

# A Post-COVID Inflection Point and Call to Action: Theorizing a Legal Right to Youth Sport, Play, and Physical Activity in the United States

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Literature links sport, play, and similar leisure endeavors to numerous physical, psychological, and social benefits critical to a young person's development. Unlike other nations, the United States lacks a national policy to fund structures supporting youth sport, play, and the like. Instead, a for-profit youth sport industry oversees this sector using a pay-to-play model, creating significant financial and access barriers. The COVID-19 pandemic created an inflection point and call for action to meaningfully reform youth sport. Advocates often claim, without providing legal justification, that access to sport and play is a constitutional right. Therefore, the purpose of this commentary is to move beyond aspiration or hypothetical rhetoric and investigate whether a persuasive legal argument exists that places a constitutional legal responsibility upon the United States federal government to create structures, allocate funding, and provide universal access to free sport, recreation, and play opportunities for youth. While review and analysis of relevant case law found that no constitutional right likely existed under United States law, this process confirmed that such claims will have little chance of success under current precedent. Therefore, given the improbability of substantive voluntary reforms in the private sector, a deeper exploration of innovative legal theories is required to achieve the necessary structural change.

Keywords: youth sport, policy, COVID-19, constitutional law

## Introduction and Literature Review

Sport's popularity throughout the United States exists, in part, because it brings people together and serves as a universal language (Levermore, 2008). Whether it is a small community in rural Kansas, or a neighborhood on the South Side of

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Chicago, chances are a group of individuals are taking part in either an organized game or engaging in free play. However, sport, play, and physical activity are not just ways to bring individuals together; a significant body of literature links these leisure activities to a variety of physical, mental, psychological, and cognitive social benefits (Andermo et al., 2020; Biddle & Asare, 2011; Murthy, 2023; Sahlberg & Doyle, 2019; Savina et al., 2016; White et al., 2019; Yogman & Hirsch-Pasek, 2018). All of these benefits are critical for a young person's development.

Partaking in activities such as organized sport aid an adolescent's emotional intelligence and social growth (Amado-Alonso et al., 2019), and are linked to increasing their likelihood of success as an adult (Project Play, n.d.a). Physical activity has also been found to be as effective as antidepressant medication and psychotherapy in treating depression and anxiety (Bostan, 2023; Heissel et al., 2023). However, enjoying these benefits, which are critical to youth development and adulthood, is predicated on young people having access as well as opportunities to participate in sport, play, and recreation (Murthy, 2023; U.S. Department of Health and Human Services, 2019). Unfortunately, especially in America, not all do.

Internationally, the value of sport and play is widely acknowledged and promoted through robust youth sport policies (Bergsgard et al., 2019). In Europe, for instance, the European Union has adopted a comprehensive framework to advance the inherent benefits of sport (Council of the European Union, 2017). Globally, the United Nations Convention on the Rights of the Child (1989) affirms children's inherent right to age-appropriate play and recreational activities. This principle is echoed in several U.N. policy documents (Veal, 2022), including the Universal Declaration of Human Rights (1948) and the International Charter of Physical Education and Sport by UNESCO (2015), which emphasizes the fundamental right to physical education, physical activity, and sport for all, without discrimination.

Several European countries effectively transformed policy into actionable measures, ensuring access through legal rights and funding structures. For example, nations such as Norway, Sweden, and Finland have codified legal rights and instituted policies to provide equitable access to sport, play, and recreation for all citizens under 18, at little to no cost (Green et al., 2019; Levine, 2020). The United Kingdom has begun its own process, launching a comprehensive national strategy for sport, health, and well-being, alongside related funding initiatives (National Plan for Sport and Recreation Committee, 2021). These policy and funding strategies have led to broad sport participation and the fostering of healthy, active populations, as evidenced in Finland, Norway, and Sweden (Helliwell et al., 2023). The success of these models abroad suggests a pathway that other nations, including the US, may consider when exploring and eventually adopting their own youth sport policies.



## Youth Sports in the United States

In contrast to many nations throughout Europe, when it comes to youth sport policy, the United States has taken a starkly different approach. A child's right to sport, play, and similar activities are not guaranteed in the US. The nation lacks a ministry of sport or similar federal entity. Furthermore, no formal nationwide policy exists to fund structures to support youth sport, play, and similar activities. The financial burden to facilitate such opportunities therefore falls on the private marketplace and families. As a result, the cost creates significant barriers to access and opportunity for some low-income families (Sulz et al., 2023; Tandon et al., 2021; U.S. Department of Health and Human Services, 2019; Whitaker et al, 2019).

Since no federal policy subsidizes sport opportunities (U.S. Department of Health and Human Services, 2019), “play deserts” have emerged throughout many communities (Ridpath, 2016). Play deserts exist in communities where there is a “lack of accessibility, quality, and/or opportunity” (Wilkie et al., n.d., para. 2). Furthermore, the private marketplace has created a \$19.2 billion for-profit and at times unethical sports industry (Bannon, 2020; Hensley-Clancy, 2022; Stubbs, 2022b), effectively locking out those families that cannot afford this pay-to-play model and depriving many youth from many of the inherent benefits of sport (Holt et al., 2011; Project Play, 2022; Richtel, 2023). This trend will likely continue, as the youth sports industry is forecast to swell to a \$77.6 billion industry by 2026 (Bjork & Hoynes, 2021), creating an additional economic strain on some families seeking to participate. This financial barrier has translated to youth from low-income families quitting sports at a rate six times greater than kids from affluent households (Solomon, 2020a), and an overall downward participation trend for youth from low-income households (Richtel, 2023).

