NOTES

EXILED FROM EDUCATION: *PLYLER V. DOE*'S IMPACT ON THE CONSTITUTIONALITY OF LONG-TERM SUSPENSIONS AND EXPULSIONS

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INTRODUCTION

> *Tunette was a problem student herself, preschool through high school graduation. . . . She remembers being bad. She flipped over a desk in class one time. That happened. But she also remembers that, after getting suspended in preschool, she walked into kindergarten fully convinced the teacher was the enemy. And that never went away. All those times she was suspended, she didn't come back less angry, ready to obediently follow directions. It was the opposite. Tunette says, 'I went into kindergarten knowing I was bad. I went into first grade knowing I was terrible. And it just went up from there.'*[1]

FOR students like Tunette, receiving a quality public education is rarely easy. Being poor, speaking another language, and misbehaving all increase the costs of education and provide incentives for schools to exclude students entirely. The Supreme Court issued one potential impediment to schools' policy of exclusion over thirty years ago in *Plyler v. Doe*, applying heightened scrutiny to invalidate a Texas law that kept undocumented students out of public schools.[2] The Court's reasoning suggested the existence of a plausible right of equal access to education under the United States Constitution.[3] Since then, states have at-

[1] This American Life: Is This Working?, Chicago Public Radio (Oct. 17, 2014), http://www.thisamericanlife.org/radio-archives/episode/538/is-this-working.

[2] 457 U.S. 202, 230 (1982).

[3] See id. at 219–21 (noting that the Texas law imposes a discriminatory burden on the basis of a legal characteristic over which children have little control and that education, while

tempted to limit this potential right in myriad ways. In some cases, states have gone so far as to directly attack it, passing draconian laws that ban undocumented students from school. For example, in 1994, California voters passed Proposition 187, making it illegal for undocumented students to attend public school.[4] Similarly, in 2011, Alabama passed H.B. 56, requiring parents to report the immigration status of their school-aged children.[5] These laws discouraged parents, fearful of deportation, from sending their children to school.[6] While the exclusion of undocumented students in particular has garnered widespread media coverage, it is far from the only example of school exclusion going on in the United States today. In fact, the hidden excommunication of millions of students who misbehave in classrooms every year gets almost no media attention at all. But it should.

Prior to the 1990s, school districts utilized suspensions and expulsions as a way to address only the most serious offenses, as well as to provide consequences for repeat offenders.[7] Since then, school districts around the country have adopted zero-tolerance policies that "impose[] expul-

not a constitutional right, is more important than a governmental benefit). Chief Justice Burger first described the possible right recognized in *Plyler* as a quasi-fundamental right in his dissent, a term which was later adopted by academics. See id. at 244 (Burger, C.J., dissenting) (referring to the majority opinion as "what might be termed quasi-suspect-class and quasi-fundamental-rights analysis"); Emily Barbour, Separate and Invisible: Alternative Education Programs and Our Educational Rights, 50 B.C. L. Rev. 197, 211–13 (2009) (describing *Plyler* as being later interpreted by the Court as a "once-in-a-lifetime confluence of a quasi-suspect class . . . and a quasi-fundamental right" analysis); cf. Mark D. Perison, Equal Protection and Medical Malpractice Damage Caps: The Health Care Liability Reform and Quality of Care Improvement Act of 1991, 28 Idaho L. Rev. 397, 417 (1992) (acknowledging that the Court has never recognized the existence of a quasi-fundamental rights analysis, even though it "seemed to employ just such an analysis without using the term in *Plyler v. Doe*"). I have not adopted this language.

[4] Cal. Educ. Code § 48215 (Deering 2013) (repealed 2015); Timothy Appleby, California Initiative Squeezes Illegals: Proposition Faces Court Challenges, The Globe and Mail, Nov. 10, 1994 (on file with author).

[5] Julia Preston, In Alabama, a Harsh Bill for Residents Here Illegally, N. Y. Times, June 3, 2011, http://www.nytimes.com/2011/06/04/us/04immig.html; see also United States v. Alabama, 691 F.3d 1269, 1278 (11th Cir. 2012) (describing Section 28 of H.B. 56, which required schools to obtain either the birth certificate or official citizenship documentation attested to under penalty of perjury from every child seeking to enroll).

[6] See Press Release, U.S. Dep't of Justice, Department of Justice Challenges Alabama Immigration Law (Aug. 1, 2011), available at: http://www.justice.gov/opa/pr/2011/August/11-ag-993.html; Udi Ofer, Protecting *Plyler*: New Challenges to the Right of Immigrant Children to Access a Public School Education, 1 Colum. J. Race & L. 187, 222 (2012).

[7] Eric Blumenson & Eva S. Nilsen, One Strike and You're Out? Constitutional Constraints on Zero Tolerance in Public Education, 81 Wash. U. L.Q. 65, 69 (2003).

sion or suspension [as a mandatory sanction] for a wide range of . . . conduct,"[8] including trivial offenses such as disrupting class.[9] As a result, by the 2005–2006 school year, more than 3.3 million students were suspended at least once, while over 100,000 students were expelled.[10]

The purported goal of such policies is to maintain the integrity of the learning environment (by, for example, ensuring school safety and protecting academic outcomes for other students) by removing poorly behaved students from class.[11] However, data from the past three decades has demonstrated that such policies are ineffective at achieving either school safety or academic success. For example, throughout the 1980s, 1990s, and early 2000s, school crime rates remained stable, even though suspension rates *doubled* during the same time period.[12] In other words, school suspensions did not have the effect of increasing school safety. In addition, recent research has found that "a negative relationship [exists] between the use of school suspension and expulsion and school-wide academic achievement, even when controlling for . . . socioeconomic status."[13] This means that students suffer from poor academic performance at schools with high suspension and expulsion rates.[14] Based on this data, harsh disciplinary policies accomplish little and fail to improve either safety or academic achievement on a school-wide level.

This Note will argue that, following *Plyler*, public school students have a plausible right of equal access to education under the United States Constitution. In addition to this right, students also benefit from a fundamental right to education in sixteen states.[15] This framework has

[8] Id.

[9] Jacob Kang-Brown et al., Ctr. on Youth Justice, Vera Inst. of Justice, A Generation Later: What We've Learned About Zero Tolerance in Schools 1, 3 (Dec. 2013), http://www.vera.org/sites/default/files/resources/downloads/zero-tolerance-in-schools-policy-brief.pdf.

[10] Office for Civil Rights, U.S. Dep't of Educ., Civil Rights Data Collection (2006), available at http://ocrdata.ed.gov/StateNationalEstimations/Projections_2006.

[11] See Kang-Brown et al., supra note 9, at 4; Blumenson & Nilsen, supra note 7, at 65–66.

[12] Blumenson & Nilsen, supra note 7, at 71.

[13] Am. Psychological Ass'n Zero Tolerance Task Force, Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations 852, 854 (2008), available at http://www.apa.org/pubs/info/reports/zero-tolerance.pdf.

[14] See id. The precise causes of this relationship remain unclear.

[15] The sixteen states are: Arizona, California, Connecticut, Kentucky, Minnesota, Mississippi, New Hampshire, New Jersey, North Carolina, North Dakota, Pennsylvania, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. See Shofstall v. Hollins, 515 P.2d 590, 592 (Ariz. 1973); Serrano v. Priest, 487 P.2d 1241, 1244 (Cal. 1971); Horton v. Meskill, 376

thus far provided students with some respite from states' attempts to limit *Plyler*. However, in states where the right to education is not fundamental, or the status of education has not yet been determined by state supreme courts, school districts regularly violate students' plausible right of equal access to education in two ways. First, school districts offer no alternative education programs ("AEPs") during periods of long-term suspension or expulsion. Second, when school districts do offer AEPs, they routinely fail to provide even basic education, which places students at risk of academic failure. Ultimately, long-term suspensions and expulsions mean that many of our nation's most vulnerable students are not receiving an education. However, as this Note will argue, our federal and state constitutions suggest that they are entitled to one.

In the legal field, little has been written about the implications of *Plyler* outside the context of undocumented students. The analyses that do exist focus on state and local attempts to limit the rights of undocumented students to attend primary and secondary school.[16] Other studies analyze the limits to higher education that undocumented students face in terms of college admissions[17] and in-state tuition rates.[18] This Note differentiates itself from what the legal field already knows by focusing instead on the interplay between federal and state law to determine how students' plausible right of equal access to education has been limited in other contexts, specifically school discipline. Such knowledge is worthwhile because it may permit a better understanding of exactly how child advocates can protect their most vulnerable clients from being shut out of the education system altogether. Equipped with this knowledge,

A.2d 359, 374 (Conn. 1977); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 206 (Ky. 1989); Skeen v. State, 505 N.W.2d 299, 313 (Minn. 1993); Clinton Mun. Separate Sch. Dist. v. Byrd, 477 So. 2d 237, 240 (Miss. 1985); Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1358–59 (N.H. 1997); Robinson v. Cahill, 351 A.2d 713, 720 (N.J. 1975); Leandro v. State, 488 S.E.2d 249, 255–56 (N.C. 1997); Bismarck Pub. Sch. Dist. 1 v. State, 511 N.W.2d 247, 256 (N.D. 1994); Sch. Dist. of Wilkinsburg v. Wilkinsburg Educ. Ass'n, 667 A.2d 5, 9 (Pa. 1995); Brigham v. State, 692 A.2d 384, 391–95 (Vt. 1997); Scott v. Commonwealth, 443 S.E.2d 138, 142 (Va. 1994); Cathe A. v. Doddridge Cnty. Bd. of Educ., 490 S.E.2d 340, 346 (W. Va. 1997); Kukor v. Grover, 436 N.W.2d 568, 579 (Wis. 1989); Washakie Cnty. Sch. Dist. No. 1 v. Herschler, 606 P.2d 310, 333 (Wyo. 1980).

[16] See, e.g., Ofer, supra note 6, at 204–11.

[17] See Azadeh Shahshahani & Chaka Washington, Shattered Dreams: An Analysis of the Georgia Board of Regents' Admissions Ban from a Constitutional and International Human Rights Perspective, 10 Hastings Race & Poverty L.J. 1, 7–13 (2013).

[18] See Laura S. Yates, Note, *Plyler v. Doe* and the Rights of Undocumented Immigrants to Higher Education: Should Undocumented Students Be Eligible for In-State College Tuition Rates?, 82 Wash. U. L.Q. 585, 585–87 (2004).

school districts can be held accountable for educating all students, even the most behaviorally challenged ones.

To support these claims, this Note will proceed in three parts. Part I will explain the existence of any rights to education in the United States by outlining where possible rights are protected under federal and state law. In Part II, this Note will argue that students who are long-term suspended or expelled are deprived of their rights when states fail to create AEPs at all, or when states provide low-quality AEPs that do not even offer a basic education. Finally, Part III will address the typical school defense that students who misbehave forfeit their right to education.

