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THE RIGHT TO EDUCATION IN THE UNITED STATES: BEYOND THE LIMITS OF THE LORE AND LURE OF LAW

ROGER J.R. LEVESQUE*

The author argues that U.S. as well as international law on educational rights needs to incorporate an important, but heretofore neglected, dimension. U.S. legislation and court decisions, as well as existing international instruments on educational rights focus chiefly on educational access and assign responsibility and authority over educational content and methods almost exclusively to the state and parents. The ideas, concerns and wishes of the young people being educated remain largely unacknowledged and disregarded. The author maintains that only to the extent our understanding of educational rights is rethought to include "youth's self-determination of education for citizenship" can we expect to improve academic performance, overcome negative attitudes toward school, and adequately prepare children and youth for life in a democratic, pluralistic society and an increasingly interdependent world.

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I. INTRODUCTION: THE RIGHT TO EDUCATION AS INTERPRETED AND IMPLEMENTED IN THE UNITED STATES

Profound irony marks educational reform and educational policy making. The efforts have virtually nothing to do with the intended beneficiary of the right to education. Recent efforts to impose national standards are grounded on the need to address the nation's economic vulnerability, not children's needs.¹ Arguments about school choice essentially involve issues of parental choice to determine their children's entry into and exit from particular schools, not children's own choices.² Concerns about student expression and need for information really deal with school official control of curriculum, not children's demands.³ Reforms to address school violence deal with societal fears of guns, gangs and violent youth, not the everyday fears and needs of students.⁴ Cutting-edge approaches that guide the development of further educational reform and seek to include all relevant stakeholders, except students.⁵ Texts devoted to inequality among students claim to include all interested parties, yet overlook students.⁶ Even commentaries that urge a more

1. Despite efforts to mute the focus on the nation's economic need and vulnerability, rather than children's needs, efforts continue to be couched in the common language of the prevailing internationally oriented intellectual capital approach to educational policy; see generally, Michael Heise, *Goals 2000: Educate America Act: The Federalization and Legalization of Educational Policy*, 63 FORDHAM L. REV. 345 (1994).

2. See *infra* notes 113-122.

3. See *infra* notes 18, 95-111.

4. See *infra* notes 185-189.

5. Michael A. Rebell & Robert L. Hughes, *Schools, Communities, and the Courts*, 14 YALE L. & POL'Y REV. 99, 114-136 (1996) (proposing a "dialogic model" that seeks to unite all relevant stakeholders in the processes of discussion, deliberation, and reevaluation of fundamental policies and values yet largely ignores student voice). Even reviews that ostensibly aim to educate students about participation exclude youth in discussion about education. Walter C. Parker, "Advanced" Ideas about Democracy: Toward a Pluralist Conception of Citizen Education, 98 TEACHERS COLLEGE RECORD 104, at 120 (1996) ("The discussion I have in mind involves teachers, principles, curriculum coordinators, and parents who are wondering whether it would [sic.] be worthwhile, and what it might mean, to educate students for democratic citizenship.") Even textbooks devoted to inequality ignore students.

6. See, e.g., CORNELIUS RIORDAN, EQUALITY AND ACHIEVEMENT: AN INTRODUCTION TO THE SOCIOLOGY OF EDUCATION 16-24 (1997) (framing issues of control in terms of

aggressive turn to human rights law in order to recognize the fundamental right to education for everyone essentially ignore those they ostensibly aim to assist.⁷

The failure to include youth's needs leads to more than ironic results. The failure stifles reform efforts. Educational reforms that ignore youths' voices and distort views of youth result in impractical and ineffective efforts.⁸ The distortions also account for a sagging confidence in public schools and in the ability of youth to learn and make valuable contributions to society.⁹ Yet, the general public and policy makers continue to turn to schools to eradicate or alleviate whatever new and larger social problems confront society.¹⁰ The current discourse and legal realities do not offer much hope to those interested in youth's own educational rights.

If the future looks dim, the past and its possible lessons are even more bleak; for history does not offer much solace and guidance either. Indeed, current failures have strong historical roots. Public schools draw their philosophical and political objectives from the "common school" reformers who viewed mass education as the primary vehicle for defining the nation.¹¹ Like current efforts, those of the common school were marked

parent and state); see also *id.* at 246-249 (concluding text with a list of what interested parties should do, yet continuing to exclude students).

7. See *infra* notes 21 and 22.

8. See JEFFREY KANE, EDUCATIONAL REFORM AND THE DANGERS OF TRIUMPHANT RHETORIC IN EDUCATIONAL FREEDOM FOR A DEMOCRATIC SOCIETY: A CRITIQUE OF NATIONAL GOALS, STANDARDS, AND CURRICULUM 57, 57 (Ron Miller ed., 1995).

9. Tom Loveless, *The Structure of Public Confidence in Education*, 105 AM. J. OF EDUC. 127, 127-142 (1997) (detailing factors leading to the eroding confidence in American public schools and plotting results of yearly polls in which the public flunk performance of the nation's schools).

10. Edward F. Zigler & Matia Finn-Stevenson, *The Child Care Crisis: Implications for the Growth and Development of the Nation's Children*, 51 J. OF SOCIAL ISSUES 215, 215-229 (1995) (envisioning the *School of the 21st Century* as the site for solving numerous problems with the current state of child care). Larry Cuban, *Reforming Again, Again, and Again*, 19 EDUC. RESEARCHER 3, 3-8 (Jan.-Feb. 1990) (noting that Americans continue to believe that schools can solve a host of social problems created by disintegrating families and communal institutions).

11. The common school reformers set the foundation for the current educational systems. See Rosemary C. Salomone, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, 14 YALE L. & POL'Y REV. 169, 172-186 (1996) (detailing the historical foundations of the common school and its impact on current education).

by a rampant disregard for youth's needs.¹² Even the discourse about the need to foster education has not changed. Just as current efforts aim to assimilate immigrant, delinquent, and other "learning-impaired" youth who place the nation at risk,¹³ the common school sought to secure conformity¹⁴ and deal with newly arrived immigrants who were viewed as posing a threat to the republic.¹⁵ Just as current efforts fail to find a common ground, so did the historical; the failure to find and inculcate a shared set of values and to develop a national character and civic virtue consistently leads to profound societal discontent and educational deficiencies.¹⁶ These failures, like present ones, rested on efforts to ensure youths' right to education.

12. Several commentators note how the common school movement was aimed at, but particularly difficult for, poor children. The process disconnected students from networks of personal communication, emotional bonds, shared loyalties, religious affiliations. BARBARA FINKELSTEIN, *EXPLORING COMMUNITY IN URBAN EDUCATIONAL HISTORY*, IN *SCHOOLS IN CITIES: CONSENSUS AND CONFLICT IN AMERICAN EDUCATIONAL HISTORY* 309 (Donald K. Goodenow & Diane Ravitch eds., 1983). Commentators who research how current schools silence the voices of those who differ report that programs fail because they "ask them [students] to dislike themselves and their own culture. The staff preach the virtues of upward mobility, trying to create an environment where that might occur. At the same time, however, they are asking their students to reject their social origins and to replace them with something "better," that is, to implicitly view themselves and those they love as deficient." Bram A. Hamovitch, *Socialization without Voice: An Ideology of Hope for At-risk Students*, 98 *TEACHERS COLLEGE RECORD* 286, 302-03 (1996).

13. For an analysis of how far we have not come, see generally Sonja Diaz-Granados, *How Can We Take Away A Right That We Have Never Protected: Public Education And Immigrant Children*, 9 *GEORGETOWN IMMIGRATION L. J.* 827 (1995); see also Lora L. Grandrath, *Illegal Immigrants and Public Education: Is There a Right to the 3 R's?*, 30 *VALPARAISO U. L. REV.* 749, 753, 773-801 (1996) (arguing that Congress should enact an enabling statute permitting states to prohibit illegal immigrant students from receiving a free public education, that such an effort would not be contrary to *Plyler v. Doe*).

14. Michael A. Rebell, *Schools, Values, and the Courts*, 7 *YALE L. & POL'Y REV.* 275, 278-82 (1989) (providing an historical overview of the socialization function of American schools and the common school movement's attempt to reach a consensus of common values).

15. Schools were to prepare the children of all religions, classes, and ethnic backgrounds for American citizenship by inculcating the proper attitudes and values of American democracy and foster an appreciation for American social institutions. The goal was "... to stamp out differences among students, to secure conformity to rules and regulations defined by teachers." FINKELSTEIN, *supra* note 12, at 309.

16. See Carl F. Kaestle, *Moral Education and Common Schools in America: A Historian's View*, 13 *J. MORAL EDUC.* 101, 107-8 (1984) (noting how efforts to be uncontroversial have resulted in persistent discontent).

The historical and current failure to address educational crises and youths' needs demand a need for a different approach to educational rights. This article proposes that, rather than focusing on the right to education, efforts should center on the actual nature of educational rights.¹⁷ Framing issues in terms other than access helps sharpen our understanding of who should control the content of the right to education and the actual nature of that content. Posed differently, issues of content help address a fundamental civic question: Who should decide and bestow the values children will be taught to live by? This question considerably differs from the current and "simple" approach to educational rights as protecting the right to an education and ensuring access.¹⁸

As reframed, the question raises and begins to address important concerns. Remarkably, legal commentators have yet to explore the content of the right to education.¹⁹ Given the centrality of education in numerous debates regarding the place of youth in society, it would be incumbent on those concerned with children's rights, educational rights and human rights to respond more forcefully and articulate the nature of educational rights for everyone. The contribution would be

17. This is actually critical since arguments about access or rights to education roundly fail to achieve the ends of those who argue for effective education. See *infra* note 160.

18. To be sure, an expansive view of access would help ensure rights. Two examples are illustrative. The most obvious example involves immigrant children, since the Supreme Court has left open the right to a minimally adequate education and extensive civil rights laws to protect groups from exclusion from schooling others obtain; see Sonja Diaz-Granados, *supra* note 13, at 829-835. Yet, as rights have become defined, political tides have shifted to take away those rights; *id.* at 851-53. The other example involves protecting children from school violence. Several commentators suggest that such violence amounts to civil rights violations in that it deprives students from educations that others otherwise obtain. See Jo Ann Strauss, Note, *Peer Sexual Harassment of High School Students: A Reasonable Student Standard and an Affirmative Duty Imposed on Educational Institutions*, 10 L. & INEQ. 163 (1992). Despite these commentaries, the fact remains that such protections are meager and that states have essentially no affirmative duty to protect children. See Lyndon G. Furst, *When Children Assault Children: Legal and Moral Implications for Administrators*, 4 ED. L. REP. 719, 737-8 (1995) (reviewing recent cases and concluding that "courts have overwhelmingly declared...no affirmative duty upon school districts to protect children from injury as a result of assault by other children ...[and] that children have very little protection for their own safety while attending public school").

19. Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHIC. L. REV. 131, 131 (1995).

critical for American youth; for the continued inability to articulate more decisively who will control and define the content of children's educations largely accounts for rampant school crises and other failures in the treatment of youth.²⁰ Thus, the existing failure to delineate the legal nature of education suggests at least one fundamental proposition: successful reform requires a more refined and comprehensive image of youth, individually and collectively. Appropriately addressing this proposition requires rethinking the broad grant of educational authority allocated among the state, parents and children; for the grant of authority largely determines the nature of educational rights and conceptions of youth.

This article examines the necessity to apportion authority over the control and content of educational rights. Although the actual content of the right to education in the context of international law has yet to be explored more fully and regardless of whether or not the U.S. takes international human rights seriously, this article demonstrates that recent international developments in youth rights resolve the contentious issues of apportioning control and directing the aims of education. Properly analyzed, human rights law now places the right squarely upon those who are to be educated — children. Viewing the right to education as youths' own right, while still recognizing parental and community interests, offers insight into the nature of educational rights and fundamentally could transform current educational systems that serve youth in name only.

To demonstrate the need to rethink the nature of educational rights, this article proceeds as follows. Part II examines the right to education as currently conceived in international law and proposes that current U.S. law actually protects children to the same extent of the international approaches or that current approaches are actually superior. The analysis reveals the fundamental limitation of framing educational rights in terms of mere access — even ideal conceptions do not protect youths' educational rights. Part III underscores the problematic lure of traditional human rights law and addresses the recent move to reconceive educational rights. Given the current failures in U.S. educational policy

20. Larry Cuban, *Why Do Some Reforms Persist?*, 24 EDUC. ADMIN. Q. 329 (1988).

and the meager contribution of traditional notions of international human rights law, Part III further demonstrates the need to focus efforts on the control and the nature of the right rather than mere access to education. Part IV details the actual limits of U.S. law at work and how they function to exclude youth. Part V aims to move discussions of educational rights to actual implementation and reveals the convergence between basic human rights principles and the current state of the art of research relating to effective schooling and everyday adolescent life.

