-Toomey Amendment,²²⁵ which would have required background checks in nearly all private

Stricter Gun Laws, Still Oppose Bans, GALLUP (Dec. 27, 2012), <https://news.gallup.com/poll/159569/americans-stricter-gun-laws-oppose-bans.aspx>.

²²⁰ James Barron, *Children Were All Shot Multiple Times with a Semiautomatic, Officials Say*, N.Y. TIMES (Dec. 15, 2012), <https://www.nytimes.com/2012/12/16/nyregion/gunman-kills-20-children-at-school-in-connecticut-28-dead-in-all.html>.

²²¹ Jake Tapper et al., *President Obama Launches Gun-Violence Task Force*, ABC NEWS (Dec. 19, 2012), <https://abcnews.go.com/Politics/OTUS/president-obama-launches-gun-violence-task-force/story?id=18015694>.

²²² Philip Rucker & Peter Wallsten, *Biden's Gun Task Force Met with All Sides, but Kept Its Eye on the Target*, WASH. POST (Jan. 19, 2013), https://www.washingtonpost.com/politics/bidens-gun-task-force-met-with-all-sides-but-kept-its-eye-on-the-target/2013/01/19/520d77a6-60c5-11e2-b05a-605528f6b712_story.html?utm_term=.88095735fa74.

²²³ At this meeting, Vice President Biden, the leader of the task force, attempted to build some consensus regarding proposals such as more stringent background checks for purchasing guns and the banning of high-capacity magazines. See Amer Madhani, *NRA Blasts Biden's Gun Task Force After Meeting*, USA TODAY (Jan. 10, 2013, 12:57 PM), <https://www.usatoday.com/story/news/politics/2013/01/10/biden-nra-wildlife-gun-control/1823511>; see also Rucker & Wallsten, *supra* note 222. According to the NRA, as Wayne LaPierre famously declared, “The only thing that stops a bad guy with a gun, is a good guy with a gun.” Peter Overby, *NRA: 'Only Thing That Stops a Bad Guy with a Gun Is a Good Guy with a Gun,'* NPR (Dec. 21, 2012, 3:00 PM), <https://www.npr.org/2012/12/21/167824766/nra-only-thing-that-stops-a-bad-guy-with-a-gun-is-a-good-guy-with-a-gun>.

²²⁴ Assault Weapons Ban of 2013, S. 150, 113th Cong. (2013).

²²⁵ Public Safety and Second Amendment Rights Protection Act of 2013, S. Amend. 715 to S. 649, 113th Cong. (2013).

party gun sales.²²⁶ However, both efforts failed.²²⁷

There was great public outcry in support of more stringent firearms restrictions after the recent Parkland shooting. Marjory Stoneman Douglas High School students such as Emma Gonzalez and David Hogg, along with other students, mobilized a number of protests and rallies calling for greater gun control.²²⁸ Justice John Paul Stevens himself contributed an opinion piece to the New York Times in which he argued for repeal of the Second Amendment.²²⁹ At the federal level, the STOP School Violence Act was passed on March 23, 2018.²³⁰ The Act provides greater funding to schools for the types of ineffective surveillance measures discussed earlier in this Article, such as metal detectors and other supposedly security-bolstering items.²³¹ Apart from this debatably wasteful allocation of

²²⁶ *Id.*; see also Sean Lengell, *Leaks Hurt Gun Control Bill, Sen. Pat Toomey Says*, WASH. TIMES (Apr. 24, 2013), <https://www.washingtontimes.com/news/2013/apr/24/leaks-hurt-gun-control-bill-sen-pat-toomey-says/>.

²²⁷ Lengell, *supra* note 226; Sabrina Siddiqui, *Assault Weapons Ban, High-Capacity Magazine Measures Fail in Senate Vote*, HUFFPOST (Apr. 17, 2013, 6:27 PM), https://www.huffingtonpost.com/2013/04/17/assault-weapons-ban_n_3103120.html.

