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COMMENT: Taking a Closer Look at Massachusetts Public School Expulsions: Proposing an Intermediate Standard of Judicial Review After Doe v. Superintendent of Schools

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BIO:

* To my mother, Patricia Murphy, who, though I resisted, instilled in me an appreciation for education.

SUMMARY:
... That is, some courts hold that education is a "fundamental right," and, therefore, decisions affecting one's fundamental right to a public education are subject to strict judicial scrutiny. ... Other courts, however, hold that education is not a fundamental right, and, therefore, decisions affecting one's non-fundamental right to a public education are subject only to the rational basis test. ... Also according to traditional jurisprudence, legislation affecting a fundamental right is subject to strict scrutiny, the most stringent form of judicial review. ... Most of these states, including Massachusetts, subject infringements upon one's right to education to the rational basis test, the most lenient form of judicial review. ... Finally, this Comment concludes in Part IV that the Supreme Judicial Court in Doe was correct in holding that the right to education is not a fundamental right under the Massachusetts Constitution, but incorrect in its application of the rational basis test to expulsion decisions. ... For instance, North Dakota, which considers education a fundamental right, nevertheless applied the intermediate standard of review instead of strict scrutiny. ... Because rational basis is such a lenient constitutional test, it is troubling to consider that it is the level of judicial scrutiny applied to legislation affecting the unquestionably important right to education by the United States Supreme Court, and by the sixteen states, including Massachusetts, that have declared education a non-fundamental right. ...

TEXT:
[*605]

"Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint." n1

I. Introduction

The preceding quotation is particularly relevant in the context of public school expulsions. Although many courts have recognized that the right to education is a very important one, n2 most courts continue to analyze decisions affecting that right in an all-or-nothing approach. That is, some courts hold that education is a "fundamental right," n3 and, therefore, decisions affecting one's fundamental right to a public education are subject to strict judicial scrutiny. n4 If characterized by the opening quotation, strict judicial scrutiny would be considered an example of judicial "care." n5 Other courts, however, hold that education is not a fundamental right, n6 and, therefore, decisions affecting one's non-fundamental right to a public education are subject only to the rational basis test. n7 If characterized by the opening quotation, the rational basis test would be considered an example of judicial "restraint." n8

In Doe v. Superintendent of Schools, n9 the Massachusetts Supreme [*606] Judicial Court recently considered, in the context of a public school expulsion, whether the right to education is a fundamental right under the Massachusetts Constitution. n10 The Doe court held that the right to education is not fundamental, n11 despite the fact that the Massachusetts Constitution "'imposes an enforceable duty on the magistrates and Legislatures of this Commonwealth to provide education in the public schools for the children there enrolled.'" n12 According to traditional jurisprudence, legislation (or other state action) affecting non-fundamental rights is subject to the most lenient form of judicial review, the rational basis test. n13 The Supreme Judicial Court majority therefore applied the rational basis test in Doe and upheld a school committee's decision to expel a high school student for one year. n14

Chief Justice Liacos of the Supreme Judicial Court dissented alone. n15 He would have held that one's right to an education guaranteed by the Massachusetts Constitution is a fundamental right. n16 Also according to traditional jurisprudence, legislation affecting a fundamental right is subject to strict scrutiny, the most stringent form of judicial review. n17 The Chief Justice thought that strict scrutiny of the expulsion decision was thus the appropriate standard to apply. n18 As the majority and dissenting opinions therefore illustrate, a great deal turns on the [*607] way a court characterizes the right to education. Indeed, the characterization of education as a fundamental or non-fundamental right essentially determines whether a court will exercise judicial "care" or judicial "restraint" when analyzing decisions, such as expulsion, which effect that right.

Like forty-seven other states, Massachusetts specifically enumerates the right to education in its constitution. n19 Thirty-two states, including Massachusetts, have considered whether the right to education is fundamental under their constitutions. n20 Of the thirty-two states that have considered the question, sixteen have indicated that the right to education is a fundamental right. n21 Thus, most of those states have strictly scrutinized state actions that infringe upon one's right to an education. n22 In Doe, Massachusetts joined fifteen other states when the Supreme Judicial Court declared that education is not a fundamental right under the Massachusetts Constitution. n23 Most of these states, including Massachusetts, subject infringements upon one's right to education to the rational basis test, the most lenient form of judicial review. n24

In Part II, this Comment analyzes how individual rights are classified as fundamental or non-fundamental and the resulting impact that classification has due to the attendant levels of judicial review. n25 Part II then analyzes why the right to education has been classified as nonfundamental in the federal law under the United States Constitution, n26 as well as under sixteen state constitutions. n27 Part II also examines the reasoning of those states that have chosen to declare education

a fundamental right under their constitutions. n28 Part II concludes with an analysis of Massachusetts' position on the right to education prior to the Doe decision. n29

Part III discusses the Doe decision, including the factual and procedural background, the plaintiff's legal claim, and the majority and dissenting [*608] opinions. n30

Part IV discusses the importance of the right to education, and the serious effect that a denial of that right can have upon society at large. n31 Part IV then examines, in the context of public school expulsions, the consequences of declaring the right to education fundamental or non-fundamental. n32 That is, Part IV illustrates that when the right to education is considered non-fundamental, courts generally prefer the interests of a safe school environment for all students over one particular student's right to an education. n33 In contrast, Part IV also illustrates that when the right to education is considered fundamental, a particular student's right to obtain an education is preferred over the discretionary interests of the school community at large. n34 Part IV then discusses how an area of compromise has evolved in the traditional standards of judicial review--the so-called "intermediate" standard--in response to the traditionally rigid, two-tiered approach. n35 Part IV also explores how some state courts, and the United States Supreme Court, have both applied the closer judicial scrutiny of the intermediate standard of review to certain non-fundamental, yet important substantive rights, including education. n36

Finally, this Comment concludes in Part IV that the Supreme Judicial Court in Doe was correct in holding that the right to education is not a fundamental right under the Massachusetts Constitution, but incorrect in its application of the rational basis test to expulsion decisions. n37 This Comment will argue that the right to education, though non-fundamental under the Massachusetts Constitution, is an important substantive right deserving the closer judicial scrutiny of the intermediate standard of review. n38 That is because the intermediate standard of review best embraces the concept of both judicial care and judicial restraint. [*609]

II. Background

A. Fundamental and Non-Fundamental Rights

In the federal law, "fundamental" individual rights are those that are explicitly or implicitly guaranteed by the United States Constitution. n39 Conversely, "non-fundamental" individual rights are those that have no clear Constitutional roots. n40 Labelling individual rights fundamental or non-fundamental is significant because it directly determines how closely a court will scrutinize legislation or other state actions that infringe upon those rights. n41 As previously noted, when a court declares a right fundamental, that court will traditionally apply "strict judicial scrutiny" to state infringements upon that right. n42 On the other hand, when a [*610] court declares a right non-fundamental, that court will traditionally apply "rational basis" review to infringements upon that right. n43 Courts are reluctant to expand the list of implicit fundamental rights, however, because the judiciary "comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." n44 As a result, an "intermediate" standard of judicial review is sometimes applied by courts to infringements upon certain non-fundamental, yet important rights. n45

1. The Standards of Judicial Review

a. Strict Judicial Scrutiny (Judicial Care)

Strict scrutiny of infringements upon fundamental rights requires that the state have a "compelling purpose" for the infringement upon the right (the "end" to be achieved by the state action), and that the means chosen by the state are narrowly tailored to achieve that purpose (the state's "means" of achieving its "end"). n46 In deciding if the means are narrowly tailored to the end, courts generally require the state to demonstrate that its compelling purpose is served by the least restrictive alternative available. n47 If the court finds that the state does not have a compelling interest, or that there is a less restrictive means by which the state can achieve its compelling purpose, the infringement upon the fundamental right fails the strict scrutiny the court has given it, and is therefore found unconstitutional. n48

Strict scrutiny is a very high constitutional hurdle, which few laws [*611] survive, because a court will almost always find a less restrictive means. n49 As renowned Constitutional law scholar Professor Gerald Gunther appropriately put it, "strict scrutiny is strict in theory but fatal in fact." n50

b. The Rational Basis Test (Judicial Restraint)

The rational basis test, on the other hand, merely requires that the state have a "legitimate purpose" for infringing upon a non-fundamental right (the "end" to be achieved by the state action), and that the means chosen by the state are rationally related to achieving this end. n51 Courts generally defer to the Legislature under the rational basis test: as long as the state's means are not arbitrary or capricious, courts will presume both a legitimate purpose and rationality without requiring the state to demonstrate that the means chosen are the best possible. n52 Rather, the burden is upon the challenger to demonstrate that the law is arbitrary or completely unreasonable. n53

Rational basis is a quite low constitutional hurdle: as Professor Gunther stated, rational basis is "minimal scrutiny in theory and virtually none in fact." n54 The reason for such a lenient form of judicial review for non-fundamental rights is that "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy [*612] determinations." n55

c. The Intermediate Standard of Review

A new level of judicial review has gradually evolved that falls somewhere between the rational basis test and strict judicial scrutiny. n56 This so-called "intermediate" standard, also referred to as "heightened" or "closer" judicial scrutiny, requires that the state have an "important" purpose for its infringement (the state's "end"), and that the means chosen by the state are "substantially related" to achieving that important purpose. n57 Like strict scrutiny, the intermediate standard of review requires the state to clearly demonstrate the legitimacy of its means. n58 Like rational basis, however, the intermediate standard does not require that the state's means be the least restrictive alternative available. n59

The United States Supreme Court has most often applied the intermediate standard to classifications based upon gender n60 or one's illegitimacy. n61 The Court has also applied the intermediate standard, however, to the non-fundamental, yet "important" right to education. n62 [*613]

B. The Right to Education in the Federal Law

In 1973, the United States Supreme Court considered, in San Antonio Independent School District v. Rodriguez, n63 whether the right to education was a fundamental right under the Federal Constitution. n64 In Rodriguez, the Court upheld a Texas school-financing scheme that allocated funds to school districts in proportion to property taxes paid by the residents in those districts; this

resulted in large disparities in perpupil allocations from one district to another. n65 The parents of several students in a less affluent district brought suit claiming that the disparities in the school-financing scheme violated the Equal Protection Clause. n66

The Court held that education was not a fundamental right because it was not explicitly or implicitly guaranteed by the Federal Constitution. n67 Because education was declared non-fundamental under the Federal Constitution, the Rodriguez Court applied mere rational basis review and upheld the financing scheme. n68 In so holding, however, the Rodriguez Court acknowledged the importance of education in our society. n69 The Court stated: "Nothing this Court holds today in any way detracts from our historic dedication to public education. We are in complete agreement with the conclusion of the three-judge panel below [*614] that 'the grave significance of education both to the individual and to our society' cannot be doubted." n70

The United States Supreme Court's holding in Rodriguez--that education is a non-fundamental right because it is not explicitly or implicitly guaranteed by the Federal Constitution--implies that education might be deemed fundamental under a state constitution that does guarantee the right to education. n71 Although there is no explicit or implicit right to education under the Federal Constitution, forty-eight state constitutions have explicitly set forth such a right. n72 Indeed, a number of state courts have regarded the right to education as so important that they have declared it a fundamental right under their own constitutions. n73

C. The Right to Education in Sister States

Massachusetts is but one of the forty-eight states that specifically enumerates the right to education in its constitution. n74 To date, thirtytwo of these forty-eight states have directly or indirectly considered [*615] whether or not that right is fundamental. n75 In analyzing the impact of the Doe decision, therefore, it is important to examine how other states have interpreted their constitutional provisions regarding education.

1. States in Which Education is a Fundamental Right

Of the thirty-two states, including Massachusetts, that have considered the question, sixteen have declared a pupil's right to an education to be fundamental. n76 These states have cited a variety of reasons for so concluding. For example, Minnesota declared that education was fundamental because of its overall importance and because of the explicit provision for education in that state's constitution. n77 The North Dakota Supreme Court thought that education was fundamental because it had "at least equal standing with" other rights deemed fundamental such as "freedom of religion . . . speech and the press." n78 The Supreme Court of West Virginia reasoned that the mandatory requirement imposed upon the state by its constitution to provide a "'thorough and efficient system of free schools' . . . demonstrated that education was a fundamental constitutional right." n79 Furthermore, the Wyoming Supreme Court held that because of the emphasis education receives in its constitution, "there is no room for any conclusion but that education . . . is a matter of fundamental interest." n80 The states that have declared the right to education fundamental have traditionally subjected state infringements upon that right to strict scrutiny. n81 [*616]

2. States in Which Education is Not a Fundamental Right

Massachusetts has now joined fifteen other states that have indicated that education is a non-fundamental right under their constitutions. n82 While acknowledging the important role that education plays in society, n83 these states have generally declined to conclude that express constitu-

tional entitlements are necessarily fundamental rights. n84 Moreover, at least one state court has concluded that it is for the Legislature, not the courts, to enforce their constitutional education provisions. n85 Because the right to education was declared non-fundamental in these states, the courts have traditionally subjected state infringements upon [*617] that right to rational basis review. n86

When determining whether education is a fundamental or non-fundamental right, however, states on either side of the question have deviated from the traditional standards of judicial review. n87 Those states have recognized that the rigid, two-tiered approach to judicial review does not work very well when the non-fundamental, yet important right to education is involved. n88 For instance, North Dakota, which considers education a fundamental right, nevertheless applied the intermediate standard of review instead of strict scrutiny. n89 The North Dakota Supreme Court was fearful that strict scrutiny applied in the school setting would amount to judicial micromanagement of an area that requires difficult policy decisions. n90 Likewise, Montana, which also considers "various aspects" of the right to education to be fundamental, applied a "middle-tier constitutional analysis" to a competing and conflicting school committee rule that affected one's nonfundamental right to participate in public school extracurricular activities. n91 Similarly, Maryland, which does not consider education a fundamental right, has nevertheless indicated that heightened scrutiny, not rational basis, is the appropriate standard of judicial review in that state for infringements upon important personal rights, including education. n92

D. The Right to Education in Massachusetts

Like the constitutions of forty-seven other states, the Massachusetts Constitution specifically enumerates the right to education in its "Education Clause," which provides in part:

Wisdom, and knowledge . . . 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 . . . it shall be the duty of legislatures and magistrates . . . to [*618] cherish . . . public schools and grammar schools in the towns n93

The Massachusetts Supreme Judicial Court was called upon to interpret the Education Clause in McDuffy v. Secretary of Executive Office of Education. n94 The plaintiffs in McDuffy were sixteen students from different cities and towns in the Commonwealth who brought suit claiming that the Commonwealth had "failed to fulfil its duty to provide them an education as mandated by the Massachusetts Constitution." n95 They alleged that the state's school-financing system, which provided less funding for the schools in the plaintiffs' communities than for schools in other communities, denied the plaintiffs the opportunity to receive an "adequate" education. n96 The plaintiffs claimed that the school-financing scheme "violated both Part II, c. 5, § 2 [the Education Clause], and arts. 1 and 10 of the Declaration of Rights of the Massachusetts Constitution." n97 The McDuffy court therefore examined [*619] the Education Clause to determine if "its provisions imposed on the State an enforceable obligation to provide to each young person in the Commonwealth the opportunity for an education." n98 In concluding that it did, the court undertook an exhaustive analysis of that constitutional provision. n99