II. THE LORE OF RIGHTS: LIMITS AND POSSIBILITIES OF THE RIGHT TO EDUCATION

Commentators argue that international law provides a solid basis to affirm and take more seriously the right to education.²¹ In addition, commentators propose that taking the human right to education more seriously necessarily will transform the quality of education.²² This Part proposes otherwise. This Part details how international human rights law does firmly recognize the right to education. The discussion then re-examines the right through a focus on its potential contribution to the development of educational rights in the United States. The analysis reveals that, as currently understood and championed by commentators, the international right to education, even when conceived in the most favorable and idealistic light and fully implemented, would not alleviate the crisis facing youth education for the simple reason that the United States already complies with international law. The concordance between U.S. law and human rights proposals about the right to education suggests a need to reformulate educational rights.

21. Connie de la Vega, *The Right to Equal Education: Merely a Guiding Customary International Legal Right?*, 11 HARV. BLACK LETTER LAW 37, 44-60 (1994); Julius Chambers, *Adequate Education for All: A Right, An Achievable Goal*, 22, HARV. C.R.-C.L. L. REV. 55, 71 (1987).

22. Several argue that the U.S. should look to international law to help rethink basic constitutional, federal and state obligations regarding the right to education. Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Educational Crisis* 86 NORTHWESTERN U. L. REV. 550, 616-622 (1992); Geraldine Van Bueren, *Autonomy and the Child: The International Educational Rights of the Child*, 56(4) SOCIAL EDUCATION 214, 214-15 (1992).

A. THE HUMAN RIGHT TO EDUCATION

Although the right to education was recognized less than fifty years ago, several key human rights treaties document its significant foundation in international human rights law. The right made its formal appearance with the first instrument of the International Bill of Rights. In 1948, the Universal Declaration²³ recognized the human right to free and compulsory education.²⁴ This important recognition laid the foundation for what would become the right to education that all states would need to take seriously. The rights recognized in the Declaration provide the "common standard of achievement for all peoples and all nations."²⁵

Slightly over a decade later, the General Conference of UNESCO, through its Convention against Discrimination in Education,²⁶ reaffirmed the right to free and compulsory primary education, and found that secondary education should be made available and universally accessible.²⁷ Importantly, the Anti-Discrimination Convention expanded the right through its attempt to encourage nations to prescribe comprehensive national standards for public education.²⁸ Those standards, however, had an explicit function. The standard aimed to encourage states to formulate, develop, and

23. Universal Declaration of Human Rights, G.A. Res. 217 A, (31) U.N. GAOR Res. 71, U.N. Doc A/810 (1948) [hereinafter Universal Declaration].

24. The Universal Declaration states:

Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit. *Id.* art. 26(1).

25. *Id.* preamble, para. 8.

26. Convention Against Discrimination in Education, Dec. 14, 1960, 429 U.N.T.S. 93 [hereinafter Anti-Discrimination Convention].

27. Section (a) of the Anti-Discrimination Convention provides the obligation "[t]o make primary education free and compulsory; make secondary education in its different forms generally available and accessible to all; make higher education equally accessible to all on the basis of individual capacity; assure compliance by all with the obligation to attend school prescribed by law." *Id.*

28. The duty to provide education is also described as the need "[t]o ensure that the standards of education are equivalent in all public education institutions of the same level, and that conditions relating to the quality of the education provided are also equivalent." *Id.* section (b).

apply national policies in the hopes that states would further promote educational equality of opportunity and of treatment.²⁹

In 1966, the Covenant on Economic, Social and Cultural Rights³⁰ reiterated the right to free and compulsory primary education.³¹ In addition, it recognized the need for access to different forms of secondary education.³² The Covenant also urged that the development of school systems be "actively pursued" to ensure access to the right to education.³³ Indeed, the Covenant forcefully stated that states parties that did not comply with the mandate of compulsory education, free of charge, undertook "within two years, to work out and adopt a detailed plan of action for the progressive implementation...of the principle of compulsory education free of charge for all."³⁴ Importantly, the Covenant seemingly backtracked from the previous efforts to give effect to broad educational standards: it limited the application of the article so as not to "interfere with the liberty of individuals and bodies to establish and direct educational institutions ... [to conform with] minimal standards as may be laid down by the State."³⁵ In terms of the Covenant, individual States set standards for the nature of education; so

29. "The States Parties to this Convention undertake furthermore to formulate, develop, and apply a national policy which, by methods appropriate to the circumstances and to national usage, will tend to promote equality of opportunity and of treatment in the matter of education." *Id.*

30. The Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 19, 1966, 993 U.N.T.A. 3 [hereinafter Covenant].

31. The Covenant states:

(1) The States parties to the present Covenant recognize the right of everyone to education....

(2) The States Parties to the present Covenant recognize that, with a view toward achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all... *Id.* art. 13.

32. The Covenant states:

Secondary education in its different forms, including technical and vocational secondary education, shall be generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education... *Id.* art. 13 (2)(b).

33. The Covenant states:

The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continually improved. *Id.* art. 13 (2)(e).

34. *Id.* art. 14.

35. *Id.* art. 13 (4).

long as steps are taken to ensure access to a variety of educational alternatives, States comply with treaty obligations.

In 1989 the Convention on the Rights of the Child³⁶ reemphasized the right to free and compulsory education³⁷ and reiterated the need for the access to be free of discrimination.³⁸ In addition, the Convention reiterated that the right be achieved progressively.³⁹ Importantly, the Convention also presented two new mandates. First, States must do more than simply provide access to compulsory education; States are to take steps to ensure that children actually attend schools.⁴⁰ Second, parties to the Convention must encourage international cooperation in education, particularly in eliminating ignorance, facilitating access to scientific knowledge and modern teaching methods.⁴¹ Thus, the latest developments focus on ensuring that youth actually attend schools and, although to be achieved progressively, that resources be provided to make access more than merely theoretically available.

36. Convention on the Rights of the Child, Nov. 20, 1989, G.A. Res. 44/25, 44 U.N. GAOR. Supp. No. 49, at 165, U.N. Doc. A/44/736 (1989) [hereinafter *Children's Convention*].

37. *Id.* art. 28(1)(a) (Make primary education compulsory and available free to all).

38. Article 28(1) finds that "States Parties recognize the right of the child to education ...on the basis of equal opportunity." *Id.* See also Article 2 which provides:

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, ethnic or social origin, property, disability, birth order or other status. *Id.*

In this regard, see also article 2(2) of the Covenant, *supra* note 30, which provides:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

39. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity. *Children's Convention*, *supra* note 36, art. 28 (1).

40. *Id.* art. 28(1)(e) (take measures to encourage regular attendance at schools and the reduction of drop-out rates).

41. *Id.* art. 28 (3). Note, too, that the Convention emphasizes the need to take into account the needs of developing countries.

Existing instruments make it difficult to deny that the community of nations recognizes a right to education. Indeed, the instruments have created an impressive right. The documents reaffirm the commitment to the principle of nondiscrimination and the right of every person to an education. These rapid developments exemplify the growing international momentum toward recognizing youth's rights. The instruments have been roundly accepted and ratified by the vast majority of nations; e.g., the Children's Convention almost was ratified universally within the few years it was opened for signature.⁴² These truly incredible developments make for a rather momentous occasion.

B. THE RIGHT TO EDUCATION IN THE U.S.

Recognition of the right to education does not, and need not, necessarily translate into immediate and perfect implementation. Although nations may recognize that every person has an irrevocable entitlement to a period of education, even at the public expense, and that education be within reach of all children, the right is far from perfectly secure. The move from theory to actual practice remains fraught with obstacles and opportunities that must be addressed to understand the power of human rights law and its potential theoretical and practical contribution.

Several factors and forces operate to limit, modify, or even expand the international right to education when applied in individual nation states. Commentators have identified two general approaches that may be taken to ensure compliance with an international treaty.⁴³ A narrow approach focuses on the actual black letter law of the treaty as it would be applied in the relevant nation state. The approach generally reveals how international law has difficulty ruling in domestic policy, as revealed by doctrines of self-execution, reservations, and the

42. See Status on the Convention on the Rights of The Child, U.N. Doc. E/CN.4/1991/65, at 2.

43. For a recent analysis, see Roger J.R. Levesque, *International Children's Rights: Can They Make a Difference in American Family Policy?* 51 AMER. PSYCHOLOGIST 1251, 1251-54 (1996).

actual nature of the right recognized in the treaty. A broad approach focuses more on the spirit of the law, its actual aims, and seeks different ways to circumvent narrow rulings and approaches. The approach highlights the various ways local and international players may push, prod and ultimately influence states into implementing laws more consistent with established human rights principles. Both approaches offer important insights into the potential use of international principles and support the conclusion that the currently framed "right to education" would not do much to assist in alleviating the crises facing schools.

Even if the United States were to ratify all the international documents that refer explicitly to the right to education, the current commitment by the United States to education would ensure that it complies with international norms. Despite the common failures found in the United States' educational systems, several levels of analysis — starting with constitutional law, legislative and executive mandates and ending with popular commitment to education — reveal the United States's *legal* commitment to providing and bettering the right to education.

The Constitution, as interpreted by the Supreme Court, provides the starting point for any analysis of minimal protections. The Supreme Court has long stated that the right to education does not reach the status of a fundamental constitutional right.⁴⁴ Yet, even though the right may not be fundamental, it is still quite compelling⁴⁵ and protected by

44. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). In reaching that conclusion, the Court decided that: (1) in order to be fundamental, a right must be protected either explicitly or implicitly in the Constitution; *id.* at 33-34, and (2) no such protection can be found there, *id.* at 35.

45. The state's interest in the education of its minors is perceived as one of its most compelling concerns. The Supreme Court aptly has stated the concern that: education is perhaps the most important function of state and local governments [I]t is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him adjust normally to his environment [I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. *Brown v. Bd. of Ed.* 347 U.S. 483, 493 (1954).

Constitutional principles.⁴⁶ Three related variations already exist. First, a constitutional violation could be demonstrated if it were shown that the state system resulted in an "absolute denial of educational opportunities."⁴⁷ Second, the Court generally does not allow for the exclusion of children from different forms of public school activities.⁴⁸ Third, the Court typically leans toward adopting inclusionary policies; students should not be placed in positions in which they are forced to feel different because of their beliefs.⁴⁹ The significance of these findings cannot be underestimated. The Constitution may indirectly protect the right to education, which supports the contention that even properly ratified treaties that become the law of the land arguably would not contribute to making access to education a more weighty right.

State constitutional mandates provide a second level of analysis. This level is significant in that it could be argued that the international right to education, as developed by some

46. Thomas J. Walsh, *Education as a Fundamental Right Under the United States Constitution*, 29 WILLAMETTE L. REV. 279, 296 (1993) (finding a right to education by arguing that a "rights-combination" argument, involving education and due process, could support a claim that education is required for Americans to effectuate their various rights under the Constitution). Clearly, though, the right remains minimal; see *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 458-65 (1988) (finding an indigent child who lived sixteen miles from the nearest school and was assessed a fee for bus service was not denied equal protection because the statute did not discriminate against a suspect class -- indigent students -- and did not interfere with a fundamental right).

47. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 36-37 (1973). The finding is not surprising. In a later case, the Court considered whether a state could deny free public education to children who were not even U.S. citizens. The Court flatly denounced the statute and struck it down. *Plyler v. Doe*, 457 U.S. 202 (1982) (striking down Texas statute barring undocumented children from free public education).

48. For example, the Court consistently has found government sanctioned prayer improper on the basis that the First Amendment protects children against the division, ostracism and scorn which may be experienced by minorities living under a governmentally mandated religion. See Geoffrey R. Stone, *In Opposition to the School Prayer Amendment*, 50 U. CHIC. L. REV. 823, 836 (1983).

49. The exception, of course, is with the practice of permitting flag saluting in the classroom which dealt with fostering allegiance to the state. *West Virginia State Bd. Of Educ. v. Barnette*, 319 U.S. 624 (1943). The Court, however, did ban mandatory flag saluting, thereby eliminating the need for the non-conforming child to actually leave the classroom or pledge.

commentators, moves beyond providing minimal rights.⁵⁰ If the commentators proposals' are accurate, it becomes important to emphasize that states affirmatively recognize the right to education: All fifty states have constitutions that include provisions regarding education.⁵¹ This development is significant. State constitutional rights point to how rights actually may be applied if they were granted greater status. For example, several state constitutions that ostensibly provide the strongest language and specifically provide that education is fundamental, primary, or paramount do not necessarily offer greater protection than states that do not.⁵² Likewise, even states that emphasize quality education, such as contained in the "thorough and efficient" language, do not necessarily succeed in fostering reform.⁵³ Thus, even if the right is more explicitly stated and more forcefully articulated as a right, simply granting rights status does not necessarily improve results for children in the United States. Given these limitations, it remains doubtful that the even more expansively interpreted international right to education would ensure children greater educational rights.