²²⁸ See, e.g., Chelsea Bailey, *At Rally, Parkland Shooting Survivors Rail Against Gun Laws, NRA and Trump*, NBC NEWS (Feb. 17, 2018, 3:52 PM), <https://www.nbcnews.com/news/us-news/rally-parkland-shooting-survivors-rail-against-gun-laws-nra-trump-n849076>; Stephanie Ebbs, *Survivors of Florida High School Shooting Call for Action on Gun Control*, ABC NEWS (Feb. 15, 2018, 6:17 PM), <https://abcnews.go.com/Politics/survivors-florida-high-school-shooting-call-action-gun/story?id=53111278>; Sean Rossman, *'We're Children. You Guys Are the Adults': Shooting Survivor, 17, Calls Out Lawmakers*, USA TODAY (Feb. 15, 2018, 1:05 PM), <https://www.usatoday.com/story/news/nation-now/2018/02/15/were-children-you-guys-adults-shooting-survivor-17-calls-out-lawmakers/341002002/>.

²²⁹ Justice Stevens explained that overturning the *Heller* decision “via a constitutional amendment to get rid of the Second Amendment would be simple and would do more to weaken the N.R.A.’s ability to stymie legislative debate and block constructive gun control legislation than any other available option.” John Paul Stevens, Opinion, *John Paul Stevens: Repeal the Second Amendment*, N.Y. TIMES (Mar. 27, 2018), <https://www.nytimes.com/2018/03/27/opinion/john-paul-stevens-repeal-second-amendment.html>.

²³⁰ Consolidated Appropriations Act, 2018, H.R. 1625, 115th Cong. (2018); see also John Bowden, *Justice Department Cancels School Safety Studies After Spending Bill Enacted*, HILL (Mar. 24, 2018, 10:41 AM), <https://thehill.com/homenews/administration/380077-justice-department-cancels-school-safety-studies-due-to-spending-bill>.

²³¹ Bowden, *supra* note 230; see *supra* Section II.A.

funding, the White House also ordered the Department of Justice to ban bump stocks.²³² A formalized ban issued by the Trump Administration went into effect on March 26, 2019.²³³ Such bans on bump stocks were decried by many gun enthusiasts as an unconstitutional limitation on their Second Amendment rights.²³⁴

Gun rights have become a passionate point of debate in the United States. The NRA itself has helped fuel this debate, even on an academic level, by funding scholarship in support of unfettered gun rights.²³⁵ Prior to the 1970s, the Second Amendment was seldom discussed or written about by legal academics—only eleven articles discussed it between 1870 and 1970.²³⁶ Not only was the NRA instrumental in increasing scholarship on the Second Amendment, it also supported and encouraged a more individualistic interpretation of the Amendment itself. In 1977, the NRA's leadership shifted dramatically, populated by Second Amendment Foundation and Citizens Committee for the Right to Keep and Bear Arms activists.²³⁷

²³² Grace Donnelly, *What You Need to Know About Bump Stock Gun Accessories*, FORTUNE (Feb. 21, 2018), <http://fortune.com/2018/02/21/bump-stocks-ban-las-vegas-shooting/>.

²³³ Bump-Stock-Type Devices, 83 Fed. Reg. 66,514 (Dec. 26, 2018) (to be codified at 27 C.F.R. pts. 447, 478 & 479); see Laura Jarrett, *Trump Administration Officially Bans Bump Stocks*, CNN (Dec. 18, 2018, 11:29 AM), <https://www.cnn.com/2018/12/18/politics/bump-stocks-ban/index.html>; Martin Kaste & Ryan Lucas, *Justice Department Bans Bump Stocks, Devices Used in Deadly Las Vegas Shooting*, NPR (Dec. 18, 2018, 12:14 PM), <https://www.npr.org/2018/12/18/677788059/justice-department-bans-bump-stocks-devices-used-in-deadly-las-vegas-shooting> (last visited Feb. 12, 2019).

