

# SEPARATE AND INVISIBLE: ALTERNATIVE EDUCATION PROGRAMS AND OUR EDUCATIONAL RIGHTS

**Abstract:** This Note argues that many disciplinary alternative education programs (“AEPs”) violate both parents’ fundamental right to control their child’s education and students’ as yet unrecognized fundamental right to receive a minimally adequate education. These programs infringe parents’ fundamental right to guide their child’s upbringing by removing both the child and the child’s school from standards-based assessments, which confounds parents’ ability to compare their child’s education with their own values and to take action on the basis of that comparison. In addition, this Note argues that the right to receive a minimally adequate education is a longstanding tradition in America that has become increasingly essential to our ordered liberty along with the expansion of suffrage over the last century. AEPs often violate this right because they are unaligned with state education standards and do not offer an opportunity to earn a diploma. As part of its conclusions, this Note identifies solutions that, unlike the current model of AEPs, are narrowly tailored to achieve the state’s compelling interests in school discipline and in combating students’ disengagement from school.

## INTRODUCTION

Timothy Nevares was an A and B student at San Marcos High School.<sup>1</sup> He liked school and had set his sights on college.<sup>2</sup> One day, while Timothy was walking with friends, a young man attempted to run Timothy over with his car.<sup>3</sup> The group fled and tried to defend themselves against their assaulter by throwing gravel at the car.<sup>4</sup> The driver then went to the police, claiming that Timothy and his friends had thrown rocks at his car and injured his girlfriend.<sup>5</sup> The police detained Timothy for aggravated assault.<sup>6</sup> Pursuant to a Texas law, the police alerted Timothy’s high school principal that they had tempo-

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<sup>1</sup> Brief of Appellee at 6, *Nevares v. San Marcos Consol. Indep. Sch. Dist.*, 111 F.3d 25 (5th Cir. 1997) (No. 96-50420), 1996 WL 33450565, at \*6.

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

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

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

<sup>6</sup> Brief of Appellee, *supra* note 1, at 6.

rarily detained Timothy.<sup>7</sup> Nearly two weeks after the incident, the school pulled Timothy out of class to confirm whether the police had detained him.<sup>8</sup> The principal announced she was transferring Timothy to “Rebound,” an Alternative Education Program (“AEP”).<sup>9</sup>

Although operated by the same school district as San Marcos High, Rebound did not offer the number of credits Timothy needed to advance to the eleventh grade.<sup>10</sup> In addition, the quality of instruction dropped: students taught themselves out of textbooks at Rebound.<sup>11</sup> The only course taught in lecture format was the mandatory self discipline class, for which the students received no credit.<sup>12</sup> The curriculum was not based on the curriculum offered at San Marcos, and students could not visit their old teachers there to try to keep up with the regular education coursework.<sup>13</sup> Instead, at Rebound, students sometimes had to wait with their hands up for more than twenty-minutes before a teacher would answer their questions.<sup>14</sup> Additionally, students could not take home textbooks or school material overnight.<sup>15</sup>

Most students at Rebound had criminal charges, predominantly weapon and drug violations, pending against them.<sup>16</sup> Given the nature of the student body, students could not go to the restroom without adult supervision.<sup>17</sup> In short, Timothy’s school district sent him from a safe school and a curriculum that was preparing him for college to an unsafe school and a curriculum that was not even preparing him for the eleventh grade.<sup>18</sup>

AEPs like Rebound are spreading around the country.<sup>19</sup> School districts see them as a potential panacea because they remove “at risk” students—those who are pregnant, homeless, habitually truant, charged with delinquency, or deemed discipline problems or academic

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<sup>7</sup> *Id.* at 7.

<sup>8</sup> *Id.* at 7–8.

<sup>9</sup> *Id.* at 8.

<sup>10</sup> *Id.* at 9.

<sup>11</sup> Brief of Appellee, *supra* note 1, at 10.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 10–11.

<sup>14</sup> *Id.* at 10.

<sup>15</sup> *Id.*

<sup>16</sup> See Brief of Appellee, *supra* note 1, at 9, 11.

<sup>17</sup> *Id.* at 23.

<sup>18</sup> See *supra* notes 9–16 and accompanying text.

<sup>19</sup> BRIAN KLEINER ET AL., U.S. DEP’T OF EDUC., PUBLIC ALTERNATIVE SCHOOLS AND PROGRAMS FOR STUDENTS AT RISK OF EDUCATION FAILURE: 2000–01, at 2 (2002), available at <http://nces.ed.gov/pubs2002/2002004.pdf>.

failures—from public school rolls.<sup>20</sup> Thirty-nine percent of public school districts nationwide administered at least one AEP for at risk students during the 2000–2001 school year.<sup>21</sup> The reasons for the transfers, the duration of time that transferred students spend in AEPs, and the ages of the students transferred vary broadly by state and by school district.<sup>22</sup> Some school districts place a student in an AEP for horseplay, copying another student’s work, inappropriate displays of affection, or loitering in an unauthorized area.<sup>23</sup> Alternatively, other school districts resort to AEP placements only for students who commit serious infractions of school policy or the law.<sup>24</sup> In addition, AEPs can be strongly linked with a state’s juvenile justice system.<sup>25</sup> Some students are assigned to AEPs when they are released from a juvenile correction center or after they have been charged, though not necessarily adjudicated, with an act that, if committed by an adult, would amount to a felony.<sup>26</sup> Generally, students are referred to alternative schools and programs if they are at risk of educational failure, as indicated by factors associated with early withdrawal from school, such as poor grades, truancy, disruptive behavior, suspension, or pregnancy.<sup>27</sup> State AEP transfer laws are alternately quite vague or quite specific about these criteria, giving varying amounts of discretion to school officials.<sup>28</sup> In

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<sup>20</sup> *Id.*; JOHN G. MORGAN, TENN. COMPTROLLER OF THE TREASURY, TENNESSEE’S ALTERNATIVE SCHOOLS 27 (2000), available at [www.tennessee.gov/education/learningsupport/doc/AlternativeEdReport.pdf](http://www.tennessee.gov/education/learningsupport/doc/AlternativeEdReport.pdf); see, e.g., ALA. CODE § 12-15-71(o) (LexisNexis 2005); CAL. EDUC. CODE § 1981 (West 2002); OHIO REV. CODE ANN. § 3313.533 (West 2007).

<sup>21</sup> KLEINER ET AL., *supra* note 19, at iii.

<sup>22</sup> David D’Agata, *Alternative Education Programs: A Return to “Separate But Equal?”*, 29 NOVA L. REV. 635, 643 (2005); see DEBORAH FITZGERALD FOWLER ET AL., TEX. APPLESEED, TEXAS’ SCHOOL-TO-PRISON PIPELINE 66–67 (2007), available at [www.texasappleseed.net/pdf/Pipeline%20Report.pdf](http://www.texasappleseed.net/pdf/Pipeline%20Report.pdf); Elisa Hyman, *School Push-Outs: An Urban Case Study*, 38 CLEARINGHOUSE REV. 684, 684 (2005).

<sup>23</sup> D’Agata, *supra* note 22, at 643.

<sup>24</sup> *Id.*

<sup>25</sup> See, e.g., VA. CODE ANN. § 22.1-209.1:2 (2006).

<sup>26</sup> See, e.g., ALA. CODE §§ 12-15-34.1, 12-15-71(o) (providing that a child who is sixteen or older and charged with one of certain felonies and capital offenses must be transferred to an alternative school); VA. CODE ANN. § 22.1-209.1:2 (permitting transfers to AEPs for students recently released from a juvenile correctional center).

<sup>27</sup> KLEINER ET AL., *supra* note 19, at iii.

<sup>28</sup> Compare LA. REV. STAT. ANN. § 17:224 (2007) (requiring only that a transferee exhibit an “incorrigible attitude”), with VA. CODE ANN. § 22.1-209.1:2 (requiring that the transferee have committed specific offenses or have been expelled from school or released from a juvenile correctional center).

some states, schools can transfer children under the age of six to AEPs; in other states, students must be at least fifteen to qualify for transfer.<sup>29</sup>

This Note argues that, as currently constructed, many AEPs infringe the substantive due process rights of students and their parents. Part I of this Note examines the conditions at AEPs.<sup>30</sup> Part II traces the case law characterizing parents' fundamental right to guide their child's education.<sup>31</sup> Part III reviews the case law on a student's fundamental right to a minimally adequate education and evaluates the state of that right today.<sup>32</sup> Part IV examines the effect of prior legal challenges to AEPs.<sup>33</sup> Part V argues that many AEPs infringe on the fundamental rights discussed in Parts II and III because they are not narrowly tailored to advance compelling state interests.<sup>34</sup> These programs infringe parents' fundamental right to guide their child's upbringing by removing both the child and the child's education from standards-based assessments, confounding parents' ability to evaluate the quality of their child's education.<sup>35</sup> In addition, these programs infringe students' fundamental right to a minimally adequate education by providing an alternative education that is not aligned with state standards and can deprive students of the opportunity to earn a high school diploma.<sup>36</sup> Part V also briefly identifies solutions to problems with school discipline and at risk students' disengagement from education that, unlike the current model of AEPs, are narrowly tailored to the state's compelling interests.<sup>37</sup>

## I. WHAT IS AN ALTERNATIVE EDUCATION PROGRAM?

Alternative education originated in the 1960s as part of a movement to provide alienated and disengaged students with individualized instruction.<sup>38</sup> At that time alternative schools served chronic tru-

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<sup>29</sup> FOWLER, *supra* note 22, at 5 (writing that Texas school districts referred 500 pre-K and kindergarten students and 2700 first grade students to disciplinary AEPs in the 2005–2006 school year); Hyman, *supra* note 22, at 684 (writing that in New York schools students as young as fifteen and as old as twenty, with a range of academic achievements, were told they needed to go to a different school).

<sup>30</sup> See *infra* notes 38–68 and accompanying text.

<sup>31</sup> See *infra* notes 69–98 and accompanying text.

<sup>32</sup> See *infra* notes 99–169 and accompanying text.

<sup>33</sup> See *infra* notes 170–181 and accompanying text.

<sup>34</sup> See *infra* notes 182–319 and accompanying text.

<sup>35</sup> See *infra* notes 203–206 and accompanying text.

<sup>36</sup> See *infra* notes 219–260 and accompanying text.

<sup>37</sup> See *infra* notes 301–319 and accompanying text.

<sup>38</sup> MORGAN, *supra* note 20, at 2.

ants, teenage mothers, and students with learning disabilities who chose to enroll in these programs.<sup>39</sup> Beginning in the 1980s, concerns about disruptive student behavior, at risk students, and the dropout rate led legislators, educators, and community leaders to reconsider the voluntary nature of alternative learning environments.<sup>40</sup> School districts nowadays can send a student to an AEP for a matter of days or for a matter of years against the will of the student and the student's family.<sup>41</sup> Fear of school violence fostered the proliferation of involuntary student assignments to AEPs across the country.<sup>42</sup> In addition, fear bred federal, state, and local "zero-tolerance" policies, which mandated students' removal from school for certain infractions and expedited the spread of involuntary AEPs.<sup>43</sup>

Economics also encouraged the expansion of AEPs.<sup>44</sup> The companies that build prisons and detention centers capitalized on school districts' burgeoning interest in exclusionary punishment methods, convincing school districts to pay for new detention-like facilities.<sup>45</sup> Simultaneously, schools discovered that transferring students to AEPs could be a lucrative venture because the amount of funding an excluded student generates may still be available to the transferring school.<sup>46</sup> In addition, the federal No Child Left Behind Act<sup>47</sup> ("NCLB") authorizes funds for school districts to create AEPs, which NCLB touts as innovative programs to prevent violence and drug use and to reduce disruptive behavior.<sup>48</sup>

Pressures in the classroom also spurred the crusade for AEPs.<sup>49</sup> With the push for accountability, schools can boost test scores by re-

<sup>39</sup> Jonathan Wren, Note, *Alternative Schools for Disruptive Youths—A Cure for What Ails School Districts Plagued by Violence?*, 2 VA. J. SOC. POL'Y & L. 307, 342 (1995); see also CAMILLA LEHR ET AL., *ALTERNATIVE SCHOOLS: FINDINGS FROM A NATIONAL SURVEY OF THE STATES* 4 (2004) (writing that alternative schools in the 1960s were premised on the idea that students require different avenues for learning).

<sup>40</sup> See LEHR, *supra* note 39, at 21; MORGAN, *supra* note 20, at 2.

<sup>41</sup> See LEHR, *supra* note 39, at 14 (of the thirty-one states surveyed, six states reported holding students in AEPs for more than one academic year, ten states reported holding students in AEPs for a duration between seven months and one year, and nine states reported holding students for a duration of only one to six months).

<sup>42</sup> D'Agata, *supra* note 22, at 636; see Wren, *supra* note 39, at 347.

<sup>43</sup> LEHR, *supra* note 39, at 21; see Augustina Reyes, *The Criminalization of Student Discipline Programs and Adolescent Behavior*, 21 ST. JOHN'S J. LEGAL COMMENT. 73, 78 (2006).

<sup>44</sup> D'Agata, *supra* note 22, at 639; see Reyes, *supra* note 43, at 77–78.

<sup>45</sup> Reyes, *supra* note 43, at 77.

<sup>46</sup> D'Agata, *supra* note 22, at 639.

<sup>47</sup> 20 U.S.C. §§ 6301–7941 (Supp. V 2005).

<sup>48</sup> See *id.* § 7131.

<sup>49</sup> See *infra* notes 50–56 and accompanying text.

moving struggling students from their school rolls.<sup>50</sup> Many teachers complain that they are not trained to deal with the serious behavioral problems they face in the modern classroom and cannot teach lessons with these troubled students in their classes.<sup>51</sup> Finally, unusually high levels of school enrollment, which continue to exceed many schools' capacities, compound the pressures to shrink the general education population by any means possible.<sup>52</sup>

Although AEPs differ from state to state and school to school, they share common characteristics related to their purpose as behavior remediation centers.<sup>53</sup> AEPs utilize low teacher to student ratios, individualized and self-paced instruction, and noncompetitive performance assessments.<sup>54</sup> In addition, AEPs typically rely on stringent restrictions and social controls, including constant supervision of students, escorting students to the restroom in groups, and even police patrols.<sup>55</sup> Many AEPs group violent and disruptive students with students at risk for academic failure, threatening the latter group's potential to succeed.<sup>56</sup> Despite heightened social restrictions, studies show that students in AEPs are subject to levels of violence that are dramatically higher than those found in traditional schools.<sup>57</sup>

As for academics, the material taught at AEPs may not coincide with the material taught at a student's regular campus.<sup>58</sup> Additionally, the length of the instructional school day and school week may be shorter at an AEP than at a regular school.<sup>59</sup> As a result, school systems

<sup>50</sup> LEHR, *supra* note 39, at 21; D'Agata, *supra* note 22, at 639; Reyes, *supra* note 43, at 77-78.

