A RIGHT TO LEARN?: IMPROVING EDUCATIONAL OUTCOMES THROUGH SUBSTANTIVE DUE PROCESS

> 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.
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> . . . Does segregation of children in public schools solely on the basis of race . . . deprive the children of the minority group of equal educational opportunities? We believe that it does.
>
> — Chief Justice Earl Warren[1]

Decades after the Supreme Court issued this bold declaration, the promise of *Brown v. Board of Education*[2] has fallen disappointingly short. Not only are schools still extremely segregated,[3] but in addition, predominantly minority schools, which also tend to be high poverty schools, have "substantially inferior resources"[4]: "High poverty schools have been shown to *increase educational inequality* for students in these schools because of problems such as a lack of resources, a dearth of experienced and credentialed teachers, lower parental involvement, and high teacher turnover."[5] Ironically, an educational system originally erected to minimize social and economic disparities[6] now simply may replicate, if not exacerbate, existing disparities. Thus, although *Brown* held out the promise of equal educational opportunity, the current state of affairs resembles that of the pre-*Brown* era[7] — a result of

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[1] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

[2] 347 U.S. 483.

[3] A study conducted by the Harvard Civil Rights Project reported that for the 2000 to 2001 school year, "almost three-fourths of black and Latino students attend[ed] schools that [were] predominantly minority. Less than one percent of white students attend[ed] 90–100% minority schools while about 40 percent of blacks and Latinos attend[ed] these schools." ERICA FRANKENBERG ET AL., THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? 28 (2003), *available at* http://www.civilrightsproject.harvard.edu/research/resego3/AreWeLosingtheDream.pdf.

[4] Derrick A. Bell, Jr., *The Unintended Lessons in* Brown v. Board of Education, 49 N.Y.L. SCH. L. REV. 1053, 1055 (2005) (citing FRANKENBERG ET AL., *supra* note 3).

[5] FRANKENBERG ET AL., *supra* note 3, at 35 (emphasis added).

[6] *See, e.g.*, HORACE MANN, END POVERTY THROUGH EDUCATION (1848), *reprinted in* HORACE MANN ON THE CRISIS IN EDUCATION 124 (Louis Filler ed., 1965) ("Education, then, beyond all other devises of human origin, is the great equalizer of the conditions of men, — the balance-wheel of the social machinery.").

[7] *See, e.g.*, JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS 4 (1991) ("[T]he nation, for all practice and intent, has turned its back upon the moral implications, if not yet the legal ramifications, of the *Brown* decision. The struggle being waged today, where there is any struggle being waged at all, is closer to the one that was addressed in 1896 in *Plessy v. Ferguson*, in which the court accepted segregated institutions for black people, stipulating only that they must be equal to those open to white people.").

the Supreme Court's retreat from its commitment to *Brown* in subsequent years.[8]

School reform efforts have attempted to navigate the obstacles created in the post-*Brown* era by exploring alternatives to integration for improving educational opportunity. This Note proposes another option for school reform: if education were recognized as a fundamental interest under the Federal Constitution, substantive due process[9] might provide a means for equalizing educational opportunities. Although the Due Process Clause[10] has traditionally been considered a limit on state action, the Supreme Court has imposed an affirmative duty on states to protect individual rights when the state has first undertaken to restrain the liberty of an individual. Hence, compulsory education laws, by impairing the liberty of students, could provide the starting point for imposing an affirmative duty on states to educate those students sufficiently. However, whereas most commentary has focused on the potential use of *DeShaney v. Winnebago County Department of Social Services*[11] in seeking a right to educational resources under substantive due process, this Note proposes instead using an earlier case, *Youngberg v. Romeo*,[12] as a model for recovery.

Part I details the path of post-*Brown* school reform, focusing on school finance litigation, and suggests how the Due Process Clause could be used to remedy the shortcomings of this litigation. Part II explores how the Supreme Court has employed the Due Process Clause

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[8] *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 99–101 (1995) (limiting remedial funding to once-segregated schools); Freeman v. Pitts, 503 U.S. 467, 489–90 (1992) (allowing courts to withdraw incrementally from supervision of desegregation decrees, even before full compliance has been achieved); Bd. of Educ. v. Dowell, 498 U.S. 237, 247–50 (1991) (requiring that courts begin to withdraw from the supervision of desegregation decrees); Milliken v. Bradley, 418 U.S. 717, 752 (1974) (limiting the ability of courts to impose interdistrict remedies to achieve desegregation absent evidence of de jure segregation in each district affected by the remedies); *see also* Gary Orfield, *Why Segregation Is Inherently Unequal: The Abandonment of* Brown *and the Continuing Failure of* Plessy, 49 N.Y.L. SCH. L. REV. 1041, 1044–47 (2005) (describing the Supreme Court's dismantling of *Brown* since 1991).

[9] The text of the Due Process Clause speaks only of the procedures that are required prior to depriving individuals of "life, liberty, or property." U.S. CONST. amend. V; *id.* amend. XIV, § 1. Nevertheless, it has taken on a substantive component that looks not only to procedures, but also to the content of laws. *See, e.g.*, Reno v. Flores, 507 U.S. 292, 301–02 (1993) (noting that a line of cases "interprets the Fifth and Fourteenth Amendments' guarantee of 'due process of law' to include a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest"); Poe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting) ("Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three.").

[10] U.S. CONST. amend. XIV, § 1.

[11] 489 U.S. 189 (1989).

[12] 457 U.S. 307 (1982).

to impose affirmative duties on the states to provide certain services to individuals in the context of prisons, mental institutions, and other custodial settings. Part III employs the custodial framework set out in *DeShaney* to determine the viability of a substantive due process right to educational resources and concludes that *DeShaney* ultimately falls short. Part IV then looks to *Youngberg* and examines the viability of a constitutional right to education under its analysis. Finally, Part V demonstrates how a right to education under *Youngberg* could vindicate claims for greater educational resources. Part VI concludes.

I. POST-*BROWN* SCHOOL REFORM EFFORTS

A. School Finance Litigation

When the Supreme Court abandoned the dream announced in *Brown*,[13] litigants sought to vindicate a right to equal educational opportunity through school finance litigation, focusing on the equalization of educational resources.[14] School finance litigation, however, suffered a blow in *San Antonio Independent School District v. Rodriguez*,[15] in which the Supreme Court declined to recognize education as a fundamental right under the Equal Protection Clause[16] and therefore upheld a state's unequal funding scheme.[17] Nevertheless, the Court did suggest that the complete denial of education could pose constitutional problems,[18] but because the funding scheme in *Rodriguez* clearly provided some education — even if minimal — the Court did not address that hypothetical situation.[19]

Nine years later, the Court considered the constitutional ramifications of an absolute denial of public education. In *Plyler v. Doe*,[20] the Court struck down a statute that denied public school enrollment to

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[13] *See* sources cited *supra* note 8.