Given that federal and state constitutional protections may still be construed as failing to comply with broad interpretations of international mandates, it is important to turn to a third level of analysis. Legislative mandates and policy pronouncements provide another source of authority that

50. Some would take a more expansive view; see Van Bueren, *supra* note 22 (proposing that, according to recent international documents, children have educational interests that may not coincide with those of their parents, but failing to enumerate what they are or how they actually differ from those of their parents).

51. Mississippi provides the only potential exception. Although its constitution emphasizes the importance of education, it makes state responsibility discretionary: "It shall be the duty of the legislature to encourage by all suitable means, the promotion of intellectual, scientific, moral and agricultural improvement, by establishing a uniform system of free public schools. The legislature may, in its discretion, provide for the maintenance and establishment of free public schools." MISS. CONST. art. VIII, § 201. William E. Thro, *Note, To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1641-42 (1989).

52. *Id.* at 1662-1668.

53. For example, one author found nineteen constitutions providing for "thorough and efficient" education and only four decisions holding that these clauses required reform in state education financing. *Id.* at 1663-65.

determines the extent to which the United States recognizes the right to education. This level makes it difficult to prove that the U.S. lacks a commitment to ensuring the right to education. Significant legislation aids groups most likely to be excluded from the right to education, particularly the disabled, minorities and the extremely poor. Efforts to ensure educational access to children who traditionally have not benefited from education illustrates the extent to which laws take the right seriously.⁵⁴ For example, the federal Individuals with Disabilities Education Act (IDEA) guarantees children with disabilities access to a "free, appropriate public education."⁵⁵ To ensure access, IDEA mandates that the education must be tailored to the unique needs of the child with disabilities by means of an "individualized educational program."⁵⁶ Where needs cannot be met in general education environments, each school has the responsibility to provide a continuum of alternative services.⁵⁷ Equally illustrative of the legal commitment to education is the legal armamentarium available to those who represent the rights of poor, homeless, or runaway youth. Significant statutory frameworks ensure these children access to the same, free, appropriate public education that states provide to other children.⁵⁸ Neither last

54. This protection actually is quite broad; see Robert E. Shepherd, Jr., *Why Can't Johnny Read or Play? The Participation Rights of Handicapped Student-Athletes*, 1 SETON HALL J. OF SPORT LAW. 163, 188-198 (1991) (reviewing federal statutory protections and finding them, by far, the most effective tool available to handicapped student-athletes who have been excluded from participation in interscholastic athletics).

55. 20 U.S.C. §§ 1401-1443 (West 1992 and Supp. 1995).

56. 20 U.S.C. § 1401(18). The guaranteed education is to occur in the "least restrictive environments." 20 U.S.C. § 1412 (5)(d) (meaning that children are to be removed from general education classrooms "only when the nature or the severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.") These environments are supposed to be with regular educational programs, to the maximum extent feasible: that is, removal from regular classrooms is to occur only when "absolutely necessary." 20 U.S.C. § 1412 (2)(b). See Alan G. Osborne, Jr., *The IDEA's Least Restrictive Environment Mandate: A New Era*, 58 EDUC. LAW REP. 541 (1994).

57. The continuum of services must include instruction in regular classes, special classes, special schools, at-home, and in hospital and institutions. 34 C.F.R. § 300.550 (1992).

58. George E. Pawlas, *Homeless Children: Are They Being Prepared for the Future?*, 61 EDUCA'L FORUM 18, 19 (1996). Critics argue, however, that they actually need more to help cope with hopelessness; see *id.* 18-22 (critically analyzing the federal response and local efforts). For important analyses of homeless youth's rights, see Evan S.

nor least, minorities also benefit from significant civil rights legislation and litigation.⁵⁹ As a matter of law, the program of state-sponsored invidious racial discrimination has ended, as has the denial of education to other disenfranchised youth.

Even when moving beyond specific legal entitlements, it is difficult to deny commitment. Citizens and policy makers continue to exhibit commitment to education which serves to reflect the basic compliance with even the most broadly interpreted international obligations. The commitment to ensuring access to education is buttressed by an impressive commitment to ensuring that the right be exercised. For example, youth, teachers, and staff need to be in safe, orderly and drug free school environments; yet reports of school violence are commonplace.⁶⁰ Despite the rampant nature of violence, even a cursory look at available legal mandates reveals a striking response. To their credit, lawmakers and school officials have taken a variety of actions to ensure the safety and well being of students while they are in school. For example, to deal with school violence, the Gun-Free Schools Act of 1994 was enacted to call on school districts to expel weapons-

Stolove, *Pursuing the Educational Rights of Homeless Children: An Overview for Advocates*, 53 MD. L. REV. 1344, 1344-1366 (1994) (detailing barriers and existing remedies to ensuring homeless children's educational rights); James H. Stronge & Virginia M. Helm, *Legal Barriers to the Education of Homeless Children and Youth: Residency and Guardianship Issues*, 20 J. OF LAW & EDUCATION 201, 215-18 (1991) (critically analyzing the major federal homeless assistance act that aims to protect children's right to education).

59. See Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 243 (codified at 42 U.S.C. §§ 2000a *et seq.*) (prohibiting racial discrimination in employment, public education, and public accommodations); *Brown v. Board of Educ.*, 347 U.S. 483 (1954). See also Denise C. Morgan, *What is Left to Argue in Desegregation Law? The Right to Minimally Adequate Education*, 8 HARV. BLACK LETTER J. 99, 101 (1991) (arguing that "even if the United States government is unwilling to recognize many other substantive affirmative obligations it must provide us with adequate education, since an educated citizenry is a prerequisite for the continuance of democratic society"); see also *id.* at 116 (noting that education litigation strategies are responsible for vast improvements in educational opportunities available to children of color and that arguments for better educational opportunities can be derived from the short-comings of past litigation strategies).

60. Furst, *supra* note 18, at 719 (estimating "that more than 3 million assorted crimes occur each year in the 85,000 public schools in the United States, representing about 11 percent of all the crimes that are committed in the country"). Students are inflicting violent harms upon one another with increasing frequency; see also Donald L. Beci, *School Violence: Protecting Our Children and the Fourth Amendment*, 41 CATH. U. L. REV. 817, 820-21 (1992) (detailing the nature and extent of harm and how the violence mirrors societal violence).

carrying students from conventional schools for a year.⁶¹ Although these efforts remain less controversial than they perhaps should be,⁶² they do reflect the extent to which attempts are being made to ensure access to education.

In addition to legal mandates, the actual willingness to fund educational programs reveals the United States's commitment to education. Education undisputedly remains a high priority for governmental fiscal support. Numerous indicators confirm the highly resilient conviction that more money can address education's problems, even despite languishing confidence in educational systems. For example, polls consistently reveal considerable public support for additional spending on education.⁶³ Even more telling is the dramatic growth in constant dollar-per-student expenditures: Inflation-adjusted government spending for the past twenty years has jumped up eighty percent.⁶⁴ In terms of school safety, for example, the Safe and Drug Free Schools and Community Act⁶⁵ provides \$556 million to support violence prevention programs. These are colossal amounts of money. The incredibly steep rise in expenditures reveals how political leaders financially support public education with unprecedented fidelity.

The massive legal response, coupled with public support in the form of interest and actual dollars, make it difficult to argue a failure to comply with international norms and obligations related to the right to education. Admittedly, the commitment merely reflects the response, not their effectiveness. However, that the efforts are not as effective as commentators may wish does not necessarily impact compliance with international norms or even domestic rights and obligations. Application of

61. Pub. L. 103-382, § 14601, 108 Stat. 3907, 20 U.S.C. § 8921 (1994).

62. See also Jonathan Wren, 'Alternative Schools for Disruptive Youths' -- A Cure for What Ails School Districts Plagued by Violence?, 2 VA. J. SOC. POL'Y & L. 307, 313, 340-360 (1995) (detailing policy and legal arguments against the use of expulsion and alternative schools for violent youth).

63. BENJAMIN I. PAGE & ROBERT Y. SHAPIRO, THE RATIONAL PUBLIC: FIFTY YEARS OF TRENDS IN AMERICAN POLICY PREFERENCES (1992).

64. Loveless, *supra* note 9, at 148-150 (describing statistics and noting a jump from 3,803 in 1970 to 6,857 in 1995 in constant 1994-95 dollars).

65. The Act is Title VI of Improving America's School Act of 1994, 108 Stat. 3518 (1994).

the right to education in the United States reveals the limitations of the currently conceived and articulated international human right to education; the current right to education in America expands at least to the extent envisioned by the commentators' perceptions of the benefits of international law⁶⁶ and arguably to the extent that the right has been recognized in other legal systems.⁶⁷ The response, continued failures, and the apparent inability of the international human right to education to contribute to youth's educational rights all reveal the need to reconceive the nature of educational human rights.

III. RECONCEIVING EDUCATIONAL RIGHTS IN HUMAN RIGHTS LAW: LAW AND EDUCATION FOR PERSONHOOD AND CITIZENSHIP

Despite increasing commentary about educational rights and the apparent need to look to international law, the actual content of the right has not been the subject of much informed discussion. Yet, a close look at even the basic international instruments reveals important developments.

The Universal Declaration and the Covenant set the basic foundation for conceptions of the nature of educational rights. The Declaration forcefully states that:

Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations,

66. Van Bueren's work, *supra* note 22, provides a possible exception.

67. Christel Adick, *Formation of a World Educational System*, in PLURALISM AND EDUCATION: CURRENT WORLD TRENDS IN POLICY, LAW, AND ADMINISTRATION 41, 41-57 (Peter M. Roeder, Ingo Richter & Hans-Peter Fussel, eds., 1995) (noting world trends as moving toward state control over education, focusing on increasing universal access, aiming to foster individual membership in society and societal development, and establishing national development to compete in the world-market-structures, while still being marked by increasing social disparity based on class, gender, religion, ethnicity, etc.). Much of the effort, however, still is rather minimal and aims at literacy; see e.g., LITERACY IN THE YEAR 2000 (Daniel A. Wagner & Laurel D. Puchner, eds., 1992); see generally EDUCATION AND THE LAW: INTERNATIONAL PERSPECTIVES (Witold Tulasiewicz & Gerald Strowbridge, eds., 1994).

racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.⁶⁸

These developments reflect how education must aim to promote children's personal development and ability to interact in a civil society. The Covenant provides language similar to the Declaration; it provides that "education shall enable all persons to participate effectively in a free society, promote understanding, tolerance, and further the activities of the United Nations for the maintenance of peace."⁶⁹ The nature of civic participation indelibly means more than a focus on contributing to society as a capital resource; individuals participate by promoting tolerance, understanding and peace.⁷⁰ While aiming to ensure a civic responsibility attuned to democratic principles, the article still seeks to ensure that education focus on "the full development of the human personality and the sense of its dignity."⁷¹ The documents, then, articulate a dual purpose for education. Education functions for full personal development and for civic, democratic responsibility.

The Declaration and the Covenant also determine the role of who actually controls the content of education. Presumably, states would hold considerable power since they need to ensure that educational programs strive to promote principles consonant with international human rights and states must set minimal standards.⁷² However, the documents actually bestow the right onto parents. The Declaration provides that "[p]arents have a prior right to choose the kind of education that shall be given to their children."⁷³ The Covenant delineates the right even more. The Covenant not only respects the liberty of parents to choose their children's schools but also the parental right to "ensure [that] the religious and moral education of their children [is] in conformity with their

68. Universal Declaration, *supra* note 23, art. 26(2).

69. Covenant, *supra* note 30, art. 13(1).

70. Unlike the current approach in the U.S.; *see supra* note 1.

71. Covenant, *supra* note 30, art. 13.

72. *See supra* notes 23-35.

73. Declaration, *supra* note 23, art. 26(3).

own convictions.⁷⁴ Importantly, the article seemingly exempts schools "established by the public authorities" from its reach and mandates conformity with "minimum educational standards" laid down by the individual State.⁷⁵

The Children's Convention's most important development in educational rights actually deals with an omission. The articles that explicitly deal with education do not mention parental interests and rights.⁷⁶ This omission significantly departs from previous enumerations and suggests that children are in control of their own educations. The suggestion is consistent with the Convention's basic aim and principles. For example, to the extent that parental rights are recognized, they are limited by the child's level of development.⁷⁷ Likewise, rights related to educational rights that have been recognized have been bestowed upon the child, such as the *child's* right to freedom of expression, which includes the "freedom to seek, receive and impart information and ideas of all kinds"⁷⁸ and access to materials especially "aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health."⁷⁹ Given that other rights have been similarly delineated,⁸⁰ it is at least arguable that the Convention has

74. *Id.* art. 13(3).

75. The full part of the article reads as follows:

The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State (...).
Covenant, *supra* note 30, art. 13 (3).

76. Children's Convention, *supra* note 36, arts. 28 & 29.

77. For example, in the article devoted to enumerating parental rights, the article explicitly limits the right as it stipulates that parents shall provide "*in a manner consistent with the evolving capacities of the child*, appropriate direction and guidance in the exercise by the child of the rights recognized" in the Convention. *Id.* art. 5 (emphasis added).