I. WHAT RIGHTS? DISRUPTING STALE THINKING BY LOCATING AND DEFINING THE RIGHT TO EDUCATION IN THE FEDERAL AND STATE CONSTITUTIONS

Two distinct levels of government, federal and state, have the potential to protect students' right to education. At the federal level, the Supreme Court in *San Antonio Independent School District v. Rodriguez* held that: (1) no fundamental right to education exists; and (2) students do not have a right to absolute equality in either school funding or academic outcomes.[19] All is not lost, however. Although students do not have an absolute right to education, *Plyler* and *Brown v. Board of Education* suggest that there exists some kind of right of equal access to education under the Federal Constitution once states decide to offer a system of free, public education to all. Furthermore, some students also possess a fundamental right to education under state constitutions. Finally, even though a fundamental right to education under the Federal Constitution does not exist, *Rodriguez* implies that a threshold level of basic education may still be required to avoid constitutional problems. For the reasons outlined below, state law often defines what is considered "basic." It is this complicated combination of federal and state law that determines when, and how, students who misbehave may be long-term suspended or expelled and excluded from public education.

A. The Road to Plyler*: Possible Federal Rights to Education*

According to the Supreme Court, there are relatively few constitutional rights that prevent students who misbehave from being kicked out

[19] 411 U.S. 1, 35, 50–51 (1973).

of school. In fact, four seminal cases—*Brown v. Board of Education*,[20] *San Antonio v. Rodriguez*,[21] *Goss v. Lopez*,[22] and *Plyler v. Doe*[23]—outline the constitutional minimum afforded to students who receive a public education. These cases concluded the following: (1) educational facilities segregated by race, even if otherwise equal, violate students' federal right to equal educational opportunities;[24] (2) no fundamental right to education exists for any student under the Federal Constitution;[25] (3) no right to equal funding or to equal educational quality exists for low-income students under the federal Equal Protection Clause;[26] and (4) federal procedural due process rights do exist, such as notice and a hearing, prior to kicking students out of school.[27] Finally, and most importantly for the purposes of this Note, *Plyler* hinted again at a possible right of equal access to education, first recognized nearly thirty years earlier in *Brown*, once a system of free public education is offered to all students.[28] The last of these possible rights, based on equal access, is most relevant to determining how students' rights to education can be protected at the federal level.

More than fifty years ago, *Brown v. Board of Education* first made clear in unequivocal language that if states are going to provide a free, public education to primary or secondary students, they must do so on equal terms. The plaintiffs in *Brown* challenged state laws in Delaware, Kansas, South Carolina, and Virginia that required or permitted race-based segregation in public schools.[29] Although the Court had addressed the doctrine of "separate but equal" from *Plessy v. Ferguson*[30] in six prior cases involving education, *Brown* presented the first opportunity to analyze the doctrine when the challenged educational facilities were essentially equal.[31] After examining the history of the Fourteenth Amendment and the importance of education in contemporary society,[32] the

[20] 347 U.S. 483 (1954).
[21] 411 U.S. at 1.
[22] 419 U.S. 565 (1975).
[23] 457 U.S. at 202.
[24] *Brown*, 347 U.S. at 493–95.
[25] *Rodriguez*, 411 U.S. at 35.
[26] Id. at 47–55.
[27] *Goss*, 419 U.S. at 581–82.
[28] *Plyler*, 457 U.S. at 230.
[29] *Brown*, 347 U.S. at 487–88.
[30] 163 U.S. 537 (1896).
[31] *Brown*, 347 U.S. at 491, 493.
[32] Id. at 489–93.

Court held that "separate educational facilities are inherently unequal."[33] In doing so, the Court overturned *Plessy* in the field of education.[34] *Brown's* infamous words did not create an absolute right to education, however. Rather, because all fifty states had decided to offer a system of public education, the Court's opinion made clear that students had a federal right to equal educational opportunities that was violated by segregation.

The first major setback for students' rights following *Brown* occurred when the Court issued *Rodriguez* in 1973. *Rodriguez* involved a class action brought under the Equal Protection Clause of the Fourteenth Amendment.[35] The plaintiffs challenged the Texas school finance system, which relied on local property taxes to fund schools,[36] and claimed that strict scrutiny should be applied to the system due to the existence of wealth discrimination, a fundamental right to education, or both.[37] The Edgewood school district—the poorest in San Antonio—taxed itself at the highest rate in the metropolitan area, but was only able to raise $356 per pupil.[38] Edgewood used this money to serve a population of low-income, minority students,[39] who required more resources to reach academic outcomes similar to those of affluent, white students.[40] By contrast, the Alamo Heights school district—the wealthiest in San Antonio—taxed itself at a much lower rate, but was able to raise $594 per pupil.[41] It used this money to serve a far less needy student population.[42]

Although the Court recognized that education is critically important to society, it nevertheless held there is no fundamental right to education

[33] Id. at 495.
[34] Id.
[35] *Rodriguez*, 411 U.S. at 5–6.
[36] Id. at 6–11.
[37] Id. at 29.
[38] Id. at 12. This total combined collected property taxes, the Foundation Program contribution, and federal funds. The Edgewood school district was only able to raise $26 per pupil through property taxes; the Foundation Program contributed $222 per pupil, while the remaining $108 per pupil came from federal funds. Id.
[39] Id.
[40] Lyndsey Layton, Study: Poor Children Are Now the Majority in American Public Schools in South, West, Wash. Post, Oct. 16, 2013, http://www.washingtonpost.com/local/education/2013/10/16/34eb4984-35bb-11e3-8a0e-4e2cf80831fc_story.html.
[41] *Rodriguez*, 411 U.S. at 12–13. The Alamo Heights school district was able to raise $333 per pupil through property taxes; the Foundation Program contributed $225 per pupil, while the remaining $36 per pupil came from federal funds. Id.
[42] Id.

under the Federal Constitution.[43] Furthermore, the Court found that poor students are not a traditional suspect class and are not entitled to equal educational quality or equal school funding under the Equal Protection Clause.[44] The Court reached this latter conclusion due to "the absence of any evidence that the financing system discriminates against any definable category of 'poor' people or that it results in the absolute deprivation of education."[45] However, the Court left open the possibility of greater judicial intervention if a clearly defined group of children were absolutely precluded from receiving an education, citing its wealth-based classification precedents for support.[46] The Court's preoccupation with absolute deprivation for low-income students creates at least the possibility of a right to "some identifiable quantum of education"[47] under the Constitution. Unfortunately, however, litigation strategies have not tested this theory, focusing efforts instead on state courts.[48] As this Note will argue in Part III, this unresolved issue could help students to challenge subpar educational instruction offered by AEPs.

Following *Rodriguez*, the Court clarified which procedural due process rights are implicated whenever schools consider removing students for misconduct. In *Goss v. Lopez*, public school students challenged an Ohio law that allowed principals to suspend them for up to ten days without a hearing.[49] Although the Court recognized that the authority of a school to enforce its own discipline code is relatively broad, it nevertheless held that the state must "recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that

[43] Id. at 35.
[44] Id. at 28, 50–51.
[45] Id. at 25.
[46] Id. at 20–25 (citing Bullock v. Carter, 405 U.S. 134, 149 (1972); Williams v. Illinois, 399 U.S. 235, 242–44 (1970); Douglas v. California, 372 U.S. 353, 357–58 (1963); Griffin v. Illinois, 351 U.S. 12, 19–20 (1956)).
[47] Id. at 36.
[48] See, e.g., Scott R. Bauries, Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions, 61 Ala. L. Rev. 701, 705 (2010) (discussing an increase in education finance litigation, focused on equalizing funding, in state courts after *Rodriguez*); William E. Thro, Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model, 35 B.C. L. Rev. 597, 601–04 (1994) (describing current education litigation in state courts as focused on the quality of education received).
[49] 419 U.S. at 568.

Clause."[50] The Court went on to conclude that, "as a general rule[,] notice and hearing should precede removal of the student from school," unless the student "pose[d] a continuing danger to persons or property" or created "an ongoing threat of disrupting the academic process."[51] In that case, he or she could be removed immediately, but notice and a hearing had to occur shortly thereafter.[52]

Although *Goss* ensured that students who are suspended for even short periods of time are entitled to some procedural due process before being excluded from the classroom, the case did little to encourage schools to utilize suspensions or expulsions as a last resort. Rather, lower courts and school districts interpreted *Goss* as narrowly as possible, requiring only that a student be informed of possible disciplinary action and given an informal opportunity to be heard, usually by speaking with a school administrator.[53] For that reason, *Goss* may have in fact made it easier for schools to exclude students. Once schools comply with the minimal notice and hearing requirements, they can suspend students with near impunity.

The final Supreme Court case, and the primary focus of this Note, addressed again the status of education under the Federal Constitution. In *Plyler v. Doe*, a class of children of Mexican origin challenged a Texas law under the Equal Protection Clause that withheld state funding from schools that served undocumented students.[54] In addition, the law authorized local school districts to deny enrollment to these students.[55] The Court focused its analysis on several factors, including the children's undocumented status, the importance of education, and the values underlying the Fourteenth Amendment.

First, the Court concluded that the Texas law "impose[d] a lifetime hardship on a discrete class of children not accountable for their [undocumented] status"[56] without furthering a substantial state interest.[57] Next,

[50] Id. at 574.
[51] Id. at 582.
[52] Id. at 582–83.
[53] For two cases that show how little process is required under *Goss*, see *Hinds County School District Board of Trustees v. R.B. ex rel. D.L.B.*, 10 So. 3d 387, 398–99 (Miss. 2008) (relying on *Goss* in finding no substantial prejudice when a student was denied two full evidentiary hearings), and *Smartt v. Clifton*, No. C-3-96-389, 1997 WL 1774874, at *19 (S.D. Ohio Feb. 10, 1997) (upholding as sufficient notice that was given only two days prior to the hearing).
[54] 457 U.S. at 205–06.
[55] Id. at 205.
[56] Id. at 223.

the Court pointed out that, although "[p]ublic education is not a 'right' granted to individuals by the Constitution," it is also not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation."[58] Rather, education has "a fundamental role in maintaining the fabric of our society."[59] In focusing on the importance of education, the Court reiterated the words of *Brown v. Board of Education* from twenty-eight years prior:

> In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[60]

Finally, the Court described the Texas law as "an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit."[61] Given the stigma of illiteracy for undocumented students, the explicit discrimination, and the lack of a substantial state interest,[62] the Court applied heightened scrutiny and invalidated the law.[63] Once the state offered free public education to all children, the Court declared the state could not exclude undocumented children from its public schools.[64]

Plyler suggests that students have a plausible right of equal access to public education under the federal Equal Protection Clause, as long as claims are not premised upon wealth-based classifications alone. Such classifications do not typically merit heightened scrutiny absent other factors, such as a suspect class or fundamental right.[65] By the time of

[57] Id. at 230.
[58] Id. at 221 (citing *Rodriguez*, 411 U.S. at 35).
[59] Id.
[60] Id. at 222–23 (quoting *Brown*, 347 U.S. at 493).
[61] Id. at 221–22.
[62] Id. at 223–24, 230.
[63] The level of scrutiny applied by the Court is not explicit. However, Justice Blackmun's *Plyler* concurrence makes clear that *Rodriguez* "implicitly acknowledged that certain interests, though not constitutionally guaranteed, must be accorded a special place in equal protection analysis." Id. at 233 (Blackmun, J., concurring). His concurrence draws analogies to the voting rights cases, which suggest that rational basis review is insufficient. See id. at 233–35 (Blackmun, J., concurring).
[64] Id. at 230.
[65] Id. at 216–18.