[14] *See* Michael Heise, *Litigated Learning and the Limits of Law*, 57 VAND. L. REV. 2417, 2436–40 (2004).

[15] 411 U.S. 1 (1973).

[16] *Id.* at 37.

[17] *See id.* at 54–55. Public schools are financed by state and local funds, with the majority of funds traditionally coming from local taxes. The local contribution depends on local tax rates as well as local property values; hence, localities with lower property wealth or lower available tax revenues due to competing municipal needs contribute less money to public schools. *See* Heise, *supra* note 14, at 2436–37.

[18] *See Rodriguez*, 411 U.S. at 25 n.60 ("If elementary and secondary education were made available by the State only to those able to pay a tuition assessed against each pupil, there would be a clearly defined class of 'poor' people . . . who would be absolutely precluded from receiving an education. That case would present a far more compelling set of circumstances for judicial assistance than the case before us today.").

[19] *See id.* at 25 n.60, 36–37.

[20] 457 U.S. 202 (1982).

the children of illegal immigrants.[21] Although the basis of the holding was unclear,[22] the Court was clearly troubled by the complete denial of education: "[The statute] imposes a lifetime hardship . . . . 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."[23] Therefore, even if the Court has declined to raise education to fundamental status under its equal protection jurisprudence, the Court is obviously uncomfortable with a scheme that visits a total denial of education on a class of children,[24] suggesting that some minimal amount of education might be constitutionally required.

Shortly after the Court erected its roadblock in *Rodriguez*, litigants turned to state constitutions, bringing claims premised on state education and equal protection clauses[25] rather than pursuing the question left open in *Rodriguez*. The theories behind these lawsuits have varied, with litigants seeking either the equalization of resources or sufficient funding to provide an adequate level of education.[26] Results have been mixed: of the forty-five state-level school finance lawsuits that have been adjudicated, twenty-six have resulted in plaintiff victories.[27]

B. An Alternative to the Equal Protection Clause

For litigants seeking judicial relief in federal courts, or for litigants in states where school finance lawsuits have proven unsuccessful, the Due Process Clause presents an alternative means of establishing a constitutionally recognized right to education. Although the Supreme Court closed the door to according education fundamental status un-

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[21] *Id.* at 230.

[22] *See id.* at 244 (Burger, C.J., dissenting) ("[B]y patching together bits and pieces of what might be termed quasi-suspect-class and quasi-fundamental-rights analysis, the Court spins out a theory custom-tailored to the facts of [this case].").

[23] *Id.* at 223 (majority opinion).

[24] *Cf.* Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 458–62 (1988) (holding that access to schooling can be burdened, but not addressing whether access can be denied completely).

[25] *See* James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 266 (1999). "State constitutions, unlike Federal Constitutional language, contain an explicit reference to education." Anna Williams Shavers, *Rethinking the Equity vs. Adequacy Debate: Implications for Rural School Finance Reform Litigation*, 82 NEB. L. REV. 133, 150 (2003); *see also id.* at 150 n.62 (listing state constitutions containing education clauses).

[26] For a description of the differences behind these theories, as well as the results under each, see Ryan, *supra* note 25, at 266–71.

[27] NAT'L ACCESS NETWORK, "EQUITY" AND "ADEQUACY" SCHOOL FUNDING COURT DECISIONS (2006), http://www.schoolfunding.info/litigation/equityandadequacytable.pdf. However, even when state courts vindicate school finance claims, actual remedies may fall short of equalizing educational resources. *See* Heise, *supra* note 14, at 2438–40.

der the Equal Protection Clause, it might find recognizing this right under the Due Process Clause less problematic.

The *Rodriguez* Court had difficulty discerning a limiting principle in guaranteeing educational rights under the Equal Protection Clause: "[T]he logical limitations on appellees' nexus theory are difficult to perceive. How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter?"[28] The Court feared that recognizing education as a fundamental right would thus create a slippery slope, such that any governmental service or benefit could be deemed fundamental simply because it might be necessary to effectuate other protected liberty interests. By contrast, the Due Process Clause provides an inherent limiting principle: it is triggered only when the government has first infringed on an individual's personal liberty. Thus, the limited circumstances in which due process can be invoked address the concerns raised in *Rodriguez*.

Moreover, although substantive due process rests on a shaky foundation,[29] recent Supreme Court decisions not only have reaffirmed its legitimacy,[30] but also might have expanded its scope. In particular, Justice Kennedy has been willing to entertain the idea that the sources of the rights recognized under substantive due process are not limited to "history and tradition" but can also include "evolving social trends."[31] However, recognizing that substantive due process remains a viable basis for recovery is just the starting point for vindicating educational rights; attention must also be paid to *when* the Court has invoked substantive due process to impose affirmative duties on states.

II. NEGATIVE VERSUS AFFIRMATIVE RIGHTS

The Supreme Court has repeatedly acknowledged that the U.S. Constitution is a constitution of negative, not positive, rights: "[The Due Process Clause] forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other

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[28] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973). The nexus argument posits that some rights are fundamental, even if they are not mentioned explicitly in the Constitution, because they are "essential to the effective exercise" of other fundamental rights. *Id.* at 35.

[29] *See* RICHARD H. FALLON, JR., THE DYNAMIC CONSTITUTION 81–86 (2004) (describing the critique that the Due Process Clause was originally meant to ensure only procedural fairness).

[30] *See* Lawrence v. Texas, 539 U.S. 558, 564 (2003); Troxel v. Granville, 530 U.S. 57, 65 (2000).

[31] Lisa K. Parshall, *Redefining Due Process Analysis: Justice Anthony M. Kennedy and the Concept of Emergent Rights*, 69 ALB. L. REV. 237, 238–49 (2005); *see also* Wilson Huhn, *The Jurisprudential Revolution: Unlocking Human Potential in* Grutter *and* Lawrence, 12 WM. & MARY BILL RTS. J. 65, 68–77 (2003).

means."[32] The Court has, however, recognized a limited set of exceptions to this rule, acknowledging that affirmative duties may exist when a state has initially impaired a liberty interest. Applied to education, this framework might similarly impose an affirmative duty upon states: compulsory education laws that restrain a student's liberty might create corresponding state obligations.