²³⁴ See, e.g., Dara Kam, *Gun Owners Sue Florida over 'Bump Stock' Ban*, ORLANDO SENTINEL (Mar. 20, 2018), <https://www.orlandosentinel.com/news/politics/political-pulse/os-bump-stocks-lawsuit-20180320-story.html>. A federal judge upheld the ban after a challenge to the regulation's constitutionality. Tim Stelloh, *Federal Judge Upholds Trump Administration's Ban on Rapid-Fire Bump Stocks*, NBC NEWS (Feb. 26, 2019, 12:43 AM), <https://www.nbcnews.com/news/us-news/federal-judge-upholds-trump-administration-s-ban-rapid-fire-bump-n975991>.

²³⁵ Kenneth Lasson, *Blunderbuss Scholarship: Perverting the Original Intent and Plain Meaning of the Second Amendment*, 32 U. BALT. L. REV. 127, 128–29 (2003) (citing Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 2, 8 n.28 (2000); *Supported Research*, NRA C.R. DEF. FUND, <https://www.nradefensefund.org/supported-research.aspx> (last visited Nov. 11, 2018)).

²³⁶ Lasson, *supra* note 235, at 146.

²³⁷ Michael Waldman, *How the NRA Rewrote the Second Amendment*,

With the change in leadership, the NRA became strongly ideological and focused on the enforcement of its interpretation of the Second Amendment.²³⁸ This change in direction was appealing to many Republicans and conservatives at the time, most of whom were drifting ever further to the right during the 1970s.²³⁹

Politicians were happy to adjust. While an earlier version of the Republican platform supported gun control, by 1980 it declared that “[w]e believe the right of citizens to keep and bear arms must be preserved. Accordingly, we oppose federal registration of firearms.”²⁴⁰ Members of Congress were also eager to ride the wave of Second Amendment enthusiasm, and in 1981, Utah Senator and chair of a Judiciary Committee panel, Orrin Hatch, commissioned the study “The Right to Keep and Bear Arms.”²⁴¹ Eventually, the Supreme Court definitively sided with the NRA’s interpretation of the Second Amendment as an individual right to bear arms as opposed to a collective right in *District of Columbia v. Heller*.²⁴² Two years later in *McDonald v. City of Chicago*, the Court held that the individualized right to keep and bear arms that it formulated in *Heller* had been incorporated to the states by the Due Process Clause of the Fourteenth Amendment.²⁴³

With the Second Amendment, and a now-individual right to bear arms entrenched not only in Supreme Court jurisprudence, but also, seemingly, American culture, proposed limitations on the Second Amendment have consistently failed.²⁴⁴ Now that the right to bear arms is conceived as a fundamental right, it is more likely to overcome proposed limitations to make American schools safer and more conducive places for learning. However, if the right to bear arms was found to be in conflict with another fundamental right,

BRENNAN CTR. FOR JUST. (May 20, 2014), <https://www.brennancenter.org/analysis/how-nra-rewrote-second-amendment>.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ The study announced in rather melodramatic fashion that “[w]hat the Subcommittee on the Constitution uncovered was clear—and long lost—proof that the second amendment to our Constitution was intended as an individual right of the American citizen to keep and carry arms in a peaceful manner, for protection of himself, his family, and his freedoms.” *Id.*

²⁴² 554 U.S. 570, 595 (2008).

²⁴³ 561 U.S. 742, 791 (2010).

²⁴⁴ *See, e.g.*, notes 221–27 and accompanying text.

then imposing limitations on the right to bear arms might be possible.²⁴⁵

In *Washington v. Glucksberg*, a case examining the right to assisted suicide, the Supreme Court outlined what has become the “established method of substantive-due-process analysis.”²⁴⁶ This analysis occurs in two parts: (1) determining whether the right or liberty asserted is a fundamental right “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty such that neither liberty nor justice would exist if [the rights] were sacrificed,”²⁴⁷ and (2) requiring a “careful description of the asserted fundamental liberty interest.”²⁴⁸

In the United States, the right to education is somehow not viewed as being on an equivalent plane as the right to bear arms. The rest of this Article argues that not only is a federally recognized right to education “implicit in the concept of ordered liberty,” it has also existed throughout “the Nation’s history and tradition”²⁴⁹ but has been long ignored. This Article then argues that reviving this right would put education, as well as the conditions needed to obtain safe educational environments conducive to learning, on an equal level of fundamental importance as the right to bear arms.