Plyler, no federal fundamental right to education existed.[66] Moreover, although the Court recognized the undocumented students as part of a "permanent caste" or "underclass,"[67] the Court did not rely upon a simple wealth-based classification to strike down the law. Rather, *Plyler* focused on the students' status as members of a suspect class of "illegal migrants" who the state had singled out for discriminatory treatment.[68]

The exact status of the right of equal access, first recognized by *Brown* and later reaffirmed by *Plyler*, remains unclear. The Court's failure to follow traditional constitutional doctrinal analysis in either *Brown* or *Plyler* is largely to blame for this confusion. In both cases, the Court never explicitly states its standard of review.[69] Moreover, although the Court may mention, or even discuss, some of the factors relevant to a suspect class analysis (for example, a history of discrimination, a discrete and insular minority, or political powerlessness) or a fundamental rights analysis (for example, tradition, history, and precedents), the Court's ultimate holdings do not logically follow from these analyses.[70] Because of this confusion, lower courts have continued to struggle with the implications of *Plyler* in other contexts, including whether the plausible right of equal access should be extended to students who face disciplinary sanctions in school.

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[66] *Rodriguez*, 411 U.S. at 35.

[67] *Plyler*, 457 U.S. at 218–19.

[68] Id. at 218.

[69] Id. at 223–24; *Brown*, 347 U.S. at 483. Although *Plyler* describes its standard of review as rational if the state discrimination furthers a substantial state interest, this combines terms from rational basis review with an intermediate level of scrutiny, making the precise standard of review unclear.

[70] In *Brown*, the Court examined the history of public education, the intent of the Framers of the Fourteenth Amendment, and past precedents on the doctrine of separate but equal, such as *Plessy v. Ferguson*. *Brown*, 347 U.S. at 489–93. But *Brown* then found the history and intent of the Framers inconclusive, id. at 489, even though segregated schools existed at the time the Fourteenth Amendment was ratified. In an unusual move by the Supreme Court, *Brown* holds that separate facilities are inherently unequal and overturns *Plessy* in the context of education. Id. at 495. At no point, however, are the words "fundamental right" or "suspect class" ever mentioned. Thus, the *Brown* court discusses the factors, but not the key terms, of the traditional suspect class and fundamental right analyses, but then relies upon neither one. In *Plyler*, the Court mentioned both suspect classes and fundamental rights as being necessary for a constitutional violation under the Fourteenth Amendment. 457 U.S. at 216–17. But the Court then fails to discuss the factors of either analysis in great detail en route to its final conclusion that states cannot exclude undocumented students from public schools. Id. at 216–30. Unlike *Brown*, the *Plyler* Court mentions the key terms of the traditional suspect class and fundamental rights analyses, but the Court does not adequately analyze the factors of either analysis to reach its final conclusion.

B. Responses to Plyler*: Federal Court Interpretations of the Plausible Right of Equal Access*

Plyler's holding did not clarify the amount of protection necessary to ensure equal access to public education. As a result, two theories emerged as to what *Plyler* meant for students. One theory, endorsed by the Supreme Court in *Kadrmas v. Dickinson Public Schools*, interpreted *Plyler* as narrowly confined to its facts, applying only in cases involving children who were denied an education based on the misconduct of their parents or cases involving a denial that led to the creation of a subclass of illiterates.[71] Other courts interpreted *Plyler* more broadly, requiring the application of heightened scrutiny any time a state limited access to public education for a discrete group of students. Because *Plyler* was not decided based upon a wealth-based classification alone,[72] however, this broader interpretation is more likely correct. Other discrete groups of students, such as students of color or students with disabilities, may have a plausible claim to equal access under the Federal Constitution.

In *Kadrmas*, decided six years after *Plyler*, the Supreme Court addressed whether school districts could charge students a fee to ride the school bus.[73] At issue in the case was a North Dakota law that allowed schools in sparsely populated areas to consolidate or reorganize into larger school districts to achieve better economies of scale.[74] When schools reorganized, they had to include a plan for the transportation of students to school; these plans, once created, could only be modified with the approval of voters.[75] A 1979 amendment to the law, however, permitted schools that chose not to reorganize to charge a fee for bus transportation.[76] The plaintiffs claimed, among other things, that the bus fee violated the Equal Protection Clause because it prevented minimal access to education for low-income students who could not afford the fee.[77]

The Supreme Court distinguished *Plyler* from the facts of *Kadrmas* on two grounds: first, that the student-plaintiff "ha[d] not been penalized

[71] 487 U.S. 450, 459 (1988).

[72] For a discussion on why *Plyler* was not ultimately about wealth-based classifications, see supra Section I.A and accompanying notes.

[73] 487 U.S. at 452.

[74] Id. at 453.

[75] Id.

[76] Id. at 454.

[77] Id. at 458.

by the government for illegal conduct by her parents"; and second, that there was no reason to believe the fee would create and perpetuate "a subclass of illiterates within our [country]."[78] The Court went on to note that it had not extended *Plyler's* holding "beyond the 'unique circumstances' that provoked its 'unique confluence of theories and rationales.'"[79] With this statement, the Court implied that *Plyler* was limited to its facts and that the Court was unwilling to extend it to other contexts.

The United States Court of Appeals for the Third Circuit adopted a narrow interpretation of *Plyler* in *Brian B. v. Pennsylvania Department of Education*.[80] It addressed a state law that excluded juveniles who were seventeen or older from public education if convicted of a criminal offense as an adult and sentenced to an adult county correctional facility.[81] The Third Circuit held that the "unique circumstances" of *Plyler*—namely, punishing children for the illegal conduct of their parents—were not present.[82] The students were being punished not for the crimes of their parents, but as a result of their own illegal conduct.[83] Thus, the court applied rational basis review and upheld the law.[84]

Although the Court suggested in *Kadrmas* that *Plyler* should be limited to its unique facts, the Court also made clear that *Plyler* was fundamentally different from *Kadrmas*. *Kadrmas* was decided solely based upon relative wealth, a category that the Court has been openly hostile to recognizing as a suspect class under traditional equal protection doctrine in the past.[85] *Plyler*, by contrast, focused instead on the relationship between the students' undocumented status, a category that is easier to define and more immutable than poverty, and its impact on their socioeconomic class.[86] Because of this key difference between *Plyler* and *Kadrmas*, it is not surprising that the Court refused to extend *Plyler's* possible right of equal access to education premised upon a wealth-based classification alone. The Court's refusal in no way suggests, how-

[78] Id. at 459 (quoting *Plyler*, 457 U.S. at 230).
[79] Id. (citations omitted).
[80] 230 F.3d 582 (3d Cir. 2000).
[81] Id. at 584–85.
[82] Id. at 586 (internal quotation marks omitted).
[83] Id.
[84] Id. at 588.
[85] See, e.g., Harris v. McRae, 448 U.S. 297, 323 (1980) (stating "this Court has held repeatedly that poverty, standing alone, is not a suspect classification").
[86] For a discussion on why *Plyler* was not ultimately about wealth-based classifications, see supra Section I.A and accompanying notes.

ever, that this federal right of equal access might not exist in other, more compelling contexts. Due in part to the key differences between *Kadrmas* and *Plyler*, in fact, the Eighth Circuit and Eastern District of New York have both taken a broader approach, applying heightened scrutiny to any denial of equal access to education for a discrete group of students.

In *Horton v. Marshall Public Schools*, the Eighth Circuit addressed an Arkansas law that required a child's parents to be domiciled in a school district in order for the child to be eligible to attend the district's public schools.[87] The plaintiffs in *Horton* argued that they had been excluded from public education, even though they lived in the school district, because of their parents' status as non-domiciliaries.[88] The Eighth Circuit relied upon a disagreement between Chief Justice Burger and Justice Powell in *Plyler* to clarify when heightened scrutiny applies. Chief Justice Burger's dissent had pointed out that, given the holding in *Rodriguez*, lacking control over a status—undocumented or otherwise—"was irrelevant for purposes of determining the applicable standard of review."[89] Powell's concurrence responded by clarifying that heightened scrutiny was not necessary in *Rodriguez*, as it was in *Plyler*, because the low-income children in *Rodriguez* had not been "singled out by the State and then penalized," nor "totally deprived of all education."[90] Adopting Justice Powell's reasoning, the Eighth Circuit held that penalizing children for their parents' non-domiciliary status and the total deprivation of education (that is, denial of equal access) that resulted required heightened scrutiny.[91] The Eighth Circuit then struck down the law as unconstitutional.[92]

In *National Law Center on Homelessness and Poverty v. New York*, the Eastern District of New York also applied heightened scrutiny in the context of students in temporary housing, denying the defendants' motion to dismiss.[93] Rather than focusing on penalizing children for their parents' illegal conduct, the court shifted its analysis to punishing a child based on a parent's "misfortunes or misdeeds," such as being too poor to

[87] 769 F.2d 1323, 1324 (8th Cir. 1985).
[88] Id. at 1329–30.
[89] Id. at 1330 (citing *Plyler*, 457 U.S. at 245 n.5 (Burger, C.J., dissenting)).
[90] Id. (quoting *Plyler*, 457 U.S. at 239 n.3 (Powell, J., concurring) (alterations omitted)).
[91] Id.
[92] Id. at 1331.
[93] 224 F.R.D. 314, 322 (E.D.N.Y. 2004).

afford housing.[94] The court noted that in erecting barriers that prevented children in temporary housing from attending school, the state was "risking significant and enduring adverse consequences" similar to the stigma of illiteracy at issue in *Plyler*.[95] *Kadrmas* notwithstanding, then, federal courts have continued to apply *Plyler* beyond the unique confines of its facts.

Plyler is, at the very least, ambiguous and unclear. Although *Rodriguez* established in no uncertain terms that there is no fundamental right to education under the Federal Constitution, *Plyler's* reasoning, combined with *Brown*, suggests the possibility of a right of equal access to education under the Equal Protection Clause. While there is no absolute right to education, *Plyler* implies that it is constitutionally problematic for states to exclude discrete groups of students from public schools once a system of free education is offered to all. The various reasons—both narrow and broad—why such exclusion is constitutionally suspect create an opportunity to challenge the long-term suspensions and expulsions of students who misbehave.

In addition to federal challenges based on *Plyler*, this Note will examine in Section II.C how state law impacts students' right to education. In some cases, states provide additional protections for students—found in equal protection and education clauses in state constitutions—that make it more difficult for schools to exclude students who misbehave. In others, state law leads to additional problems of inequity by creating multiple definitions of what might be required for a basic education following *Rodriguez*.

C. State Rights: Safe Harbor or More of the Same?

Although state law has the potential to safeguard the uncertain futures of at-risk students, it also adds to the confusion of the exact status of educational rights. This confusion stems from two possible variables, including: (1) whether the state has declared education as a fundamental right, based upon a combination of equal protection and education clauses in state constitutions; and (2) how states have chosen to define the possible requirements of a "basic education" following *Rodriguez*. Because states have become the battlegrounds for determining how easy or difficult it is to exclude students from school after *Plyler*, it is im-

[94] Id.
[95] Id.

portant to understand how this landscape of education rights differs from state to state.