The McDuffy court began its analysis of the Education Clause by examining the meaning of its language. n100 The court concluded that the constitutional duty imposed upon the Legislatures and magistrates of the Commonwealth to "cherish" the public schools is a mandatory obligation. n101 The court indicated that this conclusion was supported by the fact that the Education Clause

was "distinctively and prominently placed" in the constitution as one of only six chapters, and that this structural placement demonstrated the framers' intention "that education is a 'duty' of government." n102

The court next examined the proactive attitude toward education that existed at the time the Education Clause was included in the constitution, and pointed out that Massachusetts has been committed to public education since "the first days of the colonial period." n103 The court then explored a long history, beginning in 1647, of laws enacted in the Commonwealth to ensure that the public was educated. n104

In its analysis, the court also researched the ratification and adoption of the Education Clause, and thought it probative that the Education Clause was ratified and adopted in all material parts as originally drafted by John Adams. n105 The court also examined the legislative intent behind laws that were passed to further the Education Clause, and pointed out many instances in which legislators and other government officials publicly pronounced their appreciation of the constitutional duty imposed upon them to further public education. n106

Based upon its twenty-five page review, the Supreme Judicial Court concluded that

what emerges . . . is that the words [of the Education Clause] are not merely aspirational or hortatory, but obligatory. What emerges also is that the Commonwealth has a duty to provide an education for all [*620] its children, . . . to prepare them to participate as free citizens of a free State to meet the needs and interests of a republican government, namely the Commonwealth of Massachusetts. n107

Having found that the Commonwealth has a legal duty to provide an education for all its children, the court next looked to the schoolfinancing scheme in question to determine if the then-existing disparities in its per-capita expenditures violated that duty. n108 The court concluded that the disparities in the school-financing scheme significantly impacted the quality of education for some students, and that this disparity denied those students the kind of education to which they were constitutionally entitled. n109

The McDuffy court, however, limited its review to deciding whether the school-financing scheme was constitutional; it did not specifically address whether the right to education was a fundamental right. n110 And, because McDuffy did not consider whether the right to education was fundamental, that court did not articulate any particular standard of judicial review in declaring the financing scheme unconstitutional. n111 The plaintiff in Doe, however, crafted her case upon the McDuffy holding, interpreting it as declaring that the right to education was a fundamental right under the Education Clause of the Massachusetts Constitution. n112

III. Doe v. Superintendent of Schools

A. Factual and Procedural Background

On November 5, 1993, the plaintiff, Jane Doe, n113 a student at North High School in Worcester, Massachusetts, was caught in school while in possession of a lipstick tube containing a one and one-quarter inch blade. n114 She was expelled from school for one year pursuant to a policy that prohibited the possession of "weapons." n115 The Policy on [*621] Possession or Use of Weapons," adopted by the school committee of Worcester pursuant to the Education Reform Act, n116 was set forth in two student handbooks. n117 Additionally, signs were posted in the school reminding students that possession of a gun or knife could result in expulsion. n118 The plaintiff

signed a form acknowledging receipt of the handbooks, admitted having seen the signs, and understood that a student in possession of a knife could be expelled. n119

On November 5, 1994, however, the plaintiff brought the "lipstick knife" to school to show her friends. n120 After initially denying that she had a knife, the plaintiff showed it to a teacher. n121 She was first suspended [*622] for five days for having it in her possession. n122 The plaintiff was then charged with a violation of the weapons policy, and a disciplinary hearing was held before the school principal. n123 The plaintiff testified at the hearing that she thought the lipstick knife was a "joke," and that she had not considered it a weapon. n124 The plaintiff was nevertheless expelled by the principal for one year because he considered her a threat to the safety of students and staff at the school. n125 The principal also considered the lipstick knife to be a true knife, and found that the plaintiff, although remorseful, had knowingly violated the weapons policy. n126 The plaintiff exercised her right to appeal the principal's decision to the Superintendent of Schools of Worcester. n127 The Superintendent upheld the one-year expulsion. n128 [*623]

The plaintiff then brought suit in Worcester Superior Court, claiming that the Supreme Judicial Court in McDuffy v. Secretary of the Executive Office of Education n129 had declared education a fundamental right under the Massachusetts Constitution. n130 The plaintiff challenged the expulsion as a violation of that fundamental right. n131 In her complaint the plaintiff sought a temporary restraining order and a preliminary injunction enjoining the expulsion decision. n132 In a jury-waived trial, the judge rejected the plaintiff's interpretation of McDuffy that education is a fundamental right and upheld the Superintendent's decision to expel the plaintiff. n133 The plaintiff then requested, and was granted, direct appellate review by the Massachusetts Supreme Judicial Court. n134

B. The Legal Claim

The Education Clause provides in part: "It shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish . . . public schools and grammar schools in the towns." n135 [*624] In McDuffy, the Supreme Judicial Court interpreted this language to "impose an enforceable duty on the magistrates and Legislatures of this Commonwealth to provide education in the public schools for the children there enrolled." n136 In Doe, the plaintiff argued that this language from McDuffy "should be construed as holding that she, as an individual, had a 'fundamental right' to a public education" under the Education Clause. n137 From this assertion, she argued that her expulsion violated her right to substantive due process under the Massachusetts Constitution because expulsion was not the least restrictive alternative the School Committee could have employed to further its objective of maintaining the safety and welfare of its entire school community. n138 The plaintiff contended that suspension or enrollment in an alternative education program, rather than expulsion, would have been a less restrictive alternative that would have also served the school committee's interest in maintaining a safe and secure school environment. n139 The plaintiff thought one of these alternatives more appropriate than expulsion because she had not subjectively considered the lipstick knife a dangerous weapon and because she had no history as a dangerous person. n140

C. The Majority Opinion

Writing for the majority in Doe, Justice O'Connor, joined by Justices Abrams, Greaney, and Wilkins, declined to adopt the plaintiff's interpretation of McDuffy. n141 Instead, the court held that the language espoused by it in McDuffy did not afford every individual the fundamental [*625]

right to an education. n142 The Doe court pointed out that the constitutional "duty" imposed upon the Commonwealth by McDuffy to provide a public education to an individual also "includes the duty to provide a safe and secure environment in which all children can learn." n143 The court also looked to earlier cases in which the Massachusetts Supreme Judicial Court determined that one's constitutional right to an education can be lost by violating school rules, and that resulting expulsions for rules violations were merely subject to rational basis judicial review. n144 The Doe court indicated that the application of rational basis review in these prior Supreme Judicial Court decisions was a tacit recognition by the court that the constitutional right to education in Massachusetts is non-fundamental. n145 Upon this support the majority concluded:

[The Plaintiff] does not have a fundamental right to an education in the sense asserted. The right which she does have is that of an equal opportunity to an adequate education, a right which she may lose by conduct seen to be detrimental to the community as a whole. The Legislature has made plain that school officials may exclude students such as [the plaintiff] who violate school rules which proscribe weapons possession in school. It is not difficult to see how such rules further the welfare of the school community. n146

Having concluded that the right to education is not fundamental under the Education Clause of the Massachusetts Constitution, the court applied the rational basis test to determine if the school committee's [*626] decision to expel the plaintiff for one year was constitutional. n147 As is often the case under rational basis review, the court found that the expulsion passed constitutional scrutiny because it was "'reasonable and rational for school officials to determine that [the plaintiff] should be expelled as a means of insuring school safety.'" n148 Having so held, the court pointed out that the plaintiff's argument seeking a less restrictive alternative was without merit, because rational basis review does not require the existence of a less onerous alternative. n149

D. The Dissent

Chief Justice Liacos, n150 who dissented alone, would have held that one's right to an education is a fundamental right under the Education Clause of the Massachusetts Constitution. n151 He believed, therefore, that the rational basis test applied by the majority to the plaintiff's claim was not the appropriate standard of review. n152

In support of his position, the Chief Justice looked to McDuffy, a decision that he wrote. n153 He pointed out that the school-financing system at issue in McDuffy denied the plaintiffs in that case the opportunity to receive an education guaranteed to them by the Massachusetts Constitution, and that denial was a violation of their constitutional rights. n154 In the dissent, Liacos quoted his own language from McDuffy: "What emerges from . . . [an exhaustive review of the history, structure, and meaning of the Education Clause] is that the words are not merely aspirational or hortatory, but obligatory" upon the Commonwealth, n155 and thereby create a legally enforceable duty upon the [*627] Commonwealth to educate all its children. n156

Having demonstrated that an enforceable constitutional duty exists for the Commonwealth to educate its children, Liacos opined that students within the Commonwealth must have standing to enforce that duty and must therefore have a "correlative right" to such an education. n157 In his words: "Would the plaintiff [in Doe], a public school student, be eligible to seek enforcement of the Commonwealth's duty to provide education, yet not have a right to that education?" n158

To further support his contention that an enforceable constitutional duty to provide an education gives rise to a correlative right to education, Chief Justice Liacos looked to the New Hampshire

Supreme Court's interpretation of its constitutional provision regarding education which was modeled after, and is nearly identical to, the Massachusetts Education Clause. n159 The New Hampshire Supreme Court held: "'Having identified that a duty exists and having suggested the nature of that duty, we emphasize the corresponding right of the citizens to its enforcement.'" n160

Having determined that a student has a legally enforceable right to an education, the Chief Justice next considered whether that right was fundamental under the Education Clause of the Massachusetts Constitution. n161 He believed that the constitutional duty imposed upon the Commonwealth in McDuffy created a fundamental right to education. n162 In [*628] reaching this conclusion, Liacos did not rest his opinion, as he might have, merely upon the United States Supreme Court's position that fundamental rights are those explicitly or implicitly guaranteed by a constitution. n163 Instead, Liacos thought that other factors suggested that the right to education was fundamental besides the fact that it is explicitly guaranteed by the Massachusetts Constitution. n164 In Liacos' view, the factors that demonstrated the fundamental character of the right to education were: (1) the importance of the right and the enforceable duty imposed upon the Commonwealth by McDuffy to educate its children; n165 (2) the "separate and prominent treatment" that education receives in the Massachusetts Constitution; n166 (3) the historical importance of education in Massachusetts; n167 (4) the existence of Massachusetts [*629] statutes designed to ensure that children in the Commonwealth are educated; n168 (5) the relationship that education has to other rights afforded to Massachusetts citizens; n169 and (6) "the 'keystone' role education serves in the development of each individual and in the functioning of our democracy." n170 To further support his view, the Chief Justice pointed out that many other states have declared education a fundamental right under their constitutions. n171 For all of the foregoing reasons, Liacos concluded that education was a fundamental right under the Education Clause of the Massachusetts Constitution. n172

Having determined that the right to education should be fundamental, the Chief Justice turned to an analysis of the Worcester School Committee's decision to expel the plaintiff for one year. n173 He concluded [*630] that the plaintiff's fundamental right to an education was substantially infringed upon by the expulsion. n174 The Chief Justice thus considered whether this substantial infringement violated the plaintiff's substantive due process rights. n175 He noted that the appropriate level of judicial review for substantial infringements upon fundamental rights is strict scrutiny, which considers whether the infringement upon the fundamental right serves a "compelling State interest with as little infringement as possible" to pass constitutional scrutiny. n176

Although the Chief Justice advocated the use of strict scrutiny to assess the constitutionality of infringements upon the right to education, he was also careful to point out that preserving the safety and welfare of a school community is a compelling state interest, and that a school disciplinary measure, such as expulsion, might be the necessary means to achieve that state interest. n177 His analysis therefore focused upon whether the Commonwealth's compelling interest (the safety and welfare of the school community) was served in Doe with as little infringement as possible. n178 After concluding that a student's expulsion could, in certain circumstances, be the least restrictive means by which to accomplish the state's compelling interest, n179 the Chief Justice stated that he would have remanded the case to the trial judge to determine whether the state, in this case, had met its burden of demonstrating that its compelling interest could not have been achieved by a means less restrictive than a one-year expulsion. n180

IV. Analysis

A. The Importance of Education

Whether states have chosen to declare education to be a fundamental or non-fundamental right, the analyses on both sides share a common [*631] theme--courts consistently recognize the critical importance that education has in our society. For instance, in states that have found education to be a fundamental right, educational importance has played a central role in that decision. n181 Likewise, courts in those states declaring that education is a non-fundamental right have, notwithstanding that decision, been careful to include in dicta a discussion of its importance. n182 The Commonwealth of Massachusetts, which after Doe falls in the latter category of states, has long recognized the importance of the right to education. n183

Similarly, the United States Supreme Court has for many years also recognized the critical importance of education, perhaps most poignantly in Brown v. Board of Education of Topeka. n184 In Brown, Justice Warren quite eloquently stated:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in [*632] preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. n185

In Plyler v. Doe, n186 the United States Supreme Court again addressed the importance of education. The Plyler Court pointed out that one deprived of an education must cope with enduring disabilities such as illiteracy, which may have an "inestimable toll . . . on the social, economic, intellectual, and psychological well-being of the individual." n187 The Plyler Court stressed that such individual deprivations are not without cost to society. n188 Indeed, denying one an education is to "deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation." n189 The Plyler Court also declared:

"As . . . pointed out early in our history, . . . some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence." n190 And these historic "perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists." In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. n191

The conclusion that uneducated students burden society is more than just judicial speculation. Approximately one and one-half million students miss large portions of every school year because they have been suspended or expelled. n192 Those students lose valuable instruction, n193 [*633] and it is likely that a large percentage of them will never finish their education. n194 Fewer job opportunities exist for those students who have not completed high school. n195 Therefore, high school dropouts are more likely to be unemployed than high school graduates. n196 Furthermore, expelled students often turn to criminal behavior because their options may be otherwise limited. n197 Indeed, one commentator has noted that "'dropping out of high school is positively associated with later criminal activity.'" n198 Finally, some statistics suggest that expelled students

often become economically dependent upon others, or upon society at large. n199 For example, high school dropouts are more likely to [*634] require public assistance n200 or unemployment compensation. n201

In light of the importance of education in our society, it is not a small or inconsequential matter when courts characterize education as a fundamental or non-fundamental right. This is especially so because, as previously noted, the fundamental or non-fundamental label usually determines the attaching level of judicial review to which infringements upon that right are subjected. n202

1. The Effect of the Standards of Review Upon One's Right to an Education

In deciding whether or not to expel a student, a school superintendent must weigh the competing interests of the student and the entire school community. n203 The student has a property interest in obtaining an education, and a liberty interest in the opportunity to receive a higher education and employment, which may not be deprived without due process of law. n204 On the other hand, superintendents have a duty to their school communities to maintain a safe and secure school environment. n205 The United States Supreme Court has recognized that although school children "do not 'shed their constitutional rights' at the [*635] school house door," n206 courts must seek to balance these competing interests. n207 The traditional standards of judicial review for fundamental and non-fundamental rights, however, do not provide much of a balance. The Massachusetts Supreme Judicial Court has itself recognized that "the terms rational basis and strict scrutiny 'are a shorthand for referring to the opposite ends of a continuum of constitutional vulnerability.'" n208 Another court suggested that rational basis and strict scrutiny are "mutually exclusive" terms. n209

Bearing in mind the underlying importance of education, it is appropriate to analyze how the label of education as a fundamental or nonfundamental right, together with the competing interests of students and the entire school community, is likely to effect a school committee's decision to expel a student.

a. The Rational Basis Test

Because of the Doe decision, rational basis will now be the test applied in Massachusetts to legislation authorizing the expulsion of a student. n210 The Supreme Judicial Court's application of such a lenient constitutional test to such an important societal right is misplaced. Under the rational basis test, courts generally defer to the Legislature: as long as the state's means are not arbitrary or capricious, courts will presume both a legitimate purpose and rationality without requiring the state to demonstrate that the means chosen are the best possible. n211 Because rational basis is such a lenient constitutional test, n212 it is troubling to consider that it is the level of judicial scrutiny applied to legislation [*636] affecting the unquestionably important right to education by the United States Supreme Court, and by the sixteen states, including Massachusetts, that have declared education a non-fundamental right. n213

School administrators must certainly be free to expel students who bring weapons to school without exposing those decisions to strict judicial scrutiny. n214 That is because protecting the entire school community from dangerous students is obviously a very important state interest. n215 The low threshold of the rational basis test, however, does not adequately protect infringements upon a right as important as education n216 in cases in which it is questionable whether a student should or should not be expelled. n217 Consider the following questionable examples.

