Education and the State Constitutions: Alternatives for Suspended and Expelled Students

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ALTERNATIVES FOR SUSPENDED AND
EXPELLED STUDENTS

INTRODUCTION

In the last thirty years, state constitutions have become a well-recognized source of civil liberties as well as a source of greater protection for rights recognized concurrently by federal and state constitutions.¹ State constitutions provide an alternative for plaintiffs seeking to enforce civil rights that either have not been recognized or have been narrowly interpreted by the federal judicial system.² In the area of education, state constitutions may be the most important source of protection for expelled and suspended students.

Every state constitution has an education clause.³ The highest courts of many states have held that their state constitutions' education clauses afford individuals an enforceable right to education.⁴ In some states, the highest courts have declared the right to education to be fundamental and deserving of strict scrutiny analysis for equal protection purposes.⁵ In others, the right has been accorded a standard of review that does not reach the level of strict scrutiny but is still higher than a rational basis analysis.⁶ Still other state courts have not yet addressed the issue or have employed a mere rational basis standard of review.⁷ Despite the fact that these education clauses exist and incorporate enforceable rights, students are suspended and expelled from public school every year.⁸ This Note argues that in states recognizing a right to education, suspended and expelled students,

² Id.
³ State judges from all sections of the country have reported significant increases in litigation under state bills of rights. Scholars have identified some 400 cases since 1970 in which state high courts have either granted greater rights protection under their state constitutions than was granted by the U.S. Supreme Court under the federal Constitution or have based their decisions affirming rights solely on their state constitutions.
¼ Id. (footnotes omitted).
⁶ See infra part II.B.
⁷ See infra part II.B.2.
⁸ See infra notes 136-43 and accompanying text.
⁹ See infra notes 133-35 and accompanying text.
¹⁰ See infra part III.A.
although afforded due process through suspension or expulsion hearings and other means, continue to possess a right to education, and accordingly, that the state must provide them with some form of alternative education.9

Under some circumstances, suspension or expulsion may be a completely reasonable means of dealing with problem students who disrupt classrooms and make it difficult for others to learn. Failing to provide these students with an educational alternative, however, not only contributes to the growing problems of drug abuse, crime, and increased utilization of public assistance,10 but also may be a deprivation of a state constitutional right. At least in states like California and Pennsylvania, where the states' highest courts have held that their state constitutions incorporate a fundamental right to education,11 courts should recognize that students continue to possess that enforceable right even after they have been suspended or expelled. Under the strict scrutiny equal protection analysis, which courts apply when fundamental rights are at stake, the imposition of suspension or expulsion without an offer of alternative education is not narrowly tailored enough to the state's interest in maintaining peace in the schools.12

Part I of this Note defines suspension and expulsion and explores the procedural requirements imposed by the courts under the federal Constitution. It also describes some examples of alternative education programs that have already been implemented by various states. Part I then explains the lack of a federal fundamental right to education and the possibility that education may nevertheless warrant a higher level of scrutiny than the rational basis test under the Equal Protection Clause of the Fourteenth Amendment.

Part II briefly explains the authority of state courts to interpret state constitutions more broadly than the federal courts have interpreted the federal Constitution. Part II then examines the education clauses of state constitutions and how they have been interpreted by the state courts.

Part III explores the policy arguments inherent in a claim for alternative education for suspended and expelled students. It then examines the possibility of stating a claim for alternative education under both a constitutional education clause alone and under the

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9 Various forms of alternative education already exist in many states. See infra part I.B. For the purposes of this Note, "alternative education" does not encompass private schools requiring the payment of tuition, because this alternative is only available to those students whose parents have the financial resources to pay for their education.

10 See infra part III.A.


12 See infra part III.C.
equal protection test for fundamental rights, a strict scrutiny analysis. Finally, it analyzes the possibility that, under equal protection, the disparate treatment of disabled and non-disabled students for purposes of suspension and expulsion will not withstand strict scrutiny or even an intermediate level of scrutiny.

I

BACKGROUND

A. Suspension and Expulsion in the United States

1. Suspension and Expulsion Explained

Suspension and expulsion are similar punishments, both resulting in the removal of a student from school for some period of time. The length of removal varies with the discipline imposed. Suspension is the short-term removal of a student from school or "the denial of participation in regular courses and activities." A long-term suspension is any suspension that lasts longer than ten days but less than the "time between the start of the suspension and the end of the [school] term." Expulsion, on the other hand, is the complete removal of a student from school for an extended period of time, usually for the remainder of the school term. Suspensions and expulsions are treated in the same manner for due process purposes.

The types of misconduct punishable by suspension or expulsion vary from school to school. Generally, state legislatures delegate the power to institute rules and regulations in public schools to school districts, which in turn delegate authority and responsibility to school personnel. Therefore, most of the decisions enforcing rules and regulations are made by teachers and principals. Expulsion and suspension are two of the means by which school personnel enforce rules and regulations. School authorities have the power to expel or suspend a student who disobeys a reasonable rule or regulation. These authorities are given great discretion under the expulsion and suspension rules not only to decide whether a student has violated a rule or

15 Daniel & Coriell, supra note 13, at 7.
16 ROSSOW, supra note 14, at 3.
17 Id.
18 See infra part III.A.
20 ANNE FLOWERS & EDWARD C. BOLMEIER, LAW AND PUPIL CONTROL § 1.1 (1964).
21 Id. § 1.4.
regulation, but also to determine what sort of discipline should be imposed.\textsuperscript{22} Although certain procedural safeguards must be followed for a suspension or expulsion to be valid,\textsuperscript{23} it should be clear that school authorities may impose these forms of discipline for a wide variety of rule violations.\textsuperscript{24}

2. \textit{Constitutional Procedural Requirements for Suspensions and Expulsions}

Although suspension and expulsion are considered proper forms of discipline and education is not considered a fundamental right under the federal Constitution,\textsuperscript{25} the Supreme Court has held that school districts must comply with important procedural safeguards before suspending or expelling a student.

In \textit{Goss v. Lopez},\textsuperscript{26} the plaintiffs, nine high school students who had been suspended from public school without a hearing, challenged an Ohio law that empowered public school principals to suspend students for misconduct for up to ten days or to expel them.\textsuperscript{27} Although the law provided for parental notification and an appeal of the decision to the Board of Education by expelled students or their parents, suspended students were afforded much fewer procedural safeguards than expelled students.\textsuperscript{28} The Supreme Court upheld the lower court's finding that the plaintiffs were denied due process by not being afforded a hearing before their suspension or within a reasonable time thereafter.\textsuperscript{29}

In reaching its holding, the Court ruled that when a state decides to provide public education, it must recognize that students have a property interest in education protected by the Due Process Clause.\textsuperscript{30} Along with this property interest, the Court held that students have a liberty interest in their standing with fellow students and teachers and in their opportunity for higher education and employment.\textsuperscript{31} Because the Due Process Clause protects these interests, a state may not unilaterally decide that misconduct has occurred and suspend students without affording them procedural safeguards, such as a hear-

\textsuperscript{22} Id.
\textsuperscript{23} See infra part I.A.2.
\textsuperscript{24} See infra part IIIA.
\textsuperscript{25} See infra part I.C.
\textsuperscript{26} 419 U.S. 565 (1975).
\textsuperscript{27} Id. at 567.
\textsuperscript{28} Id. at 567-68.
\textsuperscript{29} Id. at 572.
\textsuperscript{30} Id. at 574.
\textsuperscript{31} Id. at 574-75.
Therefore, the Court determined that short-term suspensions require notice and an informal hearing.

The procedural requirements for long-term suspensions and expulsions have been established through a series of federal court decisions and are somewhat more rigorous than the requirements for short-term suspensions. The student must be warned that certain types of behavior can result in long-term suspension or expulsion, and the student and his or her parent must be informed of specific charges and grounds for expulsion. These procedures satisfy the notice requirement. For expulsion, the hearing requirement is more formal than that required for short-term suspensions. The hearing must take place before the student is formally expelled, and most states afford the student many of the same rights he or she would have in a courtroom trial. Additionally, the charges against the student must be supported by substantial evidence. However, as long as the hearing is performed in good faith without a gross deprivation of rights, courts will generally uphold the decision of school authorities. State law determines whether the student has the right to appeal the decision to expel.

Other decisions have accorded students further procedural protections. In *Craig v. Selma City School Board*, for example, a federal district court held that a school district may violate substantive due process when it prohibits suspended students or their representatives from retrieving the students' books from school. The court could not find any legitimate governmental interest in depriving students of their books. Also, in *Cook v. Edwards*, another federal district court

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32 Id. at 576.
33 *Ida* at 3-33. (pointing out that in practice, no time lapse actually occurs between notice and the informal hearing because students are brought to the office where they are informed that they are going to be suspended, and the hearing usually begins immediately thereafter).
34 Id. at 3-33.
35 Id. at 4 (citing *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961)).
36 Id. at 7-8 (noting that most state statutes accord students and parents the right to present witnesses, the right to testify, the right to an attorney, the right to cross-examine, and the right to a copy of the record).
37 Id. at 21 (citing *Birdsey v. Grand Blanc Community Sch.*, 344 N.W.2d 342 (Mich. Ct. App. 1983)).
38 Id. at 8 (citing *Greene v. Moore*, 373 F. Supp. 1194 (N.D. Tex. 1974)).
39 Id. at 32.
41 Id. at 596.
42 Id.
held that a student may not be expelled for an indefinite period of time.\textsuperscript{44}

Clearly, schools must provide many procedural safeguards to lawfully suspend or expel a student. These safeguards do tend to dissipate the discretionary nature of such decisions. However, they do nothing to ensure that students who are legitimately suspended or expelled receive an education. In states where the state constitution confers a fundamental or at least enforceable right, suspended and expelled students possess rights that may be protected to a greater extent than under the federal Constitution. As the next Part demonstrates, alternative education programs are already in place in many districts and would be a viable solution to this problem.

B. Alternative Education

Alternative education programs are already operating in many states. These programs increase students' belief in their academic ability while decreasing disruptive behavior among students who have demonstrated disciplinary problems.\textsuperscript{45} These alternative schools may be one answer to the problem of providing suspended and expelled students with their constitutionally guaranteed education.

Alternative education programs are not uncommon.\textsuperscript{46} For example, alternative programs are already operating in seventy-six out of 215 school districts in Massachusetts.\textsuperscript{47} Although only thirty-five of these programs currently reach students who have been suspended or

\textsuperscript{44} Id. at 311.

\textsuperscript{45} Martin Gold & David W. Mann, Expelled to a Friendlier Place: A Study of Effective Alternative Schools 151 (1984). Gold and Mann conducted a study that compared students at alternative schools with those at conventional schools. They found that students viewed the alternative schools as more flexible. Id. They further found that those students who believed their school to be more flexible were more confident in their academic abilities. Id. Indeed, the study found that the alternative students had a better opinion of their academic abilities than did the conventional school students. Id. This belief remained with these students even after their return to conventional schools. Id. at 108-09. The alternative school students demonstrated behavioral improvements, which also survived their return to conventional schools. Id. at 151.