The established approach of a privatized marketplace for youth sport without a low-cost or free alternative has fostered a caste system of haves and have-nots for American youth (Holt et al., 2011; Project Play, 2019; Richtel, 2023; Stubbs, 2022b; Whitaker et al., 2019). These challenges are intensified in communities of color and other marginalized groups such as youth with a disability, girls, and youth who identify as a member of the LGBTQIA+ community (Murrell, 2021; Project Play, n.d.b.; U.S. Department of Health and Human Services, 2019). In 2019, youth were quitting sport at alarming numbers, with barriers accessing sport, play, and recreation opportunities playing a role in this exodus (Project Play, 2019). At the same time, young people also reported experiencing near-record levels of depression (Murthy, 2023; Twenge et al. 2019), obesity, and sedentary lifestyles (Project Play, 2019). Youth sport advocates appealed for industry leaders to address these systemic challenges and inequities. Calls for meaningful reforms to enhance access and opportunity began in 2020. Instead, 2020 brought further disparities between the haves and have-nots due to the COVID-19 pandemic.



## Youth Sports and COVID-19

The COVID-19 pandemic fundamentally changed society in 2020. Lockdowns and social distancing essentially rendered traditional forms of sport, play, and recreation in many instances impracticable or impermissible. As the world wrestled with how to respond to COVID-19, youth sport also struggled to cope. Data gathered during the pandemic illustrated that youth athlete anxiety rose significantly (McGuine et al., 2020), youth sport participation fell 50%, and, by September 2021, 28% of parents surveyed reported that their child was no longer interested in sports (Drape, 2021; Solomon, 2020b). Data unearthed a troubling trend: Youth from working class families bore a larger brunt of this trauma when compared to more affluent households (Project Play, n.d.b.; Solomon, 2020a). However, regardless of their household segment, COVID-19 intensified young people's collective struggles with mental health (Murthy, 2023). According to a report issued by the Centers for Disease Control and Prevention, in 2021 "more than a third (37%) of high school students reported they experienced poor mental health during the COVID-19 pandemic, and 44% reported they persistently felt sad or hopeless during the past year" (CDC Newsroom, 2022, para. 2). Individuals from the LGBTQIA+ community reported higher levels of poor mental health from the population surveyed. One sobering finding concluded that "47% of lesbian, gay and bisexual teens said they had 'seriously considered committing suicide'" (Rascoe & Narro, 2022, para. 5). The data support a continuing cry for help, as the daily reality for numerous young people throughout the US erodes their collective well-being (CDC Newsroom, 2022).

Some believed that a silver lining of COVID-19 was an opportunity to improve some aspects of society and rebuild youth sports (Farrey et al., 2021; Uwan, 2020). This imaginative exercise could have built support among policymakers and community leaders to provide all youth with access to sport, play, and similar activities. It offered a proving ground for the market of ideas to unearth the best potential recommendations (Flanagan, 2020; Office of Disease Prevention and Health Promotion, 2022; Subramanyam & Kinderknecht, 2021). Regrettably, this did not occur, and much of the nation seems on track to reverting to their pre-pandemic habits (Project Play, 2022; Uwan, 2020).

As the United States moves toward a post-COVID society, the effects of the coronavirus pandemic have not demonstrated to policymakers the importance of sport, play, physical activity, and similar endeavors, or changed the environment so that fewer barriers to access exist. Instead, the inverse has proved true: COVID-19 has exacerbated the equity gap between families that can and cannot afford to participate in youth sports (O'Neal, 2020; Project Play, 2022; Streeter, 2020; Stubbs, 2022c). Data suggests children from more affluent families significantly benefited from increased access to sports during the COVID-19 pandemic when compared to lower income families (Richtel, 2023; Solomon, 2021). While high income families



enjoyed access to youth sports, one survey indicated that low-income youth sport decreased by 84% during the pandemic (Simonton, 2021). Evidence also illustrated that, when compared with other groups, Black and Brown youth were less likely to return to sports post-pandemic than other groups (Turner, 2021). This disparity seems to further call into question the systemic societal issues within American society that predate the COVID-19 pandemic (Turner, 2021).

As the US reawakened post-coronavirus, burdened by inequitable youth sport market forces, persistent inflation, and a lingering global pandemic, the youth sport industry needed a reset (Bjork, 2022; Pells, 2022). However, none ever occurred. Recent survey data estimates that American families collectively spend between \$30 and \$40 billion on youth sports (Project Play, 2022; Stubbs, 2022c). Marginalized youth once again struggle to gain access to sport, play, and recreation opportunities. The pay-to-play youth sports industry is now more problematic than ever. Private equity investors seek to further monetize this segment, squeezing numerous families out of participation opportunities due to these barriers (Blair, 2022; Wallstreet, 2022).

The pursuit for improved access is uncertain. Although many pandemic-era restrictions have receded, much of the youth sports industry was greatly impacted financially (Bachman, 2020; Seligman & Cohen, 2020). Youth sport participation post COVID-19 may be fraught with challenges due to the current reality. Some public financial support programs ended and numerous businesses in the youth sports industry ceased operations (Project Play, 2022; Tracy, 2020; Turner, 2021). Calls by the youth sport industry for a large-scale federal financial bailout never materialized (Cohen, 2020; Silverman, 2020). Instead, participation costs continue to climb sharply, furthering the divide between high-income and low-income families (Burton & O'Reilly, 2022) and leaving in place a barrier to accessing numerous physical, mental, and social benefits. This led some to declare that youth sport has reached “a moment of historic crisis” (Streeter, 2020, para. 14), that the “cost of youth sports is out of control” (Stanmyre, 2022), with the potential to impact future generations’ access to sport, play, and similar opportunities.