A. *The Historical Right to Education in the United States*

In *San Antonio Independent School District v. Rodriguez*, the Supreme Court refused to recognize a fundamental right to education, reasoning that while education is important, it has never been one of the categories of rights previously recognized by the Court as

²⁴⁵ See, e.g., *Burson v. Freeman*, 540 U.S. 191, 211 (1992) (“[I]t is the rare case in which we have held that a law survives strict scrutiny. This, however, is such a rare case. Here, the State . . . asserted that the exercise of free speech rights conflicts with another fundamental right, the right to cast a ballot in an election free from the taint of intimidation and fraud. A long history, a substantial consensus, and simple common sense show that some restricted zone around polling places is necessary to protect that fundamental right. Given the conflict between these two rights, we hold that requiring solicitors to stand 100 feet from the entrances to polling places does not constitute an unconstitutional compromise.”).

²⁴⁶ 521 U.S. 702, 720 (1997).

²⁴⁷ *Id.* at 720–21 (first quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) and then quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)) (internal quotations omitted).

²⁴⁸ *Id.* at 721 (internal citations omitted).

²⁴⁹ *Id.* at 720–21.

guaranteed under the Constitution.²⁵⁰ This reasoning is particularly tortured and tautological, amounting to the Court stating that “because we have never recognized this right previously we refuse to recognize it now.”²⁵¹ Efforts to have a narrower right to education recognized in a subsequent case also failed.²⁵²

The American refusal of a right to education makes it unique among its counterparts.²⁵³ The United Nations Convention on the Rights of the Child (“CRC”), with its 196 parties, acknowledges a fundamental right to free public education for children²⁵⁴—only the

²⁵⁰ 411 U.S. 1, 29–39 (1973).

²⁵¹ See *id.* at 116–17 (Marshall, J., dissenting). Justice Marshall, in his dissent, stated that although the Court had previously found “the right to procreate, . . . the right to vote in state elections, . . . [and] the right to an appeal from a criminal conviction” to be fundamental rights “due to the importance of the interests at stake[.]” *id.* at 100, the Court inexplicably declined to similarly find the right to education to be fundamental. *Id.* at 110–11 (“[T]he fundamental importance of education is amply indicated by the prior decisions of this Court, by the unique status accorded public education by our society, and by the close relationship between education and some of our most basic constitutional values.”). This is despite the fact that the Court acknowledged that “education is perhaps the most important function of state and local governments.” *Id.* at 29 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

²⁵² See *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 457–60 (1988). In this case, the Kadrmas family challenged a North Dakota statute that allowed some school districts to charge a fee to bus students to school. *Id.* at 454. The Kadrmas family argued that the statute should be subject to intermediate scrutiny because it not only infringed upon Sarita (the Kadrmas’ schoolage daughter) Kadrmas’s right to education, but withheld government services based on ability to pay. *Id.* at 459–60. The Court rejected both of these arguments and upheld the state statute. *Id.* at 465.

²⁵³ A right to education is enumerated in the Universal Declaration of Human Rights, as well as the International Covenant on Economic, Social and Cultural Rights. G.A. Res. 217 (III) A. Universal Declaration of Human Rights, at art. 26 (Dec. 10, 1948); International Covenant on Economic, Social, and Cultural Rights art. 13, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976). As of December 2018, the International Covenant on Economic, Social and Cultural Rights has 169 parties. *International Covenant on Economic, Social and Cultural Rights*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en (last visited Dec. 13, 2018).