Unlike the Federal Constitution, every state constitution contains an education clause that is critically important for determining whether students have a fundamental right to education at the state level.[96] To date, seven states have held that education is not a fundamental right under their respective state constitutions.[97] Conversely, sixteen states have recognized a fundamental right to education.[98] The status of the right to education is less clear in the remaining twenty-seven states, where the respective state supreme courts have not yet issued an opinion interpreting the right to education enumerated in their state constitutions. Until those state supreme courts declare otherwise, a total of thirty-four states are presumed to offer no greater protections than those available under the Federal Constitution. In practice, this variance in protection matters for determining how much judicial intervention will be allowed in school discipline cases. In fact, *the* dispositive factor at the state level in determining how much leeway courts will give schools to exclude misbehav-

[96] "Stronger education clauses use adjectives such as 'efficient,' 'high quality,' 'uniform,' and 'thorough' to describe the system of free public schools that the state must establish. Others simply require that the legislature establish public schools." Katherine Twomey, Note, The Right to Education in Juvenile Detention Under State Constitutions, 94 Va. L. Rev. 765, 788 (2008) (citing Ark. Const. art. XIV, § 1; Del. Const. art. X, § 1; Ill. Const. art. X, § 1; Ky. Const. § 183; Md. Const. art. VIII, § 1; Pa. Const. art. III, § 14; Tex. Const. art. VII, § 1; W. Va. Const. art. XII, § 1).

[97] The seven states are: Colorado, Georgia, Idaho, Illinois, Indiana, Massachusetts, and Rhode Island. See Lujan v. Colo. State Bd. of Educ., 649 P.2d 1005, 1018–19 (Colo. 1982); McDaniel v. Thomas, 285 S.E.2d 156, 167 (Ga. 1981); Thompson v. Engelking, 537 P.2d 635, 647 (Idaho 1975); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1194 (Ill. 1996); Bonner v. Daniels, 907 N.E.2d 516, 522 (Ind. 2009); Doe v. Superintendent of Sch. of Worcester, 653 N.E.2d 1088, 1095–97 (Mass. 1995); City of Pawtucket v. Sundlun, 662 A.2d 40, 55 (R.I. 1995). The rational basis test is applied when no fundamental right is found. This test requires only a rational relationship to a legitimate state interest before schools can suspend or expel students for misbehaving. See, e.g., Katzenbach v. McClung, 379 U.S. 294, 303–04 (1964). This standard is extremely deferential. Id. at 304. But see, e.g., Romer v. Evans, 517 U.S. 620, 631–32 (1996).

[98] The sixteen states are: Arizona, California, Connecticut, Kentucky, Minnesota, Mississippi, New Hampshire, New Jersey, North Carolina, North Dakota, Pennsylvania, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. See cases cited supra note 15. The strict scrutiny test is applied when a fundamental right is found. This test requires a compelling state interest and narrow tailoring. See, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995). This standard is very demanding. See, e.g., Loving v. Virginia, 388 U.S. 1, 12 (1967). But see Grutter v. Bollinger, 539 U.S. 306, 343 (2003); Korematsu v. United States, 323 U.S. 214, 216, 219 (1944).

ing students from traditional classrooms is whether education is a fundamental right.

One state supreme court that has proactively protected students' right to education is Kentucky. The Education Clause in the Kentucky Constitution states that "[t]he General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State."[99] In *Rose v. Council for Better Education*, the Kentucky Supreme Court used this sparse constitutional language to find a fundamental right to education and define what "efficient" means.[100] Rather than tying the meaning of "efficient" to state standards, the court defined an efficient system as one aimed at providing every child with seven specific capacities.[101] Thus, Kentucky is an example of the kind of robust protection offered in certain states for students' education rights.

In contrast, of the states that failed to find a fundamental right to education, the Indiana Supreme Court has created the strongest presumption against protecting students' rights. The Indiana Constitution, which contains far more textual opportunities to ensure that all children receive an education than Kentucky's does, states the following:

> Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall without charge, and equally open to all.[102]

In *Bonner v. Daniels*, the Indiana Supreme Court interpreted this language and held that "to the extent that an individual student has a right, entitlement, or privilege to pursue public education, this derives from the enactments of the General Assembly, not from the Indiana Constitution."[103] In other words, education is a statutory right in Indiana, not a constitutional one. Consequently, the legislature gets "considerable discretion in determining what will and what will not come within the

[99] Ky. Const. § 183.
[100] 790 S.W.2d 186, 206 (Ky. 1989).
[101] Id. at 212–13.
[102] Ind. Const. art. 8, § 1.
[103] 907 N.E.2d 516, 518 (Ind. 2009).

meaning of a public education system."[104] For students who are suspended and expelled in states like Indiana, the legislature—and by extension, the school boards that operate under legislative authority—can severely limit the kind of education children receive.

Because *Rodriguez* foreclosed the possibility of a fundamental right to education under the Federal Constitution, litigation shifted to state courts to address first the equity, and then the adequacy, of school funding.[105] Although *Rodriguez* suggested that low-income students might have a right to a "basic education," it never addressed the possible baseline level of learning that had to be present. Moreover, because advocates abandoned their efforts at the federal level following *Rodriguez*, no federal challenge brought the question back to the Supreme Court for determination. Thus, it remains unclear whether a basic education must be provided under the United States Constitution, and if so, what that education must look like.

In practice, state courts have turned to curriculum standards—approved by state legislatures—in an attempt to define the term "basic."[106] In some states, this effort has raised expectations for what schools must deliver to students in terms of academic outcomes. A New Jersey court, for example, ordered the state to equalize funding in order to provide a "thorough and efficient" education under the New Jersey Constitution.[107] The result was a system that aligned school funding with the actual costs of meeting defined achievement levels, devoting more money to poorer school districts to help struggling students catch up.[108]

In other states, courts set expectations lower, sometimes failing to anchor state constitutional violations to educational standards. The New York Court of Appeals, for instance, rejected the Regents' standards as failing to provide proof of a violation of the Education Article of the New York Constitution because those standards "exceed[ed] notions of

[104] Id. at 521.

[105] See, e.g., William S. Koski, Of Fuzzy Standards and Institutional Constraints: A Re-Examination of the Jurisprudential History of Educational Finance Reform Litigation, 43 Santa Clara L. Rev. 1185, 1188–93 (2003).

[106] See, e.g., Abbott v. Burke, 693 A.2d 417, 428 (N.J. 1997) (*Abbott IV*) (holding that "the standards are facially adequate as a reasonable legislative definition of a constitutional[ly] thorough and efficient education"). But see, e.g., Campaign for Fiscal Equity v. New York, 655 N.E.2d 661, 666 (N.Y. 1995) (*CFE I*) (holding that the Regent's tests and Commissioner's standards adopted by the state of New York "exceed notions of a minimally adequate or sound basic education").

[107] *Abbott IV*, 693 A.2d at 456.

[108] Id. at 439–43.

a minimally adequate or sound basic education."[109] The New York Court of Appeals then refused to "definitively specify" what is constitutionally required, suggesting only that the trial court consider on remand whether students were being provided with an opportunity to learn "basic literacy, calculating and verbal skills necessary to . . . function as civic participants capable of voting and serving as jurors."[110] But being able to vote or serve on a jury is a much easier requirement to meet than parity in academic achievement. This gap in what is minimally required helps illustrate the potential problems that *Rodriguez* created at the state level in defining the level of education that all children should receive.

Even when state courts choose to rely on state educational standards to define "basic," another problem of inequity arises: State standards vary, leading to different academic outcomes in different states. To give just one example, all students in the United States take the National Assessment of Educational Progress ("NAEP") in the fourth and eighth grades to test their reading and mathematics proficiency.[111] Georgia and South Carolina have similar results on the NAEP test for eighth grade reading: 26% proficient and 25% proficient, respectively.[112] But under Georgia's state standards, 88% of its students are considered proficient.[113] In contrast, only 25% of students in South Carolina are considered proficient.[114] This means that South Carolina's state standards are far more rigorous than Georgia's. Thus, a child who previously was not considered able to read at a particular grade level in South Carolina could move across its western border to Georgia and suddenly be considered able to do so. Such wide variance in what is expected from a "basic" education means that, in some states, schools will not be held accountable if students fail to learn. This is especially concerning given the increasing frequency with which students with behavioral problems are excluded from school. If schools are not accountable for such students' learning while they are physically present, schools will be even less accountable for their learning during their long-term suspension or expulsion and possible attendance at AEPs.

[109] *CFE I*, 655 N.E.2d at 666.
[110] Id. at 666–67.
[111] Paul E. Peterson & Frederick M. Hess, Few States Set World-Class Standards, Educ. Next, Summer 2008, at 70.
[112] Id. at 72–73.
[113] Id. at 73.
[114] Id. at 72.

Ultimately, variance in state constitutions in defining "basic education," and in the rigor of state standards makes it difficult to determine precisely what rights students have in the majority of states when they are excluded from school . If a fundamental right to education under the state constitution exists, then students are entitled to greater protection. However, even if no fundamental right exists at the state level, *Plyler* still suggests that such exclusion may violate students' plausible right of equal access to education at the federal level. The next Part of this Note will clarify why school exclusion based on misbehavior is constitutionally problematic at either level of government.

II. STUDENTS WHO ARE LONG-TERM SUSPENDED OR EXPELLED ARE DEPRIVED OF THEIR RIGHT OF EQUAL ACCESS TO A BASIC EDUCATION IN TWO WAYS

When students are long-term suspended or expelled from school, two distinct deprivations of their possible rights to education occur. First, although eleven states currently require school districts to provide alternative education services to students excluded from school,[115] many of

[115] Eleven states have created a statutory right to alternative education in certain contexts. See Ark. Code. Ann. § 6-15-1005(a)(5)(A) (2013) (providing alternative education to students who are behind academically or whose behavior impedes their learning or the learning of others); Cal. Educ. Code § 48915 (Deering 2013) (providing alternative education to students who are expelled); Conn. Gen. Stat. § 10-233d (2013) (providing alternative education to all students under age sixteen while expelled, but for students who are sixteen or older, providing it only if the students meet certain conditions imposed by the local or regional school board); Ga. Code Ann. § 20-2-751.1 (2012) (authorizing the placement of a student who brings a firearm or dangerous weapon to school in an alternative education program); Md. Code Ann., Educ. § 7-304 (LexisNexis 2014) (requiring boards of education to create special programs for disruptive students); Mo. Rev. Stat. §167.164 (2000) (making clear that suspensions and expulsions do not relieve the state of its duty to educate students); N.J. Stat. Ann. § 18A:37-2.2 (West 2013) (requiring the placement of any student who commits an assault at school or brings a weapon to school in an alternative education program or, if none is available, in home-bound instruction); Ohio Rev. Code Ann. § 3313.534 (LexisNexis 2013) (requiring the establishment of alternative schools to serve students with severe discipline problems or who attend schools with low graduation rates); R.I. Gen. Laws § 16-21-27 (2013) (requiring each school district to establish continued education for students suspended for longer than ten days or who are chronically absent); Tex. Educ. Code Ann. § 37.008 (West 2012) (requiring each school district to create a disciplinary alternative education program); Utah Code Ann. § 53A-11-907 (LexisNexis 2013) (requiring a parent or guardian to ensure that alternative education is provided through the use of private education, an alternative education program provided by the district, or other suitable means). At least one state supreme court has held that alternative education services can be required for suspensions and expulsions that are long-term. See Cathe A. v. Doddridge Cnty. Bd. of Educ., 490 S.E.2d

these programs violate students' possible right to a basic education by providing abhorrent services. Second, in the majority of states where students do not receive alternative education services, school boards violate students' plausible right of equal access to education. Before arguing how either a lack of AEPs or the existence of AEPs that offer a watered-down curriculum potentially violate students' rights, this Note will briefly explain the history and purpose of such programs.