78. The only limitation may be for respect of rights or reputations of others or for the protection of national security, public order, public health or morals. *Id.* art. 13(2)(a)(b).

79. *Id.* art. 17.

80. Two other rights are illustrative. The Convention recognizes the *child's* right to "freedom of thought, conscience and religion," a right where parent's rights and duties are only "to provide direction in the exercise of his or her right in a manner consistent with the evolving capacities of the child." *Id.* art. 14. Note, also that the right is also limited as necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. *Id.* art. 14(3). The other right includes the

bestowed considerable control of education upon children themselves. The power, however, remains far from absolute. The Convention places two major limits on children's control of their education: it (1) emphasizes that children have greater control over their rights as they become better able to exercise those rights⁸¹ and (2) ensures that youth be brought up to support principles of the United Nations.⁸²

In sum, we have seen that international documents essentially view education as necessary to ensure effective participation in society as well as full development of the individual's personality. The Children's Convention departs from other documents in allowing for an interpretation that the rights have been bestowed upon the child and, consistent with the child's evolving capacities, the child may contribute to and participate in matters that aim to ensure their right to an education devoted to the child's development of personhood and citizenship. This development reflects an important departure not just from international law, but also from U.S. law.

IV. THE NEED TO FOCUS ON MORE PRECISE LIMITS OF U.S. LAW: THE CONTROL AND NATURE OF AMERICAN EDUCATION

We have seen thus far that human rights law now aims to bestow upon children increasing control in determining the nature of their own educational experiences. In the U.S., the judicial system has been given the final authority to balance the interests of individual students and their families against those of the local community and the larger society. The balancing of these interests has resulted in three important lines of cases. These cases reflect a shift from parental and student's rights to a current approach that bestows authority upon school officials to make curricular and administrative decisions that reflect community and societal values. This section explores these seminal cases.

child's right to "freedom of association and to freedom of peaceful assembly" also focuses on the child and remains consistent with the Convention's focus on ensuring *children's* rights. *Id.* art. 15(1). Parental rights are not mentioned; the only limitation is to protect national security, public safety and health or morals. *Id.* art 15(2).

81. *Id.* arts. 5 and 14.

82. *Id.* preamble, para. 7.

The famous trilogy of parental rights cases provides the foundation for the first line of cases. Through these decisions, the Supreme Court provides the basis for claims by parents to control their children's education and be free from state intrusion. The first case, *Myer v. Nebraska*,⁸³ actually involved the right of teachers to pursue their profession. Yet, it is in *Myer* that the Court announced that parents had a right to "establish a home and bring up children"⁸⁴ and control their education. In the second case, *Pierce v. Society of Sisters*,⁸⁵ a lower court had struck down a state law that had declared it a misdemeanor for a parent or guardian to send a child between the ages of eight and sixteen to school other than the public school in the district where the child resided. The Supreme Court affirmed, gave parents the power to direct their children's education, and used the occasion to find that "the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with a high duty, to recognize and prepare him for future obligations."⁸⁶ The third major case, *Wisconsin v. Yoder*,⁸⁷ upheld the challenge by parents of a state law requiring all children under the age of sixteen to attend public or private school. The Court concluded that the "primary role of parents in the upbringing of their children is now established beyond debate as an enduring American tradition."⁸⁸ As these cases strongly suggest, the parental right to control their children's educations has been well entrenched. Importantly, bestowing upon parents that right has two implicit outcomes; firmly established parental rights (1) minimize a school's inculcative function and (2) diminish students' own right to determine their own upbringing when balanced against parental rights.

83. 262 U.S. 390 (1923).

84. *Id.* at 399. The Court also found that the state had impermissibly interfered with the rights of parents to control the education of their children. *Id.* at 401.

85. 268 U.S. 510 (1925).

86. *Id.* at 535. Importantly, and often ignored, the Court recognized the state's interest in regulating education and its inculcative functions. The Court acknowledged the "power of the State reasonably to regulate all school" and to require that "certain studies plainly essential to good citizenship must be taught, and nothing be taught which is essentially inimical to the public welfare." *Id.* at 534.

87. 406 U.S. 205 (1973).

88. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1973).

The Court also has used unusually powerful language to find in favor of youths' rights. Two cases illustrate the Court's specific recognition of students' right to protection from governmental intrusion into their right to engage in speech and to receive protection from government-compelled speech. The first case, *West Virginia State Board of Education v. Barnette*,⁸⁹ dealt with the expulsion of students who had refused to salute the American flag. The Court found that the flag salute requirement constituted an unconstitutional exercise of governmental authority and used the opportunity to decide "that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."⁹⁰ The second case, *Tinker v. Des Moines Independent Community School District*,⁹¹ involved a school's prohibition against students' wearing black arm bands in protest of the Vietnam War.⁹² The Court struck down the ban and emphasized student's rights in the expansive proclamation that students do not "shed their constitutional rights . . . at the schoolhouse gate."⁹³ The Court found that students may not be confined to the expression of "officially approved" sentiments and that schools should encourage students to participate in the learning process.⁹⁴

The third approach accords school officials increasing power in educational policy making and largely dominates the Rehnquist Court's educational rights cases. The first case of three foundational cases, *Board of Education v. Pico*,⁹⁵ established the "right to receive information and ideas" in the context of school libraries.⁹⁶ In those instances, school boards could not remove books based on partisan politics; however,

89. *West Va. State Brd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943).

90. *Id.* at 642.

91. 393 U.S. 503 (1969).

92. *Id.* at 511.

93. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969).

94. *Id.* at 503.

95. 457 U.S. 853 (1982).

96. *Id.* at 67. The board justified the book removal on the basis that they were "anti-American, anti-Christian, anti-Semitic, and just plain filthy." *Id.* at 857.

they did have discretion to remove books based on educationally relevant criteria.⁹⁷ The Court construed the school board's rights as "vitally important 'in the preparation of individuals for participation as citizens' and ... for 'inculcating fundamental values necessary to the maintenance of a democratic political system.'"⁹⁸ The Court gave school boards broad control over curricular matters, even to the extent that boards "might well defend their claim of absolute discretion" to transmit community values.⁹⁹ Although seemingly extreme, two important cases that followed firmly swayed the balance in the direction of school official control of school governance when students assert their own First Amendment rights. In *Bethel School District v. Fraser*¹⁰⁰ a 17-year-old senior delivered a sexually charged speech nominating a fellow student for elective office.¹⁰¹ The Court turned to *New Jersey v. T.L.O.*,¹⁰² a case previously construed as offering students' rights, to note that students' constitutional rights in public school settings may be more narrowly defined than those of adults in other settings.¹⁰³ The limitation allowed school officials to curb forms of speech deemed threatening to others, disruptive and contrary to "shared values"¹⁰⁴ and which contravened the mission of schools to inculcate "fundamental values necessary to the maintenance of a democratic political system."¹⁰⁵ Included in these values are tolerance of diverse and unpopular political and religious views that must be balanced against the interests of society in teaching the bounds of "socially appropriate behavior."¹⁰⁶ The power of school authorities, acting as the inculcators of proper community values, was supported and developed further in *Hazelwood School District v. Kuhlmeier*.¹⁰⁷ In this case, students alleged

97. *Id.* at 870-71. The school board would have acted unconstitutionally if it would have been a substantial factor in removal.

98. *Id.* at 864 (quoting *Ambach v. Norwick*, 442 U.S. 68, 76-77 (1979)).

99. *Id.* at 869.

100. 478 U.S. 675 (1986).

101. *Id.* at 687.

102. 469 U.S. 325, 340-42 (1985).

103. *Id.* at 682 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 340-42 (1985)).

104. *Id.* at 683.

105. *Id.* at 681.

106. *Id.* at 681.

107. 484 U.S. 260 (1988).

that their free speech rights had been violated when the principal deleted two objectionable articles from a school paper; the objectionable articles involved issues of teen pregnancy and the impact of parental divorce on students.¹⁰⁸ The Court upheld the authority of school officials to control the content of school-sponsored speech based upon "legitimate pedagogical concerns."¹⁰⁹ The majority emphasized the role of schools as the primary vehicles for transmitting cultural values and their discretion in refusing to sponsor student speech that might be perceived as advocating conduct otherwise inconsistent with "the shared values of a civilized social order."¹¹⁰ Given these developments, the Court now approaches values from two perspectives to reaffirm (1) the authority of school officials to uphold the values of the community and (2) the mission of the schools to promote the fundamental values of a democratic society. Thus, although students may not "shed their constitutional rights . . . at the schoolhouse gate[.]"¹¹¹ in practice, the Court accords the government considerable license to control public school classrooms in general and secular curriculum in particular. The state has the special responsibility to inculcate youth.

The above developments reflect how public school officials play the key role of arbiters and protectors of community values or preferences, both in the sense of common values shared throughout society and in a particular community. The decisions emphasize the inculcative or indoctrinative nature of schooling for a given purpose; according to these decisions, public schools not only may but should influence their students to adopt particular beliefs and values. Although other cases recognized and fostered the socialization function of schooling, the current approach looks to socialization as a mechanism both to preserve community interests and preferences and to prepare students for citizenship in the larger society.¹¹² These

108. *Id.*

109. *Id.* at 273.

110. *Id.* at 272 (quoting *Fraser*, 478 U.S. at 683).

111. *Tinker*, 393 U.S. at 506.

112. The Supreme Court repeatedly has acknowledged the special role of the public schools in preparing youth for citizenship and full participation in a democratic society. See *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979) (the purpose of public education is

jurisprudential developments challenge the prevailing belief that parents (and sometimes students) control the nature of public education.

Although the power given to schools undoubtedly is great, it is important to highlight a significant wave in reform efforts. The most recent wave of reforms to balance individual student, parent, community and broader societal interests, focuses on individuals. Importantly, the individual interests at stake in the dramatic efforts to restructure educational governance are essentially those of parents. Trendy "parental choice" reforms illustrate the emerging focus that capitalize on the parental right to remove thier children from traditional public schools. Despite numerous possible permutations on the "choice" theme,¹¹³ current proposals view choice in parental terms as the most effective manner to improve the quality of educational programs and thereby enhancing student performance and development. Three formats dominate debates. The first involves "charter" schools that are funded directly by the state but under management of outside groups granted exemptions for significant state regulations and local rules.¹¹⁴ The second

the "inculcat[ion] [of] fundamental values necessary to the maintenance of a democratic political system"); *Brown v. Board of Educ.* 347 U.S. 483, 493 (1954) (the school is a "principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (classroom is a "market place of ideas" and "[t]he Nation's future depends upon leaders trained through wide exposure to [these ideas].")

Lower courts necessarily find that challenges to administrators' discretion predominantly fail. For example, groups of cases reveal that broad challenges to curricula on the grounds that they advance secular humanism and inhibit theistic religion have failed. *Smith v. Brd. of Sch. Commissioners*, 827 F.2d 684, 692 (11th Cir. 1987) (reversing a district court decision which had removed books from schools on charges of promoting the religion of secular humanism on grounds that the school official properly sought to "instill . . . such values as independent thought, tolerance of diverse views, self-respect, maturity, self-reliance and logical decision-making").

113. See generally, Diane Ravitch & Joseph Viteritti, *New Vision for City Schools*, 122 PUB. INTEREST 3 (1996); JOHN E. COONS & STEPHEN D. SUGARMAN, *EDUCATION BY CHOICE* (1978).

114. Patricia Wohlstetter, *Education by Charter*, in *SCHOOL-BASED MANAGEMENT: ORGANIZING FOR HIGH PERFORMANCE* 139, 139-64 (Susan Albers Mohrman et al. eds., 1994) (discussing history and contemporary functioning of charter schools); Salomone, *supra* note 11, at 231 & n. 283 (listing the states that have enacted charter school legislation and federal laws that support state educational agencies' efforts to conduct charter school programs).

involves the use of selected private schools, including religiously affiliated institutions, and funding them through private tuition and voucher payments provided by the state to parents who demonstrate economic need.¹¹⁵ The last approach would provide vouchers, still based on economic need, for parents to use at any school.¹¹⁶ The permutations reiterate the prevailing belief that significant change can occur only if the entire school culture is transformed by more meaningful parental participation.¹¹⁷ As with other approaches, the efforts have not been immune from criticism. Opponents voice concern about the various "choice" schemes. They worry that choice programs will foster fraud and waste, create overregulation of private schools and even threaten the religious integrity of sectarian schools.¹¹⁸ Others voice concern that reforms are still caught in existing political forces: even charter schools are far from independent, highly regulated, and not necessarily able to accommodate at-risk students and respond to market forces.¹¹⁹ Likewise, others propose that the call for greater citizen participation is not new; just as it is not new that citizens persistently fail to answer the call¹²⁰ despite the powerful desire to have control over one's children's education.¹²¹ Other critics charge that "local school reform does

115. See David Futterman, *School Choice and the Religion Clauses: The Law and Politics of Public Aid to Private Schools*, 81 GEO. L. J. 711 (1993) (arguing that vouchers violate the fundamental principles of the Establishment Clause, although they are likely to be found constitutional by the Supreme Court).