A. Recognition of an Affirmative Duty

1. Prisons. — In 1976, the Court, in *Estelle v. Gamble*,[33] invoked the Eighth Amendment prohibition on cruel and unusual punishment to recognize that states have an affirmative duty to provide medical treatment for prisoners: the Eighth Amendment prohibits "deliberate indifference to serious medical needs of prisoners."[34] The Court reasoned that a state's infringement of a prisoner's liberty precluded the prisoner from seeking medical treatment for himself. The government has an "obligation to provide medical care for those whom it is punishing by incarceration" because the restriction of their liberty renders them unable to care for themselves.[35]

2. Civil Commitment. — Six years later, the Court extended the *Estelle* principle to civilly committed patients in *Youngberg v. Romeo*.[36] Recognizing that such patients are "entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish,"[37] the Court turned to the Due Process Clause to determine the substantive rights of involuntarily committed mentally retarded persons.[38] The Court held that such patients "enjoy[] constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and *such training* as may be required by these interests."[39] Thus, not only was the State obligated to keep patients safe, but it was

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[32] DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195 (1989); *see also* Harris v. McRae, 448 U.S. 297, 317–18 (1980) ("Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.").

[33] 429 U.S. 97 (1976).

[34] *Id.* at 104.

[35] *Id.* at 103. Notably, the State's affirmative duty in prisons is unrelated to the institution's purpose — the obligation arises not from the prison's purpose of imprisonment, but rather from its incapacitation of the individual.

[36] 457 U.S. 307 (1982).

[37] *Id.* at 322.

[38] *Id.* at 324.

[39] *Id.* (emphasis added). Specifically, the Court qualified the right to treatment as a right related to securing an individual's liberty interest in "safety and freedom from undue restraint." *Id.* at 319. Thus, the patient's right to training derives directly from the patient's other fundamental interests.

also obligated to provide them with "minimally adequate training" in an effort to effectuate their "liberty interests in safety and freedom from unreasonable restraints."[40] Notably, in reaching this conclusion, the Court employed a balancing test, weighing the "individual's interest in liberty against the State's asserted reasons for restraining individual liberty."[41] As such, the level of training afforded to patients is subjected only to a reasonableness test,[42] not to heightened scrutiny.

In his concurrence, Justice Blackmun suggested that a committed individual should have an independent constitutional right to "habilitation" beyond that necessary to secure the recognized liberty interests of "safety and freedom from unreasonable restraint."[43] Justice Blackmun would have required "such training as is reasonably necessary to prevent a person's pre-existing self-care skills from *deteriorating* because of his commitment."[44]

3. Other Settings. — In *DeShaney*, the Court acknowledged that there may be certain situations, aside from criminal and civil commitment, that trigger a state's affirmative duty to provide protections and services for individuals. Specifically, *DeShaney* involved a state's failure to protect a four-year-old boy from being brutally beaten by his father.[45] In declining to find that the State had an affirmative duty to protect the child,[46] the Court summarized the principles enunciated in *Estelle* and *Youngberg*: "Taken together, [these cases] stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."[47] Because the State in *DeShaney* had not imposed any restriction on the child's liberty,[48] the State had no corresponding affirmative duties and hence was under no obligation to protect the child from private parties.[49]

In contrast to its analysis in *Youngberg*, in which the Court focused on the conditions under which an individual's liberty can be restricted

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[40] *Id.* at 322.

[41] *Id.* at 320.

[42] *See id.* at 322–23.

[43] *Id.* at 327 (Blackmun, J., concurring).

[44] *Id.*

[45] *See* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 191 (1989).

[46] *See id.* at 194.

[47] *Id.* at 199–200.

[48] Although Winnebago County's Department of Social Services had been involved in the child's case, investigating claims of child abuse and even temporarily taking the child into custody, the Court relied on the fact that the child was in his father's custody at the time of the beating. *See id.* at 201–02.

[49] "The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *Id.* at 200.

and the State's corresponding duties, the Court in *DeShaney* focused on when a state's obligation to protect individuals from private violence arises. Arguably, requiring that a state protect individuals from private parties imposes a greater obligation upon states than specifying the types of conditions under which an individual can be restrained.[50] As such, the Court erected a fairly high barrier to triggering a state's duty to protect citizens from private parties.

After *DeShaney*, it is clear that prevailing on a claim that a state has an obligation to protect its citizens against private violence will be difficult; what remains unclear is the type of obligation that a state acquires when it restricts an individual's liberty. While the contours of state affirmative duties remain ambiguous, the *Estelle-DeShaney* line of cases does indicate that affirmative duties may be imposed on a state when the State has restricted an individual's liberty interests. Thus, in the context of education, compulsory laws mandating school attendance might be the starting point in establishing a state's affirmative obligations.

B. Compulsory Education Laws: Restraints on Liberty?

In 1925, the Supreme Court, in *Pierce v. Society of Sisters*,[51] recognized compulsory education laws as a valid exercise of state power: "No question is raised concerning the power of the State . . . to require that all children of proper age attend some school . . . ."[52] Today, every state has compulsory education laws mandating that children within a certain age range attend school.[53] Even though there are undoubtedly compelling state reasons for requiring that children attend schools — "[e]ducation in public schools is considered by many to furnish desirable and even essential training for citizenship"[54] — the existence of a

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[50] In the former situation, the state may not even be aware that it has obligations because its duties are tied to the actions of private third parties. In the latter situation, however, the State's obligations are triggered only when the State has first made the choice to restrain an individual's liberty.

[51] 268 U.S. 510 (1925).

[52] *Id.* at 534. The issue in *Pierce* was whether a state could compel attendance at *public* schools. *See id.* at 530.

[53] MARK G. YUDOF ET AL., EDUCATION POLICY AND THE LAW 1 (4th ed. 2002); *see also* JIM JOHNSON ET AL., INTRODUCTION TO THE FOUNDATIONS OF AMERICAN EDUCATION 5 (1966) (describing the rise of compulsory education laws).