A. Background on Alternative Education Programs

In the 1960s, AEPs were created to provide individualized instruction to alienated or otherwise disengaged students.[116] Originally, rather than being ordered to attend AEPs by school districts, student attendance was voluntary.[117] The goal behind AEPs was to reach marginalized students who had failed to do well in mainstream settings, providing them with an alternate route to academic success.[118] During the 1980s, however, a growing concern with school violence overlooked this goal and "fostered the proliferation of involuntary student assignments to AEPs across the country."[119] As schools suspended and expelled more and more "problem children" under zero-tolerance discipline policies, school boards began to mandate that these students attend AEPs.[120]

Now, students are transferred to AEPs for a variety of reasons, such as horseplay, loitering, inappropriate displays of affection, poor grades, truancy, crime, disruptive behavior, or even pregnancy.[121] In fact, in one high-profile case, a black student in Florida was charged with a felony and referred to an AEP after getting into a disagreement with a school administrator over a dress code violation.[122] The entire incident is disputed. The student claimed that the male assistant principal placed a

340, 351 (W. Va. 1997) ("[I]n all but the most extreme cases the State will be able to provide reasonable state-funded educational opportunities and services to children who have been removed . . . in a safe and reasonable fashion. Under such circumstances, providing educational opportunities and services to such children is constitutionally mandated.").

[116] Barbour, supra note 3, at 200.

[117] Id. at 201.

[118] See Kelly E. Cable et al., Ctr. for Evaluation & Educ. Pol'y, Alternative Schools: What's in a Name?, Educ. Pol'y Brief Vol. 7, No. 4 (Winter 2009) at 1, 2, http://eric.ed.gov/?id=ED510969.

[119] Barbour, supra note 3, at 201.

[120] Id. at 201.

[121] Id. at 199.

[122] Don Jordan & Christina Denardo, District Denies Gardens High Student Choked, Palm Beach Post, Jan. 12, 2007, at 1C, available at Westlaw 2007 WLNR 759762.

hand on her arm to escort her out of the girls' locker room.[123] He then alleged that the student assaulted him, while the student asserted that the assistant principal choked her.[124] Either way, the escalation was dramatic, given that the initial transgression was simply wearing a tube top to school.

Over the years, AEPs have morphed from a way to reach troubled students and ensure their academic success to a "dumping ground" for the most difficult children.[125] Now, AEPs have established themselves as warehouses for the worst-behaved students, as well as those most at risk of academic failure.

B. Low-Quality Alternative Education Programs Violate Students' Potential Right of Equal Access by Not Offering a Basic Education

In the eleven states that provide alternative education services to students while they are suspended or expelled, the quality of such programs is often so bad as to prevent students from obtaining even a basic education. Greater judicial intervention is warranted in this context for two reasons. First, AEPs suffer from a number of deficits—including the quality of the curricula and teachers, the length of the instructional day, and the lack of state accountability—that suggest that these programs are simply not rigorous enough to avoid constitutional problems following *Rodriguez*. Second, schools routinely use AEPs to segregate students of color and students with disabilities outside of mainstream classrooms, violating their plausible right of equal access after *Brown* and *Plyler*. Combining these two claims, it is clear that these programs do not provide a constitutionally adequate public education.

At the federal level, students' best argument against low-quality AEPs rests upon the question left open by *Rodriguez* of when, if ever, a state's exclusion of students warrants judicial intervention. Focusing on the two defining characteristics that merit intervention on behalf of impoverished individuals, *Rodriguez* pointed out that the low-income students who brought the case had not demonstrated that "they were completely unable to pay for some desired benefit, and as a consequence, they sus-

[123] Id.
[124] Id.
[125] India Geronimo, Deconstructing the Marginalization of "Underclass" Students: Disciplinary Alternative Education, 42 U. Tol. L. Rev. 429, 435 (2011) (internal quotation marks omitted).

tained an absolute deprivation of a meaningful opportunity to enjoy that benefit."[126] Success was not impossible, however. To win on the merits, the students needed to convince the Court that the school districts with the lower assessed property values in Texas received no public education at all.[127] In other words, the students needed, but failed, to prove that an "absolute deprivation" had occurred.[128]

One implication of the Court's discussion of wealth-based classifications in *Rodriguez* is that if low-income students cannot be totally precluded from public education, they must possess some kind of constitutional right to receive a baseline level of instruction. If that is true, then other discrete groups of students—with stronger claims to equal protection than those based on relative differences in wealth—should a fortiori have an interest in not being totally excluded from public education either. Thus, *Rodriguez* creates the possibility that AEPs that fail to provide a basic education to discrete groups of students violate the United States Constitution.

Current AEPs do not meet the idea from *Rodriguez* that students might need to receive a basic education under the Federal Constitution. In fact, these programs fail to provide a basic education in a variety of ways, including deficiencies in: (1) how and what students are taught; (2) the length of the instructional day; and (3) state accountability for student learning. Nowhere is this failure more clear than in AEPs' graduation statistics. Students who attend these programs are five times more likely to drop out of high school than their peers.[129] If that many students are falling behind and giving up, AEPs are simply not offering a basic education.

AEPs fail to offer a basic education in part because these programs do not provide quality curricula or teachers. In fact, "many AEPs effectively ban their students from receiving instruction in a curriculum aligned with state standards."[130] As a result, mainstream schools often penalize students when they return from an alternative program by not allowing them to advance grades.[131] These students then fall further behind aca-

[126] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 20 (1973).
[127] Id. at 23.
[128] Id. at 25.
[129] See, e.g., Deborah Fitzgerald Fowler et al., Tex. Appleseed, Texas' School-to-Prison Pipeline: Dropout to Incarceration: The Impact of School Discipline and Zero Tolerance 1, 2 (2007), available at http://www.texasappleseed.net/pdf/Pipeline%20Report.pdf.
[130] Barbour, supra note 3, at 221.
[131] Id. at 202–03.

demically. Even if a rigorous curriculum were offered, students in AEPs still face the problem of interacting with teachers who are often less qualified than teachers in mainstream schools.[132] Because teachers in AEPs have less experience and training, they frequently struggle to deliver the curriculum to students in ways that are proven to lead to student mastery.[133] Due to both the misaligned curricula and inexperienced teachers, most AEPs leave students to figure out what and how to teach themselves to avoid falling further behind.

In addition, the instructional day at AEPs is too short to provide a basic education. For example, as noted by the Education Law Center, a week at a mainstream school in Pennsylvania involves, on average, at least 27.5 hours of instruction.[134] In contrast, alternative schools in Pennsylvania can offer as few as 20 hours of instruction per week.[135] Despite research finding that at-risk populations served by AEPs, including low-income students and students with disabilities, need more time in school to catch up to their affluent peers,[136] AEPs continue to offer fewer hours. This failure to provide adequate instructional time demonstrates in part that AEPs do not offer a basic education.

Finally, AEPs fail to provide a basic education because no one is held accountable for the academic outcomes of the students placed in these programs. AEPs rarely have enough students enrolled to yield statistically reliable information.[137] As a result, AEPs are usually exempt from the requirement to make Adequate Yearly Progress ("AYP") on the state's measurable academic objectives under the federal No Child Left Behind

[132] Geronimo, supra note 125, at 435.

[133] See generally Doug Lemov, Teach Like a Champion: 49 Techniques That Put Students on the Path to College 71–108 (2010) (highlighting ten techniques that master teachers use to build student understanding, particularly in inner-city public schools that serve low-income students who are behind academically).

[134] Formal Complaint from David Lapp et al., Educ. Law Ctr., to Anurima Bhargava, Chief, Educ. Opportunities Section, U.S. Dep't of Justice 5 (Aug. 7, 2013) (available at http://www.elc-pa.org/wp-content/uploads/2013/09/ELC_DOJ_AEDYComplaint_8_7_13.pdf).

[135] Id. at 5–6 (citing Pa. Dep't of Educ., 2013-2015 Alternative Education for Disrupted Youth Program Guidelines 7 (March 2013), https://www.portal.state.pa.us/portal/server.pt/document/1407791/2013-15_alternative_education_for_disruptive_youth_program_guidelines_pdf_%282%29).

[136] See Harris Cooper et al., The Effects of Summer Vacation on Achievement Test Scores: A Narrative and Meta-Analytic Review, 66 Rev. Educ. Res. 227, 261 (1996); Erika A. Patall et al., Extending the School Day or School Year: A Systematic Review of Research (1985–2009), 80 Rev. Educ. Res. 401, 427 (2010).

[137] Barbour, supra note 3, at 203 n.67.

Act ("NCLB").[138] Because AEPs are exempt, mainstream schools are also not held responsible for the academic performance of students who attend AEPs.[139] As a result, most AEPs "neither participate in state-mandated tests nor track students' post-school academic or professional outcomes."[140]

Moreover, the few test scores that are available suggest that students are not receiving a basic education. For example, "in 2004[,] at an alternative school in Springfield, Massachusetts"—one state that did track the performance of its students in AEPs—"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."[141] Similar scores were reported across the state in other alternative schools in 2003, 2004, and 2005.[142] Since the release of these scores, Massachusetts has changed its policy and no longer requires AEPs to track and report student performance.[143] Given the appalling outcomes in Massachusetts, and the lack of accountability under NCLB more generally, it is not surprising that states hide from public view just how bad AEPs are at educating students.

Because AEPs involve unaligned curricula, less qualified teachers, shorter instructional days, and unaccountable schools, they cannot provide a basic education on par with traditional schools. Thus, these low-quality AEPs present a potential constitutional problem following *Rodriguez*.

Students' second major federal challenge to AEPs is premised upon a claim that, in practice, AEPs are utilized to exclude certain discrete groups of students from a basic education. These students can rely upon the *Rodriguez* arguments outlined above, as well as an additional claim that such exclusion violates the students' plausible right of equal access

[138] Id.

[139] See 20 U.S.C. § 6311(h)(1)(C)(i) (2012) (requiring states to disaggregate performance data by race, disability status, and status as economically disadvantaged, among others, except when "the number of students in a category is insufficient to yield statistically reliable information"); see also Barbour, supra note 3, at 203 n.67 (citing 34 C.F.R. § 200.7(a)(2)(i)(A) (2014) ("[E]ach State must determine the minimum number of students sufficient to . . . [y]ield statistically reliable information for each purpose for which disaggregated data are used.")).

[140] Barbour, supra note 3, at 203–04 (citations omitted).

[141] Id. at 224.

[142] Id.

[143] Id.

following *Plyler*. This Note will examine two groups of students that could potentially utilize a claim based upon *Plyler*: students of color and students with disabilities.

AEPs exist mostly in school districts in urban areas,[144] where black and Hispanic students are more likely than their white peers to be disciplined or arrested, even when committing the same offense.[145] These trends in school discipline are alarming, given that referrals to AEPs based on student misconduct reflect a similar pattern. For example, in one county in Mississippi, black students were referred to AEPs at *seven times* the rate of white students.[146] As a result, many AEP classrooms across the country are overwhelmingly black and male.[147] This tendency to refer black male students disproportionately to alternative programs presents one example of a clearly defined group of students whose plausible right of equal access to a basic education is being violated by schools.

Students with disabilities present another clearly defined group. Despite greater procedural protections provided under the Individuals with Disabilities Education Act ("IDEA"), students with disabilities are sometimes overrepresented in AEPs.[148] In a complaint filed with the Department of Justice, for example, the Education Law Center in Pennsylvania identified eighty-two school districts where students with disabilities made up at least fifty percent, if not more, of the student population in AEPs.[149] In some districts, the percentage of students with disabilities in AEPs was "more than double the rate of students with disabilities in the district."[150] In others, it was triple.[151] This overrepresentation of students with disabilities, like the overrepresentation of students of color, suggests that students' potential right of equal access is being violated.