## Youth Sport’s Inflection Moment and a Call to Action

Taking a step back, this moment may serve as an opportunity to innovate and reconceptualize the fundamental social and policy structures that underpin the United States’ sports system. Given the disparities in America’s youth sport marketplace, which have been intensified by the COVID-19 pandemic, the time seems ripe to explore novel legal theories to address these significant challenges. The US unveiled its fledgling National Youth Sports Strategy several years ago (U.S. Department of Health and Human Services, 2019), taking a step in the right direction. However, while research shows the federal government distributed \$8.1 million in grants to 18 organizations (Vaux-Bjerke et al., 2022), the strategy largely failed to incorporate the



financial resources and structures necessary to overcome the barriers U.S. families face. Now, with the youth sports industrial sports complex having rebounded to pre-pandemic levels and a new youth sports arms race on the horizon (Stubbs, 2022a), families are once again under significant financial duress when faced with the decision of whether their children will participate in youth sports (Blair, 2022; Richtel, 2023; Tracy & Baker, 2022).

Youth sports in the United States finds itself at an inflection point. Physical inactivity among youth is on the rise (Dunton et al., 2020; Physical Activity Alliance, 2022), children are losing interest in playing sports at high levels (Newberry, 2021; Project Play, 2022), and youth sport participation opportunities are vanishing (Stubbs, 2022c). These trends lessen the likelihood that youth in urgent need of the positive outcomes associated with sport, play, and physical activity—including those that may combat the youth mental health crisis plaguing the US, as adolescents are losing their collective sense of belonging in an increasingly isolated and lonely world (AAP, 2021; Heissel et al., 2023; Hoffmann et al., 2022; Murthy, 2020, Murthy, 2021, 2023)—will receive these benefits. The logical question is what can be done to change these trends.

Some are calling for stakeholders from the public and private sectors to make a significant investment into the United States youth physical activity system (Milton et al., 2021). Such action may include state actors not only allocating fiscal resources (Turner, 2021) and providing more rigorous oversight over the youth sport industry (Stubbs, 2022b), but also considering fundamental structural changes to America's youth sports. There is precedent for government to help facilitate positive externalities through funding and structure (Lee et al., 2013). Sport may be such a case (Dallmeyer et al., 2017; Downward & Rasciute, 2011). However, any significant reform would of course require marshaling a variety of financial and non-economic resources. The Aspen Institute's Project Play Program, a domestic youth sports policy organization, has advocated that United States lawmakers codify legislation recognizing sport, play, and recreation for youth as a "basic human right" (Project Play, n.d.c.; Solomon, 2020c, para. 20). Perhaps, to underscore the importance of this assertion and potentially mobilize government resources, Project Play also created a Children's Bill of Rights in Sports—a non-binding list of rights to be used as an exemplar for policymakers (Project Play, n.d.d.). While this document was purely an aspirational, normative document without any legal impact, it begins with the declaration that "[e]very child has the right to play sports" (Project Play, n.d.d., para. 1). However, it will take more than such a pronouncement to galvanize the federal government to provide this opportunity. For meaningful change to occur, there needs to be action—either voluntarily or compulsory.

Before citizens can demand specific results, one must ascertain whether every child indeed has the legal right to play sports in a fair and equitable manner throughout



the nation regardless of location or local resources. Given the improbability of this right being voluntarily granted by government, the pertinent question becomes: What would legally *compel* the United States federal government to provide young people with free access to sport, play, recreation, and similar opportunities? Looking to a federal approach would ensure equitable access regardless of socioeconomic status as well as geographic location. Facilitating wide-scale change that includes the necessary financial investment will likely require such a legal argument to be grounded in one's fundamental rights as a United States citizen.

## Purpose

The current reality suggests that, despite the increasing commercialization of youth sports and the considerable impacts of the COVID-19 pandemic, policymakers are unlikely to enact significant structural change in this space. Since change is not going to come voluntarily and calls for reform have largely left law-based approaches unexplored, it becomes necessary to investigate whether a legal or policy argument exists under United States law for guaranteeing youth the right to the benefits of sport, play, and physical activity. Inspired by the current inflection moment and recognizing that such a right may not be supported under current precedent, this inquiry seeks to explore whether any potential legal rights exist to play, physical activity, and sport in the US. In other words, what legal theories might potentially spur the U.S. federal government into action to expand access and opportunities for youth sport, physical activity, play, and similar endeavors? Establishing such responsibility at the federal level is essential to ensure equitable access and opportunities to sport, play, and physical activity for all youth across the nation. Alternatively, in the event no legal ground exists, this commentary suggests that federal legislation ought to be enacted in light of sport, play, and physical activity's established benefits, perhaps utilizing other countries' governing systems and structures as benchmarks. Thus, this inquiry moves the process beyond the hypothetical or aspirational, and into the realm of theorizing potential *actionable* legal rights.

This article is guided by the following central question: Can a persuasive legal argument be theorized and presented that places a constitutional legal responsibility upon the U.S. federal government to create structures, allocate funding, and provide universal access to free sport, physical activity, and play opportunities for youth? The next section will be broken down into the following segments: (1) exploring the likelihood of success of theorizing sport, play, and physical activity as a human right or constitutional right, and (2) exploring the likelihood of success of theorizing sport, play, and physical activity as a fundamental right. The article will close with a discussion, potential implications, future research directions regarding this topic, and a brief conclusion.