[54] State v. Hoyt, 146 A. 170, 170 (N.H. 1929); *see also* Concerned Citizens for Neighborhood Sch. v. Bd. of Educ., 379 F. Supp. 1233, 1237 (E.D. Tenn. 1974); *cf.* MICHAEL B. KATZ, CLASS, BUREAUCRACY, AND SCHOOLS 48 (1971) ("If everyone was taxed for school support, if this was justified by the necessity of schooling for the preservation of urban social order, if the beneficial impact of schooling required the regular and prolonged attendance of all children, and finally, if persuasion and a variety of experiments had failed to bring all the children to school — then, clearly, education had to be compulsory.").

compelling state justification does not negate the fact that the student has a liberty interest that is being burdened.[55]

Requiring that students attend school for the majority of their waking day to receive government-endorsed instruction can be classified as a restriction on personal liberty. As the Court acknowledged in *Meyer v. Nebraska*,[56] an individual has many liberty interests aside from physical restraint of the body[57]:

> Without doubt, [due process] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, *to acquire useful knowledge* . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[58]

Compulsory education laws infringe on a student's undeniably broad liberty interests by precluding the student from pursuing activities that would otherwise be possible and by forcing a certain type of instruction upon the student. Although compulsory education laws are socially beneficial and justifiable, they restrain an individual's liberty and thereby might trigger a state's affirmative obligation to provide certain services to those citizens it chooses to confine.

Specifically, a state's interest in restricting an individual's liberty is not unlimited, but rather must be tempered by the individual's liberty interest. When these two interests are in tension, the Court employs a balancing test[59] that looks to whether the government is actually achieving its "asserted" goal[60] — be that goal to punish, to protect the public, or, presumably, to educate. Hence, although a state may legitimately restrain an individual's liberty for the purpose of educating her, the restriction must be related to its governmental purpose. If it is

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[55] Even if the liberty interests of minors may be restricted more justifiably than those of adults, the Court has continuously upheld the due process interests of minors in the school context. *See, e.g.*, Ingraham v. White, 430 U.S. 651, 674 (1977) (recognizing a student's liberty interest in "freedom from bodily restraint and punishment"); Goss v. Lopez, 419 U.S. 565, 576 (1975) (recognizing a student's property interest in education and personal reputation).

[56] 262 U.S. 390 (1923). Although *Meyer* was decided more than eighty years ago, its principles were reaffirmed recently in *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000).

[57] *See* Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954) ("Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective."); *see also* Bd. of Regents v. Roth, 408 U.S. 564, 572 (1972) (citing *Meyer*, 262 U.S. at 399).

[58] *Meyer*, 262 U.S. at 399 (emphasis added).

[59] *See* Youngberg v. Romeo, 457 U.S. 307, 320 (1982); *cf.* Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (noting that the nation, over time, has struck a balance between "liberty of the individual" and "the demands of organized society").

[60] *See* Bell v. Wolfish, 441 U.S. 520, 539 (1979) ("Conversely, if a restriction or condition is not reasonably related to a legitimate goal — if it is arbitrary or purposeless — a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees.").

not reasonably related, then the restriction may trigger additional affirmative duties to ensure that the restriction does in fact serve its stated purpose, as suggested in the *Estelle-DeShaney* line of cases. The contours of these possible state duties are unclear and merit further exploration.

III. APPLYING *DESHANEY* TO PUBLIC EDUCATION

DeShaney is the Supreme Court's most recent pronouncement on the scope of affirmative rights and when such rights are triggered. Although *DeShaney* did not, on its face, address education, many commentators have applied its analysis to public schools. However, much of this scholarship has focused on a school's duty to provide safer school environments by protecting students from private harms rather than on the types of services that the school must provide on account of its restricting students' liberty interests.

A. Duty To Protect Against Private Parties: "Special Relationship" or "Custody"

Since the Court's decision in *DeShaney*, commentators have suggested that the "special relationship" that *DeShaney* recognized imposes on schools an affirmative obligation to protect students from harms inflicted by private parties — usually other students.[61] Nevertheless, such claims are unlikely to prevail given courts' reluctance to recognize compulsory education laws as sufficiently custodial to trigger a state's affirmative duties to protect students from private parties. Indeed, although the Supreme Court has yet to address whether compulsory education triggers the *DeShaney* obligation to protect, those lower courts that have weighed in on the question have suggested that no such duty exists:

> To date, every federal circuit court of appeal to address the question of whether compulsory school attendance laws create the necessary custodial relationship between school and student to give rise to a constitutional

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[61] *See* Alison Bethel, Note, *Keeping Schools Safe: Why Schools Should Have an Affirmative Duty To Protect Students from Harm by Other Students*, 2 PIERCE L. REV. 183 (2004) (asserting that schools should have an affirmative duty to protect students from harm by private parties); Peter Gallagher, Note, *The Kids Aren't Alright: Why Courts Should Impose a Constitutional Duty on Schools To Protect Students*, 8 GEO. J. ON POVERTY L. & POL'Y 377 (2001) (same); Susanna M. Kim, Comment, *Section 1983 Liability in the Public Schools after* DeShaney*: The "Special Relationship" Between School and Student*, 41 UCLA L. REV. 1101 (1994) (same); Thomas J. Sullivan & Richard L. Bitter, Jr., *Abused Children, Schools, and the Affirmative Duty To Protect: How the* DeShaney *Decision Cast Children into a Constitutional Void*, 13 GEO. MASON U. CIV. RTS. L.J. 243 (2003) (same).

> duty to protect students from harm by non-state actors has rejected the existence of any such duty.[62]

In declining to recognize a custodial relationship between schools and students, courts have relied on the distinction between the types of restraints imposed by schools and those imposed by prisons and mental institutions. The nature of the restrictions, courts have concluded, differ in extent and type. Whereas mental patients and prisoners are restrained on a twenty-four hour basis, students regain their liberty once the school day is over. Moreover, students are not so restrained that they must rely exclusively on the State for care and protection.[63] Without this custodial or "special relationship," there is no corresponding state duty to improve school environments and to protect students from harms created by private parties.[64] Thus, if the rulings of these courts are any indication, it is unlikely that *DeShaney* will provide a foundation for claims seeking greater resources to create safer school environments.

B. Duty To Protect Against State-Created Harms

Although *DeShaney* is unlikely to impose upon states the affirmative obligation to protect students from private harm, it might suggest that a state-created danger triggers other affirmative state obligations. Indeed, *DeShaney* "leaves the door open for liability in situations where the state creates a dangerous situation or renders citizens more vulnerable to danger."[65] Under this theory, claimants would have to allege that a wrongdoing was at the hands of a state actor and that the State therefore has an affirmative duty to protect against the harm that it created:

> Such plaintiffs would not be asking the court to find that the state had a duty to intervene where a private actor posed a risk to students, as in *DeShaney*. Nor, importantly, would these plaintiffs be claiming that the state has a general duty to provide services to those within its border . . . .

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[62] Wright v. Lovin, 32 F.3d 538, 540 (11th Cir. 1994); *see also* Stevens v. Umsted, 131 F.3d 697, 703 (7th Cir. 1997) (listing cases).