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[144] Geronimo, supra note 125, at 435.

[145] See Jamie Dycus, Missing the Mark: Alternative Schools in the State of Mississippi 26–27, ACLU (2009), https://www.aclu.org/files/pdfs/racialjustice/missingthemark_report.pdf ("The per capita rate of alternative school referral among African American students . . . was 2.7 times the rate among white students . . . .").

[146] Id. at 27–29 (finding that for the past four years in Mississippi as a whole, blacks were two to three times more likely than whites to be referred to alternative education programs).

[147] See, e.g., id. at 25–26 (finding that for the past three years in Jackson, Mississippi, over eighty percent of the students attending AEPs were boys).

[148] Id. at 33; see also 20 U.S.C. § 1415(k) (2012) (outlining procedural protections provided to students with disabilities placed in AEPs).

[149] Lapp et al., supra note 134, at 10.

[150] Id.

[151] Id.

Combining the right to a basic education from *Rodriguez* with the claim of equal access from *Plyler*, students of color and students with disabilities have a final argument to make to challenge AEPs. These students could argue that even temporary deprivations of their right of equal access to mainstream schools can turn into an absolute one that would ultimately deny them a basic education under *Rodriguez*. First, students with behavioral problems are usually behind academically, and being excluded from traditional school only makes the problem worse. In fact, one study found that "students who ha[d] been suspended in the past score[d] three grade levels behind their peers in reading skills after one year, and almost five years behind after two years." Second, even if students are not behind, it is impossible for students to remain on grade level after missing days, weeks, months, or even years of key instruction from teachers in mainstream schools. They return from suspension or expulsion to earn additional bad grades, continue misbehaving, drop out of high school, and commit crimes.

Such poor outcomes for students demonstrate the problem with school districts suspending and expelling students, even in the short term. The lack of appropriate educational instruction may begin as only a temporary deprivation of students' rights, but its consequences are so far reaching and severe that the deprivation turns into an absolute one. Furthermore, the total derailment of students' education brought on by AEPs suggests an additional constitutional problem: infringing on a fundamental right at the state level.

Few state supreme courts have addressed the nexus between the existence of a fundamental right to education under the state constitution and the level of adequate education necessary to protect that right, either in AEPs or at traditional schools. The one supreme court to do so—New Hampshire—provides valuable insights into how strict scrutiny could be applied to protect the rights of students who are long-term suspended or expelled.

In *Claremont School District v. Governor*, the court held that students possess a state fundamental right to a constitutionally *adequate* public education.[152] While recognizing that the substance of the right could be achieved by schools that do not possess identical resources, the court noted that strict scrutiny would still apply to any "governmental action or lack of action that is the root cause of [any] disparity" in "adequa-

[152] 703 A.2d 1353, 1359 (N.H. 1997).

cy."[153] The court then outlined what would be considered a constitutionally adequate education under the New Hampshire Constitution:

> "Given the complexities of our society today, the State's constitutional duty extends beyond mere reading, writing, and arithmetic. It also includes broad educational opportunities needed in today's society to prepare citizens for their role as participants and as potential competitors in today's marketplace of ideas." A constitutionally adequate public education is not a static concept removed from the demands of an evolving world. It is not the needs of the few but the critical requirements of the many that it must address. *Mere competence in the basics—reading, writing, and arithmetic—is insufficient* . . . .[154]

Given this conception of the right to education, the New Hampshire Supreme Court invalidated the legislature's school funding scheme.[155]

Although *Claremont* addressed school funding, and not school discipline, its approach can be applied in the discipline context. The New Hampshire Supreme Court demonstrated a willingness, which may exist in other state courts that have declared a state fundamental right to education, to use strict scrutiny to ensure that students have access to an adequate education. In the context of school funding, the court's analysis suggests that it will protect low-income students from receiving a subpar education due to a lack of resources. In the school discipline context, analogous reasoning could lead to protecting students who misbehave from receiving a subpar education in AEPs because that education fails to provide them with even the "mere competence" the *Claremont* court rejected as insufficient. The only major barrier to the possible extension of this reasoning is the typical school defense of students forfeiting their rights to education by misbehaving, an issue this Note will address in Part III. Absent that defense, however, the New Hampshire Supreme Court's reasoning could be utilized to protect students' education rights once they are long-term suspended or expelled.

Both *Rodriguez* and *Plyler*, as well as the far greater protections provided by the existence of a fundamental right to education at the state level, create opportunities to challenge the constitutionality of low-quality AEPs for students who misbehave. The dismal academic out-

[153] Id.

[154] Id. (emphasis added) (citations omitted).

[155] Id. at 1360. The court's holding did not include any analysis of the state's compelling interest or the funding scheme's narrow tailoring.

comes in these programs suggest that students are not even gaining competence in the basics. At the very least, these programs are constitutionally problematic. At the federal level, they fail to provide students with equal access to a free public school education. At the state level, these programs may directly infringe upon a fundamental right. In either case, judicial intervention is warranted to strike down AEPs.

C. Lack of Alternative Education Programs Violates Students' State Fundamental Right to Education

Rather than provide low-quality AEPs, several states have affirmatively chosen not to provide students who are long-term suspended or expelled with alternative education services. For example, in places like Massachusetts, North Carolina, West Virginia, and Wyoming, school districts actually refuse to educate such students.[156] The impact of such a decision is often that students of color and students with disabilities (the vast majority of students who are long-term suspended or expelled by schools)[157] receive no educational services at all. Decisions like this are constitutionally problematic for the same reasons pointed out by this Note in the foregoing Section. Rather than repeat any arguments from *Claremont* about the adequacy of education that must be offered here, this Section will focus instead on how state courts apply heightened scrutiny to protect education as a fundamental right when states decide not to offer AEPs at all to long-term suspended or expelled students.

In the sixteen states that have found education to be a fundamental right under state constitutional provisions, the application of heightened scrutiny by state courts prevents schools from excluding students who misbehave, except in the narrowest of circumstances. Two states, North Carolina and West Virginia, have dealt with the issue of access to education in the context of school discipline directly.

[156] Doe v. Superintendent of Sch. of Worcester, 653 N.E.2d 1088, 1091–92 (Mass. 1995) (providing no alternative education to ninth grade student who brought a knife to school); King ex rel. Harvey-Barrow v. Beaufort Cnty. Bd. of Educ., 704 S.E.2d 259, 260–61 (N.C. 2010) (providing no alternative education to tenth grade student who participated in a fight at school); Cathe A. v. Doddridge Cnty. Bd. of Educ., 490 S.E.2d 340, 348–51 (W. Va. 1997) (overturning a school district's decision to provide no alternative education to a high school student during his expulsion for bringing two knives to school unless his parents agreed to pay for it); In re RM, 102 P.3d 868, 870, 874–76 (Wyo. 2004) (providing no alternative education to two high school students who sold marijuana to other students on school grounds).

[157] See Dycus, supra note 145, at 25–28, 33.

In *King ex rel. Harvey-Barrow v. Beaufort County Board of Education*, the North Carolina Supreme Court held that a suspended student who is excluded from alternative education (a statutory right in the state) "has a state constitutional right to know the reason for her exclusion."[158] Although a prior case—*Leandro v. State*—applied strict scrutiny to decide whether the state was providing a constitutionally adequate education to low-income students, the court noted that *Leandro* "does not immunize students from the consequences of their own misconduct."[159] Rather, "the right to attend school . . . is the right to attend subject to all lawful rules and regulations prescribed for the government thereof."[160] Because the application of strict scrutiny in the school discipline context would impose an "unworkable burden" on schools, the court instead held that intermediate scrutiny applies.[161] Thus, schools must give "an important or significant reason for denying students access to alternative education."[162]

The West Virginia Supreme Court in *Cathe A. v. Doddridge County Board of Education* also permitted the denial of access to education for some students under narrow circumstances.[163] Applying strict scrutiny, the court held that "in all but the most extreme cases," and after a strong showing of necessity, "the State will be able to provide reasonable state-funded educational opportunities and services to children who have been removed from the classroom . . . . [P]roviding educational opportunities and services to such children is constitutionally mandated."[164] The only extreme circumstance the court identified dealt with a student posing excessive danger to the safety of others.[165] Thus, the West Virginia Supreme Court went even further than the North Carolina Supreme Court in limiting a school's ability to exclude students from alternative education services.

Both state court opinions illustrate how the recognition of education as a fundamental right at the state level can lead to closer judicial scrutiny of school officials' decisions not to provide alternative education

[158] 704 S.E.2d at 261.
[159] Id. at 263 (citing Leandro v. State, 488 S.E.2d 249, 252, 261 (N.C. 1997)).
[160] Id. (quoting Coggins v. Bd. of Educ. of Durham, 28 S.E.2d 527, 530 (N.C. 1944)) (internal quotation marks omitted).
[161] Id. at 264–65.
[162] Id. at 265.
[163] 490 S.E.2d 340, 350–51 (W. Va. 1997).
[164] Id. at 351.
[165] Id.

programs to students who are long-term suspended or expelled. Absent an important or compelling reason in these states, schools will no longer be able to engage in this type of exclusion with impunity.

Ultimately, school districts cannot decide to offer students zero alternative education programs while they are long-term suspended or expelled. Although such a decision infringes on students' plausible right of equal access to education under the Federal Constitution, it also directly infringes on their fundamental right to education under state constitutions. In either instance, a total lack of education for these students is constitutionally problematic.

III. TYPICAL SCHOOL DEFENSE: FORFEITURE OF THE RIGHT TO EDUCATION

A. Students Cannot Forfeit Their Rights to Equal Protection of the Laws by Misbehaving

School districts often argue that students who misbehave interfere with the state's interest in providing a safe and secure environment in which all children can learn and, as a result, are subject to temporary removal.[166] Additionally, these schools maintain that regardless of the type of right to education that exists, students' receipt of educational services is contingent upon following state laws and school rules.[167] Based on these two rationales, schools routinely exclude students, claiming that they have forfeited their rights to education.[168]

[166] Doe v. Superintendent of Sch. of Worcester, 653 N.E.2d 1088, 1096 (Mass. 1995); Kolesnick v. Omaha Pub. Sch. Dist., 558 N.W.2d 807, 813 (Neb. 1997); *King*, 704 S.E.2d at 263; In re RM, 102 P.3d 868, 874 (Wyo. 2004).

[167] *Doe*, 653 N.E.2d at 1096; *King*, 704 S.E.2d at 263; *In re RM*, 102 P.3d at 874.

[168] Schools have not chosen to rely upon an alternate theory that students who misbehave are waiving their right to education. There are several potential complications with this theory. First, waiver of important constitutional rights generally requires a knowing, intelligent, and voluntary decision. See, e.g., State v. Pau'u, 824 P.2d 833, 835 (Haw. 1992); Pennsylvania v. Rickabaugh, 633 A.2d 647, 650 (Pa. 1993). But for reasons that will be discussed infra Subsection III.A.2, students are not generally capable of engaging in these types of waivers. Second, even if a student signs a behavioral contract with a school, such contracts rarely contain explicit provisions that students agree to waive all access to education if long-term suspended or expelled. Even if a contract did contain such provisions, the contract would likely be unenforceable because it was signed by a minor or it involved a parent waiving possible fundamental rights on behalf of his or her child. Courts are reluctant in either circumstance to find waiver. See, e.g., Allied Artists Picture Corp. v. Alford, 410 F. Supp. 1348, 1354 (W.D. Tenn. 1976) ("A waiver of constitutional rights is possible, but such a waiver of fundamental rights is not lightly inferred or assumed.").