\textsuperscript{46} Alternative schools are usually small and offer counseling and conflict resolution as part of the educational program. In 1994, Virginia funded four alternative schools and is planning three more in 1995. Michael D. Shear & Debbi Wilgoren, Expulsions Rise as Schools Get Tough on Violence, WASH. POST, July 10, 1994, at B1, B4.

New Jersey, too, is in the process of establishing alternative schools. These schools are actually aimed specifically at expelled students, unlike many alternative schools currently in existence. Rene Sanchez, Expulsions Becoming Popular Weapon in U.S. Schools, WASH. POST, Jan 20, 1995, at A1.

\textsuperscript{47} Jordana Hart, Group Urges Ban on Expelling Pupils, BOSTON GLOBE, Mar. 18, 1994, at 29.
expelled, or who have dropped out.\textsuperscript{46} Boston officials are considering the prospect of establishing boarding schools for expelled students.\textsuperscript{49}

Massachusetts is not alone in its efforts to provide alternative education. In Washington, D.C., the police department has become involved in providing alternative education to problem students.\textsuperscript{50} The program, funded by private donations, was designed to reach suspended students who are often merely "suspended to the streets."\textsuperscript{51} Although attendance is purely voluntary, the program has been fairly successful, increasing self-esteem and improving students' attitudes.\textsuperscript{52}

Recently, Maryland has gone even further in providing alternative education for problem students. In 1994, the Maryland General Assembly earmarked $1.8 million for the state's first alternative school.\textsuperscript{53} The school is designed for disruptive and aggressive middle-school students. These students will return to their conventional schools after a minimum stay of three months at the alternative school where, along with typical school work, the students will be taught ways to manage their behavior. Again, the program will be completely voluntary.\textsuperscript{54}

Another innovation in alternative education is the charter school.\textsuperscript{55} Minnesota was the first state to pass charter school legislation. Under this legislation, someone wishing to create an alternative school applies to state and local authorities for a three-year charter to operate the school. The charter contains an option for renewal after the first three years.\textsuperscript{56} If approved, the charter school receives the same state funding as the public schools.\textsuperscript{57} The idea seems to be working in Minnesota. The oldest charter school there, City Academy, has been quite successful. Out of seventeen graduates in its first

\textsuperscript{46} Id.
\textsuperscript{49} Jordana Hart, Alternatives Weighed for Expelled Pupils: Educators Debate Boarding Schools, BOSTON GLOBE, May 27, 1994, at 27. Massachusetts currently requires principals to expel any student who is caught with a weapon or drugs. Although educators have voiced concerns about establishing boarding schools for these students because they fear that it will encourage greater expulsion rates, it is an interesting alternative, offering, at the least, an education to students who may not otherwise receive one. Id.
\textsuperscript{50} Patrice Gaines, The Other Learning Place: Suspended from School, Children Get Love with Their Lessons from District Police, WASH. POST, Mar. 31, 1994, at J1.
\textsuperscript{51} Id. (quoting Lt. Wanda Francis of the Washington, D.C. Police Department's Youth and Family Services Division).
\textsuperscript{52} Id.
\textsuperscript{53} Retha Hill, P.G. Site Set for School for Disruptive Youths: Maryland Program Aims to Head Off Unlawfulness, WASH. POST, May 12, 1994, at B3.
\textsuperscript{54} Id.
\textsuperscript{55} Peter Baker, For Virginia Education, a Minnesota Model Popular "Charter Schools" Test the Merits of Autonomy, WASH. POST, Dec. 5, 1994, at D1. Currently, 12 states, including California, have passed charter school legislation. Id.
\textsuperscript{56} Id.
\textsuperscript{57} Id. This funding amounts to $3,800 per student along with aid and grants. The charter school is not allowed to charge tuition or solicit private donations. Id.
class, fifteen went on to post-secondary schools. In 1992, forty-five dropouts, gang members, and teenage parents attended the school. The success of this charter school with so-called “problem students” suggests that similar schools could be created to meet the educational needs of suspended and expelled students.

Because so many states already have facilities for the provision of alternative education, the justification for expelling students without making another alternative available hardly seems compelling. As this Note demonstrates, the enforceable right to education provided by many state constitutions cannot be overcome by the state’s asserted justification of maintaining peace in the public schools. As illustrated by the success of currently existing alternative schools, there is a more narrowly tailored means of achieving this goal.

C. No Fundamental Right to Education under the Federal Constitution

In San Antonio Independent School District v. Rodriguez, the Supreme Court held that education is not a fundamental right protected by the federal Constitution. The plaintiffs brought an action against the school district, claiming that the Texas school system’s reliance on local property taxes to finance public schools favored the wealthy and violated equal protection. Plaintiffs maintained that large disparities in per-pupil expenditures resulted from the differences in the values of assessable property among the districts and thus amounted to an equal protection violation. The district court determined that classifications by wealth are inherently suspect and that education is a fundamental right; it accordingly applied strict scrutiny to find an equal protection violation. The Supreme Court, however, found that no suspect class was involved and that education, although important, is not a fundamental right guaranteed by the Constitution. The Court went on to apply a rational basis standard

58 Id.
59 At least one state already requires limited alternative education for expelled students. Under Connecticut law, expelled students under age sixteen must have two hours of education per day. The city of Hartford has recently agreed to institute a new program through which expelled students will receive group learning and counseling. The new program will actually operate at a lower cost than the current program of individual tutoring. Robin Stansbury, Rebuilding Bridges for Expelled Kids: As Numbers Grow, New Joint Program to Provide Group Tutoring, Counseling, HARTFORD COURANT, July 3, 1995, at B2.
60 411 U.S. 1 (1973).
61 Id.
62 Id. at 6.
63 Id.
64 Id. at 16. For a brief explanation of equal protection analysis, see infra part III.C.1.
65 Id. at 28.
66 Id. at 37-38.
of review and held that because the school funding system was rationally related to the legitimate state purpose of permitting participation in and control of educational programs at the local level, it did not violate the Equal Protection Clause. 67

The holding in Rodriguez suggests that it will be virtually impossible for suspended or expelled students to state a claim for alternative education under the federal Constitution because of the lack of a federal fundamental right to education. There is, however, some suggestion that education may be a sufficiently important interest to warrant a somewhat higher level of scrutiny under equal protection analysis than the rational basis standard applied by the Rodriguez Court.

In Plyler v. Doe, 68 the plaintiffs, school-age children of Mexican origin who could not establish that they had been legally admitted into the United States, brought an action challenging Texas education laws, which withheld state funds from local school districts for the education of undocumented children. 69 Apparently applying the rational basis test, 70 the Court held that the law violated equal protection because the state could not demonstrate a substantial interest in denying undocumented children the free public education that it provided to all other children. 71 Although the Court reiterated that education is not a fundamental right, it did note that, because of its importance in maintaining basic institutions and the impact of its deprivation on the life of a child, education is more than “some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation.” 72 Although not explicitly acknowledging that it was doing so, the Court seemed to impose a higher level of scrutiny on state regulations of education than the rational basis test by requiring the state to show a “substantial state interest.” The concurring opinions of Justices Powell and Blackmun acknowledged that the Court applied or

67 Id. at 55.
69 Id. at 205.
70 Commentators have argued that the Plyler Court actually applied an intermediate scrutiny analysis. For example, Amy Schmitz has suggested that the Court actually employed “intermediate” or ‘heightened’ scrutiny under which “courts uphold a legislative distinction only if it is substantially related to an important government interest.” Amy J. Schmitz, Note, Providing an Escape for Inner-City Children: Creating a Federal Remedy for Educational Ills of Poor Urban Schools, 78 MINN. L. REV. 1639, 1647-48 (1994). Similarly, Professor Ronald Kahn has said:

The case is unique because it is the only one in which the Court found a right to education not to be constitutionally fundamental, but not to be constitutionally unimportant either; the case thus represents a kind of fundamental rights analogue of “intermediate scrutiny” in the gender area of equal protection.

71 457 U.S. at 230.
72 Id. at 222.
could have applied a somewhat higher standard of review in the Plyler case.\textsuperscript{73}

Despite the possibility that the Plyler Court employed a higher level of review, the majority did not explicitly recognize this heightened review. Therefore, it is unlikely that a suspended or expelled student could successfully state a claim for alternative education under the federal Constitution.\textsuperscript{74} A student's claim for alternative education would be more likely to succeed under a state constitution where a fundamental, or at least an enforceable, right to education has been recognized.

II
THE STATES
A. The Protection of Civil Rights and the State Constitutions

Increasingly, litigators are asserting claims for the protection of civil rights under state constitutions.\textsuperscript{75} Many commentators suggest

\textsuperscript{73} Id. at 238-39 (Powell, J., concurring); Id. at 235 n.3 (Blackmun J., concurring).

\textsuperscript{74} Although difficult, stating a claim for alternative education under the federal Constitution may not be impossible. As noted above, the Court in Plyler did appear to apply an intermediate level of review. Furthermore, the Court has recognized that both Plyler and Rodriguez left open "the possibility that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either [the right to speak or the right to vote]." Papasan v. Allain, 478 U.S. 265, 284 (1986) (quoting Rodriguez, 411 U.S. at 36) (alteration in original). The Papasan Court further explained that it "has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review." Id. at 285.

It is possible that a suspended or expelled student could argue that a minimally adequate education is indeed a fundamental right and that his or her suspension or expulsion without provision for alternative education excessively infringes upon that right. In Papasan, the Court explicitly pointed out the importance of education to the ability to take advantage of other rights, such as the right to vote and the right to speak freely. Plyler too enunciated the importance of education and rested not only on the strength of the education right, but also on the consequences of the denial of education to the children affected.