## Theorizing a Legal Right

This exploration of theorizing a new legal right is guided by language invoked by many of the aforementioned legal, policy, or aspirational documents describing the importance of sport, play, and recreation or physical activity as justification for endowing youth with the right to pursue these activities with the assistance of the state. Language such as “human right,” invoking the United States Constitution, and “fundamental right” were used by Project Play and the United Nations. While it is easy to make these declarations, the challenge will be to determine whether these terms can be theorized, operationalized, and be applied successfully under the laws of the United States.

## Theorizing a Human Right or Constitutional Right

Many legal analyses begin at broadly defining the term. A human right, according to Black’s Law Dictionary, is defined as the “freedoms, immunities, and benefits that, according to modern values ... all humans should be able to claim as a matter of right in the society in which they live” (Human Rights, 2019, para. 1). This entry references the UN’s Universal Declaration of Human Rights, noting that a human right is often understood in the context of international law. Human rights are rights or entitlements derived upon the sole basis of being a human being (Donnelly, 2003). Thus, human rights are collectively described as “legal guarantees intending to protect individuals from any form of state interference or negligence resulting in abuse or neglect” (David, 2005, p. 19). The notion of a human right suggests that a relationship exists between the state and citizens, where they are owed specific privileges as rights holders (David, 2005, p. 19). What constitutes a human right may evolve over time, but the bedrock of a human right is grounded in civil and political rights emphasizing individual freedom.

Human rights are a foundational concept linked to the founding of the United States as a country. These have been classified as inalienable rights that are inherent and universal in nature, found in seminal legal documents like the Declaration of Independence and the Bill of Rights (Levine, 2020). Human rights, under U.S. law, were described by the Supreme Court as restraining states from restricting citizens’ liberty and to prescribe for the good of the public (*Slaughter-House Cases*, 1872). In other words, early interpretation of a human right under U.S. law appears to focus on protecting citizens from government. A more modern interpretation occurred in *Lawrence v. Texas* (2003), when the Supreme Court found state laws prohibiting homosexuality were unconstitutional. The court characterized the right for consenting adults to engage in sexual activity in the privacy of their home as an integral part of human freedom: protection from government intrusion.

Given that human rights are intertwined in the Constitution, it is prudent to also explore what constitutes a constitutional right. Constitutional rights are negative





liberties. The fundamental focus is to prevent government from interfering with citizens' lives and to leave people alone (*Hilton v. City of Wheeling*, 2000). Thus, Constitutional rights protect Americans from government oppression (e.g., "Congress shall make no law ... abridging the freedom of speech" [U.S. Constitution amend. I, 1791]), as opposed to imposing an affirmative right to demand and secure services from the state (*Hinman v. Lincoln Towing Service*, 1985; *Jackson v. City of Joliet*, 1983). Protecting basic negative rights, therefore, may be interpreted as protecting one's basic rights under the Constitution: personal liberty, personal security, and the right to pursue, acquire, and enjoy property (*Calder v. Bull*, 1798).

The legal question of whether a right to participate in sports exists under the Constitution has been extensively litigated (*State ex rel. West Virginia Secondary School Activities Commission v. Hummel*, 2015). There is no constitutionally protected right to participate in sports (*Seamons v. Snow*, 1996). It is not considered a due process, property or liberty interest (*Angstadt v. Midd-West School District*, 2004; *Indiana High School Athletic Association, Inc. v. Carlberg by Carlberg*, 1997). The Fourteenth Amendment solely requires state actors to provide adequate due process where liberty and property interests are allegedly impinged (Heckman, 2005).

One illustrative case is *Angstadt v. Midd-West School District* (2004). This lawsuit stemmed from a dispute over a high school student's asserted right to play an interscholastic sport. The student had been home schooled from third to eighth grade and obtained an exemption from the school district allowing her to play interscholastic basketball as a seventh and eighth grader. However once she enrolled in an online charter school as a ninth grade student, which did not have a girls basketball team, the school district rescinded this exemption. The parents sued, alleging the school district violated their child's rights under the First and Fourteenth Amendments as well as the Pennsylvania Public School Code by denying their daughter the opportunity to participate on the high school basketball team. However, in ruling for the school district, the Third Circuit Court of Appeals acknowledged that no right to play sports existed under the Constitution, thus negating their First and Fourteenth Amendment claims.

*Angstadt v. Midd-West School District* (2004) represents the predominant approach under United States law, as even the plaintiffs in that case had to admit that the Constitution did not endow citizens with a property interest to participate in sports. Instead of a right, courts have routinely labeled the opportunity to participate in sports a privilege or a mere expectation (*Bean v. Wilson County School System*, 2015; *Mississippi High School Activities Association, Inc. v. Coleman*, 1994; *Scott v. Oklahoma Secondary School Activities Association*, 2013; *Walsh v. Louisiana High School Athletic Association*, 1980). Any government regulation, such as what occurred during the early stages of the COVID-19 pandemic, is evaluated under rational basis scrutiny (*Let Them Play MN v. Walz*, 2021; *Sw. Ohio Basketball, Inc. v. Himes*, 2021). This is an exceedingly low threshold for the government to meet.