[63] *See Wright*, 32 F.3d at 540 ("[M]andatory attendance at a public high school simply does not restrict one's liberty in the same sense that incarceration in prison or involuntary commitment in a mental institution does. In contrast, a school child and the child's parents retain the liberty to provide for the child's basic needs."); Graham v. Indep. Sch. Dist., 22 F.3d 991, 994 (10th Cir. 1994); *cf.* Ingraham v. Wright, 430 U.S. 651, 670 (1977) ("The schoolchild has little need for the protection of the Eighth Amendment. Though attendance may not always be voluntary . . . [t]he openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner.").

[64] *See, e.g.*, *Stevens*, 131 F.3d at 704; *Wright*, 32 F.3d at 540; *Graham*, 22 F.3d at 994.

[65] Reed v. Gardner, 986 F.2d 1122, 1125 (7th Cir. 1993).

> Rather, the claim is that the state may not, consistent with the Due Process Clause, confine children to facilities which threaten their health.[66]

Although this theory arguably obliterates the custodial requirement, another requirement is raised in its place — that the danger be sufficiently state-created. In *Monell v. Department of Social Services*,[67] which involved a § 1983 claim, the Supreme Court held that municipalities are liable for the deeds of state actors only when those deeds are sufficiently attributable to a governmental agency, such that the actions were taken pursuant to governmental policy or custom.[68] Practically speaking, establishing who, or which entities, can be held liable will determine the scope of the remedy; if liability is imposed only on an individual teacher or administrator, then the remedy will correspondingly be limited to recovery from that individual. In contrast, litigants seeking schoolwide reform would need to establish that the state-created harm resulted from a schoolwide policy.

It is unclear how the intricacies of *Monell* will play out in school reform claims.[69] Nevertheless, the state-created danger doctrine provides a more promising path toward recovery than *DeShaney*'s special relationship exception to state affirmative duties. Specifically, curricula, teaching methods, and educational resources are often part of a larger governmental policy; if these factors contribute to a state-created harm, such as the harm of being deprived of a minimal level of education, then a state could arguably be held responsible for its failings because it created the danger. The success of such claims, however, will depend on the willingness of courts to recognize the deprivation of an adequate education, or the deprivation of the ability to compete in the job market, as a harm sufficient to trigger state obligations. Although obtaining such recognition might be a challenge in itself, seeking relief through the state-created harm doctrine at least would avoid the obstacle of establishing a custodial relationship between students and schools. Thus, as between *DeShaney*'s two paths — protection against private harms and protection against state-created harms — courts might be more willing to entertain claims under the latter theory.

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[66] Rebecca Aviel, *Compulsory Education and Substantive Due Process: Asserting Student Rights to a Safe and Healthy School Facility*, 10 LEWIS & CLARK L. REV. 201, 221 (2006).

[67] 436 U.S. 658 (1978).

[68] *See id.* at 691. *Monell* thus limited state liability for § 1983 claims.

[69] In other contexts, these claims have entailed some complexities. *See, e.g.*, Canton v. Harris, 489 U.S. 378, 388 (1989) (finding that failure to train police officers properly may result in municipal liability only if the failure "amounts to deliberate indifference to the rights" of the city's inhabitants); Pembaur v. Cincinnati, 475 U.S. 469, 483 (1986) (plurality opinion) (finding that only municipal officers with "final policymaking authority" may subject the government to liability).

C. DeShaney's *Implications: Affirmative Obligations in the School Context and the Promise of* Youngberg

Although *DeShaney* may provide little hope for improving educational opportunities for students by creating safer environments, pursuing a claim premised on state-created harm might prove a more fruitful approach. Even though this path has not been foreclosed, much of its success will depend on whether courts entertain the claim that deprivation of an adequate or equal education is a state-created harm sufficient to trigger affirmative obligations on the part of a state.

In light of these concerns, a more promising approach might be a return to *Youngberg*, in which the Court held that a minimum level of treatment was required for involuntarily committed mental patients. Although decided before *DeShaney*, *Youngberg* has been consistently reaffirmed in later Supreme Court cases,[70] and it can be understood as standing for a proposition different from that of *DeShaney*.[71] In particular, *Youngberg* can be interpreted to mandate a balancing between a state's asserted interest and an individual's liberty interest whenever the State restrains an individual's liberty, and this balancing might impose obligations upon the State. As applied to mandatory schooling, *Youngberg* supports the proposition that a state's restriction on a student's liberty for the purpose of education might be justified, but also might impose special obligations on the State.

IV. APPLYING *YOUNGBERG* TO EDUCATION

Although *Youngberg* established a foundation by recognizing a state's obligation to provide a minimal amount of training to preserve certain liberty interests, the Supreme Court left unanswered other questions regarding the boundaries of this obligation. Nevertheless, two differing ideas of due process can be gleaned from the majority and concurring opinions, suggesting two alternative bases from which one might construct a substantive due process right to education.

A. *Commitment Must Be Related to the Purpose of the Restraint*

Although the *Youngberg* majority recognized a constitutionally protected interest in a minimal amount of training for civilly committed patients, the precise contours of this right are unclear. At the most basic level, it would appear that the Court was primarily concerned with

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[70] *See, e.g.*, Sacramento v. Lewis, 523 U.S. 833, 852 n.12 (1998); Collins v. City of Harker Heights, 503 U.S. 115, 127 (1992); Washington v. Harper, 494 U.S. 210, 221–22 (1990).

[71] *DeShaney* concerns when a state must protect an individual from private harms, whereas *Youngberg* concerns the types of conditions under which an individual's liberty can be restrained.

training that would secure the individual's other recognized interests in safety and freedom from bodily restraint:

> In this case, therefore, the State is under a duty to provide respondent with such training as an appropriate professional would consider reasonable to ensure his safety and to facilitate his ability to function free from bodily restraints. It may well be unreasonable not to provide training when training could significantly reduce the need for restraints or the likelihood of violence.[72]

In reaching this conclusion, however, the Court invoked a balancing test, looking to both state and individual interests.[73] In undertaking this balancing, the Court necessarily examined the relationship between the State's restriction on liberty and the purported state interest, upholding "those restrictions on liberty that [are] reasonably related to legitimate government objectives."[74] In particular, the Court acknowledged as one of the State's justifications for confining its patients the need to "protect them as well as others from violence."[75] But as it recognized this state purpose as legitimate, the Court also imposed a corresponding duty upon the State to ensure that its confinement was in accordance with this goal; the State had a duty to provide training to ensure that these safety interests were secured.[76] Thus, underlying the analysis and result in *Youngberg* was a concern that the restrictions on the individual's liberty interests be related to the purpose of confinement; the Court accordingly imposed a state duty to provide training for its patients in pursuit of the State's asserted interest.