²⁵⁴ United Nations Convention on the Rights of the Child art. 28, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990); *Status of Ratification*, UNITED NATIONS HUM. RTS: OFF. HIGH COMMISSIONER, <http://indicators.ohchr.org/> (last visited Dec. 19, 2018).

United States has yet to ratify the CRC.²⁵⁵ The United States, however, does have a federal right to education, even if it is unrecognized, because its origin and purpose were obscured in the immediate aftermath of the Civil War during Reconstruction²⁵⁶ and the backlash against it in the form of Jim Crow.

After the conclusion of the Civil War, the ratification of the Fourteenth Amendment and the readmission of formerly Confederate states proceeded concurrently.²⁵⁷ In order to be readmitted, “Southern states were rewriting their state constitutions and ratifying the Fourteenth Amendment, one state at a time.”²⁵⁸ Each of these states was also, in their constitutional redrafting, required to include a guarantee to free, public education for all children,²⁵⁹ pursuant to Congress’s mandate to “guarantee to every State in this Union a Republican Form of Government.”²⁶⁰ The Fourteenth Amendment guarantees national citizenship—conferring it upon former slaves who had been born in the United States, but had been unjustly considered chattel—as well as equal protection of the laws.²⁶¹ In a recent article, Professor Derek W. Black addressed an important question: Why would Congress not pass an amendment of any sort guaranteeing a federal right to education if it meant to institute such a right?²⁶² This Article agrees with Professor Black in arguing that at the time of enactment of the Fourteenth and Fifteenth Amendments, no other steps to establish a federal right to education were seen as necessary.²⁶³ While extending suffrage to black men after the Civil War was controversial, establishing education as a right of

²⁵⁵ *Status of Ratification*, *supra* note 254. The United States signed the CRC on February 16, 1995, but has yet to ratify it, and thus, is not bound by the CRC. *Id.*

²⁵⁶ See *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1872) (holding that the Fourteenth Amendment protects the privileges and immunities of citizenship of the United States, not the privileges and immunities of citizens of the states); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 *YALE L.J.* 330, 335 (2006).

²⁵⁷ *Constitutional Compromise*, *supra* note 34, at 766.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 766 & n.161 (quoting U.S. CONST. art. IV, § 4).

²⁶¹ U.S. CONST. amend. XIV, § 1; see also Liu, *supra* note 256, at 335.

²⁶² Black, *supra* note 32, at 774.

²⁶³ *Id.*

citizenship raised no general objections.²⁶⁴

Citizenship, however, is not meant to be a mere formality or title, but rather a status indicating equality in social rank as compared to others in society.²⁶⁵ As explained by California Supreme Court Justice Goodwin Liu, “[t]o be a citizen is to have not only a set of legal rights and duties, but also a level of human functionings and capabilities essential to being regarded by oneself and by others as a full member of one’s society.”²⁶⁶ Citizenship also includes a certain economic independence such that one can exercise freedoms as well as have the respect of fellow citizens.²⁶⁷ Justice Harlan, in his dissent to the *Civil Rights Cases*, acknowledged in 1883 that citizenship “necessarily imports equality of civil rights among citizens of every race in the same State. It is fundamental in American citizenship that . . . there shall be no discrimination by the State.”²⁶⁸ Justice Harlan also stated that interpreting the Fourteenth Amendment to transfer control of aspects of American citizenship to the states would be absurd; to do so would make it impossible for the federal government to protect the rights of its citizens against the varying states, which had already proven that the rights of a large segment of their respective populations were of no consequence to them.²⁶⁹

As any student of constitutional law understands, the language of the Constitution and its Amendments is not always precise or clear. The Framers of the Constitution kept much of the language imprecise for a good reason²⁷⁰: “to permit reasonable future

²⁶⁴ *Id.* (citing WILLIAM GILLETTE, *THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT* 25 (1965)).

²⁶⁵ *Id.* at 765 (citing Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 4–6 (1977)) (“The essence of equal citizenship is the dignity of full membership in the society. . . . [T]he principle not only demands a measure of equality of legal status, but also promotes a greater equality of that other kind of status which is a social fact—namely, one’s rank on a scale defined by degrees of deference or regard.”).