Commentators have also recognized this aspect of Plyler. Schmitz has pointed out that "[t]he Court granted the illegal aliens special constitutional protection not only because of the importance of education, but also because denial of education would marginalize them from political participation if they later became United States citizens." Schmitz, supra note 70, at 1651 (citing Plyler, 457 U.S. at 229-30 (Powell, J., concurring)). Certainly, a suspended or expelled student faces these same consequences. The possibility of these students being unable to participate meaningfully in the political process is perhaps even greater than for the Plyler plaintiffs because most suspended or expelled students are already citizens. Similarly, Professor Kahn has noted that "[w]hat is most intriguing is that this near-right [to education] is based on a structural notion—the fear of creating future groups with limited political power." Kahn, supra note 70, at 32. As this Note explains, suspended or expelled students, especially those who eventually drop out of school, are in a position to lose any chance of political power. See infra part III.A.

that the reason for the increase in claims based on state constitutions is the current reluctance of the United States Supreme Court to expand, or sometimes even to maintain,76 civil rights under the federal Constitution.77 It is also important to note, however, that resort to state constitutions for the protection of civil rights is not a new proposition due only to the changing political sentiment of the federal court system. Since before the application of the federal Bill of Rights to the states and throughout this country's history, state constitutions have been employed to protect the civil rights and liberties of individuals.78

For litigants attempting to enforce civil rights not clearly protected by the federal Constitution or clearly unprotected by it, state constitutions offer great advantages. The United States Supreme Court cannot review a state court's ruling based on the state constitution.79 In the realm of the state constitution, the state's highest court is the ultimate interpretive authority.80 Therefore, a state court is free to hold that the state constitution protects rights that the federal Constitution does not81 or that the state constitution offers greater prote-

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77 See, e.g., JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSE ¶ 1.01, at 1-5 (1994) ("Renewed interest in state law is in part a response to the perception that national rights are no longer interpreted as generously as in previous decades."); Stanley H. Friedelbaum, Preface to HUMAN RIGHTS IN THE STATES: NEW DIRECTIONS IN CONSTITUTIONAL POLICYMAKING vii (Stanley H. Friedelbaum ed., 1988) ("As the U.S. Supreme Court continued to retreat from the unusual activism of the Warren years, so judges in a number of states moved beyond federal guarantees . . . ."). Senior Judge Constance Baker Motley has offered a powerful narrative regarding the "conservative backlash" that has affected the United States Supreme Court and the reaction of many state courts. The Honorable Constance Baker Motley, Civil Rights-Civil Liberties Litigation in the U.S. Supreme Court: Are the State Courts Our Only Hope?, 9 HARV. BLACKLETTER J. 101 (1992). In that piece, Senior Judge Motley states:

There is a concerted effort now underway to shut the federal courthouse door to civil rights-civil liberties petitioners of all description; and there is a real danger that the federal courts, led by the Supreme Court, will relinquish their role in society as the primary guardian of the Bill of Rights and the people's shield against abusive government action. The good news is that elected state court judges, the peoples' representatives in the judiciary, as well as appointed state court judges may be responding to the beat of another drummer.

Id. at 102.
78 Hershkoff, supra note 75, at 14-15.
79 FRIESEN, supra note 77, ¶ 1.07, at 1-56.
80 Id.
81 See infra part II.B.; see also Peter J. Galie, Social Services and Egalitarian Activism, in HUMAN RIGHTS IN THE STATES: NEW DIRECTIONS IN CONSTITUTIONAL POLICYMAKING 97, 106-07 (Stanley H. Friedelbaum ed., 1988) (explaining that the New York Court of Appeals has interpreted the New York State Constitution to "impose[ ] on the state an affirmative duty to aid the needy") (quoting Tucker v. Toia, 371 N.E.2d 449, 452 (N.Y. 1977)).
tion for a right that is recognized under the federal Constitution. Many state courts have explicitly acknowledged this principle.

If, however, a state court cites federal precedent to support its ruling, the United States Supreme Court may be able to review the state court's decision. In order to avoid this result, a state court that cites federal precedent must include a "plain statement" of its "reliance on independent and adequate state grounds." When United States Supreme Court review is allowed, the Court may either reverse or affirm on the federal grounds and remand to the state court, or it may vacate the decision and remand with instructions to consider an intervening Supreme Court decision bearing on the federal issue. Because of this possibility of Supreme Court review, a state court must clearly explain that its decision relies on independent and adequate state grounds, notwithstanding the federal precedent cited in the opinion.

As the next Part demonstrates, in many states, education is an enforceable right under the state constitution despite the fact that it is not recognized as such under the federal Constitution. Many state courts have developed a significant constitutional jurisprudence based solely on the state's constitutional guarantee of education.

B. Education Clauses in State Constitutions

Most of the courts that have interpreted the education clauses of state constitutions have done so in the context of determining the

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82 Kathryn Kolbert & David H. Gans, Responding to Planned Parenthood v. Casey: Establishing Neutrality: Principles in State Constitutional Law, 66 Temp. L. Q. 1151, 1158-59 (1993); see, e.g., id. at 1161-62 (describing cases in which state courts have interpreted state constitutions to require the strict scrutiny standard of review for laws impinging on a woman's right to choose abortion); Motley, supra note 77, at 104 (noting that several state courts have interpreted state constitutions to provide greater protection of the freedom of speech than the federal Constitution).

83 See, e.g., Serrano v. Priest, 557 P.2d 929, 950 (Cal. 1976) ("[O]ur state equal protection provisions, while 'substantially the equivalent of' the guarantees contained in the Fourteenth Amendment to the United States Constitution, are possessed of an independent vitality which, in a given case, may demand an analysis different from that which would obtain if only the federal standard were applicable."); Horton v. Meskill, 376 A.2d 359, 371 (Conn. 1977) ("[D]ecisions of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but they are to be followed by Connecticut courts only when they provide no less individual protection than is guaranteed by Connecticut law."); Skeen v. Minnesota, 505 N.W.2d 299, 313 (Minn. 1993) ("Minnesota is not limited by the United States Supreme Court and can provide more protection under the state constitution than is afforded under the federal constitution."); Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310, 392 (Wyo. 1980) ("A state may enlarge rights under the Fourteenth Amendment announced by the Supreme Court of the United States, which are considered minimal, and thus a state constitutional provision may be more demanding than the equivalent federal constitutional provision.").

84 FRIESEN, supra note 77, ¶ 1.07, at 1-60.
85 Id.
86 Id. at 1-61.
constitutionality of state funding systems for public schools. The state courts that have addressed the issue vary in their determinations of what kind of right the state constitutions' education clauses provide. Some courts have characterized the right to education as very strong while others have limited it. A few courts have considered the education clause completely independent of equal protection in striking down a school funding system as unconstitutional. However, most courts have relied on the education clause only as the source of the right to education and then have applied equal protection analysis to that right.

1. States Looking Only to the Education Clause

At least two courts have looked to the education clause independently rather than applying equal protection analysis when deciding whether a school funding system was unconstitutional. In *Seattle School District No. 1 v. State*, a school district, taxpayers (some of whom were members of the school board) with children enrolled in and attending the schools in the district, and students in the district sought to have the state's public education funding system declared unconstitutional. Under that system, districts were required to provide educational programs that complied with various state statutes and regulations; however, they were not given enough state funding to do so. Instead, the state allocated partial funding through special excess levy elections. Of course, there was nothing to guarantee that the voters would approve requests for levies, and these special levy elections could be held no more than twice a year. Meanwhile, the school districts had no other authority to raise the necessary funds. In 1975, School District No. 1 submitted two excess levy proposals, both of which failed. Other districts were experiencing similar revenue losses under the state's system. The lower court found that such levy failures adversely affected the quality of education that a district could provide.

In finding for the plaintiffs, the Washington Supreme Court examined the state constitution's education clause, which provides that the state's duty to "make ample provision for the education of all chil-

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87 585 P.2d 71 (Wash. 1978).
88 Id. at 78.
89 Id. at 77-78.
90 Id.
91 Id.
92 Id.
93 Id.
94 Id.
95 Id. at 78.
The court determined that this language imposed a mandatory duty on the state\textsuperscript{96} It then went on to determine that the duty imposed by the constitutional language is a "paramount" duty, and that the corresponding right, possessed by all Washington State children, "has equal stature."\textsuperscript{98} The court distinguished this "'right' to be amply provided with an education" from other so-called rights, which are merely liberties or privileges that, given the proper level of state interest, can be invaded. Instead, the court determined that the right in question was a "true 'right' (or absolute)."\textsuperscript{99}

The court then went on to define the duty imposed by the Washington State Constitution. Although it refused to specify guidelines for making ample provision for education,\textsuperscript{100} the court did state:

\begin{quote}
[T]he State's constitutional duty goes beyond mere reading, writing and arithmetic. It also embraces broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today's market as well as in . . . the market place of ideas. Education plays a critical role in a free society . . . . The constitutional right to have the State 'make ample provision for the education of all [resident] children' would be hollow indeed if the possessor of the right could not compete adequately in our political system, in the labor market, or in the market place of ideas.\textsuperscript{101}
\end{quote}

As this Note will explain, many of the concerns that the Washington Supreme Court articulated are exactly the same problems that suspended and expelled students face.

Because the Washington court relied specifically on the education clause instead of performing an equal protection analysis, it is possible that students in that state could assert a claim for alternative education based solely on the state constitution's education clause.\textsuperscript{102}

This Note focuses, however, on equal protection challenges because most state courts that have construed constitutional education provi-

\begin{footnotes}
\item[96] Id. at 84. The Washington State Constitution provides, "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex." WASH. CONSTR. art. IX, § 1. It goes on to state, "The legislature shall provide for a general and uniform system of public schools." Id. art. IX, § 2.
\item[97] 585 P.2d at 84-87 (rejecting several arguments by the state and arriving at the conclusion that the Washington Constitution's education clause places a mandatory duty on the state legislature).
\item[98] Id. at 91.
\item[99] Id. at 99 n.13.
\item[100] Id. at 95-96. The plaintiffs had asked the court to create judicial guidelines for the legislature as to what specifically would satisfy the duty. The court declined to do so, stating its confidence that the legislature would take these concerns into consideration when defining "basic education" and giving substantive content to the program. Id.
\item[101] Id. at 94-95 (alteration in original) (citations omitted).
\item[102] See infra part III.B.
\end{footnotes}
sions have done so in the context of equal protection analysis. The Washington court did not specifically address the question of how the right to education would fare under such an analysis; however, the court's strong language regarding the important place education occupies in the state constitution suggests that the Washington court would consider the right fundamental for equal protection purposes if it were called upon to make that determination.

The New Jersey Supreme Court likewise invalidated that state's public school funding system, relying exclusively on the state constitution's education clause. In *Robinson v. Cahill*, the court examined a school funding system similar to Washington's in that it relied on local property taxes to a great extent to fund public education and did not provide for substantial state aid to equalize the resulting disparities. The court invalidated the system, holding that the state constitution's education clause placed the duty "to maintain and support a thorough and efficient system of free public schools" on the state, and that when the state chooses to delegate that duty it must do so in a manner "which will fulfill that obligation." Hence, because the system in question "ha[d] no apparent relation to the mandate for equal educational opportunity," the state had the duty to rectify the situation.

Unlike the Washington court, the New Jersey court addressed an equal protection argument. The court refused to hold that education was a fundamental right for equal protection purposes, citing the difficulty it would have in explaining why education, and not some other constitutionally mandated service, warranted fundamental-right status. Therefore, in New Jersey, a suspended or expelled student would probably be most likely to succeed on a claim for alternative education if that claim were based exclusively on the education clause.

2. State Courts Recognizing a Fundamental Right to Education

Many state courts have held that education is a fundamental right for purposes of equal protection analysis under their state constitu-

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104 Id. at 276-77.
105 Id. at 292. The New Jersey Constitution states, "The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this state between the ages of five and eighteen years." N.J. Const. art. VIII, § 4.
106 303 A.2d at 295-96.
107 Id. at 284-86. The court explained that it would be "difficult... to find an objective basis to say that the equal protection clause selects education and demands inflexible statewide uniformity in expenditure." Id. at 284. The court went on to explain that the fact that public education was explicitly mentioned in the state constitution was not enough to bestow fundamental-right status upon it because the New Jersey Constitution mandates "a vast range of services," and it would be unreasonable to suggest that all of these services must be declared fundamental rights. Id. at 285.
tions' education clauses. Again, most of these decisions were reached in the course of determining whether a state public school funding system was constitutional. However, the courts have differed in their characterizations of the right involved and in the degree of protection they have been willing to give that right.