Similarly, Justice Blackmun's concurrence vocalized the concern that if restraint of liberty is undertaken for a specific purpose, then the restraint must be related to that purpose. Justice Blackmun, picking up on language from *Jackson v. Indiana*[77] — "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is commit-

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[72] Youngberg v. Romeo, 457 U.S. 307, 324 (1982); *see also* Diane M. Weidert, *Constitutional Rights of the Involuntarily Committed Mentally Retarded After* Youngberg v. Romeo, 14 ST. MARY'S L.J. 1113, 1126–28 (1983).

[73] *See Youngberg*, 457 U.S. at 320 ("In determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance 'the liberty of the individual' and 'the demands of an organized society.'" (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting))); *id.* at 321 ("[W]hether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests."); *id.* at 324 ("In deciding this case, we have weighed those postcommitment interests cognizable as liberty interests . . . against legitimate state interests . . . .").

[74] *Id.* at 320; *see also id.* at 324 ("Such conditions of confinement would comport fully with the purpose of respondent's commitment.").

[75] *Id.* at 320.

[76] *See id.* at 324.

[77] 406 U.S. 715 (1972).

ted"[78] — implied that it would not be constitutionally permissible for a state to restrain an individual for "care and treatment" and then refuse such treatment:

> If a state court orders a mentally retarded person committed for "care *and* treatment," however, I believe that due process might well bind the State to ensure that the conditions of his commitment bear some reasonable relation to each of those goals. In such a case, commitment without any "treatment" whatsoever would not bear a reasonable relation to the purposes of the person's confinement.[79]

Because this question of a right to training unrelated to freedom from restraint was never properly raised by the petitioner, the majority in *Youngberg* declined to address the issue.[80] Yet, in recognizing a right to a minimal level of training, the majority was clearly concerned with ensuring that a relationship existed between the confinement and the purpose of confinement. The difference between the majority and the concurrence is that whereas the concurrence might have recognized an absolute right to training if an individual were confined for the explicit purpose of treatment, the majority tempered such a right to training with a reasonableness requirement: "In determining what is 'reasonable' — in this and in any case presenting a claim for training by a State — we emphasize that courts must show deference to the judgment exercised by a qualified professional."[81]

Regardless of the type or level of treatment that would be accorded under either the majority or the concurring opinion, it is notable that underlying both opinions was a concern that the nature of the restrictions on an individual's liberty bear some relation to the State's asserted purpose for restraining his liberty. This line of thinking can be readily applied to the education context: if a state restricts an individual's liberty for the express purpose of educating that individual and then fails to educate her, then the nature of the restraint bears no reasonable relation to the purpose of the restraint, and due process is violated. Hence, litigants might assert a substantive due process right to a minimal level of education, given that compulsory education laws and the resulting restrictions on students' liberty are undertaken for the express purpose of education.

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[78] *Id.* at 738.

[79] *Youngberg*, 457 U.S. at 326 (Blackmun, J., concurring).

[80] *Id.* at 318 (majority opinion) ("If, as seems the case, respondent seeks only training related to safety and freedom from restraints, this case does not present the difficult question whether a mentally retarded person, involuntarily committed to a state institution, has some general constitutional right to training *per se*, even when no type or amount of training would lead to freedom."). In two earlier cases, the Supreme Court also declined to address a constitutional right to treatment, finding that the claim was improperly raised. *See* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 31–32 (1981); O'Connor v. Donaldson, 422 U.S. 563, 573 (1975).

[81] *Youngberg*, 457 U.S. at 322.

B. Independent Claim to Treatment: Justice Blackmun's Concurrence

A second principle that can be gleaned from Justice Blackmun's concurrence is the right to a level of training that would enable confined individuals to realize their personal autonomy interests. Specifically, the latter half of the concurrence suggested that the State has an obligation to provide training that will help maintain a patient's preexisting self-care skills,[82] even if those skills would have deteriorated in the absence of confinement. Although this right to training seemingly rested on the notion that the State's confinement cannot cause the deterioration of the skills that the individual had prior to entering the institution, there is language suggesting that Justice Blackmun had a notion of personal autonomy and human potential unrelated to the confinement:

> [I]f the testimony establishes that respondent possessed certain basic self-care skills when he entered the institution, and was *sufficiently educable* that he could have maintained those skills with a certain degree of training, then I would be prepared to listen seriously to an argument that petitioners were constitutionally required to provide that training, even if respondent's safety and mobility were not imminently threatened by their failure to do so.[83]

Apparently, the right to training that Justice Blackmun would have recognized is unrelated to the State's asserted purpose of confining the individual; instead, Justice Blackmun was concerned with the individual's potential — specifically, whether the individual is "sufficiently educable." The language refers to the individual's preexisting skills, but even if the preexisting skills would have naturally deteriorated — absent the individual's confinement — the State would still have an independent obligation to train the individual, so long as she could be trained.[84] Justice Blackmun reasserted this principle later in his opinion, explaining that the respondent could assert a legal claim to habili-

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[82] *Id.* at 327–29 (Blackmun, J., concurring).

[83] *Id.* at 329 (emphasis added); *see also id.* at 327 ("If a person could demonstrate that he entered a state institution with minimal self-care skills, but lost those skills after commitment because of the *State's unreasonable refusal to provide him training*, then . . . he has alleged a loss of liberty quite distinct from — and as serious as — the loss of safety and freedom from unreasonable restraints." (emphasis added)). The loss of liberty recognized by Justice Blackmun is premised not on the State's depriving the individual of preexisting skills through its confinement, but rather on the State's refusal to provide the training necessary to maintain those skills.

[84] To clarify, this interpretation does not require that the State provide training to an individual to secure skills beyond those that the individual already had upon arriving at the institution. *See id.* at 329 ("If expert testimony reveals that respondent was so retarded when he entered the institution that he had no basic self-care skills to preserve, or that institutional training would not have preserved whatever skills he did have, then I would agree that he suffered no additional loss of liberty even if petitioners failed to provide him training.").

tation "to maintain those basic self-care skills necessary to his *personal autonomy*."[85] Because this theory looks to an individual's autonomy interests rather than the nature of the State's restriction, it essentially imposes upon the State an obligation to harness an individual's potential to exercise some degree of personal autonomy.