116. See, e.g., JOHN E. CHUBB & TERRY MOE, *POLITICS, MARKETS AND AMERICA'S SCHOOLS* 217-18 (1990) (examines calls for broad-based use of vouchers that would allow parents to obtain public funding to enroll their children in private schools). See also Michael A. Rebell, *Values Inculcation and the School: The Need for a New Pierce Compromise*, in *PUBLIC VALUES, PRIVATE SCHOOLS* 37 (Neal E. Devins ed., 1989) (arguing that a publicly-funded voucher scheme may be appropriate in cases where religious believers's views cannot be accommodated in public school settings).

117. SEYMORE B. SARASON, *PARENTAL INVOLVEMENT AND THE POLITICAL PRINCIPLE* (1995).

118. See generally, JEFFREY R. HENIG, *RETHINKING SCHOOL CHOICE: LIMITS OF THE MARKET METAPHOR* (1994).

119. Terry G. Geske, Douglas R. Davis, and Patricia L. Hingle, *Charter Schools: A Visible Public Choice Option?*, 16 *ECONOMICS OF EDUC. REV.* 15, 21-23 (1997).

120. Researchers conclude that only a "small minority" of citizens bother with school district elections and attend public meetings. HARVEY J. TUCKER & L. HARMON ZEIGLER, *PROFESSIONALS VERSUS THE PUBLIC: ATTITUDES, COMMUNICATION, AND RESPONSE IN SCHOOL DISTRICTS* 229 (1980).

not empower those who have the most important stake in improving education — the *parents*.”¹²² Reforms and criticisms of reform schemes reveal an important theme — they ignore youths’ voices and individual concerns.

V. MOVING BEYOND SIMPLE LURES AT LEAST IN U.S. LAW: RECOGNIZING STUDENTS’ RIGHT TO EDUCATIONAL SELF-DETERMINATION

Two trends emerge from an analysis of leading legal cases and reform efforts that relate to the control and nature of education. Recent legislative reform efforts place emphasis on parental choice to determine which schools their children will attend while Supreme Court cases increasingly move toward greater school official control to determine the content of education. Although seemingly going in opposite directions, these two trends are far from contradictory. They reinforce, and allow for, one another. The parental choice reform efforts offer parents apparently improved rights of “exit” and “entry” from particular schools, which makes more politically palatable the Supreme Court’s hands-off approach that places the everyday running of institutions under school official control. Essentially, the approaches function to exclude students and fail to consider the important roles youth play in determining their education.¹²³ The marginalization of youth reveals the fundamental limitations of approaches that seek to ensure the right to education. Rather than concerning themselves with the nature of the right, current approaches remain trapped in the lure that simply ensuring access satisfies educational rights. The effects of the failure to include students and recognize their own right to educational self-determination reverberate and have destructive repercussions on the lives of youth. This section explores these repercussions and

121. The Supreme Court has recognized how the “direct control over decisions vitally affecting the education of one’s children is a need that is strongly felt in our society.” *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49 (1973).

122. John M. Evans, *Let Our Parents Run: Removing the Judicial Barriers for Parental Governance of Local Schools*, 19 HASTINGS CONST. L. Q. 963, 964 (1992) (emphasis added).

123. See *supra* note 5.

demonstrates how more effective schooling and the everyday life of adolescents warrants a move toward greater respect for youths' self-determination.

Failure to include youth, or at least take their interests more seriously, actually has deadly consequences. Even though education may serve a primarily socialization function, students clearly have the most at stake in ensuring that the content of education reflect the living realities they face. Sex education reform efforts illustrate students' important interests and their pervasive exclusion from educational policy making that dramatically impact their lives. Furious controversy surrounds the role of parents and schools in determining the nature of sex education for youth, particularly in light of the onset of the HIV/AIDS epidemic and the rise in the number of adolescents contracting the disease.¹²⁴ Political conflicts continue to emerge between parents' and schools' inculcation of values and pedagogic techniques. The extremes would have schools provide either comprehensive sexuality education or abstinence-only sex education.¹²⁵ Recognizing the intensity of the differences, state statutes and regulations have turned to efforts that promote broad community involvement in policy-making decisions about sex education.¹²⁶ Remarkably, none of the efforts include students. Students are pervasively excluded in policy making discussions, even though their lives are the ones undoubtedly at stake.

The everyday school activities and curricula tend to be much more mundane than controversial, despite what the sex education debates may suggest. Yet, reforms remain equally problematic when viewed in light of routine school days. Reforms that exclude students fundamentally misunderstand

124. See generally Roger J.R. Levesque, *The Peculiar Place of Adolescents in the HIV-AIDS Epidemic: Unusual Progress & Usual Inadequacies in Adolescent Jurisprudence*, 27 LOY. UNIV. CHIC. L. J. 237 (1996).

125. JOSH MCDOWELL, *THE MYTH OF SEX EDUCATION* 80 (1991).

126. See, e.g., Idaho Code 33-1610 (1993) (school districts must "involve parents and school district community groups in the planning, development, evaluation, and revision of any instruction in sex education"); Mass. Gen. Laws Ann. Ch. 71 § 380 (West 1982) (local school communities must meet bi-monthly with advisory committee to review materials pertaining to sex education).

the student's role in the learning process of usual school activity. Students are successful when they take control, not when they are passive in educational processes. The literature on school improvement calls upon students to empower themselves and to assert their rights in the learning community.¹²⁷ The literature simply reinforces what teachers have long realized. Students must be viewed as, and actually be, active "producers" of their own learning.¹²⁸ This is actually a traditional hope of education: develop the dispositions and skills that incline people to take responsibility for their own lifelong learning by developing habits, capacities, passions and interests to commit themselves to a lifetime of engaged personal learning.¹²⁹ The best learners have learned how to formulate the most useful questions to the relevant problems they face and have learned how to engage in the kind of problem solving that enables them to draw upon the best available information.¹³⁰

127. See, e.g., Dorothy Kerzner Lipsky, *We Need a Third Waive of Educational Reform*, 22 SOC. POL'Y 43, 44-45 (1992). See also John Elliott, *School Effectiveness Research and its Critics: Alternative Visions of Schooling*, 26 CAMBRIDGE J. OF EDUC. 199, 223 (1996) ("The individualization process in advanced societies challenges schools to develop an education which enables pupils to take active responsibility for shaping the conditions of their existence in society.").

128. Lipsky, *supra* note 128 at 43.

129. Progressive educators, from John Dewey onward, have called attention to the need to view students as active learners and as problem solvers is far from new. JOHN DEWEY, *DEMOCRACY AND EDUCATION* (1916). See also SEYMORE SARASON, *THE PREDICTABLE FAILURE OF EDUCATIONAL REFORM: CAN WE CHANGE COURSE BEFORE IT IS TOO LATE?* 162-63 (1990) ("Should not our aim be to judge whatever we do for children in our schools by the criterion of how we are fostering the desire to continue to learn about self, others, and the world, to live in the world of ideas and possibilities, to see the life span as an endless intellectual and personal quest for knowledge and meaning?").

130. Leading commentators recently put it as follows:

The 21st century will require that we educate all students to think of themselves as first and foremost "investigators, inquirers, and active researchers." The cornerstone of the investigative process is not finding the answer to someone else's question ... Rather the cornerstone of the new education will be to hone one's skills at identifying useful questions and identifying effective strategies for answering them. This feature of critical reflectiveness, the art of asking useful questions, is virtually nonexistent in most courses, even courses devoted to critical thinking. Michael S. Katz & Louis D. Denti, *The Road to Nowhere Begins With Where We Are: Rethinking the Future of American Education*, 27 INTERCHANGE, 261, 268 (1996).

Ensuring that students are producers of their own education provides only part of the environment conducive to effective learning. The manner students are treated provides the other important condition. Research consistently reveals that feeling unequal and undervalued severely diminishes students' learning capacities.¹³¹ These findings are actually not very counter-intuitive. Yet, the need for inclusion and active participation remains pervasively ignored when policies are designed for students who are "different." For example, legal rules about basic entitlements make students feel different, such as laws to deal with children in need of special education,¹³² bilingual education¹³³ or those who have become problem youth.¹³⁴ These efforts take students out of interactions and collaborative efforts with others and take away their sense of participation, equality, community and belonging.¹³⁵ Including youth in their education means that those who would be marginalized are noticed, encouraged, and participate in their own development,¹³⁶ which properly prepares youth for societal diversity, not societal homogeneity.

131. See Ronald R. Edmonds, *Effective Schools for the Urban Poor*, 37 EDUCATIONAL LEADERSHIP 15, 18, 20-24 (1979).

132. Determinations that youngsters are entitled to special status actually have a negative impact. See Adam Gamoran, *Synthesis of Research: Is Ability Grouping Equitable?*, 50 EDUCATIONAL LEADERSHIP 11 13 (1992). Lorin W. Anderson & Leonard O. Pellicer, *Synthesis of Research on Compensatory and Remedial Education*, 48 EDUCATIONAL LEADERSHIP 10, 11 (1990).

133. Critics of bilingual programs feel that programs have segregative effects. See Rachel F. Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 CAL. L. REV. 1249, 1256-57 (1988). Their proposals are supported by legislative mandates; see *Lau v. Nichols*, 414 U.S. 563 (1974) (ruling that Title VI of the Civil Rights Act of 1964 required compensatory programs for Chinese students taught in English only classes).

134. Critics claim that instead of helping the targeted population, the recent focus on alternative schools for troubled and troubling youth actually exacerbate problems by simply abandoning them; see, e.g., James A. Maloney, *Constitutional Problems Surrounding the Implementation of "Anti-gang" Regulations in the Public Schools*, 75 MARQ. L. REV. 179, 201 (1991).

135. Lipsky, *supra* note 127, at 44-45 (noting that students are successful when they take charge of their lives, associate with other students and not when they are isolated).

136. Importantly, as Walberg & Walberg note, this is due to the greater incidence of mixed age groupings, peer tutoring and reciprocal teaching that is found in smaller school settings. Again there is a focus on inclusion, not exclusion. Herbert J. Walberg & Herbert J. Walberg III, *Losing Local Control*, 53 EDUCATIONAL LEADERSHIP 19, 19-26 (1994).

236 ANNUAL SURVEY OF INT'L & COMP. LAW [Vol. 4:1]

Encouraging equality and fostering participation leads to clear results. Researchers have noted dramatic effects, including increases in students' achievement, improvements in empathy and social skills, higher involvement in school activities, increases in attendance records, decreases in drug use and deviant behavior, and decreases in feelings of loneliness.¹³⁷ Marginalized youth clearly suffer.¹³⁸ Given the difficult transition even the most well-adjusted youth experience during adolescence,¹³⁹ these are considerably important findings.

The contentiousness of inclusionary efforts and the established trend against it make a turn for taking the above research results seriously rather unlikely. However, the research on inclusion actually is more telling of "normal" schooling. Much can be learned from the guiding principle behind inclusive and participatory efforts: Recognize student individuality and react to it.¹⁴⁰ For success to occur, students must sense that adults feel responsible toward the achievement of student potential.¹⁴¹

137. *Id.* at 26 (noting how size in schools makes an incredible difference for students).

138. For a general review of how youth are marginalized and suffer consequences, see *BEYOND SILENCED VOICES: CLASS, RACE, AND GENDER IN UNITED STATES SCHOOLS* (Lois Weis & Michelle Fine, eds., 1993); for analyses of students who are explicitly silenced, see Wren, *supra* note 62, at 341-354 (noting the increased use of suspensions and expulsion, the increasing agreement that other methods must be used to reduce the harm to students' interests).

139. See generally *International Handbook of Adolescence* (Klaus Hurrelmann, ed. 1994) (reports from thirty-one countries on psychological and social problems youth face, sociostructural patterns of rites of passage and urgent policy concerns).

140. Research now indicates the need to move away from traditional schools that organized curricula on the concept of intelligence as a single general capacity rather than as a variegated concept of individual capacity and talent. For example, a leading educator and researcher, Howard Gardner, has developed a theory of multiple intelligences and emphasizes the need to respond to each individuals individualized ways of learning and their distinctive combination of intelligences, abilities and talents. Tina Blythe & Howard Gardner, *A School for All Intelligences*, 47 *EDUCATIONAL LEADERSHIP* 33, 33-34 (1990). See also HOWARD GARDNER, *FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES* 3-4, 10, 388-92 (2nd ed. 1985).