A number of courts have clearly held that education is a fundamental right requiring strict scrutiny equal protection analysis with no reservations. For example, in *Rose v. Council for Better Education, Inc.*\(^\text{108}\) the Kentucky Supreme Court held the state's common school system unconstitutional because it was not "efficient" as required by that state constitution's education clause.\(^\text{109}\) In so holding, the court explicitly stated, "A child's right to an adequate education is a fundamental one under our Constitution."\(^\text{110}\) Similarly, the Pennsylvania Supreme Court, in *District of Wilkinsburg v. Wilkinsburg Education Ass'n*,\(^\text{111}\) stated that "public education in Pennsylvania is a fundamental right" and that "this court has consistently examined problems related to schools in the context of that fundamental right."\(^\text{112}\)

Courts in Connecticut and Alabama have also held that their state constitutions afford a fundamental right to education. In *Horton v. Meskill*,\(^\text{113}\) the Connecticut Supreme Court upheld the lower court's determination that the state's system of funding public schools was unconstitutional under the state constitution. In so doing, the court stated that "the right to education is so basic and fundamental that any infringement of that right must be strictly scrutinized."\(^\text{114}\) Similarly, an Alabama trial court declared the state's public education funding system unconstitutional because many of the state's schools

\(^{108}\) 790 S.W.2d 186 (Ky. 1989).

\(^{109}\) *Id.* at 189. The Kentucky Constitution provides, "The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State." KY. CONST. § 183.

\(^{110}\) 790 S.W.2d at 212.

\(^{111}\) 667 A.2d 5 (Pa. 1995). Unlike many of the education-clause cases, this Pennsylvania case did not involve a challenge to the state's school funding system. Instead, the school district had attempted to enter into a contract with a private party to operate a school. *Id.* at 6. The chancellor had granted the Education Association's request to enjoin the district from entering the contract. *Id.* The Association had claimed that the school code did not authorize the district to enter into such a contract. *Id.* On appeal, the district argued, among other things, that if the Association's interpretation of the code was correct, it was unconstitutional because under the circumstances, without entering into the contract, the district would not be able to meet the constitutionally mandated requirement of a "thorough and efficient system of public education." *Id.* at 8.

\(^{112}\) *Id.* at 9. The Pennsylvania Constitution provides, "The General Assembly shall provide for the maintenance of a thorough and efficient system of public education to serve the needs of the Commonwealth." PA. CONST. art. 3, § 14.

\(^{113}\) 376 A.2d 359 (Conn. 1977).

\(^{114}\) *Id.* at 373. The Connecticut Constitution provides, "There shall always be free public elementary and secondary schools in the state." CONN. CONST. art. 8, § 1.
fell below minimal standards.\textsuperscript{115} Although the system did not withstand even the rational basis test, the court found education to be a fundamental right accorded strict scrutiny for purposes of equal protection review under the Alabama Constitution.\textsuperscript{116}

Other courts that have found a fundamental right to education embodied in a state constitution have also declared wealth to be a suspect classification in holding a school funding system unconstitutional. For example, in \textit{Serrano v. Priest},\textsuperscript{117} the California Supreme Court held that the state's funding system was unconstitutional.\textsuperscript{118} In so holding, the court employed a strict scrutiny equal protection analysis. The use of this heightened scrutiny was predicated on the existence of both a fundamental right and a suspect classification, wealth.\textsuperscript{119} The court did not state whether it would have employed heightened scrutiny based solely on the infringement of the fundamental right to education; however, it is likely, based upon the common treatment of fundamental rights for purposes of equal protection analysis, that the court would have done so.\textsuperscript{120}

Other courts have varied in the degree of protection that they have afforded to the fundamental right to education or have attached a caveat to their holding that such a fundamental right exists. For example, in \textit{Bismarck Public School District No. 1 v. State},\textsuperscript{121} the North Dakota Supreme Court, in declaring the state's public school funding system unconstitutional, found education to be a fundamental right under the state's constitution.\textsuperscript{122} The court, however, refused to apply

\begin{itemize}
\item \textsuperscript{116} \textit{Alabama Coalition for Equity}, 19 IDELR at 838.
\item \textsuperscript{117} 557 P.2d 929 (Cal. 1976).
\item \textsuperscript{118} \textit{Id.} at 952-53. The California Constitution provides, "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement." \textit{CAL. CONSR. art. 9, § 1.} It goes on to state, "The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year." \textit{Id.} art. 9, § 5.
\item \textsuperscript{119} 557 P.2d at 951. Another court that has taken this approach is the Wyoming Supreme Court. \textit{See Washakie County Sch. Dist. No. 1 v. Herschler}, 606 P.2d 310, 334 (Wyo.), \textit{cert. denied}, 449 U.S. 824 (1980). However, in \textit{Simons v. Laramie County School District No. 1}, 741 P.2d 1116, 1125 (Wyo. 1987), the Wyoming Supreme Court applied strict scrutiny analysis based solely on the fundamental right to education.
\item \textsuperscript{120} For a brief explanation of equal protection analysis, see \textit{infra} part III.C.1.
\item \textsuperscript{121} 511 N.W.2d 247 (N.D. 1994).
\item \textsuperscript{122} \textit{Id.} at 256. The North Dakota Constitution provides, "The legislative assembly shall provide for a uniform system of free public schools throughout the state." \textit{N.D. CONSR. art. VIII, § 2.} The North Dakota Constitution also provides:
the strict scrutiny standard to the funding system because legislative determinations regarding taxation and fiscal planning were "ill-suited for strict scrutiny analysis." The court instead applied an intermediate level of scrutiny. In the case of a suspended or expelled student seeking access to alternative education, it is conceivable that the North Dakota Supreme Court would apply the strict scrutiny standard because presumably the same types of legislative determinations would not be involved.

The Minnesota Supreme Court has also held that different standards of review will be applied to state regulations implicating the right to education depending on the type of challenge involved. In *Skeen v. Minnesota,* the court held that there was a fundamental right to "a general and uniform system of education" but that the constitutional requirement that the state's public school funding system be "thorough and efficient" did not create a fundamental right. Therefore, the court determined that:

> while strict scrutiny analysis should be applied in determining whether the legislature has met a student's fundamental right to a general and uniform system of public schools, a lesser standard, such as a rational basis test, should apply to the determination of whether the financing of such a system is "thorough and efficient."

Again, it is probable that a suspended or expelled student's claim for alternative education would fall into the fundamental right, strict scrutiny half of the Minnesota Supreme Court's analysis.

Both the Virginia Supreme Court and the Wisconsin Supreme Court have held that a fundamental right to education exists but that...
there is no requirement of equal funding under their state constitutions. In *Scott v. Commonwealth of Virginia*,, the court held that, although there is a fundamental right to education under the Virginia Constitution, strict scrutiny analysis did not require "equal, or substantially equal, funding or programs among and within the Commonwealth's school districts." The Wisconsin Supreme Court went even further in *Kukor v. Grover* and held that, although "education is, to a certain degree, a fundamental right," only a rational basis review would be applied to spending disparities because "a complete denial of educational opportunity" was not involved. It is much more difficult to predict how these courts would decide if faced with a challenge by a suspended or expelled student for access to alternative education. It is certainly possible that at least the Wisconsin court would reject such a challenge because, based on the language quoted above, it does not seem to have even held with any certainty that a strong fundamental right to education exists.

3. **Courts Offering Different Treatments of Education Clauses**

Other state courts have been less clear in determining what sort of right, if any, is supplied by the state's education clause. For example, the North Carolina courts have found a fundamental right to equal access to education embodied in the North Carolina Constitution. However, this right differs from a fundamental right to education in that it does not require that students receive an equal education, but merely equal access to whatever education is provided. Also, the New Hampshire Supreme Court has held that the

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130 *Id. at 142.* The Virginia Constitution provides, "The General Assembly shall provide for a system of free public elementary and secondary schools for all children throughout the Commonwealth and shall seek to ensure that an educational program of high quality is established and continually maintained." VA. CONST. art. VIII, § 1. It goes on to state, "Standards of quality . . . shall be determined and prescribed . . . by the Board of Education, subject to revision only by the General Assembly." *Id. art. VIII, § 2.* It continues, "The General Assembly shall provide for the compulsory elementary and secondary education of every eligible child of appropriate ages. . . ." *Id. art. VIII, § 3.*
131 436 N.W.2d 568 (Wis. 1989).
132 *Id. at 579-80.* The Wisconsin Constitution provides:

> The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years; and no sectarian instruction shall be allowed therein; but the legislature by law may, for the purpose of religious instruction outside the district schools, authorize the release of students during regular school hours.

Wis. Const. art. 10, § 3.
133 *Sneed v. Board of Educ., 264 S.E.2d 106 (N.C. 1980)* (holding that equal access to education is a fundamental right under the state constitution); *Britt v. North Carolina St. Bd. of Educ., 357 S.E.2d 432 (N.C. Ct. App.)* (clarifying that the fundamental right embodied in the North Carolina Constitution is to equal access, not to an equal education; each
state constitution imposes a duty on the state to provide education to its citizens. The court did not explicitly find the corresponding right to be fundamental, but it did acknowledge that the right to education was "at the very least an important, substantive right." Still other courts have held that their state constitutions do not provide fundamental rights to education or have not yet addressed the issue. For example, the Maryland Court of Appeals has held that the right to an adequate education in Maryland is not fundamental merely because of the state constitutional mandate that there be a "thorough and efficient" statewide system of public schools. Like the North Dakota Supreme Court in Bismarck Public School District No. 1 v. State, the Maryland court noted that strict scrutiny analysis is often avoided when social or economic legislation is involved. However, unlike the North Dakota court, the Maryland court extended this reasoning to find that the right to education is not fundamental under the Maryland Constitution.

Recently, the Massachusetts Supreme Judicial Court also held that that state's constitutional education clause did not incorporate a fundamental right to education. In McDuffy v. Secretary of the Executive Office of Education, that court had found an enforceable right to education, but left open the question of whether this right was a fundamental one. Despite very strong language in McDuffy, suggesting

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student need not be provided with identical opportunities), dismissal allowed, review denied, 361 S.E.2d 71 (N.C. Ct. App. 1987).

The North Carolina Constitution provides, "The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students." N.C. CONST. art. IX, § 2(1). "Education encouraged. Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools, libraries and the means of education shall forever be encouraged." Id. art. IX, § 1.

134 Claremont Sch. Dist. v. Governor, 635 A.2d 1375 (N.H. 1993). The New Hampshire Constitution provides, "[I]t shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools. . . ." N.H. CONST. pt. 2, art. 83.

135 685 A.2d at 1381.


138 458 A.2d at 786.

139 615 N.E.2d 516 (Mass. 1993).

140 Id. The Massachusetts Constitution provides:

Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates,
the possibility of a fundamental right to education in Massachusetts, the Supreme Judicial Court recently held, in *Doe v. Superintendent of Schools*, that the Massachusetts Constitution does not provide students with a fundamental right to education.