<sup>51</sup> D'Agata, *supra* note 22, at 639; Reyes, *supra* note 43, at 77-78.

<sup>52</sup> LEHR, *supra* note 39, at 21.

<sup>53</sup> See LEHR, *supra* note 39, at 15; Reyes, *supra* note 43, at 80.

<sup>54</sup> Stephen M. Cox, *An Assessment of an Alternative Education Program for At-Risk Delinquent Youth*, 36 J. RES. CRIME & DELINQ. 323, 323 (1999); D'Agata, *supra* note 22, at 643; Wren, *supra* note 39, at 344.

<sup>55</sup> D'Agata, *supra* note 22, at 643; Patty Blackburn Tillman, *Procedural Due Process for Texas Public School Students Receiving Disciplinary Transfers to Alternative Education Programs*, 3 TEX. WESLEYAN L. REV. 209, 223 (1996); Wren, *supra* note 39, at 344-45.

<sup>56</sup> Audrey Knight, *Redefining Punishment for Students: Nevares v. San Marcos I.S.D.*, 20 REV. LITIG. 777, 793 n.81 (2001); Wren, *supra* note 39, at 352; Rodney Turpin & Deborah Hinton, *Academic Success of At-Risk Students in an Alternative School Setting* 37-38 (Spring 2000) (unpublished Master's research paper, Campbellsville University), available at <http://eric.ed.gov/ERICWebPortal/contentdelivery/servlet/ERICServlet?accno=ED440814>.

<sup>57</sup> D'Agata, *supra* note 22, at 641; Wren, *supra* note 39, at 351.

<sup>58</sup> See D'Agata, *supra* note 22, at 641; Tillman, *supra* note 55, at 223.

<sup>59</sup> Brief of Appellant and Reproduced Record at 10, Tyson *ex rel.* Jefferson v. Sch. Dist. of Phila., 900 A.2d 990 (Pa. Commw. Ct. 2006) (No. 1795 CD 2005), 2005 WL 5167474, at \*10, *appeal denied*, 917 A.2d 316 (Pa. 2007); see, e.g., 24 PA. CONS. STAT. ANN. § 19-1901-C (West 2006); N.Y. COMP. CODES R. & REGS. tit. 8, § 175.5 (2000).

often penalize students on assessments or in grade advancement for not learning what they were not taught at their AEP.<sup>60</sup> In a 2004 study, researchers at the University of Minnesota found that a majority of AEPs that responded to a survey had not fully integrated the state standards and curriculum into their program.<sup>61</sup> Moreover, only nineteen states reported having a system for tracking what becomes of students who attend AEPs.<sup>62</sup> Still fewer states reported tracking the results of state-mandated tests, student enrollment in secondary school, or hiring rates.<sup>63</sup> The Minnesota survey identified quality of staff, accountability, and meeting state academic standards as important issues facing alternative schools in the next few years.<sup>64</sup> In addition, some studies have found that alternative programs do not reduce delinquent behaviors.<sup>65</sup> Large percentages of students removed to AEPs never finish their education; instead, some of these students turn to crime, drugs, and delinquency.<sup>66</sup> Because most AEPs neither participate in state-mandated tests<sup>67</sup> nor track students' post-school academic or professional out-

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<sup>60</sup> See Tillman, *supra* note 55, at 223.

<sup>61</sup> See LEHR, *supra* note 39, at 15.

<sup>62</sup> *Id.* at 16.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 19.

<sup>65</sup> Cox, *supra* note 54, at 323.

<sup>66</sup> FOWLER ET AL., *supra* note 22, at 27, 30; Joseph Lintott, *Teaching and Learning in the Face of School Violence*, 11 GEO. J. ON POVERTY L. & POL'Y 553, 572 (2004); Wren, *supra* note 39, at 332–33.

<sup>67</sup> See 34 C.F.R. § 200.7(a)(2)(i) (2008) (“[A] State must determine and justify in its State plan the minimum number of students sufficient to yield statistically reliable information for each purpose for which disaggregated data are used.”); *id.* § 200.20(a)(2) (“[T]o be included in the determination of [Adequate Yearly Progress] for a school . . . , the number of students in the group must be sufficient to yield statistically reliable information.”); see also FOWLER ET AL., *supra* note 22, at 26 (writing that Texas does not require state oversight of its disciplinary AEPs). AEPs rarely have enough students enrolled to yield statistically reliable information, so, under NCLB regulations, they are generally exempt from the requirement to make Adequate Yearly Progress (“AYP”) on the state’s measurable academic objectives. See 34 C.F.R. § 200.20(a). Compare LEHR, *supra* note 39, at 12 (stating that total enrollment at nearly a third of all AEPs is below twenty-six students and at the vast majority of AEPs it is below seventy-six students), with, e.g., ILL. ADMIN. CODE tit. 23, § 1.60 (2008) (stating that for the purposes of evaluating its public schools, Illinois defines a subgroup as comprised of at least forty-five students). Furthermore, like other state education departments before it, in 2006 the Massachusetts Department of Education changed its testing policies to exclude results from students who were not enrolled in that school as of October 1 of the fall preceding exams. See 34 C.F.R. § 200.20(e)(2) (“In determining the AYP of a school, the State may not include students who were not enrolled in that school for a full academic year, as defined by the State.”). Compare Mass. Dep’t of Elementary & Secondary Educ., School and District Profiles Help, <http://profiles.doe.mass.edu/help/data.aspx> (last visited Oct. 29, 2008) (explaining the October enrollment reporting policy), with ELIZABETH G. HILL, CAL. LEGISLATIVE ANALYST’S OFFICE, IMPROVING

comes, decades deep in the AEP experiment, the question remains: do AEPs provide a basic education?<sup>68</sup>

## II. PARENTS HAVE A FUNDAMENTAL RIGHT TO PROVIDE FOR THEIR CHILD'S EDUCATION

In 1923, in *Meyer v. Nebraska*,<sup>69</sup> the U.S. Supreme Court established one of the oldest fundamental liberty interests by holding that parents have a fundamental right to guide the education of their children in preparation for their station in life.<sup>70</sup> In doing so, the Court struck down a state law that prohibited all educators from teaching languages other than English to students who had not successfully passed eighth grade.<sup>71</sup> Since *Meyer*, the Court has interpreted this right to preclude

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ALTERNATIVE EDUCATION IN CALIFORNIA 22 (2007), available at [http://www.lao.ca.gov/2007/alternative\\_educ/alt\\_ed\\_020707.pdf](http://www.lao.ca.gov/2007/alternative_educ/alt_ed_020707.pdf) (finding that California law exempts student assessment data from a school's accountability score for students who were not enrolled in that school in October), and LA. CODE R. tit. 28, pt. LXXXIII, § 4310(B)(1)(a)(i) (Weil 2007) (providing that Louisiana students' state assessment scores are exempted if the students were not enrolled at the school on October 1). Because many students are not transferred into AEPs until October, state policy changes like these create additional exemptions from NCLB's accountability testing for AEPs. See HILL, *supra*, at 22 (writing that California's attendance rule results in the federal determination of AYP being based on only a small proportion of the students who attended an AEP and that forty-five percent of California's AEPs are eliminated from the state's Academic Performance Index because they did not have enough scores from students who satisfied the state's attendance policy).

<sup>68</sup> LEHR, *supra* note 39, at 21; see also LAUDAN Y. ARON, URBAN INST., AN OVERVIEW OF ALTERNATIVE EDUCATION 11 (2006), available at [http://www.urban.org/UploadedPDF/411283\\_alternative\\_education.pdf](http://www.urban.org/UploadedPDF/411283_alternative_education.pdf) ("[T]here is no way of determining what gaps are in the system . . . . [This] prevents policymakers from moving onto the larger and more compelling questions about the quality of academic programs . . . ."); SUSAN BRODY HASAZI ET AL., VT. DEP'T OF EDUC., REPORT ON ALTERNATIVE EDUCATION SCHOOLS/PROGRAMS IN VERMONT 14 (2001) ("[I]t would be difficult at this time to assess the state-wide impact of alternative programs on student performance and continuation in school."); MORGAN, *supra* note 20, at i ("Alternative schools lack systems of accountability to ensure program quality.").

<sup>69</sup> 262 U.S. 390, 400 (1923). The Court also noted that the public education system Plato desired, which was strikingly similar to the model Sparta used, would, if imposed in the United States, infringe upon this fundamental right. *Id.* at 401–02. Plato's public education system mandated the removal of all children from their families to be reared and educated by official guardians. *Id.* The Court suggested, however, that the fundamental right involved in *Meyer* foreclosed any government power to standardize American children by wholly removing their education from their parents' supervision. *Id.* at 402.

<sup>70</sup> *Id.* at 399–401, 403; see also *Troxel v. Granville*, 530 U.S. 57, 65, 95 (2000). *But see Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174, 179 (4th Cir. 1996) (finding that rational basis review is appropriate for an analysis of a parent's substantive due process challenge to a graduation requirement that all students perform fifty hours of community service).

<sup>71</sup> *Meyer*, 262 U.S. at 400–02.

the state from “contract[ing] the spectrum of available knowledge,”<sup>72</sup> and other courts have construed it to preclude state interference with parents’ ability to seek instruction in benign topics for their children.<sup>73</sup> In effect, *Meyer* established that part of the liberty protected by the Fourteenth Amendment is the right to seek useful knowledge without state interference.<sup>74</sup>

In 1925, just two years after its decision in *Meyer*, the Court ruled in *Pierce v. Society of Sisters* that the fundamental liberty interest established in *Meyer* prohibits a State from compelling its students to attend public, as opposed to private, schools.<sup>75</sup> In *Pierce*, the plaintiffs, a Catholic school and a private military school, sought to enjoin enforcement of a state law requiring parents to send their children to a public school.<sup>76</sup> The Court held that those who nurture a child and direct his destiny “have the right, coupled with the high duty, to recognize and prepare him for additional obligations,” which may entail entrusting an institution other than a public school with the child’s education.<sup>77</sup> Today, *Pierce* is characterized as an affirmation of parents’ fundamental constitutional right to determine who shall educate and socialize their children.<sup>78</sup> In 2000, in an opinion concurring in *Troxel v. Granville*, Justice Souter wrote that *Pierce* means even a state’s considered judgment about the preferable character of a student’s schoolteachers is not entitled to prevail over a parent’s choice of school.<sup>79</sup>

In effect, *Pierce* and *Meyer* posited a negative substantive due process right for students to acquire useful knowledge.<sup>80</sup> In other words, parents have a fundamental right to be free from state intervention while evaluating their child’s education in light of their own values and making any subsequent decisions to offer their children additional learning opportunities.<sup>81</sup> The Supreme Court reaffirmed

<sup>72</sup> *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

<sup>73</sup> See *Herndon*, 89 F.3d at 178 (citing *Meyer*, 262 U.S. at 400) (noting that it “is a right of parents to seek German instruction for their children”).

<sup>74</sup> Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 564 (1992); Peter S. Smith, Note, *Addressing the Plight of Inner-City Schools: The Federal Right to Education after Kadrmas v. Dickinson Public Schools*, 18 WHITTIER L. REV. 825, 835 (1997).

<sup>75</sup> 268 U.S. 510, 534–35 (1925).

<sup>76</sup> *Id.* at 530–32.

<sup>77</sup> *Id.* at 535.

<sup>78</sup> *Troxel*, 530 U.S. at 78–79, 80 (Souter, J., concurring); see *id.* at 65 (plurality opinion).

<sup>79</sup> *Id.* at 78–79 (Souter, J., concurring).

<sup>80</sup> Bitensky, *supra* note 74, at 593.

<sup>81</sup> See *Pierce*, 268 U.S. at 534–35; see also Barbara Bennett Woodhouse, “Who Owns the Child?”: *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1090–91,

this right in 1972 in *Wisconsin v. Yoder*.<sup>82</sup> In *Yoder*, the state's compulsory education laws conflicted irreconcilably with the right of Amish parents to choose not to send their children to school after eighth grade for religious reasons.<sup>83</sup> The Court held that a state's interest in universal education, no matter how important, must be balanced with the traditional interests of parents in leading and shaping their families' values.<sup>84</sup> The Court drew significantly from the conclusions in *Pierce*, reiterating that because parents have a fundamental liberty interest in directing their children's education, the state has no power to force all children within its borders to accept instruction from public school teachers only.<sup>85</sup> Additionally, the Court elaborated on the reference in *Pierce* to "additional obligations" for which parents have a right and duty to prepare their children.<sup>86</sup> Under *Yoder*, these obligations include the inculcation of moral standards and elements of good citizenship, which parents may feel is most effectively taught in a particular facility or system.<sup>87</sup> Finally, the Court distinguished the fact pattern in *Yoder* from situations where parents have only a general, rather than a *religious*, interest in the nature and education of their children: where only a general interest is involved, the *Yoder* Court held that a state acts reasonably and constitutionally in requiring education in a school that meets the standards prescribed by the state.<sup>88</sup>

The lower courts have construed *Yoder* much less expansively than its predecessors, *Pierce* and *Meyer*, limiting its relevance to cases where a state law threatens a long-established religious community's way of life.<sup>89</sup> The Amish community's strong claim to Free Exercise, given the community's longstanding religious practice, has therefore become

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1112, 1114 (1992) (writing that *Pierce* and *Meyer* endowed parents with a fundamental right to control their own children—a right under which children serve as conduits for their parents' religious expression, cultural identity, and class aspirations—and, therefore, that state reform efforts may not tamper with parental efforts to align their child's development with their values).

<sup>82</sup> 406 U.S. 205, 233–34 (1972); see Woodhouse, *supra* note 81, at 1114–15 (writing that *Yoder* ratified the *Meyer* and *Pierce* view of children as tools of their parents).

<sup>83</sup> *Yoder*, 406 U.S. at 208–09; see also *Leebaert v. Harrington*, 332 F.3d 134, 144 (2d Cir. 2003) (referring to an "irreconcilable *Yoder*-like clash").

<sup>84</sup> *Yoder*, 406 U.S. at 214.

<sup>85</sup> *Id.* at 232–33.

<sup>86</sup> *Id.* at 233.