²⁶⁶ Liu, *supra* note 256, at 342 (internal quotations omitted).

²⁶⁷ *Id.* at 343 (citing ALICE KESSLER-HARRIS, *IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA* 12 (2001); Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL’Y 37, 42 (1990)).

²⁶⁸ *Civil Rights Cases*, 109 U.S. 3, 48 (1883) (Harlan, J., dissenting).

²⁶⁹ *Id.* at 55.

²⁷⁰ See Alexander M. Bickel, *The Original Understanding and the*

advances' through legislation and judicial interpretation."²⁷¹ This lack of clarity, however, underscores the need for an informed and educated citizenry and populace; citizenship not only confers rights, but assigns duties, such as voting and jury service, for which a basic level of education is necessary.²⁷² Therefore, the right to education, while not explicitly stated in the Constitution itself, is characteristic of citizenship and can be inferred.²⁷³

As Justice Liu explains, the "general assumption of lawyers and lay people alike is that the meaning of the Constitution is fixed by the courts. . . . Because the Supreme Court has refused to squarely recognize [a] fundamental right[] to education . . . , we are taught to believe that no substantive obligations exist in these areas."²⁷⁴ The Supreme Court does not always make its decisions correctly, and has even rendered decisions that are arguably unjust, especially relating to individual liberties, freedoms, and rights.²⁷⁵ Rather than assuming that the Supreme Court is infallible in its judgment and interpretation of the Constitution, it is important to recognize that the

Segregation Decision, 69 HARV. L. REV. 1, 59 (1955) (arguing that the tradition of constitutional amendments was to have "broadly worded organic law not frequently or lightly amended" that would be understood by the immediate effect and "long-range effect, under future circumstances").

²⁷¹ Liu, *supra* note 256, at 369 (citing Bickel, *supra* note 270, at 63; JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 28 (1980)).

²⁷² See Liu, *supra* note 256, at 341–48; *Constitutional Compromise*, *supra* note 34, at 772.

²⁷³ See Liu, *supra* note 256, at 367–70; *Constitutional Compromise*, *supra* note 34, at 781–83.

²⁷⁴ Liu, *supra* note 256, at 337–38.

²⁷⁵ See, e.g., *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940), *overruled by* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944) (holding that an executive order leading to the internment of Japanese Americans was constitutional, which has recently been recognized by the Supreme Court as "gravely wrong" in *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018)); *Buck v. Bell*, 274 U.S. 200 (1927) (upholding a statute providing for the sterilization of inmates in institutions supported by the State that were afflicted with a hereditary form of insanity or imbecility, which has never been explicitly overruled); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding the constitutionality of racial segregation under the "separate but equal" doctrine), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (holding that descendants of enslaved persons could not be, nor were ever intended to be, citizens under the Constitution), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

fullness of the meaning of the Constitution may be broader and more expansive than the meaning determined by the courts.²⁷⁶

Using this framework, one can view the federal right to education as being drastically underenforced.²⁷⁷ The federal right to education's enforcement has never been more important, not only to stand up equally against the Second Amendment to end gun violence in American schools, but also to guarantee a minimal standard of education for all children throughout the United States.

B. *The Enforcement of the Underenforced Right to Education*

The time is now to start enforcing the long-dormant and forgotten federal right to education. But what mechanisms of enforcement might there be? Litigation pending in the federal District Court for the Southern District of Mississippi is seeking a declaratory judgment that Mississippi's current public school system and the Mississippi Constitutions of 1890, 1934, and 1960 have been violating the terms of Mississippi's readmission to the Union by not providing adequate educational opportunities to African Americans since 1890.²⁷⁸ If the plaintiffs in the case are successful, it may go a long way toward reviving the federal right to education or, at the very least, illustrating potential paths to take and quagmires to avoid for other litigants who may attempt to do so. This Article, however, does not attempt to advise litigants how to craft their causes of action attempting to assert a right to education; it merely provides the beginnings of the analytic framework for considering the federal right