In Nebraska, Jennifer Blankenship, age fourteen, was expelled for one year under a "zero-tolerance" anti-weapons policy for bringing a steak knife to school. n218 Jennifer, who had no history of violent behavior, and who was described by her teachers as a "polite" and "cooperative" student, had grabbed the knife as she ran from her house to catch the school bus so that she could peel and cut an orange. n219 More recently, Jeffrey Parks, a ten-year-old Seattle boy, was expelled under a similar "zero tolerance" anti-weapons policy for bringing his G.I. Joe action figure's one-inch toy gun to school. n220

Consider also the legislation in Doe authorizing the expulsion of the plaintiff. n221 That legislation authorizes expulsion of a student who possesses [*637] a "dangerous weapon" without taking into account the nature of that "weapon," n222 nor the student's purpose for having it. n223 As applied, this means Massachusetts students can be expelled for possession of "weapons" such as a lipstick knife, n224 even though their reason for having that item is unclear. n225

While policies prohibiting weapons possession must be strictly enforced to be effective, the consequences of a lost education can burden all of society. Thus, whether students like Jennifer Blankenship, Jeffrey Parks, or Jane Doe deserve expulsion in these questionable cases should be very carefully considered. Under rational basis judicial review, however, such expulsions are not considered carefully because rational basis is "minimal scrutiny in theory and virtually none in fact." n226 Therefore, Jennifer Blankenship, Jeffrey Parks, and Jane Doe's expulsions would be upheld by a court if the Legislatures in each case had merely a rational basis for concluding that the anti-weapons policies under which each was expelled (the state's means) would accomplish the safety of the school community (the state's end). n227 Indeed, in finding that the legislation at issue in Doe passed rational basis review, the Supreme Judicial Court majority stated that "it is not difficult to see [*638] how such rules [authorizing expulsion for weapons possession] further the welfare of the school community.'" n228

The problem with this arrangement is that, in some cases, decisions to expel may not be warranted. n229 Because courts under rational basis review defer to the Legislature and presume that its means (mandatory expulsion of students in violation of the weapons policy deemed dangerous by the school principal) are rationally related to its end (the safety and welfare of the school community), decisions to expel are routinely upheld by courts. n230 Section 37H, as amended by the Education [*639] Reform Act, n231 requires that a principal expel any student the principal determines to present a danger to others. n232 Few would doubt that the Legislature in Doe had a rational basis to believe that these means would accomplish the desired end. It is nevertheless likely that principals will make honest or intentional errors in judgment and that those errors will go virtually unreviewed by Massachusetts courts. n233 The consequence of a wrongful expulsion is detrimental to the student involved and to society at large. n234 For these reasons, the Doe majority was wrong to apply the low threshold of the rational basis test to a substantial infringement (a one-year expulsion) upon such an important societal right.

b. Strict Judicial Scrutiny

Most of the sixteen states that have declared education a fundamental right apply strict judicial scrutiny to state infringements upon that right. n235 In his dissent in Doe, Chief Justice Liacos would have sided with these states in finding education to be fundamental, and would have thus subjected the decision to expel the plaintiff to strict judicial scrutiny. n236 The application of such a demanding constitutional standard, [*640] however, is also misplaced. In Doe, the state's compelling purpose for expelling the plaintiff was the safety and welfare of the school community.

n237 Because, under strict scrutiny, a less restrictive alternative will almost always be found, n238 it is troubling to consider that it is the level of judicial scrutiny applied to expulsions furthering this compelling purpose.

Had the court in Doe held that education was a fundamental right under the Massachusetts Constitution, the Supreme Judicial Court would have strictly scrutinized the Worcester School Committee's decision to expel Jane Doe for the possession of a weapon. n239 Upon this precedent, one can imagine that students expelled for violating the weapons policy would sue, demanding that the school committee demonstrate in each case that expulsion was the least restrictive alternative to ensuring the safety and welfare of the school community. n240 This would prove unwieldy. School officials must be free to expel dangerous students without exposing those decisions to the constitutional vulnerability of strict judicial scrutiny. n241 That is because Massachusetts schools, like those throughout the country, have become dangerous places. n242

Consider that 958 Massachusetts high school students were expelled between September 1993 and May 1, 1994. n243 Of those 958 students, [*641] 41.6% were expelled for bringing weapons to school. n244

The United States Supreme Court has recognized that "by and large, public education in our Nation is committed to the control of state and local authorities. Courts . . . cannot intervene in the resolution of conflicts which arise in the daily operation of school systems." n245 The Supreme Court has also stated that misconduct in the nation's public school systems "necessarily" depends upon school officials' ability to exercise discretion and judgment. n246 That is because "education . . . presents a myriad of 'intractable economic, social, and even philosophical problems.'" n247 Therefore,

"the legislature's efforts to tackle the problems" should be entitled to respect. . . . The judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumvent or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions. n248

The majority in Doe appropriately recognized this notion when it concluded that the constitutional duty imposed upon the Commonwealth by McDuffy to provide an education "includes the duty to provide a safe and secure environment in which all children can learn." n249 In order to fulfill their responsibility to all students, school officials must [*642] be given the discretion to expel those that present a danger. n250 School officials would not be able to uphold this duty, however, if every expulsion decision they made were subject to strict scrutiny's requirement that an expulsion was the least restrictive alternative to ensuring the safety of all students. n251 For these reasons, the majority was right to declare education a non-fundamental right.

B. The Evolution of the Intermediate Standard of Review for Important Substantive Rights

As illustrated above in the context of public school expulsions, rigid application of the traditional two-tiered levels of judicial review proves problematic. n252 As a result, courts have settled upon an intermediate standard of review for infringements upon certain non-fundamental, yet important substantive rights. n253

The evolution of this heightened review, or closer judicial scrutiny, has its roots in the late United States Supreme Court Justice Thurgood Marshall's now-famous dissent in San Antonio Independent School District v. Rodriguez. n254 Although the majority of the Supreme Court in Rod-

riguez determined that education was not a fundamental right under the Federal Constitution, n255 Justice Marshall advocated that the Court adopt a "spectrum of standards" when scrutinizing infringements upon the right to education for equal protection purposes. n256 Marshall rejected the holding of the Rodriguez majority that fundamental rights are those which are "bound to . . . the text of the Constitution itself," n257 or "explicitly or implicitly guaranteed by the Constitution." n258 Marshall thought that the degree of judicial scrutiny along the spectrum should [*643] instead be determined by the "constitutional and societal importance of the interest adversely affected." n259 That is, Marshall thought that those rights with a close nexus to explicit Constitutional rights should receive more judicial scrutiny than those rights with a more remote Constitutional nexus. n260 Marshall argued in his dissent that the Court had indeed already utilized this spectrum of standards approach when it had previously deemed as fundamental the rights to procreate, n261 to vote in state elections, n262 and to appeal from a criminal conviction, n263 all of which, Marshall suggested, are neither explicitly nor implicitly guaranteed by the text of the Constitution itself. n264

Applying the spectrum of standards approach to the right to education, Marshall found that education should have been declared fundamental. n265 This finding was based upon the importance of education to society and because of the close relationship between education and the Constitutionally guaranteed rights of freedom of expression and to participate [*644] in the political system. n266

A majority of the United States Supreme Court has never embraced Marshall's spectrum of standards approach to judicial review. Since Rodriguez, however, a new level of judicial review has evolved that falls somewhere between the rational basis test and strict judicial scrutiny. n267 This so-called "intermediate" standard requires that the state have an "important" purpose for its infringement (the state's end), and that the means chosen by the state are "substantially related" to achieving that important purpose. n268 Like strict scrutiny, the intermediate standard of review requires the state to clearly demonstrate the legitimacy of its means. n269 Like rational basis, however, the intermediate standard does not require that the state's means be the least restrictive alternative available. n270

The intermediate standard was first clearly articulated in Craig v. Boren, n271 in which the United States Supreme Court applied heightened scrutiny to an equal protection challenge of a legislative classification based upon gender. n272 Because classifications based upon gender are "inherently suspect," traditional jurisprudence would dictate that the court apply strict judicial scrutiny to those classifications. n273 The Court in Boren, however, thought that gender-based classifications were not suited for strict scrutiny because, among other reasons, many such classifications are actually designed to benefit women. n274 The Boren Court therefore applied the intermediate standard when it held that classifications based on gender "must serve important governmental objectives and must be substantially related to achievement of those objectives." n275 [*645]

Since Boren, the Supreme Court has most often applied the intermediate standard to classifications based upon gender n276 or one's illegitimacy. n277 The Court has also applied the intermediate standard, however, to the non-fundamental, yet important right to education. n278

1. Federal Application of the Intermediate Standard to Education

In Plyler v. Doe, n279 the United States Supreme Court applied the intermediate standard of judicial review to an equal protection challenge of a Texas statute proscribing alien children from attending Texas public schools. n280 Writing for the majority, Justice Brennan conceded that since

Rodriguez, education was not a fundamental right under the Federal Constitution. n281 The Plyler Court, however, did not simply apply rational basis review to Texas' infringement upon the non-fundamental right. Instead, the Court examined the importance of the right to education, and the lasting impact its denial would have on the deprived student. n282

Having acknowledged the importance of education, the Court next analyzed the proper level of judicial scrutiny of the infringement upon [*646] that non-fundamental, yet important right. n283 The Court concluded:

These well-settled principles allow us to determine the proper level of deference to be afforded [to infringements upon education]. . . . Education [is not] a fundamental right; a State need not justify by compelling necessity how . . . education is provided to its population. But more is involved in these cases than the abstract question whether . . . education is a fundamental right. . . . By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of [the Texas statute], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in [the statute] can hardly be considered rational unless it furthers some substantial goal of the State. n284

It is true that most instances in which the intermediate standard of review has been applied to infringements upon the right to education have been equal protection arguments, n285 or equal protection arguments coupled with substantive due process arguments. n286 The Supreme Court, however, has implicitly applied heightened scrutiny to education in challenges to legislation affecting one's right to obtain an education brought exclusively on substantive due process grounds. n287 Indeed, renowned [*647] Constitutional law scholar Professor Gerald Gunther believes that although the intermediate standard of review is most often applied in the context of equal protection claims, courts are actually more likely to apply heightened scrutiny to substantive due process claims because closer judicial review is "clearly based on differences in evaluating the 'fundamentalness'" of the right in question. n288

It is particularly significant that the United States Supreme Court has applied the closer scrutiny of the intermediate standard to education--a right that was declared non-fundamental under federal law because it is not "explicitly or implicitly" guaranteed by the United States Constitution. n289 Because the Supreme Court has applied closer scrutiny to the non-fundamental right to education due to its importance, although that right is absent from the United States Constitution, n290 state courts considering the issue have even more incentive to follow that lead because forty-eight state constitutions do explicitly guarantee the right to education. n291

2. State Application of the Intermediate Standard to Education

Of the thirty-two states that have directly or indirectly considered whether or not education is a fundamental right under their constitutions, at least three have applied the intermediate standard of review to infringements upon that right. n292 These states have employed the intermediate standard because they have found that rigid application of the traditional two-tiered levels of judicial review to infringements upon the right to education has proven problematic. n293

In Bismarck Public School District No. 1 v. State, n294 the North Dakota [*648] Supreme Court applied the intermediate standard of review to a school-financing scheme because education was deemed an "important substantive" right. n295 Although education is considered a fundamen-

tal right under North Dakota's constitution, n296 the court refused to subject the school-financing scheme to strict judicial scrutiny because it would "essentially require the judiciary to micro-manage and second guess difficult policy decisions in the legislative arena." n297 Therefore, the court thought that such questions of educational policy were "ill-suited" for the "rigorous and exacting standards of strict scrutiny." n298 Under the intermediate standard, the court instead required the school-financing scheme to bear a close relationship to legislative goals. n299

In Montana, although "various aspects" of the right to education are considered fundamental, the right to participate in public school extracurricular activities is not. n300 In analyzing a school district rule that required students to maintain a 2.0 grade average to participate in extracurricular activities, the Montana Supreme Court in State ex rel. Bartmess v. Board of Trustees of School District No. 1, n301 weighed the "competing" and "contradictory" interests of a student's fundamental right to education against the "government interests in developing the full educational potential of each person" through the 2.0 grade average rule. n302 The Bartmess court concluded that a "middle-tier analysis" of the rule was the appropriate standard of judicial review because that level of judicial scrutiny "allows a careful balancing of these competing interests." n303 The middle-tier analysis described in Bartmess required the court to balance the infringement upon the fundamental right to education against the state interest to be served by that infringement. n304

In Attorney General v. Waldron, n305 the Maryland Supreme Court applied the intermediate standard of review to invalidate legislation denying a retired judge his pension because he was compensated for [*649] post-retirement legal work. n306 The Waldron court indicated that closer judicial scrutiny was warranted when the challenged legislation significantly interfered with an "important private right," or a "benefit vital to an individual." n307 Following the Waldron analysis, the Maryland Supreme Court subsequently pointed out in Hornbeck v. Somerset County Board of Education n308 that Maryland had adopted a standard of heightened scrutiny of legislation that significantly infringed upon "important personal rights." n309 Although the facts of the Hornbeck case did not warrant the application of heightened scrutiny to the state's school-financing scheme, the court indicated that heightened scrutiny would be the appropriate test for substantial infringements upon the important personal right to education, n310 even though education is not a fundamental right under Maryland's constitution. n311

C. Massachusetts Should Apply the Intermediate Standard to School Expulsions

To date, the Massachusetts Supreme Judicial Court has rejected all invitations to apply the closer scrutiny of the intermediate standard of review to infringements upon non-fundamental, yet important rights. n312 The court has instead adhered to rational basis as the appropriate standard of judicial review of legislation affecting non-fundamental rights. n313 Indeed, the Supreme Judicial Court, properly aware of its limited role in governmental decision-making, has cited the "undesirability of the judiciary substituting its notions of correct policy for that of [*650] a popularly elected Legislature" as its reason for clinging to rational basis. n314

While the Supreme Judicial Court is right to restrain itself from overstepping the boundaries of the separation of governmental powers, it must not at the same time exempt itself from examining more closely legislation that infringes upon a constitutional right as important as education. Indeed, the court recently acknowledged that it has an obligation to resolve challenges to laws that are in conflict with a constitutionally guaranteed right. n315 The court stated that this obligation is "the very essence of its judicial duty." n316

Although the Supreme Judicial Court has so far adhered to the traditional standards of judicial review, it has indicated a willingness to deviate from this two-tiered approach. In Marcoux v. Attorney General, n317 the court admitted that the standards of judicial review are not inflexible, but instead should be "determined at every point by the competing values involved." n318 The court has also indicated that the nonfundamental, yet constitutionally guaranteed right to an education under the Massachusetts Constitution is not static, but instead "must be interpreted 'in accordance with the demands of modern society.'" n319 Despite its acknowledgements for compromise, however, the Supreme Judicial Court in Doe adhered to the judicial restraint of the rational basis test in reviewing infringements upon the constitutionally guaranteed right to education. Instead, the court in Doe should have recognized that substantial infringements upon that right represent the "competing values" to which they have alluded as sufficient to justify a deviation from the traditional standards of judicial review.