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

<sup>88</sup> *Id.*

<sup>89</sup> See, e.g., *Leebaert*, 332 F.3d at 144.

integral to the *Yoder* decision and has been hard for later plaintiffs to replicate.<sup>90</sup>

In *Leebaert v. Harrington*, decided in 2003 by the U.S. Court of Appeals for the Second Circuit, a father attempted to rely on *Yoder* and its predecessors to overcome a state law that forced his son to attend a mandatory health class that discussed drugs, alcohol, and peer resistance to social pressures.<sup>91</sup> To distinguish *Leebaert* from *Meyer* and *Pierce*, the court differentiated positive and negative rights.<sup>92</sup> The court wrote that in *Meyer* and *Pierce* the fundamental right at issue was a negative one, a right against the state preventing parents from choosing a specific educational program.<sup>93</sup> In *Leebaert*, on the other hand, the plaintiff was seeking a positive right for parents to dictate the curriculum at the school to which they chose to send their children.<sup>94</sup> Both policy and precedent militated against the recognition of such a sweeping positive right.<sup>95</sup> Thus, although parents have a fundamental right to choose the nature of the education their children receive, they do not have the right to pick and choose elements of the education offered within the public schools.<sup>96</sup>

Through this chain of parental rights cases, the courts have recognized and reaffirmed the existence of parents' fundamental *negative* right to guide their child's education without undue interference by the state.<sup>97</sup> Founded in the Due Process Clause of the Fourteenth

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<sup>90</sup> See *id.*; *Halderman v. Pennhurst State Sch. & Hosp.*, 707 F.2d 702, 707 (3d Cir. 1983).

<sup>91</sup> *Leebaert*, 332 F.3d at 137–38.

<sup>92</sup> See *id.* at 141.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 141–42; see also Bitensky, *supra* note 74, at 575 (noting that mainstream legal thought construes the Constitution as a series of negative rights protecting Americans against governmental intrusion).

<sup>96</sup> See *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206 (9th Cir. 2005); *Leebaert*, 332 F.3d at 141.

<sup>97</sup> See *Pierce*, 268 U.S. at 534–35; *Fields*, 427 F.3d at 1206; *Leebaert*, 332 F.3d at 141. It is worth noting that *Herndon* applied rational basis review, rather than strict scrutiny, to a case where the parents relied on their fundamental right to guide their children's upbringing to challenge the school district's application of a graduation requirement to their children. 89 F.3d at 176–77, 179. *Herndon*, however, does not contravene the existence of parents' negative fundamental right to guide their child's education because, by seeking to have their students avoid an element of their public education, the *Herndon* parents wrongly interpreted their fundamental right as a positive, rather than negative, one. Compare *id.*, with *Leebaert*, 332 F.3d at 141. As discussed in *Leebaert*, the right arising from *Meyer* and *Pierce* is not a positive right that permits parents to dictate a curriculum to public schools; it is a negative right that forces parents to leave the composition of a public education up to the public schools. See *Leebaert*, 332 F.3d at 141.

Amendment, this right bars the government from obstructing or contracting a child's acquisition of knowledge against the parents' wishes.<sup>98</sup>

### III. THE QUASI-FUNDAMENTAL RIGHT TO EDUCATION

Thomas Jefferson wrote that it is the business of the state to educate the common people.<sup>99</sup> In line with this statement, Jefferson promoted a central role for the federal government in ensuring that a free public education was provided to all children.<sup>100</sup> His contemporaries and the other Framers shared Jefferson's belief that, under the Constitution, the national government would shoulder a direct and pivotal responsibility for ensuring an adequate public education system was in place.<sup>101</sup> George Washington and James Madison made education one of their foremost concerns.<sup>102</sup> Across the board, the Framers did not believe a public school system was merely incidental to liberty, but rather that the federal government had a duty to create and protect a public education system on a national scale.<sup>103</sup> Reflecting this view, in 1787 the Congress of Confederation declared in the Northwest Ordinance that knowledge was necessary to good government and that education would forever be encouraged.<sup>104</sup> Pursuing this policy, the federal government required territories applying for statehood to set aside land for educational purposes.<sup>105</sup> During the second half of the nineteenth century, the federal government also required that territories applying for statehood establish public school systems.<sup>106</sup> This in-

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<sup>98</sup> See *Pierce*, 268 U.S. at 534–35; *Leebaert*, 332 F.3d at 141.

<sup>99</sup> Michael Salerno, Note, *Reading Is Fundamental: Why the No Child Left Behind Act Necessitates Recognition of a Fundamental Right to Education*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 509, 514 (2007) (quoting Letter from Thomas Jefferson to George Washington (Jan. 4, 1786) (northeast wall of the Jefferson Memorial, Washington, D.C.)).

<sup>100</sup> Bitensky, *supra* note 74, at 588; see *Wisconsin v. Yoder*, 406 U.S. 205, 225 (1972); Salerno, *supra* note 99, at 514.

<sup>101</sup> Bitensky, *supra* note 74, at 627, 629; see 147 CONG. REC. 26,348 (2001) (statement of Sen. Kennedy) (quoting John Adams as saying, "The education of a nation instead of being confined to a few schools and universities for the instruction of the few, must become the national care and expense for the formation of the many.").

<sup>102</sup> Bitensky, *supra* note 74, at 628.

<sup>103</sup> *Id.* at 627, 629; see 147 CONG. REC. 26,348–49 (statement of Sen. Kennedy).

<sup>104</sup> Bitensky, *supra* note 74, at 628; Salerno, *supra* note 99, at 514.

<sup>105</sup> Marla Valdez, Note, *Constitutionality of Educational Land Grants and Mississippi State Property Interests Under Review in Papasan v. Allain*, 28 NAT. RESOURCES J. 199, 203 & n.23, 204 (1988); see also Bitensky, *supra* note 74, at 628–29 (noting that with the exceptions of Texas, Maine, and West Virginia, the federal government endowed every state admitted to the Union after 1802 with lands for public education).

<sup>106</sup> See Robert Vogel, *Sources of the 1889 North Dakota Constitution*, 65 N.D. L. REV. 331, 331 n.1, 332 n.5 (1989) (stating that the Enabling Act, which permitted the residents of

vestment in the budding nation's education system paid off, and, by 1830, the northern states were developing a system for public education.<sup>107</sup> At the end of the nineteenth century, public primary and high schools were in operation across the country, and compulsory schooling laws quickly followed suit.<sup>108</sup> Between 1890 and 1930, enrollments in public high schools doubled each decade.<sup>109</sup>

In 1954, in *Brown v. Board of Education*, Chief Justice Warren, for the Supreme Court, echoed Jefferson's sentiments writing, "Today, education is perhaps the most important function of state and local governments."<sup>110</sup> Nevertheless, in 1973, the Supreme Court ruled in *San Antonio Independent School District v. Rodriguez* that education is not a fundamental constitutional right.<sup>111</sup> The *Rodriguez* plaintiffs challenged a Texas school financing system that resulted in affluent districts receiving close to \$600 per student and more impoverished districts receiving closer to \$350 per student; they argued this system infringed the Fourteenth Amendment's Equal Protection and Due Process Clauses because it deprived the students of their fundamental right to an education.<sup>112</sup> The plaintiffs specifically contended that education, unlike other socially important rights and liberties, was essential to the effective exercise of other fundamental rights guaranteed by the Constitution.<sup>113</sup> This was a "rights combination" argument of the ilk the Court had previously accepted.<sup>114</sup> What makes *Rodriguez* unusual in Supreme Court jurisprudence is that the Court accepted the plaintiffs' arguments but

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the territories of Montana, Washington, and the Dakotas to form constitutions and state governments, included as a prerequisite to statehood ordinances for the establishment of universal public school systems).

<sup>107</sup> Thomas J. Walsh, *Education as a Fundamental Right Under the United States Constitution*, 29 WILLAMETTE L. REV. 279, 289 (1993).

<sup>108</sup> Bitensky, *supra* note 74, at 586.

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

<sup>110</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

<sup>111</sup> 411 U.S. 1, 35 (1973).

<sup>112</sup> *Id.* at 12–13, 17.

<sup>113</sup> *Id.* at 35.

<sup>114</sup> Walsh, *supra* note 107, at 286. In *Griswold v. Connecticut*, 85 U.S. 479 (1965), the Supreme Court accepted a similar "rights combination" argument, finding that there is a fundamental right to privacy located in the combined penumbras of other constitutionally protected rights. Walsh, *supra* note 107, at 286; see *Griswold*, 85 U.S. at 484. These arguments hinge on the notion that, without the *unenumerated* right, the other, enumerated, fundamental rights have no practical effect. See Walsh, *supra* note 107, at 286. Therefore, if the enumerated rights are to have an effect, they must be read to imply, when combined, another fundamental right that is not explicitly listed in the Constitution. See *id.* In the context of *Rodriguez*, the penumbras of the right to vote, the First Amendment's guarantee of free speech, and, Walsh argues, also the Fourth Amendment's warrant requirement combine to imply a fundamental right to education. *Id.* at 286–87.

ruled in the defendant's favor.<sup>115</sup> First, the Court agreed with the plaintiffs that the right to receive information is meaningless when its recipient has not been taught to read or to assimilate and utilize knowledge.<sup>116</sup> Second, the Court concurred that the electoral process depends on an informed electorate, specifically voters with sufficient reading skills and developed thought processes to enable them to cast ballots intelligently.<sup>117</sup>

Consequently, the Court never rejected the nexus between education and the exercise of one's constitutional rights.<sup>118</sup> Rather, it refused in *Rodriguez* to acknowledge an infringement of a fundamental right out of fear and because the plaintiffs alleged only unequal funding, not that an inadequate education was being provided to the students.<sup>119</sup> In particular, the Court was afraid that recognizing education as a fundamental right would open the floodgates to claims to other fundamental rights that, although biologically or socially important, are not explicitly acknowledged in the Constitution.<sup>120</sup> The Court also feared that the judiciary lacked the expertise and familiarity with local problems to interfere with education systems.<sup>121</sup> Despite its fears, the Court ultimately accepted the plaintiffs' arguments and observed that, under a different set of facts, an "identifiable quantum of education" could be a constitutionally protected prerequisite to the exercise of other fundamental rights.<sup>122</sup> The Court did not elaborate on this seemingly discordant observation because the Texas financing system did not appear to deny any educational opportunities.<sup>123</sup> Instead of a denial of a minimally adequate education, the pleadings in *Rodriguez* alleged only a difference in educational funding, which had no statistically sound correlation to the quality of education provided.<sup>124</sup> Nevertheless, the idea that there may be a fundamental right to an identifiable quantum of educa-

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<sup>115</sup> See *Rodriguez*, 411 U.S. at 35–36.

<sup>116</sup> *Id.* at 35.

<sup>117</sup> *Id.* at 36.

<sup>118</sup> *Id.* at 35–36.

<sup>119</sup> Joshua S. Wyner, Note, *Toward a Common Law Theory of Minimal Adequacy in Public Education*, 1992 ANN. SURV. AM. L. 389, 394 (1993); see *Rodriguez*, 411 U.S. at 36–37, 41–42.

<sup>120</sup> See *Rodriguez*, 411 U.S. at 37.

<sup>121</sup> See *id.* at 36, 41–42.

<sup>122</sup> *Id.* at 36; Bitensky, *supra* note 74, at 567–68; Smith, *supra* note 74, at 837–38.

<sup>123</sup> *Rodriguez*, 411 U.S. at 37, 43; Smith, *supra* note 74, at 838.

<sup>124</sup> *Rodriguez*, 411 U.S. at 37, 42–43 (“[O]ne of the major sources of controversy concerns the extent to which there is a demonstrable correlation between educational expenditures and the quality of education.”).

tion lives on as *Rodriguez's* "unheld holding."<sup>125</sup> The Court recognizes this inconsistency, citing *Rodriguez* both for the proposition that there is no fundamental right to education and for the proposition that there may be a fundamental right to education.<sup>126</sup>

In 1982, the Supreme Court affirmed *Rodriguez* in *Plyler v. Doe*, finding that education is not a fundamental right but holding that allegations of educational deprivation may warrant a heightened level of scrutiny anyway.<sup>127</sup> The issue in *Plyler* was whether Texas could, consistent with the Equal Protection Clause, deny undocumented school-age children a free public education.<sup>128</sup> The Court held the Texas law unconstitutional because, by depriving children of an education, it imposed tremendous social costs on the country and the affected children and, therefore, could only be considered rational if it furthered a *substantial* state goal.<sup>129</sup> Thus, the Court applied an unusual form of heightened scrutiny to the Texas law, requiring that it not merely be rationally related to a legitimate state goal but be rationally related to a substantial state goal.<sup>130</sup>

What remains unclear about *Plyler* is whether the Court thought heightened scrutiny was appropriate solely because of the countervailing costs involved in the denial of educational opportunities or because, in addition to denying the plaintiffs educational opportunities,

<sup>125</sup> Bitensky, *supra* note 74, at 566; Matthew A. Brunell, Note, *What Lawrence Brought for "Show and Tell": The Non-Fundamental Liberty Interest in a Minimally Adequate Education*, 25 B.C. THIRD WORLD L.J. 343, 353–54 (2005).

<sup>126</sup> Wyner, *supra* note 119, at 394. Compare *Plyler v. Doe*, 457 U.S. 202, 221 (1982) ("Public education is not a 'right' granted to individuals by the Constitution."), with *Papasan v. Allain*, 478 U.S. 265, 285 (1986) ("[T]his Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right . . .").

<sup>127</sup> *Plyler*, 457 U.S. at 223–24.

<sup>128</sup> *Id.* at 205.

<sup>129</sup> *Id.* at 223–24, 230. For the children, some of the costs described included: the stigma of lifelong illiteracy; a lifetime of personal, professional, and psychological hardship; and an inability to live within America's civic institutions. *Id.* at 222–23. For the nation, the Court believed that denying children an education cost the country the potential benefit of having these children contribute to its economic, cultural, civic, and military progress. See *id.* at 221–23.