### III

**CLAIMS FOR ALTERNATIVE EDUCATION**

This Part examines policy arguments that support a claim for alternative education for suspended or expelled students. By demonstrating the drastic effects that suspension and expulsion can have on students, this Part illustrates how these disciplinary measures greatly infringe on the fundamental right to education. This Part then briefly focuses on the possibility of stating a claim for alternative education exclusively under a state constitution’s education clause. Next, it examines the equal protection analysis of a fundamental right to education in the context of claims for alternative education by suspended or expelled students. Finally, this Part examines the disparate treat-
ment of disabled and nondisabled students for suspension and expulsion purposes. This treatment further supports the argument that these disciplinary measures are not narrowly tailored to achieve the state's goals.

A. Policy Arguments

Approximately one and a half million students miss a large portion of school each year because they have been suspended or expelled.\(^\text{145}\) Only about three percent of these suspensions and expulsions are imposed to punish major offenses.\(^\text{146}\) Most suspended and expelled students miss school for minor offenses, such as smoking, tardiness, truancy, and dress code violations.\(^\text{147}\) Even without a fundamental right to education, these drastic disciplinary actions are hard to justify for such minor offenses.

Of course, some students are expelled or suspended for major offenses, such as possession of weapons. However, even with regard to these more disruptive and sometimes potentially dangerous behaviors, school districts may be overreacting in expelling students. Throughout the United States, school boards are requiring expulsions for a term of one year for any student found with a weapon of any sort.\(^\text{148}\)

argument did not specifically address the issues of suspension and expulsion but focused instead on educational malpractice. \textit{Id.} at 568-69. However, a similar argument could conceivably be made for students who have been suspended or expelled.

This argument, however, is fairly weak because a suspended or expelled student is no longer forced to attend school and is therefore not deprived of his or her liberty interest. In \textit{Adams v. Dothan Board of Education}, 485 So. 2d 757, 760 ( Ala. Civ. App. 1986), an expelled student argued that, because of compulsory attendance laws and the school board's lack of statutory authorization to expel students, only a juvenile court should have the authority to decide whether a student should be expelled. 485 S.2d 757, 760 ( Ala. Civ. App. 1986). The court held that "a student is entitled and indeed required to attend school under our compulsory education law. However, this does not mean that a student may escape the consequences of his misconduct at school." \textit{Id.} It is probably reasonable to assume that most courts would hold as the Alabama court did when the state laws not only impose compulsory attendance but also authorize expulsion and suspension as potential punishment for violations of school rules. Therefore, this Note focuses on the fundamental right to education and equal protection as the better means of achieving alternative education for suspended and expelled students.\(^\text{145}\) Daniel & Coriell, \textit{supra} note 13, at 15.

In many school districts, the rates of suspensions and expulsions continue to increase. For example, in the 1985-86 school year, there were only fourteen expulsions in Fairfax County, but during the 1993-94 school year, that number rose to 153. Sanchez, \textit{supra} note 46, at A1.

It is not merely older students who are being expelled; rather, very young children are often punished by expulsion. For example, in Massachusetts, during the 1991-92 school year, 574 students were expelled. Seventeen of these students were pre-kindergarten to third-grade children. 203 were fourth through seventh graders. Hart, \textit{supra} note 47, at 29.\(^\text{146}\) Daniel & Coriell, \textit{supra} note 13, at 15.

\textit{Gail Paulus Sorenson, The Worst Kind of Discipline, 6 UPDATE ON LAW-RELATED EDUC.} 26, 27 (Fall 1982).\(^\text{147}\)

Sanchez, \textit{supra} note 46, at A1; \textit{see, e.g.}, Wash. Rev. Code Ann. § 9.41.280 (1994).\(^\text{148}\)
Many of the school districts are including more than guns and knives in their definitions of "weapons." For example, some districts have determined that razors, slingshots, and toy guns are weapons. Many districts apply these disciplinary codes to very young students and to students who merely threaten violence. Recently, President Clinton authorized the Education Department to cease funding for

The effect of these laws is drastic. Educators in Massachusetts estimate that hundreds of students have been expelled since that state passed its education reform law. Jordana Hart, Expelled, She's Out of It: Ousted Student Has Few Options, BOSTON GLOBE, May 26, 1994, at 1. In the Washington, D.C. area, more than 600 students were expelled in 1994. Shear & Wilgoren, supra note 46, at B1. During the 1993-94 school year, 1,108 students in the Washington, D.C. area were suspended, an increase of 173 suspensions from the prior school year. Graciela Sevilla, School Suspensions Are Rising: Board's Study to Focus on Underlying Causes, WASH. POST, Sept. 15, 1994, at M1. The rate of suspension increased by 14% in elementary schools, 25% in middle schools, and 17% in high schools. Id.

Under a recently passed Michigan law, kindergartners through fifth graders will be expelled for a minimum of 90 days for weapon possession, rape, or arson; the minimum for older students is 180 days. Matt Davis & Margaret Trimer-Hartley, Weapon in School? You're Expelled, DET. FREE PRESS, Sept. 22, 1994, at 1A. Although the schools are not required to provide students with alternative education, they are given the option of placing students in alternative schools. Id. Requirements that these alternative schools be at separate locations or meet when other students are not in school, however, may create disincentives for school districts to provide alternative education by increasing the burden on the school districts attempting to create alternative programs. Democrats in the state legislature attempted to include amendments requiring schools to provide alternative education, but this proposal was rejected. Id. This Michigan law has already been the subject of litigation. A probate court judge ruled that the school district must provide an expelled student with an education. Lisa Holewa, Crackdown on Guns in School Challenged, DET. FREE PRESS, Nov. 24, 1994, at 2B. However, this ruling is currently being appealed. In a bizarre twist on fundamental rights analysis, school superintendent Tommy Saylor said, "We believe that a board of education has the fundamental right to expel a student from school for just cause. We think bringing a loaded gun to school is just cause." Id.

Administrators in one Massachusetts town have included geometry compasses in their definition of weapons. Jordana Hart, Creeping Violence Worries Suburban Schools; Stricter Rules Enforced to Seize "Weapons," BOSTON GLOBE, Apr. 18, 1994, at 15.

A 7-year-old was recently suspended from a Boston school for three days and ordered to have a psychological evaluation. This excessive discipline was imposed when the child brought a plastic water gun on the school bus. Similarly, a ten-year-old was suspended for bringing a plastic toy space gun to school. Jordana Hart, Suspension Over Toy Gun Angers Some, BOSTON GLOBE, May 5, 1994, at 33.

Expulsions are becoming the punishment of choice for offenses other than weapons possession as well; infractions currently punishable by suspension and expulsion now include drug and alcohol possession. For example, a proposed policy in Virginia would require a ten-day suspension and a transfer to another school for any middle or high school student caught on campus or at a school activity with drugs. Debbi Wilgoren, Schools Look at Tougher Punishments: Uniform Penalties Debated for Alcohol, Drug Abusers, WASH. POST, Nov. 10, 1994, at V1. Students caught violating the drug policy more than once would be expelled. Id. Similarly, the same school board would require students found in possession of alcohol to be suspended for the first violation, suspended and forced to transfer if caught again, and expelled if caught a third time. Id.
states that do not adopt a policy requiring one-year expulsions of students caught with guns.\textsuperscript{151}

Through education, the citizens and residents of this country gain the knowledge and skills necessary to earn a living and to exercise their constitutional rights, such as the right to vote and the right to free speech. When many of the members of a society lack the skills necessary to exercise their rights and support themselves, there is a strong probability that the fears of the \textit{Plyler} Court will materialize as increasing numbers of American citizens are denied a basic education and thus forced into their own "underclass."\textsuperscript{152} In this context, as well as in that of aliens deprived of education, "the existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law."\textsuperscript{153}

Because of the important role that education plays, not just in the life of an individual, but in a productive society generally, the constitutional right to education, afforded by many state constitutions, should be enforced to protect children from losing the opportunities that an education provides. As one commentator has said, "Determining guilt or innocence may be important to the system of criminal justice, but it is much less relevant in an education system that, as a matter of educational policy, provides some form of education to all students."\textsuperscript{154}

1. Suspension and Expulsion: Dropping Out and Its Effects

Close to one million students drop out of school every year.\textsuperscript{155} Suspension is one of the major factors explaining the decision to drop out.\textsuperscript{156} This Part considers the adverse effects that dropping out of


\textsuperscript{153} Id.

\textsuperscript{154} Sorenson, supra note 147, at 72. Sorenson argues that "[b]ecause education is so important to the individual as well as to the society of which he is a member, it is essential that we provide at least some educational services to every child, along a continuum from least restrictive to most restrictive." Id.

\textsuperscript{155} R.C. SMITH & CAROL A. LINCOLN, AMERICA'S SHAME, AMERICA'S HOPE 3 (1988). In Chicago, the dropout rate is close to 50%, nearing 70% for certain Chicago high schools. John J. Lane, \textit{Principal Perceptions of the At-Risk Child}, in CHILDREN AT RISK 45 (Joan M. Lakebrink ed., 1989).

\textsuperscript{156} Pedro Reyes, \textit{Factors that Affect the Commitment of Children at Risk to Stay in School}, in CHILDREN AT RISK supra note 155, at 18, 23. A 1985 study found that "schools with above average suspension rates had higher dropout rates than schools with average suspension rates." Id. at 24. It has been suggested that the long periods spent away from school by some suspended students may at least partially account for the higher dropout rates because these students are not able to complete the work required for graduation. Id. at 25.

Another study included "being a discipline case," "irregular attendance and frequent tardiness," and "active antagonism to teachers and principals" in a list of factors character-
school has on the lives of these students. Because suspension and expulsion positively correlate with dropping out, it is probable that the problems associated with dropping out of school will often be experienced by suspended and expelled students.

Terence Thornberry et al. conducted a study examining the effect dropping out of school has on the level of an individual's criminal behavior later in life. The group studied males who lived in Philadelphia at least from the age of ten to eighteen. Even when social status of origin, race, marital, and employment status were held constant, the study found that "dropping out of high school is positively associated with later criminal activity." Dropping out of high school has other adverse effects on former students. For example, dropping out is associated with a greater need for such expensive social services as public assistance and unemployment assistance. Compared to high school graduates, dropouts are much more likely to be unemployed. Even those dropouts who are able to find work are at a distinct disadvantage in terms of earning capacity when compared to those students who graduated from high school and college. Of course, the earning-capacity gulf widens even further when dropouts are compared with high school graduates who continue on to college. One study has estimated that the foregone income of dropouts from the class of 1981 amounted to $228 billion and that the foregone government revenues totalled $68 billion. At the same time, it has been estimated that for every dollar spent on "early intervention and prevention . . . $4.74 [can be saved] in costs of remedial education, welfare, and crime." It should also

izing potential dropouts. Ray E. Jongeward & Maybelle K. Chapman, Dropouts: Washington's Wasted Resource 3 (1963). These factors are some of the same problems for which students are often suspended or expelled. See supra notes 146-47 and accompanying text.

157 Terence P. Thornberry et al., The Effect of Dropping Out of High School on Subsequent Criminal Behavior, 23 CRIMINOLOGY 3, 7 (1985).