As previously noted in this Comment, the importance of education [*651] to our society appears undisputed. n320 The recognition of both the importance of the right to education and of appropriate judicial restraint has influenced a departure in both federal and state jurisdictions from the traditional standards of review for infringements upon that right. n321 In the federal law, the United States Supreme Court has applied the closer judicial scrutiny of the intermediate standard to infringements upon the non-fundamental, yet important right to education. n322 Similarly, North Dakota, Montana, and Maryland have recognized the dilemma presented by a right as important as education, and have thus settled upon the intermediate standard for infringements upon that right. n323

Like these jurisdictions, the Massachusetts Supreme Judicial Court appears to have recognized that infringements upon the right to education present problems requiring both judicial care and judicial restraint. That is, although the court in Doe exercised judicial restraint when reviewing an infringement upon one's right to an education, it has for many years plainly recognized the importance of that right, n324 and has also indicated a willingness to deviate from the traditional standards of judicial review under appropriate circumstances. n325 What the Supreme Judicial Court has not yet recognized, however, is that the intermediate standard of review offers courts an appropriate and convenient solution to the conundrum they face. [*652]

As applied, the intermediate standard would first require the state to demonstrate that the infringement upon one's right to an education (the expulsion) is substantially related n326 to ensuring the safety and welfare of the entire school community. n327 Except in truly questionable cases, n328 few would doubt that the state could satisfy this prong. n329 The intermediate standard, however, would not require that the expulsion be the least restrictive alternative available. n330 Thus, closer judicial scrutiny of this non-fundamental, yet important right would merely ferret out unwarranted expulsions, thereby reducing the harmful societal consequences of one more needlessly uneducated child. n331

V. Conclusion

Because forty-eight state constitutions specifically enumerate the right to education, state courts considering infringements upon that right have the difficult task of deciding whether or not it is fundamental. n332 Traditionally, this classification has been especially difficult for courts because it directly determined how closely the court would scrutinize infringements upon that right. n333 Under the traditional approach, a court will strictly scrutinize legislative actions when those actions have substantially infringed upon a fundamental right. n334 Otherwise, the separation of govern-

mental powers suggests that the court defer to the legislative judgment, through rational basis review, so long as that judgment was not arbitrary or capricious. n335

The Supreme Judicial Court in Doe was right to hold that in the context of public school expulsions, education is not a fundamental right under the Massachusetts Constitution. n336 Although the right to education is one of undisputed societal importance, the Supreme Judicial Court was also right to conclude that it is one that a student may forfeit through conduct that presents a danger to the entire school community. n337 [*653]

But what about legislative infringements, like the expulsion of Jane Doe, for which there is some rational basis, but that also substantially infringe upon a right of such importance? It is uniformly recognized that all of society loses when a student goes uneducated. n338 The answer to such an enigmatic question, therefore, should not lie at one extreme (strict scrutiny) nor the other (rational basis). Indeed, as the United States Supreme Court noted in the quotation prefacing this Comment, "judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint." n339 In response to this notion, courts on both the federal and state level have recognized that the traditional, two-tiered approach to judicial review does not work very well when the non-fundamental, yet important right to education is involved. n340 These courts have found that by applying the closer judicial scrutiny of the intermediate standard of review they can strike the delicate balance between the two competing interests they face. n341 In so doing, these courts avoid substituting their own ideas of correct educational policy for those of the Legislature, and at the same time, protect against substantial infringements upon such an important societal right.

The Commonwealth of Massachusetts has long recognized the importance that education has in our society. n342 How then can the Supreme Judicial Court reconcile its judicial restraint, under rational basis review, when legislative actions substantially infringe upon that right? The Supreme Judicial Court should be guided by the federal n343 and state n344 jurisdictions that have acknowledged their limited role in government, by refusing to strictly scrutinize educational decision-making, but that have at the same time elevated the standard of review they apply to infringements upon education. Such a compromise neatly balances [*654] the obligation courts have to exercise both judicial care and judicial restraint in educational decision-making. n345 To strike such a balance, the Supreme Judicial Court need not deviate from its holding in Doe; but when children in the Commonwealth are expelled from school under questionable circumstances, the court should take a closer look.

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawForeign & International ProtectionsGeneral OverviewEducation LawFundingAllocationEducation LawStudentsRight to Education

FOOTNOTES:

n1 *Epperson v. Arkansas, 393 U.S. 97, 104 (1968)* (emphasis added).

n2 See infra text accompanying notes 77-80; see also infra note 83.

n3 See infra note 76 and accompanying text.

n4 See infra note 81 and accompanying text.

n5 See infra notes 46-50 and accompanying text.

n6 See infra note 82 and accompanying text.

n7 See infra note 86 and accompanying text.

n8 See infra notes 51-55 and accompanying text.

n9 *653 N.E.2d 1088 (Mass. 1995).*

n10 See *id. at 1092.*

n11 See *id. at 1095.* Justice O'Connor, joined by Justices Abrams, Greaney, and Wilkins, wrote for the majority. See *id. at 1090.* Chief Justice Liacos dissented. See *id. at 1098* (Liacos, C.J., dissenting).

n12 *Id. at 1095* (quoting *McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516, 555 (Mass. 1993));* see also Mass. Const. pt. II, cl. 5, § 2.

n13 See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40 (1973).* The rational basis test merely requires that the state have a legitimate purpose for its infringement upon a non-fundamental right, and that the means chosen by the state are rationally related to achieving that purpose. See id.; see also *Zobel v. Williams, 457 U.S. 55, 60 (1982); Williamson v. Lee Optical, Inc., 348 U.S. 483, 491 (1955);* see also infra notes 51-55 and accompanying text.

n14 *Doe, 653 N.E.2d at 1097.* "We decline to hold today, that a student's right to an education is a 'fundamental right' which would trigger strict scrutiny analysis whenever school officials determine, in the interest of safety, that a student's misconduct warrants expulsion." *Id. at 1095.*

n15 *Id. at 1098* (Liacos, C.J., dissenting).

n16 *Id. at 1099, 1101* (Liacos, C.J., dissenting).

n17 See, e.g., *Rodriguez, 411 U.S. at 17.* Strict scrutiny requires the government to demonstrate that it has a compelling purpose for infringing upon a fundamental right and that the means chosen are narrowly tailored to achieving that purpose. See *id. at 16-17;* see also infra notes 46-50 and accompanying text.

n18 See *Doe, 653 N.E.2d at 1102* (Liacos, C.J., dissenting).

n19 See infra note 93 for the text of Mass. Const. pt. II, cl. 5, § 2; see also infra note 74.

n20 See infra notes 76-86 and accompanying text.

n21 See infra note 76 and accompanying text.

n22 See infra note 81 and accompanying text.

n23 See infra note 82 and accompanying text.

n24 See infra note 86 and accompanying text.

n25 See infra Part II.A.

n26 See infra Part II.B.

n27 See infra notes 82-85 and accompanying text.

n28 See infra notes 76-80 and accompanying text.

n29 See infra Part II.D.

n30 See infra Part III.

n31 See infra notes 181-202 and accompanying text.

n32 See infra notes 203-51 and accompanying text.

n33 See infra notes 210-34 and accompanying text.

n34 See infra notes 235-51 and accompanying text.

n35 See infra Part IV.B.

n36 See infra notes 279-311 and accompanying text.

n37 See infra Parts IV.C, V.

n38 See infra Parts IV.C, V.

n39 See *San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973).* Examples of rights deemed fundamental by the United States Supreme Court because of their explicit or implicit Constitutional roots include: the right to vote, see, e.g., *Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966)* (holding that the right to vote is implicitly fundamental because it is preservative of other Constitutional rights); the right to travel, see, e.g., *Shapiro v. Thompson, 394 U.S. 618, 630 n.8 (1969)* (holding that the right to travel is implicitly fundamental because of its connection to the Privileges and Immunities Clause and the Commerce Clause); the right to procreate, see, e.g., *Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)* (holding that the right to procreate is implicitly fundamental "to the very existence and survival of the race"); and the right to marry, see, e.g., *Loving v. Virginia, 388 U.S. 1, 12 (1967)* (holding that marriage is one of the basic civil rights and thus is a fundamental right).

n40 See, e.g., *Bowers v. Hardwick, 478 U.S. 186, 196 (1986)* (holding that there is no fundamental right to engage in homosexual sodomy within the purview of the Constitutional right to privacy).

n41 See infra notes 42-43 and accompanying text. A showing that one's Constitutional rights were infringed upon by some "state action" is prefatory to any Constitutional analysis because Constitutional provisions concerned with individual rights only protect one from governmental intrusions upon those rights. See Paul Brest & Sanford Levinson, Processes of Constitutional Decisionmaking 1301 (3d ed. 1992). This so-called "state action requirement" was first set out by the United States Supreme Court in the *Civil Rights Cases, 109 U.S. 3 (1883).* The Court there held that "individual invasion of individual rights is not the subject-matter of the [Fourteenth] amendment." *Id. at 11.* "[The Fourteenth Amendment does not protect individual rights] until some State law has been passed, or some State action through its officers or agents has been taken . . . ." *Id. at 13.* This means that the Fourteenth Amendment to the United States Constitution "erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley v. Kraemer, 334 U.S. 1, 13 (1947).*

n42 See *Rodriguez, 411 U.S. at 16* (stating that strict scrutiny is the appropriate level of judicial review for infringements upon fundamental rights). A court will also apply strict judicial scrutiny to state actions infringing upon a suspect classification of people. See *McLaughlin v. Florida, 379 U.S. 184, 192 (1964).*

Strict scrutiny is not the appropriate standard of review, however, for all infringements upon fundamental rights; it is only appropriate when some state action has substantially interfered with a fundamental right. See *Zablocki v. Redhail, 434 U.S. 374, 388 (1978).* Reasonable state regulations "that do not significantly interfere with [a fundamental right] may legitimately be imposed." *Id. at 386* (emphasis added).

n43 See *Rodriguez, 411 U.S. at 38-40* (stating that the rational basis test is the appropriate level of judicial review for non-fundamental rights). A court will also apply the rational basis test to state actions infringing upon those who are not part of a suspect classification of people. See *Skinner v. Oklahoma, 316 U.S. 535, 540-42 (1942).*

n44 *Bowers v. Hardwick, 478 U.S. 186, 194 (1986).*

n45 See, e.g., *Plyler v. Doe, 457 U.S. 202, 230 (1982)* (applying the intermediate standard of review to infringements upon the federal, non-fundamental right to education because of the importance of that right); see also infra notes 267-311 and accompanying text.

n46 See *Rodriguez, 411 U.S. at 16-17.*

n47 See id.

n48 See id.

n49 See *Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318 (1976)* (Marshall, J., dissenting) ("If a statute is subject to strict scrutiny, the statute always, or nearly always . . . is struck down. Quite obviously, the only critical decision is whether strict scrutiny should be invoked at all."); see also Ellen E. Halfon, Comment, A Changing Equal Protection Standard? The Supreme Court's Application of a Heightened Rational Basis Test in City of Cleburne v. Cleburne Living Center, *20 Loy. L.A. L. Rev. 921, 929 (1987).*

n50 See Gerald Gunther, The Supreme Court 1971 Term-Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, *86 Harv. L. Rev. 1, 8 (1972).*

n51 See *Rodriguez, 411 U.S. at 40;* see also *Zobel v. Williams, 457 U.S. 55, 60 (1982); Williamson v. Lee Optical, Inc., 348 U.S. 483, 488 (1955).*

n52 See *Lee Optical, 348 U.S. at 487* (upholding under the rational basis test legislation forbidding an optician from fitting or duplicating lenses without a prescription from an ophthalmologist or optometrist). In Lee Optical, no particular purpose was offered by the Legislature for the challenged legislation. See *id. at 487-89.* It was enough to satisfy the Court under

the rational basis test that the Legislature "might have" concluded that its chosen end was legitimate, and that its chosen means "might have" been rationally related to that end. See id.

n53 See Halfon, supra note 49, at 956.

n54 Gunther, supra note 50, at 8.

n55 *City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976).*

n56 See Brest & Levinson, supra note 41, at 813.

n57 See, e.g., *Craig v. Boren, 429 U.S. 190, 197 (1976)* (holding that a classification based on gender "must serve important governmental objectives and must be substantially related to achievement of those objectives").

n58 See *Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-24 (1982)* (finding that the state failed to demonstrate that its policy of excluding men from a state nursing school was substantially related to an important interest).

n59 See *Califano v. Webster, 430 U.S. 313, 317-20 (1977)* (treating men differently than women need not be the least restrictive alternative, as Congress' purpose in enacting the social security eligibility statute might have been to equalize traditional inequalities between men and women).

n60 See, e.g., *Hogan, 458 U.S. at 718* (holding that a classification based on gender must serve an important governmental objective and be substantially related to the achievement of that objective); *Boren, 429 U.S. at 197* (same).

n61 See *United States v. Clark, 445 U.S. 23, 27 (1980)* ("A classification based on illegitimacy is unconstitutional unless it bears 'an evident and substantial relation to the particular . . . interests the statute is designed to serve.'" (quoting *Lalli v. Lalli, 439 U.S. 259, 268 (1978)* (Powell, J., for a plurality))).

n62 See, e.g., *Plyler v. Doe, 457 U.S. 202, 221-24 (1982)* (applying the intermediate standard of review to infringements upon the federal, non-fundamental right to education because of the importance of that right). The Plyler Court invalidated a Texas statute proscribing alien children from attending public schools, as violative of the Equal Protection Clause, because the statute could not be considered rational unless it furthered a substantial goal of the state. See *id. at 224;* see also infra notes 279-87 and accompanying text.

n63 *411 U.S. 1 (1973).*

n64 See id.

n65 See *id. at 4-6.*

n66 See *id. at 6.*

n67 See *id. at 33-35.* The Court held:

The key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education . . . . Nor is it to be found by weighing whether education is as important as the right to travel [a fundamental right]. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.