<sup>130</sup> *Id.* at 223–24, 230; Bitensky, *supra* note 74, at 568; Wyner, *supra* note 119, at 395. Note that this form of scrutiny is stricter than rational basis review, which requires a showing that the regulation is rationally related to achieving a legitimate state interest, but is not quite intermediate scrutiny, which requires a showing that the regulation is substantially related to achieving an important governmental objective. Compare *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (defining rational basis review), and *United States v. Virginia*, 518 U.S. 515, 533, 569 (1996) (defining intermediate scrutiny), with *Plyler*, 447 U.S. at 223–24 (requiring a showing that the law be rationally related to a substantial state goal).

the Texas law created a “disabling classification”<sup>131</sup> in applying only to undocumented children.<sup>132</sup> Of the three concurring justices, only Justice Marshall identified the reason for the heightened review without equivocation.<sup>133</sup> To Justice Marshall, heightened scrutiny was appropriate for the simple reason that education was a fundamental right.<sup>134</sup> The other two justices, Justice Blackmun and Justice Powell, joined the majority’s opinion in all its ambiguity but wrote separately only to emphasize both the unique importance of education and the unfairness of targeting a particular group for educational privation.<sup>135</sup> The essence of their concurrences is significant, however, as they both argue that intermediate review is appropriate for claims that a legislative action will create an underclass of citizens.<sup>136</sup> Ultimately, the *Plyler*

<sup>131</sup> Smith, *supra* note 74, at 842; see *Plyler*, 457 U.S. at 223–24. In *Plyler*, the Court asserted that the law affected a “discrete class of children not accountable for their disabling status.” 457 U.S. at 223. This statement hints at finding that undocumented immigrant children are a suspect class, which would then require heightened review, but the Court never decided that issue. See *id.*; Salerno, *supra* note 99, at 523–24 (noting that *Plyler* can be read to hold that a basic education must be preserved for all children or to read that illegal immigrant children are a class that, like classifications by gender, should be afforded intermediate scrutiny). At most, the Court suggested that personal culpability may have a role to play in determining what is and is not a suspect classification. See *Plyler*, 457 U.S. at 223 (stating that when a group violates federal law, the fact of that violation is not constitutionally irrelevant to a suspect-class determination). Chief Justice Burger, in his dissent, railed against this suggestion that the Equal Protection Clause precludes legislators from classifying among persons on the basis of characteristics over which those individuals lack control. *Id.* at 244–45 (Burger, C.J., dissenting).

<sup>132</sup> See *Plyler*, 457 U.S. at 244 (Burger, C.J., dissenting) (arguing that the majority had engaged in a “quasi-suspect-class and quasi-fundamental-rights analysis”); Bitensky, *supra* note 74, at 568 (“[I]f the *Rodriguez* Court opened the door to a positive right to education, the *Plyler* majority may have momentarily straddled the threshold.”); Smith, *supra* note 74, at 842 (“The question, then, is whether one construes the holding of *Plyler* narrowly on its facts or broadly as signaling the Court’s shift towards heightened scrutiny regarding education.”).

<sup>133</sup> Compare *Plyler*, 457 U.S. at 230 (Marshall, J., concurring) (stating that education is a fundamental right and therefore implying that allegations of its denial require the application of strict scrutiny), with *id.* at 234 (Blackmun, J., concurring) (stating that allegations of the complete denial of education warrant heightened scrutiny because it is the analogue of the denial of a right to vote and because its victims are at an insuperable disadvantage), and *id.* at 239 (Powell, J., concurring) (stating that allegations of the denial of education warrant heightened scrutiny because the denial of education threatens to create a permanent underclass).

<sup>134</sup> *Id.* at 230 (Marshall, J., concurring).

<sup>135</sup> See *id.* at 234–36 (Blackmun, J., concurring); *id.* at 236–39 (Powell, J., concurring).

<sup>136</sup> See *id.* at 234 (Blackmun, J., concurring) (“Children denied an education are placed at a permanent and insurmountable competitive disadvantage . . . [a]nd when those children are members of an identifiable group, that group—through the State’s action—will have been converted into a discrete underclass.”); *id.* at 238–39 (Powell, J., concurring) (“These children thus have been singled out for a lifelong penalty and stigma.

majority's tergiversation has led the Court to interpret the decision as a once-in-a-lifetime confluence of a quasi-suspect class determined by a trait for which the class's members are not responsible and a quasi-fundamental right.<sup>137</sup> Its authors, however, never intended *Plyler* to be so narrowly interpreted as to be effectively irrelevant.<sup>138</sup> Consequently, when the Supreme Court first announced that *Plyler* had only negligible value in educational rights cases, most of the justices on the Court who had participated in *Plyler* dissented.<sup>139</sup>

In 1986, the Supreme Court faced another suit challenging a disparity in financial support for a state's public schools in *Papasas v. Allain*.<sup>140</sup> Drawing on its approach in *Rodriguez*, the Court held that education is not a fundamental right, but it explicitly noted that the Court "has not yet definitively settled the question[] whether a *minimally adequate* education is a fundamental right . . ."<sup>141</sup> The Court also stated that this particular lawsuit did not require the resolution of the question.<sup>142</sup> Specifically, the Court held that the petitioners had failed to allege that the children were denied a minimally adequate education because, so far as it could tell, the schoolchildren in the under-funded counties received instruction in reading, writing, and the educational basics.<sup>143</sup>

*Papasas* also limited the reach of *Rodriguez's* deference to local control, stating that *Rodriguez* did not stand for the proposition that *all*

A legislative classification that threatens the creation of an underclass of future citizens and residents cannot be reconciled with one of the fundamental purposes of the Fourteenth Amendment.").

<sup>137</sup> See *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 459 (1988) (refusing to extend *Plyler* beyond its "unique circumstances" or allow it to govern a case in which a child was allowed to attend public school but her parents could not pay for her bus transportation to the school); *Brian B. v. Pa. Dep't of Educ.*, 230 F.3d 582, 586 (3d Cir. 2000) (holding, in a challenge to a law mandating that youths convicted and sentenced as adults receive only the education afforded expelled students, that heightened scrutiny did not apply because the burden on education did not disadvantage a discrete class of innocent children).

<sup>138</sup> See *Kadrmas*, 487 U.S. at 470–71 (Marshall, J., dissenting); *id.* at 472–73 (Stevens, J., dissenting). Justice Brennan, the author of the court's opinion in *Plyler*, and Justices Marshall, Stevens, and Blackmun, who were among the majority in *Plyler*, dissented from the Court's refusal in *Kadrmas* to acknowledge *Plyler's* relevance to the review of mandatory school bus fees. See *id.* at 470–71 (Marshall, J., dissenting); *id.* at 472–73 (Stevens, J., dissenting); *Plyler*, 457 U.S. 202.

<sup>139</sup> See *Kadrmas*, 487 U.S. at 466 (Marshall, J., dissenting); *id.* at 472 (Stevens, J., dissenting). Of the seven justices who heard *Plyler* and were still on the Court when *Kadrmas* was decided, four dissented, including Justice Brennan, the author of the *Plyler* opinion. See *id.* at 466 (Marshall, J., dissenting).

<sup>140</sup> 478 U.S. at 274.

<sup>141</sup> *Id.* at 285 (emphasis added).

<sup>142</sup> *Id.* at 286.

<sup>143</sup> *Id.*

school funding schemes resulting in financial disparities between schools are automatically constitutional.<sup>144</sup> Instead, the Court found that *Rodriguez* only controlled funding disparities based on differing local wealth because the disparities may be a necessary adjunct of allowing meaningful local control over school funding.<sup>145</sup> *Papasan*, however, involved a disparity resulting from the state's distribution of federal assets that the state held in trust for the benefit of its public schools, rather than a disparity resulting merely from the natural variations in local wealth around the state.<sup>146</sup> Having distinguished the issues in *Papasan* from those in *Plyler*—where the plaintiffs did plead a deprivation of a minimally adequate education—and *Rodriguez* (where the disparity was the result of variations in local wealth), the Court remanded the case for consideration of whether assets the federal government granted to the state for the use of state schools could be distributed unequally among school districts by the state.<sup>147</sup> In effect the Court found that some disparities in public education are *not* related to local control, and, in these cases, the Court has the expertise necessary to review their constitutionality.<sup>148</sup> The parties in *Papasan* ultimately settled, stipulating in a consent judgment that the disparities in school funding violated the plaintiffs' equal protection rights secured by the Fourteenth Amendment.<sup>149</sup>

The most recent Supreme Court case to consider whether education is a fundamental right is *Kadrmas v. Dickinson Public Schools*, decided in 1988.<sup>150</sup> The plaintiffs in *Kadrmas* challenged the defendant school district's decision to charge each child using the district's door-to-door bus service.<sup>151</sup> The plaintiffs were a family of five who lived sixteen miles from their eldest child's school and whose annual income was near the

<sup>144</sup> *Id.* at 287.

<sup>145</sup> *Papasan*, 478 U.S. at 288.

<sup>146</sup> *See id.* at 287–88.

<sup>147</sup> *Id.* at 289.

<sup>148</sup> *See id.* at 286 (hinting that the judiciary should review allegations of a denial of a minimally adequate education when made); *id.* at 289 (writing that the judiciary must decide whether the variations in school benefits are rationally related to a legitimate state interest). This restrains, if not undermines, the suggestion in *Rodriguez* that the judiciary is ill-equipped to review local education decisions. *Compare id.* at 286, 289, with *Rodriguez*, 411 U.S. at 36, 41–42.

<sup>149</sup> Preston C. Green & Bruce D. Baker, *Circumventing Rodriguez: Can Plaintiffs Use the Equal Protection Clause to Challenge School Finance Disparities Caused by Inequitable State Distribution Policies?*, 7 TEX. F. ON C.L. & C.R. 141, 151 & n.75 (2002).

<sup>150</sup> 487 U.S. at 458.

<sup>151</sup> *Id.* at 453–55.

officially defined poverty level.<sup>152</sup> The plaintiffs sought to enjoin the defendant school district from collecting any fee for bus service and contended that it unconstitutionally deprived indigent children of access to a basic education.<sup>153</sup> In the meantime, the eldest child continued to attend school although she was denied access to the school bus.<sup>154</sup> Writing for the Court, Justice O'Connor reiterated that education is not a fundamental right.<sup>155</sup> In addition, the Court said it had "not extended [*Plyler*] beyond the 'unique circumstances' that provoked [it]," and therefore chose not to apply heightened scrutiny.<sup>156</sup> Justice O'Connor then distinguished *Kadrmas* from *Plyler* on two counts: first, unlike the undocumented children in *Plyler*, the *Kadrmas* child was not punished for the illegal conduct of her parents but rather for their refusal to pay a user fee; second, the user fee would not, in the Court's opinion, promote the creation of a subclass of illiterates and add to the problems associated with unemployment, welfare, and crime.<sup>157</sup>

The precedential value of *Kadrmas* is uncertain.<sup>158</sup> One reason is that the case can be framed as either an equal access to education case or a right to transportation case.<sup>159</sup> Whether Justice O'Connor's conclusions are dicta or significant conclusions depends upon how the case is characterized.<sup>160</sup> More importantly, the case did not address the question of whether children have a fundamental right to a minimally adequate education.<sup>161</sup> Therefore, the fundamental right to a "minimally adequate" or an "identifiable quantum" of education recognized by *Papasan* and *Rodriguez* remains undiminished.<sup>162</sup>

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<sup>152</sup> *Id.* at 454–55.

<sup>153</sup> *Id.* at 458.

<sup>154</sup> *Id.*

<sup>155</sup> *Kadrmas*, 487 U.S. at 458.

<sup>156</sup> *Id.* at 459. It is unclear what supports this statement: the Court cites no case, and *Papasan* does not justify it. See *id.*; Stuart Biegel, *Reassessing the Applicability of Fundamental Rights Analysis: The Fourteenth Amendment and the Shaping of Educational Policy After Kadrmas v. Dickinson Public Schools*, 74 CORNELL L. REV. 1078, 1098 (1989); see also *Papasan*, 478 U.S. at 285 (stating that *Plyler* supports the theory that a minimally adequate education may be a fundamental right). Instead, the Court appears to rely solely on patched together quotes from Justice Powell's concurrence and Chief Justice Burger's dissent in *Plyler*. See *Kadrmas*, 487 U.S. at 459.

<sup>157</sup> *Kadrmas*, 487 U.S. at 459.

<sup>158</sup> See Smith, *supra* note 74, at 842.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> Bitensky, *supra* note 74, at 572; Kristen Safier, Note, *The Question of a Fundamental Right to a Minimally Adequate Education*, 69 U. CIN. L. REV. 993, 1006 (2001); Smith, *supra* note 74, at 842.

<sup>162</sup> Bitensky, *supra* note 74, at 573; see Safier, *supra* note 161, at 1006.

In the wake of these four cases, all of which avoided deciding whether a fundamental right to a minimally adequate education exists, one commentator has suggested that the Court will never decide the issue.<sup>163</sup> Few plaintiffs have pleaded the facts necessary to support an allegation of a school depriving a student of a minimally adequate education.<sup>164</sup> In *Craig v. Selma City School Board*, decided by the U.S. District Court for the Southern District of Alabama in 1992, however, the plaintiffs did plead the necessary facts: the court held that the allegations that a principal had refused to permit expelled students to send a representative to retrieve their schoolbooks presented a possible substantive due process violation because there was no legitimate governmental end in depriving the students of their books.<sup>165</sup>

Additionally, in 1993, in *Donnell C. v. Illinois Board of Education*, the U.S. District Court for the Northern District of Illinois found that students in a correctional facility pleaded a denial of a minimally adequate education when they alleged that they were not being taught courses other than reading and math, did not have textbooks or other instructional materials, and were not given learning disability assessments.<sup>166</sup> The court wrote that these were “serious factual allegations of a lack of instruction on even the educational basics” and therefore stated a claim under the substantive component of the Due Process Clause.<sup>167</sup> *Donnell C.* has since been cited for the proposition that juveniles in correctional facilities have a federal constitutional right to an adequate educational program.<sup>168</sup> It therefore suggests that a heightened level of scrutiny should be applied to cases where the plaintiffs allege a denial of a minimally adequate education.<sup>169</sup>

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<sup>163</sup> Gregory E. Maggs, *Innovation in Constitutional Law: The Right to Education and the Tricks of the Trade*, 86 Nw. U. L. REV. 1038, 1042 (1992). Maggs suggests that the Court will never decide the issue because so many state constitutions guarantee a right to a free education that a federal lawsuit may never be worthwhile. *Id.* Additionally, he suggests that petitioners may never have a set of facts that would entitle them to challenge an education system on substantive due process, rather than equal protection, grounds. *Id.* at 1042–43.

<sup>164</sup> *E.g.*, *Donnell C. v. Ill. State Bd. of Educ.*, 829 F. Supp. 1016, 1018 (N.D. Ill. 1993); *Craig v. Selma City Sch. Bd.*, 801 F. Supp. 585, 596 (S.D. Ala. 1992); *see also* Maggs, *supra* note 163, at 1042–43 (noting that plaintiffs rarely have a set of facts on which to argue that an education is not minimally adequate and, without those facts, the Court will continue to evade the issue).

<sup>165</sup> 801 F. Supp. at 596. The *Craig* court, therefore, implied that rational basis review should apply to educational deprivations. *See id.*

<sup>166</sup> 829 F. Supp. at 1018.