141. The basic research in this area has been conducted and championed by Ronald R. Edmonds. Edmonds' ground breaking efforts listed factors that characterize effective schools:

- (1) The principal's leadership and attention to the quality of instruction;
- (2) A pervasive and broadly understood instructional focus;
- (3) An orderly, safe climate conducive to teaching and learning;
- (4) Teach behaviors that convey the expectation that all students are expected to obtain at least minimum mastery; and,

For example, those concerned with schooling tend to focus on textbooks,¹⁴² while much of the educational experiences derive from the content of the "hidden curricula." Undoubtedly, the textbooks used may be irrelevant to how materials are taught.¹⁴³ The substance and use of exams and the manner students are rewarded, punished, or simply ignored provide important extra-curricular lessons. The school's overall governance structure, whether it is more democratic or hierarchical, provides another important "curriculum." Even the extra-curricular activities and the role models that teachers and other students provide, such as through their mode of dress and affect, unquestionably have an impact on other students. Clearly, both hidden and explicit curricula form the basis of educational experiences. School life is value-laden; the experience impacts upon the formation of students' beliefs and world views.¹⁴⁴ Clearly, both hidden and explicit curricula form the basis of educational experiences. The community life of the school provides fundamental lessons for broader community life; schools transmit cultures. Recognizing students' individual interests as they strive to educate themselves impacts dramatically on how they will respect others' liberty, privacy, and security interests. Yet, reforms and legal mandates concern themselves with the overt curriculum, remove power from youth, and even seek to move control outside the classroom and individual schools.¹⁴⁵

(5) The use of measures of pupil achievement as the basis for program evaluation.

Ronald R. Edmonds, *Programs in School Improvement: An Overview*, 40 EDUCATIONAL LEADERSHIP 4, 4 (1982).

142. See, e.g., Gaea Leinhardt, *What Research on Learning Tells Us About Teaching*, 49 EDUCATIONAL LEADERSHIP 20, 20 (1992) (emphasizing that learning is an active process of knowledge construction and sense-making by students and teachers).

143. Penelope L. Peterson, Sarah J. McCarthy and Richard F. Elmore, *Learning From School Restructuring*, 33 AM. EDUC'L RES. J. 119, 147 (1996) ("teaching and learning occur mainly as a function of teachers' beliefs, understandings, and behaviors in the context of specific problems in the classroom.").

144. Stanley Inger, *Socialization, Indoctrination, or the "Pall of Orthodoxy": Value Training in the Public Schools*, 1987 U.ILL. L. REV. 15, 30 ("Classroom instruction reflects value judgments. These judgments in turn significantly affect the child's self-image and view of society.").

145. Studies show that virtually all of the factors associated most with effective schools have been those where education has been individual school-based and neighborhood-based. Walberg & Walberg III, *supra* note 136, at 19-26.

238 ANNUAL SURVEY OF INT'L & COMP. LAW [Vol. 4:1

Bestowing upon children greater power, and allowing teachers greater control, does not vitiate the role of parents. Giving teachers greater control derives from increased local power. It is when there is more local power that parents are more likely to be involved and interact with teachers.¹⁴⁶ The energizing effects of local power on parents, however, still remain limited. Although parental involvement may influence children's educational success, their involvement is neither a sufficient nor necessary condition for creating the learning environment. Children's learning outcomes in school are more proximally related to school based events, such as the teacher's teaching effectiveness, the child's school behavior, and the child's learning performance.¹⁴⁷ In addition to the limits of parental impact, the need for parental involvement does not necessarily mean that parents must control.¹⁴⁸ Researchers report that the positive influence of parental involvement on children's educational outcomes is mediated by the manner two factors are perceived and experienced by the child. The first is the parent's selection of developmentally appropriate involvement activities,¹⁴⁹ which become particularly challenging as the child reaches adolescence and experiences the need to move from

146. Importantly, although parent involvement has evolved from respect for teacher authority and professional expertise, parents also increasingly undercut teacher authority and hold them in low regard. See Patricia A. Bauch & Ellen B. Goldring, *Parent Involvement and Teacher Decision Making in Urban High Schools of Choice*, 31 URBAN EDUCATION 403, 408 (1996).

147. Kathleen V. Hoover-Dempsey & Howard M. Sandler, *Parental Involvement in Children's Education: Why Does It Make a Difference?*, 97 TEACHERS COLLEGE RECORD, 310, 322 (1995).

148. Bauch & Goldring, *supra* note 146, at 425-426 (noting that for partnerships to work, both parents and teachers will need to rethink their roles and that fundamental shifts in thinking will be necessary).

149. Research indicates that in order for parental involvement to have a positive impact on educational outcomes, the involvement must be perceived as appropriate by the child:

The importance of this "appropriateness" is underscored by several areas of developmental research suggesting the benefits, for example, of accurate parent understanding of children's abilities or beliefs about children, and the importance of parents' abilities to impact in supportive, individually responsive ways when helping children or responding to their school performance. ... The parents' activity and strategy choices must reasonably be perceived by the child as positive or neutral if those activities are to have a reasonable chance of exerting positive influence on learning outcomes.

Hoover-Dempsey & Sandler, *supra* note 147, at 323 (citations deleted).

parental control.¹⁵⁰ The second is the fit between the parent's activities and the school's expectations for parental involvement.¹⁵¹ The importance of fit is critical, simply because the child is the primary link between the school and the parent: the child must negotiate, respond to and deal with the day-to-day demands and expectations of two separate entities.¹⁵² With greater local, teacher control, the schools are more able to respond and help fit expectations to those of parents, and vice versa.¹⁵³ Importantly, though, the child's perspective and experience of the "fit" controls, not those of parents or teachers.

Considerable research from adolescent development and their interactions with their parents supports the claim that youth benefit from being given increasing control.¹⁵⁴ The general theory is that "the most effective parents regard their parental rights and obligations as complementary to the duties and rights of their child."¹⁵⁵ The voluminous literature on various socialization practices and their effects consistently link the authoritative parent with positive developmental outcomes. Investigations of parent-child relations and school achievement clearly indicate that the most effective learning environment

150. See D. R. ENTWISLE, 1990 SCHOOLS AND THE ADOLESCENT IN AT THE THRESHOLD: THE DEVELOPING ADOLESCENT 197, 197-224 (S. S. Feldman & G. R. Elliot eds. 1990) (citing research that argues that parental involvement continues to be of significance during children's adolescence).

As children leave childhood, their parents' task in selecting appropriate activities and involvement becomes exacerbated by normal adolescent move toward greater peer-orientation, the need for greater independence, and the difficulty of having adolescents accept interest and praise from parents. Hoover-Dempsey & Sandler, *supra* note 147, at 323-24.

151. Bauch & Goldring, *supra* note 146, at 424-25.

152. Hoover-Dempsey & Sandler, *supra* note 147, at 324 ("Parents and teachers may interact directly with each other frequently or intermittently, but it is the *child* who lives fully in each adult's domain and it is the child who is necessarily the person responsible for absorbing and responding to the full measure of each adult's expectations, demands, and requests.") (emphasis in original).

153. The teacher's sense of self-efficacy and involvement is critical to determining the amount of parental involvement. J. O. Comer & N. M. Haynes, *Parental Involvement in Schools: An Ecological Approach*, 92 ELEMENTARY SCH. J. 271, 271-77 (1991).

154. For useful introductions to the role of the family in education, see FAMILIES AND SCHOOLS IN A PLURALISTIC SOCIETY (Nancy Feyl Chavkin ed., 1993); EDUCATION AND THE AMERICAN FAMILY: A RESEARCH SYNTHESIS (William J. Eston, ed., 1989).

155. Diana Baumrind, *New Directions in Socialization Research*, 35 AMERICAN PSYCHOLOGISTS 639, 641 (1980).

for youth is one in which parents relinquish control and increase children's sense of participation, control and sense of individual competence.¹⁵⁶ For example, a leading research group from Stanford University examined the relationship between parenting styles and academic achievement. They found that adolescents who describe their parents as behaving more authoritatively — as more democratic, more warm, and more encouraging — earn higher grades in school than their peers.¹⁵⁷ Others, most notably another leading research group from the University of Wisconsin, have found a more explicit link between parenting and academic ability: authoritative parenting has a positive impact on the development of psychosocial maturity. It is this maturity, typified by greater psychosocial autonomy, that enables students to thrive academically and socially.¹⁵⁸ Family dynamics research, then, does not support the general belief that parents should control their children's education. The factors at work in successful family and parent-child relations reinforce those at work in teacher-child relations.

156. To put it in our own terms, Baumrind's research found that the most effective parents were, in essence, democratic. That is, effective parents regard their parental rights and obligations as complementary to the duties and rights of their child. Authoritative parents, it has been found, see the balance between the rights of parents and those of children as a changing function of the child's stage of development as well as an expression of the norm of reciprocity by which they operate and which they wish their children to adopt. This is contrary to authoritarian parents who tend to view children as having few rights but as having responsibilities similar to those of adults, and to permissive parents who view children as having few responsibilities but as having rights similar to those of adults. Diana Baumrind, *Child Care Practices Indicating Three Patterns of Preschool Behavior*, 75 GENETIC PSYCHOLOGY MONOGRAPHS 43 (1967); Diana Baumrind, *Rearing Competent Children*, in CHILD DEVELOPMENT TODAY AND TOMORROW 349, 349-378 (William Damon, ed., 1989); Sanford M. Dornbusch, & K. D. Wood, *Family Process and Education Achievement*, in EDUCATION AND THE AMERICAN FAMILY 66, 66-95 (W. J. Weston ed. 1989); Chavkin, *supra* note 154.

157. Sanford M. Dornbusch et al., *Family Decision Making and Academic Performance in a Diverse High School Population*, 5 J. OF ADOL. RES. 143, 143-160 (1990); Sanford M. Dornbusch, et al., *The Relation of Parenting Style to School Performance*, 58 CHILD DEVELOPMENT 1244, 1244-1257 (1987).

158. Lawrence Steinberg et al., *Authoritative Parenting, Psychosocial Maturity, and Academic Success Among Adolescents*, 60 CHILD DEVELOPMENT 1424, 1424-1436 (1989). They concluded that adolescents who describe their parents as treating them warmly, democratically, and firmly are more likely than their peers to develop positive attitudes toward, and beliefs about, their achievement, and as a consequence, they are more likely to do better in school.

Parent, teacher, school and youth relations that promote effective educational environments reveal more than a need to respect children's educational self-determination. The educational environment reveals courts' potential roles, particularly in terms of their control. Clearly, courts can play a powerful role in educational policy making. Courts can clarify principles, marshal resources and compel compliance.¹⁵⁹ However, commentators who evaluate judicial reforms of schools paint a different picture of judicial effectiveness. Researchers increasingly agree that court involvement rarely provides a fully satisfactory solution to complex educational controversies.¹⁶⁰ Although several obstacles reduce courts' potential effectiveness,¹⁶¹ a critical point about judicial

159. Ralph Vavanagh & Austin Sarat, *Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence*, 14 LAW & SOC'Y REV. 371, 373 (1980) ("Thinking about competence in terms of the ability of courts to reach and enforce decisions misses perhaps their most important function: providing a framework within which parties negotiate and bargain").

160. The civil rights cases are illustrative. Courts have been unable to stem the increasing "return" to separate, segregated schools notwithstanding the promise of *Brown v. Board of Education*, 347 U.S. 483 (1954). For example, when state action is not responsible for segregation, such as when private action like "white flight" occurs, what may resemble segregation may not be unlawful. *Board of Education v. Dowell*, 498 U.S. 237, 249-50 (1991) (considering the question of when judicial supervision of segregation should end and finding that where there is a good faith compliance with desegregation that can be shown, regardless of the level of continuing segregation). Thus -- and despite popular perceptions of *Brown* -- state action, rather than the racial composition of schools, was the triggering concept for judicial protection of students. Importantly, the failure of courts helps explain the turning away of African-American parents from the integrative ideal and favoring all-black schools or predominantly Africa-American neighborhood schools. Dew S. Days, III, *Brown Blues: Rethinking the Integrative Ideal*, 34 WM. & MARY L. REV. 53, 54 (1992). See also HOWARD I. KALODNER & JAMES J. FISHMAN, *LIMITS OF JUSTICE: THE COURT'S ROLE IN SCHOOL DESEGREGATION* (1978); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

161. Judicial review of public school curriculum raises the specter of a transfer of ultimate curricular authority from elected school boards to judges who are neither experts in pedagogy nor necessarily responsive to the needs and aspirations of the community; see *Board of Educ. v. Pico*, 457 U.S. 583, 890-91 (1982) (Burger, C.J. dissenting). Considerable evidence supports the contention that courts simply lack the educational expertise and the staff resources to monitor closely the implementation of systematic reforms: They have difficulty controlling. See, e.g., Paul Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM L. REV. 728, 789-98 (1986) (a most critical concern in issues of judicial involvement is when to terminate oversight); David I. Levine, *The Latter Stages of Enforcement of Equitable Decrees: The Course of Institutional Reform Cases After Dowell, Rufo and Freeman*, 20 HASTINGS CONST. L. Q. 579 (1993); Neal Devins, *Interest Balancing and Other Limits to Judicially Managed Equal Educational Opportunity*, 45 MERCER L. REV. 1017, 1033

intervention is that it necessarily takes control away from the schools and thus from youth, parents, and teachers themselves.¹⁶² Courts remove a power crucial to good practice and effective schooling.¹⁶³ For example, classroom teaching is affected by what educators are told they must do, and what they cannot do. The result is that teachers feel unimportant or simply irresponsible; rather than seeking to implement students' rights and ensure educational success, the educator often feels that the task has been usurped.¹⁶⁴ Again, it is critical to recall that courts primarily have become concerned with educational rights in terms of access to education, and when courts concern themselves with the nature of education, they increasingly aim to protect the rights of school officials.