Extending Justice Blackmun's idea of substantive due process to education implies that the State has an obligation — unrelated to the State's impairment of an individual's liberty — to provide training so as to realize an individual's potential to enjoy some level of personal autonomy. Under this analysis, schools would have a duty to educate students to the extent necessary for the students to enjoy their personal autonomy, which might mean educating a student either to her potential or to a certain minimal level. Justice Blackmun's theory is the more liberal of the two ideas of due process set forth in *Youngberg*, and might also be the least likely to be adopted since it comes from a concurring opinion. Nevertheless, the ideals behind Justice Blackmun's concurrence provide a model for how states should conceive of their obligations in public education.

C. Employing Youngberg *To Vindicate School Reform Claims: Which Path To Take?*

The two concepts of due process gleaned from *Youngberg* provide alternative routes for pursuing a right to education. Under the first theory, a State's restriction of an individual's liberty must be related to the state's purported rationale for the restraint; hence, if a state undertakes to restrain an individual's liberty through compulsory education laws for the express purpose of educating that individual, then the State has a corresponding duty to educate that individual. Under the second theory, the State has a per se obligation to train, arising from its obligation to help an individual exercise her personal autonomy; correspondingly, this obligation would apply to schools as well. Although the latter theory has greater appeal, the former represents the actual state of the law, as a state's obligation is triggered by its initial restraint on an individual's liberty. Thus, claims seeking to vindicate a right to education should pursue this "reasonably related" theory, asserting that states, in restraining an individual's liberty for the purpose of educating that individual, have a corresponding obligation to educate that individual.

The popularity of this "reasonably related" approach in court decisions and legal scholarship lends further support to its viability as a

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[85] *Id.* at 328 (emphasis added); *see also id.* at 327 ("For many mentally retarded people, the difference between the capacity to do things for themselves within an institution and total dependence on the institution for all of their needs is as much liberty as they ever will know.").

means of vindicating education claims. Notably, even before the Supreme Court's decision in *Youngberg*, some lower federal courts had begun to recognize that civil commitment for the purpose of rehabilitation would offend due process if the State failed to provide the committed individual with treatment. In *Rouse v. Cameron*,[86] the District of Columbia Circuit condemned "involuntary confinement without treatment."[87] Although *Rouse* rested on a statutory provision,[88] the court recognized that even absent the statutory provision, civil commitment without a corresponding state obligation to treat would raise constitutional concerns.[89] Some other courts had expressed similar sentiments.[90] As the well-known *Wyatt v. Stickney*[91] decision explained: "To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process."[92] This principle — that confinement for purposes of treatment gives rise to a corresponding obligation to treat — comes from the long-recognized due process requirement that "legislative means must rationally promote legislative ends,"[93] and has been consistently reiterated in the academic literature.[94] Hence, *Youngberg*'s "reasonably related" requirement rests on a solid foundation and provides a promising approach for those seeking a right to education under substantive due process. Under this theory, a claimant would assert that in restricting a student's liberty through compulsory education laws for the purpose of education, the State acquires a corresponding duty to educate the student.

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[86] 373 F.2d 451 (D.C. Cir. 1967).

[87] *Id.* at 455.

[88] *See id.*

[89] *See id.*

[90] *See* Clark v. Cohen, 794 F.2d 79, 94 (3d Cir. 1986) ("[I]t violates the tenets of fundamental fairness embodied in the due process clause for the state to deprive a person of her or his liberty for the stated purpose of training that person, and then to fail even to attempt to give training."); Covington v. Harris, 419 F.2d 617, 625 (D.C. Cir. 1969) ("[T]he principal justification for involuntary hospitalization is the prospect of treatment, and a failure to provide treatment would present 'serious constitutional questions.'" (quoting *Rouse*, 373 F.2d at 455)).

[91] 325 F. Supp. 781 (M.D. Ala. 1971), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

[92] *Id.* at 785.

[93] John H. Garvey, *Freedom and Choice in Constitutional Law*, 94 HARV. L. REV. 1756, 1788 n.140 (1981).

[94] *See, e.g.*, *id.*; Roy G. Spece, Jr., *Preserving the Right to Treatment: A Critical Assessment and Constructive Development of Constitutional Right to Treatment Theories*, 20 ARIZ. L. REV. 1, 5–12 (1978); *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1324–29 (1974).

V. THE RIGHT TO EDUCATION UNDER SUBSTANTIVE DUE PROCESS

A. Explaining the Right to Education Under Youngberg

Even if *Youngberg* can be understood as recognizing a substantive due process interest in a minimal level of education, the question of how to determine the required level of training — or education — remains. In *Youngberg*, the Court required minimally adequate training but left the details of such training to professional judgment.[95] In doing so, the Court repeatedly affirmed the need to defer to the judgment of professionals.[96] Notably, lower federal courts have followed the Court's lead in *Youngberg*, granting substantial deference to professional judgment.[97] It thus seems unlikely that any claim seeking to prove the inadequacy of treatment will prevail; there seems to be little hope for vindicating claims to greater educational rights so long as *some* professional judgment is exercised in the administration of education. There is, however, a limited exception to courts' broad deference to professional judgment, and this exception, in combination with the No Child Left Behind Act (NCLB),[98] might provide a more viable basis for recognizing educational rights.

Indeed, the Court has noted an exception to the presumptive validity of professional judgments: "[L]iability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."[99] Thus, any substantial departure from professional norms and practices is not entitled to the presumption of validity. Specifically, if the claimant makes a showing that the State's practices do not fall within the spectrum of relevant professional practices and standards, and if the State fails to respond with evidence demonstrating professional support behind its practices, then these practices will

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[95] *See supra* p. 1337.

[96] *See* Youngberg v. Romeo, 457 U.S. 307, 322 (1982) ("[C]ourts must show deference to the judgment exercised by a qualified professional."); *id.* at 323 ("[T]he decision, if made by a professional, is presumptively valid."); *id.* at 324 ("[D]ecisions made by the appropriate professional are entitled to a presumption of correctness.").

[97] *See, e.g.*, Jackson v. Fort Stanton Hosp. & Training Sch., 964 F.2d 980, 991–92 (10th Cir. 1992); Doe v. Gaughan, 808 F.2d 871, 884–85 (1st Cir. 1986); Woe v. Cuomo, 729 F.2d 96, 105–06 (2d Cir. 1984).

[98] Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.).

[99] *Youngberg*, 457 U.S. at 323.

not be deemed reasonable.[100] Therefore, claimants can use other schools' practices as well as educational standards in making the claim that the education a state provides fails to meet *Youngberg*'s requirements. If the education provided falls outside of general education practices and standards, claimants might be able to establish a violation of *Youngberg*'s affirmative obligations.