<sup>167</sup> *Id.*

<sup>168</sup> *State ex rel.* S.D., 832 So. 2d 415, 434 (La. Ct. App. 2002).

<sup>169</sup> *See* 829 F. Supp. at 1018.

## IV. CHALLENGES TO ALTERNATIVE EDUCATION PROGRAMS

This Note has described two theories of fundamental rights that are potentially infringed by the operation of most AEPs: parents' right to avoid state abridgment of their children's education and students' right to a minimally adequate education.<sup>170</sup> This Part examines legal challenges to AEPs as violations of the fundamental rights discussed above.<sup>171</sup>

The landmark case challenging a disciplinary transfer to an AEP is the 1997 decision of the U.S. Court of Appeals for the Fifth Circuit in *Nevares v. San Marcos Consolidated Independent School District*.<sup>172</sup> As discussed above, the San Marcos High School principal transferred Timothy Nevares to an AEP after learning that the police had detained the student for an alleged aggravated assault.<sup>173</sup> Timothy and his father informed the principal that Timothy had acted in self-defense and then sued for a declaratory judgment on the unconstitutionality of the transfer statute.<sup>174</sup> The court of appeals, noting that Timothy was merely transferred from one school program to another with stricter discipline, held that Timothy was not denied access to public education.<sup>175</sup> Because *Nevares* was a procedural due process, rather than a substantive due process, challenge to the Texas AEP transfer law, the court did not consider whether the transfer satisfied the fundamental educational rights of Timothy and his parents.<sup>176</sup>

Like *Nevares*, the legal challenges to AEP transfers have focused on procedural due process issues, challenging the procedural safeguards against wrongful transfers, rather than challenging the inadequacy of the education provided at AEPs.<sup>177</sup> Consequently, the courts deciding

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<sup>170</sup> See *supra* notes 69–169 and accompanying text.

<sup>171</sup> See *infra* notes 172–180 and accompanying text.

<sup>172</sup> 111 F.3d 25, 26 (5th Cir. 1997).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* To support its reasoning, the court relied heavily on *Arundar v. DeKalb County School District*, 620 F.2d 493 (5th Cir. 1980), which found no protected property interest was implicated in a school's refusal to offer a student certain courses of study. See *Nevares*, 111 F.3d at 27; *Arundar*, 620 F.2d at 494.

<sup>176</sup> See *Nevares*, 111 F.3d at 26–27. It is also worth noting that, as in *Kadrmas*, the alleged harm never materialized in *Nevares*: just as the bus fee never, ultimately, prevented Sarita Kadrmas from getting an education, the school never, ultimately, transferred Timothy Nevares to an AEP. Compare *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 458 (1988), with *Nevares*, 111 F.3d at 26.

<sup>177</sup> E.g., *Zamora v. Pomeroy*, 639 F.2d 662, 668 (10th Cir. 1981) (finding no due process violation in connection with a student's transfer to an AEP after narcotics were discovered in the student's locker); *Everett v. Marcuse*, 426 F. Supp. 397, 399–400 (E.D. Pa. 1977) (de-

these cases have always been able to assume that AEPs amount to nothing more than a different course offering or a different public school, neither of which a student has a right to choose.<sup>178</sup> The federal courts have yet to confront an AEP transfer as a denial of either a minimally adequate education or parents' right to avoid state abridgment of their children's education.<sup>179</sup> This litigation strategy ignores the central complaint of AEP critics that AEPs effectively warehouse students rather than provide them with the education for which their parents

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termining, so as to enter an order in addition to a consent decree, that some kind of due process procedures are constitutionally required in disciplinary AEP transfers).

<sup>178</sup> E.g., *Neavares*, 111 F.3d at 26; cf. *Leebaert v. Harrington*, 332 F.3d 134, 141 (2d Cir. 2003) (denying parent's right to dictate curriculum). Note that just because a *student* has no right to an education at a particular school does not mean that *parents* do not have a right for their children to receive an education at the school in which they were enrolled. See *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206 (9th Cir. 2005); *Seamons v. Snow*, 84 F.3d 1226, 1234 (10th Cir. 1996); *Doe v. Bagan*, 41 F.3d 571, 576 n.5 (10th Cir. 1994); *C.B. v. Driscoll*, 82 F.3d 383, 389 n.5 (11th Cir. 1981); *Arundar*, 620 F.2d at 494. *Neavares* relies on *Seamons* for the proposition that a student has no constitutional right to be educated at a particular school, but *Seamons* involved a plaintiff who voluntarily transferred out of the school at which his parents had originally enrolled him. Compare *Neavares*, 111 F.3d at 27, with *Seamons*, 84 F.3d at 1234. Thus, unlike the AEP cases, the school took no affirmative action in that case to remove him from the school against his parents' wishes. See *Seamons*, 84 F.3d at 1234. Similarly, *Bagan*, which *Driscoll* cites for the proposition that a student has no constitutional right to choose a particular public school, also involved a *parent's* desire to transfer her child from a school, rather than a *school's*. Compare *Driscoll*, 82 F.3d at 389 n.5, with *Bagan*, 41 F.3d at 576. The school rejected the mother's transfer request because the new school could not accommodate the student's special education needs. *Bagan*, 41 F.3d at 576 n.5. Again, unlike the AEP cases, the school in *Bagan* took no affirmative action to remove the student from the school against his parents' wishes. See *id.* at 576. Underlying the proposition that a student has no constitutional right to be educated at a particular school is the assumption that all schools in a district are approximately equal in terms of the educational opportunities they offer. *Everett*, 426 F. Supp. at 400. In other words, administrative transfers (or the refusal to comply with a requested transfer) are permissible because the state is not abridging the educational opportunities afforded to the student. See *id.* When the transfer does significantly abridge those opportunities, however, parents' fundamental right against state abridgement of their child's educational opportunities comes into play. See *id.* at 401, 403 (writing that when the state transfers a student to an AEP and thereby restricts that student's educational opportunities, the parent must be provided notice and the right for a prompt, informal hearing so that the decision to transfer is subject to the parents' right to guide their children's education).

<sup>179</sup> E.g., *Neavares*, 111 F.3d at 26; *Zamora*, 639 F.2d at 668, 670; *Everett*, 426 F. Supp. at 399. In *Driscoll*, however, the plaintiff did allege a substantive due process violation, but the U.S. Court of Appeals for the Eleventh Circuit foreclosed it in light of *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), a case foreclosing pretextually terminated employees from basing causes of action on substantive due process violations. Compare *Driscoll*, 82 F.3d at 389, with *McKinney*, 20 F.3d at 1560–61. Arguably, the Eleventh Circuit wrongly extended a principle of its employment law to an education case, ignoring Supreme Court precedent to the contrary. Compare *Driscoll*, 82 F.3d at 389, with *McKinney*, 20 F.3d at 1560–61, and *supra* notes 110–169 and accompanying text.

enrolled them in school.<sup>180</sup> Part V of this Note advances potentially viable legal challenges to AEPs that would address the programs' infringements of students' and parents' fundamental rights under the Fourteenth Amendment.<sup>181</sup>

## V. POTENTIAL SUBSTANTIVE DUE PROCESS CHALLENGES TO ALTERNATIVE EDUCATION PROGRAMS

There are two untested substantive due process challenges to the current system of AEPs.<sup>182</sup> First, AEPs infringe parents' fundamental right against state abridgement of their ability to guide their child's education.<sup>183</sup> Second, they deny a student's fundamental right to a minimally adequate education.<sup>184</sup> Section A of this Part examines the viability of the first, and Section B examines the second.<sup>185</sup> Section C critiques the "compelling" interests guiding the current operation of most AEPs and argues that AEPs are not narrowly tailored to advance state goals.<sup>186</sup> Section D recommends alternative discipline policies and AEP models that are closely tailored to the alleged goals of the AEP boom.<sup>187</sup>

### A. Parents' Fundamental Right and AEPs

As demonstrated in the *Meyer*, *Pierce*, and *Yoder* line of cases, parents have a fundamental right to direct the education of their children without significant state intervention.<sup>188</sup> In 2003, in *Leebaert v. Harrington*, the U.S. Court of Appeals for the Second Circuit characterized this right as a negative right: parents cannot claim a fundamental right to dictate which classes and mandatory school activities their children will and will not attend.<sup>189</sup> Rather, the government can-

<sup>180</sup> Wren, *supra* note 39, at 349; see D'Agata, *supra* note 22, at 641.

<sup>181</sup> See *infra* notes 182–319 and accompanying text.

<sup>182</sup> See *supra* notes 178–179 and accompanying text.

<sup>183</sup> See *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923); Bitensky, *supra* note 74, at 563 n.86; Smith, *supra* note 74, at 834.

<sup>184</sup> See *infra* notes 275–300 and accompanying text.

<sup>185</sup> See *infra* notes 188–270 and accompanying text.

<sup>186</sup> See *infra* notes 271–300 and accompanying text.

<sup>187</sup> See *infra* notes 301–319 and accompanying text.

<sup>188</sup> *Woodhouse*, *supra* note 81, at 1091, 1112; see *Wisconsin v. Yoder*, 406 U.S. 205, 214, 232–33 (1972); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer*, 262 U.S. at 400–01.

<sup>189</sup> 332 F.3d 134, 141 (2d Cir. 2003).

not strip parents of educational options for their children.<sup>190</sup> Additionally, the Courts of Appeals for the Third, Sixth, and Ninth Circuits have each acknowledged that parents may choose to send their child to a particular school.<sup>191</sup>

Nevertheless, when a school assigns a student to an AEP, the government simultaneously abridges the educational options available to a student and strips parents of their right to decide which school their child should attend.<sup>192</sup> Because students can be transferred to an AEP for actions as harmless as quietly failing or being homeless, neither the students nor their parents have necessarily waived their liberty interest in an education.<sup>193</sup> The state, through its schools, can nevertheless unilaterally remove students to AEPs with or without consulting the student's parents and, although the parents can appeal the decision through administrative channels, the decision remains in the hands of the state.<sup>194</sup>

In unilaterally transferring students to AEPs, the government contracts the realm of knowledge available to students.<sup>195</sup> The states substitute programs carefully integrated with state standards for programs that may deviate so significantly from those standards that the student may be unable to earn a diploma in the usual number of years.<sup>196</sup> The effect can be analogized to that of the law struck down by the U.S. Supreme Court in 1923 in *Meyer v. Nebraska*.<sup>197</sup> The law prevented students below ninth grade from learning a foreign language from an "educator."<sup>198</sup> If the students' parents knew a foreign

<sup>190</sup> See *Pierce*, 268 U.S. at 534–35; *Herndon v. Chapel-Hill Carrboro City Bd. of Educ.*, 89 F.3d 174, 178 (4th Cir. 1996); *Bitensky*, *supra* note 74, at 564 n.86; *Smith*, *supra* note 74, at 834.

<sup>191</sup> *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206 (9th Cir. 2005); see *C.N. v. Ridge-wood Bd. of Educ.*, 430 F.3d 159, 185–86 n.26 (3d Cir. 2005); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395 (6th Cir. 2005).

<sup>192</sup> See Brief of Appellee, *supra* note 1, at 10–11; *Tillman*, *supra* note 55, at 223; see also *Fields*, 427 F.3d at 1206 (stating that parents may decide whether to send their children to public school).

<sup>193</sup> *E.g.*, CAL. EDUC. CODE § 1981 (West 2002); see *KLEINER ET AL.*, *supra* note 19, at iii; see also *Goss v. Lopez*, 419 U.S. 565, 576, 582 (1975) (students whose presence poses a "continuing danger" to persons, property, or the academic process may be immediately removed from school despite their liberty and property interests in receiving a public education).

<sup>194</sup> See, *e.g.*, *Nevares v. San Marcos Consol. Indep. Sch. Dist.*, 111 F.3d 25, 26 (5th Cir. 1997).

<sup>195</sup> See *LEHR*, *supra* note 39, at 15; *Tillman*, *supra* note 55, at 223.

<sup>196</sup> See *LEHR*, *supra* note 39, at 15; *Tillman*, *supra* note 55, at 223.

<sup>197</sup> 262 U.S. at 401–03.

<sup>198</sup> See *id.* at 401.

language, they could teach it to their children, but the students could not learn the language in school.<sup>199</sup> Because foreign language is a useful subject, however, the Court ruled that the state could not abridge its availability to parents looking for a school that would instruct their children in a foreign language before they passed eighth grade.<sup>200</sup> Nevertheless, like the state law in *Meyer*, many AEPs effectively ban their students from receiving instruction in a curriculum aligned with state standards.<sup>201</sup> Like the parents in *Meyer*, who made deliberate choices about the education of their children, parents today choose to enroll their children in particular public schools believing that those schools will provide their children with at least a minimally adequate education.<sup>202</sup> Therefore, in an AEP transfer, the state can undermine parental control by unilaterally restricting a student's educational opportunities in direct violation of parents' right to decide to offer a broader swath of educational opportunities to their children.<sup>203</sup>

Moreover, banishing a student to an AEP removes the student from a school that participates in state accountability testing to a school that does not.<sup>204</sup> This substitution replaces a school where the parents can monitor both the school and the student's progress relative to state and national standards with a school where this comparison is no longer possible.<sup>205</sup> Consequently, the state blindfolds the child's principal educational advocates, thus preventing parents from learning about inadequacies in their child's education and restraining their ability to supplement their child's education accordingly.<sup>206</sup> The

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<sup>199</sup> See *id.* at 400–01.

<sup>200</sup> See *id.*; see also *Herndon*, 89 F.3d at 178 (describing *Meyer* as standing for the proposition that it is within the liberty component of the Fourteenth Amendment for parents to seek foreign language instruction for their children).

<sup>201</sup> See LEHR, *supra* note 39, at 15.

<sup>202</sup> See *Meyer*, 262 U.S. at 400–01; see also *Pierce*, 268 U.S. at 534–35; *C.N.*, 430 F.3d at 185 n.26; *Everett v. Marcase*, 426 F. Supp. 397, 400 (E.D. Pa. 1977) (describing the assumption that all schools provide a basic education).

<sup>203</sup> See *Meyer*, 262 U.S. at 401; *Tillman*, *supra* note 55, at 223.

<sup>204</sup> See *supra* note 67.

<sup>205</sup> Compare HILL, *supra* note 67, at 22, and LEHR, *supra* note 39, at 16, with 20 U.S.C. §§ 6301, 6311(h) (Supp. V 2005). Under the statement of purpose for NCLB, a school's participation in accountability systems and standards-based assessments should enable parents and other stakeholders in a student's education to measure that child's performance relative to common expectations of student achievement. See 20 U.S.C. § 6301. In line with this, NCLB mandates that states make school report cards available in an understandable format to parents and the public. *Id.* § 6311(h).