²⁷⁶ See Ian P. Farrell, *Enlightened Originalism*, 54 HOUS. L. REV. 569, 577–83 (2017). Professor Farrell's theory of constitutional interpretation is unique in that he argues that the Constitution's meaning has not changed over time. *Id.* Rather, he argues that those attempting to understand and interpret it come to grasp its underlying morality and fullness of meaning with time. *Id.* “[T]he meaning of the concept of equality, for example, has not changed. Rather, we have become more enlightened as to the full ramifications—the true meaning—of equality.” *Id.* at 569.

²⁷⁷ See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1250–52 (1978) (arguing that “[t]he enforcement of federal constitutional norms at a margin regarded by the federal courts as institutionally inappropriate,” such as the right to education “should be welcomed as an exercise which can richly inform future federal judicial enforcement decisions”).

²⁷⁸ See Complaint at 1–7, *Williams v. Bryant*, No. 3:17-cv-404 WHB-LRA (S.D. Miss. May 23, 2017).

to education.

The Fourteenth Amendment may also contain a political solution. Members of Congress who believe that limitations placed on the Second Amendment would guarantee a safe and conducive learning environment in American public schools should consider availing themselves of Section 5 of the Fourteenth Amendment. Section 5 of the Amendment provides that “[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”²⁷⁹ Section 5, therefore, would allow Congress to advance legislation that would support and enforce a federal right to education as guaranteed by the Citizenship Clause of Section 1.²⁸⁰ Furthermore, citizens should support candidates who run with the purpose of enforcing a federal right to education or who have a goal of getting an amendment explicitly stating that such a right exists ratified. While both the litigation path and the political process may take a long time to effect meaningful change and require multiple efforts to reach any sort of success, correcting the underenforcement of the right to education is a worthwhile goal that would benefit schoolchildren nationwide. It is time for the Supreme Court to recognize this right for the sake and protection of American schoolchildren, and if the Supreme Court refuses to do so, the American public should demand a constitutional amendment that would make the status of the right to education undoubtedly clear.

CONCLUSION

The expanded search, seizure, and surveillance in public schools in the wake of high-profile mass shootings such as that in Parkland in February 2018, is, in some ways, understandable; parents and school administrators feel compelled to do all they can to keep students safe. Students, however, do not abandon their fundamental rights at the schoolhouse gate,²⁸¹ including those assured under the Fourth Amendment. Schools should be places in which students are able to enjoy a safe environment that is also, most importantly, conducive to learning, as explained in *T.L.O.*²⁸²

With the furor that arises after every mass school shooting,

²⁷⁹ U.S. CONST. amend. XIV, § 5.

²⁸⁰ *Id.* amend. XIV, § 1.

²⁸¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

²⁸² *N.J. v. T.L.O.*, 469 U.S. 325, 332 n.2, 338–40 (1985).

American schools and their officials have often lost focus on what it means to foster an environment conducive to education, instead focusing on security measures—such as ID badges, closed campuses, metal detectors, and clear backpacks. Empirical studies have shown that increased security measures harm students by undermining the trust that students should have in their administrators and teachers, hindering their academic performance, and causing them stress that may be hazardous to their physical health.

If tightened security should not be used to keep students safe from gun violence, what measures should be taken? Rather than relying on deleterious security measures, what schools, parents, and Americans generally should demand is the revival of the federal right to education, which has long gone underenforced. As demonstrated in the Article above, the federal right to education was incorporated to the states by the Fourteenth Amendment, along with every other right appurtenant to American citizenship. Such arguments may be brought before the Court pursuant to litigation focused on education, or through a political process, hopefully gaining credibility with each iteration. The revival of the federal right to education would place education on the same plane as the individual right to bear arms, making it more likely that efforts to institute reforms such as those suggested by a number of education-law scholars would be successful.