Education, of course, is not among the rights afforded explicit protection under our Federal Constitution.

Id.

n68 See *id. at 38-40.* The Court held that the financing scheme was not so arbitrary or irrational as to fail the rational basis test and thus did not violate the Equal Protection Clause. See *id. at 50-55.*

Since Rodriguez, the right to education has remained non-fundamental in the federal law. See, e.g., *Plyler v. Doe, 457 U.S. 202, 221 (1982).* The Supreme Court, however, has since applied the closer judicial scrutiny of the intermediate standard to education because of the importance of that right. See, e.g., *id. at 223-24;* see also infra notes 279-87.

n69 See *Rodriguez, 411 U.S. at 29-30.*

n70 *Id. at 30* (quoting *Rodriguez v. San Antonio Indep. Sch. Dist., 337 F. Supp. 280, 283 (W.D. Tex. 1971)).*

n71 See Allen W. Hubsch, The Emerging Right to Education Under State Constitutional Law, *65 Temp. L. Rev. 1325, 1330-31 (1992)* (stating that Rodriguez stands for the idea that if the right to education is explicitly guaranteed in a state constitution then it follows that the right is therefore fundamental).

n72 See infra note 74.

n73 See infra note 76 and accompanying text. States are free to consider the constitutionality of rights under their own constitutions independent of United States Supreme Court de-

cisions, even if the state and federal constitutional provisions are similar or identical. See *Cooper v. California, 386 U.S. 58, 62 (1967).*

n74 See Mass. Const. pt. 2, cl. 5, § 2; see also Alaska Const. art. VII, § 1; Ariz. Const. art. XI, § 1; Ark. Const. art. XIV, § 1; Cal. Const. art. IX, § 1; Colo. Const. art. IX, § 2; Conn. Const. art. VIII, § 1; Del. Const. art. X, § 1; Fla. Const. art. IX, § 1; Ga. Const. art. VIII, § 1, pt. 1; Haw. Const. art. X, § 1; Idaho Const. art. IX, § 1; Ill. Const. art. X, § 1; Ind. Const. art. VIII, § 1; Kan. Const. art. VI, § 1; Ky. Const. § 183; La. Const. art. VIII, § 1; Me. Const. art. VIII, § 1; Md. Const. art. VIII, § 1; Mich. Const. art. VIII, § 1-2; Minn. Const. art. XIII, § 1; Miss. Const. art. VIII, § 201; Mo. Const. art. 9, § 1(a); Mont. Const. art. X, § 1; Neb. Const. art. VII, § 1; Nev. Const. art. XI, § 1-2; N.H. Const. pt. 2, art. 83; N.J. Const. art. VIII, § 4; N.M. Const. art. XII, § 1; N.Y. Const. art. XI, § 1; N.C. Const. art. IX, § 1-2; N.D. Const. art. VIII, § 1; Ohio Const. art. VI, § 3; Okla. Const. art. XIII, § 1; Or. Const. art. VIII, § 3; Pa. Const. art. III, § 14; R.I. Const. art. XII, § 1; S.C. Const. art. XI, § 3; S.D. Const. art. VIII, § 1; Tenn. Const. art. XI, § 12; Tex. Const. art. VII, § 1; Utah Const. art. X, § 1; Vt. Const. ch. 2, § 68; Va. Const. art. VIII, § 1; Wash. Const. art. IX, § 1; W. Va. Const. art. XII, § 1; Wis. Const. art. X, § 3; Wyo. Const. art. VII, § 1.

n75 See infra notes 76, 82 and accompanying text.

n76 See *Opinion of the Justices, 624 So. 2d 107, 157 (Ala. 1993); Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 811 (Ariz. 1994); Serrano v. Priest, 557 P.2d 929, 951 (Cal. 1976); Horton v. Meskill, 376 A.2d 359, 369, 374 (Conn. 1977); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 206 (Ky. 1989); Skeen v. State, 505 N.W.2d 299, 313 (Minn. 1993); Clinton Mun. Sep. Sch. Dist. v. Byrd, 477 So. 2d 237, 240 (Miss. 1985); State ex rel. Bartmess v. Board of Trustees of Sch. Dist. No. 1, 726 P.2d 801, 804 (Mont. 1986); Bismarck Pub. Sch. Dist. No. 1 v. State, 511 N.W.2d 247, 256 (N.D. 1994); Robinson v. Cahill, 303 A.2d 273, 282 (N.J. 1973); School Dist. of Wilkinsburg v. Wilkinsburg Educ. Ass'n, 667 A.2d 5, 9 (Pa. 1995); Scott v. Commonwealth, 443 S.E.2d 138, 142 (Va. 1994); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 92-93 (Wash. 1978); Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va. 1979); Kukor v. Grover, 436 N.W.2d 568, 579 (Wis. 1989); Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310, 333 (Wyo. 1980).*

n77 See *Skeen v. State, 505 N.W.2d 299, 313 (Minn. 1993).*

n78 *Bismarck, 511 N.W.2d at 250, 256.*

n79 *Pauley, 255 S.E.2d at 878* (quoting W. Va. Const. art. XII, § 1).

n80 *Herschler, 606 P.2d at 333.*

n81 See, e.g., *Serrano, 557 P.2d at 952* (holding that education is a fundamental right under the state constitution and that infringements upon that right are subject to strict judicial scrutiny); *Horton, 376 A.2d at 369, 374* (same).

n82 See *Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1018 (Colo. 1982); McDaniel v. Thomas, 285 S.E.2d 156, 167 (Ga. 1981); Idaho Sch. for Equal Educ. Opportunity v. Evans, 850 P.2d 724, 733 (Idaho 1993); Committee for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1195 (Ill. 1996); Unified Sch. Dist. No. 229 v. State, 885 P.2d 1170, 1188-89 (Kan. 1994),* cert. denied, *115 S. Ct. 2582 (1995); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 788 (Md. 1983); Palmer v. Bloomfield Hills Bd. of Educ., 417 N.W.2d 505, 507 (Mich. Ct. App. 1987); Board of Educ. v. Nyquist, 439 N.E.2d 359, 366 (N.Y. 1982); Leandro v. State, 468 S.E.2d 543, 550* (N.C. Ct. App.), reh'g granted, *472 S.E.2d 11 (1996); Pawtucket v. Sundlun, 662 A.2d 40, 55 (R.I. 1995); Kirby v. Edgewood Indep. Sch. Dist., 761 S.W.2d 859, 863 (Tex. App. 1988),* rev'd on other grounds, *777 S.W.2d 391 (Tex. 1989).*

Four state courts (Maine, Ohio, Oklahoma, and Tennessee) have not explicitly held that education is a non-fundamental right, but have implicitly done so by applying rational basis review to education matters. See *School Admin. Dist. No. 1 v. Commissioner, Dep't of Educ., 659 A.2d 854, 857 (Me. 1995); Board of Educ. of City Sch. Dist. of Cincinnati v. Walter, 390 N.E.2d 813, 819-20 (Ohio 1979); Fair Sch. Fin. Council of Okla., Inc., v. State, 746 P.2d 1135, 1149-50 (Okla. 1987);* Tennessee *Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 155 (Tenn. 1993).*

n83 See, e.g., *Lujan, 649 P.2d at 1018* ("A heartfelt recognition and endorsement of the importance of an education does not elevate . . . it to a fundamental interest warranting strict scrutiny."); *Nyquist, 439 N.E.2d at 366* (holding that education is not a fundamental constitutional right even though it is an unquestionably important area of concern and responsibility); *Kirby, 777 S.W.2d at 863* (stating that "education, although vital, does not rise to the same level" as the fundamental rights to free speech and to exercise religion).

n84 See, e.g., *Lujan, 649 P.2d at 1017* (noting that the Colorado Constitution is not restricted to addressing only fundamental rights); *Palmer, 417 N.W.2d at 507* (holding that the mere mention of education in the Michigan Constitution is not enough for that right to be considered fundamental).

n85 See, e.g., *Lujan, 649 P.2d at 1018* (noting that because education involves questions of public policy regarding quality schooling for all children, educational considerations "properly lie within the legislative domain").

n86 See, e.g., *Lujan, 649 P.2d at 1015-16* (holding that education is not a fundamental right under the California Constitution and thus infringements upon that right are subject to rational basis review); *Nyquist, 439 N.E.2d at 365* (holding that a school-financing scheme was subject to rational basis review because education is not a fundamental right under the New York Constitution).

n87 See infra notes 292-311 and accompanying text.

n88 See infra notes 292-311 and accompanying text.

n89 See *Bismarck Pub. Sch. Dist. No. 1 v. State, 511 N.W.2d 247, 257, 259 (N.D. 1994);* see also infra notes 294-99 and accompanying text.

n90 See *Bismarck, 511 N.W.2d at 257, 259.*

n91 See *State ex rel. Bartmess v. Board of Trustees of Sch. Dist. No. 1, 726 P.2d 801, 804-05 (Mont. 1986);* see also infra notes 300-304 and accompanying text.

n92 See *Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 787 (Md. 1983);* see also infra notes 305-11 and accompanying text.

n93 Mass. Const. pt. II, cl. 5, § 2. The Education Clause of the Massachusetts Constitution provides in its entirety:

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, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns; to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humor, and all social affections, and generous sentiments among the people.

Id.

n94 *615 N.E.2d 516 (Mass. 1993).* Chief Justice Liacos, who was joined by Justices Abrams, Nolan, and Greaney, wrote for the majority. See *id. at 517.* Justice O'Connor concurred in part and dissented in part. See *id. at 556* (O'Connor, J., concurring in part and dissenting in part). Chief Justice Liacos subsequently dissented in Doe from the Doe majority's interpretation of McDuffy. See *Doe v. Superintendent of Sch., 653 N.E.2d 1088, 1098 (Mass. 1995)* (Liacos, C.J., dissenting).

n95 *McDuffy, 615 N.E.2d at 517.* The plaintiffs were from Brockton, Belchertown, Berkley, Carver, Hanson, Holyoke, Lawrence, Leicester, Lowell, Lynn, Rockland, Rowley, Salis-

bury, Springfield, Whitman, and Wichendon. See *id. at 516 n.1.* These plaintiffs sued the Board of Education, the Commissioner of Education, the Secretary of the Executive Office of Education, and the Treasurer and Receiver General. See *id. at 516 n.2.*

n96 See *id. at 517.*

n97 *Id. at 518.*

n98 *Id. at 522-23.*

n99 See infra notes 100-07 and accompanying text.

n100 See *McDuffy, 615 N.E.2d at 524-26.*

n101 See *id. at 527.*

n102 *Id. at 526-27.*

n103 *Id. at 529.*

n104 See *id. at 529-33.*

n105 See *id. at 533-34.*

n106 See *McDuffy, 615 N.E.2d at 537-41.*

n107 *Id. at 548.*

n108 See id.

n109 See *id. at 552.*

n110 See *Doe v. Superintendent of Sch., 653 N.E.2d 1088, 1095 (Mass. 1995)* ("The McDuffy court did not hold . . . that a student's right to an education is a 'fundamental right' . . . ." (citing *McDuffy, 615 N.E.2d at 548)).*

n111 See generally *McDuffy, 615 N.E.2d at 547-56.*

n112 See *Doe, 653 N.E.2d at 1095.*

n113 The court gave the plaintiff the pseudonym Jane Doe. See *id. at 1090.* The suit was brought by Jane Doe's mother on her behalf. See *id. at 1088 n.1.*

n114 See *id. at 1090.* The lipstick tube, "when twisted open, revealed a pointed, single edge, one and one-quarter inch blade. The blade was sharply pointed but the cutting edge was dull." *Id. at 1091.*

n115 *Id. at 1091.* The school committee of Worcester initially established a policy proscribing weapons possession in response to the fatal stabbing of a student at Worcester South High Community School in 1989. See *Parkins v. Boule, 1994 WL 879558,* at *1 (Mass. Super. Aug. 3, 1994), aff'd sub nom. *Doe v. Superintendent of Sch., 653 N.E.2d 1088 (Mass. 1995).* The school committee of Worcester subsequently adopted the "Policy on Possession or Use of Weapons," under which Jane Doe was expelled, during the first week of the 1993-1994 school year. *Doe, 653 N.E.2d at 1090.* The "Policy on Possession or Use of Weapons" stated: "'In order to protect the students of the Worcester Public Schools, any student who is found on school premises . . . in possession of a dangerous weapon, including . . . a knife may be subject to expulsion from the school by the principal regardless of the size of the knife.'" Id. (quoting "Policy on Possession or Use of Weapons").

n116 1993 Mass. Acts ch. 71, § 36. The Education Reform Act amended *Mass. Gen. Laws ch. 71, § 37H,* in order to make it easier for school officials to expel students in possession of weapons. See *Doe, 653 N.E.2d at 1093* (interpreting *Mass. Gen. Laws ch. 71, § 37H* (1993)). The statute provides: "Any student who is found on school premises . . . in possession of a dangerous weapon, including . . . a knife . . . may be subject to expulsion from the school or school district by the principal . . . ." *Mass. Gen. Laws ch. 71, § 37H(a)* (1994 & Supp. 1996) (emphasis added). A student in violation of the weapons policy shall receive notice of an opportunity for a hearing on the expulsion decision. See id. at § 37H(c). The statute further provides that "after said hearing, a principal may, in his discretion, decide to suspend rather than expel" a student in violation of the weapons policy. Id. (emphasis added). A principal may not, however, decide to suspend rather than expel a student whom the principal believes would "pose a threat to the safety, security and welfare of the other students and staff in the school." Id.; see also *Doe, 653 N.E.2d at 109394.* Therefore, when a school principal believes that a student presents a threat to the school community, the principal has no discretion under the statute to suspend rather than expel that student. See *Doe, 653 N.E.2d at 1094.*

n117 See *Doe, 653 N.E.2d at 1090-91.* The "Policy on Possession or Use of Weapons" was included in "School Policies, Rules and Services" for North High, and in "Policies and Programs Handbook in the Worcester Public Schools 1993-1994." Id.

n118 See *id. at 1091.*

n119 See id.

n120 See id.

n121 See id.

n122 See id.

n123 See *Doe, 653 N.E.2d at 1091;* see also *Brief for Defendant-Appellee at 2-3, Parkins v. Boule, 1994 WL 879558* (Mass. Super. Aug. 3, 1994) (No. 94-987), aff'd sub nom. *Doe v. Superintendent of Sch., 653 N.E.2d 1088 (Mass. 1995).*

n124 See *Doe, 653 N.E.2d at 1091.* At the principal's hearing the plaintiff's social worker also testified that, in her opinion, the plaintiff had not considered the lipstick knife to be a weapon. See id. Also, the plaintiff contended in her brief that the lipstick knife was a "novelty item." Brief for Plaintiff-Appellant at 1, Parkins (No. 94-987) [hereinafter Brief for Plaintiff-Appellant].

n125 See *Doe, 653 N.E.2d at 1091.* As previously noted, because the principal believed that the plaintiff was a safety threat, he had no discretion under *Mass. Gen. Laws ch. 71, § 37H(c)* (1993), to suspend rather than expel her. See supra note 116. The principal's belief that the plaintiff presented a threat to the school community was influenced by the fact that the plaintiff had tried to cut her own wrists on at least three occasions, including the day before she brought the lipstick knife to school. See *Doe, 653 N.E.2d at 1091.* Additionally, the trial court found that the principal also "had in his thoughts the memory of a student who had been killed in a knife attack by a fellow student in 1989 at another Worcester high school." *Parkins, 1994 WL 879558,* at *8.