<sup>206</sup> See 20 U.S.C. §§ 6301, 6311(h); *Troxel v. Granville*, 530 U.S. 57, 78–80 (Souter, J., concurring); see also 34 C.F.R. § 300.300 (2008) (describing the role of the parent as the child's main educational advocate in special education and requiring schools to obtain

Supreme Court has made clear that where a state's affirmative act restrains an individual's freedom to act on his or her own behalf, Due Process Clause protections apply.<sup>207</sup>

Finally, in addition to contracting the realm of knowledge available to a student and blindfolding parents to that reality, transfers to AEPs strip parents of their fundamental right to choose the school that their child attends.<sup>208</sup> In making their original decision about where to educate their child, parents consider a host of factors, including their child's strengths and weaknesses, their capacity to pay for and transport their child to and from a school, a school's reputation, and its success relative to state and national standards.<sup>209</sup> Many families go so far as to base their decision about where to buy a house on their decision about which schools they want their children to attend.<sup>210</sup> The Constitution protects the parents' right to make this decision: *Pierce v. Society of Sisters*, decided by the Supreme Court in 1925, recognized that parents have the right to choose who will educate and socialize their children.<sup>211</sup> The parents' right to choose a school for their children is so important that it *prevails* over a school's well-reasoned judgment about the character of students' teachers.<sup>212</sup> Consequently, when a school transfers a child to an AEP with a curriculum the parent distinctly did not choose for that child, the state infringes

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parental consent before evaluating a child for disabilities and again before providing special education services).

<sup>207</sup> See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989); *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976).

<sup>208</sup> See *Troxel*, 530 U.S. at 78-80 (Souter, J., concurring); *Pierce*, 268 U.S. at 534-35; *C.N.*, 430 F.3d at 185 n.26; *Fields*, 427 F.3d at 1206; *Blau*, 401 F.3d at 395.

<sup>209</sup> See, e.g., Jerry Cheslow, *A Town Where Water Lovers Abound*, N.Y. TIMES, Oct. 6, 2002, at J5 (listing as selling points for homes in Monmouth Beach, New Jersey the ability of elementary school students to walk to school and go home for lunch; the school's new media center, music room, and computer lab; and the high percentage of teachers with master's degrees); John Rather, *Great Site for Schools, Parks and Trains*, N.Y. TIMES, Sept. 9, 2002, at J5 (listing as selling points for homes in Great Neck, New York, the school district's per pupil spending, its students' success in a variety of competitions, the schools' higher than average SAT scores, and the option for Great Neck high school students to spend a semester working or studying in a field of interest to them).

<sup>210</sup> See *supra* note 208.

<sup>211</sup> *Troxel*, 530 U.S. at 78-80 (Souter, J., concurring); *Fields*, 427 F.3d at 1206; see *Pierce*, 268 U.S. at 534-35.

<sup>212</sup> *Troxel*, 530 U.S. at 78-80 (Souter, J., concurring); see *Runyon v. McCrary*, 427 U.S. 160, 177 (1976) (stating that *Yoder* held that the state cannot preempt the educational process by requiring children to attend certain schools); *Pierce*, 268 U.S. at 534-35; *Meyer*, 262 U.S. at 400.

the parents' fundamental right to make all of the long-term educational decisions for their children.<sup>213</sup>

A major concern with recognizing a public school's action as an infringement of a parent's fundamental right is that parents, rather than the school, will dictate each student's curricula.<sup>214</sup> Recognizing the constitutional invalidity of AEPs, however, would not set this dangerous precedent.<sup>215</sup> Unlike *Leebaert*, where ruling in favor of the parents would have permitted parents to tell the state what to teach their children, ruling in favor of the parents in an AEP case would not impose impracticable burdens on the state.<sup>216</sup> Instead, finding in favor of the parents in an AEP case would merely prevent states from unilaterally abridging the educational opportunities available to a child without giving parents the opportunity to evaluate the education subsequently provided to their child.<sup>217</sup> Recognizing that an AEP infringes parents' substantive due process rights will not force those schools to develop a new curriculum for each student whose parents disagree with the one provided.<sup>218</sup> Consequently, the policy concerns that occasionally militate against parental control of a student's education would not apply.<sup>219</sup>

### B. Student's Fundamental Right and AEPs

A student's right to receive a minimally adequate education is of a fundamental nature.<sup>220</sup> Courts have typically been hesitant to recognize this right because of concerns that it would hinder local legislative control over schools and place it in the hands of the federal judiciary.<sup>221</sup>

<sup>213</sup> See *Troxel*, 268 U.S. at 78–80 (Souter, J., concurring); *Yoder*, 406 U.S. at 213; *C.N.*, 430 F.3d at 185 n.26; *Fields*, 427 F.3d at 1205–06.

<sup>214</sup> See *Yoder*, 406 U.S. at 213–14; *Fields*, 427 F.3d at 1206; *Brown v. Hot, Sexy & Safer Prods.*, 68 F.3d 525, 533–34 (1st Cir. 1995).

<sup>215</sup> See *Leebaert*, 332 F.3d at 141; *Brown*, 427 F.3d at 533–34.

<sup>216</sup> See *Leebaert*, 332 F.3d at 141; *Brown*, 427 F.3d at 533–34.

<sup>217</sup> See *supra* note 67 and accompanying text.

<sup>218</sup> *C.f.* *Brown*, 68 F.3d at 534 (finding the Constitution does not impose a burden on states to cater a curriculum for each student whose parents have moral disagreements with the school's choice of subject matter).

<sup>219</sup> See *Leebaert*, 332 F.3d at 141; *Brown*, 68 F.3d at 534.

<sup>220</sup> See *Papasan v. Allain*, 478 U.S. 265, 274 (1986) (reiterating that a minimally adequate education may be a fundamental right); *Plyler v. Doe*, 457 U.S. 202, 223, 230 (1982) (holding that the denial of a basic education requires a heightened level of scrutiny); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36 (1973) (stating that an "identifiable quantum of education" may be constitutionally required); *Donnell C. v. Ill. State Bd. of Educ.*, 829 F. Supp. 1016, 1018 (N.D. Ill. 1993) (finding that the plaintiffs have a claim for a denial of a minimally adequate education under the substantive component of the Due Process Clause).

<sup>221</sup> *Salerno*, *supra* note 99, at 510; see, e.g., *Rodriguez*, 411 U.S. at 40–41.

Whatever legitimacy this concern may have had in 1973, when the Supreme Court held in *San Antonio Independent School District v. Rodriguez* that there is no fundamental right to education, for decades now state education systems have not been under purely local control—which is especially true in the wake of NCLB.<sup>222</sup> Moreover, with the creation of state standards for grade advancement and graduation, states now define quite clearly what a minimally adequate education is, and the judiciary no longer would have to undertake a state legislature's role to enforce a student's right to receive a "minimally adequate" education.<sup>223</sup>

AEPs have not generally integrated these state standards into their curricula, nor are they held accountable for doing so.<sup>224</sup> In addition, the few standardized state test scores available for AEPs indicate that the students are not receiving a minimally adequate education.<sup>225</sup> In 2004 at an alternative school in Springfield, Massachusetts, one hundred percent of the third graders were not proficient in reading, one hundred percent of the sixth graders were not proficient in math, and one hundred percent of the tenth graders were not proficient in English.<sup>226</sup> These test scores were far from unusual: alternative schools across the state reported similar scores in 2003, 2004, and 2005.<sup>227</sup> Since the release of these test scores, Massachusetts changed its policy so that alternative schools no longer need to report their abysmal performance.<sup>228</sup> Nevertheless, these test scores indicate that the education at AEPs is not just inferior to the education at regular public schools but shockingly substandard, and they raise the question: if no student at these schools is proficient in all three educational basics (reading, writing, and math), do these students truly have access to a minimally adequate education?<sup>229</sup>

<sup>222</sup> Salerno, *supra* note 99, at 511–12, 538–39. Unlike the year when *Rodriguez* was decided, states are now so dependent on the federal government to finance their public education systems that the concept of the "local nature" of education is absurd. *Id.* at 538.

<sup>223</sup> See 20 U.S.C. § 6311 (2006) (requiring that states develop rigorous standards that meet certain federal specifications); see, e.g., ALASKA ADMIN. CODE tit. 4, § 04.140 (2008); 005-000-006 WYO. CODE R. § 7 (Weil 2008).

<sup>224</sup> ARON, *supra* note 68, at 11; LEHR, *supra* note 39, at 15, 21; HASAZI ET AL., *supra* note 68, at 14; MORGAN, *supra* note 20, at i.

<sup>225</sup> See, e.g., Memorandum from Katherine Lipper, Ctr. for Law & Educ., to Kathleen Boundy 25 (Aug. 11, 2006) [hereinafter Ctr. for Law & Educ. Memo] (on file with author).

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 25–27.

<sup>228</sup> Mass. Dep't of Elementary & Secondary Educ., *supra* note 67; see *supra* note 67 and accompanying text.

<sup>229</sup> See Salerno, *supra* note 99, at 534 n.182 (comparing two state supreme courts' definitions of a basic education under their state constitutions); Smith, *supra* note 74, at 857;

Despite these concerns, some commentators disapprove of relying on the Fourteenth Amendment to alter a current school policy or procedure.<sup>230</sup> These commentators can draw hope from the fact that although U.S. district courts have acknowledged a substantive due process right to receive a minimally adequate education, the Supreme Court has yet to formally classify it as fundamental.<sup>231</sup> Additionally, the Court worries that recognizing a “new” fundamental right is dangerous because there are only scarce and open-ended guideposts for responsible decision-making in that area, leaving cases vulnerable to determination by reference to policy preferences and personal values.<sup>232</sup> Despite these concerns, a child’s interest in receiving a minimally adequate education does satisfy the test, as described by the Supreme in 1997 in *Washington v. Glucksberg*, for recognizing unenumerated fundamental rights.<sup>233</sup> Under the *Glucksberg* test, the Court first narrowly defines the asserted liberty interest.<sup>234</sup> Next the Court determines whether this defined right is fundamental based on the tradition and history of protections for that interest and whether that interest is necessary to the concept of ordered liberty.<sup>235</sup> A child’s interest in attending a school that provides a minimally adequate education meets these requirements: it is fundamental based on our tradition and history, and it is necessary to the concept of “ordered liberty.”<sup>236</sup>

## 1. The Tradition and History of Protecting the Right to Education

Since before the founding of our nation, education was a protected interest and considered implicit to ordered liberty.<sup>237</sup> Before the Congress of Confederation made its sweeping statements about the importance of education in the Northwest Ordinance of 1787, the

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*see also Papasan*, 478 U.S. at 286 (speculating on what kinds of pleadings would allege the deprivation of a minimally adequate education).

<sup>230</sup> *E.g.*, Maggs, *supra* note 163, at 1045; Smith, *supra* note 74, at 846.

<sup>231</sup> *Compare Donnell C.*, 829 F. Supp. at 1018, and *Craig v. Selma City Sch. Bd.*, 801 F. Supp. 585, 596 (S.D. Ala. 1992), with *Kadrmas v. Dickinson Public Schs.*, 487 U.S. 450, 458 (1988).

<sup>232</sup> Joseph F. Kadlec, Note, *Employing the Ninth Amendment to Supplement Substantive Due Process: Recognizing the History of the Ninth Amendment and the Existence of Nonfundamental Unenumerated Rights*, 48 B.C. L. REV. 387, 392 (2007).

<sup>233</sup> *See* 521 U.S. 702, 720–21 (1997); Bitensky, *supra* note 74, at 586; Smith, *supra* note 74, at 850.

<sup>234</sup> *Glucksberg*, 521 U.S. at 721; Kadlec, *supra* note 232, at 391.

<sup>235</sup> *Glucksberg*, 521 U.S. at 720–21; Kadlec, *supra* note 232, at 391.

<sup>236</sup> Smith, *supra* note 74, at 850; *see* Bitensky, *supra* note 74, at 586.

<sup>237</sup> Smith, *supra* note 74, at 850; *see* Bitensky, *supra* note 74, at 586.

colonies had already established local schools.<sup>238</sup> Even before that the New England Poor Laws required local governments to assure that parents and guardians taught their children basic literacy.<sup>239</sup>

As noted above, the Framers, early presidents, and their contemporaries all considered an educated populace necessary to the survival and health of the republic.<sup>240</sup> The Framers believed the federal government had a duty to create and protect a public education system on a national scale.<sup>241</sup> Interestingly, they thought much more highly of the role of education in their new republic than they did of the role of popular elections.<sup>242</sup> It seems that our Founding Fathers believed an effective public education system was an essential underpinning of popular elections and, knowing that such a system was not yet in place, they approached popular elections with caution.<sup>243</sup> Specifically, the Framers expressed concern that the common people were uninformed and uneducated and therefore incapable of acting rationally in a democratic society.<sup>244</sup> Consequently, on the one hand, the Founding Fathers and their peers worked tirelessly to support a minimally adequate public education system while, on the other hand, they disenfranchised people they did not deem sufficiently educated to vote.<sup>245</sup> These seemingly opposite positions in fact reveal the Framers' keen awareness of the nexus between a minimally adequate education and a self-governed democracy: without the former, the latter could not exist.<sup>246</sup>

This concern for the effects of enfranchising an uneducated public shaped and linked the expansion of voting rights and a basic educa-

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<sup>238</sup> Safier, *supra* note 161, at 999.

<sup>239</sup> Susan P. Stuart, *Fun with Dick and Jane and Lawrence: A Primer on Education Privacy as Constitutional Liberty*, 88 MARQ. L. REV. 563, 623 n.368 (2004).

<sup>240</sup> Bitensky, *supra* note 74, at 628; *see* 147 CONG. REC. 26,348–49 (2001) (statement of Sen. Kennedy).

<sup>241</sup> 147 CONG. REC. 26,348–49 (statement of Sen. Kennedy); Bitensky, *supra* note 74, at 627, 629.

<sup>242</sup> *Compare* Bitensky, *supra* note 74, at 627–29, *with* Walsh, *supra* note 107, at 288–89.

<sup>243</sup> *Compare* Bitensky, *supra* note 74, at 627–29, *with* Walsh, *supra* note 107, at 288–89.

<sup>244</sup> Walsh, *supra* note 107, at 288–89. Elbridge Gerry, for example, said, “The people are uninformed and would be misled by a few designing men.” *Id.* The Framers rejected popular election of the president and senators, preferring to rely, respectively, on the Electoral College and state legislative bodies instead. *Id.*

<sup>245</sup> *Compare* Bitensky, *supra* note 74, at 628–29 (detailing George Washington’s, James Madison’s, and Benjamin Rush’s efforts to create a federal university as well as Noah Webster’s creation of the first national curriculum), *with* Walsh, *supra* note 107, at 288–89.