158 Id. at 15-17.

159 Smith & Lincoln, supra note 155, at 5.

160 Van Dougherty, Youth at Risk: The Need for Information, in CHILDREN AT RISK, supra note 155, at 4.

161 U.S. Dep't of Lab. Bureau of Lab. Statistics, Students, Graduates, and Dropouts, October 1980-82, SPECIAL LAB. FORCE REP. 4 (Dec. 1983). In 1982, the unemployment rate for recent dropouts was 41.6%. This was 1.8 times the unemployment rate of new high school graduates. Id.

162 Smith & Lincoln, supra note 155, at 2. Although the rate of dropping out has remained relatively constant, "the mean earnings of 20- to 24-year-old male dropouts declined 41.6 percent (from $11,210 to $6,552) between 1973 and 1984." Id.

163 Id.

164 Id. at 5.

165 Id.
be noted that the national average cost of education per student is only $4,422.166

The dropout problem is even greater for minority students.167 In 1980, the national dropout rate for white males was 16.1%.168 Yet, the dropout rates for Blacks and Hispanics were 22.7% and 43.1%, respectively.169 In the inner city, the problem is even worse. For example, in 1987, the dropout rates in New York State were 62% for Latinos, 53% for Blacks, and 43% for Native Americans.170

Obviously, the cost of dropping out of high school is great to the individual student. The cost to society is even greater, both in monetary and nonmonetary terms. When the state does not provide suspended and expelled students with an alternative education, many of the costs associated with dropping out will eventually be experienced, because of the positive correlation between these disciplinary measures and dropping out. As the Fifth Circuit has said, "In our increasingly technological society getting at least a high school education is almost necessary for survival. Stripping a child of access to educational opportunity is a life sentence to second-rate citizenship, unless the child has the financial ability to migrate to another school system or enter private school."171

2. Disparate Treatment of Minority Students

As the preceding Part demonstrates, minority students are more likely to drop out of school than white students. This fact may be partially explained by the suspension rates for minority students. Throughout the country, minority students are consistently suspended at much higher rates than white students.172 In 1984, when black students made up only 16.2% of the total national enrollment,

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166 Valerie Strauss, Disparity Between City, Suburban Schools: Almost $440 a Student, WASH. Post, Sept. 28, 1994, at A20. Unfortunately, the education allocation per pupil in inner cities is approximately $437 less than that for suburban children. Id.

As for the cost of alternative education, in Boston, for example, there are twelve alternative programs specifically designed for expelled and problem students. The cost of these programs is approximately $5,000 per student. Hart, supra note 47, at 27.

167 One study has reported that the overall dropout rate has declined in 53% of urban schools. However, 80% of the reporting districts acknowledged that the Black dropout rate had increased, and 72% reported an increase in the Hispanic dropout rate. Strauss, supra note 166, at A20.

168 Reyes, supra note 156, at 20.

169 Id.

170 Id. A 1986 study of one high school in Brooklyn, where the students are predominantly Black and Latino, found that the dropout rate was 75%. Id.

171 See, e.g., Graciela Sevilla, Schools Get Good Report Card: Officials Praised for Their Efforts to Improve Human Relations, WASH. Post, Oct. 27, 1994, at M3 (praising a school for improving human relations, but noting that a disproportionate number of black students were still being suspended).
they accounted for 31.3% of suspensions. By 1988, black enrollment had increased to 21.4%, but the rate of suspension had also increased to 38.3%. Black high school students are suspended at a rate of three times that of white students.

Much of this disparity in suspension rates can probably be explained by the discretionary aspect of suspension and expulsion rules, which, as explained above, are applied by teachers and principals. School systems are certainly not free from racism, whether intentional or not. For example, one study found that teachers in middle-class, predominantly white schools viewed student inattention as an indication that the teacher needed to do more to gain the student's interest. On the other hand, this same behavior in predominantly black, lower-class schools was interpreted as resulting from the students' putative low attention spans. When this type of disparate treatment of black students is coupled with the discretion afforded teachers under the suspension and expulsion rules in most states, it is not surprising that the result is often increased suspension rates for minority students.

In 1974, one court considered the disparity in suspension rates between black and white students. In *Hawkins v. Coleman*, a federal district court in Texas examined the disproportionate impact of suspension on black students. The court found that black students were suspended much more frequently than white students at all levels of public education—elementary, junior high, and senior high school. It also found that black students received long-term suspensions, a more severe form of discipline, more frequently than did white students. The court further noted that sixty percent of the offenses punished by either suspension or corporal punishment were

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174 *Id.* It should also be noted that male students are suspended much more frequently than female students. In 1988, 71.6% of suspended students were male. *Id.*
176 *See supra* part I.A.1.
178 *Id.*
179 The discriminatory application of discretionary suspension and expulsion rules can easily be demonstrated by one school's interpretation of a rule banning weapons. The school interpreted the rule to include hair picks as weapons. A student found with a hair pick could therefore be disciplined under the rule. As Julie Underwood has pointed out, "[t]he discriminatory impact of such an interpretation is obvious." Underwood, *supra* note 175, at 96.
181 *Id.*
182 *Id.* at 1335.
183 *Id.*
minor, nonviolent offenses, such as truancy and talking back.\textsuperscript{184} The court, after hearing the testimony of expert witnesses, concluded that the disproportionate imposition of suspension on black students was due to institutional racism.\textsuperscript{185} Although the court declined to outline a specific program for the school district to follow in attempting to eradicate the problem, it did order the district to review the present program and to institute an affirmative program to decrease "white institutional racism."\textsuperscript{186} More recently, other courts have reached similar results.\textsuperscript{187}

Because suspension so often influences a student’s decision to drop out of school and because the effects of dropping out are so drastic, the fact that minority students are consistently suspended more frequently than white students adds to the urgent need to supply these students with an educational alternative. The "underclass" that may result from increased suspensions and expulsions will be disproportionately composed of black students, a fact that should not be ignored. Despite new guidelines and programs, such as those initiated by the judicial branch mentioned above, the discretionary nature of the suspension and expulsion rules, combined with the racism found in some school systems, make it unlikely that the disproportionate suspension of black students will be completely ameliorated. When one considers that suspension and expulsion are most often imposed as discipline for relatively minor offenses, alternative education emerges as a much more reasonable solution to disruptive behavior than condemning students, frequently minority students, to a life without education, which will often lead to increased criminal behavior, public assistance utilization, and unemployment.

Despite the disparate treatment of minority students under suspension and expulsion rules, it is extremely unlikely that an expelled or suspended minority student could successfully state a claim for alternative education under the Federal Equal Protection Clause by asserting that the suspension and expulsion rules employ the suspect classification of race. The Supreme Court has held that strict scrutiny for race classifications will be employed only when both a discrimina-

\textsuperscript{184} Id.
\textsuperscript{185} Id. at 1337.
\textsuperscript{186} Id. at 1338.
\textsuperscript{187} In Ross v. Saltmarsh, 500 F. Supp. 985 (S.D.N.Y. 1980), the school district agreed to set up committees of teachers, parents, citizens of the community, and principals from each school in order to meet a timetable aimed at the elimination of racial disparities in suspension rates. An Arkansas district court found that school rules were vague and allowed too much discretion which in turn resulted in black students being disciplined for behaviors that did not merit discipline when observed in white students. The court ordered the development of guidelines to remove some of this discretion. Sherpell v. Humnoke Sch. Dist. No. 5, 619 F. Supp. 670 (E.D. Ark. 1985).
tory impact and a discriminatory purpose are demonstrated. In the area of expulsion and suspension rules, it is unlikely that a plaintiff could prove a discriminatory purpose.

In stating a claim for alternative education under a state constitution's guarantee of a fundamental right to education, however, proof of discriminatory impact would not be wholly irrelevant. The discriminatory impact supports the argument that imposing suspensions and expulsions as discipline without providing for alternative education is harmful to students; not only do suspended and expelled students tend to drop out of school at higher rates than other students and thereby experience many setbacks, but minority students are feeling the adverse impacts of these punishments at increased rates. In this way, proof of discriminatory impact helps to demonstrate that the expulsion and suspension rules are not narrowly tailored enough to the state's goal of maintaining a safe learning environment.

B. Relying Solely on the Education Clause

It is possible that a suspended or expelled student in Washington State or New Jersey could state a claim for alternative education under the state constitution's education clause without resorting to an equal protection argument. As explained above, the Washington and New Jersey Supreme Courts, unlike most state courts, invalidated their state school funding systems on the basis of their state constitution's education clause alone. However, most state courts that have invalidated school funding systems have done so using a combination of the education clause and equal protection analysis. There are some advantages to proceeding exclusively under the education clause rather than a state equal protection clause. First, education has always been governed by the state rather than the federal government. Second, because the federal Constitution does not incorporate a right to education, state courts proceeding under the state's education clause will not feel the pressure to follow federal precedent. Finally, deciding the case under an education clause does not have as far-reaching implications as does a decision based on equal protection. If equal

188 Laurence H. Tribe, American Constitutional Law 1028 (1978). It is possible that a minority student may be able to make this claim based on discriminatory impact under the state's equal protection provision because, as noted above, a state is free to interpret its equal protection clause as providing more protection than its federal counterpart. See supra part II.A.
189 See Tribe, supra note 188, at 1030 (discussing the relevance of impact in the federal constitutional context).
190 See supra part II.B.1.
191 See supra part II.B.2.
192 McUsic, supra note 3, at 315.
193 Id.
194 Id.
NOTE—EXPELLED STUDENTS

protection is expanded to protect education, a state court may find it difficult to determine where to draw the line as to what other sorts of personal rights are to be protected under the state's equal protection clauses.\footnote{195} The New Jersey court, in fact, cited this reason specifically when it held that education was not a fundamental right for equal protection purposes but nonetheless invalidated the funding system on the basis of the education clause alone.\footnote{196}

Because most state courts that have invalidated state school funding schemes have done so through use of an equal protection provision, this Note focuses primarily on stating a claim for alternative education under a state constitution's equal protection clause in conjunction with its education clause. However, it is important to note that suspended or expelled students in Washington State and New Jersey may be able to state a claim for alternative education without resort to equal protection. Therefore, this Part focuses briefly on this argument, using Washington State as an example. In Washington, a suspended or expelled student could rely on the forceful language of the Washington Constitution, which imposes on the state a "paramount duty . . . to make ample provision for the education of all children."\footnote{197} The Washington Supreme Court has interpreted this language quite literally, defining "paramount" as "supreme, preeminent or dominant," and has accorded children in Washington a right of "equal stature."\footnote{198}

Washington plaintiffs challenging the state's failure to provide alternative education for suspended or expelled students would argue that their "preeminent" or "dominant" right to education has been violated. Of course, the state can argue that suspended or expelled students have forfeited their right to a public education through the behavior that led to the suspension or expulsion. In fact, the Washington Supreme Court in \textit{Seattle School District} stated, "Since the children residing within the State's borders possess this 'right,' the State may discharge its 'duty' only by performance unless that performance is prevented by the holder of the 'right.'"\footnote{199} Although a suspended or expelled student could argue that he or she did not "prevent" the state from providing him or her with an education, this may be difficult, especially in the case of a student who is suspended for an offense of greater magnitude than some of the minor offenses which are punishable by suspension or expulsion. For those students who are suspended or expelled for minor offenses, such as tardiness or dress

\footnote{195} \textit{Id.}
\footnote{197} \textit{WASH. CONST.} art. IX, § 1.
\footnote{199} \textit{Id.} at 92.
code violations, it may be possible to argue that they have not "prevented" the state from providing them with an education. These students, and even students who have been expelled for major offenses, could still attend alternative schools. Provided they are willing to attend such schools, they have not prevented the state from providing them with this form of education.