The trial court found that there was substantial evidence to support the principal's conclusion that Jane Doe presented a threat to the school community because she brought the knife to school, showed the knife to other students and allowed those students to handle it, knew that knives were prohibited in school, and had a history of disciplinary and behavioral problems, including attempted suicide. See id. at *15.

n126 See *Doe, 653 N.E.2d at 1091-92.* The trial court pointed out that although the "lipstick/knife appears innocuous from the outside [that fact] does not make its contents any the less dangerous." *Parkins, 1994 WL 879558,* at *19.

n127 See *Doe, 653 N.E.2d at 1092.* The plaintiff appealed the expulsion decision to the superintendent pursuant to *Mass. Gen. Laws ch. 71, § 37H(d).* See id. The superintendent's review was limited by § 37H, however, to ensuring that the principal's decision was not arbitrary or capricious. See *id. at 1094.*

n128 See *id. at 1092*. The superintendent gave no reasons for his decision to uphold the expulsion. See *Brief for Plaintiff-Appellant, supra* note 124, at 3.

n129 *615 N.E.2d 516 (Mass. 1993).* See supra notes 94-111 and accompanying text for a discussion of the McDuffy opinion.

n130 See *Brief for Plaintiff-Appellant, supra* note 124, at 5-6.

n131 See id. at 6. The superintendent's decision to expel the plaintiff satisfied the "state action" requirement prefatory to any constitutional challenge. See supra note 41. The United States Supreme Court has said that the Fourteenth Amendment to the United States Constitution offers due process protection from the "State itself and all of its creatures--Boards of Education not excepted." *West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).* Articles One and Ten of the Declaration of Rights of the Massachusetts Constitution are the state equivalent to the Due Process Clause of the Fourteenth Amendment to the United States Constitution. See *Commonwealth v. O'Neal, 327 N.E.2d 662, 667 & n.5 (Mass. 1975); Pugliese v. Commonwealth, 140 N.E.2d 476, 479 (Mass. 1957).* Because school committees in Massachusetts are given "general charge" of the public schools by the Legislature pursuant to *Mass. Gen. Laws ch. 71, § 37*, including the power to remove students, pursuant to ch. 71, §§ 40-42, the expulsion decision in this case satisfied state action for purposes of either a state or federal constitutional challenge. See generally *McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516, 549 (Mass. 1993).*

n132 See *Brief for Plaintiff-Appellant, supra* note 124, at 1-2. The Judge denied the motion for a temporary restraining order on the day the complaint was filed, and ordered the motion for preliminary injunction merged with a trial on the merits. See id.

n133 See *Doe, 653 N.E.2d at 1095-97.*

n134 See *Brief for Plaintiff-Appellant, supra* note 124, at 2. Direct appellate review was granted after the plaintiff's injunction pending appeal to the appellate division was denied. See id.

n135 Mass. Const. pt. II, cl. 5, § 2; see also supra notes 94-107 for the McDuffy court's interpretation of this constitutional language.

n136 *McDuffy, 615 N.E.2d at 555.*

n137 *Doe, 653 N.E.2d at 1095.*

n138 See id. Although federal case law is not binding upon questions arising under the Massachusetts Constitution, see *id. at 1099 n.4* (Liacos, C.J., dissenting), Massachusetts

courts do follow essentially the same federal standards of judicial review for infringements upon fundamental and non-fundamental rights. See *id. at 1102* (Liacos, C.J., dissenting). That is, statutes affecting fundamental rights in Massachusetts are subject to strict judicial scrutiny. See, e.g., *Commonwealth v. O'Neal, 327 N.E.2d 662, 668 (Mass. 1975).* Statutes affecting non-fundamental rights must merely be rationally related to a legitimate state objective to pass constitutional scrutiny. See *Doe, 653 N.E.2d at 1097.*

n139 See *Brief for Plaintiff-Appellant, supra* note 124, at 18-21.

n140 See id. at 19. Although the plaintiff contended in her brief that she had no history as a dangerous person, she had tried to cut her own wrists on at least three occasions, including the day before she brought the lipstick knife to school. See supra note 125.

n141 See *Doe, 653 N.E.2d at 1095.*

N142 See id. The court held:

While the court acknowledged in McDuffy the importance of education and decided that the Commonwealth generally has an obligation to educate its children, the court did not hold, and we decline to hold today, that a student's right to an education is a 'fundamental right' which would trigger strict scrutiny analysis whenever school officials determine, in the interest of safety, that a student's misconduct warrants expulsion.

Id.

n143 *Id. at 1096* (emphasis added) (interpreting *McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516, 545-46 (Mass. 1993)).*

n144 See id. at 1096-97; see also *Nicholas B. v. School Comm., 587 N.E.2d 211, 212 (Mass. 1992)* (holding that a school committee's decision to expel a student who assaulted another student was not arbitrary or capricious); *Leonard v. School Comm., 212 N.E.2d 468, 472 (Mass. 1965)* (holding that a school could expel a student subject to rational basis judicial review); *Sherman v. Charlestown, 62 Mass. 160, 16364 (1851)* (holding that a school committee could expel a student for good cause because education is a common right, not an exclusively individual one).

n145 See *Doe, 653 N.E.2d at 1096-97.*

n146 *Id. at 1095* (alterations in original) (quoting *Parkins v. Boule, 1994 WL 879558,* at *17 (Mass. Super. Aug. 3, 1994), aff'd sub nom. *Doe v. Superintendent of Sch., 653 N.E.2d 1088 (Mass. 1995)).*

n147 See *id. at 1097.*

n148 Id. (alteration in original) (quoting *Parkins v. Boule, 1994 WL 879558,* at *19 (Mass. Super. Aug. 3, 1994), aff'd sub nom. *Doe v. Superintendent of Sch., 653 N.E.2d 1088 (Mass. 1995)).*

n149 See id.

n150 Chief Justice Liacos announced his retirement from the Massachusetts Supreme Judicial Court on June 19, 1996. See Frank Phillips & John Ellement, SJC to Lose Liacos' Voice--Liberal Chief Justice's Retirement Likely to Alter Court, Boston Globe, June 20, 1996, at C1. Herbert P. Wilkins was sworn in as the new Chief Justice on October 1, 1996. Wilkins Sworn in as Head of State's Highest Court, Telegram & Gazette (Worcester, Mass.), Oct. 2, 1996, at A6.

n151 See *Doe, 653 N.E.2d at 1098* (Liacos, C.J., dissenting).

n152 See id. (Liacos, C.J., dissenting).

n153 See id. (Liacos, C.J., dissenting).

n154 See *id. at 1099* (Liacos, C.J., dissenting) (citing *McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d at 516, 553-54 (Mass. 1993)).*

n155 Id. at 1098-99 (Liacos, C.J., dissenting) (quoting *McDuffy, 615 N.E.2d at 548).*

n156 See id. at 1099 (Liacos, C.J., dissenting). Liacos stated: "Clearly, since McDuffy, the Commonwealth has a duty to provide education to the plaintiff and it is an enforceable one." Id. at 1100 (Liacos, C.J., dissenting).

n157 See *Doe, 653 N.E.2d at 1100* (Liacos, C.J., dissenting).

n158 Id. (Liacos, C.J., dissenting).

n159 See id. (Liacos, C.J., dissenting). The New Hampshire Education Clause states in pertinent part: "Knowledge and learning . . . being essential to the preservation of a free government . . . it shall be the duty of the legislators and magistrates . . . to cherish the interest of education . . . ." N.H. Const. pt. 2, art. 83.

n160 *Doe, 653 N.E.2d at 1100* (Liacos, C.J., dissenting) (quoting *Claremont Sch. Dist. v. Governor, 635 A.2d 1375, 1381 (N.H. 1993)).* The Chief Justice found additional authority

for his contention that a duty upon one affords a corresponding right upon another: "In addition, Black's Law Dictionary 505 . . . indicates in its treatment of 'duty,' 'In its use in jurisprudence, this word is the correlative of right. Thus, wherever there exists a right in any person, there also rests a corresponding duty upon some other person or upon all persons generally.'" Id. at 1101 (Liacos, C.J., dissenting) (quoting Black's Law Dictionary 505 (6th ed. 1990)).

n161 See id. (Liacos, C.J., dissenting).

n162 See id. (Liacos, C.J., dissenting); see also supra notes 107-09 and accompanying text for a discussion of the McDuffy holding.

In light of the clarity of the McDuffy holding, Chief Justice Liacos thought that the majority in Doe was wrong to distinguish McDuffy as merely addressing whether the school-financing system was constitutional, and not whether education was a fundamental right. See id. at 1099 (Liacos, C.J., dissenting). Instead, Liacos suggested that the task before the Doe court was not to reinterpret McDuffy, to show that it did not explicitly decide whether education was fundamental, but instead to recognize its content, which suggested that education was a fundamental right under the Massachusetts Constitution. See id. (Liacos, C.J., dissenting). Liacos therefore thought that the Doe majority's reliance on previous Massachusetts cases to find the right to education non-fundamental was misplaced. See id. at 1100 n.5. (Liacos, C.J., dissenting).

n163 See id. at 1101. The United States Supreme Court in San Antonio Indep. Sch. Dist. v. Rodriguez, stated that "the answer [to whether education is a fundamental right] lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the [U.S.] Constitution." *San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973).* Some commentators have indicated that this language from Rodriguez stands for the idea that if the right to an education is explicitly guaranteed by a constitution (as it is in forty-eight state constitutions), it follows that the right is therefore fundamental. See, e.g., Hubsch, supra note 71, at 1330-31. Indeed, some of the states that have declared education a fundamental right have included in their reasoning the fact that education is explicitly guaranteed by their constitutions. See, e.g., *Skeen v. State, 505 N.W. 299, 313 (Minn. 1993)* (holding that education is a fundamental right because of the explicit provision in the state constitution and because of its overall importance); *Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310, 333 (Wyo. 1980)* (holding that education is a fundamental right because of the emphasis it receives in the state constitution).

n164 See *Doe, 653 N.E.2d at 1101* (Liacos, C.J., dissenting).

n165 See id. (Liacos, C.J., dissenting).

n166 Id. (Liacos, C.J., dissenting).

n167 See id. (Liacos, C.J., dissenting). For an excellent and exhaustive analysis of the historical treatment of education in the Commonwealth of Massachusetts see *McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516, 523-47 (Mass. 1993);* see also Kate Strickland, Ph.D., The School Finance Reform Movement, a History and Prognosis: Will Massachusetts Join the Third Wave of Reform? *32 B.C. L. Rev. 1105, 1159-67 (1991).*

n168 See *Doe, 653 N.E.2d at 1101* (Liacos, C.J., dissenting). An example of such a statute is the Massachusetts Compulsory School Attendance law, which requires all students age six to sixteen to attend school. See *Mass. Gen. Laws ch. 76, § 1* (1994 & Supp. 1996).

n169 See *Doe, 653 N.E.2d at 1101* (Liacos, C.J., dissenting). Some have argued the parallel proposition that although education is not explicitly guaranteed by the Federal Constitution it should nevertheless be declared fundamental because of its close nexus to other, explicit Federal Constitutional rights. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 & n.78 (1973).* Specifically, the plaintiffs in Rodriguez suggested that education was fundamental because it is essential to the exercise of First Amendment rights of expression, and the right to participate on an equal basis in state elections, which are both explicitly guaranteed by the Constitution. See id.

n170 *Doe, 653 N.E.2d at 1101* (Liacos, C.J., dissenting).

n171 See id. (Liacos, C.J., dissenting). See supra note 76 for the states that have declared education a fundamental right under their constitutions.

n172 See *Doe, 653 N.E.2d at 1101* (Liacos, C.J., dissenting) ("I . . . believe that this constitutional duty [to educate] generates a right which, for purposes of legal analysis, is fundamental."). Liacos also stated:

> For us to retreat from the principles stated in McDuffy would be to deny the thrust and logic of its historical underpinnings and would be inconsistent with the letter of our Constitution. Such a retreat would ignore the opinions of other state courts and put Massachusetts into the sad condition of giving greater status to property rights and other rights, recognized as fundamental, which are not as fundamental to the liberty of our free citizens and the preservation of our constitutional democracy as is the right to a public education. This right is necessary "fundamentally, to prepare [our children] to participate as free citizens of a free State to meet the needs and interests of a republican government, namely the Commonwealth of Massachusetts." In such a retreat I cannot join.