Fundamentally, then, the task for all constituencies involved in education reform is to reconstitute schools as effective communities, not simply learning communities. Research suggests a need to re-orient concern toward the youth's actual needs. Schools must accept the diversity of their constituents while promoting a core of common educational values. These

(1994) (concluding that "[w]ithout the support of community leaders and government officials, there are real limits on what we should expect of courts. The judiciary, while possessing significant power, cannot unilaterally manage social reform").

162. JOEL HENNING ET AL., *MANDATE FOR CHANGE: THE IMPACT OF LAW ON EDUCATIONAL INNOVATION* 231 (1979) (finding judicial involvement in educational affairs as so extensive that it frustrates the school's educational goals); see also DAVID NEAL AND DAVID L. KIRP, *The Allure of Legalization Reconsidered: The Case of Special Education*, in *SCHOOL DAYS, RULE DAYS: THE LEGALIZATION AND REGULATION OF EDUCATION* 343, 344 (David L. Kirp & Donald N. Jensen, eds., 1986).

163. Leading commentators have moved from describing characteristics of effective schools in support of Edmonds' proposals, see Edmonds, *supra* note 142, to identifying the factors and guiding principles for creating effective schools. The focus is on liberating schools from external control. In this regard, they focus on similar ones: on the need to preserve the single school as the unit for planned change; involve teachers and principles in the process; focus on the notion of process, not event; and, importantly, schools must feel as if they have a choice in the matter and feel they have control over the process of change. See Lawrence W. Lezotte, *Learn From Effective Schools*, 22 SOC. POL'Y 3, 31 (1992). Importantly, the disturbing trend has been encouraged by judicial decisions. Thus, courts have their impact on the classroom, while teachers and administrators are left without room for their decision making. They send negative consequence of judicial activism in education: educational policy making itself has been influenced more by the need to deal with the articulated legal rights of individuals than by the need to advance good school practice for all students within the larger definition of those rights.

164. Judicial interventions essentially conflict with what educators have determined is good school practice.

values only can be harnessed to promote educational reform in an individualistic, multicultural society through a communal structure that embraces rights assertion and diversity. Unlike existing efforts and proposals, it would be critical for youth to recognize their own educational rights. In endeavors to promote the common good, efforts must be found to respect all individuals' rights.¹⁶⁵ The common good cannot be reached by granting greater power to parents choices or the authority of school officials. The human right to education is about including youth in their education as they learn to deal cooperatively, tolerantly and respectfully with people from diverse backgrounds. Although undeniably an enormous challenge, it is the challenge youth face in and outside of school.¹⁶⁶

Undoubtedly, the effort to ensure greater respect for self determination by youth aims for a reconceptualization of education for citizenship. The offered conception is actually quite broader than the one that currently undergirds the citizenship education literature. The proper point of departure for modern constructions of citizenship is to recognize that, in a society that is both formally democratic and politically and culturally pluralistic, the notion of citizenship is an essentially contested concept.¹⁶⁷ Yet, existing approaches to citizenship education continue as if it were not. The mainstream approach simply focuses on the knowledge base that will eventually be necessary for citizenship. At best, this approach seeks to inform youth about the "office of citizen," meaning one who votes, develops opinions on public matters and understands the nature of democratic governments and the respect for

165. Joel F. Handler, *Dependent People, the State, and the Modern/Postmodern Search for Dialogic Community*, 35 UCLA L. REV. 999 (1988) (proposing that communal and individual goals may be reconciled and achieved through a "dialogic community").

166. The challenge of education mirrors the challenge of the larger political, social, and cultural issues. THE CHALLENGE OF PLURALISM: EDUCATION, POLITICS, AND VALUES (F. Clark Power & Daniel K. Lapsley eds., 1993).

167. Colin Wringer, *The Ambiguities of Education for Active Citizenship*, 26 J. OF PHILOSOPHY OF EDUC. 29, 29-38 (1992); T. H. McLaughlin, *Citizenship, Diversity and Education: A Philosophical Perspective*, 21 J. OF MORAL EDUCATION 235, 235-250 (1992); D. HEATER, *CITIZENSHIP: THE CIVIC IDEAL IN WORLD HISTORY, POLITICS AND EDUCATION* (1990).

244 ANNUAL SURVEY OF INT'L & COMP. LAW [Vol. 4:1

individual rights.¹⁶⁸ The more progressive model focuses on the intellectual framework students use in handling mainstream materials. The approach views citizenship education as more participatory and envisions a more direct form of citizenship. Rather than simply voting and understanding the nature of democratic rights and responsibilities, the approach emphasizes the development of personal sense of public agency, the many capacities to act with and affect public ends.¹⁶⁹ Clearly, both are critical. The first ensures knowledge and proper deliberation, the second ensures that youth have the skills for community action and problem solving in order to foster direct and deliberate participation rather than spectators who preoccupy themselves with rights talk.¹⁷⁰ The envisioned approach would take the developments even further and address individual, social and cultural heterogeneity; the approach would move from dealing with civil and political relations and tensions to dealing with social and cultural diversity. More simply put, existing approaches aim for assimilation, the latter would aim for accommodation of

168. This is the approach taken by the massive mainstream civics curriculum under the highly influential *Civitas* framework. See CENTER FOR CIVIC EDUCATION, *CIVITAS: A FRAMEWORK FOR CIVIC EDUCATION* (1991); CENTER FOR CIVIC EDUCATION, *NATIONAL STANDARDS FOR CIVICS AND GOVERNMENT* (1994). For a review and criticism of the effort, see H. Boyte, *Review of Civitas: A Framework for Civic Education*, 95 *TEACHERS COLLEGE RECORD*, 414, 414-418 (1994). For an analysis of modern citizenship, see CRAIG A. RIMMERMAN, *THE NEW CITIZENSHIP: UNCONVENTIONAL POLITICS, ACTIVISM, AND SERVICE* 75-95 (1997).

169. Although "progressive", the approach is not new. See DONALD W. OLIVER & JAMES P. SHAVER, *TEACHING PUBLIC ISSUES IN THE HIGH SCHOOL* (1974) (Oliver and Shaver's jurisprudential framework); F. CLARK POWER, ANN HIGGINS & LAWRENCE KOHLBERG, *LAWRENCE KOHLBERG'S APPROACH TO MORAL EDUCATION* (1989) (focusing on just community discussions); ROBERT PRATTE, *THE CIVIC IMPERATIVE* (1988) (focusing on community service); Robert Howard & Robert Kenney, *Education for Democracy: Promoting Citizenship and Critical Reasoning Through School Governance in LEARNING FOR LIFE: MORAL EDUCATION -- THEORY AND PRACTICE*, 210, 210-227 (Andrew Garrod ed., 1992) (schoolwide governance curriculum). Each approach has spawned extensive controversies among educators as well as parents, see, e.g., Rebell, *supra* note 14, at 284-89 (discussing several techniques, controversies they have engendered, and their failure either to articulate clear sets of values beyond individual preferences or to seek to inculcate substantive values that essentially ignore situations of value conflict); see also Michael A. Rebell & Robert L. Hughes, *Schools, Communities, and the Courts: A Dialogic Approach to Education Reform*, 14 *YALE L. & POL'Y REV.* 99, 109-10 (1996) (arguing that existing approaches fail to address issues of how to transmit common values). Regrettably, the failure to do so appears to be the fundamental barrier to effective school reform.

170. See MARY ANN GLENDON, *RIGHTS TALK* (1991).

differences into a “cultural politics of difference”¹⁷¹ and “politics of recognition.”¹⁷² Remarkably, the former two approaches essentially ignore the latter.¹⁷³ The proposed approach would seek to bind citizens together in a broad political community, not individual or cultural unity.

In efforts to recognize students’ rights in the form of increasing participation and inclusion, it is clear that students’ interests in an effective education does not dictate that students simply be “given” rights.¹⁷⁴ The need to focus on students and their learning environment does not mean students should be given free reign. Commentaries inappropriately focus on extremes: They regard a rigid authoritarianism with no youth rights and a lax permissiveness with full-blown rights as the only two possibilities. Neither fosters the development of autonomy. The first does not allow independent decision-making; the second insulates the makers of decisions against the natural consequences of their actions, depriving them of feedback on the results of their actions taken. Students need opportunities to make real decisions and be responsible for their consequences in order to develop an ability to make wise decisions and judge their results. Older students need more opportunities to practice responsibility; for if they are not ready to make responsible decision-making before they graduate, they will be more likely to engage in potentially harmful experimentation.

Freedom to pursue self-determination is not the same as a blank license. It cannot be. Federal constitutional norms

171. Cornell West, *The New Cultural Politics of Difference*, in RACE, IDENTITY, AND REPRESENTATION IN EDUCATION, 11, 11-23 (Cameron McCarthy & Warren Crichlow, ed., 1993).

172. Charles Taylor, *The Politics of Recognition*, in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25, 25-73 (Amy Gutmann, ed., 1994).

173. Parker, *supra* note 5, at 113 (arguing that the two existing approaches share a narrow conception of unity and difference tension and aim for assimilation and that the focus on social and cultural diversity has resulted in an altogether different literature on multicultural education).

174. Although the law has made important points, it is important to keep in mind, for example, that the amount of resources alone available to each school is not as powerful an indicator of school success as one might think. See Frank J. Macchiarola, Dorothy Kerzer Lipsky, & Alan Gartner, *The Judicial System & Equality in Schooling*, 22 FORDHAM URBAN L.J. 567, 575 (1996).

246 ANNUAL SURVEY OF INT'L & COMP. LAW [Vol. 4:1

necessarily guide educational experiences.¹⁷⁵ Indeed, proposing greater recognition of the right to educational self-determination takes on considerable legal significance when joined with constitutional theory of democratic governance that shares the proposal's commitment to respect for individual differences and participation in groups and community life. At its root, the model essentially argues for an approach to education evoked and guided by a constitutional mandate. In addition, it is critical to recall that education could not contravene enforceable laws, such as the anti-discrimination statutes prohibiting discrimination on the basis of race,¹⁷⁶ gender¹⁷⁷ and disabilities.¹⁷⁸ These broad guidelines leave considerable discretion to school officials, teachers, parents and students in their ability to negotiate control and content of education. These protections and discretions are actually important considerations. The discretion clearly allows for considering what is most problematically absent in educational reform: consideration of youth's self-determination. Equally importantly, the discretion still obligates society to respond to

175. The Supreme Court recognized that schools "are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Board of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). See Patricia L. Van Dorn, *Proposal For a "Lawful" Public School Curriculum: Preventive Law from a Societal Perspective*, 28 INDIANA L.J. 477, 489-501 (1995) (detailing a proposal for a curriculum program that would have the Constitution serve as its foundation).

176. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (Supp. 1994) states:
No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

177. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (a) (Supp. 1994) states:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.

178. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 (Supp. 1994); Individuals With Disabilities Act, 20 U.S.C. §§ 1400-1500 (Supp. 1994) (originally enacted as the Education of the Handicapped Act, Pub. L. No. 91-230, 84 Stat. 175 (1970)).

inappropriately discriminatory behavior that adolescents themselves unwittingly reflect.¹⁷⁹

Limits to the increase in youth participation and inclusion actually help make positive contributions to youth development and education. The increasingly pressing concern about the need to deal more effectively with school violence illustrates well the need to recognize youths' self-determination. For example, the current state of the law reveals "that children have very little protection for their own safety while attending public school."¹⁸⁰ Including youth in their education and considering their perspectives allows for considering how youth can be trained in avoidance techniques and ways to deal with assault.¹⁸¹ Research suggests that educators and youth can identify risk behaviors and help intercede,¹⁸² such as through mediation programs that help prevent confrontations and create nonviolent norms as part of school culture.¹⁸³ Students do not benefit from learning that safety requires intrusive

179. Adolescent behavior necessarily depends on broader societal forces since these young people seemingly naturally segregate themselves into homogenous groups. The problem runs deep. Disproportionately large numbers of nonwhite students are being labeled as mentally retarded or emotionally disturbed and being segregated on the basis of stigmatizing labels. Finesse G. Couch, *Not Just Another Brown Analysis: A Call for Public Education Reform*, 20 N.C. CENT. L.J. 143, 158 (1993). Where they are not segregated, even schools with a racially mixed student body end up with racially segregated classes to the extent that children with differences do not have meaningful interactions during the school day. Days, *supra* note 160, at 55. Likewise, minority students are disproportionately suspended and expelled. AMALIA G. VUERO, JOAN LEES, & RICHARD LACEY, NATIONAL SCHOOL BOARD ASSOCIATION, TOWARD BETTER AND SAFER SCHOOLS: A SCHOOL LEADER'S GUIDE TO DELINQUENCY PREVENTION 18 (1984) (summarizes available research regarding suspension and expulsion). The effects reverberate and are counterproductive: these youth lose valuable instruction and are more likely to distrust the authority that rejected them; importantly, it rewards teachers and others for avoiding classroom responsibilities. *Id.* Lastly, once excluded, these students are increasingly less likely to never finish their education. *Id.* at 19. See generally JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (1991); Brenna Bridget Mahoney, *Children at Risk: The Inequality of Urban Education*, 9 N.Y.L. SCH. J. HUM. RTS. 161 (1991).