In Washington, the state may assert that *Ramsdell v. North River School District No.* 200 do not require it to provide alternative educational services. In that case, the plaintiffs wanted to change school districts because there was some evidence that they would receive a better education in another district. The plaintiffs argued that not allowing them to change districts violated their constitutional right to an "ample education." The court disagreed, finding that "disparity among school districts" did not amount to a constitutional violation. The court reached this conclusion because there was no evidence that the district in question was lacking in staff or facilities and because the only evidence in the plaintiffs' favor merely suggested that they received somewhat more intensive training at the other school. If a suspended or expelled student were to bring an action against the state for alternative education, the state might point to this case to demonstrate that the right to "ample education" is not as strong as it might appear from the *Seattle School District* holding.

*Ramsdell*, however, can be easily distinguished from the case of a suspended or expelled student in need of alternative education. In *Ramsdell*, the plaintiffs were not deprived of education altogether. In fact, the court found that they were receiving an education that did not fall below minimal standards. In the case of a suspended or expelled student, however, all education is withheld. Suspension or expulsion amounts to a total deprivation of the "paramount" right to education. It is much more than a disparity between school districts.

Because this Note argues that all suspended or expelled students should be accorded the opportunity for alternative education, the equal protection analysis is of greater significance. It should also be noted that the Washington Supreme Court, unlike the New Jersey Supreme Court, did not rule out the possibility that education would be treated as a fundamental right under an equal protection analysis. Therefore, the discussion of that analysis may be applicable to Wash-

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201 Id. at 608-09.
202 Id. at 609.
203 Id.
204 Id.
205 Id.
ington school children as well as children in states where education has explicitly been declared a fundamental right.

C. Education Clauses and Equal Protection

1. Equal Protection Analysis Explained

This Part of the Note argues that, under an equal protection analysis, suspension and expulsion rules that do not provide for alternative education must be found invalid. A plaintiff making an equal protection argument based on the fundamental status of the education right under a state constitution will, of course, rely on the state’s equal protection or equal treatment provision.\(^{206}\) However, state courts generally interpret their equal protection provisions as requiring the same type of analysis as that developed by the United States Supreme Court for the Federal Equal Protection Clause.\(^{207}\)

There are two well-recognized tiers to equal protection analysis: (1) the rational basis test and (2) the strict scrutiny test.\(^{208}\) Under the rational basis test, a statutory classification must bear some rational relationship to the purpose intended by the legislation.\(^{209}\) The purpose of the legislation must be predicated on an idea of the “general good.”\(^{210}\) Courts have been very deferential to legislatures with regard to their decisions about what constitutes the general good.\(^{211}\) “The Constitution invalidates only that governmental choice which is ‘clearly wrong, a display of arbitrary power, not an exercise of judgment.’”\(^{212}\)

The analysis changes, however, when the statute either impinges upon a fundamental right or employs a suspect classification, such as race.\(^{213}\) In these situations, the courts employ strict scrutiny analysis. “Legislative and administrative classifications are to be strictly scrutinized and thus held unconstitutional absent a compelling governmental justification if they distribute benefits or burdens in a manner inconsistent with fundamental rights.”\(^{214}\) As the United States

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\(^{206}\) Every state constitution has some sort of clause guaranteeing equal protection of the law. See, e.g., CONN. CONST. art. IV, § 1; IOWA CONST. art. I, § 6; MASS. CONST. art. I, § 1; MASS. CONST. amend. art. CXIV; OHIO CONST. art. I, § 2; VT. CONST. ch. 1, art. I.

\(^{207}\) McCusick, supra note 3, at 312.

\(^{208}\) It should be noted that although these two levels of review are the most well-recognized, the Supreme Court has at times applied a level of review that falls somewhere between the two. Thus, the Court has applied an intermediate standard of review to classifications based on illegitimacy and gender. Tribe, supra note 188, at 1057, 1063.

\(^{209}\) McLaughlin v. Florida, 379 U.S. 184, 191 (1964); see also Tribe, supra note 188, at 995.

\(^{210}\) Tribe, supra note 188, at 995.

\(^{211}\) Id.

\(^{212}\) Id. at 997 (quoting Mathews v. deCastro, 429 U.S. 181, 185 (1976)).

\(^{213}\) Id. at 1000.

\(^{214}\) Id. at 1002.
Supreme Court has explained, under strict scrutiny analysis, the state must show that its classification is "precisely tailored to serve a compelling governmental interest."\(^{215}\) According to Professor Laurence Tribe, once strict scrutiny is employed, as when a fundamental right is at stake, it is only in the very rare case that the legislative enactment will be upheld.\(^{216}\)

Although education is not a fundamental right under the federal Constitution\(^^{217}\) and therefore not subject to strict scrutiny analysis, a state court invalidating a suspension or expulsion on this ground should not be overturned for employing strict scrutiny. As explained above, a state court is free to interpret a state constitutional provision differently from a Supreme Court interpretation of its federal counterpart.\(^{218}\) The Supreme Court interpretation of, for example, the Federal Equal Protection Clause merely serves as a floor for the state court's interpretation of its own clause.\(^{219}\) Therefore, the state court is free to provide more, although not less, protection for rights under the state's constitution.\(^{220}\) As the Washington State Supreme Court explained in *Darrin v. Gould*:

> [T]he state's version of the Equal Protection Clause[] has been construed in a manner similar to that of the Equal Protection Clause of the Fourteenth Amendment. Such construction, however, is not automatically compelled. [The state version] may be construed to provide greater protection to individual rights than that provided by the Equal Protection Clause.\(^{221}\)

Because of this power, a state court could conceivably hold that the state equal protection provision protects the state right to education in the suspension or expulsion situation even when that right has not been declared fundamental.

2. *Equal Protection Analysis of a Right to Education*

This Part of the Note argues that suspensions or expulsions without provision for alternative education are unconstitutional under equal protection analysis in states where education is a fundamental right under the state constitution.


\(^{216}\) *Tribe*, *supra* note 188, at 1000.


\(^{218}\) *Advisory Commission*, *supra* note 1, at 12.

\(^{219}\) *Id.*

\(^{220}\) *Id.*

\(^{221}\) 540 P.2d 882 (1975) (internal citations omitted).
As explained above, many state courts have held that the state constitution's education clause incorporates a fundamental right to education. Therefore, in those states, any infringement on the right to education should require a strict scrutiny equal protection analysis. Under such an analysis, the imposition of suspension or expulsion without making provision for alternative education violates the state constitution. As explained above, when the state infringes upon a fundamental right, it must demonstrate that there is a compelling government interest behind that infringement and that the classification is "precisely tailored" to serve that interest. In some expulsion or long-term suspension cases, at least in those cases in which the offense is not minor, the state may be able to point to a compelling government interest, such as maintaining safety and peace in the schools. However, an expulsion or long-term suspension without provision for alternative education will rarely, if ever, be "precisely tailored" to serve that end. The school may have a legitimate, even compelling, reason for excluding a student from school. However, a student's fundamental right to education can be more thoroughly and precisely protected, and the state's interest can be preserved, without resort to suspension or expulsion without alternative education. A student in a state where education is a fundamental right can argue that the state is required to provide alternative education under the state constitution, because the suspension or expulsion of a student from public school implicates a fundamental right. Providing educational services to suspended or expelled students is a more precisely tailored means of attaining the state's goals and should therefore be required under a strict scrutiny analysis.

This deprivation of a constitutional right without employing means narrowly tailored to attain a compelling state interest amounts to a denial of not only the substantive fundamental right to education but also the equal protection of the laws. Children who are not sus-


223 See supra part II.B.2.

pended or expelled continue to receive education services. This sort of classification would almost certainly withstand a rational basis inquiry. However, under the strict scrutiny construction of the equal protection clause required when a fundamental right is implicated, the classification fails because it is not "precisely tailored" to the state’s legitimate interest in peace in the schools. By providing suspended and expelled students with an opportunity for alternative education, the state attains its goal of maintaining peace in the public schools and avoids impinging drastically on the students’ fundamental right to education.

b. Litigation of the Suspension-Expulsion Question

Very few plaintiffs have litigated the validity of a suspension or expulsion under an equal protection analysis of the fundamental right to education. However, there are a few cases that have addressed the issue either directly or indirectly.

In *Doe v. Superintendent of Schools*, the plaintiff had been expelled from public school without provision for alternative education for bringing what she considered to be a gag knife to school. She challenged her expulsion on several grounds. Most importantly, she asserted that *McDuffy v. Secretary of Executive Office of Education* had held that students in Massachusetts had a fundamental right to education and that therefore her expulsion was not "the least restrictive alternative" required under strict scrutiny analysis because the school authorities could have either suspended her or provided her with alternative education. The court, however, insisted that *McDuffy* did not provide a fundamental right to education and therefore applied a rational basis level of review to find that the plaintiff’s constitutional rights had not been infringed.

Although *Doe* squarely confronts a claim for alternative education under a state constitution’s education clause, the case will not be con-

226 Id. at 1091. The knife had a one-and-one-quarter-inch blade with a sharp point but dull cutting edge. The blade was hidden in a lipstick case which twisted open. Id.
227 The plaintiff asserted that "school officials abused their discretion, acted outside their statutory authority, and violated her fundamental, constitutionally protected interest in a public education." Id. at 1092.
228 615 N.E.2d 516 (Mass. 1993). For a brief discussion of *McDuffy*, see supra notes 139-41 and accompanying text.
229 653 N.E.2d at 1095.
230 Id. at 1097. The court stated:

Under the minimal scrutiny of the rational basis test, the fact that a less onerous alternative exists is irrelevant. Thus, since her expulsion was rationally related to the maintenance of order in the school, the defendants’ decision not to provide the plaintiff with an alternate education does not render her expulsion unconstitutional.