Id. at 1102 (Liacos, C.J., dissenting) (alteration in original) (quoting *McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516, 548 (Mass. 1993)).*

n173 See id. at 1102 (Liacos, C.J., dissenting).

n174 See id. (Liacos, C.J., dissenting).

n175 See id. at 1102-04 (Liacos, C.J., dissenting).

n176 Id. at 1102 (Liacos, C.J., dissenting).

n177 See id. at 1102-03 (Liacos, C.J., dissenting). The conclusion that an expulsion might serve a compelling state interest "seems to me to be inescapable." Id. (Liacos, C.J., dissenting). The plaintiff also conceded this point in her brief. See *Brief for Plaintiff-Appellant, supra* note 124, at 18 n.15; see also *Doe, 653 N.E.2d at 1102 n.6* (Liacos, C.J., dissenting).

n178 See *Doe, 653 N.E.2d at 1102* (Liacos, C.J., dissenting).

n179 The Chief Justice thought that expulsion would be the least restrictive means by which to further the state's compelling interest in circumstances such as "the protection of students and staff, and the prevention of suicide." *Id. at 1103* (Liacos, C.J., dissenting).

n180 See *id. at 1104* (Liacos, C.J., dissenting).

n181 See, e.g., *Skeen v. State, 505 N.W.2d 299, 313 (Minn. 1993)* (holding that education is a fundamental right in Minnesota because of its overall importance, and because of the explicit provision for education in the state constitution); *Bismarck Pub. Sch. Dist. No. 1 v. State, 511 N.W.2d 247, 250, 256 (N.D. 1994)* (holding that education is fundamental in North Dakota because of its equal standing with other fundamental rights such as freedom of speech, religion, and the press); *Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310, 333 (Wyo. 1980)* (holding that in Wyoming "there is no room for any conclusion but that education . . . is a matter of fundamental interest").

n182 See, e.g., *Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1018 (Colo. 1982)* ("A heartfelt recognition and endorsement of the importance of an education does not elevate . . . it to a fundamental interest warranting strict scrutiny."); *Board of Educ. v. Nyquist, 439 N.E.2d 359, 366 (N.Y. 1982)* (holding that education is not a fundamental constitutional right even though it is an unquestionably important area of concern and responsibility); *Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989)* ("Education, although vital, does not rise to the same level" as the fundamental rights of free speech and religion).

n183 The Supreme Judicial Court chronicled the historical importance of education in the Commonwealth of Massachusetts in *McDuffy v. Secretary of the Executive Office of Education, 615 N.E.2d 516, 523-47 (Mass. 1993).* See supra notes 94-111 and accompanying text for a discussion of the McDuffy analysis. In its holding in Doe, however, the majority indicated that the importance of education, as recognized by McDuffy, was not enough to elevate that right to fundamental status. See *Doe, 653 N.E.2d at 1097.*

n184 *347 U.S. 483 (1954).*

n185 *Id. at 493.*

n186 *457 U.S. 202 (1982).*

n187 *Id. at 222.*

n188 See *id. at 223.*

n189 Id.

n190 *Id. at 221* (omission in original) (quoting *Wisconsin v. Yoder, 406 U.S. 205, 221 (1972)).*

n191 Id. (quoting *Ambach v. Norwick, 441 U.S. 68, 77 (1979)).*

n192 See Phillip T.K. Daniel & Karen B. Coriell, Suspension and Expulsion in America's Public Schools: Has Unfairness Resulted from a Narrowing of Due Process?, *13 Hamline J. Pub. L. & Pol'y 1, 10-11 (1992).*

n193 See Amalia G. Curevo et al., National School Boards Association, Towards Better and Safer Schools: A School Leader's Guide to Delinquency Prevention 18 (1984).

n194 See *id. at 19.* Although the trial court in Doe upheld the superintendent's decision to expel Jane Doe, it acknowledged that "[Jane Doe's] education may now permanently be at an end which is troubling beyond measure." *Parkins v. Boule, 1994 WL 879558,* at *18 (Mass. Super. Aug. 3, 1994), aff'd sub nom. *Doe v. Superintendent of Sch., 653 N.E.2d 1088 (Mass. 1995).* Indeed, as Tom Haney, Denver, Colorado Police Chief observed, "I don't think [expelled children will] go to the library and do independent study." Tustin Amole & Bill Scanlon, Schools Suspend Nearly Half of Black Males Across State, Hispanics Kicked Out Last School Year at Nearly Twice the Rate of Anglos, Agency Says, Rocky Mtn. News, Jan. 6, 1996, at 1A.

n195 See Digest of Education Statistics 363 (Thomas D. Snyder ed., 25th ed. 1989). Even if students do complete high school, those who have been suspended or expelled are less likely to be admitted to college than students who have no history of disciplinary infractions. See Lynn M. Engel, Comment, At the Schoolhouse Gate: Education, Law and Democracy, The Admissibility of Hearsay in Public Secondary School Disciplinary Hearings, *1991 U. Chi. Legal F. 375, 379 (1991).* Therefore, because the job market for the high school edu-

cated is shrinking, "the potential negative consequences of an unjust suspension or expulsion may be magnified." Id. (footnote omitted).

n196 Roni R. Reed, Note, Education and the State Constitutions: Alternatives for Suspended and Expelled Students, *81 Cornell L. Rev. 582, 606 (1996)* (citing United States Dep't of Lab. Bureau of Lab. Statistics, Students, Graduates, and Dropouts, Oct. 1980-1982, Special Lab. Force Rep. 4 (Dec. 1983)).

n197 See Curevo et al., supra note 193, at 18-19. As George Butterfield, Deputy Director of the National School Safety Center suggested: "'If you just expel, the school washes its hands of the problem, but daytime burglaries go up. . . . You have fights, then guns, then metal detectors, suspensions, expulsions . . . and incarceration . . . .'" Kelly P. Kisse, The 4 Rs: Reading, 'Riting, 'Rithmetic and Revolvers; Education: Rural Schools Face Big-City Problems as Children Bring Guns to Class, L.A. Times, Mar. 21, 1993, at A20 (quoting George Butterfield, Deputy Director of the National School Safety Center).

n198 Reed, supra note 196, at 606 (quoting Terence P. Thornberry et al., The Effect of Dropping Out of High School on Subsequent Criminal Behavior, 23 Criminology 15-17 (1985)).

n199 See *Prepared Testimony of Diane Lipton Before the Senate Comm. on Labor and Human Resources Subcomm. on Disability Policy, Fed. News Serv. Cong. Hearing Test. 1995 WL 10388172,* at *13 (1995).

n200 See Reed, supra note 196, at 606 (citing R.C. Smith & Carol A. Lincoln, America's Shame, America's Hope 5 (1988)).

n201 See id. (citing Van Dougherty, Youth at Risk: The Need for Information, in Children at Risk 4 (Joan M. Lakebrink ed., 1989)).

n202 See supra notes 42-43 and accompanying text.

n203 See, e.g., *Doe v. Superintendent of Sch., 653 N.E.2d 1088, 1096 (Mass. 1995)* (interpreting *McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516, 545-46 (Mass. 1993));* see also Barbara E. Smith & Sharon Goretsky Elstein, Effective Ways to Reduce School Victimization: Practical and Legal Concerns, 14 Children's Legal Rts. J. 22, 27 (1993).

n204 See *Goss v. Lopez, 419 U.S. 565, 574-75 (1975);* see also *Doe, 653 N.E.2d at 1095-97* (analyzing an infringement upon a student's constitutional "right" to education, implicitly recognizing that it is a protected interest); *Parkins v. Boule, 1994 WL 879558,* at *13 (Mass.

Super. Aug. 3, 1994), aff'd sub nom. *Doe v. Superintendent of Sch., 653 N.E.2d 1088 (Mass. 1995)* (stating that there is a constitutionally protected property interest in a public education).

n205 See, e.g., *New Jersey v. T.L.O., 469 U.S. 325, 340 (1985)* (recognizing that the Court had a duty to balance a student's expectation of privacy against unreasonable searches and seizures with the legitimate objectives of maintaining a safe school environment); *Goss, 419 U.S. at 580* ("Some modicum of discipline and order is essential if the educational function is to be performed."); see also *Doe, 653 N.E.2d at 1096* (holding that school officials have a duty to provide a safe and secure school environment for all students).

n206 *Goss, 419 U.S. at 573* (quoting *Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969)).*

n207 See *T.L.O., 469 U.S. at 340.*

n208 *Doe, 653 N.E.2d at 1102* (Liacos, C.J., dissenting) (quoting *Marcoux v. Attorney Gen., 375 N.E.2d 688, 689 n.4 (Mass. 1978)).*

n209 *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 811 (Ariz. 1994).*

n210 See *Doe, 653 N.E.2d at 1097.* The court held that because the plaintiff did not have a fundamental right to an education under the Massachusetts Constitution, the expulsion decision, made pursuant to state legislation, was merely subject to rational basis review. See id. Applying the rational basis test to the expulsion decision, the court found no constitutional violation because "'it was reasonable and rational for school officials to determine that [the plaintiff] should be expelled as a means of insuring school safety.'" Id. (alterations in original) (quoting *Parkins v. Boule, 1994 WL 879558* at *19 (Mass. Super. Aug. 3, 1994), aff'd sub nom. *Doe v. Superintendent of Sch., 653 N.E.2d 1088 (Mass. 1995)).*

n211 See supra note 52 and accompanying text.

n212 See supra text accompanying note 54.

n213 See supra note 82 and accompanying text.

n214 See infra notes 239-51 and accompanying text.

n215 See, e.g., *Doe, 653 N.E.2d at 1102-03* (Liacos, C.J., dissenting). Even the Chief Justice in dissent thought that protecting the safety and welfare of the school community was a compelling state interest. See id. (Liacos, C.J., dissenting).

n216 See, e.g., *Plyler v. Doe, 457 U.S. 202, 223-24 (1982)* (applying the intermediate standard of review, instead of rational basis, to infringements upon the nonfundamental, federal right to education because of the importance of that right); *Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 788 (Md. 1983)* (indicating that the intermediate standard of review, rather than rational basis, is the appropriate standard for infringements upon the nonfundamental, yet important personal right to education in Maryland); see also infra notes 279-311 and accompanying text.

n217 See infra notes 218-28 and accompanying text.

n218 See Judith Nygren, Board Upholds Punishment in Knife Case, Omaha World-Herald, May 8, 1996, at 41.

n219 See id.

n220 See G.I. Joe's Tiny Gun Breaks School Rules, Chi. Trib., Jan. 9, 1997, at 18. Jeffrey's violation was later downgraded from a criminal weapons violation to a rules violation. See Don't Let "Zero Tolerance" Equal Zero Common Sense, Editorial, The Pantagraph (Bloomington, Ill.), Jan. 17, 1997, at A12.

n221 See *Mass. Gen. Laws ch. 71, § 37H* (1994 & Supp. 1996); see also supra note 116 for a description of this legislation.

n222 See *Mass. Gen. Laws ch. 71, § 37H* (1994 & Supp. 1996). Section 37H, which authorized the expulsion of the plaintiff in Doe, describes a "dangerous weapon" as "a gun . . . or a knife." Id. The Doe court presumed that the Legislature did not intend to limit the term "dangerous weapon" in § 37H, as it had done in another statute, to those knives larger than one and one-half inches. See *Doe, 653 N.E.2d at 1094-95.* Instead, the Worcester High School "Policy on Possession or Use of Weapons," enacted pursuant to § 37H, authorized expulsion "'regardless of the size of the knife.'" *Doe, 653 N.E.2d at 1090* (quoting "Policy on Possession or Use of Weapons."). The lipstick knife for which Jane Doe was expelled had a one and one-quarter inch blade. See *id. at 1091.*

n223 See *Mass. Gen. Laws ch. 71, § 37H* (1994 & Supp. 1996). Jane Doe testified at the November 16, 1993 principal's hearing that she thought the knife was a "joke." *Doe, 653 N.E.2d at 1091.* Furthermore, she contended in her brief that the lipstick knife was simply a "novelty item." See *Brief for Plaintiff-Appellant, supra* note 124, at 1.

n224 See supra note 222.

n225 See supra note 124 and accompanying text.

n226 Gunther, supra note 50, at 8.

n227 See supra notes 51-53 and accompanying text. Whether the expulsions of Jennifer Blankenship, Jeffrey Parks, or Jane Doe were or were not warranted, however, is not the focus of this Comment. Instead, this Comment merely seeks, through their examples, to expose the possibility that some expulsions might be unwarranted, that such unwarranted expulsions would be upheld by a court under rational basis review, and that such results are socially undesirable.

n228 *Doe, 653 N.E.2d at 1095* (quoting *Parkins v. Boule, 1994 WL 879558,* at *17 (Mass. Super. Aug. 3, 1994), aff'd sub nom. *Doe v. Superintendent of Sch., 653 N.E.2d 1088 (Mass. 1995)).*

n229 The United States Supreme Court has recognized that decisions to expel a student are important decisions, with serious consequences, that may not be warranted in all cases. See *Goss v. Lopez, 419 U.S. 565,579-80 (1975).* The Goss Court eloquently stated:

> The student's interest is to avoid unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences. The Due Process Clause will not shield him from suspensions properly imposed, but it disserves both his interest and the interest of the state if his suspension is in fact unwarranted. The concern would be mostly academic if the disciplinary process were a totally accurate, unerring process, never mistaken and never unfair. Unfortunately, that is not the case. . . . The controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.

Id. (emphasis added). Similarly, some commentators have suggested that school officials might abuse the discretion with which the Legislature has empowered them. See Daniel & Coriell, supra note 192, at 7.

n230 See, e.g., *Doe, 653 N.E.2d at 1097;* see also *Mitchell v. Board of Trustees of Oxford Mun. Separate Sch. Dist., 625 F.2d 660, 665 (5th Cir. 1980)* (holding that the mandatory expulsion of a student for possession of knives in school was rationally related to the state's legitimate interest in maintaining a safe school environment); *Craig v. Selma City Sch. Bd., 801 F. Supp. 585, 595 (S.D. Ala. 1992)* (expelling a public school student for fighting did not violate a student's substantive due process rights because it was not arbitrary and capricious and thus passed rational basis review); *Petrey v. Flaugher, 505 F. Supp. 1087, 1092 (E.D. Ky. 1981)* (expelling a public school student for marijuana possession did not violate the student's substantive due process rights because there was a rational basis for that decision); *Hutcheson v. Grace Lutheran Sch., 571 N.Y.S.2d 760, 762 (App. Div. 1987)* (expelling a first grade private school student was not arbitrary and capricious and thus passed rational basis review); Dolores J. Cooper & John L. Strope, Jr., Long-Term Suspensions and Expulsions After Goss, 57 Educ. L. Rep. 29, 41 (1990) (concluding that courts routinely uphold long-term suspen-

sions and expulsions, under rational basis review, made within school officials' broad discretion).

n231 See supra note 116.

n232 See supra note 116.

n233 See supra notes 229-30 and accompanying text. In Massachusetts, it appears the potential for such errors is a real concern. Susan Cole, a lawyer for the Massachusetts Advocacy Center, has indicated that although § 37H, as amended by the Education Reform Act, requires school principals to exercise their discretion in deciding to suspend or expel, the principals do not always do so. Jordana Hart, Despite New Law, Pupil Expulsion Rate Steady, Boston Globe, Nov. 5, 1994, at C20; see also Robert E. Shepherd, Jr. & Anthony J. DeMarco, Weapons in Schools and Zero Tolerance, *11 Crim. Just. 46 (1996)* (noting that principals rarely exercise their discretion under § 37H to suspend rather than expel students in possession of weapons). Instead, Cole stated, "it is a rigid application although the law requires discretion. [School principals] are not evaluating children on an individual basis." Doris Sue Wong & Anne Martinez, School Weapon Ban is Backed; SJC Says Education Is Not Absolute Right, Boston Globe, Aug. 12, 1995, at C11 (quoting Susan Cole, attorney for the Massachusetts Advocacy Center). As illustrated by Doe, rigid application of this statute by school administrators will pass constitutional scrutiny under rational basis judicial review. See *Doe, 653 N.E.2d at 1097.*

n234 See supra notes 181-202 and accompanying text.

n235 See supra notes 82-86 and accompanying text for a discussion of the states that consider education a fundamental right. See infra notes 294-304 and accompanying text for a discussion of those states that consider education a fundamental right, but nevertheless apply the intermediate standard of review to substantial infringements upon that right.

n236 See *Doe, 653 N.E.2d at 1102-03* (Liacos, C.J., dissenting).

n237 See id. (Liacos, C.J., dissenting).

n238 See supra note 49 and accompanying text.

n239 See *Doe, 653 N.E.2d at 1095.*

n240 See *id. at 1095-96.*

n241 See, e.g., *Goss v. Lopez, 419 U.S. 565, 580 (1975).* The United States Supreme Court in Goss pointed out that schools are "vast and complex" places, and that "some modicum of discipline and order is essential if the educational function is to be performed." Id. The Court further indicated that too many procedural restrictions upon such an intricate system's ability to suspend its students "may not only make it too costly as a regular disciplinary tool but may also destroy its effectiveness as part of the teaching process." *Id. at 583.*

n242 A 1993 Department of Education survey of more than 2000 high school students across Massachusetts revealed that 37% of boys and 7% of girls armed themselves on a daily basis with guns, knives and other dangerous weapons. See Jordana Hart, Creeping Violence Worries Suburban Schools; Stricter Rules Enforced to Seize 'Weapons.' Boston Globe, Apr. 18, 1994, at C15. In 1993, 22% of all high school students reported carrying a dangerous weapon at one time or another, up from only 16% in 1990. See id.