180. Lyndon G. Furst, *When Children Assault Children: Legal and Moral Implications for Administrators*, 4 ED. L. REP. 719, 738 (1995).

181. Nick Hollett & Pat Gorman, *The Secret Crime*, 16(3) THE EXECUTIVE EDUCATOR 52, 52-53, 63 (1994, Fall).

182. John Martin Rich, *Predicting and Controlling School Violence*, 64(1) CONTEMP. EDUCATION 35, 35-39 (1992, Fall).

183. Melinda Smith, *Some School-based Violence Prevention Programs*, 77(5) NASSP BULLETIN, 70, 70-75 (1993, December).

policing under authoritarian and arbitrarily enforced rules.¹⁸⁴ Nor do such "get tough" methods properly address violence, as revealed by recent school gang research.¹⁸⁵ Traditional segregationist responses to adolescent problem behavior result in further alienation of more students and enhances the likelihood of violence.¹⁸⁶ If anything, research does reveal that, although schools may play a distinct role in efforts to control and possibly reform delinquent students, they clearly play a central role in creating them!¹⁸⁷ Yet, schools increasingly are

184. Justice Brennan stated the concern as follows: "Schools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedoms." *Doe v. Renfrow*, 451 U.S. 1022, 1027-28 (1981) (Brennan, J., dissenting). See also Donald L. Beci, *School Violence: Protecting Our Children and the Fourth Amendment*, 41 CATH. U. L. REV. 817, 833-843 (1992) (detailing the corruption of student respect for liberty and privacy by current enforcement measures schools adopt to stop violence and proposing alternative methods); see also Larry Baratlett & James McCullagh, *Exclusion from the Educational Process in the Public Schools: What Process is Now Due*, 1993 B.Y. U. EDUCATION & L.J. 3, 57 (proposing that educators concerned with minimal protections of students' right fail to provide students with models of how to treat others fairly). Far from arguing that searches, suspension, and expulsions should be halted, rather, the approach requires implementing clear policies that are well-known by students and utilized only in the face of clear infractions or an emergency; see, e.g., *id.* at 55 (proposing that schools have become overly concerned with providing minimal protections rather than protecting students' rights); Stuart C. Berman, *Student Fourth Amendment Rights: Defining the Scope of the T.L.O. School-Search Exception*, 66 N.Y.U. L. REV. 1077 (1991) (concluding that courts are consistently misreading T.L.O. and abandoning their responsibility to analyze closely the circumstances surrounding each search of students).

185. David C. Broterton, *The Contradictions of Suppression: Notes from a Study of Approaches to Gangs in Three Public High Schools*, 28 URBAN REVIEW 95, 99-113 (1996). The author reports results from a two-year project researching gangs in three inner-city high schools and concludes that the common repertoire of suppression strategies used by schools are futile responses to the problems of gangs and have unintentional anti-educational consequences for the pursuance of democratic public pedagogy. The author puts the reason for the failure as follows:

For many students, the degree to which adults have the authority to exercise control over the learning environment should always be negotiable...The pragmatic and commonsense recourse to gang suppression, however, often represents an end to consensus rule in the name of beating back the enemy, imagined or otherwise...Unintentionally the social control actions of the schools, guided by noneducational commonsense reasoning, affected the grander project of public schooling by undermining the legitimacy of both teachers and administrators. *Id.* at 112

186. Florence M. Stone and Kathleen B. Boundy, *School Violence: The Need for a Meaningful Response*, 28 CLEARINGHOUSE REV. 453, 456 (1994).

187. ROBERT M. REGOLI & JOHN D. WEWITT, *DELINQUENCY IN SOCIETY* 313-323 (3rd ed. 1997) (reviewing how schools contribute to delinquency, such as by the use of tracking systems and conduct codes).

heading toward an architecture of incarceration, paramilitaristic control and abridged freedom. Ironically, the move continues in the name of protecting a normative vision of freedom, peace and democracy.¹⁸⁸ Equally ironic, suspensions, expulsions, and limiting access to school activities in order to deal with problem behavior affirm that schools are *not* the place to learn how to grow and learn: Students are denied permission to attend if they have not learned what schools are supposed to be instilling; they only are welcome into the school community if they already know how to behave.¹⁸⁹

To be sure, youth cannot learn effectively when drugs, weapons, intimidating gang members and dangerous youth pass freely through the schoolhouse gate. But such behavior and “deviants” are really a small part of the challenge educators must overcome. The greater challenge is to deal with the fundamental fact that adolescents do not enjoy academics. The percentage of students who rank classes as the best or teachers as the “one best thing about school” is abysmally low.¹⁹⁰ The overwhelming majority of students enjoy school for socializing and engaging in sports.¹⁹¹ Yet, reforms continue to underestimate the inconsequential place of academic learning in the lives of adolescents. Students resist school-imposed norms. Even classic works, most notably *The Adolescent*

188. Pedro N. Noguera, *Preventing and Producing Violence: A Critical Analysis of Responses to School Violence*, 65 HARV. ED'L REV. 189, 192-207 (1995) (arguing that “get tough” approaches fail to create safe environments because the use of coercive strategies interrupts learning and produces an environment of mistrust and resistance and proposing alternative strategies that would encourage a sense of community and collective responsibility).

189. Bram A. Hamovitch, *Socialization Without Voice: An Ideology of Hope for At-risk Students*, 98 TEACHERS COLLEGE RECORD 286, 286 (1996) (analyzes programs for adolescents who are at risk of dropping out of school and finding that these programs blame young people for their problems, ignore institutional barriers to success, and silence voices of dissent); Catherine D. Ennis, *When Avoiding Confrontation Leads to Avoiding Content: Disruptive Students' Impact on Curriculum*, 11 J. OF CURRICULUM & SUPERVISION 145, 145-148 (1996) (finding that teachers actively avoid dealing with youth resistance to the content of educational materials and that al could benefit from responding differently to resistance).

190. JOHN GOODLAD, *A PLACE CALLED SCHOOL* 76-77 (1984) (only seven percent ranks classes and four percent rank teachers as the best things about school).

191. *Id.* (reporting that thirty five percent rank friends, thirteen percent rank sports and eleven rank positive student attitudes as the best things about school).

Society,¹⁹² identified how informal, student-segregated-norms dictate behavior antithetical to the formal norms of schools.¹⁹³ Youth values center on athletics, physical appearance, popularity, social life, and negative attitudes toward academics.¹⁹⁴ Yet, few schools have moved to attune their goals to adolescent life.¹⁹⁵ Just as importantly, schools worldwide generally fail to assist youth in the transition to adulthood¹⁹⁶ and fail to foster social frameworks that help youth manage the transition and empower them to shape their future in an active manner.¹⁹⁷ Despite the failure, it increasingly becomes clear that schools must act more appropriately. The Supreme Court has long recognized the need for schools to impart "useful knowledge."¹⁹⁸ Even though the Court's composition and outlook has undergone recent changes, the notion that schools must impart accurate and usable knowledge retains its essential vitality.¹⁹⁹ If the final arbiters' rulings on U.S. law

192. JAMES COLEMAN, *THE ADOLESCENT SOCIETY* (1961).

193. *Id.* at 265 (concluding that the presence of a strong adolescent value system in school "exerts a rather strong deterrent to academic achievement.").

194. GOODLAD, *supra* note 190, concluded that "junior and senior high school youth are excessively preoccupied with physical appearance, popularity in the peer group, games and athletics" and wonders "why we have taken so little practical account of them in school." *Id.* at 75-76. These values are evident even in elementary school years. See Patricia A. Adler, Steven J. Kless, & Peter Adler, *Socialization to Gender Roles: Popularity Among Elementary School Boys and Girls*, 65 *SOCIOLOGY OF EDUCATION* 169, 169-187 (1992).

195. JESSE GOODMAN, *ELEMENTARY SCHOOLING FOR CRITICAL DEMOCRACY* 163-82 (1992) (summarizing the approach and impact of an alternative school in Bloomington, Indiana that focuses on individualized and autonomous schooling for heterogeneous groups of children); see also THOMAS J. LASLEY II, *TEACHING PEACE: TOWARD CULTURAL SELFLESSNESS* (1994). It is important to note, however, that few have investigated what a move in this direction actually requires; see Joseph Kahne, *Book Review of Democracy, Education, and the Schools*, 11 *EDUCATIONAL POLICY* 134, 136 (1997) (reporting that these enterprises are actually rare, despite wide endorsement by educators).

196. Klaus Hurrelmann, *Introduction: Interdisciplinary and International Approaches to Research on Adolescence*, in *INTERNATIONAL HANDBOOK OF ADOLESCENCE* 1, 12 (Klaus Hurrelmann, ed. 1994). (Summarizing the evidence from different country reports, main risk factors of problem behavior can be identified in the domain of status transition to work and employment: strain and stress arising from educational achievement and failure, and from the uncertainty and unpredictability of the transition from school to work).

197. *Id.* at 13-14.

198. The constitutionally guaranteed right "to acquire useful knowledge" was recognized in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

199. For example, in *Edwards v. Aguillard*, 482 U.S. 578 (1987), the Court struck down a Louisiana statute forbidding the teaching of the theory of evolution unless

are to be taken seriously, schools must move toward rethinking students' needs.

VI. CONCLUSION

Education must move beyond the current focus on training to benefit others and only incidentally benefiting youth. Education must enrich their lives essentially, not incidentally, by empowering them to accomplish their own ends and fulfill their potentials. If this is what should be meant when we speak of educational rights, reform must take a radical turn.

The needed revisioning requires an alternative perspective that truly recognizes and appreciates difference — and thus respects a fundamental principle of human rights law: individual self-determination. To take appropriate steps toward respecting established human rights, institutions that impact the lives of youth must be pressured by struggles from within and without to legitimate the disenfranchised and different voices. This perspective rejects the desirability of reaching out for unity within institutions, within schools, within families and within individuals. The proposal further rejects the “simple” right to an education that aims to produce citizens in an image dictated by others and that allows for an educational system in which individuals are incidental, indirect beneficiaries and often not beneficiaries at all.

The move to recognize further the right of an individual to self-determination also includes the need to move beyond the impoverished notion of citizenship as civic voyeurism — watching other people (elected officials) act like citizens. Rather than education about citizenship, education must be for

accompanied by instruction in the theory of “creation science.” *Id.* at 885-86. The Court expressly condemned the ban for it “undermine[d] -- the provision of a comprehensive scientific education.” *Id.* at 587. See Steven Siegel, *Ethnocentric Public School Curriculum in a Multicultural Nation: Proposed Standards for Judicial Review*, 40 N.Y. L. SCH. L. REV. 311, 327-332 (1996) (review of right to receive useful information and method to apply standards); Nancy Tenney, *The Constitutional Imperative of Reality in Public School Curricula: Untruths about Homosexuality As A Violation of the First Amendment*, 60 BROOKLYN. L. REV. 1599, 1624-1633 (1995) (reviewing students' right to receive accurate information).

the development of citizenship and participation in a democratic society. Where appropriate, education must enhance pupil's awareness of the contested nature of some of the most central concepts of citizenship and democracy. The extent to which education itself involves social, cultural, political and economic tugs of war that are fought without the input of youth reveals the urgent need to include youth more actively in their own educations. Education done with a missionary zeal without regard for individual or cultural differences and their place in society robs youth of their essential selves; it does not promote democratic citizenship.

The proposed approach to educate youth challenges, stretches and ultimately seeks to redefine the nature of educational rights and who controls children's futures. This article can only serve as an invitation for others to engage their imaginations; for enormous obstacles lie ahead. As reform efforts continue, it would be wise to keep in mind that developments in law and social science research reinforce the pressing urgency to respond to youth's self-determination needs, tailor schooling to the more normative experiences of adolescent life, and take youth seriously.