*Id.*
trolling or even persuasive authority in many states. The question whether the Massachusetts Constitution provided a fundamental right to education had been left open by earlier opinions, and therefore the court in *Doe* was able to hold that there was no such fundamental right and thereby apply the rational basis level of review. As this Note has explained, in those states where education has been declared a fundamental right, suspended or expelled students will be much more likely to succeed in their demands for alternative education, because the burden on the state will be much higher.\(^{231}\)

At least one court has held that a fundamental right exists in the course of striking down a challenged suspension. In *Clinton Municipal Separate School District v. Byrd*,\(^{232}\) two high school students challenged their suspensions on the ground that their fundamental right to education had been violated. The Mississippi Supreme Court held that there was a fundamental right to "a minimally adequate public education," seemingly basing this determination on the statutory laws of the state which provided for education for all of the children of the state.\(^{233}\) However, the court denied the plaintiffs' claim on the ground that the punishment "further[ed] a substantial legitimate interest of the school district."\(^{234}\)

Although this case would appear to deny the possibility that suspended or expelled students in Mississippi could successfully state a claim for alternative education, it should not be very persuasive authority in other states. First, the court appeared to rely on legislation, rather than on a constitutional education clause, for its determination that a fundamental right to education exists. Second, perhaps because it was not relying on an education clause, the court was able to determine that the school district was entitled to great deference in its disciplinary decisions, despite an infringement on the students' right to education. Finally, the court merely required that the school district demonstrate that its action "further[ed] a substantial legitimate interest." As explained above, the strict scrutiny employed when a

\[^{231}\] In states where the courts have not yet determined whether the state constitution provides a fundamental right to education, suspended or expelled students may find it more difficult to state a claim for alternative education. Presumably, those courts will be free to take the *Doe* approach: hold that no such fundamental right to education exists and then apply the rational basis level of review to find that the suspension or expulsion was rationally related to a legitimate state interest. Plaintiffs in these states will have to argue (1) that there is in fact a fundamental right to education in their state that must be recognized and (2) that the fundamental right requires that they be afforded some form of alternative education.

\[^{232}\] 477 So. 2d 237 (Miss. 1985).

\[^{233}\] Id. at 240.

\[^{234}\] Id.
fundamental right is at stake places a much greater burden on the state.\textsuperscript{235}

Any state challenged to provide alternative education to suspended or expelled students may cite \textit{In re Jackson},\textsuperscript{236} from North Carolina, as support for denial of the claim. In that case, the plaintiff was suspended, after being afforded the proper procedural safeguards, for assaulting a teacher and another student.\textsuperscript{237} The juvenile court judge had ordered that the plaintiff either be reinstated in public school or be provided with an alternative forum for education. The judge relied on state statutes allowing a juvenile court judge to place a delinquent juvenile on probation and required as a part of that probation that he attend school.\textsuperscript{238} The North Carolina Court of Appeals reversed, finding that the statute on which the juvenile court judge relied conflicted with another statute allowing suspensions.\textsuperscript{239} The court stated that when the school has not provided an alternative forum for education, the juvenile court judge may not order public school attendance.\textsuperscript{240} The court also considered the constitutional issue and found that the student's right to an education could be denied when outweighed by a school's interest in protecting other students, teachers, and school property. According to the court, suspensions do not deny the right to education but instead deny the right to participate in prohibited behavior.\textsuperscript{241} Therefore, the court found that the public schools do not have a duty to provide suspended students with an alternative education.\textsuperscript{242}

Many states might consider this opinion persuasive authority for denying a right to alternative education for suspended or expelled students. However, as explained above, North Carolina has not recognized a fundamental right to education, but merely a right to \textit{equal access} to education.\textsuperscript{243} This equal-access right is very different from the fundamental right other courts have recognized. In North Carolina, the right to equal access is apparently protected if all students will be suspended or expelled for the same violations because all stu-

\textsuperscript{235} See, e.g., Skeen v. Minnesota, 505 N.W.2d 299, 312 (Minn. 1993) (Under strict scrutiny analysis, the state would "have to prove that the statute is necessary to a compelling government interest.") (emphasis added); Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310, 333 (Wyo.) (Under strict scrutiny, the state must "establish that there is no less onerous alternative by which its objective may be achieved.") (emphasis added), \textit{cert. denied}, 449 U.S. 824 (1980).

\textsuperscript{236} 352 S.E.2d 449 (N.C. Ct. App. 1987).

\textsuperscript{237} \textit{Id.} at 451.

\textsuperscript{238} \textit{Id.} at 453.

\textsuperscript{239} \textit{Id.} at 454.

\textsuperscript{240} \textit{Id.}

\textsuperscript{241} \textit{Id.} at 455.

\textsuperscript{242} \textit{Id.}

\textsuperscript{243} \textit{See supra} note 133 and accompanying text.
students will have the same opportunity for education which they can all lose for the same reasons. However, in a state where education itself is a fundamental right, equality in suspensions and expulsions is not enough. It cannot be said that the state is not required to provide alternative education merely because it does not currently do so, as the court in *Jackson* held. When students have a right to education, there is a greater protection for suspended or expelled students than when the students merely hold a right to equal access to the education that is currently offered by the state.

The Washington Supreme Court has also considered the suspension—expulsion question, but in a different context. In *Tommy P. v. Board of County Commissioners*,244 the Washington Supreme Court found that juveniles in detention facilities have a right to education. The court did not rest this decision on the Washington Constitution but instead on the state’s mandatory attendance laws245 and the Juvenile Justice Act.246 The court held that because juveniles in detention facilities were not expressly exempted from the mandatory attendance law and because education would further the goals of the Juvenile Justice Act, these laws required that they be provided with educational services.247

Although the case did not confront the equal protection issue, it may be helpful precedent for a student challenging his or her suspension or expulsion on equal protection grounds. It is difficult to see how denying educational services to suspended or expelled students while providing them for juvenile detainees can withstand even a rational basis scrutiny under equal protection analysis. If the state is required to provide juvenile detainees with educational services, there is no rational reason why it should not be similarly required to provide suspended and expelled students with an education. The fact that the behavior of suspended or expelled students has not reached the level at which the students become juvenile detainees is no reason to deny them at least the advantages of education with which juvenile detainees are provided. Under a strict scrutiny analysis, the classification surely fails because the policy of not providing educational services to expelled students is not precisely tailored to serve the state interest of maintaining a safe school environment. When the requirement of

244 645 P.2d 697 (Wash. 1982).
245 WASH. REV. CODE ANN. §§ 28A.27.010, .01.060 (West 1982).
247 645 P.2d at 704. This holding also refutes any use of *Jackson* by Washington State to attempt to defeat a claim for alternative education by suspended or expelled students. The court in *Jackson* had stated that because there was not currently a system of alternative education in existence, the courts could not force the state to provide one. In *Tommy P.*, no system of education was in place for juvenile detainees, but the court required that the state provide one nonetheless. *Id.*
providing juvenile detainees with education is considered together with the general equal protection analysis discussed above, it becomes clear that the classification is not precisely tailored to serve the state purpose. The fact that the state is able to provide these detainees with educational services helps to demonstrate that the burden of providing alternative education in Washington State at least is not so great as to justify infringement of the fundamental right to education.

Although the irrational distinction between juvenile detainees and suspended and expelled students may be of limited use to plaintiffs in states other than Washington, the next Part offers an example of another classification that should not withstand strict scrutiny analysis in any state.

c. Expulsion—Suspension and Disabled Students

Another classification that further strengthens the argument for providing suspended and expelled students with educational services involves disabled students. In Honig v. Doe,248 the United States Supreme Court held that the Education for the Handicapped Act (EHA) requires that schools not unilaterally exclude disabled students beyond a temporary ten-day suspension.249 Although the opinion did not expressly state that disabled students must be provided with educational services regardless of suspension or expulsion, this has been the holding of other courts.250

In 1981, the Fifth Circuit, in S-1 v. Turlington,251 held that even when the behavior leading to the expulsion does not stem from the student's disability, the student cannot be denied all educational services, although he or she may be excluded from the school.252 Similarly, in 1993, the Office of Special Education Programs issued a response to an inquiry, stating that Part B of the Individuals with Disabilities Education Act (IDEA) (the current version of the EHA) requires that when misconduct is determined not to be a manifestation of the student's disability, the student may be removed from school, but educational services may not be stopped even if the disciplinary removal is to exceed ten school days.253 Therefore, children with disabilities may not be denied free appropriate public education even

249 Id. at 323-24.
251 635 F.2d 342 (5th Cir. 1981).
252 Id. at 348.
when they are legitimately excluded from the public schools for behavior unrelated to their disabilities.\textsuperscript{254}

Students without disabilities, however, are routinely denied educational services during expulsions and long-term suspensions. When a fundamental right is implicated, classifying on the basis of disability when the behavior of disabled students is unrelated to their disability cannot survive a strict scrutiny analysis.\textsuperscript{255} Where education has been declared a fundamental right, an expelled or suspended student can point to this classification as not being precisely tailored to meet the state's interest. When a fundamental right is at stake, any classification must survive strict scrutiny analysis. In fact, there hardly seems to be a rational basis for providing disabled students with educational services when they are suspended or expelled for behavior found to be \textit{unrelated} to their disability while denying this same advantage to nondisabled students. Of course, the disabled student's right to educational services is based on a legislative act, the IDEA; however, this legislative distinction cannot withstand equal protection analysis in a state where education is a fundamental right of \textit{all} children residing in the state, not merely disabled students.

**CONCLUSION**

Public school students in America are being suspended and expelled at increasing rates. Few districts provide for alternative forms of education for these children. Thus, a large group of this country's young people are missing portions of their education, and many eventually drop out altogether. The future of dropouts is not bright. They are often unemployed or earning less than their peers, and some eventually turn to crime.

Suspended or expelled students may be able to end this destructive pattern. Although it is unlikely that a suspended or expelled student could state a constitutional claim for alternative education under

\textsuperscript{254} Recently, the Clinton administration attempted to withhold $50 million in education funds from Virginia because the state wished to expel disabled students when the behavior for which the student was being expelled was unrelated to her or his disability. However, a court of appeals recently ruled that the federal government could not withhold the funds. Steve Bates, \textit{U.S. Cannot Withhold Virginia School Funds: Court Rules in Dispute Over Policy on Expelling Disabled Students}, \textit{Wash. Post}, Apr. 30, 1994, at B5.

\textsuperscript{255} This Note does not argue that disabled students should be denied the educational benefits that these cases and statutes provide. However, it is inappropriate to continue to deny alternative education to some students merely because they do not suffer from a disability while at the same time providing alternative education to disabled students who are removed from school for behavior completely unrelated to their disability. Rather, both groups of students should be given the opportunity to receive alternative educational services. The fact that courts have construed the IDEA to require alternative services for disabled students, even when the disciplined behavior is not a result of their disability, indicates that states are able to provide such services. The provision of such services should merely be extended to nondisabled students.
the federal Constitution, many state constitutions provide students with a right to education. In states where courts have determined that the state constitution's education clause affords a fundamental right, students may assert that suspension or expulsion without provision for alternative education cannot survive a strict scrutiny equal protection analysis. Although the state may have a legitimate interest in maintaining peace in the public schools, the large infringement on the fundamental right to education brought about by suspensions and expulsions is not narrowly tailored enough to survive strict scrutiny analysis. By providing alternative education for suspended and expelled students, the state can achieve its goal and place a much less onerous burden on the students' fundamental right.

Roni R. Reed

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256 Even in states where courts have not found the state constitution to embody a fundamental right to education, students may have an equal protection claim. If a state constitution's education clause has been found to afford some enforceable right to education, it is possible that a state court, in interpreting the state's equal protection provision, may accord this right greater protection than would the federal courts under the federal Constitution.
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