School districts' conceptualization of student misbehavior as forfeiture is misleading, however. Due to the unique characteristics that children possess, students are not capable of intentionally relinquishing their rights under an implied consent or social contract theory. Rather, forfeiture should be justified only in a very narrow set of circumstances in which students engage in the most egregious forms of misbehavior. Moreover, in many states, students who commit crimes and are adjudicated delinquent retain a statutory right to education.[169] It is illogical and unjust for a student who misbehaves badly enough to commit a crime to have a stronger right to education than a student who talks too much in class. This is especially true given that all students have a plausible right of equal access to education under the United States Constitution and a fundamental right to education in sixteen states, both of which may be violated when students are long-term suspended or expelled. Ultimately, forfeiture should be possible in only the rarest of cases.

1. Under What Circumstances Can a Student Forfeit His or Her Right to Equal Access?

State supreme courts have reacted to the school forfeiture defense by allowing, in at least some circumstances, students to be long-term suspended or expelled without providing any educational services. The four states to address this issue directly—Nebraska, North Carolina, West Virginia, and Wyoming—have each applied different levels of scrutiny, depending on whether education is a fundamental right under the state constitution.

In states where there is no fundamental right to education, school districts can exclude students for a wide range of misbehaviors, as long as some possible reason for the exclusion can be imagined. For example, in *Kolesnick v. Omaha Public School District*, the Nebraska Supreme Court, recognizing that there is no fundamental right to education under the Federal Constitution,[170] went on to hold that there is no fundamental right to education under the Nebraska Constitution either.[171] As a result, expulsion did not violate a student's rights because it was a "rationally related means of protecting [other] students and staff from violence."[172]

[169] For examples of juvenile delinquents' statutory rights to education, see infra note 205.
[170] 558 N.W.2d 807, 813 (Neb. 1997).
[171] Id. The opinion left unclear whether education could be a fundamental right in other contexts.
[172] Id.

Despite this deferential review, however, the Nebraska Supreme Court left open the possibility that it could overturn a school district's disciplinary decision "if there is a shocking disparity between the punishment and the offense."[173] Thus, even when courts like Nebraska apply rational basis review, it is still possible that certain punishments will go too far.

Despite North Carolina, West Virginia, and Wyoming all recognizing a fundamental right to education at the state level, each of their respective courts—like Nebraska—also permitted schools to exclude students who exhibit serious misconduct from alternative education services. In *King ex rel. Harvey-Barrow v. Beaufort County Board of Education*, the North Carolina Supreme Court applied intermediate scrutiny, requiring schools to articulate "an important or significant reason" for denying access to alternative education.[174] Because there was only a statutory right to alternative education, however, the court reasoned that school officials would not find it difficult to articulate a reason for denying access when students forfeited their rights by "exhibit[ing] violent behavior, threaten[ing] staff or other students, substantially disrupt[ing] the learning process, or otherwise engag[ing] in serious misconduct."[175] Notably, this language is broad enough to encompass more than the most extreme cases of misbehavior.

Although both West Virginia and Wyoming went further and applied strict scrutiny to school discipline cases, these states joined North Carolina in allowing some students to be denied access based on a forfeiture theory. In *Cathe A. v. Doddridge County Board of Education*, the West Virginia Supreme Court held that

> A policy to the effect that the State has *no* responsibility to provide *any* state-funded educational opportunities and services to *any* children who are expelled [for offenses such as bringing a deadly weapon or a controlled substance to school] is constitutionally infirm because the State has not shown that applying such a limitation to *all* such children under *all* circumstances is reasonably necessary and narrowly tailored to further the compelling state interest in safe and secure schools.[176]

[173] Id.
[174] 704 S.E.2d 259, 265 (N.C. 2010).
[175] Id.
[176] 490 S.E.2d 340, 350 (W. Va. 1997) (emphasis in original).

Although the court recognized an exception for the most "extreme circumstances" with "a strong showing of necessity,"[177] the court also made clear that alternative education is constitutionally mandated for students who are long-term suspended or expelled.[178]

In contrast, in *In re RM*, the Wyoming Supreme Court held that a school district's decision to expel students for one year for selling drugs, without providing the expelled students any alternative education services, "[wa]s narrowly tailored to fit the state's compelling interest in protecting the safety and welfare of its students."[179] The court made clear, however, that the constitutionality of not providing alternative education services depended on the length of the students' suspensions being tailored to fit the circumstances of each student's case; mandatory punishments were not allowed under state law.[180] Additionally, the court highlighted the importance of the temporary deprivation of the right of equal access since expulsions under state law could not last longer than one year.[181]

Ultimately, state supreme courts appear willing to allow students to forfeit their rights to education in at least some circumstances. In fact, all courts agree that egregious misconduct will qualify as a reason for school districts to deny access to AEPs. It is less clear, particularly in states like Nebraska and North Carolina, where courts will draw the line between serious and nonserious misbehavior. One possible place to draw that line would involve considering the unique characteristics of juveniles that make it difficult for them to forfeit their rights under an implied consent or social contract theory.

2. Why Implied Consent and Social Contract Theories Are Insufficient to Justify Forfeiture

Throughout history, forfeiture as a legal concept has been used as a method of punishment for anyone who engages in intentional wrongdoing.[182] To be clear, school districts do not attempt to apply this legal doc-

[177] Id. at 350–51.
[178] Id.
[179] 102 P.3d 868, 875–77 (Wyo. 2004).
[180] Id.
[181] Id.
[182] Criminal forfeiture has a long history as a punishment for individuals found guilty of crimes. In fact, criminal forfeiture existed for centuries under English law for individuals convicted of certain felonies, such as treason, and resulted in the person forfeiting all of their real and personal property to the Crown. See 3 W. Holdsworth, A History of English Law

trine directly to the school discipline context, instead making broad policy arguments about the necessity of forfeiture to maintain order and discipline. Nevertheless, drawing analogies to specific examples of forfeiture in the criminal justice system, such as a criminal defendant's right to be present at trial or the disenfranchisement of felons, is useful for illustrating the problematic nature of allowing students to forfeit their possible right of equal access to education under the Federal Constitution.

In the criminal justice system, adults are allowed to relinquish their constitutional rights after engaging in misconduct based upon an implied consent theory. For example, under the Sixth Amendment's Confrontation Clause, criminal defendants enjoy the right to confront the witnesses against them.[183] This includes the right to be present at trial[184] and the right to cross-examine the prosecution's witnesses.[185] But such a right is not absolute. If the defendant causes the absence of a witness through coercion, intimidation, or worse, then the defendant loses the right to confront that witness on the stand.[186] Typically, the result of such misconduct will be the admission of the witness's hearsay statements at trial.[187] Additionally, if a criminal defendant chooses to misbehave during trial, the defendant can lose the right to be present at trial, either temporarily or permanently.[188] These examples illustrate that forfeiture under

68–71 (3d ed. 1922); 1 F. Pollock & F. Maitland, History of English Law 351 (2d ed. 1909); Barry L. Johnson, Purging the Cruel and Unusual: The Autonomous Excessive Fines Clause and Desert-Based Constitutional Limits on Forfeiture After *United States v. Bajakajian*, 2000 U. Ill. L. Rev. 461, 465–66 (citing S. Rep. No. 98-225, at 81 (1983)). However, Article III, Section 3 of the Constitution, U.S. Const. art. III, § 3, cl. 2 (abolishing corruption of blood and forfeiture of estate in connection with the crime of treason), and a federal statute passed by the first Congress, Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 112, 117 (1850) (codifying abolition of corruption of blood and forfeiture of estate in connection with treason and extending that abolition to other enumerated offenses), abolished this type of forfeiture in the United States. It was not revived until nearly 200 years later, when Congress provided for criminal forfeiture as a remedy in the Racketeer Influenced and Corrupt Organizations Act ("RICO") and the Controlled Substances Act. Racketeer Influenced and Corrupt Organizations Act of 1970, 18 U.S.C. § 1963 (1994); Controlled Substances Act of 1970, 21 U.S.C. § 853 (1994). This contemporary form of criminal forfeiture requires that the individual engage in serious criminal acts and that those acts be related to the rights or interests forfeited.

[183] U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .").

[184] Lewis v. United States, 146 U.S. 370, 371 (1892).

[185] Mattox v. United States, 156 U.S. 237, 242–43 (1895).

[186] Davis v. Washington, 547 U.S. 813, 833 (2006).

[187] See, e.g., Giles v. California, 554 U.S. 353, 367 (2008) (citing Fed. R. Evid. 804(b)(6)).

[188] See, e.g., Illinois v. Allen, 397 U.S. 337, 342–43 (1970).

the Sixth Amendment involves intentional wrongdoing followed by the loss of closely associated rights. This type of forfeiture theory could be used to justify school exclusion for students who commit offenses at school. By engaging in misconduct on school property, schools could argue that students consent to the loss of their plausible right of equal access to a free, public education. Such a theory is problematic, however, because students possess unique characteristics as children that make it difficult for them to consent to the loss of important constitutional rights.[189]

As the Supreme Court itself has noted, children are immature, have less sense of responsibility, have less control over their environment, are more susceptible to peer pressure, and have dynamic character.[190] Moreover, children exhibit "deficiencies in judgment" that prevent them from "fully considering all available . . . options and limit [their] ability to 'assess or integrate long-term consequences,'"[191] issues that the Supreme Court determined lead to recklessness, impulsivity, and risk-taking.[192] In other words, kids have a tendency *not* to think before they act. Students' misbehavior, then, is unlikely to be a strong indicator of any type of plan, including an intentional one, aimed at relinquishing their right of equal access to education under the Federal Constitution. Thus, it does not make sense to hold them accountable for impliedly consenting to the loss of such important rights either.

Another legal concept that involves the loss of rights through wrongdoing is the forfeiture of voting rights for individuals convicted of felonies. In eleven states nationwide, individuals who commit a serious crime and are found guilty lose the right to vote for life.[193] In the remaining thirty-eight states, laws vary, with some states permitting convicted felons to restore these rights upon release into the community.[194] Unlike

[189] Roper v. Simmons, 543 U.S. 551, 569–70 (2005).

[190] Id.

[191] Brief for NAACP Legal Defense & Educational Fund, Inc. et al. as Amici Curiae Supporting Petitioners at 12, Graham v. Florida, 130 S. Ct. 2011 (2010) (Nos. 08-7412, 08-7621) (quoting Laura Cohen & Randi Mandelbaum, Kids Will Be Kids: Creating a Framework for Interviewing and Counseling Adolescent Clients, 79 Temp. L. Rev. 357, 367 (2006)).

[192] See *Roper*, 543 U.S. at 569–70.

[193] Michael McLaughlin, Felon Voting Laws Disenfranchise 5.85 Million Americans with Criminal Records: The Sentencing Project, Huffington Post, July 12, 2012, http://www.huffingtonpost.com/2012/07/12/felon-voting-laws-disenfranchise-sentencing-project_n_1665860.html.