The aforementioned sections operationalize human rights and constitutional rights under U.S. law. As traditionally defined, these rights serve to protect individuals from government interference or neglect, rather than to obligate the government to provide specific services or benefits. Hence, they fall short as the basis for asserting an affirmative constitutional right to sport, play, and physical activity opportunities. Simply put, while the concepts of “human right” and “constitutional right” are pivotal in the broader rights discourse, they do not offer a persuasive legal argument for imposing a duty upon the U.S. federal government to universally enable access to free sport, recreation, and play opportunities for youth.

## Theorizing a Fundamental Right

While examining the categorization of access to sport, play, and physical activity as a constitutional right may not be a viable means to establish a federal mandate, advocating for its status as a fundamental right might present a more plausible approach. A fundamental right, while not viewed as the supreme law of the land like a constitutional right, is a right expressed or implied in the Constitution’s concept of liberty that cannot be deprived by the state (*Skinner v. City of Miami, Florida*, 1995). Identifying and protecting fundamental rights is a critical component of the judicial system (*Obergefell v. Hodges*, 2015). The task of determining these rights does not follow a rigid formula but rather is a continuous interpretive responsibility of jurists, evolving alongside societal changes in a manner that must be respected by the government (*Obergefell v. Hodges*, 2015; *Poe v. Ullman*, 1961). Courts must exercise care and caution when considering new fundamental rights subject to substantive due process, so it reflects the policy preferences of the people as opposed to judges. Hence, the spectrum of fundamental rights may expand over time to include newly recognized entitlements based on an evolving society (*Washington v. Glucksberg*, 1997).

Recognition of a new fundamental right that warrants protection under the Constitution is a two-part process. A court must first delve into the past and determine whether the claimed right “is deeply rooted in the nation’s history and tradition;” if this criterion is met, the court will move to the second element and evaluate whether the right is “implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed” (*Kitchen v. Herbert*, 2013, p. 1202). According to the Supreme Court, while not specifically enumerated in the Constitution, rights associated with the Bill of Rights, the right to life, liberty and property, a free press, free speech, freedom of worship and assembly, personal autonomy, and the right to marry are fundamental rights (*Obergefell v. Hodges*, 2015; *West Virginia State Board of Education v. Barnette*, 1943). Such rights are recognized in light of “evolving standards of decency that mark the progress of a maturing society” (*Trop v. Dulles*, 1958, p. 101). To put it succinctly, a fundamental right is indispensable for



the existence of “a fair and enlightened system of justice” (*West Virginia State Board of Education v. Barnette*, 1943, p. 652).

While a process to create a new fundamental right exists, meeting the threshold dictated by the two-prong test is difficult. However, it is possible. In *Gary B. v. Whitmer* (2020a), a complaint filed against the Detroit Public School System claimed the poor classroom conditions negatively impacted student scholastic performance. The difficult conditions allegedly included “missing or unqualified teachers, physically dangerous facilities, and inadequate books and materials.” (*Gary B. v. Whitmer*, 2020a, p. 620). Taken together, the plaintiffs asserted these conditions “deprive[d] them of a basic minimum education, meaning one that provides a chance at foundational literacy” (*Gary B. v. Whitmer*, 2020a, pp. 620-621). The underlying claim related to the equal protection and due process clauses of the Fourteenth Amendment. Therefore, the issue became whether a fundamental right existed to a minimum basic education protected under the Constitution, one that will provide access to literacy.

While the district court dismissed the plaintiffs’ lawsuit for failure to state a claim, the Sixth Circuit Court of Appeals reversed. The three-judge panel, two to one, found that such a right exists: “without the literacy provided by a basic minimum education, it is impossible to participate in our democracy” (*Gary B. v. Whitmer*, 2020a, p. 642). The appellate panel came to this conclusion using the two-prong test. First, looking at the historical prevalence and significance of education, the court pointed to the inclusion of compulsory education for youth as evidence that education was a deeply rooted concept in America’s history and tradition, even under an originalist interpretation. Furthermore, history has shown that education as a right has continued to expand through the Fourteenth Amendment. This led to universal compulsory education by 1918 and has continued developing ever since.

For prong two, the court declared literacy the core of being able to participate in society in any meaningful way. Literacy is required to perform one’s most basic public responsibilities as a United States citizen and is necessary to enjoy all the other rights such as participating in the political process. Therefore, “the right to a basic minimum education—one that can plausibly impart literacy—is ‘implicit in the concept of ordered liberty,’” thus meeting the second prong (*Gary B. v. Whitmer*, 2020a p. 655). The court summed up its reasoning that access to literacy is a fundamental right with the following passage:

Its ubiquitous presence and evolution through our history has led the American people universally to expect it. And education—at least in the minimum form discussed here—is essential to nearly every interaction between a citizen and her government. Education has long been viewed as a great equalizer, giving all children a chance to meet or outperform society’s expectations, even when faced with substantial disparities in wealth and with past and ongoing racial inequality. (*Gary B. v. Whitmer*, 2020a, p.662)



The State of Michigan reached a settlement with the plaintiffs a few weeks after the Sixth Circuit Court of Appeals' opinion and judgment. A press release issued by the governor stated she accepted "the [c]ourt's decision that a minimum basic education is a foundational requirement for full participation in our democracy" (Whitmer, 2020, para 2). The press release detailed a series of structural steps the State of Michigan was taking to fulfil this obligation and convert constitutional principles recognized by the Sixth Circuit into "real and measurable improvements in the quality of education available to the children of Detroit" (Whitmer, 2020, para. 14).