These statistics reflect a growing problem of violence in schools nationwide. The National Education Association found that approximately 100,000 students bring guns to school on any given day, and that more than 2000 students are victims of physical attack during every school hour. See Tamara Henry, Alternative School Forges a New Path, USA Today, Oct 5, 1994, at D7.

n243 See Statewide Report on School Expulsions and Long-Term Suspensions (Mass. Dep't of Educ.), June 13, 1994, at 1.

n244 See id. In response to the dangerous condition of Massachusetts schools, the Massachusetts Legislature enacted the Education Reform Act, which made it easier to expel students and increased the penalties for weapons possession. See supra note 116. The Education Reform Act appears to be working. Since its enactment, more Massachusetts students have been expelled than in previous years and a smaller percentage have been expelled for weapons possession. See Student Exclusions in Massachusetts Public Schools: 1994-95 (Mass. Dep't of Educ.), Dec. 1995, at 1, 3-4. During the 1994-95 academic year, 1505 Massachusetts students were expelled. See id. Only 26% of those students were expelled for bringing weapons to school. See id.

n245 *Epperson v. Arkansas, 393 U.S. 97, 104 (1968).*

n246 See *Wood v. Strickland, 420 U.S. 308, 328 (1975).*

n247 *San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42 (1973)* (quoting *Dandridge v. Williams, 397 U.S. 471, 487 (1970)).*

n248 Id. at 42-43 (quoting *Jefferson v. Hackney, 406 U.S. 535, 546-47 (1972)).*

n249 *Doe v. Superintendent of Sch., 653 N.E.2d 1088, 1096 (Mass. 1995)* (emphasis added) (interpreting *McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516, 545-46 (Mass. 1993));* see also *Leonard v. School Comm., 212 N.E.2d 468, 472 (Mass. 1965)* (holding that a school could expel a student subject to rational basis judicial review); *Sherman v. Charlestown, 62 Mass. 160, 163-64 (1851)* (holding that a school committee could expel a student for good cause because education is a common right, not an exclusively individual one).

n250 See supra notes 241-48 and accompanying text.

n251 See supra note 241 and accompanying text.

n252 See supra notes 203-51 and accompanying text; see also Halfon, supra note 49, at 929-30.

n253 See Halfon, supra note 49, at 929-30.

n254 *411 U.S. 1, 70 (1973)* (Marshall, J., dissenting).

n255 See *id. at 33-35.* The Rodriguez Court also held that students disadvantaged by disparities in a Texas school-financing scheme were not a suspect class for equal protection purposes. See *id. at 18.*

n256 *Id. at 98-99* (Marshall, J., dissenting). This spectrum of standards is also referred to by some commentators as the "sliding-scale" approach to judicial scrutiny. See, e.g., Stuart Biegel, Reassessing the Applicability of Fundamental Rights Analysis: The Fourteenth Amendment and the Shaping of Educational Policy After Kadrmas v. Dickinson Public Schools, *74 Cornell L. Rev. 1078, 1088 (1989).*

n257 *Rodriguez, 411 U.S. at 99* (Marshall, J., dissenting).

n258 *Id. at 100* (Marshall, J., dissenting) (quoting *id. at 33-34).*

n259 *Id. at 99* (Marshall, J., dissenting).

n260 See id. at 102-03 (Marshall, J., dissenting). Marshall acknowledged that determining which rights are fundamental is a difficult process, but not an "insurmountable" one. See id. at 102 (Marshall, J., dissenting). In Marshall's words:

The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the

nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.

Id. at 102-03 (Marshall, J., dissenting).

n261 See, e.g., *Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)* (holding that the right to procreate is a fundamental right, and infringements upon that right are subject to strict judicial scrutiny).

n262 See, e.g., *Reynolds v. Sims, 377 U.S. 533, 561-62 (1964)* (holding that the right to vote in state elections is a fundamental right, and infringements upon that right are subject to strict judicial scrutiny).

n263 See, e.g., *Griffin v. Illinois, 351 U.S. 12, 18-19 (1956)* (holding that the right to appeal from a criminal conviction is a fundamental right, and infringements upon that right are subject to strict judicial scrutiny).

n264 See *Rodriguez, 411 U.S. at 99-101* (Marshall, J., dissenting). Justice Marshall argued that the Court had deemed these rights fundamental, not because they were "bound to . . . the text of the Constitution," but instead based on the close nexus these rights have to express Constitutional rights, and "due to the importance of the interests at stake." Id. (Marshall, J., dissenting). Marshall queried: "I would like to know where the Constitution guarantees the right to procreate, or the right to vote in state elections, or the right to an appeal from a criminal conviction." *Id. at 100* (Marshall, J., dissenting) (citations omitted).

n265 Id. at 111 (Marshall, J., dissenting).

n266 Id. (Marshall, J., dissenting).

n267 See Brest & Levinson, supra note 41, at 813.

n268 See, e.g., *Craig v. Boren, 429 U.S. 190, 197 (1976)* (holding that classifications based upon gender "must serve important governmental objectives and must be substantially related to achievement of those objectives").

n269 See *Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-24 (1982)* (finding that the state failed to demonstrate that its policy of excluding men from a state nursing school was substantially related to an important interest).

n270 See *Califano v. Webster, 430 U.S. 313, 317-20 (1977)* (holding that a Social Security eligibility statute that treated men differently than women need not be the least restrictive

alternative, as Congress' purpose in enacting the statute might have been to equalize traditional inequalities between men and women).

n271 *429 U.S. 190 (1976).*

n272 See *id. at 199-200.*

n273 See *Frontiero v. Richardson, 411 U.S. 677, 682 (1973);* see also supra note 42.

n274 See *Craig v. Boren, 429 U.S. 190, 198 n.6 (1976).*

n275 *Id. at 197.*

n276 See, e.g., *Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)* (stating that a classification based on gender must serve an important governmental objective and be substantially related to the achievement of that objective).

n277 See, e.g., *United States v. Clark, 445 U.S. 23, 27 (1980)* ("A classification based on illegitimacy is unconstitutional unless it bears 'an evident and substantial relation to the particular . . . interests the statute is designed to serve.'" (quoting *Lalli v. Lalli, 439 U.S. 259, 268 (1978)* (Powell, J., for a plurality))).

n278 See, e.g., *Plyler v. Doe, 457 U.S. 202, 221-24 (1982)* (applying the intermediate standard of review to infringements upon the federal, non-fundamental right to education because of the importance of that right); see also infra notes 279-88 and accompanying text.

n279 *457 U.S. 202 (1982).*

n280 See *id. at 224.* The Court in Plyler invalidated the statute as violative of the Equal Protection Clause because it could not be considered rational unless it furthered a substantial goal of the state. See id.

n281 See *id. at 221.*

n282 See id. The Court stated:

Public education is not a "right" granted to individuals by the Constitution. But neither is it merely some governmental "benefit" indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basis institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction.

Id. (citation omitted).

n283 See *id. at 223-24.*

n284 Id. (emphasis added) (citations omitted).

n285 See, e.g., *Plyler, 457 U.S. 202, 216-17 (1982).*

n286 See, e.g., *Vlandis v. Kline, 412 U.S. 441, 452-53 (1973).* In Vlandis, the Court invalidated as violative of substantive due process and equal protection a Connecticut statute allowing the state to charge non-resident tuition rates to Connecticut residents who were previously non-resident students. See *id. at 453.* Although the Court did not expressly employ the intermediate standard, it did more than simply presume the legitimacy and rationality of the statute as it would have under traditional rational basis review. See *id. at 448-52.* The Court instead examined the facts from the plaintiff's perspective. See id. Some commentators have indicated that the Court's approach was an implicit application of the intermediate standard of review to infringements upon one's right to obtain an education. See, e.g., J. Harvie Wilkinson, III., The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality, *61 Va. L. Rev. 945, 953 (1975);* Biegel, supra note 256, at 1090.

n287 See, e.g., *Regents of the Univ. of Michigan v. Ewing, 474 U.S. 214 (1985).* The Court in Ewing upheld a substantive due process challenge of a university's decision to dismiss a student for failing a qualifying exam. See *id. at 227-28.* In examining the infringement upon the right to education, the Court undertook a closer examination of the university's decision than it would have under traditional rational basis review. See id. Upholding the student's dismissal, the Ewing Court found that the university's decision did not constitute a "substantial departure from accepted academic norms." *Id. at 227.* Under the traditional rational basis test, however, the Court would have presumed the legitimacy and rationality of the decision and probably would have upheld even a substantial departure from accepted academic norms. See Biegel, supra note 256, at 1092. Moreover, the Ewing Court closely analyzed the university's decision, and examined the facts from the plaintiff's perspective, which it would not have done under traditional rational basis review. See id. at 227 n.13.

n288 Gerald Gunther, Individual Rights In Constitutional Law 229 (5th ed. 1992).

n289 *San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-35 (1973).*

n290 See supra notes 279-87 and accompanying text.

n291 See supra note 74 and accompanying text.

n292 See infra notes 294-311 and accompanying text. North Dakota, Montana, and Maryland have applied the intermediate standard to infringements upon one's right to education. See infra notes 294-311 and accompanying text.

n293 See infra notes 294-311 and accompanying text.

n294 *511 N.W.2d 247 (N.D. 1994).*

n295 *Id. at 259.*

n296 See *id. at 256;* see also N.D. Const. art. VIII, § 1.

n297 *Bismarck, 511 N.W.2d at 257.*

n298 *Id. at 256-57.*

n299 See *id. at 259.*

n300 See *State ex rel. Bartmess v. Board of Trustees of Sch. Dist. No. 1, 726 P.2d 801, 804-05 (Mont. 1986).*

n301 Id.

n302 *Id. at 805.*

n303 Id.

n304 See id.

n305 *426 A.2d 929 (Md. 1981).*

n306 See *id. at 951.*

n307 *Id. at 944* (quoting Laurence H. Tribe, American Constitutional Law §§ 16-31, at 1090 (1978)). Although the Maryland Supreme Court's discussion of the intermediate standard of review was in the context of the federal law, it pointed out that Maryland's approach to judicial review is essentially the same as the federal model. See *id. at 946.*

n308 *458 A.2d 758 (Md. 1983).*

n309 *Id. at 788.* In Maryland, the standard of "heightened review" requires that the State's means "bear a fair and substantial relationship to a legitimate goal." Id.

n310 See id.; see also *Potomac Elec. Power Co. v. Smith, 558 A.2d 768, 788 (Md. Ct. Spec. App. 1989)* (interpreting Hornbeck as implicitly recognizing that substantial infringements upon one's constitutional right to education would warrant the closer scrutiny of the intermediate standard of review).

n311 See supra note 82.

n312 See, e.g., *Sena v. Commonwealth, 629 N.E.2d 986, 991 (Mass. 1994).* The court in Sena held that "close judicial scrutiny . . . could 'usurp the power and responsibility of the legislative or executive branches.'" Id. (alteration in original) (quoting *Whitney v. Worcester, 366 N.E.2d 1210, 1217 (Mass. 1977)).*

n313 See, e.g., *Zayre Corp. v. Attorney Gen., 362 N.E.2d 878, 884 (Mass. 1977).*

n314 Id. The Supreme Judicial Court in Zayre stated that its deference to the Massachusetts Legislature under rational basis review is not "an abdication of the judicial role, but a recognition of its proper place in the system of government." Id.

n315 See *McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516, 550 (Mass. 1993).*

n316 Id. (quoting *Colo v. Treasurer & Receiver Gen., 392 N.E.2d 1195, 1197 (Mass. 1979)).*

n317 *375 N.E.2d 688 (Mass. 1978).*

n318 *Id. at 689 n.4.* Similarly, the United States Supreme Court has also recognized that "the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961).*

n319 *McDuffy, 615 N.E.2d at 555* (quoting *Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1978)).*

n320 See supra Part IV.A.

n321 See supra notes 279-311 and accompanying text.

n322 See supra notes 279-87 and accompanying text. It is true that "federal case law is of little relevance in analyzing the enforceable right to education provided by Part I sic, c. 5, § 2, of the Massachusetts Constitution." *Doe v. Superintendent of Sch., 653 N.E.2d 1088, 1099 n.4 (Mass. 1995)* (Liacos, C.J., dissenting). Federal law can provide meaningful guidance, however, because Articles One and Ten of the Declaration of Rights of the Massachusetts Constitution are the state equivalent to the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Federal Constitution. See *Commonwealth v. O'Neal, 327 N.E.2d 662, 667 (Mass. 1975); Pugliese v. Commonwealth, 140 N.E.2d 476, 479 (Mass. 1957).*

n323 See supra notes 292-311 and accompanying text.

n324 See, e.g., *McDuffy, 615 N.E.2d at 523-48.* See supra notes 94-107 and accompanying text for an analysis of the McDuffy opinion's recognition of the importance of education; see also *Care and Protection of Charles, 504 N.E.2d 592, 599 (Mass. 1987)* ("From the beginning of its history, the Commonwealth has emphasized the crucial importance in the education of children."); *Jenkins v. Andover, 103 Mass. 94, 97 (1869)* (stating that the Education Clause of the Massachusetts Constitution is solemn testimony "to the importance in maintaining a system of popular government, which shall secure not only peace and order, but individual freedom and elevation of character").

n325 See supra notes 317-19 and accompanying text.

n326 See supra notes 57, 275 and accompanying text.

n327 See supra text accompanying note 146.

n328 See supra notes 218-25 and accompanying text for a discussion of potentially questionable cases.

n329 See supra note 215 and accompanying text.

n330 See supra note 270 and accompanying text.

n331 See supra Part IV.A. for a discussion of the consequences that a lost education can have on society.

n332 See supra Part II.C.

n333 See supra notes 42-43 and accompanying text.

n334 See supra note 42 and accompanying text.

n335 See supra notes 51-55 and accompanying text.

n336 See supra notes 235-51 and accompanying text.

n337 See supra notes 235-51 and accompanying text.

n338 See supra notes 184-202 and accompanying text.

n339 *Epperson v. Arkansas, 393 U.S. 97, 104 (1968)* (emphasis added).

n340 See supra notes 279-311 and accompanying text.

n341 See supra notes 279-311 and accompanying text.

n342 The Commonwealth of Massachusetts first enacted a law to ensure that the public was educated in 1647. See *McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516, 529 (Mass. 1993)*. This law "is credited with beginning the history of public education in America." Id.; see also supra notes 100-06 for a discussion of other factors evidencing Massachusetts' recognition of the importance of education.

n343 See supra notes 279-88 and accompanying text.

n344 See supra notes 292-311 and accompanying text.

n345 See supra Part IV.C.