[194] Id.

the Sixth Amendment, however, forfeiture of voting rights does not necessarily include a close connection between the criminal offense and the right lost. Convicted felons lose the right to vote, regardless of whether they intended to relinquish that right through their criminal behavior. Thus, forfeiture in the voting context is based upon a social contract theory that individuals who intentionally refuse to follow society's rules by committing serious crimes should not be allowed to participate in making those rules.[195]

This social contract theory closely maps on to school districts' efforts to exclude students based on misbehavior, whether or not serious, that violates state laws or school rules. Like voting rights, students who lose access to education as a form of punishment can have their rights restored when they eventually return to school. One key distinction between forfeiture of voting and the loss of access to education calls into question the usefulness of this comparison, though. Convicted felons have the benefit of a higher burden of proof—guilty beyond a reasonable doubt—before losing the right to vote. Students, however, can be suspended or expelled following an informal hearing.[196] Because the procedural due process safeguards are fewer and the connection between the misconduct and the right lost is more tenuous, schools should not be permitted to use a social contract theory to justify forfeiture.

Although school districts have not attempted to apply the legal doctrine of forfeiture directly to the school discipline context in defense of school exclusion, the concepts underlying forfeiture suggest that allowing students who misbehave to forfeit their right of equal access to education is problematic. Examples from forfeiture in the criminal justice system, which rely upon implied consent and social contract theories, highlight that schools should not be allowed to exclude kids who misbehave from alternative education services except in the most extreme circumstances. Although forfeiture of rights may sound plausible in theory,

[195] George Brooks, Note, Felon Disenfranchisement: Law, History, Policy, and Politics, 32 Fordham Urb. L.J. 851, 853–54 (2005); Lauren Handelsman, Note, Giving the Barking Dog a Bite: Challenging Felon Disenfranchisement Under the Voting Rights Act of 1965, 73 Fordham L. Rev. 1875, 1882–84 (2005) (noting that proponents of disenfranchisement argue that felons "forfeit their right to engage in voting and deserve to suffer a 'civil death'"); cf. Afi S. Johnson-Parris, Note, Felon Disenfranchisement: The Unconscionable Social Contract Breached, 89 Va. L. Rev. 109, 111–12 (2003) (critiquing the use of social contract theory to explain felon disenfranchisement).

[196] For the discussion on students' due process rights related to school discipline, see supra Section I.A and accompanying notes.

it should be limited to instances of egregious misconduct at school, carefully considering the due process protections available prior to the occurrence of forfeiture and taking into account the unique decision-making skills of children.

3. Kids Who Commit Crimes Have a Statutory Right to Education (Sometimes)

In addition to drawing analogies to other legal concepts that involve forfeiture by wrongdoing, it is helpful to compare the education rights of students who misbehave to those of juvenile delinquents. Interestingly, kids who commit crimes and are adjudicated delinquent by courts have a statutory right to education while incarcerated in some states, while students who misbehave in school often have no right—statutory or otherwise—to alternative education services while suspended or expelled.[197] This paradox leads to perverse results for kids. If they misbehave badly enough to commit a crime, they might possess a stronger right to education than they would if they had simply disrupted class. Based on *Plyler*, *Rodriguez*, and state constitutions, however, students in both contexts still retain a plausible right of equal access and, in some cases, a fundamental right to education.

Convicted criminals, including kids, do not lose all of their constitutional rights at the jailhouse door.[198] In fact, prisoners' constitutional rights can only be curtailed for legitimate penological reasons.[199] Like adults' constitutional rights, any possible infringement on juvenile delinquents' plausible right of equal access to education must be balanced against the state's interests in safety and rehabilitation.[200] Generally, this balance leads to the preservation of the right to education in juvenile jails for two policy reasons. First, allowing kids who commit crimes to attend school is important to their rehabilitation because it ensures that they receive high school diplomas or the equivalent, can secure a job upon reentry into the community, and are less likely to commit future crimes.[201] Second, curtailing education, including not offering it at all,

[197] For an extended discussion on the lack of alternative education services available for students who misbehave, see supra Section II.C and accompanying notes.

[198] Hanna v. Toner, 630 F.2d 442, 444 (6th Cir. 1980) (citing Jones v. Metzger, 456 F.2d 854, 855 (6th Cir. 1972)).

[199] Id.

[200] See Twomey, supra note 96, at 803.

[201] Id. at 773–74.

negatively impacts prison safety. In fact, courts have recognized that education actually increases safety in these facilities by exerting "stabilizing effect[s] on institutional [i.e. inmate] populations."[202] Since preventing juvenile delinquents from attending school while incarcerated would compromise the rehabilitation and safety of these children, any infringements on constitutional rights to education should be limited in scope.

Because youth offenders' right to education can be infringed for certain penological reasons, some states have passed laws to ensure that incarcerated juveniles do not miss out on education altogether. For example, California state law declares that kids who commit crimes cannot be deprived of education in its juvenile facilities as a disciplinary measure.[203] In addition, Florida state law views education as "the single most important factor in the rehabilitation of adjudicated delinquent youth in the custody of Department of Juvenile Justice programs."[204] As a result, it offers education to all kids serving juvenile sentences. Other states also provide for the education of incarcerated youth.[205]

If children who misbehave badly enough to commit crimes are still entitled to receive an education—and have not forfeited it based on their criminal conduct—then it is illogical to punish students who misbehave in noncriminal ways during class by taking away their rights to education. True, students' right to access education in juvenile facilities is protected by statute, and not by federal or state constitutions. As a policy

[202] Id. at 803 (citing Brian B. v. Pa. Dept. of Educ., 51 F. Supp. 2d 611, 636 (E.D. Pa. 1999)) (alteration in original).

[203] Cal. Welf. & Inst. Code § 224.71(m) (Deering 2008) ("[A]ll youth confined . . . shall have the following rights: . . . To not be deprived of any of the following as a disciplinary measure: food, contact with parents, guardians, or attorneys, sleep, exercise, education, bedding, access to religious services, a daily shower, a drinking fountain, a toilet, medical services, reading material, or the right to send and receive mail.").

[204] Fla. Stat. § 1003.52 (2013) ("It is the goal of the Legislature that youth in the juvenile justice system continue to be allowed the opportunity to obtain a high quality education.").

[205] See, e.g., Ariz. Rev. Stat. Ann. § 41-2822.01 (2013) ("A committed youth who is confined in a secure care facility and has not received a high school diploma, a high school certificate of equivalency or an exception from the director shall attend school full time and make satisfactory progress in educational classes."); Miss. Code. Ann. § 43-21-321(s) (West 2009) ("The Mississippi Department of Education will collaborate with the appropriate state and local agencies, juvenile detention centers and local school districts to ensure the provision of educational services to every student placed in a juvenile detention center."); see also Ariz. Rev. Stat. Ann. § 15-913 (2013) (providing education services to incarcerated juveniles); Or. Rev. Stat. Ann. §§ 336.585, 336.590 (West 2014) (same); 24 Pa. Stat. Ann. § 1306.2 (West 2006) (same); Tex. Educ. Code Ann. § 37.011 (West 2012) (same).

matter, states are permitted—and entitled—to offer educational services to some subset of students who misbehave and not others. However, all students, regardless of the severity of their misbehavior, have a plausible right of equal access to education under the Federal Constitution. Efforts by states to limit this possible right in the school discipline context are constitutionally problematic, as discussed above in Part II.

Thus far, this Note has focused primarily on the legal arguments—both at the federal and state level—that may be available to students to fight school exclusion during long-term suspensions and expulsions. In the next Section, this Note will briefly highlight the policy arguments available to students who misbehave as they struggle to ensure that they, too, have access to a basic education.

B. Schools Should Not Be in the Business of Deciding to Educate Only the Most Desirable Students

Several policy reasons counsel against allowing schools to decide which students are worth educating and which students are not. First, identifying the reasons why students misbehave is not easy, making it possible to misinterpret their conduct as intent to forfeit the right to an education, when in fact their behavior is motivated by other factors. For example, at least one possible explanation for students' misbehavior is that it is a direct result of the school's failure to provide adequate and appropriate educational supports.[206] When students disengage from lessons or fail to follow school rules, they may be signaling that they need additional interventions to do well.[207] Thus, schools should focus first on identifying the cause of the student's misbehavior and then should brainstorm the appropriate response to address any lagging skills.

Second, although courts typically defer to the discretion of school boards to enforce disciplinary policies,[208] school officials have already proven that they are unlikely to protect students' rights to education. In

[206] See, e.g., Ross W. Greene, Calling All Frequent Flyers, 68 Educ. Leadership 28, 29–30 (Oct. 2010), http://group4-walden.wikispaces.com/file/view/Calling+all+frequent+flyers.pdf (explaining that students who misbehave in school lack cognitive skills that traditional school discipline policies fail to address effectively).

[207] Id.

[208] Wood v. Strickland, 420 U.S. 308, 326 (1975). For more cases showing court deference to the discretion of school boards, see *Ratner v. Loudoun County Public Schools*, 16 F. App'x 140, 142 (4th Cir. 2001); *South Gibson School Board v. Sollman*, 768 N.E.2d 437, 441 (Ind. 2002); *Covington County v. G.W.*, 767 So. 2d 187, 192 (Miss. 2000).

contexts where "the political branches are unlikely to do so," courts must play a role in enforcing the United States Constitution.[209] In fact, the Supreme Court has noted that there are three instances where heightened scrutiny might apply: (1) when the right violated is written in the Constitution; (2) if there is reason to believe that the political processes will be compromised by the law; or (3) the law is directed at minorities that are insular and discrete.[210]

As a threshold matter, it is not clear whether a right of equal access under the Federal Constitution would qualify for enforcement at all. Assuming that it does, students who are long-term suspended or expelled would fall under the third category because, as explained in Section II.B, these students are often students of color and students with disabilities. As the least dangerous political branch, courts should exercise judicial discretion over school officials' decisions to punish students who misbehave by taking away their plausible right of equal access under the Federal Constitution. Since student conduct is ambiguous, and school officials currently act with nearly unlimited discretion, there are strong policy reasons for judicial intervention.

CONCLUSION

Students who are long-term suspended or expelled based on misbehavior are often students of color and students with disabilities. Although these students are undoubtedly more difficult to educate—requiring more time and resources on the part of schools to ensure their academic achievement—these students still retain a plausible right of equal access to education under the United States Constitution. Rather than devoting the extra effort needed to help these students succeed, school officials have chosen instead to implement zero-tolerance disciplinary policies that largely fail to improve school safety or the academic achievement of other students. States have also chosen to offer low-quality or no alternative education services during long-term suspensions or expulsions. Such extended absences from traditional school settings temporarily deprive students of their rights to educa-

[209] Erwin Chemerinsky, The Deconstitutionalization of Education, 36 Loy. U. Chi. L.J. 111, 132 (2004).

[210] United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938). To qualify under the third instance, groups of minorities must be easy to identify (that is, discrete) and physically and socially separate (that is, insular).

tion. Tragically, this temporary deprivation often turns into an absolute one by causing students to fall so far behind that they are unable to catch up, leading them to drop out of school altogether.

Students who misbehave, like all public school students, deserve to have their rights to education protected. These students are far from capable of forfeiting such rights, except in the most extreme circumstances. Moreover, their misconduct communicates clearly that they need more academic and behavioral support, not less. School officials should simply not be allowed to decide that some students are not worth educating, no matter how challenging they may seem.

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