Following settlement, the Sixth Circuit court initiated an en banc review on its own accord, leading to the vacatur of the initial opinion and judgement in *Gary B. v. Whitmer* (2020b). This unusual step could be interpreted as a response to the panel's judgement in *Gary B. v. Whitmer* (2020a), which seemed to challenge legal precedents established by the Supreme Court or the Sixth Circuit itself (Dolak, 2021). One such precedent is the Supreme Court's ruling in *San Antonio Independent School District v. Rodriguez* (1973), which determined the Equal Protection Clause of the Fourteenth Amendment did not ensure a fundamental right to education. However, the legal foundation underpinning *Gary B. v. Whitmer* (2020a) is distinguishable from *Rodriguez* (1973), as the ruling is grounded in the concept of substantive due process—a doctrine invoked in cases such as *Griswold v. Connecticut* (1965) and *Obergefell v. Hodges* (2015).

*Rodriguez* (1973) concluded that education was not a fundamental right because socio-economically disadvantaged students do not constitute a "suspect class" and hence have no equal protection claim. In contrast, *Gary B.* presented an argument for the existence of a fundamental right to education. This argument did not rely on the idea that low-income students constitute a suspect class, but rather asserting that each student has an inherent right to receive a state-sponsored education. This asserted right is characterized as being deeply woven in the fabric of our national history and tradition, seen as intrinsic to the principle of ordered liberty. The differentiation by the panel aligns with this commentary's central argument.

Despite the Sixth Circuit's administrative act, the *Gary B. v. Whitmer* (2020a) decision's instructive value remains undiminished. The court did not issue any subsequent judgement on the merits (*Gary B. v. Whitmer* (2020b)). Consequently, although the original judgment was vacated, the Sixth Circuit's initial reasoning was never struck down (*Washington v. Glucksberg*, 1997). Crucially, *Gary B. v. Whitmer* (2020a) continues to inform other lawsuits. An example is *A. C. v. Raimondo* (2020), where the court concurred with the majority panel's recognition of a substantive due process right to basic education from both historical and policy perspectives, thereby endorsing the relevance of the *Gary B. v. Whitmer* (2020a) analysis. In a contrast to the Equal Protection Clause, substantive due process allows an individual party to assert fundamental rights, irrespective of the state's treatment of similarly situated



parties or its provision of a particular benefit or service to any other party. Thus, while *Gary B. v. Whitmer* (2020a) does not constitute binding precedent within the jurisdiction of the Sixth Circuit due to its vacatur, it potentially provides a novel framework for future cases looking to probe this legal argument in diverse contexts or jurisdictions (Blanchette, 2023).

*Gary B. v. Whitmer* (2020a) offers an opportunity to examine how a court might go about theorizing whether youth have a right to sport, play, and physical activity. *Gary B. v. Whitmer* (2020a) also shared similarities with the instant issue, as it involved a claim by youth. Finally, it is also probative the court acknowledged a history of racial discrimination connected to denying educational access to marginalized populations, thereby preventing them from easily participating in society. History, especially in the wake of the COVID-19 pandemic, has demonstrated that inequities exist when it comes to access to sport, play, and physical activity when accounting for race and socioeconomic status (Murthy, 2023; Project Play, n.d.b.; Project Play, 2022; Reinberg, 2022; Tandon et al., 2021).

Any potential arguments in favor of granting youth the right to sport, play, and physical activity opportunities as a fundamental right will have to overcome precedent. There is no expressly guaranteed right to sport, play, and recreation as a protected interest (*Ryan v. California Interscholastic Federation-San Diego Section*, 2001). Federal courts from multiple circuits have both held that no fundamental right exists to participate in sports. The First, (*Rivas Tenorio v. Liga Atletica Interuniversitaria*, 1977), Third (*Palmer by Palmer v. Merluzzi*, 1989), Fourth (*Denis J. O'Connell High School v. Virginia High School League*, 1978), and Sixth (*Walsh v. Louisiana High School Athletic Association*, 1980) Circuits have all explicitly said there is no fundamental right to participate in sports or athletics. No sports-specific case provides a blueprint for establishing a fundamental right to sport, play, and physical activity, leaving *Gary B. v. Whitmer*, (2020a) as the principal exemplar. Given this case's stringent nature of the two-prong test, as well as uphill battle federal courts pose (*Gary B. v. Whitmer*, 2020a), it seems unlikely that a court will be persuaded by an argument in favor of granting access to sport, play, and physical activity as a fundamental right.

## Discussion

The purpose of this article was to investigate whether a persuasive legal argument can be theorized and presented that places a constitutional legal responsibility upon the U.S. federal government to create structures, allocate funding, and provide universal access to free sport, recreation, and play opportunities for youth. The legal analysis evaluated relevant U.S. law and found no likely human right, constitutional right, or fundamental right exist mandating the federal government to provide universal access to free sport, recreation, and play opportunities for youth. However, this



finding is not the end of the process. It is merely the beginning of operationalizing U.S. law to identify a potential legal framework that will compel meaningful policy change in the youth sports landscape.

The foregoing analysis suggests advocates seeking to use a constitutional argument to enshrine affirmative rights for citizens to sport, play, and physical activity will face an uphill battle. There is no constitutionally protected right to play sports—it is a privilege (*Angstadt v. Midd-West School District*, 2004; *Bean v. Wilson County School System*, 2015). Legal precedent illustrates a strenuous standard premised on liberty and the right for citizens to be protected from government intrusion (Heckman, 2005). To establish such rights would involve significant policy and financial commitments akin to those seen in some European nations (Green et al., 2019; Levine, 2020). Such a legal right being theorized would be considered an affirmative right or entitlement forcing government to provide a benefit (*Hinman v. Lincoln Towing Service*, 1985; *Jackson v. City of Joliet*, 1983). This is not the function of a constitutional right under U.S. law (*Hilton v. City of Wheeling*, 2000).