<sup>246</sup> *See* Bitensky, *supra* note 74, at 629; Walsh, *supra* note 107, at 288–89; *see also* Stuart, *supra* note 239, at 624 (stating that Jefferson and Benjamin Franklin sowed the seeds for democratic imperatives to drive the development of American education).

tion throughout the country's development.<sup>247</sup> After the Civil War, Congress passed the Fifteenth Amendment, marking the first time that the Constitution affirmatively protected the franchise.<sup>248</sup> At the same time, Congress conditioned the reentry of the Confederate states into the Union upon a guarantee of public education to all children within their borders, and the first elements of the future Cabinet-level Department of Education were put in place.<sup>249</sup> Consequently, when the Reconstruction Amendments were ratified, there was an understanding that *every* state would provide *every* child with a basic education.<sup>250</sup>

Accordingly, by the turn of the century, thirty-eight states had constitutions containing provisions supportive of state-provided education, and twenty-nine states had constitutions boasting affirmative obligations for state governments to provide public education.<sup>251</sup> Shortly thereafter, in 1913, the states ratified the Seventeenth Amendment, formally undoing the indirect voting system that the Framers had thought was so vital to the health of the republic.<sup>252</sup>

In the twentieth century, the expansion of suffrage continued to parallel the expansion of a basic education, with all three branches of government taking major strides to protect citizens' rights in both areas.<sup>253</sup> In just the last thirty years, Congress passed the Education for All

<sup>247</sup> See Stuart, *supra* note 239, at 624 (linking the development of American education with the goals of democracy). Compare Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345, 1346–59 (2003) (describing the expansion of affirmative protections for universal suffrage from the eve of the American Revolution through the twentieth century), with Safier, *supra* note 161, at 998–1001 (describing the expansion of affirmative protections for a minimally adequate education from before the ratification of the Constitution through the twentieth century).

<sup>248</sup> Karlan, *supra* note 247, at 1350.

<sup>249</sup> Bitensky, *supra* note 74, at 588; see Safier, *supra* note 161, at 1000.

<sup>250</sup> See Bitensky, *supra* note 74, at 588.

<sup>251</sup> *Id.* at 586–87.

<sup>252</sup> See U.S. Senate, Direct Election of Senators, [http://www.senate.gov/artandhistory/history/common/briefing/Direct\\_Election\\_Senators.htm](http://www.senate.gov/artandhistory/history/common/briefing/Direct_Election_Senators.htm) (last visited Oct. 31, 2008).

<sup>253</sup> See, e.g., National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580 (1958) (improving teacher-training nationwide and math, science, and foreign language instruction); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1953) (striking down segregated schools as unconstitutional); *Smith v. Allwright*, 321 U.S. 649, 650–51, 666 (1944) (striking down white primaries as unconstitutional). After World War I, the federal government initiated an educational grant program, and the states ratified the Nineteenth Amendment, which enfranchised American women. Karlan, *supra* note 247, at 1353; Safier, *supra* note 161, at 999. The New Deal allocated funds for education and school construction, and President Franklin D. Roosevelt called for an Economic Bill of Rights that would include the right to a good education. Safier, *supra* note 161, at 999–1000. During and after World War II, Congress passed a series of acts expanding both education and suffrage in the name of national security. E.g., National Defense Education Act, Pub. L. No. 85-864, 72 Stat. 1580 (1958) (improving teacher-training nationwide and math, science, and foreign language

Handicapped Children Act<sup>254</sup> and the Individuals with Disabilities Education Act,<sup>255</sup> and the executive branch consolidated the federal Department of Education.<sup>256</sup> More recently, the U.S. witnessed the introduction of Goals 2000: Educate America Act,<sup>257</sup> and No Child Left Behind,<sup>258</sup> each bill providing additional layers of protection for the right to a minimally adequate education.<sup>259</sup>

In sum, our history demonstrates that a student's right to a minimally adequate education is indeed, and traditionally always has been, a fundamental right.<sup>260</sup> It also demonstrates a deeply rooted relationship between the expansion of education and the expansion of the franchise, a relationship on which the Founders premised their original electoral system.<sup>261</sup>

## 2. A Basic Education Is Implicit in the Concept of "Ordered Liberty"

U.S. history illustrates the parallel growth of public education and universal suffrage.<sup>262</sup> As a result, it manifests a national concern that healthy democracy relies on voters' ability to intelligently cast ballots,

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instruction); Serviceman's Readjustment Act, Pub. L. No. 78-346, 58 Stat. 284 (1944) (codified as amended at 38 U.S.C. § 3451 (2000)) (providing educational services to returning veterans); Absentee Voting in Time of War, Pub. L. No. 78-277, 58 Stat. 136 (1944) (repealed in full 1955). At the same time, in 1944, the Supreme Court struck down white-only primaries as unconstitutional. *See Allwright*, 321 U.S. at 650–51, 666 (holding the right to vote in a general election cannot be abridged by a state on account of race). In 1953, the Court struck down white-only public schools as unconstitutional. *See Brown*, 347 U.S. at 495 (holding the right to an education, where the state has undertaken to provide it, must be made available to all on equal terms). Less than ten years later, the states ratified the Twenty-Fourth Amendment, banning poll taxes, and Congress passed the Elementary and Secondary Education Act, Pub. L. No. 89-10, 79 Stat. 27 (1965) (codified as amended in scattered sections of 20 U.S.C.).

<sup>254</sup> Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975). In 1990, the Education for All Handicapped Children Act was amended and renamed the Individuals with Disabilities Education Act ("IDEA"). *See* Individuals with Disabilities Education Act, Pub. L. No. 101-476, 104 Stat. 1103 (1990) (codified at 20 U.S.C. §§ 1400–1487 (2006)).

<sup>255</sup> 20 U.S.C. §§ 1400–1487.

<sup>256</sup> Safier, *supra* note 161, at 1000.

<sup>257</sup> Goals 2000: Educate America Act, 20 U.S.C. §§ 5801–5918 (2000).

<sup>258</sup> 20 U.S.C. §§ 6301–7941 (Supp. V 2005).

<sup>259</sup> *See* 147 CONG. REC. 26,348–49 (statement of Sen. Kennedy); Salerno, *supra* note 99, at 514–15.

<sup>260</sup> *See* Bitensky, *supra* note 74, at 586; Smith, *supra* note 74, at 850; *cf.* Glucksberg, 521 U.S. at 710, 720–21 (holding that the recognition of an unenumerated right as fundamental requires examining the Nation's history, legal traditions, and practices to determine whether the liberty is deeply rooted in the Nation's history and tradition).

<sup>261</sup> *See supra* notes 242–253 and accompanying text.

<sup>262</sup> *See supra* notes 247–259 and accompanying text.

which in turn establishes the nation's acceptance of education as implicit to the concept of "ordered liberty."<sup>263</sup> The Framers acknowledged this nexus when they expressed concern that the common people were uninformed and uneducated and therefore incapable of acting rationally in a democratic society.<sup>264</sup> They also formalized it in the Northwest Ordinance, declaring that education is necessary for good government.<sup>265</sup> Additionally, the Court has announced and relied upon this nexus throughout its jurisprudence.<sup>266</sup> As Justice Marshall pointed out in his dissent in *Rodriguez*, education receives special protection because it both enables and encourages citizens to exercise their rights.<sup>267</sup> Of all the great minds who articulated the relationship between democracy and education, scholar and jurist Benjamin Cardozo perhaps captured it most eloquently, writing: "There is no freedom without choice, and there is no choice without knowledge—or none that is not illusory."<sup>268</sup>

In sum, our history and our definition of liberty demonstrate that a student's right to a minimally adequate education is indeed, and traditionally always has been, a fundamental right—a right that has become *more* implicit in our concept of ordered liberty with the expansion of suffrage.<sup>269</sup> Moreover, although international law may have at most a supplemental value to American jurisprudence,<sup>270</sup> this nexus between education and political rights is broadly recognized in the modern

<sup>263</sup> See *Zelman v. Simmons-Harris*, 536 U.S. 639, 680–81 (2002) (Thomas, J., concurring); *Rodriguez*, 411 U.S. at 36; *Yoder*, 406 U.S. at 221, 225.

<sup>264</sup> See *supra* note 244 and accompanying text.

<sup>265</sup> Salerno, *supra* note 99, at 514.

<sup>266</sup> E.g., *Zelman*, 536 U.S. at 680 ("[W]ithout education one can hardly exercise the civic, political, and personal freedoms . . ."); *Plyler*, 457 U.S. at 221 ("We have recognized 'the public schools as a most vital civic institution for the preservation of a democratic system of government,' and as the primary vehicle for transmitting 'the values on which our society rests.'"); *Rodriguez*, 411 U.S. at 36 (accepting the proposition that the democratic ideal depends upon an informed electorate); *Yoder*, 406 U.S. at 221 (accepting the proposition that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence"); *Brown*, 347 U.S. at 493 ("[E]ducation is perhaps the most important function of state and local governments.").

<sup>267</sup> *Rodriguez*, 411 U.S. at 113, 114–15.

<sup>268</sup> Bitensky, *supra* note 74, at 550 (citing BENJAMIN CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 104 (1928)).

<sup>269</sup> See Bitensky, *supra* note 74, at 586; Smith, *supra* note 74, at 850; *supra* notes 237–268 and accompanying text; cf. *Glucksberg*, 521 U.S. at 710, 720–21.

<sup>270</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 576 (2003) (noting the position of the European Court of Human Rights in a substantive due process analysis); *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (stating that the reality of international law is not controlling but may be instructive in an Eighth Amendment analysis).

Western legal tradition.<sup>271</sup> Therefore, AEPs that do not provide minimally adequate educations to their students, but instead substantially abridge their students' educational opportunities, infringe upon this fundamental right and do a great disservice to our notion of a free democracy.

### C. *Narrowly Tailored to Meet Compelling State Interests*

Having shown in Sections A and B of this Part that AEPs infringe on both a recognized and an unrecognized fundamental right, this Section examines whether these AEPs would survive strict scrutiny and argues that they would not.<sup>272</sup> Under strict scrutiny, which the Court applies in all cases alleging the infringement of a fundamental right, the state carries the heavy burden of showing that its actions are narrowly tailored to meet compelling state interests.<sup>273</sup> The Court uses the "narrowly tailored" test to police against means that are over- or under-inclusive: a law with a poor fit suggests that the government does not really believe the underlying ends are so compelling.<sup>274</sup> The operation of AEPs does not survive strict scrutiny because, even where the states' interests are compelling, the AEP system is not narrowly tailored to advance those interests.<sup>275</sup>

States have a compelling interest in maintaining an ordered school environment, one in which students are safe and can learn without significant distraction.<sup>276</sup> This interest has encouraged the removal of many students from regular education classrooms to AEPs.<sup>277</sup> In practice, however, AEP transfers are over-inclusive, removing far more children than are actually disruptive or have committed disruptive acts.<sup>278</sup>

<sup>271</sup> *E.g.*, Charter of Fundamental Rights of the European Union, art. 14, 2000 O.J. (C 364) 1, 11; *A. v. Essex County Council*, [2007] EWHC (QB) 1652 (U.K.); *see* Brunell, *supra* note 125, at 347.

<sup>272</sup> *See infra* notes 273–319 and accompanying text.

<sup>273</sup> *Glucksberg*, 521 U.S. at 721; *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); Smith, *supra* note 74, at 836.

<sup>274</sup> Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 803 (2006).

<sup>275</sup> *Compare id.* at 800–01, *with infra* notes 276–301 and accompanying text.

<sup>276</sup> *See* *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655–56 (1995); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969); *C.H. ex. rel. Z.H. v. Oliva*, 226 F.3d 198, 211–12 (3d Cir. 2000).

<sup>277</sup> *See* D'Agata, *supra* note 22, at 639; Reyes, *supra* note 43, at 77.

<sup>278</sup> *See* ARON, *supra* note 68, at 10; FOWLER ET AL., *supra* note 22, at 66–67; MORGAN, *supra* note 20, at 27. Students are transferred to AEPs for any number of reasons, including reasons beyond their control, such as homelessness or an undiagnosed learning disability, and reasons that do not disrupt the in-classroom environment, such as pregnancy, irregu-

AEPs are also under-inclusive: a survey of Texas teachers found that despite a steady increase in punitive AEP transfers over the last ten years, eighty-seven percent of the teachers surveyed stated that it was no easier now than ten years ago to maintain discipline in the classroom.<sup>279</sup> Additionally, the National Association of School Psychologists has said that it considers primarily punitive alternative programs ineffective at preventing future behavioral problems.<sup>280</sup> The National School Boards Association has also found that rather than rehabilitating disruptive students, removing troublemakers from the classroom can *harden* delinquent behaviors and alienate troubled youths from school.<sup>281</sup> This finding is reflected in a report issued by Texas Appleseed, citing disciplinary transfers to AEPs as the source of learned negative behaviors, which students who did not traditionally pose discipline problems picked up from other students during their stint in an AEP.<sup>282</sup>

Another theory behind AEP transfers is that they improve the education of all students by enabling every student to receive more personalized instruction.<sup>283</sup> Again, this is a compelling interest, but AEPs are not narrowly tailored to advance this interest.<sup>284</sup> Statistics show that AEPs do not achieve this mission.<sup>285</sup> Although some students in the regular education environment *may* access a slightly higher quality education in the absence of peers who are pregnant, homeless, failing, or allegedly involved in an off-campus felony, the students who have been removed access a significantly lower quality education—one that does not meet state or national standards.<sup>286</sup> AEP transfers impede students' academic achievement in three ways.<sup>287</sup> First, the stigma attached with a transfer makes it harder for young children to relate positively to

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lar attendance, and out-of-school brushes with the law. *See* ALA. CODE § 12-15-71(o) (LexisNexis 2005); ARON, *supra* note 68, at 10; FOWLER ET AL., *supra* note 22, at 67.

<sup>279</sup> FOWLER ET AL., *supra* note 22, at 28. During the year when the survey was conducted, the 2005–2006 school year, Texas school districts made approximately 100,000 disciplinary transfers. *See id.* at 26.

<sup>280</sup> MORGAN, *supra* note 20, at 18.

<sup>281</sup> D'Agata, *supra* note 22, at 643; Wren, *supra* note 39, at 332.

<sup>282</sup> FOWLER ET AL., *supra* note 22, at 26.