B. How the Youngberg *Right to Education Would Operate*

Bringing together *Youngberg*'s affirmative state duties with the standards movement[101] and NCLB provides a promising path for litigants seeking to vindicate school reform claims. Under NCLB, states are charged with the responsibility of setting "challenging" standards and assessments in reading, math, and science.[102] Moreover, schools are required to make adequate yearly progress (AYP), with an increasing number of students meeting proficiency requirements in each succeeding year and with one hundred percent of students achieving proficiency in the year 2012.[103]

Hence, NCLB provides one method of defining the level of education required under *Youngberg*. Schools that fall short of meeting state standards arguably fall within the limited exception to deference to professional judgment: when schools do not meet these standards, the level of education that is provided can be seen as a "substantial departure" from professional practices and standards. In addition, the standards — which are being set by the states — reflect state judgments of what public education should provide, and if schools fail to meet these standards, then schools are not educating their students. Under these circumstances, the restraint of compulsory education laws is unreasonable because the restraint is not achieving its asserted purpose of educating students, at least not according to state definitions.

In fact, this sort of strategy has been used in previous attempts to increase educational resources: by pointing to educational standards, litigants have provided courts with a sense of how, and how much, to

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100 *See, e.g.*, Santana v. Collazo, 793 F.2d 41, 47–48 (1st Cir. 1986) (remanding for a determination of the changes that would be required to bring a juvenile detention center's use of isolation units into line with professional standards).

101 The standards movement gained prominence in the 1980s in response to the reported mediocrity of American public schools. "Standards-based reform promised to raise the academic bar by requiring all schools within a state to meet uniform, challenging standards." James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 938 (2004); *see also id.* at 938–44. The standards movement converged with adequacy lawsuits, allowing courts to define an "adequate" level of education with reference to state standards. *See* James E. Ryan & Thomas Saunders, *Foreword to Symposium on School Finance Litigation: Emerging Trends or New Dead Ends?*, 22 YALE L. & POL'Y REV. 463, 472–75 (2004).

102 20 U.S.C.A. § 6311(b)(1)(A), (C) (West 2003 & Supp. 2006).

103 *Id.* § 6311(b)(2)(C), (F).

increase funding.[104] In contrast to school finance lawsuits, which focus on comparative amounts of funding, *Youngberg* claims would begin with the acknowledgement that a certain level of treatment — or education — is required and, consequently, increased inputs might be necessary to achieve that level.[105]

Thus, litigants can assert that schools failing to make AYP are also falling short of their *Youngberg* obligations.[106] These failing schools would then be required to raise student achievement levels by bringing their practices into line with those of successful schools making AYP. Notably, if these schools could point to a lack of educational resources as precluding them from fulfilling their *Youngberg* duties, then they could turn to state governments for greater resources to meet their constitutional obligations. Therefore, although *Youngberg* focused on imposing liability directly on institutions, the fact that the State is ultimately setting the professional standards — coupled with the fact that, as a practical matter, only the State can remedy funding inequalities[107] — arguably would allow litigants, including schools, to seek aid from states directly, especially if failing schools can point to a specific lack of educational inputs that is preventing them from meeting these standards. Furthermore, inputs need not be limited to money, but could also include any other factors that might help achieve the necessary outputs. As Professor James Ryan suggests, school finance lawsuits have been too narrowly focused on efforts to increase funding, thereby neglecting other inputs that might enhance achievement, such as socioeconomic or racial integration.[108]

Therefore, *Youngberg* might provide the opportunity to incorporate inputs into a regime — NCLB — that has thus far been focused on outputs. Specifically, although NCLB requires a certain level of achievement from schools, it does not impose any corresponding duty upon the State to increase educational resources, focusing on outputs to the exclusion of inputs.[109] Accordingly, to the extent that inputs

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[104] *See* James S. Liebman, *Implementing* Brown *in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 VA. L. REV. 349, 413–18 (1990).

[105] To determine the amount of funding that would be necessary to reach a certain level of achievement, courts can employ costing-out studies, such as the "successful schools" approach or the "professional judgment" approach. For a description of these approaches, see Ryan & Saunders, *supra* note 101, at 476–77.

[106] Concededly, states can opt out of their *Youngberg* obligations simply by relaxing their restraints on students — in other words, by eliminating compulsory education laws. Nonetheless, the popularity and widespread acceptance of such laws make this course of action unlikely.

[107] *See supra* note 17.

[108] *See* Ryan, *supra* note 25, at 309 ("[T]he affirmative right to an adequate or equal education is broad enough to encompass racial and socioeconomic integration."); *cf.* Sheff v. O'Neil, 678 A.2d 1267, 1286 (Conn. 1996) (holding that de facto racial and ethnic isolation in schools deprives students of "substantially equal opportunity").

[109] *See* Heise, *supra* note 14, at 2450–51.

matter,[110] NCLB, with its focus on achievement levels, provides little promise of equalizing educational opportunity.

The juxtaposition of *Youngberg* and NCLB thus provides the possibility of obtaining greater educational inputs by tying together NCLB's requirements with *Youngberg*'s affirmative duties. Significantly, combining *Youngberg* and NCLB allows school reform efforts to take into consideration both outputs and inputs, acknowledging the very real concern that focusing on either one alone will not improve the educational opportunities *and* achievement of all students.[111]

VI. CONCLUSION

This Note seeks to debunk the notion that the Constitution is one of only negative rights. In particular, it suggests that, far from being simply a governmental service, education can — and should — be conceptualized as a governmental *duty*. This Note in no way suggests that *Youngberg* will provide the ultimate solution for an educational system that has gone awry and is exacerbating rather than lessening societal inequalities. Instead, what should be evident is the dire status of our current educational system and the need to attack this problem from all angles. By considering the possible relationship between education and substantive due process, this Note encourages challenging the conventional ideas about how best to accomplish educational reform.

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[110] *Compare* ERIC HANUSHEK, MAKING SCHOOLS WORK: IMPROVING PERFORMANCE AND CONTROLLING COSTS 25 (1994) ("The nation is spending more and more to achieve results that are no better, and perhaps worse."), *with* MICHAEL A. REBELL & JOSEPH J. WARDENSKI, THE CAMPAIGN FOR FISCAL EQUITY, INC., OF COURSE MONEY MATTERS: WHY THE ARGUMENTS TO THE CONTRARY NEVER ADDED UP 7 (2004) ("Overwhelmingly, the academic literature and the court holdings have debunked the methodology of the nay-sayers and strongly concluded that money spent on qualified teachers, smaller class sizes, preschool initiatives, and academic intervention programs does make a substantial difference in student achievement — especially for poor and minority students.").

[111] *See* Heise, *supra* note 14, at 2456–57.