Fundamental rights are intimately connected with the notion of justice (*West Virginia State Board of Education v. Barnette*, 1943) and thus are not constrained by the rigid terms associated with rights restraining government intrusion. Furthermore, being premised on an evolving notion of justice as well as deeply rooted principles found in United States history and tradition intimately connected to liberty and justice (*Gary B. v. Whitmer*, 2020a) may provide more fertile ground to theorize access to sport, play, and physical activity as a fundamental right. For one, physical education has historically been a part of compulsory youth education process (Czekanski et al., 2019; *Gary B. v. Whitmer*, 2020a; Siegrist et al., 2016). Some state courts have even gone so far as to acknowledge the role sport plays in education (*Duffley v. New Hampshire Interscholastic Athletic Association, Inc.*, 1982; *Florida High School Activities Association, Inc. v. Bryant*, 1975). For instance, the Supreme Court of New Hampshire ruled that “interscholastic athletics are considered an integral and important element of the educational process in New Hampshire” (*Duffley v. New Hampshire Interscholastic Athletic Association, Inc.*, 1982, p. 462). However, most courts are reluctant to embrace the importance of sport’s role in a manner similar to the general education process. A more plausible argument could involve framing a substantive due process claim that emphasizes the role of physical fitness in enhancing health and well-being, aspects critical for every individual’s ability to meaningfully participate in society.

Even if one could argue that access to sport or physical activity is deeply ingrained in national tradition, the second prong—asserting that this access is vital to the concept of ordered liberty—remains a challenge (*Kitchen v. Herbert*, 2013). However, one may argue, given the longstanding tradition of sports and play in American society and its recognized role in fostering physical, social, and cognitive



development (Project Play, 2022; Tandon et al., 2021), access to these activities is understood as a critical part of personal freedom and the liberty interest protected by the Constitution. The absence of opportunities for organized sport and play deprives individuals not only of physical benefits but also the social interactions, team building skills, and leadership opportunities they offer, all essential components of a fulfilling life (Sulz et al., 2023). These aspects are particularly acute in disadvantaged communities where access to sports, recreation, and play has been historically limited and where the impact of the COVID-19 pandemic has further intensified these inequalities (Ridpath, 2016, Wilkie et al., n.d.). The inability to engage in these activities, by no fault of one's own, denies individuals the chance to fully participate in society and to shape their own lives—a core aspect of the liberty that the Due Process Clause seeks to protect (*Kitchen v. Herbert*, 2013). Thus, the right to access sports and play is not merely about health and well-being; it is fundamentally about liberty, personal development, and equality of opportunity.

A final argument for creating a fundamental right to sport, play, and similar activities, while perhaps better suited as a policy rationale for legislative action, speaks directly to the *Gary B. v. Whitmer* (2020a) court's holding. Despite administrative vacatur, the ruling is instructive. In finding a fundamental right to a basic minimum education capable of providing literacy, the court emphasized the importance of education in society. "Education has long been viewed as a great equalizer, giving all children a chance to meet or outperform society's expectations, even when faced with substantial disparities in wealth and with past and ongoing racial inequality" (*Gary B. v. Whitmer*, 2020a, p.662). Perhaps the aforementioned rationale regarding the importance of a basic minimum education capable of providing literacy can be analogized to the significance that such physical literacy plays in fostering human development and well-being (Sulz et al., 2023). Given the myriad benefits associated with sport, play, and physical activity (Amado-Alonso et al, 2019; Andermo et al., 2020; Biddle & Asare, 2011; Sahlberg & Doyle, 2019; Savina et al., 2016; Yogman & Hirsch-Pasek, 2018), its role in building human connection and fighting the mental health crisis afflicting youth throughout the nation (AAP, 2021; Hoffmann et al., 2022; Murthy, 2020, 2021, 2023), as well as its potential to increase youths' likelihood of success as an adult (Project Play, n.d.a), one could possibly argue that physical literacy, just like education, also has the potential to be "a great equalizer, giving all children a chance to meet or outperform society's expectations" in the realm of health, socialization, and cognitive development, regardless of race or socioeconomic inequality (*Gary B. v. Whitmer*, 2020a, p.662; Sulz et al., 2023; Tandon et al., 2021). Thus, given its role in fostering human development and well-being as well as connection with race, the right to meaningfully access sport, play, and similar activities should be afforded similar status education.





While the aforementioned arguments are a good faith attempt to place a constitutional legal responsibility upon the U.S. federal government to provide universal access to free sport, recreation, and play opportunities for youth, these theories are unlikely to pass muster. United States Constitutional precedent, *stare decisis*, is not receptive to such arguments. Although the door to a judicial remedy is not shut, advocates will likely have to go back to the drawing board and locate a different legal theory. A constitutional line of reasoning may be better received if framed as policy reasons for legislators to make sport, play, physical activity, and the like more accessible for youth across the nation due to the potentially positive externalities (Dallmeyer et al., 2017; Downward & Rasciute, 2011; Lee et al., 2013).