<sup>283</sup> D'Agata, *supra* note 22, at 640; Wren, *supra* note 39, at 347.

<sup>284</sup> *See infra* notes 285–294 and accompanying text.

<sup>285</sup> *See* FOWLER ET AL., *supra* note 22, at 32 (writing that as AEPs academic standards are lowered, instruction is not aligned to state standards, and grades are inflated); D'Agata, *supra* note 22, at 641 (writing that although the mission of Texas's AEPs is to enable students to perform at grade level, the programs are not required to provide the grade-level curricula); Ctr. for Law & Educ. Memo, *supra* note 225, at 25–27.

<sup>286</sup> *See* LEHR, *supra* note 39, at 15; Ctr. for Law & Educ. Memo, *supra* note 225, at 25–27.

<sup>287</sup> *See* FOWLER ET AL., *supra* note 22, at 26–27.

school.<sup>288</sup> Second, as discussed above, the lack of accountability eliminates the positive effects of parental and state oversight of the classroom.<sup>289</sup> Third, the loss of time in classrooms with high standards and direct teaching sets AEP transferees behind their peers academically.<sup>290</sup> Frustrating a child's access to a minimally adequate education in this manner does not comport with the purpose of NCLB or local laws mandating state standards and accountability testing.<sup>291</sup> In addition, students who endure repeated referrals to AEPs are five times more likely to drop out than peers who were not referred to AEPs.<sup>292</sup> Along these lines, documentation produced by the Massachusetts Department of Education also showed that AEPs have the lowest graduation rate in the Commonwealth.<sup>293</sup> Consequently, instead of leaving no child behind, AEPs leave many children behind, many of the same children NCLB seeks to educate.<sup>294</sup>

To defend curricula that are not aligned with state standards, schools may argue that the students at AEPs are so far behind relative to their peers that they cannot handle a standards-based program and corresponding assessments.<sup>295</sup> This argument is deeply flawed.<sup>296</sup> Studies show that poor classroom behavior has no correlation to students' ability to succeed academically.<sup>297</sup> Moreover, high expectations

<sup>288</sup> *Id.* at 27.

<sup>289</sup> *See id.* at 26; *supra* notes 203–206 and accompanying text.

<sup>290</sup> FOWLER ET AL., *supra* note 22, at 26–27, 32.

<sup>291</sup> *See* 20 U.S.C. § 6301 (stating that the purpose of NCLB “is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments” through a combination of “high-quality academic assessments, accountability systems, teacher preparation and training, curriculum, and instructional materials” that are aligned with challenging academic standards); *see also, e.g.*, 005-000-006 WYO. CODE R. § 7 (Weil 2008) (requiring public school students to meet “Common Core of Knowledge” requirements).

<sup>292</sup> FOWLER ET AL., *supra* note 22, at 27.

<sup>293</sup> Bob Bickerton & Paula O’Sullivan, Mass. Dep’t of Educ., *Defining the Dropout Crisis Through Graduation Rates 15* (Jan. 26, 2007), *available at* <http://www.renniecenter.org/DOE%20Grad%20Rate%20Presentation.ppt>.

<sup>294</sup> *Compare* FOWLER ET AL., *supra* note 22, at 4–5, 27 (finding that minority and special needs populations are overrepresented in AEPs), *and* D’Agata, *supra* note 22, at 655, *with* 20 U.S.C. § 6301 (stating that the purpose of NCLB is to ensure that all children, but particularly delinquent, disabled, and minority children, obtain a high-quality education and reach proficiency on challenging academic standards).

<sup>295</sup> William L. Taylor, *Assessment as a Means to a Quality Education*, 2 GEO. J. ON POVERTY L. & POL’Y 311, 314 (2001); *see also* D’Agata, *supra* note 22, at 640 (writing that proponents of AEPs see them as facilities where children can reflect and build their self esteem).

<sup>296</sup> *See infra* notes 297–300 and accompanying text.

<sup>297</sup> Benedict Carey, *Studies on Pupils Say Bad Behavior Is Not Dooming*, N.Y. TIMES, Nov. 13, 2007, at A1.

are one of the most important components of a high quality education, and the states' low expectations for their AEP students will be reflected in these students' substandard levels of achievement.<sup>298</sup> Measures of a school's progress and success at instructing its students and delivering a minimally adequate education are vital in order to hold those schools accountable.<sup>299</sup> If no one pays attention to the quality of the education delivered at AEPs, the education delivered at AEPs will likely fall far short of being "minimally adequate," which is the reality in school districts around the country.<sup>300</sup> Given the discrepancy between the interests AEPs allegedly serve and the reality of their impact, many AEPs are not narrowly tailored to advance those interests and, therefore, cannot survive strict scrutiny.<sup>301</sup>

#### D. *Some Narrowly Tailored Solutions*

States and school systems have always needed leeway to experiment with new tactics and policies to combat the innumerable challenges they face.<sup>302</sup> Nevertheless, some experiments are so poorly tailored to their goals that they cannot survive strict scrutiny.<sup>303</sup> In these situations, it is not up to the judiciary to dictate solutions to the states, but the judiciary must ensure that the states' solutions protect parents' and students' fundamental rights.<sup>304</sup> This tension between individual

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<sup>298</sup> See C. Patrick Proctor, *Teacher Expectations: A Model for School Improvement*, 84 ELEMENTARY SCH. J. 469, 469 (1984); Taylor, *supra* note 295, at 311; Editorial, *Mind the Gap*, S.F. CHRON., Nov. 16, 2007, at B10.

<sup>299</sup> See 20 U.S.C. § 6301(1).

<sup>300</sup> See FOWLER ET AL., *supra* note 22, at 26, 32; HILL, *supra* note 67, at 1 ("[T]he state's accountability system allows schools and districts to use referrals to alternative schools as a way to avoid responsibility for the progress of low-performing students.").

<sup>301</sup> See *supra* notes 276–300 and accompanying text.

<sup>302</sup> See *Rodriguez*, 411 U.S. at 43, 50.

<sup>303</sup> See, e.g., *Nixon v. Shrink Miss. Gov't PAC*, 528 U.S. 377, 428 (2000) (Thomas, J., dissenting) (arguing that state election contribution caps infringe on the fundamental right to engage in political speech because they are not narrowly tailored to advance the state's interest in preventing actual and apparent political corruption); *Planned Parenthood v. Casey*, 505 U.S. 833, 935 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (stating that requiring a physician, rather than a counselor, to inform a woman about the risks of an abortion is not narrowly tailored to the state's interest in protecting maternal health and therefore is not constitutional).

<sup>304</sup> See Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 11 (1979). Fiss suggests that the exercise of judicial power is limited only by the existence of constitutional values, to which the judiciary must give concrete meaning. *Id.* He recognizes, though, that this theory of structural reform can lend itself to abuse at the hands of judges. *Id.* at 11, 15. According to Fiss, this abuse is constrained, perhaps even prevented, by ensuring that the meaning-giving process is both pluralistic, in that it engages multiple branches of government, and dialectical. *Id.* at 15, 16.

rights and state policies maintains a healthy stream of conversation about how schools can tailor their tactics to address new, and some old, challenges.<sup>305</sup>

In that vein, AEPs are not necessarily a failed experiment in every state and district that uses them.<sup>306</sup> Instead there are some existing policies and plans that are narrowly tailored to advance the compelling interests driving AEP referrals.<sup>307</sup> Effective AEPs provide intensive instruction in credit-earning coursework and use research-based instructional techniques that engage the students.<sup>308</sup> These narrowly tailored AEPs maintain their low student-teacher ratios, set high expectations for their students' achievement, and use functional assessment procedures to evaluate students' success.<sup>309</sup> They avoid mingling students at risk for academic failure and other nondisruptive at risk students with students who demonstrate emotional and behavioral problems.<sup>310</sup>

Additionally, there are school-wide discipline programs that reduce disciplinary transfers to AEPs, boost instructional quality, and improve staff morale.<sup>311</sup> Federal government studies of these and other discipline programs recommend that, instead of reliance on the AEP-transfer model, schools should improve school discipline with a combination of research-based bullying prevention programs, positive behavior support systems, instruction in conflict resolution, small classes, peer tutoring, and cooperative learning.<sup>312</sup> Additionally, these reports recommend in-

<sup>305</sup> See *id.* at 11, 14–16, 58. Fiss posits that all government is engaged in the process of meaning-giving, attempting to give meaning to constitutional values so as to define America's moral identity. See *id.* at 11, 14. Within this scheme, the judiciary straddles the world of the ideal and of the practical. *Id.* at 58. On the one hand, the judiciary is the most capable player in this conversation to determine the "true meaning" of these values, but, on the other, the judiciary is not necessarily the most capable player to determine how to give that meaning a reality. *Id.* Therefore, the judiciary's ideal involvement is, when asked by an injured party, to further the dialectical process of giving meaning to public values. *Id.* at 15–16.

<sup>306</sup> See Ann Fitzsimons-Lovett, *Alternative Education Programs: Empowerment or Entrapment?*, in ADDRESSING THE SOCIAL, ACADEMIC, AND BEHAVIORAL NEEDS OF STUDENTS WITH CHALLENGING BEHAVIOR IN INCLUSIVE AND ALTERNATIVE SETTINGS 37, 40 (Lyndal M. Bullock & Robert A. Gable eds., 2001); Turpin & Hinton, *supra* note 56, at 36.

<sup>307</sup> See Fitzsimons-Lovett, *supra* note 306, at 40; Turpin & Hinton, *supra* note 56, at 36.

<sup>308</sup> FOWLER ET AL., *supra* note 22, at 93; U.S. DEP'T OF EDUC., SAFEGUARDING OUR CHILDREN: AN ACTION GUIDE 33 (2000), available at [http://www.ed.gov/admins/lead/safety/actguide/action\\_guide.pdf](http://www.ed.gov/admins/lead/safety/actguide/action_guide.pdf).

<sup>309</sup> Fitzsimons-Lovett, *supra* note 306, at 39, 40; see U.S. DEP'T OF EDUC., *supra* note 308, at 34.

<sup>310</sup> Turpin & Hinton, *supra* note 56, at 37.

<sup>311</sup> FOWLER ET AL., *supra* note 22, at 84.

<sup>312</sup> *Id.* at 86–88; see, e.g., JUNE L. ARNETTE & MARJORIE C. WALSLEBEN, U.S. DEP'T OF JUSTICE, JUVENILE JUSTICE BULLETIN: COMBATING FEAR AND RESTORING SAFETY IN SCHOOLS 3

creasingly intensive interventions rather than AEP referrals to address the needs of the most chronically disruptive or “at risk” students.<sup>313</sup> These interventions require increased teacher training about serious behavioral problems.<sup>314</sup> Finally, the reports recommend “wraparound services” for the ten percent of students who continue to demonstrate severe and frequent emotional or behavioral problems.<sup>315</sup> These wrap-around services involve cooperation between the student, the family, community agencies, mental health professionals, and the school.<sup>316</sup>

Until these changes take place, AEPs will not achieve their mission.<sup>317</sup> Instead, AEPs will continue to infringe on fundamental rights because they are not narrowly tailored to advance their goals.<sup>318</sup> If the states do not tailor their AEP programs and transfer policies to advance their goals of discipline, rehabilitation, and education, then the judiciary will need to protect the educational rights of America’s parents and their children.<sup>319</sup>

#### CONCLUSION

Transfers of students to Alternative Education Programs (“AEPs”) implicate two fundamental rights. The first, parents’ right to make choices about their child’s education, is well-established. The second, students’ right to receive a minimally adequate education, remains unrecognized by the U.S. Supreme Court but should be recognized given its history, tradition of receiving governmental protection, and implicit role in “ordered liberty.” After all, the universal provision of a basic education has received protection under U.S. law since the country’s inception. Additionally, the states and federal government have accorded it more protection as the right to vote in popular elections has expanded. This correlation between the expansion of suffrage and education draws on the necessary nexus, acknowledged by

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(1998), available at <http://eric.ed.gov/ERICWebPortal/contentdelivery/servlet/ERICServlet?accno=ED420121>; U.S. DEP’T OF EDUC., *supra* note 308, at 7, 9; Ron Prinz, *Research-Based Prevention of School Violence and Youth Antisocial Behavior: A Developmental and Educational Perspective*, in PREVENTING SCHOOL VIOLENCE 23, 30 (U.S. Dep’t of Justice 2000), available at [www.ncjrs.gov/pdffiles1/nij/180972.pdf](http://www.ncjrs.gov/pdffiles1/nij/180972.pdf).

<sup>313</sup> See FOWLER ET AL., *supra* note 22, at 88–93; see, e.g., U.S. DEP’T OF EDUC., *supra* note 308, at 31.

<sup>314</sup> FOWLER ET AL., *supra* note 22, at 89.

<sup>315</sup> *Id.* at 92; U.S. DEP’T OF EDUC., *supra* note 308, at 38.

<sup>316</sup> FOWLER ET AL., *supra* note 22, at 92; U.S. DEP’T OF EDUC., *supra* note 308, at 38.

<sup>317</sup> See *supra*, notes 276–300.

<sup>318</sup> See *supra*, notes 276–300.

<sup>319</sup> See *supra*, notes 304–305.

both the Framers and the Court, between broad public enfranchisement and an effective universal public education system.

Given the fundamental nature of these two rights, the operation of AEPs should be subject to strict scrutiny. Most AEPs, however, are not narrowly tailored to advance compelling state interests. The states' interests in education and student safety are compelling enough, but many AEPs and AEP tactics have a demonstrated track record of impeding a student's educational success, endangering students, and providing no meaningful assistance to teachers struggling to keep order in their regular education classrooms.

Well-intentioned politicians, superintendents, and principals believed that AEPs were a solution to many of the challenges schools face today. Indeed, there are some AEPs that are producing the desired result, successfully re-engaging "at risk" students in their education. Without accountability procedures in place, however, parents and students cannot know whether their school does or does not provide a minimally adequate education. Many students have ended up in schools that do not provide them with the basic tools they need to read, write, calculate, and contribute to our democracy. Consequently, AEPs appear to prevent, rather than enable, their students' advancement in grade levels and their students' acquisition of diplomas. The states' unilateral substitutions of courses aligned with state standards for classes without standards infringes on parents' fundamental right to make long-term educational decisions for their children. Additionally, the resulting deficiencies in the transferred child's schooling infringes on that student's right to receive a minimally adequate education.

More narrowly tailored, and therefore effective, discipline policies and forms of alternative education exist. In the states that choose to ignore these models of education and behavior intervention, the judiciary should ensure that the rights of our parents and students are not unnecessarily trampled in the quest to create the perfect school.

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