Although the establishment of a fundamental right to sport, play, and physical activity participation via constitutional law presents complex challenges, the discussion should not stop there. In fact, it is in the realm of legislative actions where more concrete and immediate advancements can be made. A promising initial step in this domain occurred with the reintroduction of the PLAYS in Youth Sports Act (2023). The bill proposes the establishment of a \$75 million annual grant program under the supervision of the Secretary of Health and Human Services. This program would financially support nonprofit organizations dedicated to the promotion of youth sports participation and their various activities, including coach training, participation increase, and health and safety promotion. It has received support from multiple organizations, including the PLAY Sports Coalition. The PLAYS Act is an initial step in addressing funding deficiencies. However significantly more must occur in order to bring the United States in closer proximity to the European nations leading in this space.

## Implications and Future Research

The youth sports landscape has principally reverted to its pre-pandemic status. Despite the numerous benefits associated with sport and play, as well as the demonstrated need for youth to be given widespread access, no policy or structural change has occurred to meet these challenges. The same financial barriers that historically have fostered a caste system of haves and have-nots for American youth remain today. The youth sports industry is likely to continue expanding without any change or intervention, further professionalizing this segment, and pushing out more families in the process. With neither a policy change nor a persuasive legal argument that places a constitutional legal responsibility upon the U.S. federal government to create structures, allocate funding, and provide universal access to free sport, play, physical activity and similar opportunities for youth, the status quo will continue. This status quo is inflicting harm upon society, more disparately impacting the nation's most marginalized segments.





Given the improbability of private sector reform, continued exploration of potential theories that could compel necessary structural and policy change is crucial. It may be helpful to consider comparative policy approaches from other nations to discover suggested best practices to implement in the United States. Numerous European countries, such as Finland, Sweden, Norway, the UK, and the Netherlands, have instituted legislative measures to safeguard sports participation rights (Bergsgard et al., 2019; Waardenburg & van Bottenburg, 2013; Waitzman, 2023). Each nation has enacted significant legislation leading to structural and financial support to provide youth with sport, play, and physical activity opportunities. Future research could involve a comparative examination of these regulatory approaches. The research may also explore aspects such as the year of legislation, codification, and degree to which rights to sport participation are protected. Such studies could offer essential benchmarks and policy suggestions for U.S. policymakers to consider.

Future research will also investigate both legal and policy avenues for facilitating equitable access for youth to sport, play, and physical activity. One potential legal theory worth exploring is the concept of entitlements. An entitlement is a protected interest developed through an independent source entitling citizens to certain benefits (*Board of Regents of State Colleges v. Roth*, 1972; *Goss v. Lopez*, 1975). Although such a right can originate at the state level (*Grabow v. Montana High School Association*, 2002), federal law determines whether a protected state interest rises (*Johnson v. City of Memphis*, 2020). If found as an entitlement, access to sport, play, physical activity, and the like could be operationalized federally. The threshold issue would be determining whether the alleged right is more than an abstract desire, or whether a tangible law or independent source entitles citizens to certain benefits (*Goss v. Lopez*, 1972). Although forging a right federally is preferred, as it would be more reasonably calculated to ensure a more equitable approach, looking exclusively to state law may also serve as a path forward. This approach could spur structural change in some jurisdictions while creating greater urgency to enact policy changes at the federal level.

Another approach to facilitate structural and policy change may be researching the business case for government investing in structures to make youth sport, play, physical activity, and similar endeavors more accessible. The United States Council of Economic Advisers (2018) issued a report articulating the potential for youth sports to improve childhood outcomes. It concluded that a “well-targeted and well-designed youth sports program, then, has potential to generate benefits for its individual participants and for society as a whole” (United States Council of Economic Advisers, 2018, p. 14). A litany of research also articulates the societal benefits and positive outcomes related to participating in youth sports (PCSFN Science Board, 2020). This line of argument—including articulating the potential cost-savings sport, play,



and leisure activities embody related to reducing health care expenditures, police interactions and the criminal justice system, career success, as well as positively contributing to society—may be persuasive to policymakers and funders. Further research could also investigate the potential for Congress to regulate sports participation under the Interstate Commerce Clause. Given the substantial economic implications of youth sports and the influence of private sports-related entrepreneurship on interstate commerce, this approach may present a viable legislative route.

## Conclusion

Youth sports in the United States stand at an inflection point. Despite the integral role that sports, play, physical activity, and similar endeavors play in human development, voluntary institutionalization of widespread access to these activities is not forthcoming from American policymakers. While aspirational claims from organizations like the Aspen Institute that sport is a basic human right may not have legal force, the troubling trends of physical inactivity, diminished interest in sports, and a rising mental health crisis among young people underscore the urgency of providing access to these activities.

The importance of such access has been further magnified by the COVID-19 pandemic and the historic intersection of access denial with race and socioeconomic status. There are considerable societal benefits to allocating resources and effecting fundamental structural changes to America's approach to youth sports. As seen in other regions of the world, sport and similar activities can foster happier, healthier, physically active, and productive populations. Framing resource allocation in this manner may make it more palatable to policymakers, potentially sparking structural change.

It is crucial that this work continues. Although an affirmative right to sport is unlikely to emerge federally under constitutional law as a human right or fundamental right, this commentary has shifted the discussion beyond public aspirational declarations. Legal rights exist in theory until they are actualized into law by precedent or statute. The same holds true for finding a legal theory that can enshrine affirmative rights for youth to sport, play, and physical activity. The work must continue.

The ultimate goal remains—to persuade a court or policymaker that sport, play, and physical activity, with all its benefits, should be viewed as a “great equalizer” on par with literacy and education (*Gary B. v. Whitmer*, 2020a, p.662). Such a shift, granting an affirmative right to widespread, low-cost access to sport, play, physical activity, and similar endeavors, could significantly bolster the human development and well-being of American citizens.



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